ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC021981
Case Name	Brian Juncker v. State of Illinois - Department of Transportation
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0245
Number of Pages of Decision	9
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Daniel Juncker
Respondent Attorney	Shannon Rieckenberg

DATE FILED: 7/6/2022

/s/ Deborah Simpson, 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

Brian Juncker,
Petitioner,

vs. NO: 20 WC 21981

State of Illinois Department of Transportation,
Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 14, 2022, is hereby affirmed and adopted.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

July 6, 2022
o6/29/22
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC021981
Case Name	JUNCKER, BRIAN v. STATE OF ILLINOIS/ILLINOIS DEPARTMENT OF TRANSPORTATION
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Daniel Juncker
Respondent Attorney	Cori Stewart

DATE FILED: 1/14/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 11, 2022 0.27%

/s/Linda Cantrell, Arbitrator

Signature

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

January 14, 2022

/s/ Michele Kowalski

Michele Kowalski, Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN JUNCKER
Employee/Petitioner

v.

STATE OF ILLINOIS/ILLINOIS DEPARTMENT OF TRANSPORTATION
Employer/Respondent

Case # **20** WC **021981**

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

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ 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 6, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**53,219.92**; the average weekly wage was $**1,023.46**.

On the date of accident, Petitioner was **35** years of age, ***single*** with **0** dependent children.

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

Respondent ***hasor will pay per the fee schedule*** all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**1,056.01** for TTD.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $**682.31**/week for the period **7/19/20 through 8/10/20**, representing **3-2/7th** weeks, as provided in Section 8(b) of the Act.

Respondent to pay Petitioner the sum of $**614.08**/week for a period of **43 weeks**, as provided in Section 8(e) of the Act, because the injuries sustained caused permanent partial disability to the extent of **20% loss of use of the right leg** as a result of injuries to Petitioner's right knee.

Respondent shall pay Petitioner compensation that has accrued from **9/14/20** through **10/28/21**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Arbitrator Linda J. Cantrell

JANUARY 14, 2022

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

BRIAN JUNCKER,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-021981
	)	
STATE OF ILLINOIS/ILLINOIS DEPARTMENT OF TRANSPORTATION,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on October 28, 2021 on all issues. The parties stipulated that on May 6, 2020 Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent and that his current condition of ill-being is causally connected to his injury. The issues in dispute are temporary total disability benefits and the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 35 years old, single, with no dependent children at the time of accident. Petitioner was employed by Respondent as a land surveyor. Petitioner testified that on 5/6/20 he was walking along a highway through tall brush and stepped into a hole. He felt immediate discomfort and lack of mobility in his right knee.

As a result of his work injury, Petitioner underwent knee surgery in July 2020 by Dr. Matthew Matava. He testified he had a prior right anterior cruciate ligament surgery in 2001. Petitioner testified he was released without restrictions following the 2001 surgery and resumed physical activities, including playing high school football, baseball, and hockey. Petitioner testified that he recovered from the 2001 knee surgery and had no problems or treatment for his right knee until his accident on 5/6/20.

Petitioner testified he has been a surveyor for fourteen years and employed by Respondent for over three years. He testified that his employment activities involve a lot of walking on roads, shoulders, ditches, creeks, and woods throughout the course of his workday. Petitioner estimated he walks as much as ten miles per day, climbing up and down creeks and hills, walking in tall brush, and climbing fences.

Petitioner testified that he has knee soreness with walking long distances or carrying heavy objects. Petitioner rated his symptoms 5 out of 10. He notices decreased flexibility and motion in his knee since surgery. Petitioner has difficulty squatting which is occasionally required to perform his job duties.

On cross-examination, Petitioner testified he was at MMI without restrictions on 9/14/20. He has not sought additional treatment for his right knee since being released and he does not take medication for his knee symptoms. Petitioner returned to work as a surveyor.

MEDICAL HISTORY

On 6/15/20, Petitioner was evaluated by orthopedic surgeon Dr. Matthew Matava for right knee pain. Dr. Matava noted Petitioner's history of an ACL reconstruction in 2000 from a football injury and reported he had done very well until his recent injury. Petitioner reported stepping into a hole a foot deep on 5/6/20 and felt pain across his entire knee. It was unclear if he twisted his knee at that time. He had persistent pain and significant difficulty with extension.

On 6/30/20, an MRI was performed that revealed a complex and mildly displaced tear of the right lateral meniscus and quadriceps and fat pad edema. The ACL reconstruction was intact. Dr. Matava diagnosed a complex tear of the lateral meniscus and released Petitioner to light duty work, with no kneeling/squatting. Petitioner was taken off work for a COVID-19 test on 7/19/20 in preparation for surgery.

On 7/21/20, Dr. Matava performed an arthroscopic partial lateral meniscectomy. The operative report revealed degenerative tearing of the anterior horn and anterior root regions, which was debrided. Dr. Matava additionally debrided frayed fibers on the ACL graft.

On 8/3/20, Dr. Matava noted Petitioner was doing well in physical therapy, his gait was normal, and he was not taking pain medication. Dr. Matava released Petitioner to sedentary work as of 8/10/20. Petitioner was instructed to ice his knee and avoid high impact exercises and to continue physical therapy. Petitioner was released to full duty work without restrictions on 8/17/20.

On 9/14/20, Dr. Matava noted Petitioner was doing well and had returned to light duty work. He was undergoing strengthening exercises in physical therapy and denied any symptoms. Petitioner rated his pain at 0/10. Dr. Matava ordered Petitioner to complete physical therapy and continue working in a limited capacity with an increase in recreational activities as tolerated. Dr. Matava released Petitioner at MMI and told him to return on an as-needed basis.

CONCLUSIONS OF LAW

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. 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).

Based on the parties' stipulations as to accident and causal connection, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits. Petitioner was placed off work on 7/19/20 and released to light duty work on 8/10/20. Therefore, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits of $**682.31**/week for the period **7/19/20 through 8/10/20**, representing **3-2/7th** weeks.

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner returned to full duty work as a land surveyor. Petitioner testified his job duties involve a lot of walking on roads, shoulders, ditches, creeks, and woods. He walks approximately 10 miles per day, climbing up and down creeks and hills, walking in tall brush, and climbing fences. His ongoing symptoms of soreness with walking and decreased flexibility and motion affects his job duties. The Arbitrator places greater weight on this factor.

(iii) **Age**: Petitioner was 35 years old at the time of his injury. He has a considerable number of years to work and live with his disability. The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. Petitioner testified he returned to full duty work for Respondent in the same position he worked prior to his injury. The Arbitrator places some weight on this factor.

(v) **Disability**: Petitioner sustained a complex and mildly displaced tear of the right lateral meniscus. He underwent an arthroscopic partial lateral meniscectomy. Intraoperatively, Dr. Matava noted degenerative tearing of the anterior horn and anterior root regions, which was debrided, with further debridement of frayed fibers on the ACL graft. Although Petitioner's surgery was successful and his recovery was uneventful, he continues to have soreness in his knee with walking long distances or carrying heavy objects. He stated he notices decreased flexibility and motion in his knee since surgery making it difficult to squat which is occasionally required to perform his job duties. Petitioner was released to full duty work without restrictions

and he does not take medication for his symptoms. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator orders Respondent to pay Petitioner the sum of $**614.08**/week for a period of **43 weeks**, as provided in Section 8(e) of the Act, because the injuries sustained caused permanent partial disability to the extent of **20% loss of use of the right leg** as a result of injuries to Petitioner's right knee.

Respondent shall pay Petitioner compensation that has accrued from 9/14/20 through 10/28/21, and shall pay the remainder of the award, if any, in weekly payments.

Arbitrator Linda J. Cantrell DATED:

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031962
Case Name	Laura Partin v. North American Lighting Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0246
Number of Pages of Decision	47
Decision Issued By	Thomas Tyrrell, Commisioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen Carter

DATE FILED: 7/8/2022

/s/ Thomas Tyrrell, Commissioner
Signature

DISSENT: /s/ Thomas Tyrrell, Commissioner
Signature

22IWCC0246

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

Laura Partin,

Petitioner,

vs. NO: 18 WC 31962

North American Lighting, Inc.

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Petitioner has worked for Respondent since June 1999. She is a preventative maintenance worker. Petitioner worked on the weekends and worked on a cleaning crew. Petitioner testified that she injured her neck while working on February 9, 2018. Petitioner testified that she previously injured her neck due to a work injury in 2010; however, she did not recall missing any work due to that injury. Petitioner testified that she did not seek any treatment relating to her cervical spine between 2010 and the date of accident.

Petitioner testified that on February 9, 2018, she spent the first two hours of her shift disassembling a trolley and spent the next two hours of her shift grinding. Petitioner described a trolley as a large round metal cylinder on which the workers place automobile taillights. Petitioner testified that the trolley is moved into a metallizing chamber where a shiny coating makes the taillights reflect light. The trolley is approximately the size of a small car. Petitioner testified that the crew she worked on would complete one chamber each night during the weekend. She testified that each chamber consisted of two trollies. Petitioner testified that disassembling a trolley involved stretching overhead to loosen and remove several bolts. She testified that she used a rubber mallet and a wrench to loosen the bolts before she was able to remove them. She testified that the workers would then remove the end caps, blocks, and end pieces from the trolley. Petitioner testified that the workers also removed copper bars that she estimated each weighed approximately 100 pounds.

Petitioner testified that once the workers disassembled the trolley, she spent two full hours grinding the metal in the chamber to remove "…the shiny stuff…" (Tr. at 31). She testified that she used a grinder that she estimated weighed approximately six to seven pounds. However, she testified that the grinder felt heavier to her and felt like it weighed ten pounds. Petitioner identified Respondent's Exhibit 36 as a grinder she most likely used. Petitioner testified as follows regarding how she used the grinder:

> "Standing from the floor, I grind…in all different positions. Sometimes you may be on your tippy toes, stretching with your hand as far as you can stretch. You're in unnatural positions, twisting, turning. There are bolts that stick out, uneven metal, and when you plug this grinder in, it can kick. It kicks the whole time you're grinding…if you're not running smoothly with the metal and it hits the edge or an uneven metal piece, it will kick. You hit the sprockets, it will kick. Several people have dropped it."

Id. at 34. Regarding her alleged mechanism of injury, Petitioner testified:

> "I was grinding, and I was grinding above my head. I had my handles on, and I'm grinding, and I'm getting burning in the back of my neck and pain in the back of my neck, and I thought that this will go away, and it did not go away, and it has not went [sic] away since."

Id. at 35-36.

Petitioner testified that she reported her injury verbally to Paul Almy, her supervisor, that same day. She completed the accident report on February 14, 2018. (PX 15, RX 2). In the accident report, Petitioner identified February 9, 2018, as the date of injury and wrote that "during and after grinding [her] neck hurt kind of like a light feeling with burning down [the] left side between [the] shoulder and spine." *Id*. Petitioner testified that she has undergone cervical injections; however, she denied that the injections provided even temporary relief.

Petitioner testified that she continues to experience pain in the back of her neck, as well as tightness and throbbing that becomes a headache. She testified that she experiences pain on both sides of her neck with a burning sensation going down the right side of the neck to her shoulder blade. She testified that she at times feels a stabbing pain and a knot-like sensation. Petitioner testified that she also at times has pain that travels down both arms. Petitioner testified that nothing eliminated her pain; however, the massages and heat therapy she received while in physical therapy did make her feel better. Petitioner continues to take Flexeril, Naproxen, and Tylenol as prescribed by Dr. Gornet. Petitioner testified that she wants to return to her former quality of life or to have the best quality of life she can with as little pain as possible. Petitioner testified that she wants to proceed with the surgery recommended by Dr. Gornet. She denied suffering any additional injuries or incidents regarding her neck after the date of accident.

Under cross-examination, Petitioner agreed that the grinding she performs involves

cleaning equipment. Petitioner testified that each weekend the crew grinds OPMs on the second night. She identified Respondent's Exhibit 35 as the air grinder she used when grinding OPMs and sheet metal. Petitioner estimated the grinder weighed a few pounds. She testified that she told Dr. Gornet that the air grinder weighed around 10 pounds. The manufacturer's specifications show that the air grinder weighs a total 1.55 pounds with its attachment. Petitioner also identified Respondent's Exhibit 36 as the electric grinder she used at work. She agreed that she told Dr. Gornet this grinder also weighed around 10 pounds. The manufacturer's specifications show that the electric grinder weighs a total of 4.65 pounds with its attachment. Petitioner held a gallon of milk and the air grinder at the request of Respondent's counsel. She testified that the gallon of milk is considerably heavier than the air grinder.

Petitioner agreed that her job consists of more than just grinding. She testified that she discussed her job duty of disassembling equipment with Dr. Gornet. Petitioner agreed that none of her medical records mention that her job also involves disassembling equipment. Petitioner identified Respondent's Exhibit 25 as the Standard Operation Sheet that lists the various duties of members of the preventative maintenance crew. The sheet identifies 80 tasks for which the crew is responsible. Petitioner agreed that out of the 80 tasks listed in the document, only five tasks involve grinding. Petitioner agreed that using the grinders requires a "lighter touch" as the grinders do not work as well if you apply too much force. (Tr. at 78). Petitioner testified that she worked 12-hour shifts on Fridays and Saturdays. She testified that usually there was not enough work on Sundays and Mondays for her to work an entire shift. She usually only worked two hours on Sundays and did not work on Mondays. She testified that she worked an average of 26 hours per week.

Petitioner testified that on the date of accident, the maintenance crew was not fully staffed, and she had to complete the work of two people. She disagreed that a fully staffed maintenance crew only needed twenty minutes to grind a trolley. She testified that if Paul Almy and Joe Splain were to testify that she only spent 20 minutes grinding the trolley on February 9, 2018, she would disagree with that testimony. Petitioner testified that she reported her injury to Mr. Almy when she completed the first two hours of grinding that day. Petitioner denied that she verbally reported her injury to Mr. Almy on February 11, 2018. Under further cross-examination, Petitioner testified that she might have also discussed her injury with Mr. Almy on February 11, 2018. She testified that that might have been the day she first completed her written accident report. Petitioner then testified that the February 14, 2018, accident report was the second report she completed. Petitioner denied having any record of completing the report before February 14, 2018.

Petitioner testified that she reported her injury to Mr. Almy 10 to 15 minutes before her break on February 9, 2018. She testified:

> "…I went directly to Paul to tell him that I was going to want to fill out an accident report because I had burning, and he said, okay. He said—and we did not do it right at that time. I do not remember if we did it before I went home on Saturday or if he had me fill it out on Sunday."

Id. at 94. Regarding this conversation Petitioner further testified:

> "About five minutes before I went to break…coming into the grinding room, he was at the desk, I said, Hey, I am having pain in my neck, and I want to fill out an accident report."

Id. at 95. Petitioner worked her entire shift on February 9, 2018, and February 10, 2018, and did not seek medical treatment either day. Petitioner testified that she worked her normal two hours on February 11, 2018, and agreed that she also did not seek medical attention that day. Under further questioning, Petitioner testified that she did not recall if she spoke with Mr. Almy about her injury on February 10, 2018, or February 11, 2018. However, Petitioner later testified that the only day she approached Mr. Almy about her injury that weekend was February 9, 2018. When cross-examined about Respondent's Exhibit 2, Petitioner initially testified that she did not know who completed the accident report. She then agreed that she completed the information on a computer and that the information contained in the accident report are the responses she submitted. Petitioner testified that she did not know when she completed the report, but agreed that the report indicates it was completed on February 14, 2018.

Petitioner testified that she reviewed the medical records and saw that all but one record indicated an incorrect date of accident. She denied telling Mr. Almy that she initially thought she injured her neck on February 3, 2018. During cross-examination, the following exchange occurred:

> Q. …did you tell [Mr. Almy] that you actually hurt yourself on 2-3-18?
> A. No, no, sir, I did not.
> Q. And you did not tell him that you were helping to load a carriage onto a trolley on 2-3?
> A. We did speak of that while filling out the accident report. He was asking me, is there anything else, is there anything else you've done that was hard, is there anything else that you could have done. I said, [w]ell, it was really hard…to load the trolley last week because we have a broken chip on the floor, and there were only two of us instead of four to six, like there was in the beginning of the job, and the guy that I was holding it with, him [sic] and I could not get it lined up on—the caster wheels on the thing, and Dennis had stopped to come out and help us load it, and we had a conversation.

Id. at 103-104. She testified that she did not recall telling Mr. Almy on February 11, 2018, that she was going to allege a repetitive trauma injury because she believed that grinding inside the OPMs may have caused her neck complaints. She denied telling Mr. Almy that she was using the air grinder when her symptoms began. Petitioner then testified that she told Mr. Almy that she was using the air grinder on the date of accident when she began to feel pain. After further questioning, Petitioner once again denied telling Mr. Almy that she was using the air grinder. When asked if she told Mr. Almy that she was unsure about the cause of her neck pain, Petitioner testified:

> "I told him that I didn't have a specific date or anything, just that the grinding, when I was grinding, I was getting burning and pain."

Id. at 106. Petitioner did not recall telling Mr. Almy that she would report her injury to Human Resources.

Petitioner agreed that neither nurse at the clinic identified February 9, 2018, as her date of injury. Petitioner denied telling the physical therapist that her date of injury was February 10, 2018. Petitioner denied telling Danny Dye, Jerry Dobbins, and Joe Splain during a conversation in March or April 2018 that she did not know why her neck hurt. Petitioner denied telling the men that because she did not do anything at home, she would claim that her neck injury is work-related. Petitioner denied ever telling Mr. Dobbins that she did not hurt her neck at work.

Under further cross-examination, Petitioner denied telling one of the clinic nurses, Nurse Drewes, on May 8, 2018, that her symptoms worsened after gardening at her mother's house. She testified:

> "I was explaining to Nurse Drewes what caused my increase in headache and pain up into the base of my skull. And I told Nurse Drewes that looking down, walking, texting, looking up, and I had told the physical therapist and the doctor that I got—had gotten a really bad headache previously, and it was due to looking down and helping my mom plant flowers."

Id. at 116-17. Petitioner agreed that the May 8, 2018, office visit note does not reflect this history. Petitioner agreed that the April 26, 2018, physical therapy note states a history of Petitioner feeling a sudden pain in her neck and head rating a 10/10 after planting flowers with her mother. Petitioner denied ever telling her physical therapist that she was improving. Petitioner testified that she told Dr. Gornet's nurse during her first visit about the day she helped her mother plant flowers and that she developed a bad headache afterward. Petitioner agrees that none of Dr. Gornet's records reflect this history.

Petitioner agreed that she told her medical providers that she spent a significant amount of time grinding throughout her shift. She testified that on some weekends, the maintenance crew would grind during an entire shift. She denied that she only spent three hours each week grinding OPMs with the air grinder. She testified, "Every other weekend we would take it apart, and then the rest of the day would be grinding it and putting it back together." *Id*. at 138. Petitioner agreed that she would spend at most only one hour each week using the electric angle grinder. When asked if she told Dr. deGrange that her date of accident was February 2, 2018, Petitioner testified:

> "I spoke with Dr. deGrange. I told him the whole story…I overloaded Dr. deGrange on information. I told him that my supervisor had asked me over and over if there was anything else that could have caused it, and I told him that we spoke of an incident on the weekend of [February 2], but I cannot remember the exact date, and he said that was fine, that he did not have to have an exact date. It was just for his records."

Id. at 145.

Under further direct examination, Petitioner testified:

> "…there's at least six hours of grinding the first night on an OPM. You grind for two hours, then you come back, you grind the sheet metal that's been pulled out, and then you come back. Every other weekend you do four trollies."

Id. at 154-55. Petitioner testified that she continued to perform her normal job duties until she was completely restricted from work on December 3, 2018. Petitioner testified that her job required her to perform heavy lifting throughout each shift; however, she testified that the specific job duty that caused her complaints was the grinding she performed. Under additional cross-examination, Petitioner testified:

> "We grind [the trolley] for that two hours. I turned in my accident report verbally to [Mr. Almy]. We take that back, get another trolley, grind another two hours, go to break, come back and grind another two hours with the air grinding and the sub angle grinder on sheet metal, and then we take that back…that's the grinding for the day, six hours on that day."

Id. at 161.

The original Application for Adjustment of Claim filed on October 24, 2018, states that the accident occurred while "loading trolley." (RX 1). The Amended Application for Adjustment of Claim filed on March 12, 2020, states that the accident occurred while "grinding the trolley." (Arb. Ex. 2b).

Paul Almy Testimony

Mr. Almy was present on behalf of Respondent; however, Petitioner called him as a witness. He testified that he received a subpoena to testify and that the company also asked him to testify. He is a preventative maintenance supervisor at Respondent. He has worked for Respondent since January 2017 and supervises a crew of approximately ten workers. He testified that the maintenance crew cleans the metallizing equipment and paints booths on the weekends. He testified that on the night Petitioner told him about her injury, he documented the conversation in a memo and sent the memo to his manager and the Human Resources department the next day. He testified that they did not complete the accident report that night, but that Petitioner later went to Human Resources and completed the report contained in Petitioner's Exhibit 15. He testified:

> "Well, the night that she came to me and the stuff that was put in the memo, she was talking about February the 3rd. She told me that she wasn't sure if she got hurt loading a carriage back onto the trolley or whether it might have been repetitive grinding and our OPM's [sic]. Today was the first time I head the specifics…about February the 9th, I guess, when she said that she got hurt grinding the trolley.

> Basically, the night that she came to me should have been February—it's in the memo, I believe it was February the 11th, and the very next morning I sent the memo to...my boss and HR, and I state in that memo that I wasn't sure what to write or what to do because she didn't know exactly which—how she got hurt, basically. So I kind of left it up to HR, and she later came into HR and filled out the accident report."

(Tr. at 169-70).

Mr. Almy testified that the trolley is a machine that has hydraulic motors, and the workers use it to move the carriage. He testified that the workers never grind on the trolley; instead, they grind on the carriage. The carriage is large and weighs a lot, so the trolley is used to load the carriage into the chamber. He testified that they remove all the poppets off the carriage and strip off the sheet metal as well as other parts off the carriage. The carriage is then loaded onto a transport car and is moved to the room where the crew cleans the carriage with the grinder. He testified that the carriage rotates, and no one would have to get on their "tippy toes" to perform overhead grinding because there are steps for the workers to use. *Id*. at 174. He testified:

> "So the only things on the carriage that you actually have to reach up to touch, we've got steps, yellow steps that go up about that high…for two poles that the sheet metal attach to that it would be hard to reach for a shorter person without the aide of the steps. The rest of it, you can turn, and you can grind, clean, and then you turn it, so you never have to, like, reach up. It's right out in front of you."

Id. at 174-75. He testified that the workers perform a little overhead grinding in the chambers and that a worker must crawl into a little hole to clean the chambers. There is also a little overhead grinding in the OPMs on which the workers use the air grinder. He agreed that Petitioner's job included overhead grinding in the OPMs and the chamber.

Mr. Almy testified that on February 9, 2018, the crew would have cleaned a chamber. There are two carriages per chamber. He testified that the crew cleaned OPMs the following day. He testified that he was present on February 9, 2018. He denied that Petitioner told him on February 9, 2018, that she injured herself while grinding. He testified that he does not remember Petitioner ever telling him that she hurt herself while grinding the carriage or trolley. Mr. Almy denied having anything to do with Petitioner completing the accident report on February 14, 2018, and was not present when Petitioner completed the report. He believed the safety manager probably was involved in that process. After she completed the report, he completed the supervisor's portion of the accident report.

Under cross-examination, Mr. Almy identified Respondent's Exhibit 31 as the memo/email he sent to his manager about Petitioner's initial report of her injury. He sent the email at 5:21 a.m. on February 12, 2018. He testified that the company policy requires a supervisor to report any report of injury to the company regardless of whether the worker is seeking medical care. He sent the memo because Petitioner did not complete an accident report on February 11, 2018, when she

first reported her injury to him. In part, Mr. Almy wrote:

> "On Sunday morning, [Petitioner] came to me wanting to fill out an accident report for a neck injury. She told me that she thinks she injured her neck on Saturday, February 3rd, when she was helping to load a carriage back on to its trolley. However, she said that she was going to fill out the accident report as repetitive trauma because she thinks that grinding inside the OPMs might be the cause of her neck pain. One of her co-workers, Jerry Dobyns, told me that he overhead her telling Danny Dye and Dennis Sloan that she wasn't sure if she hurt her neck at work or at home but she was going to fill out an accident report because she wants to see a doctor…[Petitioner] said that she was going to come in to the office today to talk to someone about her injury. Hopefully, someone else can get more information out of her because she doesn't seem to want to talk to me."

(RX 31). Mr. Almy testified that he correctly reported his conversation with Petitioner in this email. He testified that he did not have Petitioner immediately complete an accident report because she told him she was unsure regarding what might have caused her injury. He testified that she reported her injury to him in the morning on Sunday, February 11, 2018, and that Petitioner said that the injury occurred on February 3, 2018. He denied that Petitioner reported anything to him on February 9, 2018. He testified that Petitioner did not report that she injured herself while grinding the carriage or the trolley. He testified, "She was unsure. She thought maybe it was loading the carriage onto the trolley the week before or grinding the OPM's [sic]." (Tr. at 184). Mr. Almy testified that when Petitioner mentioned she may have injured her neck while grinding OPMs, this meant that Petitioner was using the air grinder weighing 1.55 pounds.

He testified that Petitioner reported a different mechanism of injury when she completed the accident report on February 14, 2018. Mr. Almy testified that Petitioner wrote that the injury occurred while trolley grinding; however, she would have used the electric grinder, not the air grinder for grinding the trolley.[1] He testified that on February 9, 2018, there were eight people working in the crew instead of the normal 10 workers. He testified that on that night, there would have been four workers cleaning and grinding the carriage and that it should not have taken the team more than one hour each to clean each carriage. He testified that Joe Splain would be able to better testify regarding how long the crew spent cleaning the carriages on February 9, 2018, as he was working on the crew that day. The following exchange occurred regarding the grinding Petitioner would have performed on February 9, 2018:

> A. Depending on—and the type of grinding is going to vary because we do—back at the time of this, we were doing—one weekend we would do two chambers, and the other weekend, like the weekend in question, we did one chamber and the five OPMs. So one weekend you're pretty much using the electric grinder. The

1 Although Mr. Almy testified that the workers clean and grind the carriages, not the trolley, he, Petitioner, and Mr. Splain repeatedly refer to grinding the trollies. It appears the workers use the terms carriage and trolley interchangeably even though they are technically two different pieces of equipment.

> other weekend you're using both grinders. So on the weekend in question, you're talking about using the electric grinder for two hours.
> Q. All week?
> A. No. Well, two hours for the carriages from the actual grinding the trolley, like it says on the accident report, you would be talking about no more than two hours.
> Q. That week?
> A. That weekend, that would be on Friday night.
> Q. Okay.
> A. And then the next day, you use the air grinder, and you would do the OPMs.
> Q. She testified, I believe, on a 12-hour shift, she ground several hours using the air grinder, and then that same night she would grind for six hours on the OPM; is that true?
> A. The same night?
> Q. Yes.
> A. Well, it wouldn't be the same night. It would be the following night, because we did—for that weekend, we did chamber 2 on Friday night, and then on Saturday, we came in and did all four of our OPMs.

Id. at 202-04. Mr. Almy testified that a worker would not spend more than four hours a week grinding OPMs. He testified that Petitioner did not grind any OPMs on February 9, 2018; instead, she would have worked on OPMs the next day. He testified that the workers should not need to do any overhead grinding on the carriages because it rotated and there were steps provided for workers to use. He could only remember Petitioner ever cleaning in the chamber once and that time she only cleaned the floor. He does not remember Petitioner ever performing any overhead grinding in the chamber.

Mr. Almy testified that the only aspect to the OPMs that might require a worker to perform overhead grinding would be cleaning the small area inside the poppet. He estimated that depending on how dirty the poppet is, Petitioner would have spent approximately 20 minutes grinding overhead to clean the poppet. He testified that the rest of the OPM requires cleaning either in front of the worker or at the bottom of the OPM. The following exchange occurred regarding the amount of grinding Petitioner would perform on an average day:

> Q. Would there ever be an occasion, whether it be 2-3, 2-9, 2-11, 2-12, there's been a lot of dates thrown around, on any of those accident dates, is there ever a day where she would grind substantially all day?
> A. No, you can't just do—you have to take stuff apart. There is [sic] other steps to it…you've got to clean up your mess because you've got metal debris everywhere, and they usually wipe the sheet metal and stuff down with alcohol wipes, and you've got to put everything back together.

> Q. Laura suggested the type of grinding she was doing on 2-9, she suggested that she ground for up to 8 hours on 2-9. Is that possible?
> A. Should not be possible just doing the carriages, no.
> Q. Even close to that?
> A. No. The carriages should have been an hour apiece, no more than an hour apiece. And then the other thing they do is they do the sheet metal that comes off of it. And we dip the sheet metal into a caustic solution to help remove the metal coating. It eats away the aluminum coating that is on the stainless sheet metal, and whatever doesn't come off, they have to use the grinder to remove if they have to.

Id. at 208-09.

Mr. Almy testified that Petitioner did not spend a significant part of her work week grinding. Although it may vary by weekend because the workers cleaned two chambers on one weekend and one chamber and OPMs on the next weekend, he testified that Petitioner would spend no more than four hours each shift grinding. He testified that this depended on various factors including how many workers were present. He testified that Petitioner at most would have spent eight hours grinding each weekend. He testified that on the weekend the crew cleaned two chambers, Petitioner would have spent no more than eight hours using the electric grinder the entire weekend. During a weekend when the crew cleaned one chamber and the OPMs, Petitioner would have spent no more than four hours using the electric grinder because the OPMs only require the use of the air grinder. He testified that none of the grinders used by the maintenance crew weighed as much as a gallon of milk.

Under further direct examination, Mr. Almy agreed that an accident report listing February 3, 2018, as the date of accident was never completed. He testified that on February 9, 2018, Petitioner would have spent approximately four hours using the heavier electric grinder. However, he reiterated that Mr. Splain would better know the specifics of how long Petitioner spent grinding on that day. Mr. Almy then testified that Petitioner would have used the electric grinder for one hour per carriage—the crew cleaned two carriages that day—and also spent a few hours grinding sheet metal. He testified a worker would lay the sheet metal on a bench and run the grinder over it. He testified that the maximum amount of time Petitioner would have spent grinding the carriages is two hours; however, she may have very well spent less time grinding the carriages that day.

Joe Splain Testimony

Petitioner also called Joe Spain to testify. Mr. Splain has worked for Respondent for approximately eight years and works in preventative maintenance. He testified that he essentially performs the same job as Petitioner. He could not remember specifically if he worked on February 9, 2018.

Mr. Splain testified that there is a third grinder that is heavier than the electric grinder and air grinder submitted into evidence. He referred to this heavier grinder as the "Fred Flin[t]stone model." *Id*. at 225. He testified that Petitioner never used this heavier grinder. He testified that if the crew cleans two trollies out of the chamber and cleans the sheet metal, that entire process may

take up to two hours. He testified:

> "…with a full crew, usually 20 minutes we dust off a trolley, 20 minutes we dust off another. There is [sic] a lot of other jobs done in between. And when we go to the metal, you might put in another hour doing the metal. The actual time of the grinding itself, like I say, there's [sic] several other jobs, and you're doing other duties with it."

Id. at 226. He testified that generally, the actual time any worker spent grinding was around two hours during a typical shift. Mr. Splain testified that in his experience, the maintenance crew had anywhere from six to twelve workers.

Mr. Splain testified that if the records show that the two operators that were absent on February 9, 2018, were Anthony and Dennis, then he would have been working that day. Regarding the use of the two grinders in evidence, he testified:

> "The DeWalt's used on the chambers mostly, and on the trollies and on the metal that lines the chamber and lines the trollies. And generally inside the chamber, the guys that did those usually used a grinder a little bit larger than that one. And when we did the trollies, I've used that one a lot of times on the trollies because it's sufficient enough. On the metal, I would rather use the smaller one. We don't need to be aggressive. It is just for polishing up. Grinding kind of gets into the term where you're looking at a grinder, so ripping and tearing the metal, and we don't do that. We just dust the over metallization off of them. You don't want to push hard on these things. You just let them float along and go…On a trolley, with four of us in there, it would usually take no more than 30 minutes at the most. Usually, we would be in and out of there in 20 minutes. We're all used to doing it, and we go through it pretty quick."

Id. at 230-31. Mr. Splain testified that he worked beside Petitioner often. He testified that when the crew cleaned the chambers, he usually worked next to Petitioner while cleaning the metal. He testified that the crew uses the air grinder to clean the chambers, the OPMs, on the doors, and the poppets. He testified that Petitioner spent an average of four hours in one week using the grinder on an OPM. He testified that you do not apply much pressure when using the grinders because that would cause the rpms to slow, and the grinders will not clean effectively.

Mr. Splain testified that most of the men on the crew would perform any overhead grinding. He testified that Petitioner's boyfriend brought a set of steps for Petitioner to use so she would not have to stretch and reach far overhead. He testified that Petitioner could perform most of the grinding using the steps and would not have to really reach overhead. He testified that there was a little more overhead grinding involved when cleaning the poppet area in the OPMs; however, when using the steps, Petitioner usually only had to use the electric grinder overhead for around ten minutes. He testified that if the crew was short workers, then she might spend 20 minutes grinding

overhead in one night. He testified that if the crew cleaned two carriages or trollies on February 9, 2018, then Petitioner would have spent 20-30 minutes using the electric grinder at or above shoulder level. He testified that most of the grinding is at a lower height. He testified that the crew spent more time grinding on OPMs and that the crew could dust through an OPM in two hours. Cleaning the OPMs included more than just performing the grinding. The crew had to wipe everything down and clean the floors. He testified that the crew also had to put the metal back on and spent a lot of time doing these other tasks.

He testified that Petitioner normally did not work any extra hours. During Sundays and Mondays, the crew ground the metal lining the OPMs. This could involve an additional two or three hours of grinding; however, he testified that the crew also would sometimes go very slowly because they were running out of work. Mr. Splain testified that he could finish a set of OPM metal in 45 minutes, but most workers needed more time. He testified that Petitioner could complete a set of OPM metal in a few hours; however, she rarely worked the extra time to complete these sets on the third and fourth day. He testified that Petitioner rarely went into the metallizing chambers. He testified that he and Petitioner only cleaned inside a chamber around once a year.

Mr. Splain testified that in March or April 2018, he overheard a conversation during which Petitioner discussed how she believed she injured her neck. He testified that the first conversation he overheard occurred in the locker room where the employees keep their protective gear. He testified that Petitioner, Danny Dye, and Dennis Sloan were present. He testified:

> "I happened to come out of the grinding area, into that room. It was Dennis, Danny, and Laura, and Laura was having a conversation, and she didn't really know where she got hurt, but it had to be at work because she doesn't go anywhere else or do anything else. The only thing—only place I went was fishing with Danny. And kind of the reason I remember the fishing with Danny comment was, he don't [sic] take you anywhere but going fishing at all. I mean, it was something was kind of—and then I heard the same basic thing said other times, and it was kind of disheartening to realize—you know, I asked her about it, and it was disheartening that, no, we really don't go anywhere else…She just said she didn't know how she got hurt because she just—it had to be at work because she didn't go anyplace else or do anything else…"

Id. at 250-51. He testified that Petitioner did not know how, when, or where she hurt her neck, but thought that it had to have happened at work. Mr. Splain testified that there were similar conversations in the grinding room between him, Petitioner, and Braden regarding her alleged work injury. He testified:

> "…She was mostly having a conversation with Braden, and I was right there with it, because I asked a couple questions about it. And she basically stated the same thing, she didn't know where she got hurt. It had to be at work, because she didn't do—Danny don't [sic] take me anywhere else, we don't go anyplace else…"

Id. at 252-53. Mr. Splain testified that he never witnessed Petitioner injure herself at work. He testified that he heard Petitioner say that she did not know where or how she injured herself at least three to four times. He testified that he has never seen a grinder in the plant that weighed ten pounds. He denied ever using a grinder at the facility that weighed close to the weight of a gallon of milk. Mr. Splain testified that Petitioner would never spend all day grinding with the electric grinder.

He testified that he did not have any personal animosity toward Petitioner. He testified that Mr. Almy asked him about Petitioner's alleged injury, and he told Mr. Almy about the conversations he overheard regarding Petitioner's alleged work injury. He received a subpoena to testify. (RX 30).

Medical Treatment

On February 12, 2018, Petitioner presented to the clinic with complaints of burning pain in the back of her neck since the weekend. Petitioner reported to the physician assistant, "I have neck pain and burning. We do a lot of grinding at work with my hands in the air and I think it is causing my neck to hurt." (PX3). She reported that when grinding she sometimes must hold her hands up and look up and that this maneuver caused pain. She denied an injury occurred. The exam revealed pain with looking up and to the left. Petitioner was prescribed medication and the physician assistant diagnosed neck pain. Petitioner returned to the clinic four days later and complained of neck pain with a burning sensation radiating down her left shoulder blade. The nurse practitioner wrote: "She states she does overhead grinding a[nd] heavy lifting at work and feels this is the cause of her pain. Otherwise no specific injury." *Id*. Petitioner was diagnosed with a cervical strain and the nurse practitioner prescribed physical therapy. On March 2, 2018, the physician assistant wrote that Petitioner complained of neck pain that started at work on February 12, 2018. Petitioner began physical therapy on March 19, 2018. The onset date of Petitioner's symptoms is listed as February 10, 2018, in the physical therapy records. The physical therapist recorded the following history:

> "[Petitioner]…presents to PT today due to neck pain with sudden onset. Pt works in a factory where they do a lot of repetitive movements, Pt remembers that she was working on an overhead tote and she felt a pop in her neck, Pt tried to shake it off but it was getting worse as the day goes by. Went home and was still sore and reported the incident to their manager and was sent to urgent care."

(PX 4).

On April 16, 2018, Petitioner returned to the clinic and reported left neck and left upper back pain. The nurse practitioner listed the date of injury as February 12, 2018. Petitioner complained of increased stiffness to the left side of her neck after working three days in a row. Petitioner reported that physical therapy sometimes made her pain better and sometimes made it worse. On April 26, 2018, the physical therapist wrote: "Pt stated that she tried to help her mom plant flowers over the weekend and she felt a sudden pain in her neck and head that she reported

to be a 10/10 pain." *Id*. The physical therapist also wrote: "Pt presents with increased pain and soreness on the neck area due to trying to help her mom plant flowers, pt has been really guarded today and the last 2 days and is very stiff in B shoulders." *Id*. Finally, the physical therapist wrote: "Pt was doing really well and was progressing and had improving pain in the cervical area until she tried to help her mom garden yesterday. She bent over and tried to tear a packaged flower when she felt a sharp pain in her cervical area, she immediately stopped and felt a headache the whole day even today." *Id*. Petitioner returned to the clinic on May 8, 2018, with complaints of persistent neck pain since February 12, 2018. She reported making no progress with physical therapy and also reported her pain "…got much worse when she was gardening." (PX 3). The physician assistant referred Petitioner to orthopedics for further care. Petitioner told her physical therapist that same day that she felt she was doing well but was worried her pain would increase when she returned to work. On May 17, 2018, the physical therapist authored a progress report and noted that Petitioner felt better and denied any pain for the past week. However, Petitioner complained of still feeling tight and sometimes having a pulling sensation on the shoulder to the neck area that she felt was "unbearable." (PX 4).

Dr. Gornet first examined Petitioner on July 16, 2018. Petitioner complained of pain in the base of her neck and between her shoulder blades, frequent headaches, bilateral shoulder pain, and pain in the upper left arm that occasionally radiated down to her hand. The doctor recorded the following history:

> "She states her current problem, at least in its level of severity, began on or around 2/9/18. This was when she reported it. She [was] working for [Respondent] in the preventative maintenance crew. She feels her symptoms relate to work activities, particular[l]y using a grinder, which she would often hold at chest level and above. She feels the grinder weighs about 10 pounds, but this activity seems to really aggravate her underlying condition. She has had no discrete event or trauma."

(PX 8). Petitioner reported having cervical issues in 2010 and undergoing an injection that year. She reported her condition improved until the current work incident. After reviewing x-rays taken that day, Dr. Gornet wrote that "…a work activity such as that described could easily aggravate an underlying condition of foraminal stenosis and disc degeneration. She has had no discrete event." *Id*. He recommended an MRI. The cervical MRI taken that day had the following impression: 1) central annular tears of the apices and massive disc protrusions at the C4-C5 and C5-C6 levels, with extension into the foramina bilaterally, resulting in severe left greater than right C4-C5 and severe right greater than left C5-C6 foraminal stenoses, as well as moderate central canal stenoses present at both levels; 2) right foraminal C6-C7 and right lateral recess C7-T1 protrusions resulting in moderate right foraminal stenosis at the C6-C7 level but no central canal stenosis at either level; and 3) cystic structure in midline at the tongue base extending into the prelaryngeal musculature consistent with a thyroglossal duct cyst. The doctor interpreted the MRI as showing larger herniations at C4-C5 and C5-C6 and he opined that her arm symptoms related to the C5-C6 herniation. Dr. Gornet recommended a steroid injection at C5-C6 and wrote that if there was no improvement, he recommended cervical disc replacement surgery at C4-C5 and C5-C6.

Petitioner underwent an epidural steroid injection at C5-C6 in early August 2018. On October 1, 2018, Petitioner returned to Dr. Gornet with complaints of neck pain radiating to her shoulder with frequent headaches, and bilateral shoulder pain, worse in the left upper arm and radiating into her hand. Petitioner reported receiving no sustained relief from the steroid injection. Dr. Gornet prescribed a CT myelogram to rule out ossification of the posterior longitudinal ligament ("OPLL"). The December 3, 2018, CT myelogram and scan had the following impression: 1) central and left-sided disc herniation at C4-C5 causing left cord flattening and overall central stenosis; 2) degenerative changes at C5-C6 with prominent osteophytes more evident on the right side creating central stenosis and right greater than left foraminal stenosis; and 3) some anomalous development of bilateral cervical ribs and prominence of C6 lateral mass. Dr. Gornet reviewed the CT myelogram and interpreted it as showing large herniations at C4-C5 and C5-C6 causing cord deformation. He also believed the scan showed some OPLL behind the vertebral body of C5. Dr. Gornet took Petitioner completely off work and continued to recommend disc replacement surgery at C4-C5 and C5-C6. He also believed Petitioner would need bilateral foraminotomies at C5-C6 and removal of the disc herniations. Petitioner continued to follow up with Dr. Gornet throughout 2019 and 2020 and the doctor continued to recommend disc replacement surgery. He has also kept her off work. Petitioner last visited Dr. Gornet's office on September 17, 2020.

Expert Opinions and Testimony

Dr. Matthew Gornet—Treating Physician

Dr. Gornet testified via evidence deposition on behalf of Petitioner on August 8, 2019, and October 8, 2019. He is a board-certified orthopedic surgeon specializing in spinal surgery. The doctor testified that he believed Petitioner's symptoms and need for treatment are causally related to her work activity on February 9, 2018. He testified that disc replacement surgeries have superior patient outcomes compared to fusions and diskectomies. Dr. Gornet reviewed Dr. deGrange's Section 12 report and testified that he agreed with Dr. deGrange's opinion that given the size of Petitioner's herniations, her work duties could easily have aggravated her cervical condition. He testified that using a grinder at chest level and above would aggravate Petitioner's cervical condition because:

> "…if you're holding any weight away from your body, it tends to accentuate the stresses and forces on your cervical spine. One needs to only take a milk carton that's full, a 1-gallon jug of milk, and put it next to your body. You could pretty much hold it all day. But if you hold it at arm's length, you can't hold it very long without having some irritation of your muscles, your shoulders and even your neck. So taking a weight and having it extended away from your body accentuates the forces by the cube root is the general thinking…And so that activity, even though it doesn't seem like a lot of weight, is significant."

(PX 12 at 16-17). He continued to recommend the disc replacement surgery.

Under cross-examination, Dr. Gornet testified that his opinions assume that the history provided by Petitioner is factually correct. He testified that his opinions are also based on the diagnostic studies and his medical experience. He testified that the best he can do is to state that the findings on the 2018 cervical MRI are the type of findings that could be aggravated by Petitioner's described work activities. He testified that Petitioner readily admitted that she had neck pain in the past. The doctor testified that the work incident caused Petitioner's symptoms to become much more severe to the point where she required further treatment. Dr. Gornet denied having any knowledge of Petitioner possibly hurting her neck in April or May 2018 while gardening with her mother. He testified that with disc injuries, symptoms will wax and wane depending on the activities in which the patient engages. He testified that the gardening incident Dr. deGrange mentioned in his Section 12 report did not sever the causal connection between Petitioner's work injury and her ongoing need for treatment and the recommended surgery. He testified that if the history provided by Petitioner is not factually correct, it could cause his opinions regarding causation to change.

Under additional questioning, Dr. Gornet testified that he would disagree if Dr. deGrange opined that Petitioner's work injury was only a temporary aggravation of her cervical condition. He testified that Petitioner continues to suffer from ongoing and significant cervical complaints. He testified that he Petitioner's cervical disc protrusions are chronic because both he and Dr. deGrange believe the protrusions existed in 2010.

Dr. Donald deGrange—Respondent's Section 12 Examiner

Dr. deGrange examined Petitioner at Respondent's request on March 25, 2019. Petitioner reported that on February 9, 2018, she was doing some grinding above her head when she had an onset of neck pain radiating into both shoulders. She also reported that on or around February 2, 2018, she pushed a trolley weighing more than 2,500 pounds. She reported that she only had the help of one coworker instead of the normal six workers when moving the trolley. Petitioner reported being symptom free regarding her cervical spine from the time she reached maximum medical improvement for her 2010 work injury until this current cervical injury. Petitioner complained of neck pain radiating into her upper right extremity from the shoulder to elbow with occasional numbness and tingling in the right hand. She denied significant left upper extremity symptoms. She reported daily neck pain that varied from mild to moderate depending on her activities. Dr. deGrange reviewed medical records including some, such as the 2010 diagnostic studies, that pre-date this work injury.

Dr. deGrange opined: "The patient's current cervical symptoms appear to have been aggravated as a result of her customary job duties of February 9, 2018." (RX 19). However, he also pointed to numerous discrepancies regarding Petitioner's alleged work injury. For example, he noted that at one point Petitioner claimed that on February 9, 2018, she injured her neck while loading a trolley at work, but she also reported to him that the trolley incident happened a week earlier. The doctor noted that the accident report states that Petitioner was injured while grinding. He noted that Petitioner worked a full shift on the date of accident, as well as the following day. The next few days her work was limited or nonexistent due to a lack of available work—not her cervical symptoms. He also pointed to the discrepancies between the dates of accident provided in various medical records. Dr. deGrange wrote: "The medical records that I have reviewed and to

which I have just alluded seem to offer confusing and somewhat contradictory timelines and history as to when and what exactly is responsible for her ongoing pain. I will leave the final determination of such issues, including the causal relationship for the recent recommendation for the two-level disc arthroplasty…to the trier of fact." *Id*. The doctor also wrote:

> "My review of the diagnostic studies, which are the only true objective findings, indicate the presence of the disc herniation at C4-5 in 2010 as well as the disc bulge at C5-6 and then the subsequent studies approximately seven or eight years later which showed evolution of the C5-6 pathology into a full disc herniation now with obvious and apparent OPLL, which would seem to indicate a progression of her preexisting condition to its current state as revealed by her recent CT myelogram. The presence of this pathology seems to this examiner to be a reasonable basis for the proposed surgery; however, I cannot state within any reasonable degree of medical certainty that there is a causal connection between that surgery and her work-related activities."

He also noted that Petitioner failed to disclose the April 2018 "gardening incident" and the role it may have played in worsening her condition to her medical providers outside of the April 26, 2018, physical therapy visit. The doctor wrote: "The patient did report improvement after she took the medication and underwent [physical therapy] …That may be important in that subsequent activities may have worsened her condition beyond those reported some time in February 2018." *Id*. He further opined, "Given the size, appearance, nature, and extent of the herniation at C4-5 and C5-6, the patient's work duties on any one day may represent a mechanism of aggravation of her preexisting condition." *Id*.

Dr. deGrange testified via evidence deposition on behalf of Respondent on May 7, 2019, July 23, 2019, and November 9, 2019. He is a board-certified orthopedic surgeon specializing in spinal surgery. He testified that there were inconsistencies between Petitioner's report of symptoms to Dr. Gornet and those reported during the Section 12 examination. Regarding causation of Petitioner's ongoing cervical complaints, the doctor testified:

> "…I can't tell when and how it happened, to be perfectly honest with you, and I'm asked to render, to some degree, a legal determination, or at least a medical/legal determination to how I believe, based upon only information I have at the time, which includes her story, the medical records, is there a direct causal relationship. Is there a cause and effect actually…and in my opinion, given the inconsistencies, I cannot draw a direct causal relationship between the need for surgery and whatever happened on 2-9-18, whether it's the grinding or whether it's the loading of the trolley."

(RX 21 at 55). He testified that it is important that Petitioner did not raise the April 26, 2018, gardening incident during his examination because Petitioner attributed all her symptoms to a work-related incident that occurred either on February 2, 2018, or February 9, 2018. He further

testified that "…given the inconsistencies in her symptoms, physical examination findings, and the diagnostic studies, I do not think that surgery is appropriate…" *Id*. at 91.

On July 12, 2019, Dr. deGrange authored an addendum report in which he addressed comments made by Dr. Gornet after he reviewed Dr. deGrange's March 25, 2019, report. Dr. deGrange reiterated that he could not draw a causal connection between the work accident and Petitioner's need for ongoing treatment, contrary to Dr. Gornet's attempt to indicate Dr. deGrange did find a causal connection. Dr. deGrange wrote: "My sworn testimony offered [in] my May 7, 2019, deposition would refute a causal connection due to the significant inconsistencies, discrepancies, and contradictions…" that he referred to in his testimony. (RX 19). He further opined: "To repeat, given the very confusing history which is rife with the multiple dates and mechanisms, I am unable to draw a causal relationship between the patient's need for surgery and a work-related incident that may or may not have occurred on February 9, 2018." *Id*.

Dr. deGrange continued to testify via evidence deposition on July 23, 2019. Under cross-examination, he testified that it is possible that the MRI findings at C4-C5 and C5-C6 were caused by the work accident; however, it is also possible that they pre-existed the work injury. He agreed that he could attribute some increase of Petitioner's symptoms to the work injury. He testified that it would be speculative for anyone to say that the herniations and bulges that increased from 2010 until 2018 grew due to the work accident without having an MRI performed in January 2018, right before the work injury. He testified that he would recommend an anterior cervical diskectomy and fusion surgery at both levels. On October 23, 2019, Dr. deGrange authored a second addendum report. He wrote that none of Dr. Gornet's deposition testimony changed his opinion that there is not a causal relationship between Petitioner's cervical condition and the alleged February 9, 2018, work injury.

Conclusions of Law

Petitioner bears the burden of proving each element of her case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). She must show by a preponderance of the evidence that she suffered a disabling injury which both arose out of and in the course of her employment. *Id*. An accidental injury must be traceable to a definite time, place, and cause. *Interlake Steel Co. v. Industrial Comm'n*, 136 Ill. App. 3d 740, 743 (1985). Before the Commission can consider whether an accidental injury arose out of and in the course of Petitioner's employment, Petitioner must first prove that a work-related accident occurred. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 188 (1999). After carefully considering the totality of the evidence, the Commission finds Petitioner did not meet her burden of proving an accident occurred that arose out of and in the course of her employment on February 9, 2018.

The Arbitrator determined that Petitioner proved she sustained an injury due to a compensable work-related accident on February 9, 2018. In reaching this conclusion, the Arbitrator determined that Petitioner successfully resolved any uncertainty and inconsistencies regarding her date and mechanism of injury when she completed the February 14, 2018, accident report and the Application for Adjustment of Claim. The Arbitrator determined that Petitioner's alleged date and mechanism of injury detailed in these two documents were consistent with her reports of injury to her medical providers. Respectfully, the Commission views the evidence much differently than the Arbitrator. After carefully reviewing and weighing the evidence, the

Commission finds Petitioner's testimony as well as her reports to her medical providers regarding her date and mechanism of injury lacked credibility. The Commission further finds that due to Petitioner's lack of credibility, Petitioner was unable to meet her burden of proving she sustained an injury that arose out of and in the course of her employment on February 9, 2018.

To support the conclusion that Petitioner proved she sustained a compensable injury to her cervical spine on February 9, 2018, while performing work-related grinding, the Arbitrator greatly minimized the numerous and significant inconsistencies evident throughout Petitioner's testimony, her reports to her medical providers, and her statements during the Section 12 examination. For example, the Arbitrator wrote, "…although there are variances in the minutia related to Petitioner's reported accident, such as which grinder she was using at the time, the exact length of time spent grinding, which equipment was being maintained at the time, and the date she reported the injury, the record shows that Petitioner consistently believed and reported that she suffered a work injury to her neck in February 2018." (Arb. Dec. at 14). However, these very inconsistencies the Arbitrator attempts to minimize involve every element critical to Petitioner proving she sustained a compensable work injury on the alleged date of accident. In this very statement, the Arbitrator acknowledges that Petitioner was unable to credibly relate the information vital to the determination of the compensability and credibility of her claim.

A careful review of the evidence reveals that Petitioner failed to testify credibly regarding the date and mechanism of injury. Both Petitioner's testimony and her reports regarding the alleged date and mechanism of injury to her medical providers were rebutted by the credible testimony of Mr. Almy and Mr. Splain. The Commission finds that Petitioner's testimony regarding her report of her alleged injury to Mr. Almy was thoroughly rebutted by the contemporaneous email authored by Mr. Almy, as well as Mr. Almy's testimony. Petitioner testified that she sustained an injury to her cervical spine due to overhead grinding she performed on February 9, 2018. Petitioner testified that she immediately reported her injury to her supervisor, Mr. Almy during a break on February 9, 2018. She initially denied discussing her injury with Mr. Almy on any date that weekend other than February 9, 2018; however, she later testified that she might have not only discussed her alleged injury with Mr. Almy on February 11, 2018, but she also may have first completed her accident report that day.

Under further questioning, Petitioner again testified that she only discussed her injury with Mr. Almy on February 9, 2018. Petitioner testified that she told Mr. Almy that she felt neck pain after grinding the trolley. She denied telling Mr. Almy that she was unsure of the cause of her neck pain. She also denied telling Mr. Almy that she initially believed her neck pain began when she helped load a trolley on February 3, 3018. However, Petitioner later admitted that when she spoke to Mr. Almy, she did not have a specific date of injury. Furthermore, Petitioner testified that she only discussed the events of February 3, 2018, while she completed her first accident report with Mr. Almy. Petitioner also denied telling Mr. Almy that she was using the air grinder when her neck pain began. Under further questioning, Petitioner later admitted that she told Mr. Almy that her symptoms began while she used the air grinder. After additional questioning, Petitioner yet again denied telling her manager this.

Mr. Almy's testimony and contemporaneous email paints a starkly different picture regarding Petitioner's report of her alleged injury. Mr. Almy credibly testified that Petitioner did

not report any injury to him on February 9, 2018. Instead, he testified that Petitioner did not approach him regarding her alleged injury until February 11, 2018. He credibly testified that Petitioner told him that she was not sure what caused her neck pain and that it began a week earlier, on February 3, 2018. Mr. Almy's credible testimony is corroborated by the email he sent to Human Resources and his manager early in the morning on February 12, 2018. In this email, he recounted the conversation he had with Petitioner on February 11, 2018. The Commission finds this email is particularly credible because it was written within hours after Mr. Almy's conversation with Petitioner regarding her alleged injury, and it was sent long before Petitioner filed her workers' compensation case. In the email, Mr. Almy wrote that Petitioner told him that she believed she injured her neck on February 3, 2018, while helping to load a carriage onto its trolley. He wrote that Petitioner reported that she was going to indicate her injury was due to repetitive trauma because she believed grinding she performed inside OPMs may have caused her neck pain. There is no indication in the email that Petitioner reported suffering an injury on February 9, 2018, to Mr. Almy. Furthermore Mr. Almy testified that Petitioner never told him that she sustained an injury on February 9, 2018. Mr. Almy testified, and his contemporaneous email corroborates, that Petitioner did not complete an accident report on either February 9, 2018, or February 11, 2018. In fact, contrary to Petitioner's testimony, the only accident report Petitioner completed is the report dated February 14, 2018.

Mr. Splain's testimony regarding statements Petitioner made regarding her date and mechanism of injury is also quite revealing. Mr. Splain testified that he heard Petitioner tell coworkers on at least three occasions that she did not know how or when she sustained an injury to her neck. He testified that he heard Petitioner say repeatedly that although she did not know how she injured her neck, she felt it had to have happened while she was at work because she did not go anywhere or do anything outside of work. The Commission finds that Mr. Splain testified credibly. Mr. Splain was able to testify regarding details of the conversations he both overheard and personally had with Petitioner regarding her possible mechanism of injury. Additionally, there is no evidence that Mr. Splain had any reason or motivation to fabricate these conversations.

The medical records, Application for Adjustment of Claim, as well as the testimony of Mr. Splain also provide key rebuttals of Petitioner's claim that she sustained an injury on February 9, 2018, due to grinding she performed on trollies. While the original Application filed by Petitioner in October 2018 lists the date of injury as February 9, 2018, it also states the injury occurred while Petitioner was loading a trolley. Petitioner notably filed an Amended Application in March 2020, in which she changed the mechanism of injury to state that the accident occurred while grinding a trolley. Similarly, Petitioner reported various possible mechanisms and dates of injury to her medical providers. During her first office visit on February 12, 2018, Petitioner reported pain and burning in her neck since that weekend. Petitioner notably did not identify her date of injury as February 9, 2018. She reported that she at times had to grind overhead and had to look up and that the maneuver caused her neck pain. Petitioner denied a specific injury occurred. A few days later, she also reported that heavy lifting at work caused her neck pain and continued to deny a specific injury. In subsequent clinic visits, the medical provider recorded a history of Petitioner's neck pain starting on February 12, 2018.

When she began physical therapy on March 19, 2018, Petitioner reported a date of injury of February 10, 2018. The Commission also notes that Petitioner for the first time identified a

discrete event as causing her neck pain. The physical therapist wrote that Petitioner reported experiencing neck pain with a sudden onset when she felt a pop in her neck while working on an overhead tote. Interestingly, the history Petitioner gave to the physical therapist also rebuts her testimony that she immediately reported her injury to Mr. Almy—Petitioner reported to the physical therapist that she did not report her injury to her manager until she went home and her neck soreness continued. When Dr. Gornet first examined Petitioner on July 16, 2018, Petitioner denied any discrete event or trauma. She attributed her cervical condition to using a grinder at chest level and higher. Petitioner reported the grinder weighed approximately 10 pounds. Dr. Gornet's causal connection opinion was primarily based on this reported mechanism of injury. During the March 2019 Section 12 examination, Petitioner reported feeling an onset of neck pain while grinding above her head on February 9, 2018. However, she also attributed her neck pain to pushing a trolley weighing more than 2,500 pounds on or around February 2, 2018. Dr. deGrange credibly testified that due to the numerous inconsistent statements Petitioner made during the Section 12 examination and throughout the medical records, it was not possible to determine to any degree of medical certainty that Petitioner's cervical condition and need for ongoing medical care is causally related to any injury that may have occurred on February 9, 2018.

The Arbitrator also determined that the testimony of Mr. Almy and Mr. Splain largely corroborated Petitioner's testimony regarding her work duties. After considering the totality of the evidence, the Commission respectfully disagrees with this conclusion. Petitioner testified that on the alleged date of injury, she spent two entire hours grinding the metal in the chamber after disassembling a trolley. She testified that the grinder she used weighed approximately six or seven pounds, but stated it felt as if it weighed ten pounds. However, the credible evidence reveals that the grinder Petitioner used most often, the air grinder, weighed a total of 1.55 pounds. The heaviest grinder Petitioner used, the electric grinder, weighed a total of 4.65 pounds. Petitioner testified that she used the grinders in unnatural positions and at times had to stand on her "tippy toes" and stretch her arm as high as possible to reach certain areas. She testified that on some weekends the maintenance crew would spend an entire 12-hour shift grinding. She testified that the crew would spend at least six hours during the first night of the weekend grinding OPMs. She further testified that on February 9, 2018, she used a grinder for six hours during her shift.

The testimony of Mr. Almy and Mr. Splain rebutted much of Petitioner's testimony regarding the amount of time Petitioner spent grinding in general, and the amount of time she spent grinding overhead specifically. Mr. Almy credibly testified that no worker would have to stand on their "tippy toes" to perform any grinding. Both he and Mr. Splain testified that a set of steps are provided for any worker's use if they must clean higher areas. Mr. Almy testified that the carriages also rotate so there was no reason for any worker to have to stretch and grind overhead. He testified that even with a crew of eight workers, it should have taken no more than one hour to clean a single carriage. He further testified that at most, Petitioner would have used the electric grinder for two hours during the entire weekend of February 9, 2018. He testified that a worker in Petitioner's position would have spent no more than four hours each week grinding OPMs. Mr. Almy testified that cleaning the poppets was the only portion of the OPMs that may have required a worker to perform overhead grinding. He testified that depending on how dirty the poppets were, Petitioner should only have spent approximately 20 minutes grinding overhead to clean the poppets. Mr. Almy also testified that Petitioner did not spend a significant portion of her work week grinding; instead, while the amount of grinding might vary by weekend, he testified that Petitioner would

not have spent more than four hours total actively grinding during any shift.

Mr. Splain also credibly rebutted key elements of Petitioner's testimony regarding her time spent grinding and the manner in which she performed the grinding. He testified that on the days the crew cleaned one chamber, the entire process would take up to two hours. He credibly testified that with a full crew, they would usually spend approximately 20 minutes grinding each trolley/carriage and would then spend another hour grinding the sheet metal. He testified that generally a worker spent only approximately two hours grinding during a shift. He testified that the men on the crew performed most of the overhead grinding, and that when using the steps provided Petitioner would not have to stretch and reach far overhead while grinding. He testified that if Petitioner cleaned the poppets, she only used the electric grinder overhead for approximately 20 minutes in a single night. He also testified that if the crew cleaned two carriages on February 9, 2018, then Petitioner would have spent only 20-30 minutes using a grinder at or above shoulder level. Mr. Splain testified that most of the grinding performed by the crew is at a lower height. He testified that Petitioner rarely worked when the crew would perform additional hours of grinding. The credible testimony of Mr. Almy and Mr. Splain reveals that Petitioner spent significantly less time actively grinding during her shifts than Petitioner stated. Their testimony also reveals that Petitioner spent far less time engaged in overhead grinding during her shifts.

After weighing the evidence, the Commission cannot find that Petitioner was a credible witness. There are simply too many inconsistencies and conflicting statements regarding key issues for the Commission to find that Petitioner met her burden of proving she sustained a compensable work-related injury on February 9, 2018.

Finally, the Commission must address the Arbitrator's failure to rule on the numerous objections raised during the depositions of Drs. Gornet and deGrange. Neither Respondent nor Petitioner raised the absence of rulings on any deposition objections in their briefs. In *Monterey Mushrooms, Inc. v. Ill. Workers' Comp. Comm'n*, an Arbitrator failed to issue rulings on objections made during a deposition. 2021 IL App (3d) 190754WC-U.[2] The court opined that to the extent that the Arbitrator relied on the testimony that was the subject of an objection, the Arbitrator impliedly overruled the objection. Similarly, the Commission finds the Arbitrator impliedly overruled objections made by both parties throughout the evidence depositions of Drs. Gornet and deGrange.

For the foregoing reasons, the Commission denies benefits because Petitioner failed to prove she sustained an injury arising out of and in the course of her employment on February 9, 2018.

2 The Appellate Court issued this unpublished order on February 8, 2021. Pursuant to Illinois Supreme Court Rule 23(e)(1), while not precedential, this case may be cited for persuasive purposes.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on February 23, 2021, is reversed in its entirety and all benefits are 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.

July 8, 2022

o: 5/10/22

TJT/jds

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/s/ *Maria E. Portela*

Maria E. Portela

/s/ *Kathryn A. Doerries*

Kathryn A. Doerries

DISSENT

I respectfully dissent from the opinion of the majority and would affirm and adopt the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving she sustained a work-related injury on February 9, 2018.

Petitioner has worked for Respondent as a preventative maintenance worker since 1999. The evidence clearly shows that Petitioner's job duties include heavy lifting, disassembling machinery, and cleaning machinery and sheet metal. Petitioner's job requires that she cleans various areas using grinders. Respondent does not dispute that Petitioner's job required her to grind metal areas each week; however, it does dispute the amount of time Petitioner spent grinding and the amount of time Petitioner may have spent grinding overhead. Petitioner alleged she injured her neck while performing overhead grinding on February 9, 2018. After reviewing the evidence, I believe Petitioner testified credibly and met her burden of proving she sustained a compensable injury on the date of accident.

Contrary to the majority, I believe the evidence supports a finding that Petitioner sustained an injury to her neck while she performed some type of grinding on February 9, 2018. The majority chooses to focus on discrepancies in the evidence regarding Petitioner's work duties and her date of injury, and relies on the existence of these discrepancies to conclude that Petitioner was not a credible witness. However, I agree with the Arbitrator's determination that any discrepancies are minor and should not negatively affect Petitioner's credibility. There certainly are inconsistencies regarding the date and mechanism of injury evident in the testimony of Petitioner, Mr. Almy, and Mr. Splain, as well as the medical records. However, it is irrefutable that within five days after her date of injury, Petitioner clearly identified February 9, 2018, as her date of injury and clearly

identified the grinding she performed at work on that day as the cause of her injury. Regardless of when she reported her injury to Mr. Almy, on February 14, 2018, she completed an accident report that identified the date and mechanism of injury that is fully consistent with her testimony.

The majority's decision to focus only on the inconsistencies found throughout the evidence has caused them to ignore the most compelling evidence that Petitioner sustained a work-related injury on the date of accident. The majority ignores the fact that in the more than seven years preceding the date of injury, Petitioner sought no medical treatment for complaints relating to her cervical spine. During that prolonged period, it is unrebutted that no doctor prescribed work restrictions for Petitioner due to her cervical condition. Furthermore, no doctor recommended that Petitioner undergo any type of cervical surgery before this work injury. All of this changed on the date of accident. The evidence overwhelmingly shows that on or around February 9, 2018, Petitioner developed significant neck pain. She sought medical treatment a few days later and consistently told her treating medical providers that her neck pain was due to her work duties. It is irrefutable that Petitioner told her medical providers throughout the entirety of her treatment that she believed overhead grinding caused her ongoing neck pain. There is no credible evidence that Petitioner's ongoing cervical complaints were caused by anything other than her work duties on or around February 9, 2018. It is baffling that the majority has chosen to ignore the overwhelming evidence that Petitioner did sustain the claimed work-related injury.

I believe the Arbitrator took great care in weighing all the evidence and writing a detailed and well-reasoned Decision. The Arbitrator correctly concluded that Petitioner testified credibly regarding her date of injury and mechanism of injury. The most credible evidence supports a finding that Petitioner met her burden of proving she sustained an injury due to the significant amount of grinding she performed at work.

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

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

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

22IWCC0246

PARTIN, LAURA
Employee/Petitioner

Case# **18WC031962**
18WC031961

NORTH AMERICAN LIGHTING INC
Employer/Respondent

On 2/23/2021, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.04% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

5791 LAW OFFICES OF STEPHEN CARTER
PO BOX 934
MINOOKA, IL 60447

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)

LAURA PARTIN
Employee/Petitioner

v.

NORTH AMERICAN LIGHTING, INC.
Employer/Respondent

Case # 18 WC 31962

Consolidated Case: 18-WC-31961

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 **December 21, 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(s) of accident, **February 9, 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(s).

In the year preceding the injury, Petitioner earned **$21,986.64**; the average weekly wage was **$422.82**.

On the date of accident, Petitioner was **40** years of age, ***single*** with **0** dependent children.

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

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

Respondent is entitled to a credit of **any expenses paid through CCMSI and/or BCBS of Illinois related to Petitioner's cervical spine** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical expenses contained in Petitioner's Group Exhibit 1 with respect to Petitioner's cervical spine, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for the reasonable and necessary medical care, including but not limited to surgery, recommended by Dr. Matthew Gornet.

Respondent shall pay Petitioner temporary total disability benefits of **$281.88**/week for **107-1/7** weeks, for the period **December 3, 2018 through December 21, 2020,** as provided in Section 8(b) of the Act.

The Arbitrator finds Respondent had a good faith basis to dispute whether Petitioner sustained accidental injuries that arose out of and in the course of her employment with Respondent. Therefore, penalties and attorney's fees are denied.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of 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

2/18/21
Date

ICArbDec19(b)

FEB 23 2021

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

LAURA PARTIN,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-31962
	)	Consolidated Case No.: 18-WC-31961
NORTH AMERICAN LIGHTING, INC.,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on December 21, 2020 pursuant to Section 19(b) of the Act. On or about October 24, 2018, Petitioner filed an Application for Adjustment of Claim alleging injuries to her body as a whole as a result of an accident that occurred on 2/19/17 (Case No. 18-WC-31961). On March 12, 2020, Petitioner filed an Amended Application for Adjustment of Claim alleging injuries to her neck, bilateral shoulders, and body as a whole as a result of an accident that occurred on 2/9/18 (Case No. 18-WC-31962). The issues in dispute in Case No. 18-WC-31962 are accident, causal connection, medical bills, temporary total disability benefits, penalties pursuant to Sections 19(k) and 19(l) of the Act, attorney's fees pursuant to Section 16 of the Act, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 40 years old, single, with no dependent children on the date of accident. Petitioner testified she was hired by Respondent on 6/21/1999 and she is a preventative maintenance worker on the weekend crew. In 2010, Petitioner sustained a neck injury pushing a lens up into a mold. She testified she did not lose time from work as a result of that injury.

Petitioner testified she injured her back on 2/19/17 while moving a trolley (Case No. 18-WC-31961). Petitioner testified that she did not miss any extended time from work from her first accident on 2/19/17 until her second accident on 2/9/18 when she injured her neck which is the subject of the present case.

Petitioner testified that on 2/9/18 she spent the first two hours disassembling a trolley. She described the disassembly process as follows:

> [Sic]: You're all over the place. You stretch way above your head to loosen bolts, take end caps off, like I said, you take the toolbox, the carts out, somebody would start on either end taking like big bolts off, six to eight bolts – two, four, six, eight – eight to ten bolts, copper blocks off, metal pieces off. To get these bolts off, I would have to use a rubber mallet and a wrench to bang it loose because the bolts are so tight. And then you take the end caps off. There's a big metal pieces, it's a big round cylinder, and there's metal around the top to keep the metallizing from getting on the trollies when it metallized the taillights, but you take the end pieces off, take them to the dip. Somebody would be taking metal out of the metallizing chamber while we were tearing trollies apart. After we get the end caps, the blocks, the end pieces off, there would be copper bars, really long copper bars, probably longer than your desk, I'm not sure how long they were, but they were really heavy. I want to say 100 pounds apiece.

She testified that after disassembling the trolley she spent the next two hours of her shift grinding the metallic finish from the chamber metal. She testified that the grinder she uses is approximately six to seven pounds but feels like it weighs ten pounds to her. She described the grinding process also:

> [Sic]: Standing from the floor, I grind – we grind in all different positions. Sometimes you may be on your tippy toes, stretching with your hand as far as you can stretch. You're in unnatural positions, twisting, turning. There are bolts that stick out, uneven metal, and when you plug this grinding in, it can kick. It kicks the whole time you're grinding. Any time you hit something, if you're not running smoothly with the metal and it hits the edge or an uneven metal piece, it will kick. You hit the sprockets, it will kick. Several people have dropped it . . . I have had it slam into my chest, my face mask. I have seen it slam into grown men's face mask, into their chest. . .

Petitioner testified that while performing overhead grinding on 2/9/18 her neck started burning and hurting and her symptoms have not resolved since. She testified the crew was shorthanded that night and she performed the job of two positions. She stated that other than her neck injury in 2010, she has not sustained any neck injuries or received treatment for her neck. She testified she did not have any problems with her neck from 2010 until 2/9/18.

Petitioner testified she verbally reported the incident to her supervisor, Paul Almy, and filled out an accident report on 2/14/18. She stated that after two hours of grinding, she removed her protective gear and immediately told Mr. Almy she wanted to fill out an accident report because she had burning and pain in her neck. She stated she reported it approximately 5 to 10 minutes prior to taking a break and Paul was sitting at a desk in the grinding room. She could not recall if the report was filled out before her shift ended on 2/10/18 or on Sunday, 2/11/18. Petitioner testified that Respondent sent her to SSM Health Clinic for treatment and she was referred to physical therapy. She later came under the care of Dr. Matthew Gornet for her neck injury because she was not happy with the care and treatment provided by Dr. Kitchens for her back injury. She testified she continued to have low back pain at the time of her second accident on 2/9/18. Dr. Gornet recommended medication and injections which she testified did not alleviate her neck symptoms.

Petitioner testified she continues to have throbbing, tightness, and pain in her neck that causes headaches. She has pain in the left side of her neck and burning in the right side that radiates to her shoulder blade where there is a stabbing sensation and knot sometimes. She has pain into both arms. She testified that muscle massages and heat help alleviate her symptoms some and she takes Flexeril, Naproxen, and Tylenol as prescribed by Dr. Gornet. Petitioner testified she wants to undergo neck surgery as recommended by Dr. Gornet to improve her quality of life. Petitioner testified that her neck bothers her more than her back. She testified she has suffered no new incidents or injuries, though her symptoms are aggravated by activities of daily living. She stated it is painful to drive a car. She currently lives with her boyfriend and co-worker, Daniel Dye, who provides assistance.

On cross-examination, Petitioner testified she continued to report low back symptoms to Dr. Gornet, though his treatment was focused on her neck. She continues to take medication for her low back. She is examined by Dr. Gornet every six months and he takes her off work for six-month periods.

Petitioner identified an air grinder marked Respondent's Exhibit 35 that she used every other weekend to grind OPMs and sheet metal. She stated she thought the grinder weighed a couple of pounds and agreed that the manufacturer specifications for that particular grinder was 1.5 pounds, with a .05 disc, for a total weight of 1.55 pounds.

Petitioner identified an angle grinder with a wire wheel (Respondent's Exhibit 36, model number DWE4120) and testified she told Dr. Gornet she thought it weighed ten pounds. On direct examination, Petitioner testified she thought the grinder weighed 6 to 7 pounds. When asked if the manufacturer's specifications stated the grinder weighed 3.9 pounds she would agree. Petitioner was handed a gallon of milk (Respondent's Exhibit 37) and was asked to hold it with one hand while she held the angle grinder with the other hand to compare weights. She testified she was hurting really bad on one side and although the grinder felt like it weighed less than the gallon of milk, there was not a "considerable" difference. Petitioner also held the air grinder and agreed it weighed considerably less than the gallon of milk. The Arbitrator personally compared the weights of the gallon of milk and air grinder and agreed the air grinder was considerably lighter than the gallon of milk. The Arbitrator also compared the weights of the gallon of milk and angle grinder and agreed the gallon of milk was heavier than the angle grinder, although not considerably.

Petitioner testified she used both grinders for cleaning. She testified she performs other jobs in addition to grinding, including disassembling, which she stated she discussed with her treating physicians. Petitioner identified a Standard Operation Sheet (Respondent's Exhibit 25) and agreed it lists all of the job duties of a cleaning crew. Petitioner agreed that of the approximate 80 job duties contained in Exhibit 25, approximately five involved grinding. Petitioner agreed that the disc and wire wheel attached to the grinders spin fast and a light touch is required to cleaning the machines.

Petitioner testified that her scheduled shift was 12-hour days, Friday through Monday. She stated that for several years prior to February 2018 she worked 12-hour shifts every Friday and Saturday, and a couple of hours on Sunday at which time she would go home due to lack of

work. She testified she rarely worked Mondays and she averaged 26 hours per week. Petitioner testified she told her physicians she averaged 26 hours per week.

Petitioner disagreed that if there was a full crew grinding would only take 20 minutes. Petitioner agreed Joe Splain is a co-worker that works along side her. She stated she would disagree with Paul Almy and Joe Splain if they testified that grinding the trolley only took 20 minutes. She testified that some weekends the crew grinded an entire work shift and denied that grinding with the air grinder was limited to three hours per week and the angle grinder one hour per week. She stated she used the angle grinder on 2/9/18 for more than 20 minutes. She testified she reported her accident to Paul Almy on 2/9/18 after midnight (which the Arbitrator notes would have been on 2/10/18) and denies that she reported the accident on 2/11/18. Petitioner testified that 2/11/18 could have been the date they filled out the accident report on the computer. She testified she did not go to the doctor on 2/9/18 and worked a 12-hour shift on 2/10/18 (Saturday) and two hours on 2/11/18 (Sunday).

Petitioner testified that when she told Paul Almy she wanted to fill out an accident report he said he would talk to Crystal. Petitioner does not recall what day Mr. Almy told her to fill out the accident report electronically. She denied that she told Mr. Almy she injured herself on 2/3/18. She stated she was asked by Mr. Almy if there was any other activity that was difficult that she could have injured herself. She agreed she discussed with Mr. Almy she had difficulty loading a trolley the previous weekend because there was a broken chip on the floor and they only had two workers instead of four to six that night. Petitioner testified that she and the co-worker could not get the trolley lined up on the caster wheels that night and had to get assistance.

Petitioner testified that her medical records, save one physicians' record, incorrectly indicates her injury occurred on 2/11/18. She testified that Respondent's Human Resources called her on Monday, 2/12/18, and told her to report to SSM Health Clinic for treatment.

Petitioner testified she engaged in deer hunting in 2017 and after treating with Dr. Gornet in 2018 and shot a deer both seasons. Petitioner testified she was not involved in a "gardening incident", rather she was helping her mother plant flowers and developed a bad headache. When asked to compare her gardening activity to her work activities, Petitioner stated that her mom ordered two clumps of grass that would fit in the palm of your hand. Petitioner held the grass blades up while her mom put dirt around them. This was after she and her mother walked around and looked down at her flowers after a weekend that Petitioner was already hurting. Petitioner testified her headache was a 10 out of 10 and she did not feel a pop or injure herself while gardening. Petitioner testified she was concerned she could not work and lift heavy sheet metal, strip down machines and bolts, use a rubber mallet to hit the wrench, or grind for at least six hours on the first night on a trolley. Petitioner testified she grinds for two hours and then grinds the sheet metal that is pulled out for another four hours. Every other weekend she grinds four trollies for a total of six hours.

Petitioner called Respondent's preventative maintenance supervisor, Paul Almy, to the stand. Mr. Almy was hired by Respondent on 1/4/17. Mr. Almy testified he supervises a crew of approximately ten employees that cleans the metallizing equipment and paint booths during the weekend while the equipment is not in use. He testified that when Petitioner reported her injury

to him on 2/11/18 he prepared a memorandum which he sent to his boss and the HR Department the next morning on 2/12/18. He stated an accident report was not filled out the night Petitioner reported her injury and that Petitioner later went to the HR Department to fill out an accident report. Mr. Almy testified that Petitioner was not sure whether she injured her neck on 2/3/18 while loading a carriage back onto a trolley, or whether it was from repetitive grinding on OPM's. Mr. Almy testified that Petitioner's testimony at arbitration was the first time he had heard specifics about an injury on 2/9/18 while grinding a trolley. He testified that he and Petitioner spoke about her injury on 2/11/18 and he was not sure what to report as to the cause of injury and he left it up to the HR Department to decide. He stated that Petitioner completed her own accident report on 2/14/18.

Mr. Almy described a trolley as a machine that is bigger than the Arbitrator's desk and has hydraulic motors used to move a cylinder called a carriage. He stated they never grind on the trolley but on the carriage. The trolley is used to move the carriage that is "big and weighs a lot". The trolley loads the carriage to the chamber in order to load the carriage with parts to metallize. The cleaning crew removes poppets, which are devices that contain the parts being metallized, off the carriage. They remove sheet metal and other parts off the carriage and load the carriage onto a transport cart. They use a power pallet jack to lift the front of the cart to move the carriage to a cleaning room where they use a grinder.

Mr. Almy testified there are places on the carriage that require the use of steps for shorter employees to use the grinder. He clarified there is no overhead grinding performed on carriages due to the use of steps. He testified there is overhead grinding on the chambers where you have to crawl through a little hole and grind inside the chamber. Mr. Almy testified there is some overhead grinding on the OPMs where the air grinder is used. He testified that Petitioner performs all of these tasks.

Mr. Almy testified that on the night of 2/9/18, the crew cleaned two carriages and a chamber. The next night they cleaned OPMs. He worked the same 12-hour shifts as Petitioner, which was 10:00 p.m. on Friday to 10:00 a.m. on Saturday, 8:00 p.m. on Saturday to 8:00 a.m. on Sunday, 6:00 p.m. on Sunday to 6:00 a.m. on Monday, and 6:00 a.m. on Monday to approximately 10:00 a.m.

Mr. Almy testified he does not recall Petitioner telling him on 2/9/18 that she injured herself. He did not participate in completing the accident report dated 2/14/18. He testified that Petitioner initially told him she could have injured her neck on 2/3/18 while loading the carriage onto the trolley, or it was from repetitive grinding in the OPMs where the air grinder is used. Mr. Almy testified that if Petitioner would have told him she injured herself using the larger angle grinder he would have recorded it in his memorandum and he would have filled out an accident report that night because he could have performed an investigation and recommended corrective action. He stated that because Petitioner was uncertain as to the cause of her injury he left it up to the HR Department. Mr. Almy testified that Petitioner would have had to wait until Monday to fill out an accident report when HR personnel returned to work.

Mr. Almy testified that Petitioner indicated on her accident report she sustained injury while trolley grinding which was not what Petitioner reported to him. He clarified that if

Petitioner was grinding on the trolley she would have used the larger angle grinder. He clarified there are a couple of placed on the carriage that most employees cannot reach and steps are used to avoid overhead grinding. He testified that most grinding occurs directly in front of the employee.

Mr. Almy testified he was missing two employees on 2/9/18, resulting in a crew of five operators and three techs, or 80% of the cleaning crew. He testified that four employees were assigned to grinding and it took approximately one hour to grind each carriage. He testified that one weekend they would grind two chambers that required the use of the angle grinder and the next weekend they would grind one chamber and five OPMs that required the use of both grinders. The weekend of Petitioner's alleged accident they grinded one chamber and five OPMs. Petitioner would have operated the angle grinder for two hours on 2/9/18 to clean the chamber. The next night on 2/10/18, Petitioner would have used the air grinder for approximately four hours to clean the OPMs. Mr. Almy testified that grinding a chamber is different than grinding a carriage and he has only known Petitioner to grind inside a chamber on one occasion. Grinding a chamber requires you to crawl inside and grind overhead. Mr. Almy testified that grinding the poppets on an OPM requires overhead activity, but most of the work is done directly in front of you or downward. Overhead grinding on a poppet might take 20 minutes depending on how much metal has to be removed. Mr. Almy testified that Petitioner would not grind more than four hours per 12-hour shift on average depending on how many employees per shift. He testified that Petitioner likely operated the heavier, angle grinder for four hours on 2/9/18.

Petitioner next called Joe Splain to the stand. Mr. Splain is Petitioner's co-worker who also worked in preventative maintenance. He testified he could not recall whether he worked on 2/9/18. He stated it depended on what duty Petitioner was given as to how long she used the angle grinder on 2/9/18. He testified they typically used the angle grinder two hours per shift if cleaning two trollies. On direct-examination, Mr. Splain testified it took 20 to 30 minutes to grind one trolley. He worked side-by-side with Petitioner and they grinded trollies together. He testified that Petitioner used the air grinder a majority of the time. He stated it could take 2 to 6 hours to grind OPMs and they usually did two two-hour sets, for a total of four hours of grinding OPMs per week. Mr. Splain explained the grinders were abrasive tools that turned at a very high speed and should therefore be used with a light touch; however, he stated that certain high-heat target spots such as plasma rods require operators to "stay there very long and go very slow back and forth because it's very think [sic] and heavy."

Mr. Splain testified that most of the employees would grind somewhat overhead while grinding carriages or trollies. He testified that Petitioner's boyfriend, Danny Dye, who also works for Respondent, purchased a set of steps for Petitioner so she would not have to stretch overhead. He testified there is more overhead grinding inside the OPMs. Mr. Splain testified that in 2018 they grinded two trollies per night. He estimated Petitioner used the angle grinder approximately 20 to 30 minutes overhead per shift if cleaning two trollies. He testified that a person's speed depended upon his or her experience level. He testified the angle grinder weighed about half the weight of a gallon of milk.

Mr. Splain testified he overheard Petitioner say on at least four occasions she was unsure how she injured herself, but it had to be at work because she did not go anyplace else or do anything else to get hurt. One conversation occurred in the cleaning crew's locker room where Petitioner's boyfriend and co-worker, Danny Dye, was present, along with another co-worker Dennis Sloan and Mr. Splain. Mr. Splain also testified that around June 2018 while grinding a chamber Petitioner told co-worker, Braden, she was not sure where she hurt herself but it had to be at work because she did not go anywhere.

Respondent introduced deposition testimony of Daniel Dye that was taken on July 19, 2016 and a hearing transcript dated January 10, 2017 in In re: the Marriage of Kelli Dye v. Daniel Dye, pending in Jefferson County, Illinois, Case No. 15-D-34. The Arbitrator finds the testimony of Daniel Dye taken in his divorce proceedings prior to either of Petitioner's alleged injuries that occurred on 2/19/17 and 2/9/18 are irrelevant to the proceedings before the Commission.

Respondent introduced a "Weekend PM Crew Passdown" that reflected the number of operators present on the date of the alleged injury and the tasks performed by the operators. The passdown sheet for 2/9/18 reflects five operators were present and removed parts from chamber and trolleys to be dipped and ground, reassembled parts on the trolleys and ground the inside of the chamber, and began working on paint booths. During the following two days, OPMs were disassembled, ground, and reassembled, and work was finished on paint booths.

MEDICAL HISTORY

At the time of the subject accident on 2/9/18, Petitioner was actively treating for a work-related lumbar spine injury that occurred on 2/19/17 (Case No. 18-WC-31961). On 1/15/18, prior to the subject accident, Dr. Kovalsky assessed Petitioner with degenerative disc disease at L3-4 with axial low back pain and right SI joint dysfunction. Dr. Kovalsky recommended Petitioner return to physical therapy and refilled a prescription for Zanaflex related to her lumbar spine. He ordered her to follow up in one month and recommended injections if her symptoms did not improve.

On 2/12/18, Petitioner presented to SSM Health Express Clinic with neck pain. Physician Assistant Katina Candee noted burning pain in the back of Petitioner's neck since the prior weekend. She reported Petitioner had taken Midol without much relief. Petitioner reported she does grinding at work where she had to hold her hands up and look up which was causing her neck to hurt. Upon examination, it was noted Petitioner had neck pain with looking up and to the left. Petitioner was prescribed Prednisone and Flexeril for pain and muscle spasms. She was instructed to return if her symptoms worsened and she was given work restrictions.

Petitioner began physical therapy at the Orthopaedic Center of Southern Illinois on 2/14/18 for her lumbar spine injury, five days after her alleged cervical spine injury. Petitioner underwent therapy from 2/15/18 through 3/6/18 for her lumbar spine.

Petitioner returned to SSM Health Express Clinic on 2/16/18 and Nurse Practitioner Dawn Drewes noted Petitioner's complaints of neck pain and a burning sensation radiating into her left shoulder blade. She noted Petitioner does overhead grinding and heavy lifting at work

and felt that was the cause of her pain. It was noted Petitioner's symptoms did not improve with Flexeril and Prednisone. Examination showed midline soreness and burning in the medial aspect of the left shoulder blade. Petitioner was diagnosed with a cervical strain and advised to take medication as prescribed, continue work with the same restrictions, and to start physical therapy. Petitioner was currently undergoing physical therapy for her lumbar spine at the Orthopaedic Center of Southern Illinois.

On 3/2/18, Petitioner returned to SSM Health Express Clinic and PA Candee noted Petitioner's pain continued despite medication. It was noted physical therapy for her neck had not yet been approved. Physical examination revealed Petitioner had pain looking to the right and tenderness to palpation at the left base of her neck/shoulder. She was prescribed Naproxen and physical therapy was again recommended.

On 3/19/18, Petitioner returned to SSM Health Good Samaritan Hospital for a physical therapy evaluation of her neck pain. It was noted Petitioner works in a factory where she performs a lot of repetitive movements and Petitioner remembers while working on an overhead tote she felt a pop in her neck. She reported she tried to shake it off but the pain continued to get worse throughout the day. Petitioner went home sore and reported the incident to her manager and was sent to urgent care. It was noted Petitioner's therapy referral was approved six weeks after the accident. Petitioner reported neck pain of 7 out of 10, with her best being a 4 and her worst being a 9. Her pain was aggravated by physical activity, position, twisting, turning, and lifting and relieved by medication, ice, and rest. The pain was documented as radiating into her shoulder to neck area with headaches. She noted numbness and tingling in her left arm occasionally. Examination revealed flexion increased her pain and she was tender to palpation at the B trapezius muscle with trigger points at the B trapezius and mid scapular erector spinae area. Petitioner was assessed with pain and loss of motion in her neck which prevented her from standing, walking, going up and down steps, lifting, and driving. She was ordered to receive physical therapy 2-3 times per week for four weeks which she underwent through 4/16/18.

Petitioner followed up with the SSM Health Express Clinic following therapy and reported increased stiffness to the left side of her neck due to working three days straight. Her pain was exacerbated by lifting and she was currently on a 20-pound lifting restriction. Petitioner reported physical therapy sometimes helped with the pain and sometimes made it worse. Examination revealed pain when turning left and pain medial to the left scapula. She was advised to continue physical therapy and was prescribed Prednisone and Flexeril.

Petitioner continued physical therapy through 5/8/18 when she returned to SSM Health Express Clinic and reported no relief of her symptoms. Petitioner reported her pain worsened when she was gardening. Petitioner was referred to an orthopedist and her work restrictions were continued.

On 7/16/18, Petitioner was examined by Dr. Matthew Gornet at the Orthopedic Center of St. Louis. Dr. Gornet noted Petitioner presented with pain to the base of her neck, between her shoulder blades to both trapezius, bilateral shoulder pain, pain in her left upper arm occasionally down into her hand, low back pain, and frequent headaches. Dr. Gornet noted Petitioner's pain began on or around 2/9/18. Petitioner felt her symptoms were related to work activities,

particularly using a grinder, which she would often hold at chest level and above and the activity seemed to aggravate her underlying condition. Dr. Gornet noted Petitioner readily admitted to a history of neck issues from 2010, where she was briefly seen by Dr. Aiping Smith and had an injection. Petitioner stated her cervical condition improved until this incident.

Dr. Gornet also noted Petitioner presented with low back pain which began in 2017 for which she treated with Dr. Kitchens. Dr. Gornet noted Petitioner's cervical symptoms were made worse with arm activity, reaching, and pulling, and improves with position changes. Physical examination revealed pain in her neck into both trapezius, upper back, and between her shoulder blades. Dr. Gornet noted decreased rotation to the left as well as extension. Sensation was decreased in the C6 dermatome on the left. Dr. Gornet performed an x-ray which revealed foraminal stenosis at C5-6 and C6-7. Dr. Gornet ordered an MRI and prescribed Naprosyn and Tizanidine to help manage her upper and lower back pain. The MRI revealed large herniations at C4-5 and C5-6 and Dr. Gornet believed her symptoms related to the C5-6 herniation. He recommended a single steroid injection at C5-6, and if she did not improve, a cervical disc replacement at C4-5 and C5-6 was necessary. Dr. Gornet believed that Petitioner's current symptoms, in their level of severity, related to her work activity of 2/9/18. He noted she could continue to work light duty with a 10-pound weight limit and no overhead work.

On 8/2/18, Petitioner presented to Dr. Kaylea Boutwell and underwent an interlaminar epidural steroid injection at C5-6. Petitioner reported a post-injection pain of 4 out of 10. Petitioner returned to Dr. Gornet on 10/1/18 and reported temporary relief from the injection. Dr. Gornet recommended a CT myelogram to rule out ossification of posterior longitudinal ligament. Dr. Gornet noted based on the information he had, he believed Petitioner's current symptoms were work related.

Petitioner received the CT myelogram on 12/3/18 at CT Partners of Chesterfield. Findings showed central and left sided disc herniations at C4-5 causing left cord flattening and overall central stenosis, degenerative changes at C5-6 with prominent osteophytes more evident on the right creating central stenosis and right greater than left foraminal stenosis, and some anomalous development of bilateral cervical ribs and prominence of C6 lateral mass. Dr. Gornet noted large herniations at C4-5 and C5-6 causing cord deformation. He noted Petitioner's main symptoms were neck pain, headaches, bilateral shoulder pain, and left upper arm pain radiating down into her forearm and hand. Her left sided symptoms were noted as related to a herniation on the left at C5-6 with foraminal narrowing at that level. He additionally noted the scan showed some OPLL behind the vertebral body of C5. Dr. Gornet believed she would require bilateral foraminotomies at C5-6 and removal of her disc herniations. He noted she had acute on chronic herniations. Dr. Gornet noted there were more focal soft herniations to the left side as well. Examination showed a mild decrease in biceps at 4/5 with decreased sensation at C6 dermatome on the left. He believed her symptoms were increasing and recommended moving forward with disc replacement surgery at C4-5 and C5-6. He prescribed Naprosyn, Tizanidine, Ciprofloxacin, calcium citrate, and Vitamin D3 as part of her pre-operative regimen and noted they would move forward with surgery as soon as possible. Dr. Gornet placed Petitioner off work.

Petitioner returned to Dr. Gornet on 2/25/19 and his recommendation remained disc replacement surgery at C4-5 and C5-6. Dr. Gornet noted Petitioner would also require bilateral

foraminotomies at C5-6. His examination remained unchanged, as her decreased biceps and decreased sensation at C6 on the left remained. Dr. Gornet ordered Petitioner off work until her next visit on 5/9/19.

On 3/25/19, Petitioner was examined by Dr. DeGrange pursuant to Section 12 of the Act. Dr. DeGrange noted Petitioner was currently under the care of Dr. Gornet for a cervical injury that allegedly occurred on 2/9/18 while performing her usual and customary job duties, was doing some grinding above her head when she had the onset of neck pain radiating into both shoulders. Petitioner reported to SSM Hospital where she was placed on steroids and muscle relaxers and physical therapy was recommended. Dr. DeGrange noted Petitioner had mild but not significant relief from conservative treatment and was eventually referred to Dr. Gornet in July 2018. Petitioner had MRIs that revealed at least two herniated cervical discs.

Dr. DeGrange noted Petitioner had a prior work-related injury to her cervical spine in 2010 while working for Respondent. She underwent x-rays, MRIs, and injections by Dr. Smith. Dr. DeGrange noted Petitioner was symptom free until the time of the most recent incident in February 2018. He documented Petitioner's current complaints of neck pain with radiation into her right upper extremity from the shoulder to her elbow and some occasional numbness and tingling in the right hand. The pain was noted as daily and varied from mild to moderate depending on her activity. Petitioner also complained of low back pain at the lumbosacral junction radiating from hip to hip, with occasional right lower extremity numbness and tingling. These symptoms were noted to be present on a daily basis, varying upon activity. Prolonged sitting, standing, walking, and repeated bending and twisting reportedly increased her symptoms.

Dr. DeGrange's exam showed moderate tenderness from the subocciput through the interscapular region with decreased flexion, extension, lateral bending, and rotation of the cervical spine. Mild weakness to the right shoulder abduction and rotation and right elbow flexion were noted. Sensation was slightly decreased on the radial aspect and dorsal web space of the right hand.

Dr. DeGrange opined Petitioner's current cervical symptoms appeared to have been aggravated by the 2/9/18 accident. Dr. DeGrange noted some confusion of injury dates as the Petitioner mentioned a trolley incident that occurred at work on 2/2/18 and there was a work status note from SSM Health indicating a date of injury of 2/11/18. However, Petitioner reported to Dr. DeGrange that her cervical pain was from the work incident on 2/9/18, which was confirmed by the other records he reviewed.

Dr. DeGrange reviewed the cervical MRI dated 6/28/10 and noted a herniation at C4-5 and a smaller bulge at C5-6. He noted the MRI dated 7/16/18 showed a herniation at C4-5, an increased herniation at C5-6, and the presence of ossification of the posterior longitudinal ligament referred to as OPLL. He noted the radiology report included a central three-millimeter protrusion at C3-4 which he did not appreciate, as well as a protrusion into the right C6-7 foramen. Dr. DeGrange concluded the described work duties may have aggravated or exacerbated Petitioner's preexisting cervical condition, but he believed Petitioner's report of increased pain during a gardening incident could have worsened her condition. He concluded he

was unable to draw a causal relationship between the 2/9/18 injury and Petitioner's need for cervical spine surgery given questions of fact regarding the injury.

On 5/9/19, Dr. Gornet reviewed the IME report of Dr. DeGrange and noted Dr. DeGrange had issues with her history including her previous neck problems. He noted Dr. DeGrange felt the size and nature of the herniations could be aggravated by her work activity. Dr. Gornet noted her exam remained unchanged and was still showing mild decrease in biceps on the left. His recommendation was still disc replacement at C4-5 and C5-6.

Petitioner followed up with Dr. Gornet on 9/5/19 and it was noted that surgery had not yet been approved. He refilled Petitioner's Tizanidine, calcium citrate, and Vitamin D3. Her work status remained temporarily totally disabled as she continued to have axial neck pain and headaches. Dr. Gornet ordered she remain off work until their next appointment. Dr. Gornet saw Petitioner again on 3/2/20 and noted surgery had not been approved. He advised that new imaging studies would be required before surgery. Petitioner's prescription of Tizanidine, calcium citrate, and Vitamin D3 were refilled. Dr. Gornet noted Petitioner continued to have significant axial neck pain and headaches, decreased sensation in the C6 dermatome, and she remained temporarily totally disabled.

Petitioner returned to Dr. Gornet on 9/17/20 and it was noted her pain affected her quality of life and all aspects of her life. Physical exam showed continued decreased sensation in the C6 dermatome to light touch. Petitioner was noted to remain temporarily totally disabled. Her prescriptions for calcium citrate and Vitamin D3 were refilled and she was ordered to remain off work. It was noted her next follow up would be in six months or sooner should surgery be approved.

Dr. DeGrange testified by way of evidence deposition on 5/7/19. Dr. DeGrange focuses on treatment of the adult spine. Dr. DeGrange's exam showed moderate tenderness from below the skull through the area between Petitioner's shoulder blades with decreased flexion, extension, lateral bending, and rotation. He also noted noticeable weakness with right shoulder abduction and rotation and right elbow flexion and a slight decrease in light touch over the right hand. When asked to review the accident report related to the 2/9/18 incident, he testified Petitioner reported neck pain at the base of her head with pain and burning down the left side. He noted when Petitioner saw him for examination she documented pain in both shoulders and brachiums with pain in the right forearm and wrist and left arm into the left elbow. He testified about Dr. Gornet's initial symptom diagram, showing pain in the neck into both shoulders with slightly more marks on the left. Dr. DeGrange considered this an inconsistent history, although pain was documented in the neck and both arms since February 2018.

Dr. DeGrange noted Petitioner reported an accident at work on 2/2/18 in which she was pushing a trolley, but no accident report has been located. Dr. DeGrange testified he could not draw a direct causal connection between the need for surgery and "whatever happened" on 2/9/18 due to what he believed were inconsistencies in Petitioner's history. Dr. DeGrange also testified to physical therapy notes on 4/19/18, noting Petitioner said her pain was improving but was still present, and she had tightness throughout her neck that travelled to the base of her skull.

He also testified to physical therapy records dated 4/26/18, noting Petitioner had increased pain after gardening the following weekend.

On cross-examination, Dr. DeGrange reiterated that when he evaluated Petitioner her cervical symptoms appeared to have been aggravated as a result of her customary job duties on 2/9/18. Dr. DeGrange again opined he could not say within a reasonable degree of medical certainty whether Petitioner's conditions preexisted the accident without an MRI prior to February 2018. He stated it was possible Petitioner's disk herniation at C4-5 and bulge at C5-6 were caused by the February 2018 work accident. He noted a radiology report from 6/28/10 which showed a small disk extrusion with lateral and foraminal extension at C4-5. In comparing the 2010 and 2018 MRIs, Dr. DeGrange testified that the disc protrusion had grown and evolved. He opined he would attribute some increase in her symptoms as a result of the 2018 accident. He testified that with a massive disk herniation such as this at C4-5 and C5-6, Petitioner was a reasonable candidate for surgery.

On 10/29/19, Dr. DeGrange's testimony was resumed for re-direct. Dr. DeGrange testified that after reviewing Dr. Gornet's deposition and his 9/5/19 note, his previously stated opinions had not changed.

Dr. Gornet testified by way of evidence deposition on 8/8/19. Dr. Gornet is a board-certified orthopedic surgeon who specializes in spinal surgery. Dr. Gornet testified he first saw Petitioner on 7/16/18 for evaluation of her cervical spine. Petitioner admitted to a history of neck issues from 2010 as well as some history of low back pain a year before the 2018 accident. Dr. Gornet performed a clinical evaluation including x-rays which showed mild foraminal narrowing at C5-6 and C6-7 and an MRI which revealed a large herniation at C4-5 and C5-6. He noted the MRI findings correlated best with her symptoms of axial neck pain, particularly the large herniation at C5-6. He placed her on light duty with a 10-pound weight limit and no overhead work. Dr. Gornet stated he recommended a single steroid injection at C5-6 which did not provide any significant relief. Based on Petitioner's history, examination, and the diagnostic findings, Dr. Gornet believed Petitioner's symptoms and requirement for treatment were causally related to her work activity of 2/9/18. Due to the lack of relief from the injection, Dr. Gornet recommended a CT myelogram to evaluate the bone and bone anatomy further. The myelogram showed a large herniation at C4-5 and C5-6 which caused some core deformation, as well as some ossification of the posterior longitudinal ligament beyond the body of C5. Dr. Gornet recommended disc replacement surgery at C4-5 and C5-6. He noted Petitioner returned on 2/25/19 with continued pain, decreased biceps, and decreased sensation at C6 on the left side. She continued to have neck pain and returned to him on 5/9/19 with the same symptoms, predominantly axial neck pain and headaches with mild nerve symptoms. He reviewed Dr. DeGrange's IME report who felt that given the size of the herniations, her work activity could easily have aggravated those, which Dr. Gornet agreed with. Dr. Gornet testified that his examination remained unchanged and she still showed axial neck pain with some mild left-sided radicular symptoms. Dr. Gornet testified that the work history Petitioner gave him, including using a grinder at chest level and above, would aggravate her underlying cervical condition. He noted it would aggravate an underlying cervical condition because holding any weight away from one's body would tend to accentuate the stresses and forces on one's cervical spine. He detailed the severity of the work history with an example:

> One needs to only take a milk carton that's full, a 1-gallon jug of milk, and put it next to your body. You could pretty much hold it all day. But if you hold it at arm's length, you can't hold it very long without having some irritation of your muscles, your shoulders and even your neck. So taking a weight and having it extended away from your body accentuates the forces by the cube root is the general thinking. That's the equation. And so that activity, even though it doesn't seem like a lot of weight, is significant.

On cross-examination, Dr. Gornet reiterated that he based his opinion of the accident being causally connected to her current symptoms as well as Petitioner's need for surgery on the previous studies, including her MRI and her CT myelogram, Dr. DeGrange's IME report, as well Petitioner's history. Dr. Gornet noted Petitioner was very forthright and honest about her previous neck problem in 2010, which correlates very well with the medical record. He testified that Petitioner clearly had symptoms in the past and now her symptoms had become much more severe to the point it necessitated further evaluation. Dr. Gornet testified that a patient's pain listing in any one moment is irrelevant as far as association, causation, or treatment because the patient's symptoms can wax and wane depending on activities if they have disc pathology similar to Petitioner's. He stated from that standpoint, Petitioner has predominantly axial neck pain which varied with activity. Upon being asked about a gardening incident in April 2018 causing Petitioner neck pain, Dr. Gornet stated Petitioner's symptoms in their severity began on 2/9/18 and she was doing well until that time. He opined there was no indication Petitioner was having major ongoing issues prior to 2/9/18 in regard to her cervical symptoms. Dr. Gornet stated after 2/9/18, mechanical activity could easily cause a waxing and waning of symptoms depending on the mechanical activity. He noted simple activities such as gardening, once there is already irritation and disc pathology, could easily increase the symptoms associated with the structural disc pathology present. When asked if he knew Dr. DeGrange testified that Petitioner had a temporary aggravation, Dr. Gornet noted that temporary would mean something that is chronologically short lived, and given the fact that she is still symptomatic, it would be clinically inconsistent with the facts of her case.

CONCLUSIONS OF LAW

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

The Supreme Court holds that the term "accident" encompasses anything that happens without design or any event that is unforeseen by the victim. *E. Baggot Co. v. Indus. Comm'n*, 290 Ill. 530, 533, 125 N.E. 254, 255 (1919). An injury is also accidental within the meaning of the Act if "a workman's existing physical structure, whatever it may be, gives way under the stress of his usual labor." *Laclede Steel. Co. v. Indus. Comm'n*, 6 Ill. 2d 296, 300, 128 N.E.2d 718, 720 (1955). If the injury coincides with these definitions and is traceable to a definite time, place, and cause, then said injury is accidental within the meaning of the Act. *Id.*

Though Respondent presented evidence that Petitioner initially exhibited uncertainty regarding the definite time, place, and cause of her injury, Petitioner satisfied these elements and resolved such questions upon her filing of her written report of injury and the filing of her

Application for Adjustment of Claim, which were consistent with her reports of injury to her physicians.

To obtain compensation under the Act, an injury must also "arise out of" and "in the course of" employment. 820 ILCS 305/1(d). An injury arises out of one's employment if its origin is in a risk connected with or incidental to the employment so that there is a causal relationship between the employment and the accidental injury. *Orsini v. Indus. Comm'n*, 117 Ill.2d 38, 509 N.E.2d 1005 (1987). In order to meet this burden, a claimant must prove that the risk of injury is peculiar to the work or that he or she is exposed to the risk of injury to a greater degree than the general public. *Id.* "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 656 N.E.2d 1084 (1995); *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 362 N.E.2d 325 (1977). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003).

The Arbitrator finds that Petitioner's reported injury falls within the definition of an accident under the Act. Although there are varying reports of the injury and related circumstances, the records and testimony consistently reflect that Petitioner was injured at work performing duties distinctly related to her employment. The Arbitrator finds Petitioner's case akin to the matter of *Danny Farris v. Phoenix Corp. of Quad Cities*, 11 I.W.C.C. 0610 (2011), wherein both the Arbitrator and the Commission originally denied the claimant protection under the Act due to what were described as inconstancies between the medical records and the claimant's testimony. The Commission noted varying histories of the accident, and one provider recorded that the claimant simply "lost his balance and fell" as he was preparing to throw a boulder. Another provider recorded: "[The patient] relates that he was hit by a rolling rock on his right shin, abruptly twisted and fell on the ground, landing on his low back." Yet another provider recorded: "[The patient] states on one ***occasion [when he was moving rocks] he was walking up the incline with a rock in hand which weighed approximately 50 pounds and that two rocks came rolling at him from up the incline . . . hit his feet/bilateral lower legs . . . He ended up falling on his right shoulder, right flank and back in this incident." At arbitration, the claimant testified that two big rocks rolled into his feet and he "landed on his hip and shoulder, and that's how [he] hurt [his] back." *Danny Farris v. Phoenix Corp. of Quad Cities*, 11 I.W.C.C. 0610 (2011). While the Commission denied the matter on initial hearing, the Arbitrator denied compensation even on remand from the Circuit Court. The claimant appealed and maintained that his testimony was credible and unrebutted, and that any inconsistences between his testimony and the medical records were minor and "inherent in the history taking process." *Id.* On appeal, the Commission held that the records, although inconsistent and not precisely echoing the claimant's testimony, "in general support a work-related accident." *Id.*

Similar to the matter in *Farris*, although there are variances in the minutia related to Petitioner's reported accident, such as which grinder she was using at the time, the exact length of time spent grinding, which equipment was being maintained at the time, and the date she reported the injury, the record shows that Petitioner consistently believed and reported that she suffered a work injury to her neck in February 2018. The Arbitrator also places significant weight on the fact that Respondent's witnesses, though diverging on some points, largely

corroborated Petitioner's testimony regarding her performance of overhead work and the extended duration of grinding activities.

The Arbitrator notes that while Petitioner's male coworkers may not have felt her job to be intensive, one would be hard pressed not to acknowledge the physiological difference between Petitioner and her coworkers and the work accommodations made as a result thereof. Employers take their employees as they find them. Though Petitioner overestimated the weight of her work tools, the grinder weighs more than 3.9 pounds, and the Arbitrator finds it significant that her male coworkers saw fit to accommodate Petitioner and ease the burden of her duties in various ways. Such a gesture would have been entirely unnecessary had not the grinding task involved some degree of difficulty for Petitioner. Specifically, Petitioner was shielded from certain duties until she could acclimate to the workload, steps were purchased for Petitioner to assist with overhead grinding, and an extra grinder of a specific model from a former employee was given to Petitioner. The Arbitrator also places weight on Dr. DeGrange's acknowledgement that the reported injury on 2/9/18 could have aggravated Petitioner's cervical condition. As a result, the Arbitrator finds that Petitioner sustained her burden of proof in establishing that she sustained accidental injury on February 9, 2018, that arose out of and in the course of her employment with Respondent.

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

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 workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 888, 864 N.E.2d 266, 272 (2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 673 (2003) (emphasis added). Even when a preexisting condition exists, recovery may be had if a claimant's employment is a causative factor in his or her current condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 797 N.E.2d 665 (2003). Allowing a claimant to recover under such circumstances is a corollary of the principle that employment need not be the sole or primary cause of a claimant's condition. *Land & Lakes Co. v. Indus. Comm'n*, 359 Ill. App. 3d 582, 834 N.E.2d 583 (2005).

Employers are to take their employees as they find them. *A.C. & S. v. Industrial Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). The law is clear that if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

The record shows that although Petitioner had a previous neck injury in 2010, Petitioner was doing well until her accidental injury of 2/9/18. During her care and treatment following same, both her treating physician, Dr. Gornet, and Respondent's examiner, Dr. DeGrange, noted Petitioner suffered from symptomatic herniation at C4-5 and C5-6. Though Dr. DeGrange also acknowledged that Petitioner suffered injury to her neck, he testified he could not give an opinion whether Petitioner's need for surgery was related to same given the number of variables present in the record and the supposition that Petitioner could have sustained an intervening accident while gardening.

Illinois law holds that "[e]very natural consequence that flows from an injury that arose out of and in the course of the claimant's employment unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury" is compensable. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2d Dist. 2005); *Nat'l Freight Indus. v. Illinois Workers' Comp. Comm'n*, 993 N.E.2d 473, 481, 2013 IL App (5th) 120043WC, ¶ 26. Courts have consistently held that for an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition; as the Court in *Lasley Const. Co.*, aptly stated: "The fact that other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant." *Lasley Const. Co., Inc. v. Indus. Comm'n*, 274 Ill.App.3d 890, 893, 655 N.E.2d 5, 8, (5th Dist. 1995). *See also Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812, (2d Dist. 2005).

After carefully reviewing the evidence, the Arbitrator finds that no intervening accident occurred to sever the chain of causal connection between Petitioner's neck condition and her injury on 2/9/18. The Arbitrator finds the minimal gardening assistance Petitioner gave to her mother a mundane activity that, but for her work injury, would have been entirely inconsequential with respect to her symptoms. *See Teska v. Indus. Comm'n*, 610 N.E.2d 1 (1994) (finding no intervening accident since there would have been no aggravation due to bowling "but for" the original work-related accident and the initial injury). Therefore, the chain of events establishing a causal connection between Petitioner's neck injury and her current condition of ill-being remains unbroken.

The Arbitrator finds that Petitioner's current condition of ill-being with regard to her cervical spine is causally connected to her work injuries.

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

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

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

of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Arbitrator finds that all of the care and treatment rendered with regard to Petitioner's cervical spine was reasonable and necessary. The records reflect that Petitioner has not reached maximum medical improvement with respect to her cervical spine. Dr. DeGrange in fact testified that that given the significant pathology at C4-5 and C5-6, Petitioner was a surgical candidate. As the Arbitrator has found that Petitioner did not sustain an intervening accident and her current condition of ill-being is causally connected to the accident of 2/9/18, the Arbitrator finds Petitioner is entitled to the reasonable and necessary surgical care recommended by Dr. Gornet and awards prospective care for her cervical spine.

Therefore, the Arbitrator awards the reasonable and necessary medical expenses contained in Petitioner's Group Exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act, with respect to Petitioner's cervical spine. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for the reasonable and necessary medical care, including but not limited to surgery, recommended by Dr. Gornet.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 739, 743, 467 N.E.2d 1018, 1021 (1984).

Based upon the above findings regarding accident and causal connection, the Arbitrator finds Petitioner is entitled to temporary total disability benefits for her period of incapacity from 12/3/18 through 12/21/20, for a period of 107-1/7th weeks.

Issue (M): **Should penalties or fees be imposed upon Respondent?**

The Arbitrator finds Respondent had a good faith basis to dispute whether Petitioner sustained accident injuries that arose out of or in the course of her employment with Respondent. Therefore, penalties and attorney's fees are denied.

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

Arbitrator Linda J. Cantrell

2/18/24
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC037483
Case Name	Margarita Miranda v. Blue Jay's Home Care LLC & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0247
Number of Pages of Decision	26
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Dan Kallio

DATE FILED: 7/8/2022

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARGARITA MIRANDA,

Petitioner,

vs. NO: 19 WC 37483

BLUE JAYS HOME CARE, LLC, and ILLINOIS STATE TREASURER as the *ex officio* custodian of the INJURED WORKERS' BENEFIT FUND,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent Injured Workers' Benefit Fund and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with the following change made to page one of the memorandum of the Decision of the Arbitrator as stated by the Commission herein. In the Decision of the Arbitrator, the first page of the memorandum is titled, "Petitioner's Findings of Fact and Conclusions of Law." The Commission redacts the word "Petitioner's" from this heading while otherwise incorporating the Arbitrator's Findings of Facts and Conclusions of Law into the Commission's Decision. In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the word "Petitioner's" is redacted from the heading on page one of the memorandum of the Decision of the Arbitrator so that it reads only: "Findings of Fact and Conclusions of Law." In all other respects, the Commission affirms and adopts the Decision of the Arbitrator filed on November 24, 2021.

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

IT IS FURTHER ORDERED BY THE COMMISSION 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 $55,000.00. 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.

July 8, 2022

DLS/met
O- 5/25/22
46

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC037483
Case Name	MIRANDA, MARGARITA v. BLUE JAYS HOME CARE/ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE IWBF
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Dan Kallio

DATE FILED: 11/24/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 23, 2021 0.07%

/s/Michael Glaub, Arbitrator

Signature

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

Margarita Miranda
Employee/Petitioner

v.

Blue Jays Home Care / Illinois State Treasurer as Ex-Officio Custodian of the IWBF
Employer/Respondent

Case # **19** WC **37483**

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 **Waukegan, Illinois**, on **September 21, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/17/2019**, 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 $**28,080.00**; the average weekly wage was $**540.00**.

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

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

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

Respondent shall be given a credit of $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**. Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER:

MEDICAL BENEFITS:
Respondent shall pay reasonable and necessary medical services directly to Petitioner as provided in Sections 8(a) and 8.2 of the Act in the amount of $1,492.00 for treatment provided by Specialty Orthopaedics, of $2,231.91 for treatment provided by Adco Billing Solutions, of $1,075.00 for treatment provided by Midwest Anesthesia & Pain Specialists, of $27,202.50 for treatment provided by Lake Forest Hospital, of $2,836.00 for treatment provided by Lake Forest Hospital's Physician Group, and of $1,019.47 for treatment provided by Lake Forest Fire Department. The Medical Bills shall be paid pursuant to the Illinois Medical fee Schedule.

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $360.00 per week for 5 & 6/7 weeks, commencing 12/18/2019 through 01/27/2020, as provided in Section 8(b) of the Act.

Credits
Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, and $0.00 for maintenance benefits, for a total 8(j) credit of $0.00.

Permanency
The Arbitrator awards 10% MAW to the Petitioner under Section 8(d)2 of the Act based on a weighing of all relevant 8.1(b) factors.

Injured Workers' Benefit Fund
The Illinois State Treasurer, ex-officio custodian of the Injured Workers' Benefit Fund, was named as a co-respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of this Act. In the event the Respondent/Employer/Owner/Officer fails to pay the benefits, the Injured Workers' Benefit Fund has the right to recover the benefits paid due and owing the Petitioner pursuant to Section 5(b) and 4(d) of this Act. Respondent/Employer/Owner/Officer shall reimburse the Injured Workers' Benefit Fund for any compensation

obligations of Respondent/Employer/Owner/Officer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

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

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

Michael A. Glaub
Signature of Arbitrator

NOVEMBER 24, 2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Margarita Miranda,	)	
	)	
Petitioner,	)	
	)	
	)	No. 19 WC 37483
	)	Arb. Michael Glaub
vs.	)	
	)	
Blue Jays Home Care, LLC / Illinois State Treasurer as Ex-Officio Custodian of the IWBF	)	
	)	
Respondent.	)	

PETITIONER'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. FINDINGS OF FACTS:

On September 21, 2021 the Arbitrator observed the Petitioner's behavior and demeanor in and about the courtroom, including her behavior while testifying and having reviewed all of the evidence, the Arbitrator finds the Petitioner to be credible and her testimony credibly corroborated by all the other evidence. The Arbitrator further acknowledgers that Respondent employer, Blue Jays Home Care, failed to appear at trial and was not represented by counsel, despite being provided with proper notice via certified mail (Petitioner's Exhibit 1, 2). The Arbitrator also notes that Respondent did not have an active workers' compensation insurance policy on December 17, 2019, as evidenced by the certification of noncompliance issued by the National Council on Compensation Insurance on February 17, 2020 (Petitioner's Exhibit 3).

On direct examination the Petitioner, Ms. Margarita Miranda, provided unrebutted testimony that on December 17, 2019 she was 57 years old, married, and employed by the

Respondent, Blue Jays Home Care. According to Petitioner's testimony she worked for the Respondent as a caregiver primarily taking care of the elderly (Transcript: Pg. 11). With regards to compensation, Petitioner testified she was paid $13.50 an hour and made average weekly wage of $540.00 (Transcript: Pg. 12). Petitioner testified that her job duties while working from Respondent consisted of everything from assisting patients with daily activities, bathing, changing diapers, grocery shopping, general hygiene assistance, ambulating around their homes as well as in and out of their vehicles, preparing meals, assisting with daily errands and house chores as well as providing daily medical assistance (Transcript: Pg. 11). Petitioner further testified that in addition to the aforementioned her position required her to stay overnight at the patient's home (Transcript: Pg. 12).

According to Petitioner on December 17, 2019, she was working for Respondent to provide overnight home healthcare assistance for elderly patient. Petitioner testified that she was awaken in the early morning hours by an emergency page and hearing screams for help coming from the downstairs of the home (Transcript: Pg. 12, 13). As a result, Petitioner described getting up out of bed and rushing to the aid of the patient through a darkened hallway that lead to the stairway of the client's home. In her hurried and panicked state Petitioner rushed to the assistance of her patient, but unfortunately footing at the top of the staircase and tumbled down the flight of stairs. Petitioner testified to having struck her head and losing consciousness at the time of accident (Transcript: Pg. 13, 14). When she came to, Petitioner indicated that she called her employer and spoke with Jacob, her supervisor, to notify him of the accident (Transcript: Pg. 15). Petitioner also called an ambulance for medical assistance as she testified that she was feeling pretty sick at that time (Transcript: Pg. 14). The ambulance report taken on December 17, 2019 confirms Petitioner's testimony and documents Petitioner's complaints of suffering a

head trauma, loss of consciousness, blurred vision, and elevated blood pressure at the time of accident (Petitioner's Exhibit 4, Pg. 145 – 147).

The record demonstrates that Petitioner was rushed to the emergency department at Lake Forest Hospital (Petitioner's Exhibit 4.) The hospital records indicate Petitioner made several complaints during intake that included experiencing a closed head injury with a short period of loss of consciousness, right shoulder pain, and right knee pain (Petitioner's Exhibit 4, Pg. 53). The records further show that Petitioner was treated with various diagnostic tests along with a neuro consult. Petitioner's examinations included x-rays of Petitioner's right knee and right shoulder as well as CT scans of Petitioner's brain and cervical spine (Id., Pg. 58, 59). Per the reviewing technician, Petitioner's brain scan was suggestive of a subarachnoid hemorrhage (Id., Pg. 59), When discharged by Lake Forest Hospital on December 17, 2019 the Petitioner was diagnosed with having sustained a mechanical fall that resulted in a right clavicle fracture with right humeral head subluxation. Petitioner was recommended the use of a shoulder sling, an orthopedic evaluation, and was prescribed pain medication (Id., Pg. 77).

Once discharged from care, the Petitioner returned to Lake Forest Hospital for a follow up appointment on December 20, 2019 (Petitioner's Exhibit 4, Pg. 1). According to Petitioner she was suffering from ongoing symptoms of dizziness, headaches, ear pain and periods of vertigo (Petitioner's Exhibit 4, Pg. 5). Given Petitioner's complaints the physicians at Lake Forest Hospital once again performed a second CT of Petitioner's brain. According to the reviewing technician, Petitioner brain scan when compared to the scan for December 17, 2019 had no acute intracranial abnormalities and the previously seen hemorrhage was no longer visible (Petitioner's Exhibit 4, Pg. 2). Based on the finds Petitioner was released from care and advised to follow up with her primary physician as soon as possible (Id., Pg. 5).

Petitioner followed up with Midwest Anesthesia & Pain Specialists on December 26, 2019 (Petitioner's Exhibit 7). Per the medical report, Petitioner presented with complaints of an injury occurring while working as a home caretaker. Petitioner reported that she was sleeping at a patient's home when she was called after midnight for help (Petitioner's Exhibit 7, Pg. 4). Petitioner stated when she got up out of bed, she rushed down a darkened area shortly before falling down the stairs (Id.). Ms. Miranda complained to the doctor of experiencing pain to her right shoulder, upper back, and right knee. Petitioner further reported that her head was no longer hurting, but she was still experiencing episodes of dizziness (Id.). After a physical examination the Petitioner was diagnosed with right shoulder pain, pain in the left knee, contusion of the left knee, and a closed fracture of the right clavicle (Id., Pg. 7). Petitioner was prescribed physical therapy to be performed two to three times a week, was provided with a referral to an orthopedic surgeon, and was prescribed medication for dizziness and pain management. Furthermore, given the nature of Petitioner's work as a home caretaker, she was placed off work until she could follow up in three weeks (Id., Pg. 7).

On January 9, 2020 Petitioner was seen by orthopedic surgeon Dr. Samuel S. Park of Specialty Orthopaedics (Petitioner's Exhibit 9). Petitioner made complaints involving her right shoulder and right knee. According to the history taken, Petitioner was working as a caretaker when in the middle of the night she was called to the aid of her patient. After a physical examination was performed, Petitioner was diagnosed with a closed facture of the right clavicle with routine healing, osteoarthritis of the right knee, contusion of the right knee, sprain of the medial collateral ligament of the right knee, and subarachnoid hemorrhage (Id.). Given his findings, Dr. Park recommended Petitioner continue to use her sling, repeat an x-ray of the right

clavicle, as wells undergo a right knee MRI (Id., Pg. 2). Dr. Park also recommended Petitioner refrain from work (Id.).

Thereafter, Petitioner followed up with Midwest Anesthesia & Pain Specialists on January 13, 2020 (Petitioner's Exhibit 7, Pg. 9). According to the report, the Petitioner indicated that sine her fall the right shoulder has been the most bothersome followed by her dizziness (Id.). Petitioner indicated that she still felt mild front headaches and that her knee continued to bother her, especially when going up and down stairs (Id.). After conducting a physical examination the treating physician, Dr. Adrei Rakic, MD determined Petitioner should continue with physical therapy to address ongoing issues with Petitioner's right knee as well as her right shoulder (Id., Pg. 9). According to Dr. Rakic, Petitioner was suffering from ongoing right shoulder pain with abduction deficits and signs of impingement (Id.). Dr. Rakic further recommended Petitioner should obtain an MRI of the right shoulder and also prescribed Petitioner with medication for pain and inflammation. Petitioner was again recommended to remain off work and to return in two weeks for additional care (Id., Pg. 9).

The Petitioner testified that after her last appointment with Dr. Rakic of Midwest Anesthesia & Pain Specialist she did not continue to pursue treatment. When asked why on direct examination the Petitioner indicated that she did not have health insurance or money to be able to continue to obtain medical treatment (Transcript: Pg. 19). Petitioner further testified that if she would have had access to health care she would have continued to seek treatment (Transcript: Pg. 19). Petitioner indicated at the time of hearing that she still experiences episodes of dizziness, vertigo, and pain in her clavicle and in her right knee as a result of her accident (Transcript: Pg. 20).

With regards to her employment at Blue Jays Home Care, Petitioner testified that since the date of accident she has never returned to work for the employer and is no longer working as a home caretaker. When asked to clarify, Petitioner indicated that approximately a month after the accident she called the employer and was told over the phone that she was terminated (Transcript: Pg. 18, 19). The Petitioner further testified that as a result she was unable to work in any capacity from the date of accident through February 13, 2020 (Transcript Pg. 19). As for new employment Petitioner indicated that she was unable to find gainful employment until November of 2020 (Transcript: Pg. 19). When asked if she made more or less money in her new position, Petitioner indicate to making less (Transcript: Pg. 20).

II. CONCLUSIONS OF LAW

The Arbitrator adopts the above findings of fact in support of the following conclusions of law:

ISSUE (A): Was Respondent Operating under and subject to the Illinois Compensation Occupational Disease Act?

In Illinois the Workers' Compensation Act shall automatically apply to all employers and all their employees that engage within their respective enterprises or business, in activities that are considered to be extra hazardous (820 ILCS 305/3). In the case at hand, the Petitioner testified that her job duties as a home caretaker would often require her to prep and cook meals at the patient's home, to use a motor vehicle to transport patients to and from their homes, assist patients with their daily errand, with ambulating around their homes, transport patients to medical appointments as wells a to perform light cleaning tasks around the patient's home.

Based on the Above, the Arbitrator finds that Blue Jays Home Care is subject to the

provisions of the Act and was indeed operating under and subject to the Illinois Compensation Act on December 17, 2019.

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

The Claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim including the existence of an employment relationship O'Dettev. Industrial Comm'n, 403 N.E. 2d 221 38 Ill. Dec 133 (1980). Such a relationship, if one exists, is inferred from the conduct of the parties. While the right to control work is often the primary factor in determining an employment relationship, there are multiple factors to consider in assessing the nature of the relationship between the parties. Roberson v Indus. Comm'n, 225 Ill. 2d 159, 175 (2000). Among the factors for the court to consider are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; (6) whether the employer supplies the person with the needed instrumentalities; and (7) whether the employer's general business encompasses the person's work. Other relevant factors the court can consider is the label the parties place on their relationship.

In the case at hand, Petitioner's testimony establishes an employment relationship existed on December 17, 2019. Petitioner testified to having been employed by Blue Jays Home Care as an at home caretaker. She testified to being paid an hourly rate of $13.50 or $540.00 a week and provided three separate paystubs as evidence (Petitioner's Exhibit 10). Petitioner further testified that she would perform various tasks for her patients that included but was not limited to taking

patients to doctors' appointments, running daily errands, as well as cooking and cleaning as needed. According to Petitioner these tasks were routinely performed for the patients she was assigned to assist by the employer.

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 to resolve conflicts in the evidence. The Arbitrator, having weighed Petitioner's unrebutted testimony finds that Petitioner has proved by a preponderance of the evidence that on December 17, 2019 the relationship with Respondent was one of employer-employee.

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

In the state of Illinois, an injury is compensable only if the Petitioner's injuries "arises out of" and "in the course of" their employment with Respondent. The phrase "in the course of" refers to the time, place and circumstances under which the accident occurred. The words "arising out of" refer to the origin or cause of the accident. In order of a Petitioner's claim to be determined compensable both elements must be present at the time of the accidental injury.

Past Illinois worker' compensation cases such as, *Caterpillar Tractor Co v. Industrial Commission*, 129 Ill. 2d 52 (1989), continue to be good law and stand for the proposition that an injury arises out of a claimant's employment if at the time of injury, the claimant was performing an act reasonably expected to be performed for his employment, or causally related to what the claimant must do to complete his job duties. In *Caterpillar Tractor Co v. Industrial Commission*, the Court noted that a risk is distinctly associated with a claimant's employment if at the time of 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.

In the case at hand the Petitioner's unrebutted testimony was that one of her job duties was to stay overnight at patients' homes in order to provide around the clock home healthcare. As such, petitioner's actions were acts her employer might reasonably expect her to perform in fulfilling her job duties of carrying for her patient. Furthermore, the accident described by the Petitioner occurred inside the patient's home during work hours.

Based on the above, the Arbitrator finds Petitioner's accidental injuries arose out of and in the course of her employment with Blue Jays Home Care.

ISSUE (D): What was the date of the Accident?

In order to obtain compensation under the Act, an employee mush point to a date on which both the injury and its causal connection to the employee's work became plainly apparent to a reasonable person. Durand v. Indus' Comm'n, 682 N.E. 2d 918 (2006). In the case at hand the Petitioner provided a signed application for adjustment of claims with a clear date of accident on December 17, 2019. The Petitioner also provided unrebutted testimony that during the early morning hours if December 17, 2019 she suffered a trip and fall while working for Blue Jays Home Care. Lastly the medical records submitted into evidence all support Petitioner's testimony and describe a work place injury occurring on the morning of December 17, 2019.

Based on the above including Petitioner's testimony which is supported by the entirety of the record, the Arbitrator finds Petitioner suffered a compensable work place accident on December 17, 2019.

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

In the case at hand the Petitioner provided unrebutted and credible evidence regarding the issue of notice. When asked whether she informed her employer of her accident on Petitioner indicated that she called her employer immediately before calling the ambulance on December 17, 2019. Petitioner testified that at that time she advised her supervisor that she had tripped and fallen down a set of stairs while at work.

Based on the above, and the Arbitrator's findings with respect to employer-employee relationship and Accident, the Arbitrator finds that Petitioner has proved by a preponderance of the evidence that she provided notice to Respondent within the time limits stated in the Act.

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

The Arbitrator incorporates the foregoing findings of fact and conclusion of law as though fully set forth herein. Having already established the Petitioner sustained accidental injuries arising out of and in the course of her employment with Respondent on December 17, 2019, the Arbitrator now finds Petitioner's current condition of ill-being to be causally related to her work accident.

In Illinois, a workers' compensation claimant bears the burden of showing by a preponderance of credible evidence that their current condition of ill-being is causally related to a workplace injury. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Commission,* 409 Ill. App. 3d 943 (2011). With regards to casual connection and cases with preexisting conditions, recovery depends on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related

injury and not simply the result of a normal degenerative process of the preexisting condition. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36-37 (1982). Moreover the courts have long established that an accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill. 2d 123, 127 (1967).

In the case at hand, Petitioner credibly testified that while working for Respondent she tripped and fell at a patient's home and required immediate medical attention. The medical records submitted into evidence, specifically the emergency room records from Lake Forest Hospital, clearly document and support Petitioner's version of events. Further adding credibility to Petitioner's claim is the ambulance report taken on the date of accident (Petitioner's Exhibit 4, Pg. 145 – 147). According to the report, the ambulance was called to 1136 East Tedy Round Lake Beach, Illinois 60073 to provide medical attention to Petitioner (Petitioner's Exhibit 4, Pg. 145). The ambulance report indicates that Petitioner was complaining of right shoulder pain and had a hematoma on the right side of her head (Id.). The cause of injury noted in the report was stated as a fall on stairs and steps (Id.).

Based on the above including Petitioner's unrebutted testimony, the Arbitrator finds Petitioner's account of the mechanism of injury to be well founded by a preponderance of the evidence. Given the medical treatment directly relates to the mechanism of injury, the Arbitrator finds Petitioner's condition of ill-being to be causally related to her December 17, 2019 workplace accident.

ISSUE (G): What were Petitioner's earnings?

After carefully reviewing of Petitioner's testimony and all of the evidence submitted at trial, the Arbitrator finds Petitioner's average weekly wage is $540.00.

In Illinois the basis for computing a claimant's average weekly earnings is determined by Section 10 of the Illinois Workers' Compensation Act. Section 10 defines and employee 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 52 weeks ending with the last day of the employees' last full pay period immediately preceding the date of injury, excluding overtime and bonus divided by 52." 820 ILCS 305/10 (West 2008).

In the case at hand, the Petitioner testified and provided copies of her paystubs which establish Petitioner was compensated at $13.50 an hour or $540.00 as week (Transcript: Pg.12; Petitioner's Exhibit 10).

After weighing all of the evidence the Arbitrator finds the Petitioner's average weekly earnings were $540.00.

ISSUE (H): What was Petitioner's age at the time of the accident?

Based on Petitioner's testimony and the entirety of the records submitted into evidence the Arbitrator finds the Petitioner was born on December 23, 1961 and was 57 years old at the time of the accident on December 17, 2019.

ISSUE (I): What was Petitioner's marital status at the time of the accident?

Based on Petitioner's testimony and the entirety of the records submitted into evidence the Arbitrator finds the Petitioner was married at the time of the accident on December 17, 2019.

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

Based on the entirety of the evidence presented, the Arbitrator finds the Respondent liable for medical treatment rendered to Petitioner as a result of her workplace accident occurring on December 17, 2019 and further finds the medical care and associated bills to be reasonable and necessary to treat Petitioner's injuries.

The admitted medical records are consistent in showing the care and treatment provided to Petitioner was both reasonable, necessary and related. Not only do the medical records adequately document the mechanism of injury, but they also provide a clear causal connection between Petitioner's complaints and the described mechanism of injury. Specifically, the history portion of every medical provider that examined the Petitioner clearly articulate she was seen as a result a work injury.

Petitioner claimed the following medical bills as unpaid and part of Respondent's liability to pay:

- Specialty Orthopaedics: $1,492.00
- Adco Billing Solutions: $2,231.91
- Midwest Anesthesia & Pain Specialists: $1,075.00
- Lake Forest Hospital: $27,202.50
- Lake Forest Hospital's Physicians Group: $2,836.00
- Lake Forest Fire Department:$ 1,019.47

The Arbitrator notes that the medical care provided by the aforementioned providers properly addressed the Petitioner's injuries and given Respondent's failure to present any persuasive evidence to the contrary, the Arbitrator finds as follows:

Specialty Orthopaedics: The Arbitrator has reviewed the records admitted as Petitioner's Exhibit 9. These records reflect treatment provided to Petitioner resolve her work related complaints. Based on the Arbitrator's prior findings with respect to causal connection,

Petitioner is entitled to payment of the reasonable and necessary medical treatment provided by Specialty Orthopaedics. The bill of $1,492.00 is hereby awarded and Respondent shall pay Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

Adco Billing Solutions: The Arbitrator has reviewed the records admitted as Petitioner's Exhibit 8. These records reflect medications prescribed to Petitioner by her treating physicians at Midwest Anesthesia & Pain Specialists. According Petitioner's Exhibit 7, Petitioner was prescribed with medications in order to address her ongoing symptoms of dizziness, pain and inflammation.

Based on the Arbitrator's prior findings with respect to accident and causal connection, Petitioner is entitled to payment of the reasonable and necessary medical treatment provided by Adco Billing Solutions. The bill of $2,231.91 is hereby awarded and Respondent shall pay Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

Midwest Anesthesia & Pain Specialists: The Arbitrator has reviewed the records admitted as Petitioner's Exhibit 7. Per the treating records, Petitioner was seen on December 26, 2019 by Dr. Mark Farag and again on January 13, by Dr. Andrei Rakic. The records from both appointments clearly establish a connection to Petitioner's work activities and specifically the events of December 17, 2019.

Based on the Arbitrator's prior findings with respect to accident and causal connection, Petitioner is entitled to payment for reasonable and necessary treatment provided by Midwest Anesthesia & Pain Specialists. The bill of $1,175.00 is hereby awarded and Respondent shall pay

Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

Lake Forest Hospital / Lake Forest Physicians Group / Lake Forest Fire Department: The Arbitrator has reviewed the records submitted into evidence as Petitioner's Exhibits 5 and 6. These billing records properly quantify the current unpaid balances for each of the providers articulated in this section. Based on the Arbitrator's prior findings with respect to accident and causal connection, Petitioner is entitled to payment for reasonable and necessary treatment provided by Lake Forest Hospital, Lake Forest Physicians Group and the Lake Forest Fire Department. The Lake Forest Hospital bill of $27,202.50, the Lake Forest Physicians Group bill of $2,836.00 and the Lake Forest Fire Department bill of $1,019.47 are hereby awarded and Respondent shall pay Petitioner directly in accordance with the Workers' Compensation Act and the Illinois Fee Schedule.

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

Petitioner sustained a fractured collar bone, a subarachnoid hemorrhage and injuries to her head and right knee on December 17, 2019. An ambulance took petitioner to Lake Forest Hospital where she received immediate medical care for these injuries. She was observed overnight and then released. However, Petitioner returned on December 20, 2019 with increased pain and dizziness. A new CT Scan of the brain was taken, and it appears the petitioner was not discharged until December 21, 2019. Petitioner sought follow up care with Dr. Farag at Midwest Anesthesia & Pain Specialists on December 26, 2019. Dr. Farag authorized petitioner to be off work and return in 3 weeks. The petitioner did return and was seen by Dr. Rakic. In his progress note, he states petitioner should remain off work and return in two weeks or on January 27, 2020. Petitioner did not return for any additional medical care, however. She testified it was because

she has no insurance, but the Arbitrator notes petitioner was able to secure treatment prior to January 27, 2020.

The Arbitrator finds the treating medical providers' work status recommendations to be reasonable for the type of injuries sustained and given the totality of all the evidence, finds the Petitioner has proved by a preponderance of the evidence that she is entitled to TTD benefits in the amount for 5 & 6/7 weeks, representing the period from December 18, 2019 through January 27, 2020, as provided for in the Act.

ISSUE (L): What is the Nature and extend of the injury?

The Arbitrator awards 10% MAW to the Petitioner based on a weighing of all relevant 8.1(b) factors.

In Illinois, for injuries that occur after September 1, 2011, PPD benefits are based on the weighing of the following factors found in Section 8.1(b) of the Illinois Workers' Compensation Act:

1. The reported level of impairment pursuant to subsection (a);
2. The occupation of the injured employee;
3. The age of the employee at the time of injury;
4. The employee's future earning capacity; and
5. Evidence of disability corroborated by the treating medical records.

In the case at hand, the Respondent did not provide an AMA impairment report and therefore, the Arbitrator places no weight to this factor.

Regarding Petitioner's occupation at the time of injury, Petitioner worked for the Respondent as an at home caretaker. Petitioner testified that her job duties required her to cook meals, assist with running daily errands, assist patients with getting in and out of their vehicles, as well as sleeping overnight at her patient's homes in case of emergencies. Given the demands

required by home caretaker, the Arbitrator finds that this factor leads to a finding of increased permanence.

Regarding the petitioner's age, the Arbitrator notes petitioner was 57 years old at the time of the accident. The Arbitrator notes that the petitioner is in the later stages of her work life, and that this factor leads to a finding decreased permanence.

Addressing Petitioner's earning capacity, the parties did submit evidence via Petitioner's testimony that her accident has resulted in a loss of future earning capacity. In particular the Petitioner testified that after the accident occurred, she was unable to return to work because the Respondent employer terminated her over a telephone conversation. Moreover, the Petitioner testified that once he returned to maximum medical improvement, she was forced to look for a new job in a different industry that resulted in less pay. However, there is was no evidence introduced that the petitioner's specific injuries were the cause of any specific reduction in earning capacity. Specifically, there was no evidence of any permanent medical restrictions placed on the Petitioner by any treating physician. Therefore, the Arbitrator finds that this factor leads to a finding of decreased permanence.

Regarding the last factor of subsection 8.1(b), as there is meaningful evidence of Petitioner's disability in the treating medical records. Specifically, Petitioner sustained a displaced fracture of the collar bone, right humeral head subluxation and a 3-4 mm of superior displacement of the distal fracture fragment. Petitioner also sustained a head injury with a loss of consciousness. Diagnostic testing did reveal evidence of a subarachnoid hemorrhage. Petitioner's testimony that she continues to experience episodes of dizziness and vertigo up through and including the date of trial is consistent with her subjective complaints in the treating medical records. The Arbitrator fids that this factor leads to a finding of increased permanence.

Based on all of the above, the Arbitrator finds petitioner sustained serious and permanent injuries to the extent of a 10% Loss of Use of the Person under Section 8(d)2 of the Act.

Issue (M): No Penalties or Fees have been Sought.

The Arbitrator finds that no claim has been made and no evidence submitted related to penalties and fees and therefore none are awarded.

ISSUE (N): Is Respondent due any credit?

The Arbitrator incorporates the foregoing findings of facts and conclusions of law as though fully set forth herein. The Arbitrator notes that the Respondent has not claimed an 8(j) credit. As a result, the Arbitrator finds Respondent is not owed any credits under the Act.

ISSUE (O): The Injured Workers' Benefit Fund is Liable.

The Illinois State Treasurer as ex officio custodian of the Injured Workers' Benefit Fund was named as a party respondent in this matter. Petitioner submitted sufficient credible evidence that Respondent-Employer was not insured at the time of the injury. Such evidence consists of the National Council on Compensation Insurance Certificate. Further, Petitioner provided sufficient credible evidence that notice of the proceedings were provided to the Respondent-Employer.

This finding is hereby entered as to the Fund to the extent permitted and allowed under §4(d) of the Act. Should any recovery by the Petitioner occur, Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit

Fund, including but not limited to any full award in this matter, the amounts of any medical bills paid, temporary total disability paid or permanent partial disability paid. The Employer-Respondent's obligation to reimburse the IWBF, as set forth above, in no way limits or modifies its independent and separate liability for fines and penalties set forth in the Act for its failure to be properly insured.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC012620
Case Name	Patrick Trokey v. State of Illinois - Menard Correctional Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0248
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 7/8/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Patrick Trokey,

Petitioner,

vs. NO: 18WC 012620

State of Illinois/Menard Correctional Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 22, 2021 is hereby affirmed and adopted.

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

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

July 8, 2022

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/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC012620
Case Name	TROKEY, PATRICK v. MENARD C.C.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 4/22/2021

/s/ Linda Cantrell, Arbitrator
Signature

INTEREST RATE WEEK OF APRIL 20, 2021 0.04%

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

April 22, 2021

/s/ Brendon O'Rourke

Brendan O'Rourke, Assistant Secretary

Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Patrick Trokey
Employee/Petitioner

v.

State of Illinois/Menard Correctional Center
Employer/Respondent

Case # **18** WC **12620**

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 **February 11, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 19, 2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**86,073.64**; the average weekly wage was $**1,655.00**.

On the date of accident, Petitioner was **44** 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 $**all paid** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**all paid**.

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

ORDER

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

Respondent shall pay Petitioner the sum of $**790.64 (Max. rate)**/week for a period of **225** weeks, as provided in Section **8(d)2** of the Act, because the injuries sustained caused **25% loss of the body as a whole as a result of injuries to his cervical spine, and 20% loss of the body as a whole as a result of injuries to his lumbar spine.**

Respondent shall pay Petitioner compensation that has accrued from December 5, 2019 when Dr. Gornet released Petitioner at maximum medical improvement, through February 11, 2021, 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.

Linda J. Cantrell
Signature of Arbitrator

APRIL 22, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

PATRICK TROKEY,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-12620
	)	
STATE OF ILLINOIS/MENARD CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on February 11, 2021 on all issues. The parties stipulated that on February 19, 2018 Petitioner sustained accidental injuries that arose out of and in the course of his employment with Respondent. The issues in dispute are causal connection, medical bills, and the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 44 years old, single, with no dependent children at the time of accident. Petitioner testified he began working for Respondent in February 1995 and currently holds the position of Correctional Lieutenant. Petitioner testified that on 2/19/18 he was performing yard duties when two inmates began assaulting him and his co-worker. Petitioner stated it was called a gang hit on a supervisor among the inmates. Petitioner testified he had no prior workers' compensation claims for injuries to his neck or low back. Prior to the accident he did receive chiropractic adjustments on an occasional basis to get "loosened up". His prior neck and low back pain was not debilitating and never caused him to miss time from work.

Following the accident Petitioner underwent cervical and lumbar disc replacements by Dr. Gornet. He was also examined by Dr. Paletta to rule out shoulder pathology. He was examined by Dr. Ritchie for his shoulder at the request of Respondent and stated Dr. Ritchie performed a thorough exam. Petitioner was also examined by Dr. Chabot at the request of Respondent and stated his examination lasted only a couple of minutes and he was in the exam room for a total of 15 minutes. Dr. Chabot did not review any diagnostic studies with him.

Prior to surgery, Petitioner received injections in his cervical and lumbar spine that provided only temporary relief. He had stabbing pain in his neck and low back. Following the cervical disc replacement surgery his shoulder and arm pain completely resolved. His low back pain resolved following the lumbar disc replacement surgery. He returned to full duty work on 10/15/19 and has not sustained any new injuries to his neck or low back. Petitioner testified that he was paid extended benefits and temporary total disability benefits during the entire time he was off work.

Petitioner testified that despite the improvement from his surgeries, he continues to have residual symptoms. He testified he still has pain in his cervical region and his range of motion is limited from side-to-side. He stated his neck gets sore when he looks up for an extended period of time, making activities like changing a light bulb difficult. He testified that cold weather aggravates his neck and back. He takes over-the-counter Tylenol or Ibuprofen as needed for pain. He is no longer able to engage in water sports which he did every season. He attempted to put up a deer stand this hunting season but was not successful because he is uneasy on ladders since his injury. His sleep has been adversely affected due to tinnitus and muscle spasms which he did not experience prior to the accident. Petitioner testified he was in the process of building a house when the accident occurred and he has not been able to complete construction due to his injuries.

MEDICAL HISTORY

Following the assault Petitioner was taken to Chester Memorial Hospital with complaints of facial, neck, and low back pain. The records indicate Petitioner was punched in the left side of his face. It was noted he had stiffness in his neck and physical examination revealed bruises, face tenderness, and neck tenderness. He was discharged after receiving a CT scan of the maxi facial bones, which revealed no fracture, and a CT scan of the cervical spine, which showed no evidence of an acute fracture, subluxation, or dislocation, but mild right foraminal encroachment at C5-6 with some degeneration at C4-5.

On 2/24/18, Petitioner saw Dr. Matthew Gornet and provided a history of the injury. Dr. Gornet noted complaints of shoulder pain, neck pain with trapezius pain and numbness, tingling into the right arm, and low back pain into the right side and right buttock. Examination showed pain on both sides of the trapezius muscle right upper arm with some tingling pain into the right lower arm, with decreased range of motion in all directions. There were decreased triceps, biceps, and deltoid reflexes on the right, and sensation was decreased along the C6 nerve root distribution on the right. X-rays showed mild loss of disc height at C4-5 but were otherwise unremarkable. Lumbar x-rays showed mild scoliosis with minimal degeneration. A cervical MRI revealed a large right-sided herniation at C5-6, right-sided foraminal facet encroachment at C5-6 on the right, a herniation and annular tear on the right at C3-4, an annular tear at C3-4 on the left, and herniation at C3-4 on the left. Dr. Gornet placed Petitioner off work and prescribed medication, injections, and physical therapy.

Petitioner engaged in physical therapy for two weeks with no improvement. Injections performed by Dr. Blake on 3/6/18 provided only temporary relief. On 3/17/18, a lumbar MRI was performed that revealed a central disc herniation and annular tear at L4-5 and a right-sided annular tear at L5-S1. Petitioner's symptoms were radiating into his shoulder and Dr. Gornet

referred him to Dr. Paletta to resolve any shoulder issues. Petitioner saw Dr. Paletta on 4/9/18 complaining of pain in the periscapular region and shoulder. Dr. Paletta's examination showed tenderness to palpation at the AC joint with full elevation and abduction, and negative orthopedic tests and symmetrical muscle tone with no deformity. Dr. Paletta diagnosed Petitioner with an AC joint sprain of the right shoulder and recommended continued treatment with Dr. Gornet.

Respondent had Petitioner examined by Dr. Joseph Ritchie who agreed with Dr. Paletta that Petitioner had an AC joint sprain which would resolve over the course of 6-12 weeks. Dr. Ritchie and Dr. Paletta both agreed that Petitioner's symptoms were emanating from his cervical spine. On 4/9/18, Dr. Gornet noted the right lumbar steroid injection provided only temporary relief. He believed Petitioner was a surgical candidate for his cervical symptoms and recommended another injection for his lumbar spine along with a lumbar discogram. The L4-5 lumbar steroid injection provided only temporary relief. The lumbar discogram was performed on 5/11/18 and revealed a normal L3-4 level. An MRI spectroscopy was performed that Dr. Gornet interpreted as showing a normal disc at L3-4 with significant pain chemical levels at L4-5 and L5-S1.

On 7/31/18, Petitioner underwent a three-level disc replacement at C3-4, C4-5, and C5-6. Dr. Gornet reported objective intraoperative findings of a small central herniation and a large right-sided foraminal herniation at C3-4. At C4-5 there was a right-sided foraminal herniation along with a small central herniation with some right-sided foraminal stenosis, and at C5-6 a significant herniation more to the right but propagated across the entire disc resulting in the removal of multiple small fragments protruding on both foramen. Petitioner reported dramatic improvement following surgery. The tingling and strength in his arm improved and he had five plus motor strength in all muscle groups. Dr. Gornet continued Petitioner off work to address his lumbar spine.

On 11/8/18, Dr. Gornet recommended a disc replacement procedure at L4-5 and L5-S1. A lumbar MRI showed evidence of circumferential disc bulging with posterior element hypertrophy resulting in bilateral foraminal stenosis at L3-4. There was a central left foraminal disc protrusion at L4-5 associated with moderate to severe left greater than right foraminal stenosis. At L5-S1 there was lateral recess foraminal annular tear with protrusion. A cervical CT scan showed evidence of disc replacement from C3–C6 with no subsidence.

On 3/12/19, Petitioner underwent a two-level disc replacement at L4-5 and L5-S1, decompression and stabilization with prosthetic devices. Intraoperatively, Dr. Gornet found a large central herniation at L5-S1 propagating to the right, and a central herniation and annular tear propagating in both directions at L4-5.

On 9/10/18, Respondent had Petitioner examined by Dr. Michael Chabot for his cervical and lumbar conditions. Dr. Chabot took the history of accident and reviewed pertinent medical records and diagnostic studies. His examination showed a well healed left anterior neck incision with full range of motion in the cervical spine. Lumbar examination showed some limited range of motion with focal tenderness to palpation involving the right SI region aggravated with reverse extension. Dr. Chabot was unable to review the MRI study done on 3/17/18 along with the lumbar MRI studies. He therefore did not render any opinions but stated Petitioner had a

history of contusions to his face and head, history of a back strain, physical findings consistent with right sacroiliac inflammation, scoliosis, and disc degeneration in his cervical spine. Medical records were subsequently provided to Dr. Chabot and he rendered a supplemental report almost one year later on 8/1/19. He also reviewed records of Petitioner's family physician whom Petitioner saw for pre-operative clearance. In his supplemental report Dr. Chabot again requested to see Petitioner's cervical spine MRI of 2/24/18. Dr. Chabot believed that the disc pathology at L4-5 and L5-S1 shown on MRI preexisted the injury. Dr. Gornet relied on results of the MRI spectroscopy which he stated was a non-validated diagnostic entity prohibited by federal law. Dr. Chabot believed that Petitioner's current objective physical findings and observation during his exam did not support his current level of subjective complaints.

Regarding cervical surgery, Dr. Chabot stated it was unclear whether surgical intervention was reasonable and necessary and there was inadequate evaluation of the origin of Petitioner's neck complaints. With regard to the lumbar spine, Dr. Chabot believed Petitioner should have undergone a discogram procedure at L4-5 and L5-S1, even though the MRI's showed pathology at those levels, along with additional injections.

Dr. Chabot authored a second supplemental report after reviewing the CT scan of 2/19/18 and cervical MRI of 2/24/18. Dr. Chabot believed the cervical CT scan showed evidence of advanced degeneration at virtually all levels and the cervical MRI showed evidence of disc spur complexes at L4-5 without any evidence of focal disc herniation. He believed there was marginal spondylitic spurring at C5-6 on the right resulting in neural foraminal narrowing, and the MRI report read by Dr. Ruyle grossly overstated the pathology. Dr. Chabot reviewed the lumbar MRI of 3/17/18 and believed there was degenerative changes at L3-4 along with mild disc bulging. At L4-5 there was a high intensity zone along the posterior central annulus with bilateral foraminal narrowing. There was disc desiccation and mild disc space narrowing at L5-S1 with evidence of a right-sided high intensity zone. Contrary to the radiology report, Dr. Chabot did not appreciate any evidence of focal disc herniation at either level. He believed that any changes at the L4-5 and L5-S1 level showed no clear evidence of central disc protrusions and no frank central disc herniation. He believed that the lack of asymmetry with clear evidence of disc material projecting posteriorly within the spinal canal would argue against the presence of a disc protrusion. Dr. Chabot disagreed with both radiologist's interpretation of the MRI films.

Dr. Michael Chabot testified by way of evidence deposition on 10/2/20. He is an osteopathic spine surgeon who performs surgery weekly. He saw Petitioner one time on 9/10/18. Dr. Chabot testified consistently with his reports. Petitioner was noted to be cooperative and pleasant with an incision from his recent neck surgery. He believed Petitioner's cervical range of motion was full. Range of motion of the thoracic spine was normal and lumbar range of motion was near normal. There was focal tenderness to palpation involving the right SI region which was aggravated with a reverse extension test.

Dr. Chabot took x-rays which showed the cervical disc replacement devises from C3-C6. Lumbar spine films showed spondylosis at L4-5 greater than L3-4 and L5-S1 with well-preserved disc space height. Dr. Chabot's diagnosis was history of contusion to the face and head with back strain. Petitioner's physical findings were also consistent with right sacroiliac inflammation, scoliosis, and disc degeneration in his neck. On 8/1/19, Dr. Chabot reviewed a

lumbar MRI performed on 11/8/18; however, the cervical MRI was not included. He believed the lumbar MRI showed disc desiccation greater at L4-5 than L5-S1 with diminished disc space height at L4-5 and a high intensity zone along the posterior annulus at L4. At L5-S1 there was evidence of a small right-sided high intensity zone along the posterior annulus in the region of the right neural foramen. Dr. Chabot testified he reviewed the cervical MRI of 2/24/18 and while noting disc spur complexes at C4-5 he did not appreciate any focal disc herniation. At C5-6 he saw marginal spondylotic spurs on the right resulting in neuroforaminal narrowing.

After reviewing the additional films Dr. Chabot's original diagnosis did not change. He believed that the changes in Petitioner's cervical and lumbar spine were both chronic and degenerative. When asked if the cervical surgery was necessitated by the assault at work he believed it was "unclear" whether or not surgical intervention to his cervical spine was reasonable and necessary as it related to the accident. He thought there was inadequate evaluation of the origin of Petitioner's complaints and that further diagnostics were in order to clarify their origin. He stated, "Well, it's almost like whatever level had any degeneration underwent surgical intervention. Like sort of the impression was that the origin was unclear so we're just going to do every level that has any bit of degeneration in a 45-year old male. As far as I can tell from the CT studies and MRI studies, the spurs and changes that were described as herniation on the MRI were actually bony spurs as confirmed by the CT study with reconstructions, indicating that those changes were there before. The symptoms he had I thought could have been explored a bit further, such as performing selective injections to try to clarify if his symptoms were originating from C4-5 or C5-6 or even C6-7 so that a more limited procedure could have been performed."

Dr. Chabot testified he would have performed selective nerve injections to determine the specific location of Petitioner's complaints and if he was still symptomatic after the injections he would recommend a limited surgical procedure. Dr. Chabot was not provided the operative report for Petitioner's lumbar spine. When asked if the lumbar spine surgery was related to the assault he testified he found no evidence to suggest that Petitioner's complaints were associated with degeneration at L4-5 or L5-S1 and the evaluation preoperatively did not show that L4-5 and L5-S1 were the source of his symptoms.

On cross examination, Dr. Chabot acknowledged he was not participating in any research projects and has published five times from 1994 to 1997. The last lecture he gave was in 2016 to Missouri Employers Mutual Insurance Company. Dr. Chabot charges $1,100.00 per examination in a medical legal setting, performs about six a week, and stated they are all for Respondent's employers and third-party administrators. Dr. Chabot acknowledged he did not have the cervical operative report at the time of his initial examination and never received the 3/12/19 lumbar surgery report. He acknowledged that he disagreed with both radiologists and their interpretations of the cervical and lumbar MRI's.

When asked if Petitioner's cervical surgery was reasonable and related to the assault he stated he would not discount that the surgery may have been necessary, but he questioned the number of levels performed and surgical procedure performed. With regard to the lumbar spine, Dr. Chabot acknowledged there was nothing in his reports indicating whether the lumbar surgery was related to the accident because he did not find out that Petitioner had lumbar surgery until

"today". The last note of Dr. Gornet that Dr. Chabot would have reviewed was the note dated 8/1/19. None of Dr. Gornet's notes over the past year and a half were reviewed by Dr. Chabot.

Dr. Matthew Gornet testified by way of evidence deposition on 3/18/19. Dr. Gornet is a board-certified orthopedic surgeon whose practice is exclusively devoted to care of the spine. On direct examination he testified consistently with his records. His viewing of the cervical MRI showed a large right-sided disc herniation at C5-6 with disc pathology at C3-4 on the right, along with annular tears at C3-4 and C4-5. His interpretation was consistent with the radiologist. He reviewed Petitioner's intake form and found nothing of significance other than some intermittent chiropractic treatment undertaken on a routine basis.

Dr. Gornet ordered injections which provided only temporary relief. He referred Petitioner to Dr. George Paletta for consultation regarding his shoulder which came back benign. Dr. Gornet reviewed a lumbar MRI which he believed showed an obvious central annular tear at L4-5 and a right-sided tear at L5-S1 which correlated with Petitioner's complaints. Dr. Gornet's interpretation of the film was also consistent with that of the radiologist. He believed that both Petitioner's neck and low back objective pathology and subjective complaints were related to the assault of 2/19/18. Dr. Gornet described the cervical surgery in his operative report which was replete with objective findings. Following surgery, Petitioner's neck and arm pain dramatically improved. Dr. Gornet testified he last saw Petitioner for his cervical spine on 2/7/19 and he has substantially improved. Petitioner was also scheduled for follow-up for lumbar spine surgery at the time of the deposition. Dr. Gornet again reiterated that the need for both surgeries was related to the work assault.

CONCLUSIONS OF LAW

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

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *International Harvester v. Indus. Comm'n*, 442 N.E.2d 908 (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 workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011).

The evidence demonstrates that Petitioner was working full duty without restrictions prior to the work accident. He testified he has never missed any time from work as a result of a neck or back condition before the accident. Following the accident, Petitioner consistently reported neck and low back symptoms which were consistent with the pathology revealed on objective diagnostic studies. The Arbitrator finds the opinions of Dr. Gornet more credible than the opinions of Dr. Chabot, as his interpretation of the diagnostic studies is unsupported by the evidence and is contradicted by two different radiologists. The Arbitrator places weight on the fact that the objective intraoperative findings and the radiologist's interpretation of the diagnostic studies fully support Dr. Gornet's diagnoses. The MRI studies demonstrated herniations at

multiple levels throughout Petitioner's cervical and lumbar spine. Additionally, Petitioner's response to conservative and operative care demonstrate that his complaints were consistent with the diagnoses and that he received the appropriate care. The Arbitrator therefore finds Petitioner met his burden of proof and that his current conditions of ill-being in his cervical and lumbar spine are causally connected to his injury on 2/19/18.

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 manifest weight of the evidence establishing that Petitioner's current condition of ill-being in his cervical and lumbar spine is causally related to the accidental work injury on 2/19/18, the Arbitrator finds Petitioner is entitled to reasonable and necessary medical expenses. The Arbitrator finds the care and treatment Petitioner received reasonable and necessary based on the objective medical evidence and Petitioner's response to care. Though Petitioner favorably responded temporarily to conservative care, Petitioner did not obtain lasting relief from his work injuries until after his surgeries.

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

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

Pursuant to §8.1b of the Act, permanent partial disability from injuries that occur after September 1, 2011 are to be established using the following criteria: (i) the reported level of impairment pursuant to subsection (a) of the Act; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b. The Act provides that, "No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b)(v).

(i) **Level of Impairment**: Neither Party submitted an AMA rating. Therefore, the Arbitrator gives no weight to this factor.

(ii) **Occupation**: Petitioner returned to full duty work as a Correctional Lieutenant for Respondent. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 44 years old at the time of his injury. He is younger and has a considerable number of years over which he must live and work with his disability. The Arbitrator places greater weight on this factor.

(iv) **Earning Capacity**: There is no evidence of reduced earning capacity contained in the record. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of his work accident, Petitioner underwent a three-level disc replacement at C3-4, C4-5, and C5-6 and a two-level disc replacement at L4-5 and L5-S1. Despite the improvement from conservative and surgical care, Petitioner continues to have residual symptoms. He testified he still has pain in his cervical region and his range of motion is limited from side-to-side. He stated his neck gets sore when he looks up for an extended period of time making activities like changing a light bulb difficult. He testified that cold weather aggravates both his neck and back. He takes over-the-counter Tylenol or Ibuprofen as needed for pain. He is no longer able to engage in water sports which he did every season. He attempted to put up a deer stand this hunting season but was not successful because he is uneasy on ladders since his injury. His sleep has been adversely affected due to tinnitus and muscle spasms which he did not experience prior to the accident. Petitioner testified he was in the process of building a house when the accident occurred and he has not been able to complete construction due to his injuries. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator orders Respondent to pay Petitioner the sum of $**790.64 (Max. rate)**/week for a period of **225 weeks**, as provided in Section 8(d)2 of the Act, because the injuries sustained caused **25% loss of the body as a whole as a result of injuries to his cervical spine, and 20% loss of the body as a whole as a result of injuries to his lumbar spine.**

Respondent shall pay Petitioner compensation that has accrued from December 5, 2019 when Dr. Gornet released Petitioner at maximum medical improvement, through February 11, 2021, and shall pay the remainder of the award, if any, in weekly payments.

Linda J. Cantrell

Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC029770
Case Name	John Hobbs v. State of Illinois - Shawnee Correctional Center
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	22IWCC0249
Number of Pages of Decision	6
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Nicole Werner

DATE FILED: 7/11/2022

/s/Marc Parker, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Hobbs,
Petitioner,

vs. No. 16 WC 029770

State of Illinois—Shawnee Correctional Center,
Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §8(a)

This matter comes before the Commission on Petitioner's §8(a) Petition, seeking additional medical benefits for treatment after arbitration. Following a hearing and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, hereby grants the petition for the reasons set forth below.

I. FINDINGS OF FACT

A. Procedural Background

On March 9, 2018, a Decision was issued by the Arbitrator on the sole issue of the nature and extent of Petitioner's permanent partial disability. The Arbitrator awarded Petitioner 64.5 weeks under §8(e) for 30% loss of use of the left leg and 50 weeks under §8(d)2 for 10% loss of use of the person-as-a-whole for his left shoulder injury. Both parties sought review by the Commission, and the Arbitrator's decision was affirmed and adopted on September 4, 2018.

Thereafter, Petitioner filed this Petition pursuant to §8(a)[1] of the Act, seeking additional medical benefits for his left shoulder. Both parties appeared and a hearing was held before Commissioner Parker on June 9, 2022. A record was made.

[1] Although Petitioner's Petition for Review refers to both §8(a) for additional medical care and §19(h) for an increase in permanency, on this review, Petitioner seeks only §8(a) prospective medical care. PX3; Tr. 4-5.

B. Findings of Fact

The findings of fact and conclusions of law from the arbitration decision, which was affirmed and adopted by the Commission, in the above-captioned case are binding and herein adopted and incorporated by reference. The Commission notes the following pertinent findings as they relate to the Petitioner's §8(a) claim.

At the time of the September 6, 2016 accident, Petitioner was a 38-year-old correctional lieutenant. He was engaged in practical combat practice when the mat beneath him slid and caused him to fall. He injured his left knee and left shoulder, and Respondent accepted and paid for medical and lost time benefits for both injuries. Dr. Nathan Mall at The Orthopedic Center of St. Louis performed a left knee arthroscopy with ACL reconstruction and medial meniscus repair on October 6, 2016. Surgery to repair Petitioner's left shoulder labral and upper subscapularis tears was postponed until Petitioner was out of his post-operative knee brace and had completed a course of physical therapy.

On December 1, 2016, Dr. Mall performed arthroscopic left shoulder surgery consisting of debridement of the superior labrum, subacromial decompression and acromioplasty, and open biceps tenodesis. Intraoperative findings included a superior labral tear with extension into the biceps tendon, Grade IV cartilage changes to the glenoid and humeral head, and an acromial spur. Petitioner began physical therapy for his shoulder and continued therapy for his left knee. When the therapy caused further inflammation to his shoulder, Dr. Mall administered a cortisone injection that provided substantial relief. Dr. Mall found Petitioner had reached maximum medical improvement on April 11, 2017 and released Petitioner to full duty.

Respondent obtained a §12 report from Dr. Richard Katz on July 7, 2017. At that time, Dr. Katz confirmed Dr. Mall's diagnoses and provided impairment ratings of 15% of the left upper extremity and 10% of the left lower extremity.

At arbitration on October 11, 2017, the parties stipulated to all issues except the nature and extent of the permanent partial disability. Petitioner testified that he continued to have weakness and difficulty with overhead work and his left shoulder would catch occasionally. He testified he could no longer participate in his former rock-climbing hobby and had difficulty holding his arm out above his head and performing housework. His left knee felt arthritic and stiff, and his competitive running times had slowed. He was working full duty and did not require the use of any brace. He was able to fully perform his job duties.

After considering the five factors under §8.1b, the Arbitrator awarded Petitioner 30% loss of use of the left leg and 10% loss of use of the person-as-a-whole for his left shoulder injury. These awards were affirmed by the Commission on September 4, 2018.

Petitioner now seeks additional medical treatment for his left shoulder injury pursuant to §8(a) of the Act.

C. Post-Arbitration Treatment

At the hearing of his §8(a) petition, Petitioner testified that, although his left knee condition

has been "absolutely amazing," his left shoulder continued to cause him pain, restrict his range of motion and be very weak after the 2018 arbitration hearing. Tr. 14. When the pain and stiffness persisted, Petitioner sought re-evaluation and additional treatment of his shoulder injury.

On January 5, 2021, Petitioner returned to Dr. Mall, who noted reduced range of motion and "a lot of scapular substitution" with rotator cuff testing. A new MRI showed severe osteoarthritis with a chronically torn long head of the biceps, advanced from what the doctor had detected in 2016. Dr. Mall diagnosed left shoulder adhesive capsulitis and glenohumeral arthritis, provided a cortisone injection, and ordered physical therapy. These measures temporarily alleviated Petitioner's complaints, and Dr. Mall returned him to work full duty on April 6, 2021.

However, Petitioner's condition continued to deteriorate, and November 2, 2021 x-rays showed a large bony osteophyte off the humeral head, complete loss of joint space, and flattened humeral head.

Dr. Mall testified in deposition that although Petitioner had some pre-existing osteoarthritis at the time of his initial treatment for his shoulder injury, his arthritis when he returned for additional treatment in 2021 was far more extensive. Dr. Mall causally related Petitioner's increase in arthritis from the time of his work accident to the time of his return for additional treatment to the work accident. Petitioner's injury "certainly played a significant role in the development of [Petitioner's] arthritis and the severity of it." Dr. Mall did not believe that Petitioner's participation in jujitsu or wrestling would have accelerated the progression of his arthritis, nor would weightlifting unless the weights were very heavy.

Dr. Mall did not believe a second cortisone shot would benefit Petitioner: "our only option is to either live with the range of motion and discomfort or proceed with total shoulder arthroplasty." Petitioner wishes to proceed with the surgical option.

On January 18, 2022, Respondent obtained a §12 evaluation by Dr. Timothy Farley. Dr. Farley noted Petitioner's complaints of shoulder pain, weakness, stiffness, loss of motion, locking, catching, popping, grinding, and giving way. He noted on exam Petitioner's significantly reduced range of motion with crepitus and Petitioner's inability to perform Neer, Hawkins, or O'Brien's maneuvers due to the severe restrictions on his passive range of motion. Dr. Farley noted that at the time of his §12 evaluation, he had no x-rays or MRIs and no medical records pre-dating January 5, 2021. Despite the absence of diagnostic radiologic tests and earlier records, Dr. Farley diagnosed Petitioner with end-stage osteoarthritis of the left shoulder. He noted that, *based on the records available to him*, he did not believe there was a causal relationship between Petitioner's osteoarthritis and his September 6, 2016 work accident. Dr. Farley believed Petitioner's arthritis pre-dated his work accident but acknowledged that this was "an educated guess" because he had not reviewed any medical records or radiographic images from that time. He believed Petitioner should consider shoulder replacement but found him at MMI as his condition related to his work accident. Dr. Farley would have returned Petitioner to work full duty as of the date of his evaluation.

On May 24, 2022, Dr. Farley issued an addendum to his report. After reviewing Petitioner's MRIs, Dr. Farley diagnosed Petitioner with "advanced, severe, end-stage osteoarthritis" which he

opined took years to develop and was not related in any way to Petitioner's work accident. Based on the level of deterioration, Dr. Farley believed Petitioner would have been required to seek future treatments unrelated to his accident, including shoulder replacement. Although the doctor denied that there was any causal relationship between Petitioner's current condition of ill-being and his work accident, he agreed that, given Petitioner's advanced arthritis, the shoulder replacement surgery recommended by Dr. Mall was reasonable.

On cross-examination during his deposition, Dr. Farley admitted that Petitioner's osteoarthritis had progressed significantly between the 2016 MRI and his §12 exam and that the amount of deterioration due to arthritis was atypical for a man of Petitioner's age. However, he did not feel it was out of the range of natural progression of osteoarthritis. He saw no evidence of malingering or symptom magnification. Although the doctor did not believe Petitioner required any work restrictions due to his shoulder condition, he recommended that Petitioner refrain from any heavy lifting.

II. CONCLUSIONS OF LAW

In order to establish that he is entitled to post-arbitration medical expenses under §8(a), Petitioner must prove that his current state of ill-being with regard to his left shoulder is causally related to his September 5, 2016 work accident and that the treatment he received for that condition was reasonably required to cure or relieve him from the effects of the accidental injuries suffered as a result of his work accident. 820 ILCS 305/8(a). If Petitioner fails to prove that his current condition of ill-being is causally connected to his work accident, his request for post-arbitration medical expenses pursuant to §8(a) of the Act should be denied. *City of Chicago v. Illinois Workers' Comp. Comm'n,* 409 Ill. App. 3d 258, 266-67 (2011).

After a careful review of the entire record, the Commission finds that Petitioner has established his left shoulder condition for which he received treatment from 2021 through 2022 is causally related to his 2016 accident. Petitioner returned to work full duty on April 11, 2017. However, he testified at his October 11, 2017 Arbitration Hearing that he continued to suffer pain, restricted motion, and weakness in his left shoulder. Petitioner had no intervening accidents or injuries to his left shoulder, and he continued to work full duty until his appointment with Dr. Mall on January 5, 2021.

The Commission finds Dr. Mall's causation opinion more persuasive than Dr. Farley's. Dr. Mall has been Petitioner's treating physician since his September 5, 2016 accident. He was Petitioner's initial treater and performed the first surgery. He acknowledged that Petitioner had some minimal arthritis prior to his accident but found the increase in arthritis from the 2016 MRI to the 2021 MRI was significantly greater than he would have expected to see develop naturally. Dr. Mall attributed this increase to his work injury.

In light of the foregoing, the Commission grants Petitioner's §8(a) petition with regard to his post-arbitration left shoulder treatment by Dr. Mall ($1,372.00), Midwest Imaging ($2,990.00), and Joyner Therapy Service ($2,111.00), as well as Petitioner's out-of-pocket expenses for co-pays ($350.00). Respondent is further ordered to authorize and pay for the shoulder replacement surgery and post-operative care, as recommended by Dr. Mall.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's §8(a) Petition for additional medical benefits, as documented in Petitioner's Exhibit 4, is granted, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for the total shoulder replacement surgery recommended by Dr. Mall, as well as all post-operative care and medications, pursuant to Sections 8(a) and 8.2 of the Act.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

July 11, 2022

mp/dak
r-6/9/22
068

/s/ *Marc Parker*
Marc Parker

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

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC001716
Case Name	Linda Jackson v. City of Chicago
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0251
Number of Pages of Decision	16
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Mark Lee
Respondent Attorney	Stephanie Lipman

DATE FILED: 7/11/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LINDA JACKSON,

Petitioner,

vs. NO: 16 WC 01716

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues[1] of Petitioner's entitlement to maintenance benefits and the nature and extent of Petitioner's permanent disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission, like the Arbitrator, finds Mr. Patsavas' vocational rehabilitation conclusions are credible and persuasive, and we conclude that Petitioner made a good faith job search effort and was therefore entitled to maintenance benefits. The Commission further finds

[1] Respondent's Petition for Review identifies causal connection and entitlement to medical expenses as additional issues on Review. However, with respect to causal connection, the parties stipulated to it on the Request For Hearing stipulation sheet (Arb.'s Ex. 1) and at the commencement of the arbitration hearing (T. 5).With respect to medical expenses, Respondent indicated that all medical bills were paid on the Request For Hearing stipulation sheet (Arb.'s Ex. 1) and further explained at the arbitration hearing that "with regard to the bill, the City is claiming that there are no outstanding bills; however, if any bills are to be awarded, the City would agree to pay it pursuant to the fee schedule" (T. 5-6).

Petitioner established odd-lot permanent total disability. The Commission observes, however, the Decision contains a computational error as well as an internal inconsistency: 1) the Decision indicates a temporary total disability (TTD) rate of $438.27, however, Petitioner's stipulated average weekly wage of $664.04 yields a TTD rate of $442.69 ($664.04 / 3 x 2 = $442.69); and 2) the Decision awards both maintenance benefits and permanent total disability benefits on April 16, 2021. As such, the Commission modifies the Decision as follows:

Petitioner is entitled to TTD benefits in the sum of $442.69 per week for 77 1/7 weeks, representing the stipulated period of December 4, 2015 through May 26, 2017. Respondent is entitled to a credit of $27,575.13 for TTD benefits previously paid. Resp.'s Ex. 2.

Petitioner is entitled to maintenance benefits in the sum of $442.69 per week for 202 6/7 weeks, representing May 27, 2017 through April 15, 2021. Respondent is entitled to a credit of $29,725.49 for maintenance benefits previously paid. Resp.'s Ex. 2.

Petitioner is entitled to permanent total disability benefits in the sum of $517.40 per week commencing on April 16, 2021 and continuing for life.

In addition, the Commission corrects Page 7 of the Decision to reflect the employee's burden of proof for obtaining compensation under the Act is set forth in Section 1(d) (*820 ILCS 305/1(d)*).

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 14, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $442.69 per week for a period of 77 1/7 weeks, representing December 4, 2015 through May 26, 2017, that being the stipulated period of temporary total incapacity for work under §8(b). Respondent shall have a credit of $27,575.13 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits in the amount of $442.69 per week for a period of 202 6/7 weeks, representing May 27, 2017 through April 15, 2021, as provided in §8(a) of the Act. Respondent shall have a credit of $29,725.49 for maintenance benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses as stipulated by the parties and as provided in §8(a), subject to §8.2 and any credit pursuant to §8(j).

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner permanent total disability benefits of $517.40 per week for life, commencing on April 16, 2021, as provided in §8(f) of the Act. Commencing on the second July 15 after the entry of this award,

Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in §8(g) of the Act.

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

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

Under §19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 11, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 5/25/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC001716
Case Name	JACKSON, LINDA v. CITY OF CHICAGO
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Kasey Mattox
Respondent Attorney	Matthew Locke

DATE FILED: 7/14/2021

THE INTEREST RATE FOR THE WEEK OF JULY 13, 2021 0.05%

/s/ Charles Watts, Arbitrator
Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Linda Jackson
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # **16** WC **001716**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **4/16/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **12/1/2015**, 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 $**34,530.08**; the average weekly wage was $**664.04**.

On the date of accident, Petitioner was **60** 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 $**27,575.13** for TTD, $**N/A** for TPD, $**29,725.49** for maintenance, and $**N/S** for other benefits, for a total credit of $**57,300.62**.

ORDER

RESPONDENT SHALL PAY PETITIONER PERMANENT AND TOTAL DISABILITY BENEFITS OF $517.40/WEEK FOR LIFE, COMMENCING 4/16/2021, AS PROVIDED IN SECTION 8(F) OF THE ACT.

COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE *Rate Adjustment Fund*, AS PROVIDED IN SECTION 8(G) OF THE ACT.

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES, AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT AND PER THE STIPULATION OF THE PARTIES, SUBJECT TO ANY CREDIT PURSUANT TO SECTION 8(J).

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

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

JULY 14, 2021

Signature of Arbitrator

Findings of Fact:

The Petitioner, Linda Jackson, testified that she began working for the Respondent in 2004. (T.8) A copy of the Petitioner's resume, which she prepared during the vocational rehabilitation process, was admitted into evidence. (PX6-File Folder (FF) No.6)

The Petitioner testified she was first employed by the Respondent as a traffic control aide. She further testified that on the date of the accident she was employed as a custodian. (T.11)

The Petitioner testified that that on the December 1, 2015, she was "lifting a lot of heavy trash that day, and then I had to take it outside and throw it over into a Dumpster, not a regular trash can that's level, but over my shoulder and throw it. It was high to throw it over the trash can and that's when I injured my shoulder." The petitioner further testified that after this event her arm "was very painful." (T.13)

The Petitioner testified that she first began treating at U.S. HealthWorks, a medical service that was provided by the Respondent. (PX1) In the office visit with U.S. HealthWorks on December 3, 2015, the physician charted the patient "lifted heavy garbage bag and felt a sharp pain." The Petitioner also underwent physical therapy at that location.

While treating with U.S. HealthWorks, the Petitioner was referred for an MRI. (PX3) The MRI performed at Athlete Imaging on March 31, 2016, revealed "Supraspinatus rim rent tear with minimal retraction." (PX3)

The Petitioner testified that she came under the care of Dr. Thomas Poepping, an Orthopedic Surgeon in Chicago, IL. Dr. Poepping is an "Independent Contractor of U.S. HealthWorks Medical Group." (PX2)

The records of Dr. Poepping were admitted into evidence. (PX2) In the initial evaluation on April 14, 2016, Dr. Poepping charted the Petitioner was "carrying a heavy trash bag overhead into a dumpster, when she felt a pull into the shoulder. This continued to be painful for her in the posterolateral shoulder on the right side. She did physical therapy, which she feels made her worse. She has not had injections. It bothers her a lot with overhead activities, lifting and nighttime." (PX2)

Dr. Poepping re-evaluated Ms. Jackson on May 12, 2016. Based upon his review of the MRI he recommended surgery. (PX2)

Surgery was performed on July 26, 2016. The preoperative diagnosis was a right shoulder rotator cuff tear. The postoperative diagnosis was also a right shoulder rotator cuff tear. The procedures performed were a right shoulder arthroscopic rotator cuff repair, a subacromial decompression and an extensive debridement. (PX4)

The Petitioner testified that after surgery she attended post-surgical therapy at U. S. HealthWorks (T.16)

The Petitioner testified that at the end of her therapy, she was released with permanent restrictions. These were issued by Dr. Poepping. (2) The Petitioner testified in regard to these restrictions and these were also admitted into evidence.

Specifically, these restrictions were 'NO OVERHEAD LIFTING NOR MORE THAN 10LBS-PUSH AND PULL 40 LBS-OCCASIONAL OVER HEAD USE OF ARMS-NO CARRYING MORE THAN 20LB-RESTRICTIONS ARE PERMANENT." (PX11)

These restrictions were also submitted and confirmed by the physicians at US HealthWorks, the Occupational Clinic retained by the Respondent (PX11).

The Petitioner testified that by and through her previous attorney, she requested to be returned to work within her restrictions. The Petitioner testified she was not returned to work with these restrictions by the City of Chicago. (T.18)

The Petitioner testified that in June of 2017, pursuant to the city's instructions, she requested a "Reasonable Accommodation" with the City of Chicago (PX 5) The letter instructing her to do this and the application were admitted into evidence. The Petitioner testified she wanted to go back to work for the city within her restrictions, but no one (from the city) ever contacted her. (T.19)

The Petitioner testified that when she worked for the Respondent prior to the injury, she had a driver's license but never had a car and still does not own a vehicle. (T.24-25) She testified she would use public transportation to get to her job in the city.

The Petitioner testified that in June of 2017, the City retained the services of Vocamotive to help the Petitioner with her job search. The extensive file of Vocamotive was admitted into evidence. (PX6)

The Petitioner testified that her first meeting with Vocamotive was on July 10, 2017, at her former attorney's office. She further testified that the meeting was attended by the head of Vocamotive, Mr. Joe Belmonte.

The Petitioner testified that she lived in the City of Chicago but was required to go to the Vocamotive office in Hinsdale to undertake the vocational training. This required her to take a bus to the Metra train and the use of an Uber. (T.21) She used public transportation to go to their office in Hinsdale for all her future meetings.

The Petitioner testified that when she began vocational rehabilitation at Vocamotive they had her prepare a resume, issued her a computer, and set up an online Indeed account, (T. 21-22, PX6-FF6)

The Petitioner testified that during the vocational process she took classes in "Windows 7" and "Basic" and identified the certificates from Vocamotive showing the completion of these courses. (T.24) (PX6-FF 6)

The Petitioner testified from July of 2017 through November of 2017, while working with Vocamotive, she was taking courses, writing a resume and started looking for a job. (T.25) She testified that Vocamotive would give her certain people to contact. The Petitioner testified that in November of 2017, she made 13 contacts and these contacts consisted of: calling an employer, submitting online applications, submitting a cover letter to an employer, and following up with a phone call. (T.26-26)

The record of all job contacts the Petitioner made throughout the entire vocational process were entered into evidence. (PX6-FF1)

In regard to specific jobs she applied to, the Petitioner testified that she applied for a job with Northwestern Medicine and for a job with Glen Lerner - Attorney. (T.28) Neither of these employers offered her a job.

The Petitioner testified that throughout the entire vocational process she was motived to find a job and she wanted to return to work with the city. However, during the vocational process no job was ever offered. (T.29-29) Despite the fact she prepared a resume, took courses, travelled to Vocamotive in Hinsdale multiple times per week and made employer contacts, after approximately four months of these efforts, vocational rehabilitation was terminated because of "lack of effort." (T.31)

The Petitioner testified that at that point she hired Mr. Mark Lee, who went in front of an IWCC Arbitrator and the vocational process was re-started.

The Petitioner testified that she had previously had a medical certification license. The Petitioner told Vocamotive that her license would expire in March of 2018. Petitioner testified that "medical billing" was something she could do because prior to her employment with the Respondent, she had done that work for Rush Hospital. See resume. (T. 34) (PX6 FF No.6) The Petitioner testified that the Respondent would not pay for it and she could not afford to pay for it. This statement is verified in the Vocamotive reports. (PX6-FF2)

In July of 2018, vocational efforts began again. (PX6-FF1-2) The Petitioner testified that she started looking for jobs in November 2018 and continued to look for jobs through May of 2019. The Petitioner testified that she did all of the same things that she testified earlier: she was given contacts by Vocamotive, and with those contacts she made phone calls, she sent resumes, she sent cover letters, did interviews and followed up with thank you letters. (T.36) The Petitioner made approximately 650 contacts but no job was offered to her. (T.36-37)

After her benefits were terminated, the Petitioner meet with Dave Patsavas, a vocational counselor. The Petitioner testified that she began looking for jobs under the guidance of Mr. Patsavas. The records of this job search were admitted into evidence. (PX8) The Petitioner testified that she contacted 60 additional employers. When asked if she was ever offered a job, the Petitioner responded "they liked my resume … They asked me what year did I graduate, and when they found out how old I was, they didn't want to talk anymore."

The Petitioner testified that in May of 2020, she was contacted by the Respondent by mail in regard to employment opportunities with the Respondent. This was three years after Petitioner began the process of vocational rehabilitation.

This May 27, 2020 letter from Lourdes Lim, an employee of the Chicago Department of Transportation Personnel, was admitted into evidence. (PX9)

This letter stated that Ms. Jackson was eligible "for the position of career service Bridge Operator with the Chicago Department of Transportation. This letter serves as a contingent offer of employment." (PX9)

This letter also stated the Respondent was going to proceed with a criminal background check as well as a pre-employment drug test. The letter further stated that employment with the respondent was contingent on her passing both tests. (PX9)

Included with this letter was a description of the job being offered to the Petitioner. The job being offered was a "BRIDGE OPERATOR." This job description was admitted into evidence.

In that description, it stated that the "MINIMUM QUALIFICATIONS" for the position was "A valid State of Illinois Driver's License" and "Must have permanent use of an automobile that is properly insured, including a clause specifically insuring the City of Chicago from accident liability." (PX)

At the request of the Respondent the Petitioner "went down to CDOT, and I spoke with this Lourdes Lynn and I filled out my paperwork for a position with the City of Chicago." (Tp.40-41)

Admitted into evidence was a form from Occupational Health Centers of Illinois. (PX9) In that form, the provider stated "Pending Medical Hold: Based on today's examination, our medical provider was unable to approve this individual for the position. The medical provider has placed this individual's examination on hold until additional documentation and/or testing can be completed. The individual has been provided with details to return to the center with the appropriate documentation so that a final disposition of this examination can be made." (PX9)

The Petitioner testified that she took "the paperwork" (from Occupational Health Centers) to her own physician at the University of Illinois. (T.42) The Petitioner testified that her doctor "filled out the paperwork out and faxed it back to them, but they kept claiming they never got it." The Petitioner testified to the best of her knowledge her work restrictions were never lifted by her doctor.

The Petitioner testified that in August of 2020, she got a letter stating the position had been filled. (Tp.43) This letter was admitted into evidence. (PX9)

In regard to her arm, the Petitioner testified "I still have pain in my arm on and off. I can't lift …my cast iron skillet. I have to have my sons, if I have something in it that I cooked, to lift it and pour it in there because it's too heavy. It makes my arm hurt" (T.43-44)

The Petitioner testified she has a "dull, nagging pain, and it comes and goes, but most of the time it's there. And I asked my doctor for some pills because it bothers me a lot. So he prescribed me some Tramadol and that's what I'm taking for it because it never goes away." (T.44)

The Petitioner testified "I can't lift my hand up over my head for an extended period of time … It's like, a tightness in there … where I actually had my surgery. It hurts." (T.45) The Petitioner testified the "top of my refrigerator, if I want to clean it off, I'm a right-handed person, but I have to use my left hand because I can't extend my arm up there … Then my flowers that I have outside hanging, I can't use this arm to go up there and prune or water them or anything because it's too high." (T.45-46)

The Petitioner testified that on advice from her doctor she does not take over-the-counter medications for pain because "it was messing with my kidneys." (T.46)

The Petitioner testified that she "used to love bowling … Like I said, I'm right-handed, so I can't do it anymore." (T.47)

In regard to her arm, the Petitioner testified that "In the morning it is stiff, but as the day goes, it kind of, like, loosens up. It's like, frozen in the morning time, but kind of, like, loosens up during the day … When the weather changes, that's a different story. I have constant pain all day. It's like it never goes away. It's like a piece of ice or something on my shoulder. That's how bad it hurts." (T.46-49)

The Petitioner testified that when she goes grocery shopping, she has her sons carry the bags for her. "I can't carry them." (T.49)

Mr. Dave Patsavas of Independent Rehabilitation was retained by Petitioner's counsel to assess her efforts and assist her in locating gainful employment.

Mr. Patsavas's deposition, narrative report and Curriculum Vitae were admitted into evidence. (PX7) Mr. Patsavas also testified regarding his qualifications as a vocational counselor. Regarding his practice, Mr. Patsavas testified half of his patients are referred from Petitioners' attorneys, while the other and half are referred by Respondents' attorneys. Mr. Patsavas testified that the Petitioner, Linda Jackson, was referred to him by the Petitioner's attorney in October of 2019.

During his testimony, Mr. Patsavas identified "a very large banker's box full of the records." (PX7, p.10.) Mr. Patsavas identified those records as the records of Vocamotive. (PX6) Mr. Patsavas testified that in preparing his report, he had reviewed all of these records. (PX, p.11)

Mr. Patsavas testified that he met with the Petitioner and reviewed her medical records in addition to the reports of Vocamotive.

In his testimony in referencing his report, Mr. Patsavas stated the restrictions imposed by Dr. Poepping were "pretty much what I would consider light duty based on no lifting greater than 25 pounds floor to waist, 20 pounds from waist to shoulder, no overhead lifting 10 pounds." (PX7p.14)

In reviewing the Petitioner's education, he testified she is high school graduate, and completed an on-line course at Kaplan University earning a certified medical assistant degree. (PX7, p.15)

Mr. Patsavas testified that Ms. Jackson was employed as a janitor/custodian. "The dictionary of occupational titles identifies different criteria generically as far as what the physical demands are and overall responsibilities along with the skills required to perform those jobs. As a janitor slash custodian that's considered to be in the medium category for physical demand; lifting, carrying, pushing, pulling over 50lbs." (PX7, p.16)

Mr. Patsavas opined that "based upon Ms. Jackson's restrictions as identified by treating physicians and throughout the FCE, she was not capable of returning back to her prior line of work," … with the city of Chicago … "as a janitor custodian." (PX7, p.16)

When referencing the initial tests taken by Vocamotive, Mr. Patsavas testified "There was something of interest to me as a vocational consultant, some areas like math computation was at a 4th grade level. She had low percentiles as far as information processing. It was identified to me that she may work with written information at a slower rate than average." (PX7, p.19)

Mr. Patsavas testified that at this point, some two months after the vocational process began, it was the opinion of Joe Belmonte that Ms. Jackson was not motivated to participate in vocational rehab, so the service was suspended. (PX7, p.24)

In reviewing the reports of Vocamotive, which consisted of the initial vocational report, the vocational tests taken in September of 2017, the vocational progress report on November 30th, the fact that she was taking computer classes (Basic Chapter 1 and 2), Mr. Patsavas testified he thought Ms. Jackson was in full compliance with the efforts of Vocamotive. (PX7, p.23)

Mr. Patsavas testified that the vocational effort restarted on July 31st, 2018. In reviewing Vocamotive's report of September of 2018, Mr. Patsavas testified that Ms. Jackson was meeting with a Vocamotive vocational counselor, working on her keyboarding. Ms. Jackson required extensive one on one assistance because she had difficulties understanding the terminology. (PX7, p.25) Mr. Patsavas also reviewed Vocamotive's reports from November 2018 through March of 2019. (PX7, p.27) Mr. Patsavas testified he though Petitioner was in full compliance with the vocational effort. (PX7)

Mr. Patsavas also testified concerning the job search Petitioner undertook after vocational rehabilitation was suspended, a second time, by the Respondent. Mr. Patsavas testified that from May of 2019 through November of 2019, Ms. Jackson independently continued to look for a job without guidance. (PX7, p.38) Mr. Patsavas reviewed the positions she looked for and found them to be appropriate. He further testified that during this period, no one had offered Ms. Jackson a job.

Based upon his review of the records of Vocamotive, and his work with Ms. Jackson specifically the reports from November 2018 through May of 2019 which documented "315 phone contacts; 271 online applications; 31 online assessments, 248 cover letters prepped between her and the staff

of Vocamotive, and an additional 245 job leads that she was provided by Vocamotive. Mr. Patsavas testified "that based upon the review of all the records and my interview with her, given the number of factors, my opinion is that a stable viable labor market would not exist for her." (PX7, p. 43) In his opinion, Ms. Jackson would be an "odd-lot permanent total under Illinois Law." (PX7, pp. 43-46)

Mr. Patsavas testified that Ms. Jackson "did some additional job search afterwards with still no positive results. She had not worked in four and a half years, almost five now. Since the date of the injury. She'll be 65 within a little more than a month. She has physical restrictions." (PX7, p. 44) "So the work injury was the start of the aspect as far as her not being able to --- she lost access to her regular line of work." (PX7, p. 44)

Mr. Patsavas testified that "Based upon the number of applications and online and everything else," it was his opinion that the Petitioner made a good faith effort to find a job. (PX7, p.41)

No testimony from Vocamotive was offered at the time of Trial.

Conclusions of Law:

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law.

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

To obtain compensation under the act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill.2d 249, 253 (1980) including that the accidental injury both arose out of and occurred in the course of his employment (Horvath v. Industrial Commission, 96 Ill.2d. 349 (1983)) and that there is some causal relationship between the employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, I29 Ill. 2d 52, 63 (1998). 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).

Credibility is the quality of a witness which renders her 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 her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. Smith v. Industrial

Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much her testimony might be contradicted by the evidence, or how evidence it might be that her story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also Hansel & Gretel Day Care Center v. Industrial Commission, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

The Petitioner 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). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" Shell Petroleum Corp. v. Industrial Commission, 10 N.E.2d 352 (1937). The burden of proof is on a claimant to establish the elements of her 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. Revere Paint & Varnish Corp. v. Industrial Commission, 41 Ill.2d. 59 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. Spankroy v. Alesky, 45 Ill. App.3d 432 (1st Dist. 1977).

Petitioner testified in open hearing before the Arbitrator who viewed her demeanor under direct examination and under cross-examination. Petitioner's manner of speech, body language, and flow of answers to questions, when added together, showed sincerity and credibility. Petitioner's credibility was only enhanced during a short cross examination. Review of the evidence, including the deposition of Petitioner's vocational rehabilitation expert, whose testimony was essentially unrebutted, only adds to Petitioner's credibility.

In regard to disputed issue (L), the Arbitrator makes the following conclusions of law:

The Arbitrator finds that Petitioner successfully established that her work-related injury made her eligible for an odd-lot permanent total disability award.

It was not disputed that Petitioner did three separate stints of vocational rehabilitation. Two of which were with a vocational counselor of Respondent's choosing and the final with a vocational expert of Petitioner's choice. While the reports of Vocamotive found the Petitioner to be unmotivated and uncooperative, the Arbitrator is more convinced by the sheer number of job searches performed and the testimony of Petitioner's vocational expert shows that Petitioner was motivated to find employment.

The Respondent even offered employment for Petitioner long after she had been released with restrictions. After she attempted to accept this offer of employment and took the necessary steps to begin work, Respondent's own occupational physician did not clear Petitioner to return to work at that position. The Respondent ended up hiring a different party as a result. The Arbitrator notes that when offered a new job opportunity, the Petitioner seemed motivated and willing to pursue

that opportunity. This also demonstrated that Petitioner's work restrictions made finding new work very difficult for the Petitioner.

In the end, it was the testimony of the vocational counselor that swayed the opinion of the Arbitrator. Mr. Patsavas essentially concluded that there was no stable job market for the Petitioner due to her age, physical limitations, and transferrable skills. He came to this conclusion after reviewing years of Petitioner's numerous job search logs, her vocational efforts, aptitude testing, and his own personal experience with the Petitioner. The Petitioner's testimony on the stand, and the evidence presented at trial showed that she was both eager and willing to find employment but due to her injuries she had lost the ability to find gainful employment. Therefore, the Arbitrator awards Petitioner $517.40 in benefits a week starting 4/17/2021 payable through her natural life.

In regard to disputed issue (K), the Arbitrator makes the following conclusions of law:

Since neither party disputed the dates or entitlement of temporary total disability, the Arbitrator finds that Petitioner was entitled to temporary total disability from 12/4/15 - 5/26/2017 or 77 weeks at a rate of $438.27, totaling $33,746.51 in benefits minus Respondent's credit of $27,575.13. The Arbitrator therefore awards Petitioner an additional $6,171.38 in benefits after Respondent's credit.

There was a dispute to Petitioner being entitled to additional maintenance benefits. The Petitioner alleges that she is entitled to maintenance from 5/27/17 - 4/16/21, or 203 weeks of maintenance at a rate of $438.27. The Respondent disputed Petitioner's entitlement for maintenance benefits after 5/24/2019 and has a credit of $29,725.49. Having found that Petitioner did in fact comply with vocational efforts and tried, unsuccessfully, to find employment, the Arbitrator awards Petitioner an additional $88,968.81 minus Respondent's established credit of $29,725.49, which would net Petitioner an additional $59,243.32 in maintenance benefits.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC025236
Case Name	Christopher Luzynski v. Fluor Maintenance Services Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0252
Number of Pages of Decision	29
Decision Issued By	Deborah Baker, Commissioner, Deborah Simpson, Commissioner

Petitioner Attorney	Mary Massa, Todd Schroader
Respondent Attorney	Martin Spiegel

DATE FILED: 7/11/2022

/s/ Deborah Baker, Commissioner

Signature

DISSENT: /s/ Deborah Simpson, Commissioner

Signature

22IWCC0252

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHRISTOPHER LUZYNSKI,

Petitioner,

vs. NO: 20 WC 25236

FLUOR MAINTENANCE SERVICES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by both Petitioner and Respondent herein, and notice given to all parties, the Commission, after considering the issues of causal connection to Petitioner's current cervical spine condition[1], the reasonableness and necessity of medical expenses for treatment to the cervical spine, whether Petitioner is entitled to prospective medical care recommended by Dr. Gornet for his cervical spine and prospective medical care recommended by Dr. Paletta for his left shoulder, whether Petitioner is entitled to temporary total disability benefits from August 1, 2021 through September 10, 2021, and whether Petitioner had reached maximum medical improvement for his left shoulder condition as of July 31, 2021, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E. 2d 1322 (1980).

The Commission hereby incorporates by reference the findings of fact and conclusions of law contained in the Decision of the Arbitrator with respect to Petitioner's left shoulder condition.

[1] The Commission notes Respondent stipulated that the left shoulder condition is causally related to the May 8, 2020 undisputed work accident.

However, as it pertains to Petitioner's cervical condition, the Commission views the evidence differently than does the Arbitrator, and thus modifies the Decision of the Arbitrator and finds that Petitioner's current cervical condition is causally related to the instant accident for the reasons set forth below:

CONCLUSIONS OF LAW

I. Causal Connection

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 Comm'n*, 79 Ill. 2d 249, 253 (1980). This includes the burden of establishing some causal relationship between his employment and his injury. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989). "Preponderance of the evidence is proof that leads the trier of fact to find that the existence of the fact in issue is more probable than not." *In re C.C.*, 224 Ill. App. 3d 207, 215 (1st Dist. 1991). A claimant must prove that some act or phase of his employment was *a* causative factor in his ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2d Dist. 2005). Recovery will depend on the employee's ability to show that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of a preexisting condition. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). "Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205.

Our supreme court has held that "medical evidence is not an essential ingredient to support the conclusion of the [Commission] that an industrial accident has caused the disability," but rather, "[a] chain of events which demonstrates a previous condition of good health, an accident, and subsequent injury resulting in a disability" may also be sufficient to prove a causal nexus between the accident and the employee's injury. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64 (1982). Proof of prior good health and change immediately following an injury may establish that an impaired condition was due to the injury. *Navistar International Transportation Corp.*, 315 Ill. App. 3d 1197, 1206 (1st Dist. 2000). A causal connection between work duties and a condition may be established by a chain of events, including a claimant's ability to perform duties prior to the accident and inability to do the same following the accident. *Id*.

The Arbitrator found Petitioner failed to prove his current cervical spine condition is causally connected to the May 8, 2020 stipulated work accident. The Commission disagrees. The Arbitrator found that although the accident occurred on May 8, 2020, Petitioner did not complain of neck pain until four days later on May 12, 2020, at which time he felt sharp pain radiating to the left side of his neck. The Commission finds that this fact is not fatal to Petitioner's claim, and when considered in combination with the post-accident medical records, actually supports Petitioner's claim. Petitioner testified that on the day of the accident, he experienced numbness, tingling, and shooting pain from the left shoulder down to his left hand third and fourth digits. Petitioner also testified that after working light duty for two days, he returned to full duty work (on May 11, 2020 for the night shift), and while working, he experienced sharp pain into his neck that traveled down into his left forearm and fingers. Petitioner's testimony is corroborated by the

May 14, 2020 medical record from HSHS Occupational Health. During that visit, Petitioner complained of left shoulder pain and left elbow pain and numbness after torquing an "Impact" tool with his left hand at work on the date of accident. He immediately felt pressure in his third and fourth digits and eventually had left arm swelling. Petitioner informed nurse practitioner Angela Brumleve at HSHS that after two days of light duty work, he returned to full duty work on May 11, 2020, but after this shift, around 7:30 a.m. on May 12, 2020, he noticed increased pain and swelling radiating to the left side of his neck, and had pain when turning his head to the right.

The Commission finds that Petitioner's radicular complaints in his left arm on the date of accident, combined with the associated neck pain he experienced just a few days later after returning to full duty work, support a finding that he did suffer a cervical injury on the date of the accident. Treating physician Dr. Matthew Gornet testified to such in his deposition, stating that there can be overlap between neck and shoulder injuries, and that neck injuries can present as scapular pain, shoulder pain, or arm symptoms. Upon further treatment of Petitioner, Dr. Gornet opined that some of Petitioner's symptoms were cervical in origin, and that this cervical injury was causally related to the instant accident. The Commission agrees with Dr. Gornet, finding that Petitioner's immediate increase in symptoms and specific mention of neck pain in the few days following the accident support a finding that he suffered an accidental injury to his cervical spine on May 8, 2020. The Commission finds that the combination of Petitioner's testimony, corroborative medical records, and the causation opinion of Dr. Gornet, together establishes by a preponderance of the evidence a causal relationship between Petitioner's employment and his cervical injury.

The Commission also disagrees with the Arbitrator's finding that there was no diagnostic evidence of radiculopathy nor any C7 findings after the June 16, 2020 cervical EMG and MRI scan. The Commission finds Dr. George Paletta's diagnosis of probable C7 nerve root irritation to be reasonable and supported by the medical records. In addition to the decreased sensation at C7 noted by Dr. Paletta on June 3, 2020, both the radiologist and Dr. Paletta opined that the June 16, 2020 cervical MRI revealed a C6-7 protrusion with likely annular tear and minimal left foraminal stenosis. Moreover, on July 1, 2020, Dr. Gornet's examination revealed decreased C7 dermatome to light touch, and after reviewing the cervical MRI he agreed with Dr. Paletta that Petitioner's symptoms were predominantly from the C7 nerve root both in sensory changes and in strength. Dr. Paletta reviewed the cervical EMG and noted that it showed no evidence of radiculopathy, but opined that the combination of Petitioner's symptoms and MRI results made it more likely that the cervical spine was the source of Petitioner's symptoms. Accordingly, the Commission finds sufficient medical diagnostic evidence of C7 findings.

Further, the Commission finds Dr. Gornet's opinions to be credible and persuasive. The Commission acknowledges that the August 8, 2020 cervical injection provided relief for only two days, but finds it significant that the injection actually provided relief at all, and based on Dr. Gornet's October 5, 2020 note, provided "substantial" relief before returning a few days later. In further support, the Commission turns to Dr. Gornet's deposition, in which he testified that the significant decrease in cervical symptoms for two days indicated that the cervical spine was the source of some of Petitioner's complaints. The Commission points out that both the June 16, 2020 and April 9, 2021 cervical MRI scans revealed C6-7 pathology in the form of a disc protrusion, lending credence to Dr. Gornet's opinion that Petitioner's cervical pathology was

contemporaneous to, and thus causally related to, the instant accident. Accordingly, the Commission finds that Dr Gornet's opinions are supported by the evidence. To the contrary, the opinions of Respondent's Section 12 doctor, Dr. Frank Petkovich, are not supported by the evidence and are thus not as persuasive as those of Dr. Gornet. Dr. Petkovich opined that Petitioner suffered no cervical injury during the accident in question, specifically finding no soft disc herniation at C6-7 or C7 nerve root impingement. However, as stated above, the June 16, 2020 cervical MRI clearly revealed several cervical spine abnormalities, including right greater than left C3-4, small right C4-5 and C5-6 foraminal protrusions resulting in foraminal stenosis and a C6-7 protrusion with likely annular tear and minimal left foraminal stenosis. Moreover, these abnormalities were corroborated during a subsequent cervical MRI performed on April 9, 2021, which again revealed bilateral foraminal protrusions from C3-C6, a small left protrusion at C6-7, and mild to moderate foraminal stenosis at multiple levels, greatest at C3-4 on the left and C5-6 on the right.

Lastly, a "chain of events" analysis further supports Petitioner's accident claim. Since 2013, Petitioner provided unrebutted testimony that he was able to perform his duties as a millwright for Respondent without problem until the instant accident, an approximate seven-year period. Petitioner also denied any prior left shoulder or neck injuries requiring treatment. During the accident, Petitioner noticed immediate left shoulder symptoms and evidence of radiculopathy and was immediately restricted to light duty work. Further, the causation opinion of Dr. Gornet, which was based in part on the objective findings contained in Petitioner's cervical MRI scans, bolsters Petitioner's claim. Petitioner continues to suffer from the disability caused by this accident to date.

The preponderance of the evidence supports a finding that Petitioner has proven causal connection between the May 8, 2020 work accident and his current cervical condition. The Commission modifies the Arbitrator's causation ruling accordingly.

II. <u>Medical Expenses</u>

Consistent with our determination that Petitioner's current cervical spine condition remains causally related to the instant accident, the Commission modifies the Decision of the Arbitrator, finding that Respondent is liable for payment of Petitioner's medical expenses in relation to his cervical spine treatment from October 22, 2020 through the hearing date of September 10, 2021, including, but not limited to, the April 9, 2021 cervical MRI scan.

III. <u>Prospective Medical Care</u>

Consistent with our determination that Petitioner's current cervical spine condition remains causally related to the instant accident, the Commission modifies the Decision of the Arbitrator and finds that Petitioner is entitled to prospective medical care for the cervical spine condition.

During his treatment of Petitioner, Dr. Gornet was clear that Petitioner had two ongoing issues that may require surgery, one in the left shoulder and one in the cervical spine. At trial, Petitioner testified to ongoing cervical issues that had yet to be resolved, despite having undergone left shoulder surgery on February 8, 2021. Dr. Gornet acknowledged this much on July 22, 2021, when he noted that the left shoulder surgery did not fix all of Petitioner's problems, and he

continued recommending the disc replacement surgery at C6-7 in order to remedy Petitioner's cervical complaints. Dr. Gornet testified via deposition that there was a 98-99 percent chance of a full duty release to work after Petitioner undergoes surgery to the cervical spine. He further opined that the surgery would improve Petitioner's neck pain, some of his shoulder pain, as well as his numbness, tingling, and weakness. Based on the medical records, the Commission finds Dr. Gornet's opinion persuasive. Accordingly, the Commission modifies the Arbitrator's award for prospective medical care to include the C6-7 disc replacement surgery recommended by Dr. Gornet.

The Commission notes that it agrees with the Arbitrator's findings of fact and conclusions of law with respect to Petitioner's left shoulder condition. All else is affirmed.

IT IS THEREFORE FOUND BY THE COMMISSION that the Decision of the Arbitrator filed October 1, 2021, as modified above, is hereby affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,549.07 per week for a period of 68 & 6/7ths weeks, from May 16, 2020 through September 10, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay temporary total disability benefits that have accrued from May 16, 2020 through September 10 2021, and shall pay the remainder of the award, if any, in weekly payments.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit in the amount of $97,591.41 for temporary total disability benefits that have been paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner reasonable and necessary medical expenses for services rendered by both Dr. Paletta and Dr. Gornet from May 8, 2020 through September 10, 2021, including, but not limited to, the cervical spine MRI scan of June 16, 2020, the left upper extremity MRI scan of October 5, 2020, and the April 9, 2021 MRI scan, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall receive credit for medical expenses paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services for a visit to Dr. Paletta to determine if the ultrasound of the left shoulder recommended on May 19, 2021 and additional physical therapy is still needed, as provided in §8(a) and §8.2 of the Act. If so, the Respondent shall pay the reasonable and necessary medical expenses associated with this visit to Dr. Paletta, and the ultrasound of the left shoulder, and additional physical therapy recommended, as provided in §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the C6-7 disc replacement surgery recommended by Dr. Gornet, including post-operative physical therapy and treatment, as provided in §8(a) of the Act.

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

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

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

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

July 11, 2022
O: 5/11/22
DJB/wde
043

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

/s/*Stephen Mathis*
Stephen Mathis

DISSENT IN PART

I respectfully dissent from the Decision of the Majority. The Commission modified the Decision of the Arbitrator who found that Petitioner did not sustain his burden of proving that the stipulated work-related accident on May 8, 2020, caused a current condition of ill-being of his cervical spine. She awarded Petitioner medical expenses incurred for treatment of Petitioner's left shoulder, including arthroscopic surgery, those associated with diagnostic tests for his cervical spine, and 68&6/7 weeks of temporary total disability benefits.

The Majority reversed the Arbitrator on the issue of causation to Petitioner's cervical condition and awarded prospective treatment including cervical disc replacement surgery recommended by Dr. Gornet. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator in its entirety.

While the Arbitrator did not make any specific findings regarding Petitioner's veracity, she clearly had reservations about his credibility when she noted that "when Petitioner presented

to Dr. Gornet he gave a history inconsistent with the credible record when he stated that he experienced pain up through his arm into neck within 10 minutes after the injury" when in fact Petitioner did not complain of any symptoms whatsoever in his neck for four days after the accident. The Arbitrator also noted that Petitioner only reported persistent numbness/tingling into the 3rd and 4th fingers of his left hand to Dr. Paletta, his shoulder surgeon, more than a full year after the accident. While the Commission acts as co-finder of fact with the Arbitrator, I believe that the Commission should afford the Arbitrator considerable deference on the issue of Petitioner's credibility because she actually observed his testimony.

In addition, the Arbitrator found Respondent's Section 12 medical examiner, Dr. Petkovich, more persuasive than Dr. Gornet. She characterized Dr. Gornet's opinions as "less than credible, unpersuasive, and not supported by the credible evidence." Dr. Gornet appeared to base his diagnosis and recommendation for surgery on little more than Petitioner's subjective complaints. The Arbitrator noted that despite objective testing such as cervical MRIs and upper extremity EMG which found no significant cervical pathology, as well as his own clinical observation that Petitioner was neurologically intact, Dr. Gornet diagnosed cervical radiculopathy and recommended disc replacement surgery. In fact in his deposition, Dr. Gornet acknowledged that as a general rule, he would proceed with surgery based only on subjective complaints of a patient even in the absence of any objective evidence of pathology.

On the other hand, the Arbitrator found Dr. Petkovich's opinion that Petitioner did not prove his alleged cervical condition was caused by the work-related accident persuasive because it was consistent with the medical records. I agree with the analysis and reasoning of the Arbitrator as well as her assessment of Petitioner's credibility and the relative persuasiveness of Dr. Petkovich and Dr. Gornet's opinions.

For the reasons stated above, I would have affirmed and adopted the well-reasoned Decision of the Arbitrator in its entirety. Therefore, I respectfully dissent from the majority opinion.

DLS/dw
O-5/11/22

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC025236
Case Name	LUZYNSKI, CHRISTOPHER v. FLUOR MAINTENANCE SERVICES INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	21
Decision Issued By	Maureen Pulia, Arbitrator

Petitioner Attorney	Todd Schroader
Respondent Attorney	Jeffrey Rusin

DATE FILED: 10/1/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/Maureen Pulia, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

CHRISTOPHER LUZYNSKI,
Employee/Petitioner

v.

FLUOR MAINTENANCE SERVICES, INC.,
Employer/Respondent

Case # **20** WC **25236**

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 **Maureen H. Pulia**, Arbitrator of the Commission, in the city of **Springfield**, on **9/10/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **5/8/20**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being as it relates to his left shoulder ***is*** causally related to the accident.

Petitioner's current condition of ill-being as it relates to his cervical spine ***is not*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**124,038.72**; the average weekly wage was $**2,385.36**.

On the date of accident, Petitioner was **31** years of age, ***married*** with **4** dependent children.

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

Respondent shall be given a credit of $**97,591.41** for TTD, $**00.00** for TPD, $**00.00** for maintenance, and $**00.00** for other benefits, for a total credit of $**97,591.41**.

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

ORDER

Respondent shall pay reasonable and necessary medical services for the services rendered by Dr. Paletta from 5/8/20 through 9/10/21; the services of Dr. Gornet from 5/8/20 through 10/22/20; the MRI of the cervical spine on 6/16/20; and, the MRI of the left upper extremity on 10/5/20, 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 reasonable and necessary medical services for a visit to Dr. Paletta to determine if the ultrasound of the left shoulder recommended on 5/19/21, and additional physical therapy is still needed, as provided in Sections 8(a) and 8.2 of the Act. If, so the respondent shall pay the reasonable and necessary medical expenses associated with this visit to Dr. Paletta, and the ultrasound of the left shoulder, and additional physical therapy recommended, as provided in Sections 8(a) and 8.2 of the Act. The arbitrator denies petitioner's claim that he is entitled to C6-C7 disc replacement.

Respondent shall pay Petitioner temporary total disability benefits of $1,549.07/week for 68-6/7 weeks, commencing 5/16/20 through 9/10/21, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 5/16/20 through 9/10/21, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall be given a credit of $97,591.41 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.

Signature of Arbitrator

OCTOBER 1, 2021

ICArbDec19(b)

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDINGS OF FACT:

Petitioner, a 31 year old millwright, sustained an accidental injury that arose out of and in the course of his employment by respondent on 5/8/20. Petitioner alleges injuries to his left shoulder and cervical spine. The respondent has accepted all liability for petitioner's left shoulder injury, but disputes petitioner's claim of an injury to his cervical spine as a result of the injury on 5/8/20. Petitioner's home base is in St. Clair, Missouri, but was injured at the Newton Power Plant in Illinois.

Petitioner testified that a millright is essentially the mechanical side of a carpenter. A millright's duties include the repair of power plants, nuclear plants, and refineries.

On 5/8/20 petitioner was using a 1.5 inch impact tool that weighed 50-75 pounds and was 3 ½ to 4 feet long with an adapter attachment. He was torquing 6-8 inch castle nuts weighing 60-125 pounds from the high pressure side of the turbine. He was torquing the castle nuts back and forth with the impact until a certain pressure was reached, and made sure it was closed. After tightening these nuts for a few minutes, he began feeling tingling and numbness in his 3rd and 4th fingers on the left hand, and a tingling and burning sensation in his elbow. Petitioner then took a break. After the break he resumed working and began noticing shooting pain into his left shoulder, behind his elbow, and down into his left hand.

On 5/9/10 petitioner reported to the Nurse at the plant. He was examined and placed on light duty. For the next two days he handled parts and handed off tools. By the 2nd day he felt better, but his left arm felt tight and still hurt. On 5/12/18 petitioner felt better and returned to regular duty work, and felt that his arm had loosened up. He described his pain as an aching feeling. After his shift he noted more swelling and a sharp pain that radiated to the left side of his neck. He noted that it was painful to turn his neck to the right. When he did this his pain radiated to his left shoulder. When he arrived at work on 5/13/18 he reported to his supervisor he could not work. He reported more swelling, sharp pain, and cold fingers. He was placed on light duty. The next day he felt even more tightness in the left arm and more swelling.

On 5/14/20 petitioner presented to HSHS Medical Group Work Comp. He was seen by nurse practitioner Angie Brumleve. He gave a consistent history of the incident and symptoms since then. He rated his pain at a 6/10. He reported a feeling of pressure, and a burning, sharp pain. Following an examination petitioner was diagnosed with lateral epicondylitis of the left elbow, and pain in the left shoulder. X-rays of the left shoulder and elbow were normal. He was placed on restricted duty with no use of the left arm. He was given some forearm and elbow supports.

Petitioner testified that he was eventually laid off and he went home to Missouri. After that is when he saw Dr. Paletta.

On 5/27/20 petitioner was supposed to present to Dr. George Paletta, but over slept. On 6/1/20 petitioner completed a medical information sheet for Dr. Paletta that identified the reason for his visit and the description of the accident as pain shooting in left arm from the neck. He also indicated neck to hand tingling, numbness, burning and stabbing on the pain diagram. On 6/3/20 petitioner identified the reason for his visit as his left arm on the Patient Health Questionnaire form when he presented to Dr. Paletta. Dr. Paletta's report indicates petitioner's chief complaint was left arm pain and numbness into the left hand. He complained of pain into the periscapular region, with some neck pain predominantly with the right lateral bend or right rotation. The neck pain was in the base of the left side of the neck. He also complained of numbness in the 3rd and 4th fingers of the left hand. Petitioner denied any previous left neck, left shoulder or left arm problems. He also denied any previous history of numbness and tingling. Following a physical examination and x-rays, Dr. Paletta's impression was atypical radiculopathy with numbness in the C7 dermatomal distribution. He told petitioner the pain that involves the entire extremity, as well as the periscapular area with associated numbness typically originates from the neck as opposed to any shoulder or elbow injury. He recommended an MRI of the cervical spine and EMG/NCS. Dr. Paletta opined that petitioner's left upper extremity condition was causally related to the injury on 5/8/20. He was of the opinion that if petitioner's left upper extremity condition proves to be originating from his cervical spine he would recommend a consultation with a cervical spine specialist. Dr. Paletta took petitioner off work.

On 6/16/20 petitioner underwent an EMG/NCS that showed the upper extremity nerves and muscles studied fell within the range of normal, and was not impressive for left C7 radiculopathy. The responses to the middle and ring fingers were normal and compared favorably, arguing against a brachialplexopathy or more distal peripheral nerve etiology for the symptom complex. It was also noted that any nerve irritation, was insufficient to be reflected in the EMG/NCS. That same day, petitioner underwent an MRI of the cervical spine. The impression was right greater than left C3-C4, small right C4-C5 and C5-C6 foraminal protrusions resulting in foraminal stenosis at all three levels. No central canal stenosis was observed.

On 6/22/20 Dr. Paletta reviewed the MRI of the cervical spine and was of the opinion that it showed multilevel cervical disc disease with left foraminal disc protrusion and associated annular tear at C6-C7. Dr. Paletta was also of the opinion that the EMG/NCS revealed probable C7 nerve root irritation without

evidence of neuropathy or radiculopathy. Dr. Paletta reviewed the MRI and the EMG/NCS and opined that the results of these tests and petitioner's current level of symptoms, he recommended that petitioner get a cervical spine consultation. He was of the opinion that if he sees the cervical specialist and the expert does not believe the cervical spine is contributing to petitioner's problem, then he would recommend an MRI of the left shoulder. Dr. Paletta was of the opinion that the cervical spine was the likely source of petitioner's symptoms. On 6/29/20 Dr. Paletta discussed his findings with petitioner and referred him to Dr. Reeves, a cervical spine specialist. Petitioner indicated that he did not want to see Dr. Reeves, but rather pursue care with another spine specialist. Dr. Paletta gave petitioner restrictions of no lifting of more than 10 pounds above chest level, and no repetitive overhead activities. Dr. Paletta noted no evidence of any primary shoulder pathology.

On 7/1/20 petitioner presented to Dr. Gornet for his neck complaints. His main complaint was neck pain to the base of his neck to his left trapezius, left shoulder and down his left arm to his hand with numbness and tingling into his middle fingers, as well as left scapular pain. Petitioner gave a history of the accident and reported that he noticed tingling in his left hand within 5 minutes of using the impact drill and then within a few more minutes he noticed pain up his arm into his neck. Petitioner denied any previous problems of significance with his neck or shoulder. His reported that his symptoms are constant and all on the left. Dr. Gornet performed an examination and reviewed the diagnostic test. His impression was that petitioner's current symptoms and requirement for treatment were casually related to the injury on 5/8/20. He agreed with Dr. Paletta that his symptoms were predominantly C7 nerve root both in sensory changes and strength. He was of the opinion that the pain with abduction of the shoulder may play a role in his symptoms and may be related to a shoulder injury itself or it could be related to a disc problem at C3-C4. Dr. Gornet recommended a steroid injection to C6-C7 on the left. He took petitioner off work through 10/5/20. Dr. Gornet was of the opinion that if petitioner fails the injection and his arthrogram is relatively negative, the next step would be a cervical disc replacement at C6-C7.

On 8/18/20 petitioner underwent a left C6-C7 ILES performed by Dr. Blake. Petitioner only reported relief for 2 days.

On 8/26/20 petitioner underwent a Section 12 examination performed by Dr. Frank Petkovich, at the request of the respondent. Petitioner provided a history of the injury and his current complaints. Dr. Petkovich performed an examination and record review. He opined that petitioner sustained a muscle strain in his left upper extremity on 5/8/20, but did not sustain any injury to his cervical spine. Dr. Petkovic opined the accident did not aggravate a pre-existing condition. He opined that all treatment he

reviewed through 7/1/20 had been reasonable and necessary. Dr. Petkovich opined that petitioner's pain was not coming from his cervical spine. He believed the pain was coming from a muscular strain in his left upper extremity, not his cervical spine, and he would benefit from a physical therapy program of 4-5 weeks, 2-3 times a week. He did not believe any injections into the cervical spine, or surgery to the cervical spine were needed as a result of the injury on 5/8/20. Dr. Petkovich opined that petitioner could return to work with a 10 pound lifting restriction for the left arm for 4-5 weeks, and would reach maximum medical improvement at that time. He noted that petitioner had a normal neurologic examination throughout his left upper extremity and also had a normal EMG/NCV studies of his left upper extremity.

On 10/5/20 petitioner underwent an MR arthrogram of the left shoulder. The impression was no full thickness rotator cuff tear of the critical zone of the supraspinatus extending obliquely from the posterior myotendinous junction to the anterior insertion measuring up to 14 mm in AP diameter; posteriorly there was delamination of the upper supraspinatus, but no definite tear; and, no subscapular tear, biceps tear, or labral tear.

On 10/5/20 petitioner returned to Dr. Gornet. He reviewed the results of the MR arthrogram. Dr. Gornet told petitioner that he has 2 problems that will potentially require two different surgeries. Given that the injection only provided relief for 2 days, and petitioner had an obvious structural defect present that did not cause severe compression, but correlated well with his predominant axial neck pain and symptoms, Dr. Gornet recommended a cervical disc replacement at C6-C7.

On 10/22/20, after reviewing the MRI of the cervical spine and left shoulder, Dr. Petkovich issued a supplemental report on behalf of respondent. He opined that petitioner did not sustain any injury to his cervical spine as a result of the injury on 5/8/20. He was of the opinion that the MRI of the cervical spine showed minimal degenerative disc changes, no specific disc herniation, nerve root compression, or spinal cord compression. He opined it was an essentially a normal MRI given petitioner's age, and did not believe petitioner needed any further diagnostic evaluation or treatment for his cervical spine. He was of the opinion that petitioner should follow up with Dr. Paletta for his left shoulder. He opined that petitioner could return to his regular duty job without restrictions.

On 10/23/20 Dr. Paletta reviewed the results of the MRI of the left shoulder and was of the opinion that the results of the MRI and given that petitioner had a full thickness tear of the rotator cuff at the muscle tendon junction, he recommended an arthroscopy and rotator cuff repair. He was also of the

opinion that petitioner could undergo additional cervical spine treatment including a possible disc replacement as recommended by Dr. Gornet as soon as 6 weeks after his left shoulder surgery.

On 11/6/20 Dr. Petkovich issued an additional supplemental report after reviewing the report of Dr. Blake for 8/18/20, Dr. Gornet's office report of 10/5/20, and, the report of Dr. Paletta dated 10/23/20. Dr. Petkovich opined that the rotator cuff tear seen on the MR arthrogram of the left shoulder was related to the injury on 5/8/20, and the arthroscopy recommended by Dr. Paletta to repair the rotator cuff, is reasonable and necessary as related to the injury on 5/8/20. He also opined that the cervical injection performed by Dr. Blake on 8/18/20 was reasonable and necessary, or related to the injury on 5/8/20, and that petitioner needed no further treatment for his neck, including the proposed surgery at C6-C7.

On 12/3/20 petitioner followed-up with Dr. Gornet. Dr. Gornet noted that petitioner saw Dr. Paletta who felt that petitioner would require fairly urgent surgery to his left shoulder. He told petitioner that if he improved significantly after the left shoulder surgery, then he would have no problem placing the neck surgery on hold. Dr. Gornet examined petitioner and noted his condition was unchanged. He authorized petitioner off through 4/19/21.

On 2/8/21 petitioner underwent an arthroscopy with rotator cuff repair, performed by Dr. Paletta. His post-operative diagnosis was left shoulder pain and left shoulder rotator cuff tear. Paletta drafted a work status report restricting petitioner to no lifting, one handed work with the uninjured extremity, and clerical or sedentary work starting 2/15/21. Petitioner followed up post operatively with Dr. Paletta. On 2/24/21 petitioner had severe complaints of pain that were well out of proportion to the normal expected postop pain. On 3/10/21 petitioner returned to Dr. Paletta and reported that he had an injury on Friday, when there was drink on the table that started to fall and he made a sudden move with his left arm and felt a pop and increased pain. Dr. Paletta noted that the exam was almost impossible due to pain. Dr. Paletta ordered an MR arthrogram to evaluate the integrity of the repair.

On 3/15/21 the evidence deposition of Dr. Gornet, an orthopedic surgeon, was taken at the request of the respondent. Dr. Gornet testified that when petitioner presented to him he had overlapping symptoms of a cervical and shoulder problem. He opined that the need for the C6-C7 disc replacement, his current symptom, and time off are all causally related to the injury petitioner sustained on 5/8/20. Dr. Gornet noted that when petitioner first saw Dr. Paletta after the accident, Dr. Paletta felt he had a cervical spine problem based on his assessment of the shoulder, and the EMG that demonstrated what they felt was probable C7 nerve irritation. He also testified that Dr. Paletta noted objective findings on his examination at C7, including weakness and sensory changes that are all consistent with a cervical spine

problem, as well as the objective findings on the petitioner's cervical MRI that would clearly indicate there was disc pathology present at C6-C7 and a little bit at C5-C6; and the fact that petitioner had relief for 2 days following the injection.

On cross examination Dr. Gornet was of the opinion that if after Dr. Paletta's left shoulder surgery petitioner returns with the same symptoms, he would recommend the disc replacement surgery proceed, but if petitioner's numbness in his fingers was gone, he had no loss of muscle tone or trace weakness, his strength had returned to normal, and he was pain free and symptom free particularly in the neck, he would no longer consider petitioner a surgical candidate. Dr. Gornet was of the opinion that if a patient had no positive objective findings and only had pain isolated to an area that was consistent with the need the for surgery, he would go ahead with the surgery. With respect to petitioner, given the objective structural pathology coupled with his substantial relief following the injection, he would still feel comfortable doing the disc replacement. Dr. Gornet was of the opinion that when he saw petitioner on 10/5/20 he did not detect any neurologic dysfunction like he did when petitioner presented on 7/1/20. He was of the opinion that this discrepancy could be due to the fact that petitioner had some improvement in his strength, even though he was still symptomatic from a pain perspective. He attributed the improvement to the injection and was of the opinion that they were on the right track with the injection. Dr. Gornet was of the opinion that patients have substantial improvement after disc replacement surgery independent of radiculopathy after treating the structural problems. Dr. Gornet testified that he was not aware that petitioner was seen in the emergency room on 9/10/13 for pain from the left shoulder into the left arm and wrist; that he sustained a football injury on 9/20/06 when he hit someone with a helmet and lost consciousness; or that he was diagnosed with a neck sprain after x-rays were taken on 5/14/98.

Dr. Gornet was of the opinion that when he last saw petitioner he did not feel petitioner had cord compression, but had lateralized disc at C6-C7 that he did not think was causing significant nerve compression. He was also of the opinion that petitioner had no atrophy related to his cervical radiculopathy. Dr. Gornet opined that his recommendation for petitioner's C6-C7 disc replacement was based on the left foraminal disc protrusion and tear in the disc objectively seen on the MRI, and the initial symptoms of C7 nerve irritation. Dr. Gornet was of the opinion that even if petitioner does not have continued radiculopathy, but still has significant neck pain referred to his shoulder, he is highly confident that C6-C7 was the section injured and causing his continued symptoms. Dr. Gornet opined that petitioner had objective pathology on his MRI that correlates with his subjective complaints, and response to the injection. Dr. Gornet opined that you do not need a disc protrusion to have impingement.

He further opined that impingement can also be caused by inflammation, which he believed was the case with petitioner based, on his temporary response to the injection.

On redirect examination Dr. Gornet opined that the knowledge of petitioner's previous neck injuries have not changed his opinions regarding petitioner.

On 3/16/21 petitioner underwent an MR arthrogram of the left shoulder. The impression was focal partial thickness undersurface defect versus recurrent partial thickness tear involving approximately 60-70% of the craniocaudal tendon thickness in the midportion of the distal supraspinatus tendon; no discrete labral tear; and mild acromioclavicular osteoarthritis with small subacromial bursal effusion. There was no evidence of a full thickness rotator cuff tear.

On 3/19/21 Dr. Paletta reviewed the MR arthrogram of the left shoulder and was of the opinion that petitioner may have partially disrupted the repair but there was no complete disruption of the repair. He noted that petitioner's pain remained well out of proportion to what one would expect postoperatively given the small nature of his tear and the fact that there was no evidence of recurrence of the tear. Dr. Paletta noted that since petitioner had some radicular type symptoms the last time he saw him, he was recommending a repeat MRI of the cervical spine and follow-up with Dr. Gornet. He put a hold on therapy until after the MRI.

On 4/7/21 petitioner returned to Dr. Paletta. Dr. Paletta noted that petitioner's post-operative recovery had been complicated by an ongoing cervical issue. He noted that petitioner had a left foraminal disc herniation at C6-C7 for which surgery has been recommended, but not approved. He noted that petitioner was having continued neck pain, periscapular pain and radicular pain involving the left arm, that was interfering with and slowing his ability to progress with physical therapy. Dr. Paletta believed the neck was a greater problem than the left shoulder relative to pain. He also noted that petitioner still had some intermittent numbness and tingling. Following an examination, Dr. Paletta's impression was that petitioner was doing well postoperatively, but had persistent cervicalgia and radiculopathy in the setting of a known C6-C7 disc herniation. He was of the opinion that trying to progress petitioner to the early strengthening phases was likely going to result in an increase in his neck pain and radicular symptoms. He recommended a repeat MRI of the cervical spine. Petitioner's light duty restrictions were continued.

On 4/9/21 petitioner underwent a repeat MRI of the cervical spine. The impression was bilateral foraminal protrusions at C3-C4, C4-C5, and C5-C6 levels, small left foraminal protrusions at C6-C7;

mild to moderate foraminal stenoses at multiple levels, greatest at C3-C4 on the left and C4-C5 on the right; and, no central canal stenosis at any level.

On 4/16/21 Dr. Paletta reviewed the MRI and was of the opinion that the MRI confirmed that C6-C7 was a significant issue that was likely contributing to his ongoing shoulder and extremity pain. Dr. Paletta was of the opinion that petitioner was not going to progress with physical therapy until the disc was appropriately addressed. He referred petitioner back to Dr. Gornet, and told him to return to resume physical therapy once the neck issue is addressed.

On 4/19/21 petitioner returned to Dr. Gornet. He continued to complain of pain in his left shoulder and left arm with numbness and tingling. He noted no changes on exam of the left shoulder, but also noted that petitioner also had some right trapezius and right shoulder blade pain. Dr. Gornet noted that he was still awaiting authorization for the C6-C7 cervical disc replacement. He continued petitioner off work through 7/22/21.

On 5/19/21 petitioner followed-up with Dr. Paletta. He reported that he was in therapy and was making decent progress with range of motion, but stated "I have my days". He reported significant neck pain, bilateral scapular pain and radicular symptoms all the way down the left arm, as well as persistent numbness and tingling down the left arm into the 3rd and 4th fingers. Following an examination, Dr. Paletta's impression was persistent left shoulder and arm pain 3 months status post rotator cuff repair, and cervical radiculopathy with known cervical disc issue. He recommended an ultrasound of the shoulder to evaluate the rotator cuff. Dr. Paletta put therapy on hold again, and continued his light duty restrictions.

On 5/25/21 Dr. Petkovich performed a second Section 12 examination of petitioner, at the request of the respondent. Dr. Petkovich performed a record review, and physical examination. Following this, he opined that petitioner sustained a left shoulder rotator cuff strain and rotator cuff tear of the supraspinatus muscle as a result of the injury on 5/8/20, but did not sustain an injury to his cervical spine. Dr. Petkovich opined that all treatment to petitioner's left shoulder as a result of the injury on 5/8/20 has been reasonable and necessary, but any treatment to the cervical spine has not been, based on his opinion that petitioner did not sustain an injury to his cervical spine as a result of the injury on 5/8/20. Dr. Petkovich opined that an additional 4-6 weeks of physical therapy would be reasonable and necessary as it relates to his left shoulder. He further opined that petitioner was not in need of any further treatment to his cervical spine, as it is related to the injury on 5/8/20 or for any other reason. Dr. Petkovich was of the opinion that petitioner could work light duty, with no lifting of his left upper extremity over 5 pounds, and no overhead lifting with his left arm.

On 6/1/21 Dr. Petkovich issued a supplement report after reviewing the MRI of the left shoulder performed 3/16/21, which showed only postoperative changes with no acute findings. He also reviewed the MRI of the cervical spine dated 4/9/21. He opined that the MRI showed minimal degenerative disc changes at C4-C7 levels. He specifically noted no soft disc herniation on the left at C6-C7 level, or left C7 nerve root impingement. He compared this MRI to the cervical MRI taken 6/18/20 and opined that there was essentially no change. He reiterated his prior opinions that petitioner's cervical condition is not related to the injury on 5/8/20.

On 6/21/21 the evidence deposition of Dr. Frank Petkovich, an orthopedic surgeon, was taken on behalf of respondent. He opined that on 8/5/20 petitioner's neurologic examination was normal, and he found no evidence of nerve root involvement. Dr. Petkovich opined that disc replacements are indicated in young people with good bone stock and a large herniated disc. He was of the opinion that although petitioner was young and had good bone stock he did not have a large herniated disc. He opined that petitioner needs no cervical surgery at C6-C7 because he only had some very mild degenerative changes with no nerve depression, no spinal cord impingement, and no spinal canal compromise. And even if he had fissuring of an annular tear he would not be a candidate for surgery. Dr. Petkovich opined that petitioner did not sustain any injury to his cervical spine as result of the injury on 5/8/20, and also did not sustain even a temporary aggravation of a preexisting condition. He opined a causal connection between petitioner's current condition of ill-being as it relates to his left shoulder and the injury on 5/8/20.

On cross examination Dr. Petkovich was of the opinion that an annular fissure or early tear by itself is not necessarily painful. He also testified that an annular tear can be acute in certain circumstances, but he saw none in petitioner. He did not think petitioner's neck was inhibiting or holding petitioner back as it relates to his left shoulder. Dr. Petkovich was of the opinion that although the 6/18/20 cervical MRI findings noted some annular tears at different levels, it is important to note that under the impression no annular tears were noted, which means the interpreter of the MRI did not find those significant. Dr. Petkovich opined that petitioner may have some early degenerative fissuring (annular tears) present due to his age, but none of them were acute. Dr. Petkovich was of the opinion that although early degenerative changes can cause occasional aches and pains, they would not cause any significant symptoms.

On redirect examination Dr. Petkovich was of the opinion that although he reads the interpretation of radiologist who read the MRI, he will always look at the films himself, and his opinions may differ from the radiologist's at times. Dr. Petkovich opined that with a true radiculopathy the patient can have

muscular findings, reflex findings, and sensory findings, and petitioner had none of these on either examination he performed. He noted that petitioner had normal reflexes and his motor strength throughout his left and right upper extremities was completely intact, his sensation was intact, and he had a normal examination throughout his upper extremities. Based on these findings he opined that petitioner did not demonstrate any evidence of true radiculopathy.

On 7/7/21 Dr. Petkovich performed a 3rd Section 12 examination, at the request of the respondent. He examined petitioner and reviewed additional medical records through 6/23/21. In addition to the opinions he offered following his previous examinations and record reviews, he was of the opinion that petitioner had reached maximum medical improvement with regards to his left shoulder and the injury on 5/8/20 on 5/19/21, and was not in need of any further medical treatment. He further opined that petitioner could return to full duty work without restrictions as he relates to his left shoulder or his left upper extremity. Given his opinion that petitioner did not sustain an injury to his cervical spine as a result of the injury on 5/8/20, he was further of the opinion that petitioner was not in need of any further diagnostic evaluation or treatment for his cervical spine. He was of the opinion that with respect to the cervical spine petitioner was able to return to work full duty without restrictions.

On 7/22/21 petitioner followed-up with Dr. Gornet. He complained of pain in his left shoulder, as well as left arm tingling and numbness. His exam was unchanged. Dr. Gornet noted that petitioner had left shoulder surgery with Dr. Paletta that helped a portion of his pain, but unfortunately it did not fix all his problems. He again noted that the disc replacement was pending authorization. He continued petitioner off work through 11/22/21.

Petitioner testified that he currently has tightness in his neck that keeps him from doing things at home such as dishes, laundry and playing with his kids. He testified that it has gotten worse, and is now in his shoulder blades. He testified that after standing for a few minutes he gets pressure in his neck and needs to sit down. He reported sharp pain, stinging and numbness in his left arm that has been present since the surgery.

Petitioner testified that through connections with his father and brother, who are also connected to the millright business he had opportunities to go to Mexico and Guam to do millright work but was unable to do this due to his present condition. He claimed the job in Guam was for a year and would have paid $300,000.00. He also testified that he was offered jobs stateside that he could not take because he was off work. Petitioner testified that he wants to work, but he is considered a liability because the

word is out that he injured his left shoulder and neck. He also testified that he wants to undergo the surgery recommended by Dr. Gornet.

Petitioner testified that he has worked as a millright since 2013, and is part of the Carpenter's Union 716. He testified that he was working a union job on 5/8/20. He testified that his job at the power plant on 5/8/20 was only going to be for a short period of time. Petitioner stated that he is not on the 'out of work' list with the union, and is eligible to be sent out on jobs, but has not been given any. He claims he is owed a year and a half of wages from the union. He testified that during the pandemic his business slowed down. He also stated the slow time for millrights is the summer, and now that we are going into fall it is picking up.

Petitioner testified that approximately three weeks after the injury he got his last check and was laid off. He further stated that he was only on the job for about a week and a half before the injury occurred. He testified that he had tightened only 4 castle nuts before the onset of his pain. Throughout his testimony, the petitioner's actual timing as to when his pain actually started on 5/8/20 is inconsistent. At times he states it was minutes until the onset and at other times it anywhere up to 2 hours.

Petitioner testified that he has difficulty getting in and out of his Ford Expedition. He stated that it takes a few minutes to get in. He also testified that when he moves his whole upper body to turn when driving, he cannot turn his neck to the right because it is tight.

Petitioner testified that he just sits and home and does nothing. He also stated that he may go to the grocery store once in a while. He testified that he received TTD through the end of July of 2021, and then it was stopped based on the opinions of Dr. Petkovich.

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

The parties stipulate that petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the injury petitioner sustained on 5/8/20. However, respondent disputes petitioner's claim that his cervical neck condition is causally related to the injury he sustained on 5/8/20. Petitioner relied on the opinions of Dr. Paletta and Dr. Gornet, and respondent relied on the opinions of Dr. Petkovich.

Petitioner sustained an injury on 5/8/20. However, his first complaint of any neck pain was not until 5/12/20 when he reported sharp pain radiating to the left side of his neck. He also noted difficulty turning his head to the right, not the left. On 5/14/20 petitioner reported no neck complaints. Thereafter, petitioner was laid off and returned to Missouri. Once there, he presented to Dr. Paletta on 6/1/20 and

reported shooting pain in his left arm from his neck. He also complained of neck pain with right lateral bend or right rotation, and left side neck pain. Before any diagnostic tests were performed, Dr. Paletta was of the opinion that petitioner had atypical radiculopathy with numbness in the C7 dermatomal distribution. The arbitrator finds it significant that even after the EMG/NCS and the MRI of the cervical spine were performed, that showed absolutely no evidence of C7 radiculopathy, or any findings with respect to C7, that Dr. Paletta still diagnosed a probable C7 nerve root irritation without neuropathy or radiculopathy, and referred petitioner to Dr. Gornet.

When petitioner presented to Dr. Gornet he gave a history inconsistent with the credible record when he stated that he experienced pain up his arm into his neck within less than 10 minutes after the injury. The arbitrator finds no credible evidence to support this claim. Based on this history, Dr. Gornet offered petitioner a causal connection between his cervical spine and the injury on 5/8/20. Dr. Gornet also agreed with Dr. Paletta that petitioner's symptoms were predominantly related to the C7 nerve root both in sensory changes and strength, despite no such findings on the EMG/NCV or the MRI. Based on this diagnosis, Dr. Gornet had petitioner undergo an injection at C6-C7, which provided petitioner with only 2 days of relief. Despite, this lack of relief, Dr. Gornet recommended a disc replacement at C6-C7, based in part on the "significant" relief he received from the injection.

Dr. Petkovich had a chance to examine petitioner and review the medical records, including the cervical MRI and EMG/NCS. He noted that the MRI showed minimal degenerative disc changes with no disc herniation, nerve root compression, or spinal cord compression. He was of the opinion that it was an essentially normal MRI, and petitioner did not need any treatment for his cervical spine.

When Dr. Gornet was deposed he opined that the EMG demonstrated probable nerve irritation, even after the report contained absolutely no findings as it relates to the C6-C7 level. He was also of the opinion that the MRI clearly indicated pathology present at C6-C7. However, the arbitrator finds the impression of the MRI also made absolutely no reference to any pathology as it related to the C6-C7 level. Dr. Gornet then went on to state that with the objective structural pathology that was noted on the diagnostic tests, coupled with the petitioner's 'substantial' relief from the cervical injection, he would still feel comfortable doing a disc replacement. The arbitrator finds these opinions are not only not credible, but are directly contradicted by the results of the EMG/NCS, the MRI of 6/16/20, and the injection, given that the EMG/NCS and the MRI showed no pathology at C6-C7, and petitioner had only two days of relief following the injection. Dr. Gornet also noted that although he did detect neurologic dysfunction on 7/1/20, he found no neurologic dysfunction on 10/5/20. Although he tried to attribute this

change to the improvement petitioner had following the injection, the arbitrator gives little weight to this opinion, given that the petitioner had two days of relief following the injection. Dr. Gornet then goes on to state that when he last saw petitioner, even though he had no cord compression, he believed petitioner had a lateralized disc at C6-C7 (which was not seen on the MRI), that was not causing petitioner significant nerve compression. He was also of the opinion that petitioner had no atrophy related to his cervical radiculopathy. Despite all these negative findings, Dr. Gornet was of the opinion that his recommendation for the C6-C7 disc replacement was based on the left foraminal disc protrusion and tear in the disc that was objectively seen on the MRI, and petitioner's initial symptoms of C7 nerve irritation. The arbitrator finds the opinions the Dr. Gornet less than credible, unpersuasive, and not supported by the credible evidence.

Dr. Paletta, after performing surgery on petitioner's left shoulder was also of the opinion that petitioner had persistent cervicalgia and radiculopathy in a setting of a known C6-C7 disc herniation. Again, the arbitrator finds this opinion is not based on the credible medical evidence especially given the fact that the cervical MRI impression made absolutely no mention of any disc at C6-C7.

Although an MRI performed 4/9/21 showed a small left foraminal protrusion at C6-C7, the arbitrator finds something appearing for the first time 11 months after the injury, not supportive of a causal connection to the injury. The arbitrator further questions the credibility of Dr. Paletta's opinions when on 4/16/21 Dr. Paletta refers to the "small" left foraminal protrusion at C6-C7 as a "significant" issue, that likely contributed to petitioner's ongoing shoulder and extremity pain. The arbitrator also finds it significant that petitioner's subjective complaints of persistent numbness and tingling down the left arm into the 3rd/4th fingers, were only made to Dr. Paletta for the first time on 5/19/21, over a year after they injury. Given that any diagnostic finding of anything at C6-C7 did not appear until nearly a year following the injury, the arbitrator does not believe these findings are in any way related to the injury on 5/8/20.

On 10/22/20 Dr. Petkovich examined petitioner, and as part of the examination reviewed the MRI of the cervical spine. He was of the opinion that petitioner sustained no injury to his cervical spine. He was of the opinion that the MRI of the cervical spine showed minimal degenerative disc changes, no disc herniation, no nerve root compression, and no spinal cord compression. He was of the opinion that the MRI was essentially normal, and petitioner needed no treatment for his cervical spine. These opinions were essentially the same as those he had on 8/26/20.

After Dr. Petkovich reexamined petitioner on 5/25/21, in his supplemental report dated 6/1/21 he opined that the MRI of cervical spine performed 4/9/21 showed only minimal degenerative disc changes from C4-C7; showed no soft disc herniation on the left at C6-7; and, showed no left C7 nerve root impingement. He again opined that petitioner's current cervical condition is not related to the injury on 5/8/20.

Dr. Petkovich was of the opinion that petitioner's neurologic exam on 8/26/20 was normal, and that there was no evidence of any nerve root involvement. He opined that disc replacements are indicated for young people with good bone stock, and large herniated discs, and although petitioner is young and has good bone stock, there is no credible evidence to support a finding that petitioner has a large herniated disc at C6-C7. Therefore, Dr. Petkovich opined that petitioner needs no surgery to his C6-C7 level. He based this on the fact that petitioner had only some very mild degenerative changes at that level with no nerve depression, no spinal cord impingement, and no spinal cord compromise. He opined that as a result of the injury on 5/8/20 petitioner did not sustain any injury to his cervical spine or temporary aggravation of any preexisting cervical spine condition at C6-C7. He further opined that petitioner sustained no acute annular tear, and there was no credible evidence to support a finding that petitioner's neck was holding back or inhibiting petitioner as it relates to his left shoulder. He also found it significant that the MRI of the cervical spine dated 6/16/20 did not show any annular tears, and that any fissuring of the annular tear seen on the 4/9/21 cervical MRI did not appear until more than 11 months following the injury, and therefore, would not be related to the injury on 5/8/20. Dr. Petkovich also found it significant that petitioner had normal reflexes and motor strength throughout his right and left upper extremities. He opined that this meant petitioner had no true radiculopathy.

Based on the above, as well as the credible evidence, the arbitrator finds the opinions of Dr. Petkovich more persuasive than those of Dr. Gornet and Dr. Paletta, and finds the petitioner has failed to prove by a preponderance of the credible evidence that his current condition of ill-being, as it relates to his cervical spine, is causally related to the injury petitioner sustained on 5/8/20. The arbitrator found the opinions of Dr. Gornet and Dr. Paletta, less than credible, as it relates to petitioner's cervical condition. The arbitrator finds their opinions, conclusions, and recommendations, unsupported by the credible evidence.

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 offered into evidence the unpaid bills from Dr. Gornet/MFG Spine from 7/1/20 through 7/22/21 in the amount of $860.00; Dr. Paletta from 6/3/20 through 5/19/21 in the amount of $252.00; and the unpaid bill from MRI partners from 4/9/21 in the amount of $1,316.54.

The arbitrator finds that with respect to these unpaid bills from Dr. Gornet/MFG Spine, Dr. Paletta and MRI Partners of Chesterfield, it is unclear what Work Comp Adjustments were made with respect to the related dates of service.

Given that Dr. Paletta's treatment was for the petitioner's left shoulder, and the parties stipulated that petitioner's left shoulder condition is causally connected to the injury on 5/8/20, the arbitrator finds that all treatment by Dr. Paletta for petitioner's left shoulder from 5/8/20 through 9/10/21 was reasonable and necessary pursuant to Section 8(a) and 8.2 of the Act,

With respect to the unpaid bills from Dr. Gornet/MFG Spine, the arbitrator, relying on the persuasive opinions of Dr. Petkovich following his examination of petitioner on 8/26/20 and 10/22/20, finds that by that time, it is clear beyond a preponderance of the credible evidence that the petitioner's current condition of ill-being as it relates to his cervical spine is not causally related to the injury on 5/8/20. For these reasons, the arbitrator finds that only the treatment petitioner received from Dr. Gornet from 5/8/20 through 10/22/20 was reasonable and necessary pursuant to Sections 8(a) and 8.2 of the Act.

With respect to the unpaid bills from MRI Partners of Chesterfield the arbitrator finds the MRI of the left upper extremity on 10/5/20, and the MRI of the cervical spine on 6/16/20 were reasonable and necessary. The arbitrator further finds the MRI of the cervical spine on 4/9/21 was not reasonable and necessary.

Respondent shall pay reasonable and necessary medical services for the services rendered by Dr. Paletta from 5/8/20 through 9/10/21; the services of Dr. Gornet from 5/8/20 through 10/22/20; the MRI of the cervical spine on 6/16/20; and, the MRI of the left upper extremity on 10/5/20, 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.

K. IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE?

The petitioner claims he is entitled to the prospective medical treatment recommended by Dr. Gornet in the form of a C6-C7 disc replacement. Having found petitioner's current condition of ill-being

as it relates to his cervical spine is not causally related to the injury he sustained on 5/8/20, the arbitrator finds the petitioner is not entitled to the C6-C7 disc replacement recommended by Dr. Gornet. The arbitrator bases this finding on the fact that this recommendation is not based on the credible medical evidence. The arbitrator finds that Dr. Gornet repeatedly misrepresented the findings of the EMG/NCS and the MRI of the cervical spine performed on 6/16/20, as well as the relief petitioner received from the C6-C7 injection he underwent. The arbitrator finds that recommendations based on such misrepresentations could prove more harmful to the petitioner in the long run.

The arbitrator notes that on 5/19/21 Dr. Paletta put petitioner's therapy on hold, and recommended an ultrasound of the left shoulder to evaluate the rotator cuff. To date, it does not appear that has been done, or that therapy has been restarted. For these reasons, the arbitrator finds the petitioner is entitled to a follow-up visit to Dr. Paletta to determine if the ultrasound of the left rotator cuff is still needed, and if any further physical therapy for the left shoulder is needed.

L. WHAT TEMPORARY BENEFITS ARE IN DISPUTE?

Petitioner claims he was temporarily totally disabled from 5/16/20 through 9/10/21. Respondent claims petitioner was only temporarily totally disabled from 5/16/20 through 7/31/21. Based on these claims, the arbitrator finds the parties have stipulated that the petitioner was temporarily totally disabled from 5/16/20 through 7/31/21. Therefore, the arbitrator will only be looking at the period 8/1/21 through 9/10/21.

Having found the petitioner's current condition of ill-being as it relates to his left shoulder is causally related to the injury he sustained on 5/8/20; that on 5/19/21 Dr. Paletta still had petitioner on light duty when he stopped petitioner's therapy because he wanted an ultrasound of his left rotator cuff performed; that on 5/25/21 Dr. Petkovich was of the opinion that petitioner could work light duty, with no lifting of his left upper extremity over 5 pounds, and no overhead lifting with his left arm; and, that on 5/25/21 Dr. Petkovich was of the opinion that 4-6 weeks of additional physical therapy for petitioner's left shoulder would be reasonable and necessary, the arbitrator finds the petitioner is entitled to temporary total disability benefits related to his left shoulder from 5/16/20 through 9/10/21. Although Dr. Petkovich was of the opinion on 7/7/21 that petitioner was not in need of any further treatment, and could return to full duty work without restrictions as it relates to his left shoulder/upper extremity, the arbitrator finds these opinions less than persuasive given that on 5/25/21 he was of the opinion that petitioner could only work light duty, and was in need of an additional 4-6 weeks of physical therapy, and gave no basis for this change in his opinion. Given that the petitioner did not undergo the additional physical therapy, the

arbitrator questions how Dr. Petkovich went from a light duty recommendation to a full duty release, without the petitioner undergoing the recommended additional physical therapy. For these reasons, the arbitrator gives little weight to Dr. Petkovich's opinions on 7/7/21.

Based on the above, as well as the credible evidence, the arbitrator finds the petitioner was temporarily totally disabled from 5/16/20 through 9/10/21, a period of 68-6/7 weeks, with respondent getting a credit for the $97,591.41 it has already paid in temporary total disability benefits.

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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019875
Case Name	Abraham Puentes v. Norton Sons Roofing
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0254
Number of Pages of Decision	14
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Jack Epstein
Respondent Attorney	Megan Dyson, Daniel Sarther, Steven Wolf

DATE FILED: 7/11/2022

/s/ Deborah Simpson, 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

ABRAHAM PUENTES,

Petitioner,

vs. NO: 20 WC 19875

NORTON SONS ROOFING CO., INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and notice given to all parties, the Commission, after considering all issues and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, with corrections made as to the Findings section on page two of the Decision of the Arbitrator as addressed by the Commission herein.

Petitioner, a laborer, alleged that he sustained radiating low back injuries after lifting a heavy generator without assistance on August 5, 2020. Following a §19(b) hearing on the matter, the Arbitrator found that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment and denied all benefits accordingly. Despite finding no compensable accident and rendering all other issues moot in the Order and body of the Decision of the Arbitrator, the Findings section on page two of the Decision of the Arbitrator inconsistently stated that Petitioner *did* sustain an accident arising out of and in the course of his employment, timely notice *was* given, and Petitioner's current condition *is* causally related to the accident. The Commission thus corrects these typographical errors to conform with the remainder of the Decision of the Arbitrator and specifically changes the Findings section to read that Petitioner *did not* sustain an accident arising out of and in the course of his employment. Since the Arbitrator's finding of no accident rendered the issues of notice and causal connection moot, the Commission also strikes the sentences in the Findings section that read: "Timely notice of this accident *was* given to Respondent" and "Petitioner's current condition of ill-being *is* causally related to the accident." The Commission incorporates these corrections into the Decision of the Arbitrator, and in all other respects not expressly stated herein, the Commission affirms the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Findings section on page two of the Decision of the Arbitrator is changed to read that Petitioner did not sustain an accident arising out of and in the course of his employment. Since the issues of notice and causal

connection are moot, the Commission also strikes the following sentences in the Findings section on page two of the Decision of the Arbitrator: "Timely notice of this accident *was* given to Respondent" and "Petitioner's current condition of ill-being *is* causally related to the accident." After the incorporation of these corrections, the Commission otherwise affirms and adopts the Decision of the Arbitrator filed on October 5, 2021.

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

July 11, 2022

DLS/met
O- 5/25/22
46

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC019875
Case Name	PUENTES, ABRAHAM v. NORTON SONS ROOFING
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Elaine Llerena, Arbitrator

Petitioner Attorney	Jack Epstein
Respondent Attorney	Daniel Sarther

DATE FILED: 10/5/2021

INTEREST RATE FOR THE WEEK OF OCTOBER 5, 2021 0.05%

/s/Elaine Llerena, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)/8(a)

Abraham Puentes Case # **20** WC **019875**
Employee/Petitioner

v.

Norton Sons Roofing Co., Inc.
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **April 27, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **August 5, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**3,942.00**; the average weekly wage was $**563.14**.

On the date of accident, Petitioner was **21** years of age, ***married*** with **2** dependent children.

ORDER

Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment with Respondent on August 5, 2020.

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.

/s/ Elaine Llerena
Signature of Arbitrator

October 5, 2021

ICArbDec19(b)

STATEMENT OF FACTS:

Petitioner testified that he started working for Respondent on June 15, 2020. (T. 8-9) Respondent installs new roofs on homes and buildings. (T. 9) Petitioner testified that he worked as a laborer and that his job included bringing materials and whatever the roofers needed to do their jobs. (T. 9-10)

Petitioner testified he injured his back while working on August 4, 2020. (T. 11) Petitioner testified that he, Pedro Hernandez and Matt Norton lowered an old generator, which weighed about 100 lbs, down from the roof to the ground using a "pulling system." (T. 11-14) Petitioner explained that they tied a rope around the generator then threw the generator off the roof while Petitioner and his coworkers held the rope and kept the generator from slamming to the ground with their weight. (T. 15) Once the generator was on the ground, Petitioner vomited. *Id.* Petitioner believed he vomited because of the pressure and pain on him. (T. 17-18)

Petitioner testified he then tied a rope around a new generator and lifted it to the roof by himself. (T. 11, 16). According to Petitioner, the new generator as a bit smaller and weighed about 70-80 lbs. *Id.* Petitioner explained that he lifted this new generator by himself while the other workers watched. (T.11-13) Petitioner testified that while he raised the new generator, he felt a little ping in his back. *Id.* Petitioner testified that Matt Norton and Dan, Matt Norton's supervisor, watched him lift the new generator to the roof and that Pedro Hernandez and his coworkers were on break at the time. (T. 16-17) Petitioner testified that it was at this point that he felt pain. (T. 17)

Petitioner testified he told Matt Norton about his back pain toward the end of the day, around 1:00 p.m. or 2:00 p.m. (T. 18-19) Petitioner explained that his pain worsened as he continued to work throughout the day. (T. 18) Petitioner did not recall when exactly he went to the hospital and testified that he worked a few days with pain. (T. 20) Petitioner continued to work his normal job. *Id.* Petitioner did not discuss what he was going to do with Matt Norton until he went to the hospital. *Id.*

Petitioner testified that following his accident his pain started with numbness in his left back and then as the week went on his left leg became tingly to the point where he could not walk without his left leg feeling like it was asleep. (T. 20-21) Petitioner went to the hospital the following Monday because he could not take the pain anymore. (T. 21) Petitioner testified that he never works Saturdays or Sundays. (T. 34)

Petitioner sought treatment at Advocate Christ Medical Center on August 10, 2020. (PX1) Petitioner complained of left hip pain that radiated into his thigh and numbness in his thigh. *Id.* Petitioner indicated that the symptoms had started two days earlier. *Id.* Additionally, Dr. Nicholas Keeven noted that Petitioner was a construction worker who felt an immediate onset of pain in the left buttock and leg while not at work on Saturday. *Id.* Dr. Keeven further noted that the Petitioner's pain radiated down his back into his leg and calf. *Id.* Dr. Keeven diagnosed Petitioner with a herniated disc, felt that no imaging was needed, took Petitioner off work for the rest of the day, prescribed pain medication and recommended Petitioner gradually return to activities and avoid complete bedrest. *Id.* Petitioner was to follow up with his primary care physician. *Id.*

According to Petitioner, an x-ray was taken while at Advocate Christ Medical Center and he was given a light duty work slip. (T. 22, 25) Petitioner testified that he told the nurses and doctors that he was injured lifting a generator. (T. 24-25) Petitioner testified he told the doctors that his pain got worse on Saturday, which is when he was unable to walk without holding his back. (T. 24) Petitioner further testified he told the nurses two days prior was when the pain was intolerable. *Id.* Petitioner testified that he told the people at the hospital that he was lifting a generator by himself that day. (T. 41)

Petitioner testified he was unsure of when he returned to work with the light duty slip. (T. 25) Petitioner testified that he told Matt Norton he was hurt and had a light duty slip. (T. 25-26) Petitioner testified that Matt Norton told Petitioner he could be on light duty. (T. 26) Petitioner testified that Matt Norton then tried saying that Petitioner's injury did not occur at work. (T. 26-27) According to Petitioner, he continued to work light duty for the rest of the week during which time Matt Norton's crew merged with another crew. (T. 27) Petitioner testified that he was working light duty for 3 or 4 days following the incident. (T. 47) Petitioner testified he worked light duty because Matt Norton allowed him to work light duty. (T. 48)

Petitioner testified that once the crews merged, another boss asked him to lift a very heavy rope and he told him that he could not because he was on light duty. (T. 27) After that, when Petitioner and Matt Norton discussed the next job, according to Petitioner, Matt Norton stated he needed workers who could work. *Id.* That was the last day Petitioner worked. *Id.* Petitioner testified that Matt Norton then blocked his number and him on social media. (T. 28)

Pedro Hernandez was called to testify by Petitioner. (T. 49) Mr. Hernandez testified that Petitioner is a close friend that he has known since 2015. (T. 50-51) Mr. Hernandez worked for Respondent on August 4, 2020 and continues to work for Respondent. (T. 49-50) Mr. Hernandez testified that he worked with Petitioner and that Petitioner helped him get his job at Respondent. (T. 51, 64)

Mr. Hernandez recalled a time in August 2020 when a generator broke down on top of a roof. (T. 51) Mr. Hernandez testified that Petitioner, Matt Norton, Daniel Hernandez, and an older gentleman were present when they took down the generator. (T. 51) The older gentleman was the person who brought the new generator. (T. 52) Mr. Hernandez testified that he, Petitioner, Matt Norton and Daniel Hernandez brought the generator down. *Id.* Mr. Hernandez testified that Petitioner vomited after the generator was brought down. *Id.* Mr. Hernandez testified that Petitioner stated his side was hurting. (T. 53)

Mr. Hernandez testified that he helped raise the new generator onto the roof. *Id.* Mr. Hernandez explained that five people were on the ground and one person was on the roof. *Id.* According to Mr. Hernandez, the same group that lowered the old generator from the roof was the same group that raised the new generator onto the roof. (T. 53-54) Mr. Hernandez testified that everyone helped raise the generator up to the roof. (T. 54) Mr. Hernandez explained that after the generator was raised onto the roof, a break time was called, and everyone took a break. (T. 54-55)

Mr. Hernandez testified that Petitioner drove him to and from work. (T. 55-56) Mr. Hernandez testified that after the day they lifted the generator he noticed that Petitioner's health was deteriorating. (T. 57) Mr. Hernandez explained that Petitioner complained of pain in his side after lowering the generator from the roof. (T. 62) Specifically, Mr. Hernandez noted that Petitioner's left leg was stiff, and Petitioner could not bend down. *Id.* Mr. Hernandez testified that he advised Petitioner to go to the doctor. (T. 58) Mr. Hernandez testified that after Petitioner went to the doctor, Petitioner's job duties changed to light duty. (T. 58-59)

Mr. Hernandez testified that Dan Hernandez asked him to call the company's lawyer or to give a written statement stating that Petitioner did not get hurt at work. (T. 59-61) Mr. Hernandez never gave any statement to that effect. (T. 61) Mr. Hernandez could not recall when he spoke with Dan Hernandez. (T. 66)

Matt Norton was called to testify by Respondent. (T. 69) Mr. Norton testified that he runs a crew for Respondent and has worked for Respondent for 5 years, three of them as a foreman. (T. 69)

Mr. Norton testified that in August 2020, Petitioner worked on his crew. (T. 70) Mr. Norton explained that his crew was working a job in Elk Grove Village, laying a new roof over an existing roof. (T. 70-71) Mr. Norton testified that they needed a generator on the roof to operate their tools. (T. 71)

Mr. Norton testified that the generator broke on August 5, 2020, not August 4, 2020. (T. 71-72) Mr. Norton called his boss, Steven Norton, who indicated he would send a new generator out as soon as possible. (T. 72) Mr. Norton testified that the new generator arrived after lunch around 12:00 p.m. or 12:30 p.m. *Id.*

Mr. Norton testified that they first brought down the old generator. (T. 73) Mr. Norton explained that five guys were on the ground and two guys were up on the roof to lift it over the edge. (T. 73) The five guys on the ground, which were Ed Yanchick, Mr. Hernandez, Evan Rivera, Petitioner and Mr. Norton, lowered it to the ground. *Id.* Mr. Norton testified that once the generator was on the ground, they rolled it over to Ed Yanchick's work van and took out the other generator. *Id.* Mr. Norton testified that four guys pulled the new generator up to the roof. (T. 73-74) Mr. Norton explained that Ed Yanchick was the anchor for the rope and did not actually pull the generator up. (T. 74) Mr. Norton testified that Petitioner did not lift the generator by himself. *Id.*

Mr. Norton testified that after the crew lifted the generator onto the roof, they took a break. *Id.* According to Mr. Norton, Petitioner did not tell him that he hurt his back after lifting the generator. (T. 75)

Mr. Norton testified that Petitioner did not show up to work on August 6, 2020. (T. 76) Mr. Norton called Petitioner but got no response. *Id.* Mr. Norton explained that Mr. Hernandez did not work on August 6, 2020 either since Petitioner was his ride to and from work. *Id.* Mr. Norton got a call from Petitioner's wife around 10:00 a.m. on August 6, 2020. (T. 77) Mr. Norton testified that Petitioner's wife reported that Petitioner had been unconscious in the morning because he was dehydrated. *Id.*

Mr. Norton testified that Petitioner returned to work on August 7, 2020. (T. 75) Mr. Norton testified that Petitioner worked light duty because he had been dehydrated the day before. (T. 79) Petitioner next returned to work on August 11, 2020 and worked a half day due to lack of work. (T. 80) On August 12, 2020, Petitioner was moved to a new crew. (T. 81)

Mr. Norton testified that Petitioner never told him that he injured his back lifting a generator. *Id.* Mr. Norton testified that he did not see Petitioner vomit after lowering the generator. (T. 87) Mr. Norton denied seeing Petitioner have any problems with his back. *Id.* Mr. Norton testified that the only reason Petitioner worked light duty was because of dehydration. (T. 87-88, 94) Mr. Norton testified that Petitioner's light duty went into the following week. (T. 90-91) Mr. Norton testified that after Petitioner was transferred to the new crew, Petitioner asked if he could come back to Mr. Norton's crew, but Mr. Norton's crew was full, so he could not take Petitioner back. (T. 93-94)

Ed Yanchick was called to testify by Respondent. (T. 96) Mr. Yanchick testified that he is a roofer and has worked for Respondent for 23 years. *Id.* Mr. Yanchick's current position is shingle technician. *Id.* Mr. Yanchick also does inspections, repair and maintenance work and whatever else is needed, including deliveries. (T. 96-97)

Mr. Yanchick testified that on August 5, 2020 he had to take a generator to the Rollex job. (T. 97) Mr. Yanchick explained that once he completes a task, he writes down the completed task in his logbook. (T. 97-98) Mr. Yanchick testified that he left the office to deliver the generator around 11:30 a.m. and arrived at the work site around 12:30 p.m. (T. 99)

Mr. Yanchick testified that he helped lower the old generator down from the roof. *Id.* He explained that the entire crew helped lower the generator. *Id.* Mr. Yanchick did not recall everyone who was on the crew that day. *Id.* According to Mr. Yanchick, the generator was lowered down with a rope and pulley. (T. 100) Mr. Yanchick testified he did not see anyone get hurt while raising or lowering the generators from the roof. (T. 102)

On rebuttal, Petitioner admitted to being part of the crew that lowered generator down from the roof and the crew that raised the generator onto the roof. (T. 104-105) Petitioner then for the first time testified that there was another smaller generator that was raised onto the roof. (T. 105-106) According to Petitioner, Mr. Norton asked Petitioner to move this new generator by himself after lowering the old generator from the roof. *Id.* Petitioner testified it was while he was moving this third generator that he injured his back. (T. 106)

Petitioner denied any problems with being dehydrated the week the generators were moved. (T. 107) Petitioner explained he did have a problem with dehydration the week prior and he told Matt Norton that he was not feeling well. (T. 108) Petitioner testified he gave Matt Norton a light duty slip on August 11, 2020. (T. 109) Petitioner testified the crews were merged the next week and he continued to work light duty, until they didn't have any light duty work. (T. 110) Petitioner testified he was then terminated. (T. 111)

Petitioner testified the first generator was raised onto the roof before lunch. (T. 114) After the lunch break, they realized a second one was needed, so they raised it onto the roof. *Id.* Petitioner testified that Mr. Hernandez took the second generator from Mr. Yanchick's truck. *Id.*

At the conclusion of Petitioner's testimony, Petitioner moved to amend the date of accident from August 4, 2020 to August 5, 2020. (T. 116) The Arbitrator granted Petitioner's oral Motion to Amend the date of accident from August 4, 2020 to August 5, 2020. *Id.*

On rebuttal, Mr. Norton testified there are always two generators on jobsites, and they are both the same size. (T. 117, 119) Mr. Norton explained that at the Rollex job, a broken generator was brought down, and a working generator was taken up. (T. 117) Mr. Norton testified that there was never a third generator moved on August 5, 2020. (T. 118) Mr. Norton denied asking Petitioner to move a generator by himself. *Id.* Mr. Norton testified that Mr. Yanchick only brought one generator to the Rollex jobsite. *Id.*

On rebuttal, Mr. Yanchick testified that he only brought one generator to the Rollex jobsite. (T. 119) He denied bringing a second small generator to the work site. *Id.*

On August 21, 2020, Petitioner sought treatment with Dr. Eugene Lipov. (PX2) Petitioner complained of low back pain with radiation down the left lower leg following a work accident on August 4, 2020. *Id.* Petitioner reported pulling a generator that weighed approximately 80 lbs when he felt a sharp pain on both sacral areas with radiation to his left lower leg down to his toes. *Id.* Petitioner reported going to the ER two days later, where he was given pain medication and an intramuscular steroid injection. *Id.* Petitioner reported that his back pain was at 6 out of 10 with muscle cramping and spasms. *Id.* Petitioner had an antalgic gait and left foot drag. *Id.* Dr. Lipov noted that straight leg raise was positive on the left. *Id.* Dr. Lipov ordered an MRI, prescribed physical therapy and pain medication, and took Petitioner off work. *Id.*

Petitioner began physical therapy at Midcity Rehabilitation on August 25, 2020. (PX3) He reported developing back pain that spread into his left leg while pulling a generator up to the roof by himself on August 4, 2020. *Id.* Petitioner reported that he went to work the following day and his left foot was dragging. *Id.* Petitioner further reported that he had not returned to work since. *Id.* Petitioner complained of left leg

numbness. *Id.* On August 31, 2020, Petitioner reported no pain in his lower back, but complete numbness in his left lower extremity. *Id.* He also reported having pain in his right knee since the past weekend. *Id.*

Petitioner underwent an MRI of the lumbar spine on September 1, 2020. (PX2) The MRI revealed loss of lordotic curvature on lateral survey scan likely due to muscular spasm, disc desiccation at L4-5 and L5-S1, Schmorl's nodes at multi-levels, disc protrusions at L5-S1 and L4-5 with bilateral facet arthropathy and hypertrophy of the ligamentum flavum causing thecal sac indentation and bilateral lateral spinal canal and neural foraminal narrowing and central annular tear at these levels, and a 1.0 mm broad-based diffuse disc bulge at L3-4 and L2-3 with bilateral moderate facet joint arthropathy and hypertrophy of the ligamentum flavum causing mild effacement of the thecal sac and mild bilateral neural foraminal narrowing without significant radicular compression. *Id.*

On September 2, 2020, Petitioner reported at physical therapy that he was feeling good and had no current pain. (PX3) On September 15, 2020, Dr. Manal Elmusa authored a letter indicating that after five physical therapy sessions Petitioner informed him that he was starting to regain sensation in his left leg and that the numbness was localized to his left calf and first two toes. (PX2) Petitioner also reported a lump in his umbilical region which was nontender to palpation but that he felt comfortable continuing with physical therapy. *Id.*

On September 16, 2020, Petitioner saw Dr. Samir Sharma at Illinois Orthopedic Network. *Id.* Petitioner reported low back and left lower extremity pain following an August 4, 2020 work-related injury where he was hoisting a generator, about 80 lbs, to the roof of a building when he felt a pop in his back. *Id.* Petitioner reported that he vomited and was placed on light duty for two days. *Id.* Petitioner also reported getting an injection at the hospital to his shoulder which did not provide any relief. *Id.* Dr. Sharma diagnosed Petitioner as having a left L5-S1 disc herniation, extrusion type herniation, contributing to severe lateral recess and foraminal stenosis on the left with impingement of the left S1 spinal nerve root. *Id.* Dr. Sharma recommended a left L5-S1 transforaminal epidural steroid injection and a spine surgical consult and took Petitioner off work. *Id.*

Petitioner continued physical therapy, during which time Petitioner reported feeling good and, at times, having no pain. (PX3) On October 1, 2020 and October 2, 2020, Petitioner reported that pain medication was improving his pain and denied any current pain. *Id.*

Petitioner saw Dr. Kevin Koutsky at Illinois Orthopedic Network on October 30, 2020. (PX2) Petitioner complained of lower back pain radiating down the left leg into his foot with some numbness and tingling. *Id.* Petitioner also reported some weakness. *Id.* Petitioner reported that his symptoms started after a work-related injury on August 4, 2020 while pulling a generator weighing approximately 80 lbs. *Id.* Petitioner indicated that he felt a sharp pain in his back that radiated into his leg. *Id.* Dr. Koutsky diagnosed Petitioner as having left L5-S1 radiculopathy and disc herniation. *Id.* Dr. Koutsky continued Petitioner's physical therapy and noted that Petitioner was awaiting a lumbar epidural injection. *Id.* Dr. Koutsky recommended lumbar decompression surgery on the left at L5-S1 to which Petitioner agreed. *Id.*

On December 8, 2020, Petitioner presented to Dr. Sharma via telephonic consultation. *Id.* Dr. Sharma noted that Petitioner was waiting on an injection, but then noted that Petitioner reported improvement with his injection. *Id.* Dr. Sharma also noted Petitioner had completed physical therapy which had helped improve Petitioner's function. *Id.* Petitioner reported he no longer had numbness and tingling in his left leg, but still had occasional radiation into the left buttock localized to the left lumbosacral area. *Id.* Dr. Sharma continued to seek authorization for a left L5-S1 epidural steroid injection and recommended that Petitioner restart physical therapy. *Id.* Dr. Sharma continued Petitioner's medication regimen and kept Petitioner off work. *Id.*

On December 11, 2020, Petitioner returned to physical therapy at Midcity Rehabilitation. (PX3) Petitioner reported that he had mainly been at home watching his kids while his wife worked. *Id.* Petitioner indicated that he had not been doing his home exercises and that his back had been stiff since he had not been in physical therapy. *Id.* Petitioner denied taking pain medication. *Id.* He also denied any numbness, tingling, or radiation into his lower extremity. *Id.* Petitioner reported bending aggravated his pain and that pain medication helped alleviate his discomfort. *Id.*

Petitioner returned to Dr. Sharma on January 7, 2021. (PX2) Petitioner reported his pain was at 7 of 10, localized predominantly to the left lumbosacral junction. *Id.* Petitioner indicated that he was taking pain medication as prescribed, but sporadically about every other day. *Id.* Petitioner reported physical therapy was exacerbating his pain and spasms, so he had not attended physical therapy for about 2-3 weeks. *Id.* Dr. Sharma noted that Petitioner had positive tenderness and hypertonicity of the left lumbosacral paraspinal musculature with radiation to his left flank. *Id.* Dr. Sharma recommended restarting physical therapy and switched Petitioner to lidocaine pain patches. *Id.* Dr. Sharma continued to recommend injections for Petitioner's low back pain. *Id.*

Petitioner testified that he told his treating doctors that he injured his back on August 4, 2020. (T. 44) Petitioner testified he started having back pain on August 4, 2020. (T. 44-45) Petitioner explained that the pain started that day because he was lifting a generator up to the roof all by himself. (T. 45)

Petitioner did not know the last time he sought treatment for his low back. (T. 42) Petitioner testified that his leg pain improved with physical therapy, but his back pain has remained constant. (T. 43) Petitioner denied reporting that his back pain was down to zero to any medical provider. (T. 43) He further denied that his back pain improved with physical therapy. *Id.*

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes a plethora of contradictions in Petitioner's testimony regarding the alleged work accident. Petitioner testified that he lifted a generator by himself. This testimony was contradicted by all three witnesses, Pedro Hernandez, Matt Norton and Ed Yanchick. For most of the trial, Petitioner only spoke of two generators, the broken generator that was removed from the roof and the replacement generator that was placed on the roof. On rebuttal, Petitioner mentioned for the first time a third generator and claimed that this third generator was the generator he lifted on his own. Petitioner's witness, Mr. Hernandez, made no mention of a third generator and testified that both generators moved that day were moved by the crew and not solely by Petitioner. Further, Mr. Yanchick, who delivered the replacement generator to work site, testified that he only delivered one generator. This is confirmed by his logbook in which he noted that he delivered "generator to Matt @ Rollex" and "take Broken gen to Repair Shop." (RX1)

The Arbitrator also notes that the initial medical records fail to document a work-related injury. The records show that when Petitioner sought treatment on August 10, 2020 at Advocate Christ Medical Center, that Petitioner complained of left hip pain that radiated into his thigh and numbness in his thigh and that the pain started on Saturday when he was not at work. The Arbitrator further notes that those hospital records note Petitioner is a construction worker, yet clearly indicates that Petitioner's pain began on Saturday when he was not working. Additionally, the records show that Petitioner was taken off work for the rest of that day and that Dr. Keeven recommended Petitioner gradually return to activities. Petitioner testified that he was placed on light duty that day, however the medical records do not support that assertion.

Petitioner also testified that his pain has never completely alleviated. However, the physical therapy records do not support this claim. There are several physical therapy notes which indicate that Petitioner reported no pain and that he was feeling good on multiple visits.

Considering the many inconsistencies and contradictions in Petitioner's testimony and the lack of any mention of a work-related accident when he first seeks treatment on August 10, 2020, the Arbitrator does not find Petitioner credible. Based on the above, the Arbitrator finds that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment on August 5, 2020.

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

The Arbitrator notes that, at trial, Petitioner moved to amend the date of the alleged accident from August 4, 2020 to August 5, 2020 and that the Arbitrator granted Petitioner's oral Motion to Amend the date of accident from August 4, 2020 to August 5, 2020.

Therefore, the Arbitrator finds that the date of alleged accident was August 5, 2020.

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

Based on the Arbitrator's finding that Petitioner failed to prove that Petitioner sustained accidental injuries arising out of and in the course of his employment on August 5, 2020, the Arbitrator finds the issue of whether timely notice of the alleged accident was given to Respondent moot.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that Petitioner failed to prove that Petitioner sustained accidental injuries arising out of and in the course of his employment on August 5, 2020, the Arbitrator finds the issue of whether Petitioner's present condition of ill-being is causally related to the alleged injury moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove that Petitioner sustained accidental injuries arising out of and in the course of his employment on August 5, 2020, the Arbitrator finds the issues of whether the medical services that were provided Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges moot.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that Petitioner failed to prove that Petitioner sustained accidental injuries arising out of and in the course of his employment on August 5, 2020, the Arbitrator finds the issue of whether Petitioner is entitled to prospective medical care moot.

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

Based on the Arbitrator's finding that Petitioner failed to prove that Petitioner sustained accidental injuries arising out of and in the course of his employment on August 5, 2020, the Arbitrator finds the issue of whether Petitioner is entitled to temporary total disability benefits moot.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's finding that Petitioner failed to prove that Petitioner sustained accidental injuries arising out of and in the course of his employment on August 5, 2020, the Arbitrator finds the issue of whether penalties should be imposed on Respondent moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC017146
Case Name	Francisca Rivas v. Costco Wholesale
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0255
Number of Pages of Decision	16
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Muriel Collison
Respondent Attorney	Michelle LaFayette

DATE FILED: 7/12/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Francisca Rivas,

Petitioner,

vs. NO. 18WC 17146

Costco Wholesale,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19b having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical expenses, causal connection, 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 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 January 7, 2022 is hereby affirmed and adopted.

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

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

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

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

July 12, 2022

SJM/sj
o-05/25/2022
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/s/ *Stephen J. Mathis*
Stephen J. Mathis

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC017146
Case Name	RIVAS, FRANCISCA v. COSTCO WHOLESALE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Stephen Friedman, Arbitrator

Petitioner Attorney	Muriel Collison
Respondent Attorney	Michelle LaFayette

DATE FILED: 1/7/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 7, 2022 0.22%

/s/Stephen Friedman, Arbitrator

Signature

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)

Francisca Rivas
Employee/Petitioner

v.

Costco Wholesale
Employer/Respondent

Case # **18** WC **17146**

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 **Wheaton**, on **December 7, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 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 $**50,326.38**; the average weekly wage was $**967.82**.

On the date of accident, Petitioner was **48** 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 $**93,482.19** for TTD, $**1,655.29** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**95,137.48**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,225.00 to Integrated Physical Medicine of Joliet, $2,140.00 to Plainfield Chiropractic and Rehabilitation, Ltd, $3,500.00 to Smart Choice MRI, and $1,044.00 to Dr. Vivik Mohan, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Mohan including an L4-5 fusion, any post-operative treatment, physical therapy, or other reasonable and necessary care.

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

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

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

/s/ Stephen J. Friedman **JANUARY 7, 2022**
Signature of Arbitrator

ICArbDec19(b)

Statement of Facts

Trial in this matter was heard on December 7, 2021. At that time the parties noted that temporary compensation was not in dispute. Respondent has agreed to pay the temporary partial compensation listed on the Request for Hearing and temporary total compensation paid is calculated with payments through December 3, 2021. Payment of benefits is ongoing.

Petitioner Francisca Rivas testified she was employed by Respondent Costco from 2002 until September 2021. She worked as a stocker, handling stock, cleaning and generally doing various tasks as needed. She testified her job included lifting, including boxes of jeans. A box of jeans was the heaviest item she lifted, weighing about 40 lbs. The job analysis for a stocker notes essential functions required occasional lifting to 20 pounds and non-essential functions required occasional lifting up to 50 pounds (PX J). On October 24, 2017, Petitioner was moving a 40 pound box of jeans to put it on a table and felt a “crack” in her lower back. She consulted by phone with a nurse, was advised to go home, ice her back and take ibuprofen. Petitioner prepared an Employee Injury Record on the date of accident (PX K).

Petitioner testified she didn’t go into work the next day due to pain. She was instructed by her Employer to go to Edward Occupational Health. Petitioner was seen on October 25, 2017 (PX A). She complained of back pain, and pain radiating into right buttock and right thigh. Petitioner was diagnosed with a lumbar strain with radiculopathy. She was provided medication and instructed to begin physical therapy. She was taken off work. Petitioner followed up at Edwards Occupational Health and began physical therapy at Brightmore on November 2, 2017 (PX B). On November 7, 2017, she was released to light duty and limited hours (PX A, p 15). On November 17, 2017, she advised that light duty was not available. An MRI was ordered (PX A, p 17). The December 6, 2017 MRI of the lumbar spine showed: a right paracentral disc protrusion contacts the right L5 nerve root at L4-5; a bulging disc and a central annular fissure with contact of both S1 nerve roots at L5-S1; and mild left foraminal narrowing at L5-S1 due to a bulging disc (PX C, p 13). On December 12, 2017, Petitioner was to be referred to pain management (PX A, p 29).

Dr. Vinita Mathew of Northwestern Medical provided treatment beginning on December 18, 2017 (PX D). She diagnosed lumbar radiculitis and lumbar disc herniation with radiculopathy. Dr. Mathew suggested an epidural injection, but Petitioner requested she hold off. Petitioner began a Medrol Dosepak (PX D, p 71-72). On January 8, 2018, Petitioner reported no relief and Dr. Mathew recommended epidural steroid injections (PX D, p 132-133). Petitioner underwent 2 injections without significant relief. A second MRI on June 1, 2018 demonstrated findings like those on the first MRI (PX D, P 174-175). On June 11, 2018, Dr. Mathew noted the June 1, 2018 MRI showed a slight worsening of the L4-5 disc herniation. She recommended an L5 TESI, and if Petitioner did not receive relief, a referral to a spine surgeon (PX D, p 180). Petitioner underwent the third injection on August 1, 2018 (PX D, p 239-240). On August 13, 2018, Petitioner reported no overall improvement. Dr. Mathew referred Petitioner to a spine surgeon (PX D, p 270-272).

Petitioner saw Dr. Kolavo on August 22, 2018. After examination and review of the 2 MRIs, Dr. Kolavo assessed degeneration of the lumbar or lumbosacral intervertebral disc and lumbar disc herniation with radiculopathy. He stated the L5-S1 level does not merit surgery, and proposed a right L4-5 microdiscectomy (PX D, p 287). On September 24, 2018, Dr. Kolavo performed a right L4-5 microlumbar discectomy. The post-operative diagnosis was herniated right L4-5 disc with persistent right L45 radiculitis. The operative report notes that drills were used to thin the inferior lamina of L4 and “a small portion of the L4-5 facet joint that was seen to be modestly hypertrophic” (PX D, p 468).

Petitioner had postoperative care with Dr. Kolavo beginning October 9, 2018. She was released to begin physical therapy October 23, 2018 (PX D, p 577). Petitioner had physical therapy at Brightmore from October 31, 2018 through November 26, 2018. The therapist noted good progress with functional ROM and improving core strength (PX B, p 204). On November 27, 2018, Dr. Kolavo notes Petitioner reported low-grade residual right sided low back pain but no radicular pain (PX D, p 598). Petitioner was advanced to work conditioning on November 30, 2018 (PX D, p 599, PX B). On December 26, 2018, Petitioner reported a flare up on right sided low back pain spreading to the right lateral leg (PX D, p 601). Petitioner was discharged from work conditioning on January 4, 2019 noting she completed the program except heavy lifts. Her subjective reports were unchanged, and a plateau reached (PX B, p 252). On January 16, 2019, Dr. Kolavo noted the release from work conditioning and released Petitioner to return to work with lifting of 35 pounds. He noted the job description included lifting up to 50 pounds and encouraged Petitioner to share lifting whenever possible (PX D, p 613).

On February 19, 2019, Petitioner reported she had returned to work a month ago and shortly thereafter began to experience low back pain radiating down the left leg. This was not present prior to her previous surgery. Dr. Kolavo ordered an MRI. He maintained the 35 pound lifting restriction (PX D, p 622-630). The MRI was performed on March 7, 2019 (PX C, p 34-35). On March 19, 2019, Dr. Kolavo noted the study demonstrated degenerative changes confined to the L4-5 and L5-S1 levels, post-surgical changes on the right at L4-5 with a customary amount of scarring and some minor right central residual prominence of the disc and annulus. There was no left-sided nerve compression. A small central disc herniation was noted at L5-S1, similar to the preop, with some foraminal stenosis on the left and some facet arthropathy. He indicated a trial of injection to the left at L5-S1 could be considered if she failed to improve with therapy and routine medical management (PX D, p 645). Dr. Kolavo maintained Petitioner's 35 pound lifting restriction. He states, "she is requesting removal of the lifting restriction." He did not lift the restriction, asking her to contact his office in a week with a status update. He wanted to see improvement with her left radicular symptoms prior to increasing her work activities (PX D, p 649). On March 27, 2019, Petitioner reported her leg pain improved and requested a full-duty release. Dr. Kolavo provided the release (PX D, p 653). Petitioner testified she gradually returned to work after the surgery. She initially did not have to lift anything heavy while on light duty. Once she was released to full-duty, Petitioner testified the pain returned with bending to lift boxes. She denied any additional injuries.

Petitioner returned to Dr. Kolavo on August 21, 2019. Petitioner's symptoms were never completely gone after surgery and recurred shortly after she returned to work full duty. The diagnosis was lumbar radiculitis. Dr. Kolavo opined her symptoms resulted from a recurrent disc herniation, but the symptoms were not disabling enough to warrant surgical intervention. Surgery might be a possibility in the future, depending on how things worked out. He returned her to work full duty on a trial basis. She was to return in a month to see how she was doing (PX D, p 657-658). On September 24, 2019, Petitioner reported medication management was not controlling her symptoms. Dr. Kolavo discussed injections and a possible revision surgery for a recurrent disc herniation, but Petitioner did not want to pursue either option. He continued medication management and ordered physical therapy at the facility of her choice. He restricted her to 32 hours a week (PX D, p 675-680).

Petitioner began treatment with Dr. Polcyn D.C. on October 7, 2019 (PX E). She provided him with Dr. Kolavo's physical therapy referral for 3 times per week for 4 weeks (PX E, p 24). She was seen on October 7 and 9, 2019 (PX E, p 26-33). Petitioner saw Dr. Kolavo on November 5, 2019, reporting pain was more manageable with the modification of her work schedule. He noted physical therapy had only recently been approved. He continued therapy and a modified work schedule (PX D, p 688-689). Petitioner continued treatment with Dr. Polcyn through December 4, 2019 (PX E). Petitioner contacted Dr. Kolavo's office on

December 13, 2019, reporting she did not improve with physical therapy and working worsened the right leg pain. She asked to be off work. Dr. Kolavo's ordered her off work until her next visit and ordered another MRI study (PX D, p 704). The radiology report indicated the study demonstrated the post-operative changes at L4-5, a mild residual broad bulging of the intervertebral disc, but no evidence of residual or recurrent disc herniation, moderate right neural foraminal narrowing at L4-5 with no definite focal neural impingement and mild bulging of the L5-S1 disc with a midline annular fissure/tear (PX D, p 709). Dr. Kolavo reviewed the study and noted there were some Modic endplate changes at L4-5, but what was previously a significant recurrent disc herniation is now trivial. There was some foraminal narrowing. He also noted some degenerative changes and minor degenerative bulging of the disc with annular tear at L5-S1 (PX D, p 710). A radiologist from Authentic4D reviewed the MRI of January 6, 2020. The radiologist agreed there was no evidence of disc herniation, agreeing with the interpretation of the study done by the treating radiologist (RX 2).

Dr. Kolavo saw Petitioner on January 14, 2020. She complained of more central low back pain than right leg pain. Dr. Kolavo noted she stands and walks slowly. She holds her back when ambulating. She verbalizes pain often. Lumbar examination showed diffuse soft tissue tenderness, forward flexing to within 16 inches of touching her fingers to the floor and extension to 20 degrees with central low back complaints only. She had normal motor strength and could walk on toes and heels, demonstrating good power versus gravity. Sitting straight leg raise produced some leg pain, but mostly central back pain. Dr. Kolavo advised Petitioner what was previously a recurrent disc herniation reabsorbed. There is no significant nerve root compression, only degenerative disc disease. He stated that she was not a candidate for further surgical intervention and her symptoms should be managed conservatively. He returned Petitioner to physiatry for further non-operative management of her symptoms. He ordered physical therapy for 4 weeks (PX D, p 721-722).

Petitioner returned to Dr. Mathew on January 20, 2020. Petitioner advised Dr. Mathew her symptoms resolved after surgery and she returned to work, working without pain until October of 2019. She gradually began to have pain again, which worsened over the last three months. She attributed a flare-up of her symptoms to repetitive bending and lifting at work. She described pain in the right side of her lower back radiating to the posterior thigh, posterior knee, and calf with numbness in the foot. Dr. Mathew diagnosed a recurrence of radicular pain. She opined the MRI demonstrated no surgical pathology. She recommended restarting physical therapy and conservative treatment with L4-5 transforaminal epidural steroid injections. She also suggested that Petitioner find a new job, as the pain seems to recur each time Petitioner returned to work. She placed Petitioner off work until the flare-up was under control, deferring discussion of permanent restrictions (PX D, p 734-739). Petitioner testified that Dr. Polcyn's office closed so she began treatment with Dr. McCarthy at Plainfield Chiropractic and Rehabilitation on January 20, 2020. He performed chiropractic techniques, physical therapy modalities and therapeutic procedures (PX F).

Dr. Mohan saw Petitioner for the first time on March 2, 2020 (PX G). Petitioner testified she was referred by Dr. McCarthy. Dr. Mohan noted Petitioner returned to work after surgery in December of 2019 and worked in a light-duty capacity until October of 2020. When she returned to work full-duty and was lifting heavy items, she noticed a gradual return of low back pain. Petitioner reported numbness and tingling from the buttocks to her right great toe, some balance and weakness issues and pain at 8/10 daily, worse with activity. Dr. Mohan noted Petitioner has previously been treated by an immediate care center, physical therapist, and pain management doctor, but has been discharged. His examination noted mild to moderate tenderness to palpation over the right sacroiliac joint and L5-S1 facet joint region, flexion to 80 degrees and extension to 30 degrees, a normal motor examination, a normal neurologic examination with only decreased findings at the lateral ankle for S1, a positive straight leg raise in a seated position and negative in the supine position. He stated her symptoms were coming from the right L5-S1 level again due to recurrent disc protrusion and

moderate facet degeneration and possible lysis at the right L5-S1 level. He recommended she proceed with the epidural steroid injection, but did not believe it would provide relief. He also recommended a CT scan to evaluate for facet degeneration and resection performed at the time of surgery (PX G, p 6-13).

Petitioner underwent a right L4-5 TESI on March 4, 2020 (PX D, p 795). Petitioner reported no improvement to Dr. McCarthy on March 9, 2020 (PX F) and to Dr. Mathew on March 12, 2020 (PX D, p 819) and March 16 (PX D, p 822). Dr. Mathew stated the lack of improvement with epidural steroid injections and a benign lumbar spine MRI indicates that the pain is not due to lumbar root impingement. Pain is most likely from piriformis syndrome and recommended stretching exercises and, if pain persists, a trigger point injection to the right piriformis (PX D, p 825). Petitioner had additional visits with Dr. McCarthy through March 18, 2020. She missed additional visits through April 15, 2020 due to COVID (PX F). Petitioner last saw Dr. Mathew on April 13, 2020 when further treatment was put on hold because Petitioner advised she was seeing a different provider at Rush for the same symptoms (PX D, p 846).

On April 21, 2020, Petitioner reported to Dr. Mohan that her pain was the same as she had before the surgery with numbness to the bottom of the foot/toes with calf pain. Dr. Mohan concluded based on his examination and MRI findings that her symptoms were coming from the right L5-S1 level due to recurrent disc protrusion and moderate facet degeneration and possible lysis at the right L5-S1 level. He again ordered a CT of the lumbar spine, looking to evaluate the facet and resection performed with the 2018 surgery (PX G, p 14-19). On May 20, 2020, Dr. Mohan indicated Petitioner's symptoms came from the right L4-5 level due to a recurrent disc protrusion and moderate facet degeneration. He noted positive straight leg raise in both a seated and supine position. He recommended an L4-5 transforaminal lumbar interbody fusion. Petitioner was limited to 10 pound lifting (PX G, p 21-25). On June 9, 2020, Dr. Mohan notes that a Utilization Review has been requested and he is awaiting surgical authorization. Petitioner was restricted to 5 pound lifting (PX G, p 32-35). On July 14, 2020, Dr. Mohan noted surgery was approved and he planned to schedule surgery next week (PX G, p 44).

On January 9, 2021, Dr. Mohan reports that surgery was approved by utilization review but that an IME was performed, but the report has not yet been received. He kept Petitioner off work to await the IME report. On February 17, 2021, Dr. Mohan notes that surgery was approved by utilization review, but the IME recommended an FCE with no further treatment nor an EMG. He ordered an EMG and updated MRI (PX G, p 57-62). The MRI performed February 22, 2021 was read by the radiologist as demonstrating an L4-5 broad based right foraminal/extraforaminal disc protrusion measuring 6mm AP super imposed on diffuse posterior disc displacement with resultant effacement and compression of the ventral thecal sac contributing to mild-to-moderate central canal stenosis, moderate right and mild foraminal stenosis with abutment of the existing bilateral L4 nerves. A right foraminal zone annular fissure (tear) is also seen at this level. There were 3.5mm to 4 mm protrusions also noted at L2-3, L3-4 and L5-S1 (PX C, p 38). The February 26, 2021 EMG noted mild irritability with rare fibrillation potentials present in the right tibialis anterior (L4-5). No right lumbar/lumbosacral nerve root pattern was present (PX H).

On March 3, 2021, Dr. Mohan reviewed the MRI and EMG findings. He disagreed with the IME recommendation of an FCE, as Petitioner wants to have her lumbar radiculopathy fixed and not live with this pain. He noted the EMG also shows persistent nerve irritability. The patient does not want to live with this pain and wants to have it addressed, surgically if necessary. We discussed the lumbar fusion at L4-5 to address the persistent disc protrusion and radiculopathy emanating from the L4-5 lateral right-sided herniation and enhancing granulation tissue seen on the Feb 2021 MRI (PX G, p 70). On September 29, 2021, Dr. Mohan continued to recommend surgery and ordered the Petitioner off work until 12/21 (PX G, p 80-85).

Dr. Mohan testified by evidence deposition taken May 21, 2021 (PX I). Objections were made to testimony by Dr. Mohan concerning the utilization review performed and provided to him in June 2020 and the offer of the exhibit itself (PX I, Ex 4). The Arbitrator notes that the Peer Review was sent to Dr. Mohan by Respondent's insurance carrier with the notation that the procedure requested was certified. The Arbitrator finds that this information provided is admissible, even though the Peer Review itself is a hearsay document and not admissible. The testimony by Dr. Mohan as to his understanding of the document and his actions following its receipt are not offered for the truth of the Peer Review and are also admissible.

Dr. Mohan testified to Petitioner's history of the treatment received before seeing him on March 2, 2020, including the surgery. He agreed with the care. He testified the MRIs demonstrated a disc herniation. He did not review records of Dr. Kolavo, Dr. Mathew, the physical therapists, or the chiropractors. He only reviewed the operative report and the MRI images. He testified the initial examination findings indicated "At least a nerve irritation but more consistent with nerve compression because of the positive straight leg raise plus the numbness or decreased sensation and decreased flex." He recommended the CT scan because he "suspected a significant portion of the facet joint was removed to get the disc herniation for her prior surgery, and that is causing increased instability and pain as well." He admitted there was no indication the facet joint was removed or trimmed down in the operative report. He testified Dr. Kolavo may not have known he removed part of the joint during the surgery. He also testified it could have occurred later (PX I).

Dr. Mohan opined Petitioner was having continued pain secondary to the scar tissue formation and epidural fibrosis surrounding that nerve root as visualized on the MRI and as seen on the EMG. Dr. Mohan testified the February 22, 2021 MRI demonstrated a 6-mm disc protrusion noted in the right L4-5 lateral recess and there is still significant epidural enhancement on the right side on the L5 nerve root from the prior laminectomy. The disc protrusion has slightly progressed. Dr. Mohan further testified with scar tissue, there's really no good nonsurgical option at this point. When we do the surgery, there might be more scar tissue that forms in the future. But at least once it's fused, the scar tissue tends not to irritate the nerve because the scar tissue is not pulling on it (PX I).

Dr. Mohan testified he felt the January 6, 2020 MRI was underreported. He testified there was a disc herniation, but not severe enough to cause her pain by itself. Dr. Mohan testified he felt the MRI was underreporting the amount of nerve irritation in a sense that everyone was focused on a disc herniation where it's clearly showing right-sided stenosis from epidural enhancement and scarring. Dr. Mohan testified as he was recommending surgery not only the disc protrusion, but facet degeneration, there's a possible lysis. He testified he disagreed with Dr. Goldberg, Dr. Kolavo and Dr. Mathew on whether additional surgery should be done for two reasons. The first reason was there was epidural scar tissue. The second reason was she was looking for further improvement of her symptoms. Dr. Mohan testified Petitioner could currently work at a sedentary level 6 hours per day. If the surgery was performed, she could possibly be able to work at the light or perhaps medium levels (PX I).

Dr. Goldberg testified by evidence deposition taken June 28, 2021 (RX 1). He testified to his examination on May 11, 2020. He noted Petitioner walked with an antalgic gait, which would be secondary to pain, not a neurological deficit. She had good range of motion with tenderness to palpation over the lumbar incision. She had normal muscle strength, positive straight leg raising on the right and some diminished right sensation in the L4 and L5 distributions. The findings were consistent with her complaints. He also reviewed several MRI studies which were addressed in his December 22, 2020 addendum. He testified there was no disc herniation on the March 7, 2019 MRI. There was some epidural fibrosis, which is normal post-operative scarring. The January 6, 2020 MRI was the same with no evidence of any herniated disc, no ongoing nerve compression.

There was no difference on the February 22, 2021 study. There was no recurrent disc herniation. Based upon this review of the treating records, the MRI studies and his examination, Dr. Goldberg opined that Petitioner had a herniated disc at L4-5 to the right and underwent a discectomy. She returned to gainful employment, but had recurrent symptoms. The MRIs reveal no evidence of any nerve compression or instability, so she has residual symptoms form the original work related herniated disc (RX 1).

Dr. Goldberg testified that that the microdiscectomy does not require excision of the pars. It may require a 5% excision of the facet. Instability is not created unless 50% of the 2 facets are resected. The MRI showed minimal resection of the facet. There was no evidence of instability on the MRIs or February 2021 x-rays. Dr. Goldberg found no need for a CT scan or EMG. He saw no need for chiropractic care. Dr. Goldberg recommended anti-inflammatories, a nerve medication such as Gabapentin or Lyrica, and an FCE. He testified he thinks Petitioner will have some residual symptoms. He does not feel she needs further injections or surgery. Dr. Goldberg does not agree with the L4-5 fusion because there is no physical nerve compression. There is post-operative scarring, likely the reason for her pain. A fusion does not address that. There is no significant disc degeneration or instability. He is not optimistic of the outcome of a fusion. He expects that an FCE would show some restrictions. Dr. Goldberg testified that radiculitis is inflammation of a nerve root. Radiculopathy is physical compression of a nerve root. You can have radiculitis without physical compression, so you would not recommend surgery for radiculitis; you treat the residual symptoms. You tell the difference by the diagnostic studies (RX1).

Dr. Goldberg testified that he does not dispute the prior treatment except for the chiropractic. He agrees the Petitioner’s condition is related to the accident. He did not see any signs of malingering. Dr. Goldberg disagrees with the February 2021 MRI showing a 6 mm disc protrusion. He disagrees with the MRI finding compression of the ventral sac. There is no change from the January 2020 MRI. He notes that the other levels reading 4 mm and 3.5 mm are normal on the MRI. The MRI was overread. Dr. Goldberg testified that Petitioner’s radicular pain could be the scarring, or it could be intrinsic change to the nerve from the original herniation.

Petitioner testified she was terminated by Respondent September 15, 2021(PX L). She testified she has insurance through her husband, but Dr. Mohan does not accept it. She wants to have the surgery. She testified she is unable to do daily activities such as laundry. She wakes from sleep. Sitting or lifting increase her pain. She is in pain all the time. She is taking Tramadol.

Conclusions of Law

In support of the Arbitrator’s decision with respect to (F) Causal Connection, 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 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*. International Harvester Co. v. Industrial Comm.*, 56 Ill. 2d 84, 89 (Ill. 1973). 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. For an injury to 'arise out' of the employment its origin must be in some risk connected with, or incidental to, the employment so as to create 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 order in fulfilling his job duties. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848.

The parties agree an accidental injury occurred arising out of and in the course and scope of Petitioner's employment on October 24, 2017. On that date, Petitioner sustained an injury to the low back while lifting a heavy box. She sought treatment and had surgery with Dr. Kolavo. Following surgery, Petitioner initially reported improvement of her symptoms, but her complaints of low back pain and symptoms to the right lower extremity returned. Dr. Kolavo, Dr. Mathew and Dr. Goldberg all agree Petitioner's symptoms are legitimate and her current condition of ill-being is related to the accident. They recommend conservative, nonoperative medical management of her symptoms. Dr. Mohan recommended an L4-5 interbody fusion, which is disputed. The dispute is not whether her current condition is related to the injury; it is whether the treatment is appropriate.

Based upon the record as a whole, the Arbitrator finds Petitioner proven by a preponderance of the evidence that there is a causal connection between her present condition of ill-being and the October 24, 2017 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). The record shows that Petitioner underwent treatment that failed to provide demonstrable benefit. Petitioner testified that he simply placed himself in the hands of his doctors and followed their recommendations. This is not the standard for an award of medical expenses. In weighing the reasonableness and necessity of treatment, the Commission considered the medical opinions presented. 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.*

Petitioner claimed the following in outstanding medical: (1) $2,225.00 from Integrated Physical Medicine of Joliet (chiropractic care); (2); $2,895.00 from Plainfield Chiropractic and Rehabilitation, Ltd (3); $3,500.00 from Smart Choice MRI for the 2/22/2021 MRI and (4) $1,044.00 from Dr. Vivik Mohan. These bills have not been adjusted for the fee schedule. Respondent payment log was admitted as RX 3. It is undisputed that the treatment was for Petitioner's causally related condition of her low back. Respondent disputes this care based upon reasonable and necessary. Having reviewed the evidence, the Arbitrator finds as follows:

Integrated Physical Medicine of Joliet: Petitioner received treatment from October 4, 2019 through December 4, 2019. On September 24, 2019, Dr. Kolavo ordered physical therapy at the facility of her choice. The records document that Dr. Kolavo's physical therapy referral was provided to Dr. Polcyn. Although Dr. Polcyn is a

chiropractor, he provided therapy modalities rather than manipulation. The Arbitrator finds that this treatment fits within the reasonable and necessary modalities specified by Dr. Kolavo.

Plainfield Chiropractic and Rehabilitation, Ltd: The Arbitrator applies the same reasoning with respect to this chiropractic care by Dr. McCarthy. On January 14, 2020, Dr. Kolavo advised Petitioner her symptoms should be managed conservatively. He returned Petitioner to physiatry for further non-operative management of her symptoms. He ordered physical therapy for 4 weeks. Petitioner's treatment From January 20, 2020 through February 26, 2020 would be in accordance with that order. However, there is no further recommendation for therapy and Petitioner, in fact, had left the care of Dr. Kolavo and Dr. Mathew. Dr. Goldberg stated chiropractic care was not reasonable. The records do not demonstrate any improvement thereafter. Several charges are for cancelled visits due to COVID. Dr. Mohan admitted he had not reviewed the chiropractic records so any opinion he had about the reasonableness of this care is given no weight.

Smart Choice MRI and Dr. Vivik Mohan: As more fully discussed with respect to Prospective Medical below, the dispute is whether Dr. Mohan's recommendation for a lumbar fusion is reasonable and necessary. Dr. Mathew and Dr. Kolavo released Petitioner as not a surgical candidate. Dr. Goldberg has agreed with that opinion. The key element in these opinions is the review of the MRI studies. Given the dispute and the fact that the last MRI was over a year old, the Arbitrator finds the repeat MRI in February 2021 and the follow up appointment with Dr. Mohan reasonable. The additional follow up with Dr. Mohan six month later, in September 2021 to determine Petitioner's updated condition was also reasonable given the continued possibility of additional treatment including surgery.

Based upon the record as a whole, the Arbitrator finds that Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $2,225.00 to Integrated Physical Medicine of Joliet, $2,140.00 to Plainfield Chiropractic and Rehabilitation, Ltd, $3,500.00 to Smart Choice MRI, and $1,044.00 to Dr. Vivik Mohan, as provided in Sections 8(a) and 8.2 of the Act.

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Petitioner is seeking approval for additional treatment as recommended by Dr. Mohan including the lumbar fusion surgery. Respondent has disputed the reasonableness and necessity of treatment beyond that recommended by Dr. Goldberg.

Dr. Mohan opined Petitioner was having continued pain secondary to the scar tissue formation and epidural fibrosis surrounding that nerve root as visualized on the MRI and as seen on the EMG. Dr. Mohan testified the February 22, 2021 MRI demonstrated a 6-mm disc protrusion noted in the right L4-5 lateral recess and there is still significant epidural enhancement on the right side on the L5 nerve root from the prior laminectomy. The disc protrusion has slightly progressed. Dr. Mohan further testified with scar tissue, there's really no good nonsurgical option at this point. When we do the surgery, there might be more scar tissue that forms in the future. Once it's fused, the scar tissue tends not to irritate the nerve because the scar tissue is not pulling on it.

On January 14, 2020, Dr. Kolavo advised Petitioner that she was not a candidate for further surgical intervention and her symptoms should be managed conservatively. On January 20, 2020, Dr. Mathew diagnosed a recurrence of radicular pain. She opined the MRI demonstrated no surgical pathology. She recommended restarting physical therapy and conservative treatment with L4-5 transforaminal epidural steroid

injections. Dr. Goldberg testified there was no disc herniation on the March 7, 2019 MRI, January 6, 2020 MRI, or the February 22, 2021 study. There was some epidural fibrosis, which is normal post-operative scarring. There was no evidence of any ongoing nerve compression. Dr. Goldberg opined that the MRIs reveal no evidence of any nerve compression or instability. Dr. Goldberg testified that that the microdiscectomy does not require excision of the pars. It may require a 5% excision of the facet. Instability is not created unless 50% of the 2 facets are resected. The MRI showed minimal resection of the facet. There was no evidence of instability on the MRIs or February 2021 x-rays. Dr. Goldberg found no need for a CT scan or EMG. He does not feel she needs further injections or surgery. Dr. Goldberg does not agree with the L4-5 fusion because there is no physical nerve compression. There is post-operative scarring, likely the reason for her pain. A fusion does not address that. There is no significant disc degeneration or instability. He recommended anti-inflammatories, a nerve medication such as Gabapentin or Lyrica, and an FCE.

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.

In assessing the weight to be given to the medical opinions, the Arbitrator also considers Petitioner’s testimony and subjective presentation. The Arbitrator notes that Dr. Mohan noted negative Waddell signs. Dr. Goldberg testified to the Petitioner’s complaints and examination results. He noted normal muscle strength, positive straight leg raising on the right and some diminished right sensation in the L4 and L5 distributions. The findings were consistent with her complaints. He did not find any signs of malingering. The Arbitrator observed Petitioner’s testimony and finds her complaints credible. The Arbitrator notes that she complied with her work releases and tried to work full duty when requested.

The varied opinions over whether there is a recurrent disc herniation are not dispositive since Dr. Mohan testified that the pain generator is likely the scar tissue. Dr. Goldberg agrees that this is present, and Petitioner’s radicular pain could be the scarring, or it could be intrinsic change to the nerve from the original herniation. On August 21, 2019, Dr. Kolavo opined her symptoms were not disabling enough to warrant surgical intervention. Surgery might be a possibility in the future. He again discussed surgery on September 24, 2019. Dr. Mohan provided an explanation of why he was doing a fusion to limit the recurrent pain that may be causes by recurrent scar tissue. Having considered the medical opinions, recognizing that Dr. Mohan acknowledged that the surgery may not provide full recovery but could improve Petitioner’s quality of life from her current situation as she credibly testified, the Arbitrator finds the dispute in this matter, not a question of correct v. incorrect option, but an honest disagreement between physicians as the optimal course of care

given the likelihood of a favorable outcome. The Arbitrator finds that while Dr. Mohan cannot guarantee a successful outcome to the surgical recommendation, the option of leaving Petitioner in her current condition is not acceptable and justifies the attempt at improvement. The surgical option is reasonable and necessary.

The Arbitrator notes that Petitioner has also sought approval for a CT scan. The Arbitrator notes that Dr. Mohan sought this study to determine the amount of instability caused by the surgical removal of a portion of the facet. Since he has advanced a surgical recommendation without this additional testing, the current extent of instability is not relevant since it will be addressed by performing the fusion. The Arbitrator notes he was initially proceeding to surgery in July 2021 without a CT scan. The Arbitrator finds that the CT scan is not necessary.

Based upon the record as a whole, the Arbitrator finds that Respondent shall authorize and pay for additional reasonable and necessary treatment consistent the recommendations of Dr. Mohan including an L4-5 fusion, any post-operative treatment, physical therapy, or other reasonable and necessary care.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031149
Case Name	Christopher W Fisher v. City of Highland Park
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0256
Number of Pages of Decision	15
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	John Rizzo
Respondent Attorney	Leslie Johnson

DATE FILED: 7/12/2022

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Christopher Fisher,

Petitioner,

vs. NO. 20WC 31149

City of Highland Park,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 29, 2021 is hereby affirmed and adopted.

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

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

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

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

July 12, 2022

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

SJM/sj
o-05/25/2022
44

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031149
Case Name	FISHER, CHRISTOPHER W v. CITY OF HIGHLAND PARK
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Paul Seal, Arbitrator

Petitioner Attorney	John Rizzo
Respondent Attorney	Leslie Johnson

DATE FILED: 9/29/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 28, 2021 0.05%

/s/ Paul Seal, Arbitrator

Signature

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
19(b)

CHRISTOPHER W. FISHER
Employee/Petitioner

v.

CITY OF HIGHLAND PARK
Employer/Respondent

Case # **20** WC **31149**

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 **Rockford**, on **July 27, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **March 5, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$120,827.72**; the average weekly wage was $**2,323.61**.

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

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

Respondent shall be given a credit of $**26,998.07** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**26,998.07**.

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,549.07 per week for 18 4/7 weeks,** commencing **7/11/20 through 11/9/20 & 5/10/21 through 5/17/21**, as provided in Section 8(b) of the Act because the injuries sustained caused the disabling condition of the Petitioner, the disabling condition is temporary and had not reached a permanent condition, pursuant to Section 19(b) of the Act.

Respondent shall pay Petitioner a maintenance benefit of **$1,549.07 per week for 11 2/7 weeks**, commencing **5/18/21 through 7/27/21 (date of hearing) & continuing weekly thereafter,** as provided in Section 8(a) of the Act because the injuries sustained caused the disabling condition of the Petitioner, and it can be reasonably determined that Petitioner will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury.

Respondent shall pay Petitioner **Reasonable and Necessary medical services of $3,359.43**, as provided in Section 8(a) of the Act, contained and demonstrated in Petitioner's Exhibit #7 from Illinois Bone & Joint Institute.

Respondent shall provide **Vocational Rehabilitation benefits**, including an initial assessment and vocational plan, as provided in Section 9110.10 of the Rules of the Workers Compensation Commission because the injuries sustained caused the disabling condition of the Petitioner, and it can be reasonably determined that Petitioner will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury.

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

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

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

SEPTEMBER 29, 2021

Signature of Arbitrator

FINDINGS OF FACTS

The Petitioner is forty (40) years old and has been employed by the Respondent for more than eighteen (18) years. (Tr. Trans. Pg. 10-11) Petitioner is employed in the police department as a patrol officer. His duties include driving, making stops, accident reports, responding to calls, making arrests, physical confrontations, and foot pursuits. (Tr. Trans. Pg. 11)

Officer Fisher testified that the six page job description contained in Petitioner's exhibit #1 was a good description of the current day to day obligations of patrol officers in the City of Highland Park. Those obligations include chasing suspects and arresting resisting individuals. (Px 1) (Tr. Trans. Pgs. 11-14)

On March 5, 2020, Officer Fisher testified that he was engage in Defensive Tactics training with approximately 20 other others including Chief Jogmen and Commander O'Neill. (Tr. Trans. Pg. 15) The training included classroom review and discussions followed by live physical scenarios which applied the training with 2 "perpetrators" and 3 officers. (Tr. Trans. Pg. 16-18)

Officer Fisher testified that he grappled with a "perpetrator" and they fell to the ground. Officer Fisher was attempting to pull the arms/hands of the other individual which was resisting by keeping their hands under their body. Officer Fisher testified that he was forcefully pulling the arm to place cuffs on the resisting individual. (Tr. Trans. Pgs. 19-20)

Immediately after that defensive tactic engagement, Officer Fisher testified that he noticed intense pain in his Left Shoulder. (Tr. Trans. Pg. 20) He requested permission to leave for the day as his left shoulder was in pain.

After notifying Sgt. Evans the following morning, Officer Fisher was sent for a medical evaluation at Advocate Condell MC. (Px 11)(Tr. Trans. Pg. 21) After the evaluation he was prescribed some medications and physical therapy. (Px 1) Eventually, he was referred for an orthopedic evaluation and an MRI.

The MRI of March 30, 2020 was reviewed and discussed with Officer Fisher during his orthopedic evaluation with Dr. Zachary Domont. (Px 12) Dr. Domont was concerned about a suspicious SLAP tear and suggested an arthrogram to better delineate that tear and offer that Petitioner could continue physical therapy at that time. (Px 12) An MR arthrogram was performed April 28, 2020 at Advocate Condell MC. (Px 11)

Officer Fisher testified that he felt Dr. Domont didn't provide a clear explanation and plan to address his injury and scheduled an evaluation with orthopedic surgeon, Dr. Roger Chams. (Tr. Trans. Pg. 23)

Dr. Chams diagnosed a partial cuff tear, AC joint arthritis, instability of the shoulder, biceps tendinopathy, and a labral tear, left shoulder. (Px 8, 5/26/20) Officer Fisher was given a cortisone injection, prescribed PT and a surgical recommendation.

Officer Fisher underwent surgery with Dr. Chams at Hawthorn Surgery Center on July 15, 2020. (Px 9) In addition to arthroscopic exam, Dr. Chams performed SLAP reconstruction (Bankart), subacromial decompression (Mumford), debridement of the bursal side rotator cuff and open CW long head of bicep subpectoral tenodesis. (Px 9) Dr. Chams stated in the report that Petitioner a type 2 SLAP tear and Bankart tear as well as a full-thickness rotator cuff tear. Dr. Chams also made an open subpectoral incision address the bicep tendon. (Px 9)

Following surgery, Officer Fisher engaged in post-operative physical therapy at Illinois Bone & Joint Institute PT. (Px 14)

In early 2021, Officer Fisher testified that his improvement was making slow progress and he discussed that with Dr. Chams. (Tr. Trans. Pg. 25) At that point, Dr. Chams prescribed an MRI which was done on February 12, 2021 at Hawthorne Works Medical Imaging. (Px 13) Dr. Chams provided an additional cortisone injection and an additional four weeks of physical therapy. (Px 8, 2/25/21) At the conclusion of that physical therapy, Dr. Chams ordered a Functional Capacity Evaluation.

Officer Fisher participated in a Functional Capacity Evaluation on May 5, 2021 at Illinois Bone & Joint Institute. (Px 10) Officer Fisher testified that he participated fully, provided his full effort, and performed all task requested to his full abilities. (Tr. Trans. Pgs. 27-28)

The Functional Capacity Report, 5/5/21, states that Officer Fisher was compliant with all requests, providing good effort for valid results. In addition, the report notes that Petitioner scored 0/21 by their criteria indicating that non-organic signs were not present. The report specifically delineated that Officer Fisher demonstrated significant limited left shoulder range of motion as well as significant weakness in the left shoulder. (Px 10, Pg. 1 summary)

The Functional Capacity Report Summary concludes that Officer Fisher demonstrated valid abilities within the Light-Medium Physical Demand Level; whereas, the job of a Police Officer is in the Very Heavy Physical Demand Level. (Px 10, Pg. 2 summary) Accordingly, the FCE states, "Mr. Fisher is **unable** to meet his job demands for returning to work unrestricted as a Police Officer." (Px 10, Pg. 2 recommendation)

Dr. Chams reviewed the FCE report during his May 18, 2021 evaluation. As a result of the FCE findings, Dr. Chams states, "…the patient will be placed on light duty permanent work restrictions." (Px 8, 5/18/21 plan)

Respondent did obtain a Section 12 evaluation with Dr. Jay Levin on December 21, 2020. (Rx 1) That evaluation did note a limited Range of Motion in the left shoulder as well as weakness in the left shoulder. The Arbitrator notes that in his December 21, 2020 report Dr. Levin provides no opinion regarding work status and requested additional information. Dr. Levin did not review any additional physical therapy notes or orthopedic evaluations of Dr. Chams after his December 2020 evaluation of Petitioner. Dr. Levin did not perform any evaluation of Officer Fisher in 2021 including after the Functional Capacity Evaluation of May 5, 2021. (Tr. Trans. Pg. 32) However, Dr. Levin issued a report dated March 19, 2021 that Officer Fisher was reached maximum medical improvement and could return to work full duty. (Rx 1) Dr. Levin declined to entertain an FCE or review a completed FCE. (Rx 1, 4/19/21)

Despite not being evaluation by Dr. Levin since December 2020, Officer Fisher testified that he received correspondence for Emily Taub, HR manager, advising him to report to work full duty on May 10, 2021 based upon Dr. Levin's report. (Px 2) (Tr. Trans. Pgs.32-33) Officer Fisher testified that he provided a copy of his FCE to Chief Jogmen, DC Bonaguidi, Cmdr. O'Neil, Sgt. Evans, and Ms. Taub in HR on May 7, 2021. (Px 3) Officer Fisher advised them that the FCE specifically states that he cannot return to full duty and that he will be unable to report to duty on May 10 as requested. (Px 3)

Officer Fisher testified that he was forced to use sick time while he waited for his appointment with Dr. Chams on May 18, 2021. (Tr. Trans. Pgs. 38-39) Upon being evaluation by Dr. Chams, Officer Fisher provided a copy of his Work Status Report indicating that he was under a permanent light duty restriction by Dr. Chams. (Px 4)

Notwithstanding the current medical information, Officer Fisher received a May 25, 2021 letter from Ms. Taub indicating that the City would disregard the current Dr. Chams report and Functional Capacity Evaluation conclusions in favor of Dr. Levin's opinion. (Px 5) Officer Fisher was ordered by Chief of Police to return to full duty for shift May 28, 2021 and his failure to report would be considered "insubordination" and considered "absent without leave." (Px 5)

Officer Fisher testified that understood that letter to be on order from the Chief and that if he disobeyed he would be found insubordinate and terminated. (Tr. Trans. Pgs. 41-42)

Fearing retribution and against the medical recommendations of Dr. Chams, Officer Fisher appeared at roll call on May 28, 2021 and reported to Sgt. Evans. (Tr. Trans. Pg. 44) Officer Fisher was advised that he would be required to "qualify" with his firearms before being able to report to patrol duties. (Tr. Trans. Pg. 44)

Officer Fisher was taken to the police range by Officer Merkel where he attempted to qualify with his issued Sig Sauer P220 firearm. Officer Fisher testified he was given a practice round and 2 official attempts at qualification. Officer Fisher testified that the firearm

qualification was 30 rounds fired at different distances and different groupings in which 24 of the 30 rounds must be contained in within the rectangle on the target. (Tr. Trans. Pgs. 45-46)

Officer Fisher was provided a practice round for warm up. (Px 6a)

Officer Fisher testified that in the office Round 1 he was not able to pass. He was able to place 18 rounds within the target rectangle with 2 rounds missing the paper completely. (Px 6b)(Tr. Trans. Pg. 47) He stated that he was having difficulty firing his weapon on both his practice round and first attempt.

Officer Fisher testified that after a few moments of rest he made a second attempt. He was able to place 19 rounds within the target rectangle and 6 rounds missed the paper completely. (Px 6c)(Tr. Trans. Pg. 48) Officer Fisher failed to pass.

Officer testified that he could not use his typical shooting stance because he was having a hard time getting the left arm that far forward in front of him. (Tr. Trans. Pg. 50) Officer Fisher stated that while firing the weapon his shoulder started to ache pretty quickly and that his arm started shaking and trembling. He noted that it got harder and harder to stay on target and to bring gun up quick enough to stay within time limits. (Tr. Trans. Pgs. 50-51)

Officer Merkel telephoned Sgt. Evans advising him that Officer Fisher did not qualify with the firearm and that he observed Officer Fisher trembling and shaking during the test. (Tr. Trans. Pg. 51)

Officer Fisher was place on administrator leave without pay at the end of that day. The City has not made any offer to accommodate the light duty restrictions put in place by Dr. Chams and have provided no pay since May 10, 2021. (Tr. Trans. Pgs.52-53)

Officer Fisher testified that neither the City nor any of their representatives have contacted him regarding his requests for vocational assessment. (Tr. Trans. Pg. 53)

CONCLUSIONS OF FACT & LAW

The Request for Hearing containing the stipulations of the parties was admitted as Arbitrator's exhibit #1. Those stipulations state that the parties agree that Officer Fisher and the City of Highland Park were operating under the Act and that an employee and employer relationship existed on March 5, 2020. Moreover, the parties stipulated and agree that Officer Fisher sustained accidental injuries that arose out of and in the course of his employment and that timely notice of those injuries was provided. In addition, the parties stipulated and agree that Officer Fisher's present, current condition is causally connected to the injury of March 5, 2020. (Arb. Ex. 1)

The issues in dispute are medical benefits, TTD benefits, maintenance benefits, and entitlement to vocational rehabilitation assessment. These disputed issues arose based upon the City of Highland Park's reliance upon Dr. Levin and disregard for the opinions of Dr. Roger Chams; essentially, can Officer Fisher return to full duties as a Police Officer.

Dr. Chams notes Petitioner was able to improve his ROM after the additional cortisone injection in January 2021 but some deficits did remain. (Px 8, 2/25/21) However, Petitioner was demonstrating significant weakness where his Motor Strength could not get above 3/5 on examination. (Px 8, 2/25/21) A further course of physical therapy was undertaken.

The Arbitrator notes that Dr. Levin identified similar limitations in ROM and weakness during his only evaluation in December 2020. (Rx 1)

Following the additional physical therapy, Dr. Chams noted some improvements but still identified Motor weaknesses and some limitations in ROM. (Px8, 3/29/21) Prudently, Dr. Chams requested authorization for a Functional Capacity Evaluation.

As noted in detail above, the Functional Capacity Report, 5/5/21, presented valid, reliable results with Officer Fisher providing full effort with zero non-organic signs. (Px 10, Pg. 1 summary) In fact the FCE report confirms Dr. Chams' findings of significant limited left shoulder range of motion as well as significant weakness in the left shoulder. (Px 10, Pg. 1 summary)

Dr. Levin did not re-evaluate Officer Fisher in 2021 after he completed additional physical therapy, received an additional cortisone injection, and underwent a functional capacity evaluation. Dr. Levin's opinions about Officer Fisher's work status in March or May of 2021 are tenuous at best and, more likely suspect at the least. Moreover, Dr. Levin's refusal to entertain an FCE and failure to review the FCE report when completed makes Dr. Levin's opinions unreliable and without adequate foundation.

The Arbitrator finds that the City of Highland Park's reliance on Dr. Levin's outdated opinions and refusal to acknowledge the valid results of the FCE is remarkably misguided.

Dr. Chams diligently followed Officer Fisher's recovery on a monthly basis with proper orthopedic examinations. Furthermore, Dr. Chams undertook numerous medical treatments to assist with Petitioner's recovery from the undisputed injury and undisputed surgery. Officer Fisher's ROM limitations and weaknesses continued despite Dr. Chams' best efforts including additional cortisone injections and physical therapy; treatment Dr. Levin never reviewed.

Ultimately, Dr. Chams requested an objective, independently observed Functional Capacity Evaluation with validity profiles; an FCE that Dr. Levin never reviewed.

That objectively valid Functional Capacity Report Summary concluded that Officer Fisher is **unable** to meet his job demands for returning to work unrestricted as a Police Officer. (Px 10, Pg. 2 recommendation)

The Arbitrator finds that Dr. Chams' May 18, 2021 opinion that Officer Fisher requires a permanent light duty restriction is supported by his timely, current evaluations and has a solid foundation in the objectively valid Functional Capacity Evaluation of May 5, 2021.

The Arbitrator finds the opinions of Dr. Chams more reliable and validly accurate and, therefore, the opinion of Dr. Levin should be set aside and disregarded.

(J.) Medical Expense Benefits :

The findings of fact and conclusions of law noted above are incorporated and reiterated here for the purposes of findings regarding medical expense benefits.

Respondent disputes liability and payment of medical expenses presented in Petitioner's Exhibit #7 in the amount of $3,359.43 for Illinois Bone & Joint Institute based upon its reliance of Dr. Levin's opinion. The outstanding charges at IBJI include orthopedic evaluations by Dr. Chams, physical therapy prescribed by Dr. Chams, and the functional capacity evaluation ordered and relied upon by Dr. Chams.

Having found the medical opinions of Dr. Chams more reliable and trustworthy than those of Dr. Levin, the charges for treatment directed by Dr. Chams should be awarded to Officer Fisher.

Therefore, the Arbitrator finds that Petitioner is entitled to claimed medical benefits as submitted in Petitioner's Exhibit #7.

The Respondent, City of Highland Park, shall pay to Petitioner, Officer Christopher W. Fisher reasonable and necessary medical benefits of $3,359.43, as provided in Section 8(a) of the Act, contained and demonstrated in Petitioner's Exhibit #7 from Illinois Bone & Joint Institute.

(L.) Temporary Total Disability benefits :

The findings of fact and conclusions of law noted above are incorporated and reiterated here for the purposes of findings regarding temporary total disability benefits.

Respondent disputes liability and entitlement to temporary total disability benefits after the initial period of incapacity. Specifically, Respondent denies payment of TTD benefits in

the timeframe May 10, 2021 through May 17, 2021 based upon its reliance of Dr. Levin's opinion that Petitioner could return to work full duty.

Having found the medical opinions of Dr. Chams more reliable and trustworthy than those of Dr. Levin, the work status reports and Petitioner work restrictions put in place by Dr. Chams entitle Officer Fisher to temporary total disability benefits as the City of Highland Park did not provide an accommodation for Officer Fisher's valid, supported light duty restriction.

The Arbitrator finds that Officer Fisher is entitled to temporary total disability benefits as claimed.

The Respondent shall pay Petitioner temporary total disability benefits of $1,549.07 per week for 18 4/7 weeks, commencing 7/11/20 through 11/9/20 & 5/10/21 through 5/17/21, as provided in Section 8(b) of the Act because the injuries sustained caused the disabling condition of the Petitioner, the disabling condition is temporary and had not reached a permanent condition, pursuant to Section 19(b) of the Act.

(L.) Maintenance benefits & (O.) Vocational Rehabilitation :

The findings of fact and conclusions of law noted above are incorporated and reiterated here for the purposes of findings regarding maintenance benefits and vocational rehabilitation.

Respondent disputes liability and entitlement to maintenance benefits and vocational rehabilitation on the adherence to their position that Officer Fisher can perform full duty police officer duties. The only support for their position is Dr. Levin.

Having found the medical opinions of Dr. Chams more reliable and trustworthy than those of Dr. Levin, the permanent light duty restrictions opined by Dr. Chams on May 18, 2021 support Officer Fisher's entitlement to maintenance benefits and vocational rehabilitation.

Specifically, the Functional Capacity Report Summary concludes that Officer Fisher demonstrated valid abilities within the Light-Medium Physical Demand Level; whereas, the job of a Police Officer is in the Very Heavy Physical Demand Level. (Px 10, Pg. 2 summary) Accordingly, the FCE states, "Mr. Fisher is **unable** to meet his job demands for returning to work unrestricted as a Police Officer." (Px 10, Pg. 2 recommendation)

These FCE determinations were utilized by Dr. Chams as the foundation for his May 18, 2021 statement that Officer Fisher would be placed on light duty permanent work restrictions." (Px 8)

The City of Highland Park decided not to accommodate the permanent light duty restrictions despite their validity and reliable determinations.

Section 9110.10 of the Rule of the Workers Compensation Commission specifically state, "…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." *50 Ill.Adm.Code 9119.10*

The Arbitrator finds that Officer Fisher is entitled to maintenance benefits as of May 10, 2021 which should continue until suitable employment can be identified via an appropriate and suitable vocational rehabilitation plan subject to an initial assessment and review consistent with Rules Section 9110.10.

The Respondent shall pay Petitioner a maintenance benefit of $1,549.07 per week for 11 2/7 weeks, commencing 5/18/21 through 7/27/21 (date of hearing) & continuing weekly thereafter, as provided in Section 8(a) of the Act because the injuries sustained caused the disabling condition of the Petitioner, and it can be reasonably determined that Petitioner will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury.

The Respondent shall provide Vocational Rehabilitation benefits, including an initial assessment and vocational plan, as provided in Section 9110.10 of the Rules of the Workers Compensation Commission because the injuries sustained caused the disabling condition of the Petitioner, and it can be reasonably determined that Petitioner will, as a result of the injury, be unable to resume the regular duties in which he was engaged at the time of injury.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC002162
Case Name	Thomas Johnson v. State of Illinois Illinois Youth Center - St. Charles
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0257
Number of Pages of Decision	14
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Richard Turner
Respondent Attorney	Dan Kallio

DATE FILED: 7/12/2022

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Thomas Johnson, Jr.,

Petitioner,

vs. No. 17 WC 02162

Illinois Youth Center – St. Charles,

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 issue of the nature and extent of Petitioner's 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 notes Petitioner's most significant injury, requiring two surgeries, was to the right middle finger. The Arbitrator's permanency award was mainly based on the loss of trade, some loss of earnings due to the new job not offering overtime, and the residual symptoms and limitations. The Commission agrees with the Arbitrator's determination of how much relative weight to give each of the factors enumerated in section 8.1b(b) of the Workers' Compensation Act (the Act). However, the Commission finds a lesser degree of disability (factor (v)) than the Arbitrator found.

The Arbitrator noted "the loss of grip strength and permanent restrictions identified in the FCE, treating physician and the Section 12 examiner. Petitioner testified that he continues to experience pain and discomfort and loss of grip strength." The Commission notes that during the visit on August 29, 2018, near the time of maximum medical improvement, Dr. Fanto charted: "FCE report reviewed. Able to work at the medium demand level. Wounds healed. No swelling.

Range of motion is functional. Capillary refill is normal. *** May work with limitations of medium physical demand classification." In a work status note, Dr. Fanto further restricted Petitioner from "contact with residents." Dr. Fernandez, who examined Petitioner at Respondent's request on September 11, 2018, summarized the diagnosis as follows: "He sustained a central slip injury to the right middle finger, proximal interphalangeal joint, and a flexor tendon injury to that same finger," with "residual hand stiffness and with associated weakness of the hand." Dr. Fernandez agreed with Dr. Fanto's restrictions. On September 12, 2018, Dr. Fanto noted: "No new complaints. Physical examination is the same. The patient is applying for different employment where he does not need to have contact with violent clients." Petitioner's testimony is consistent with the medical records and section 12 examination. Petitioner's new job as a human service caseworker is a sedentary office job that involves typing throughout the day.

The Commission believes the proper measure of disability is 25 percent of the person as a whole. All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 2, 2021, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the medical bills itemized by the Arbitrator pursuant to §§8(a) and 8.2 and subject to a hold harmless pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $672.65 per week for a period of 125 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent disability to the extent of 25 percent 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.

Pursuant to §19(f)(1) of the Act, there shall be no right of appeal as the State of Illinois is Respondent in this matter.

July 12, 2022

SJM/sk
o-06/29/2022
44

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC002162
Case Name	JOHNSON JR, THOMAS v. ILLINOIS YOUTH CENTER - ST CHARLES
Consolidated Cases	No Consolidated Cases
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Richard Turner
Respondent Attorney	Dan Kallio

DATE FILED: 11/2/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 2, 2021 0.06%

/s/ Frank Soto, Arbitrator

Signature

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

November 2, 2021

/s/ Brendon O'Rourke

Brendan O'Rourke, Assistant Secretary

Illinois Workers' Compensation Commission

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

THOMAS JOHNSON, JR.
Employee/Petitioner

v.

ILLINOIS YOUTH CENTER - ST. CHARLES
Employer/Respondent

Case # **17** WC **002162**

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 **Geneva**, on **09/17/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☐ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 **09/23/2016**, 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 $**58,296.12**; the average weekly wage was $**1,121.08**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**78,048.39** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**78,048.39**.

ORDER

Respondent shall pay the medical bills, as outlined in Px 15, pursuant to the Fee Schedule, §8.2 and 8(a) of the Act. Respondent shall hold Petitioner harmless for any medical bills for which Respondent claims a credit pursuant to 8(j) of the Act, as set forth in the Conclusions of Law attached hereto and incorporated herein.

Respondent is not liable for TTD benefits from 11/01/2018 through 01/02/2019, as set forth in the Conclusions of Law attached hereto and incorporated herein.

Petitioner sustained permanent partial disability to the extent of 30% loss of use of a person as a whole, pursuant to Section 8(d)(2) of the Act, as set forth in the Conclusions of Law attached hereto and incorporated herein.

Respondent shall pay Petitioner compensation that has accrued from September 23, 2016 through September 17, 2021 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.

By: /o/ *Frank J. Soto* **NOVEMBER 2, 2021**
Arbitrator

Procedural History

This case was tried on September 17, 2021. The disputed issues were whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits and the nature and extend of Petitioner's injury. (Arb. Ex. 1).

Findings of Fact

Thomas Johnson, Jr. (hereafter referred to as "Petitioner") testified on September 23, 2016, he was employed as a juvenile justice specialist at Illinois Youth Center-Saint Charles (hereafter referred to as "Respondent"). Petitioner testified his job duties required him to oversee 12 youth residents.

Petitioner testified on September 23, 2016, a fight broke out between two residents and he was injured while attempting to breakup the fight. Petitioner testified he was struck or pushed by one of the youth inmates and he fell to the ground striking his head, right leg, back, and right arm and hand. Petitioner testified he injured his right hand and arm attempting to break his fall. Petitioner testified he experienced immediate pain in his right middle finger and his right hand was swollen. Petitioner testified he was also experiencing pain in his right leg, head, neck and back. Petitioner testified he reported the incident to his supervisor before seeing a nurse at the infirmary.

Petitioner testified, after his shift, on September 24, 2016, he sought medical treatment at the Emergency Department of Ingalls Memorial Hospital. Those medical records noted swelling and tenderness over the right side of the forehead, tenderness over the right third finger with the inability to fully extend that finger, and abrasions over the anterior aspect of the right mid-leg. (Px2). Petitioner testified he was unable to work the following day due to difficulties gripping or using his right hand.

On September 26, 2016, Petitioner sought treatment at Advocate Medical Center, with Dr. Cornelius Rogers, his primary care physician. At that visit, Petitioner reported right-hand pain with swelling of the right middle finger, right shoulder pain, neck pain and back pain. Dr. Rogers prescribed therapy and referred Petitioner for a consultation with an orthopedic hand specialist.

On October 19, 2016, Petitioner sought treatment with Dr. Salvatore Fanto, an orthopedic hand specialist, who prescribed physical therapy. Petitioner attended therapy at Physical

Therapy and Sports Injury Rehabilitation. Dr. Fanto diagnosed ruptures of the tendon in the middle finger of the right hand and recommended surgery which was performed on December 27, 2016 at Ingalls Memorial Hospital. The surgery performed consisted of a tenolysis of the extensor tendon of the right long finger with release of ligaments on the volar aspect of the proximal interphalangeal joint with a debridement and repair of the ruptured flexor digitorum superficialis slip with insertion of K-wire across the proximal interphalangeal joint. (Px4 and Px2).

On February 13, 2017, Petitioner underwent a subsequent procedure to remove the buried wire and a tenolysis of the extensor tendon and capsulotomy of the proximal interphalangeal joint of the middle finger in the right hand. (Px4 and Px2).

Petitioner testified the surgeries provided limited relief from pain and improved function in his right hand. Petitioner underwent additional physical therapy at Stepping Stones Rehabilitation Services and Ingalls Center for Outpatient Rehabilitation. Thereafter, Petitioner underwent an MRI of the right hand. After reviewing the MRI, Dr. Fanto referred Petitioner for additional therapy.

On August 1. 2018, Petitioner underwent an FCE identified permanent work restrictions consisting of lifting below the waist to 40lbs., to shoulder of 30lbs., overhead to 25lbs., and push/pull to 30lbs. (Px. 20). On September 12, 2018 (misdated as September 12, 2017), Dr. Fanto released Petitioner to work with the restrictions outlined in the FCE in addition to restricting Petitioner from contact with residents.

On September 11, 2018, Petitioner underwent a Section 12 examination with Dr. John Fernandez who diagnosed residual hand stiffness with associated weakness of the hand. (Px. 16, pg. 14). Dr. Fernandez testified that Petitioner sustained a central slop injury to the right middle finger, proximal interphalangeal joint, and a flexor tendon injury to the same finger. (Px. 16, pg. 14).

Dr. Fernandez opined that Petitioner's medical treatment had been necessary and reasonable including the subsequent removal of the pin, joint release, and therapy. (Px 16, pg. 16). Dr. Fernandez also opined that Petitioner could engage in medium-duty use, defined as 40 pounds maximum, 30 pounds on average, 20-30 pounds average with gripping and grasping with limitations with frequency or repetition. (Px. 16, pg. 16). Dr. Fernandez further opined that

Petitioner was unable to return to prior occupation due to his restrictions and significant objective evidence that he cannot engage in heavy use. (Px. 16, pgs. 17-18). Dr. Fernandez testified Petitioner reached MMI. (Px. 16, pg. 18).

Petitioner testified he could not return to his former occupation without exposing himself to personal risk because of his inability to defend himself. Petitioner also testified that because of his reduced grip strength his ability to grasp and hold inmates was compromised.

Petitioner testified as to the Medical Billing Summary (PX 15) and the Equian subrogation claim (PX 18). Petitioner testified he also received PEDA benefits for a year. Petitioner testified he attempted to return to work at the Ludeman Center pursuant to his restrictions of light duty-medium duty issued by Dr. Fanto. Petitioner testified he was removed from that employment, on October 31, 2018, due to his inability to interact or restrain patients. Petitioner testified he obtained a new job at Illinois Department of Human Services (IDHS) on January 2, 2019. Petitioner testified he did not receive temporary total disability benefits from November 1, 2018, through January 2, 2019, the date he started his new job.

Petitioner testified he is currently employed at IDHS and his job duties include reviewing and assisting securing medical services for clients. Petitioner testified his new job duties involves data entry. Petitioner testified accepting the job with IDHS resulted in a reduction of his earning capacity due to the job classification and lack of overtime.

Petitioner testified to ongoing difficulties due to his reduced grip strength in his right/dominant hand. Petitioner testified that he no longer bowls, a prior recreational activity he once enjoyed. Petitioner also testified that he has trouble painting houses and murals, activities he previously performed. Petitioner testified he has trouble using a keyboard for prolonged periods of time due to his right hand/finger injury as well as the lingering effects of his cervical injury.

The Arbitrator found Petitioner's testimony credible.

Conclusions of Law

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

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 (1998). To be compensable under the Act, an injury need only be a cause of an employee's condition of ill-being, not the sole or primary causative factor. *Sisbro, Inc. v. Industrial Commission*, 207 Ill.2d 193, 205 (2003)

With Respect to Issue "J", Whether Respondent is liable for Medical Expenses, the Arbitrator Finds as Follows:

Section 8(a) of the Act states a Respondent is responsible "…for all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury…" A claimant has the burden of proving that the medical services were necessary, and the expenses were reasonable. See *Gallentine v. Industrial Comm'n*, 201 Ill.App.3d 880, 888 (2nd Dist. 1990).

The Arbitrator finds Petitioner proved by the preponderance of the evidence the medical treatment rendered was reasonable and necessary to cure and alleviate Petitioner's condition. Dr. Fernandez, who performed the Section 12 examination, opined that Petitioner's medical treatment was necessary are reasonable.

Petitioner testified that Px15, which consists of a Medical Billing Summary spreadsheet with accompanying billing records, truly and accurately reflects billing for diagnostic and treatment services he received. The parties stipulated that to the extent these payments meet the Fee Schedule for the charges assessed by these providers, Respondent has met its obligation to pay for the services rendered. The parties agreed that any balances, if any, would be paid by Respondent, pursuant to the Fee Schedule and §8.2 of the Act. As such, Respondent shall pay the medical bills, as outline in Px 15, pursuant to the Fee Schedule and §8.2 of the Act. Respondent shall also hold Petitioner harmless for any medical bills for which Respondent claims a credit pursuant to 8(j) of the Act.

With respect to issue "L" whether Petitioner is entitled to TTD benefits, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, "*i.e.,* until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The Arbitrator finds Petitioner proved by the preponderance of the evidence that

The parties stipulated that Petitioner was entitled to TTD from September 23, 2016 through September 19, 2017 and from October 9, 2017 through April 26, 2018. The evidence presented at trial shows that Petitioner received, during these periods, either Public Employee Disability Act (PEDA) benefits or TTD benefits. (Arb. Ex. #1, Rx 1). Respondent paid TTD benefits totaling $78,048.39. (Arb. Ex. #1).

Respondent disputes that Petitioner is entitled to TTD benefits from November 18, 2018 through January 2, 2019. Petitioner testified he was removed from employment with the Ludeman Center on October 31, 2018 due to his inability to restrain residents and his right-hand restrictions. Petitioner also testified that he started his new job with IDHS on January 2, 2019. Petitioner testified he did not receive TTD benefits from November 1, 2018 through January 2, 2019, the date he started work with IDHS.

The Arbitrator finds that Petitioner failed to prove that he was entitled to TTD benefits from November 1, 2018 through January 2, 2019. On September 12, 2018, Dr. Fanto released Petitioner to work pursuant to the FCE restrictions and the limitation of no contact with residents. Dr. Fernandez, who performed the Section examination on September 11, 2018, opined that Petitioner had reached maximum medical improvement. As such, the Arbitrator finds that Petitioner's condition stabilized and he was able to work prior to his employment ending with Ludeman Center on October 31, 2018. To show entitlement to temporary total

disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

With respect to issue "L," the nature and extent of Petitioner's injuries, the Arbitrator makes the following conclusions:

Section 8.lb 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 regards to paragraph (i) of Section 8.1(b) of the Act. No AMA rating was offered into evidence. The Arbitrator, therefore, gives no weight to this factor determining permanent partial disability.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that Petitioner was employed as a juvenile justice officer and he was unable to return to his prior occupation due to his work injury. The Arbitrator also that work restrictions were recommended by both Drs. Fanto and Fernandez. The Arbitrator gives this factor greater weight in determining permanent partial disability.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 45 years old at the time of the accident. Because Petitioner has some years remaining in the workforce with a permanent medium duty restriction and limitations on the use of his right hand, the Arbitrator gives some weight to this factor determining permanent partial disability.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earning capacity, the Arbitrator notes that Petitioner testified that he earns less money in his employment with the Illinois Department of Human Services due to the inability to work overtime. The Arbitrator also notes that Petitioner did not testify as to the amount of overtime he worked per year, if any. As such, the Arbitrator gives this factor some weight determining permanent partial disability.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the loss of grip strength and permanent restrictions identified in the FCE, treating physician and the Section 12 examiner. Petitioner testified that he continues to experience pain and discomfort and loss of grip strength. As such, the Arbitrator places greater weight on this factor in determining permanent partial disability.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that the Petitioner sustained permanent partial disability to the extent of 30% loss of use of a person as a whole, pursuant to Section 8(d)(2) of the Act.

By: /o/ *Frank J. Soto* November 2, 2021

Arbitrator Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC009178
Case Name	Patrick McCarey v. State of Illinois - Central Management Services
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0258
Number of Pages of Decision	23
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	James Gale

DATE FILED: 7/12/2022

/s/ Deborah Simpson, 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

Patrick McCarey,
Petitioner,

vs. NO: 11 WC 9178

State of Illinois,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of nature and extent, fees 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 24, 2021, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall pay the petitioner the sum of $1,087.21/week for life, commencing August 19, 2021, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the petitioner.

Commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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

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

Pursuant to §19(f)(1) of the Act, claims against the State of Illinois are not subject to judicial review. Therefore, no appeal bond is set in this case.

July 12, 2022
O
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	11WC009178
Case Name	MCCAREY, PATRICK v. STATE OF ILLINOIS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Joseph Amarilio, Arbitrator

Petitioner Attorney	Kevin Veugeler
Respondent Attorney	Drew Dierkes

DATE FILED: 11/24/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 23, 2021 0.07%

/s/ Joseph Amarilio, Arbitrator
Signature

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

November 24, 2021

/s/ Brendon O'Rourke
Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

TATE 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

Patrick McCarey
Employee/Petitioner

Case # **11 WC 009178**

v.

Consolidated cases: **N/A**

State of Illinois
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 **Joseph Amarilio**, Arbitrator of the Commission, in the city of **Chicago**, on **August 18, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 12, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**84,802.38,** the average weekly wage was $**1,630.82**.

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

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

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

Respondent shall be given a credit of $**361,592.09** for TTD, $**0** for TPD, $**120,072.70** for maintenance, and $**0** for other benefits, for a total credit of $**481,664.79**.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$1,087.21/week** for **477-4/7** weeks, commencing **12/13/10** through **2/6/2020**, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner maintenance benefits of **$1,087.21/week** for **80** weeks, commencing **2/7/2020** through **8/18/2021**, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner permanent and total disability benefits of **$1,087.21/week** for life, commencing **8/19/21**, as provided in Section 8(f) of the Act.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

Respondent shall pay further sum of **$89,028.25** for reasonable and necessary medical services pursuant to the medical fee schedule directly to the medical providers as provided by the Section 8(a) and 8.2 of the Act. The Respondent is entitled to credit for medical bills previously paid pursuant to Section 8(a) and 8.2 of the Act.

Respondent is entitled to a credit under Section 8(j) of the Act for medical bills paid through its group medical plan. and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay to Petitioner penalties of $ **0**, as provided in Section 16 of the Act; $ **0**, as provided in Section 19(k) of the Act; and $**0**, 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 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.

/s/ *Joseph D. Amarilio*

NOVEMBER 24, 2021

Signature of Arbitrator **Joseph D. Amarilio**

IN THE ILLINOIS WORKERS' COMPENSATION COMMISSION
CHICAGO, ILLINOIS

DECISION OF ARBITRATOR

PATRICK MCCAREY,	)	
	)	
Petitioner,	)	
	)	
v.	)	**11 WC 009178**
	)	
STATE OF ILLINOIS,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. Procedural History

This action was pursued under the Illinois Workers' Compensation Act (the "Act") by the Petitioner-Employee, Patrick McCarey ("Petitioner"), and sought relief from the Respondent-Employer, State of Illinois, ("Respondent" or "State").

Previously, this matter had been heard on Petitioner's 19(b)(1) motion November 13, 2015, and a 19(b)(1) Decision was issued January 21, 2016 in favor of Petitioner. [R. Ex. 1] That Decision was appealed and reviewed, with a commission-level decision issued May 12, 2016, which was again in Petitioner's favor, and remanded the matter for adjudication of bills. [R. Ex. 2] The Decisions of the Arbitrator and Commission are incorporated herein as though fully set for forth. Ultimately, a remand Decision was issued by that Arbitrator, and thereafter Petitioner resumed treatment and benefits continued. [P. Ex. 16]

Subsequent to those determinations, a second trial proceeded to hearing before Arbitrator Joseph Amarilio ("Arbitrator') on August 18, 2021 in Chicago, Illinois, the result of which is the decision herein. The issues in dispute were liability for unpaid medical bills, TTD, maintenance,

nature and extent, fees and penalties, and credit due to Respondent. [Arbitrator's Exhibit "Arb. Ex." 1]

II. Law of the Case

The law of the case doctrine applies to matters before the Workers' Compensation Commission. Guerra v. McShane Const. Corp, 07 ILWC 36628 (2011). Under the law of the case doctrine, a court's unreversed decision on an issue that has been litigated and decided settles the question for all subsequent stages of the action. Help at Home v. Ill. Workers' Comp. Comm'n, 305 Ill.App.3d 1150, 1151 (4th Dist. 2010). The Commission decision becomes the law of the case for subsequent stages of the litigation. Id. On January 20, 2016, an Arbitrator of the Illinois Workers' Compensation Commission found that Petitioner had established that he suffered right lumbar radiculopathy with disc herniation at the L5-S1 level as a result of a fall at work on December 12, 2010 that necessitated an L5-S1 laminectomy repair by Dr. Anis Mekhail and revision L3-S1 laminectomy surgery by Dr. Anthony Rinella. 16IWCC0313, (RX1, RX2). This decision was not appealed and became final. Respondent was ordered to pay temporary total disability benefits from December 13, 2010, through the date of the hearing, November 13, 2015, as well as medical expenses for the spine surgery performed by Dr. Rinella, and other treatment related to his low back. (RX8, RX9).

III. Findings of Fact

In the second hearing of this case on August 18, 2021, Petitioner testified he has been employed with the State of Illinois as a stationery engineer since September 2001. (TR. P. 30-

31). Petitioner testified just prior to the November 13, 2015 hearing, Dr. Rinella referred him to a neurologist, Dr. Douglas Anderson, Dr. Peter Brown for pain management, and prescribed work conditioning, a functional capacity exam and vocational rehabilitation. (TR. P. 32, PX1).

On November 9, 2015, Petitioner was evaluated by Dr. Anderson of Loyola Medical Center. (TR. P. 32, PX3). Dr. Anderson recommended consideration of a spinal stimulator and referred Petitioner to Dr. Troy Buck for nerve root injections. (TR. P. 33, PX3).

On December 14, 2015, Petitioner underwent a nerve root injection and was placed on Gabapentin for nerve pain. (TR. P. 33, PX3).

On December 17, 2015, Petitioner returned to Dr. Rinella. (TR. P. 33, PX1). At that visit, Dr. Rinella discussed an additional surgery. His notes also reflect that given Respondent's refusal to authorize the previously prescribed functional capacity exam, permanent restrictions of no lifting greater than 15 pounds occasionally, no repetitive motions and no bending or twisting were put in place. (TR. P. 34, PX1). Petitioner was discharged from care. (TR. P. 34, PX1).

Petitioner returned to Dr. Rinella complaining of pain on September 30, 2016. (TR. P. 34, PX1). Petitioner testified since the initial two surgeries, he has pain that originates in the back, through both hips, and down his right leg. (TR. P. 35). He has no feeling on his right thigh, pain in his calf, and no feeling of his foot. (TR. P. 35-36). An MRI and epidural steroid injection were prescribed. (TR. P. 34-35, PX1).

An October 31, 2016 MRI at Silver Cross Hospital noted a right disc protrusion at L4-L5, a left disc protrusion at L3-L5, and L5 nerve root encroachment bilaterally. (TR. P. 36, PX1). Dr. Rinella reviewed the MRI results, diagnosed residual lumbar radiculopathy and recommended care with Dr. Nitin Malhotra for pain management. (TR. P. 36-37, PX1, PX6).

Petitioner treated with Dr. Malhotra through June of 2017. (TR. P. 36-37, PX6). Petitioner received medication, a nerve block injection and aqua therapy. (TR. P. 36-37, 39, PX6).

Ultimately, Respondent initiated vocational rehabilitation efforts on April 3, 2017. (TR. P. 37-38). Petitioner worked with Melanie Kamen and Tracy Peterlin from Creative Case Management. (TR. P. 38-39, 65). Melanie Kamen recommended computer training, as Petitioner had not previously used a computer. (TR. P. 38-39, 65-66, 79-80). The computer training was not authorized by Respondent and was not completed. (TR. P. 67, 78). Petitioner attended a job fair with Tracy Peterlin and performed a job search throughout the Summer and Fall of 2017. (TR. P. 38-40, 41, 72-73). On September 27, 2017, Respondent stopped vocational counseling and cancelled an October 5, 2017 meeting. (TR. P. 42). No job offers were received. (TR. P. 49-50, 57-59). Computer training was never authorized by Respondent. (TR. P. 42).

On July 12, 2017, Petitioner was evaluated by Dr. Cary Templin of Hinsdale Orthopedics. (TR. P. 40-41, PX4). After an additional MRI, physical therapy, and pain management, Dr. Templin performed an L4-L5 fusion surgery at Silver Cross Hospital on March 14, 2018. (TR. P.

40-43, PX4, PX8). Post-surgery, Petitioner participated in physical therapy and pain management. (TR. P. 43-46, PX4, PX8).

On September 13, 2018, after completion of physical therapy, Petitioner returned to Dr. Templin complaining of continued low back pain. (TR. P. 44-46, PX4). Dr. Templin prescribed a functional capacity exam. (TR. P. 46, PX4). An October 18, 2018 Functional Capacity Exam indicated Petitioner could not perform the duties of a stationary engineer, a heavy-duty position. The test was a valid indication of his work capacity and showed Petitioner could only work at the light duty capacity. (TR. P. 46, PX4). Dr. Templin reviewed the results of the FCE on November 1, 2018, placed Petitioner on permanent light duty restrictions, and instructed Petitioner to return in one year. (TR. P. 46, PX4). Petitioner returned sooner, on March 27, 2019, complaining of continued right leg pain. (TR. P. 43-46, PX4). Petitioner was given additional medication. (TR. P. 47, PX4).

On April 4, 2019, Respondent resumed vocational rehabilitation efforts. (TR. P.47). Vocational testing was requested but was not done. (TR. P.48). Computer training was also denied. (TR. P.48). Petitioner continued to look for positions within his restrictions with the assistance of Tracy Peterlin. (TR. P.49). On June 23, 2019, Petitioner attended a job fair with Ms. Peterlin. Five days later, temporary total disability benefits were suspended, despite the fact that he was actively treating with Dr. Templin and participating in vocational rehabilitation. (TR. P.49-50). No offers of employment were extended to Petitioner. (TR. P.49). Since that time, Petitioner has continued to perform an unsuccessful, self-directed, job search. (TR. P. 57-59, PX14).

Petitioner's last visit with Dr. Templin was February 6, 2020. (TR. P. 50-51, PX4). Dr. Templin noted Petitioner's right leg was giving away. (TR. P. 50-51, PX4). Dr. Templin indicated that there was no further treatment available to address Petitioner's low back issues, found Petitioner had reached maximum medical improvement, and placed permanent light duty restrictions on Petitioner's activities. (TR. P. 51-52, PX4).

Petitioner testified that at the time of hearing, he still had numbness and tingling down his right leg as well as difficulty lifting, walking, sitting, and standing. (TR. P. 52-55). The Arbitrator finds Petitioner testified truthful and forthright and finds him highly credible.

Petitioner testified that the current rate of pay for a stationary engineer with the State of Illinois is $49.83/hr. (TR. P. 56-57). The last Temporary Total Disability benefits he received was up to and including June 28, 2019. (TR. P. 49-50). Since that time, Respondent has not paid benefits. (TR. P. 57). As a result, Petitioner was forced to take his retirement to receive income. (TR. P. 57, 77).

Petitioner presented the testimony of Lisa Byrne, a nationally certified rehabilitation counselor and vocational evaluator. (TR. P. 84-85, PX19). She obtained a Master's degree in Rehabilitation Counseling and has published articles in her field. (PX19). Ms. Byrne testified she works for a variety of clients, including the Illinois Department of Rehabilitation Services, Special Education students and Veterans, performing vocational evaluations and placement services, including in the Illinois Workers' Compensation Commission. (TR. P. 85-87). Ms. Byrne testified that she performed a vocational assessment of Mr. McCarey after his back injury

and multiple surgeries. (TR. P. 87). The Arbitrator finds she is not only well qualified in her field but also a sincere and credible witness.

Ms. Byrne interviewed Petitioner, reviewed medical records, took an education and employment history, and reviewed vocational reports of Respondent's vocational counselor. (TR. P. 88-92, PX13). As identified by Ms. Byrne, Petitioner's vocational challenges include his injury to his low back, multiple surgeries, and the resulting light duty restrictions of only 6 hr./day which precluded him from returning to work as a stationary engineer. (TR. P. 89-90, 98-99, PX13). In addition, the highest level of education reached was a high school diploma, and Petitioner did not have any familiarity with computers or typing. (TR. P. 89, 91-92, 98, PX13). Finally, Petitioner's age, large gap in employment, and lack of broad work experience contributed to his employment challenges. (TR. P. 97-99, PX13).

Ms. Byrne confirmed that there was not a stable labor market for Petitioner's transferable skills. (TR. P. 99, PX12, PX13). As a result, Petitioner is permanently disabled. (TR. P. 99-100, PX12, PX13). The Arbitrator finds Ms. Byrne's testimony honest, true and persuasive assessment of Petitioner's lack of employability.

IV. Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law set forth below. Section 1(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the Petitioner bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820

ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of his or her claim *O'Dette v. Industrial Commission,* 79 Ill. 2d 249, 253 (1980) including that there is some causal relationship between the employment and the injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989). And, yet it also is well established that the Act is a humane law of remedial nature and is to be liberally construed to effect the purpose of the Act - that the burdens of caring for the casualties of industry should be borne by industry and not by the individuals whose misfortunes arise out of the industry, nor by the public.. *Shell Oil v. Industrial Comm'n,* 2 Ill.2nd 590, 603 (1954). Decisions of an arbitrator shall be based exclusively on stipulation of the parties, the evidence in the record of proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e)

The Arbitrator, as the trier of fact in this case, has the responsibility to observe the witnesses testify, judge their credibility, and determine how much weight to afford their testimony and the other evidence presented. *Walker v. Chicago Housing Authority*, 2015 IL App (1st) 133788, ¶ 47 Petitioner's testimony is found to be credible. He does appear to be an unsophisticated individual and any inconsistencies in his testimony are not attributed to an attempt to deceive the finder of fact.

WITH RESPECT TO ISSUE (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:

Petitioner submitted the following medical expenses without objection concerning reasonableness and necessity:

Exhibit 5 – Hinsdale Orthopaedics: $3,911.00
Exhibit 7 – Dr. Nitin Malhotra: $11,498.32
Exhibit 9 – Silver Cross Hospital: $12,431.24
Exhibit 11 – Heartcare Centers of Illinois: $3,171.00

As Respondent stipulated to causal connection, the Arbitrator awards the above medical bills that reflect treatment provided to Petitioner's low back. In addition, over Respondent's foundation objection, the medical bills of Dr. Anthony Rinella in the amount of $56,720.86 were received into evidence. (PX2). Respondent does not dispute liability for these charges, and the Arbitrator awards those bills with the understanding that the Respondent is entitled to credit for payments made. Furthermore, the Arbitrator awards Petitioner's out of pocket expenses that were paid directly to the providers in the amount of $1,296.07. (PX15).

The Arbitrator finds that Petitioner did present sufficient, credible evidence that he received reasonable and necessary medical care as a result of the injuries sustained on December 12, 2010. Petitioner has submitted into evidence bills, some of which were subpoenaed several years ago and may not accurately reflect the balances outstanding with the facilities at the time of this trial. The bills in general do not indicate whether the charges reflected on them are at rates above, at, or below fee schedule medical rates.

Respondent contends that the bills which have been received in this matter were paid already pursuant to medical fee schedule and submitted into evidence a payment ledger to support this assertion. [R. Ex. 3] This Arbitrator finds that dates of service listed in outstanding bills are reflected among Respondent's payment ledger for these same medical facilities, but

often at different payment rates than the total billed amounts reflect. This calls into question whether any appropriate charges remain outstanding pursuant to negotiated or fee schedule medical rates, or if the outstanding balances are overcharges for which Respondent would not be responsible. As the Commission rightly noted when this matter was reviewed on a 19(b)(1) trial previously, "the parties, the insurers, and medical providers are in a much better position than the Commission to determine the precise amount of outstanding medical bills." [R. Ex. 2, pg. 2]

Respondent does not dispute its liability to pay the medical bills. Section 8(a) of the Workers' Compensation Act states, "The employer shall provide and pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule, subject to Section 8.2, in effect at the time the service was rendered 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. If the employer does not dispute payment of first aid, medical, surgical, and hospital services, the employer shall make such payment to the provider on behalf of the employee." Accordingly, Respondent should pay any outstanding medical bills directly to the providers and not the Petitioner.

In regard to out-of-pocket expenses presented by the Petitioner at trial, the Arbitrator notes that there is sufficient evidence in the record to warrant reimbursement of Petitioner's out of pocket expenses in the amount of $1,296.07. For example, the Silver Cross Hospital bills reflect Petitioner's notation of the check number and date of payment. Therefore, the Arbitrator to finds Respondent liable for reimbursing Petitioner the amount of $1,296.07.

Based upon the above, the Arbitrator finds it is undisputed that the Respondent should be liable for charges between December 12, 2010 and August 18, 202, in addition to the prior award. The Arbitrator finds that Respondent shall be liable for any such reasonable and related medical bills. The Respondent shall pay the sum of $89,028.25 for reasonable and necessary medical services pursuant to the medical fee schedule directly to the medical providers as provided by the Section 8(a) and 8.2 of the Act. Respondent is entitled to a credit for any payments previously made.

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:

Petitioner testified that he was paid Temporary Total Disability benefits up to and including June 27, 2019, when Respondent unilaterally stopped paying benefits. Petitioner was actively treating and under the care of Dr. Templin through February 6, 2020, when he placed Petitioner at maximum medical improvement. During this period, Dr. Templin placed Petitioner off work, or under restrictions, that Respondent failed to accommodate. Respondent failed to present any contrary medical evidence to suggest Petitioner was capable to return to work full duty. The Arbitrator finds that Respondent is responsible for Temporary Total Disability benefits in the amount of $1,087.21 per week for 477-4/7 weeks for the period of December 13, 2010 through the date of maximum medical improvement, February 6, 2020.

After February 6, 2020, Petitioner was released from Dr. Templin's care with permanent light duty restrictions for a 6-hour workday. Petitioner fully cooperated with Respondent's vocational counselor. Despite Petitioner attending a job fair with Respondent's vocational

counselor on June 23, 2019, Respondent suspended benefits. Respondent seems to suggest that Petitioner failed to cooperate with Respondent's vocational efforts. However, it is clear that Respondent's vocational counselor recommended computer classes in order for a chance at a successful placement and Respondent failed to authorize computer training. It is Respondent that failed to follow its vocational counselor's recommendations, and the suggestion that Petitioner failed to cooperate with vocational efforts is without merit. The Arbitrator finds that Respondent is responsible for maintenance benefits in the amount of $1,087.21 per week for 80 weeks for the period of February 6, 2020 through the date of hearing, August 18, 2021.

The Arbitrator finds that Petitioner is entitled to temporary total disability past the date of retirement. Petitioner was unable to work and retired not by choice, but because he needed income. *Land & Lakes Co. v. Industrial Comm.*, 359 Ill.App.3d 582, (2nd Dist. 2005). In *Land & Lakes,* Petitioner was unable to work because of his injury and was denied temporary total disability benefits. In order to receive some income, Petitioner retired and began receiving union and social security retirement benefits. The Commission and the Appellate Court agreed that receiving such benefits because of financial need was dissimilar from voluntarily quitting. Thus, petitioner was entitled to receive temporary total disability benefits past the date of his retirement. The facts of the instant case are the same, and Petitioner is entitled to temporary total disability benefits past the date of his retirement.

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

Based on the testimony of the Petitioner and Ms. Lisa Byrne, the medical records submitted into evidence reflecting two lumbar laminectomies, a multi-level lumbar fusion with residual radiculopathy, right leg give away and weakness, a valid Functional Capacity Examination demonstrating significant permanent restrictions and a limited workday, Petitioner's advanced age of 68, his lack of advanced education, lack of computer training, limited work experience, Petitioner's unsuccessful job search and the record, the Arbitrator finds Petitioner has suffered permanent total disability. The Arbitrator places great weight on the persuasive testimony of Ms. Byrne.

It is well settled that an employee is permanently and totally disabled when he is unable to make some contribution to the work force sufficient to justify the payment of wages. An employee need not be reduced to total physical incapacity. Instead, he need only show that he is incapable of performing services except those for which there is no reasonable stable market. Age, training, education and experience are all relevant to determine employment potential. Additionally, medical opinions and the results of a diligent but unsuccessful job search are relevant to the determination. Once an employee initially established that he is so handicapped that he will not be employed regularly in any well-known branch of the labor market, then the burden shifts to the employer to show that some kind of suitable work is regularly and continuously available to him. In this case, despite the thousands of positions within the State of Illinois, Respondent was unable to accommodate Petitioner and accommodate his restrictions during the eleven years this case has been pending. As one of largest employers in the State of Illinois, Respondent's inability, or unwillingness to find a position for Petitioner to make some contribution to its own work force supports the award of permanent total disability.

Where a claimant is not obviously unemployable or no medical evidence exists to support a total disability claim, a claimant may be entitled to lifetime PTD benefits upon a showing that he falls into an "odd-lot" category, meaning employment is unavailable to a person in his circumstances. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n,* 389 Ill. App. 3d 191, 204, (2009). "An odd-lot employee is one who, though not altogether incapacitated to work, is so handicapped that he will not be employed regularly in any well-known branch of the labor market." *City of Chicago v. Illinois Workers' Compensation Comm'n,* 373 Ill. App. 3d 1080, 1089 (2007). To show he fits into the "odd-lot" category, a claimant must show (1) a diligent but unsuccessful job search, or (2) that he is unable to engage in stable and continuous employment because of his age, training, education, experience, and condition. *Economy Packing v. Illinois Workers' Compensation Comm'n*, 387 Ill. Appl 3d 283 (2008). Whether a claimant is permanently and totally disabled is a question of fact for the Commission and, on review, its decision will not be disturbed unless it is against the manifest weight of the evidence. *Ameritech,* 389 Ill. App. 3d at 203. As stated, "the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination." *Ameritech,* 389 Ill. App. 3d at 203.

Here, the Arbitrator has determined Petitioner is permanently and totally disabled. This decision is supported by a preponderance of the evidence. As discussed, Petitioner credibly testified regarding the significant right sided low back pain and right leg weakness he experiences with his day to day activities of daily living. After three back surgeries, his left sided pain has improved significantly but not his right sided pain. It remains constant and unrelenting. Petitioner testified credibly that due to his chronic condition of ill-being he feels and acts older

than his chronological age. It is undisputed that Petitioner's subjective complaints are consistent with the objective findings and the medical evidence.

An odd- lot award is further supported by the vocational evaluation report and testimony of Ms. Lisa Byrne. Ms. Byrne assessed Petitioner as being permanently and totally disabled and determined that, based upon claimant's physical status and situational factors, prospective employers would be unable to effectively assist Petitioner with placement with or without accommodation. She noted claimant was 68 years old, had only a high school education, was not computer literate, had a work experience consisting of mostly unskilled labor or customer service activities, had no transferable skills, and had a physical demand level that was not marketable.

The Arbitrator orders Respondent to pay the sum of $1,087.21 a week for the remainder of Petitioner's life, commencing August 19, 2021, as provided in §8(f) of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that a claim has been made, but the evidence submitted and record as a whole, does not warrant the imposition of penalties and fees. As such, none are awarded. The bills from Dr. Rinella's office, which Petitioner submitted into evidence as Petitioner's alleged outstanding bills in relation to the prior 19(b)(1) trial award, actually contain additional bills that were incurred after the prior 19(b)(1) trial had proceeded. Furthermore, the original bills have not been re-subpoenaed in several years in order to verify that the amounts due and owing as

reflected remain currently at the same figures. Additionally, it is not clear whether those bills have already had fee schedule applied or were negotiated for lower rates. The outstanding bills as presented are unclear to the extent that they do not prove Respondent acted or failed to act at a level which rises to be deemed bad faith. Beyond the bills, the evidence has failed to establish any other aspect of this claim that exhibits a lack of good faith intentions on Respondent's behalf in regard to benefits owed. The Arbitrator is mindful that the Attorney General's office without benefit of its computers and files for a significant period of time. Therefore, the Arbitrator finds that penalties and fees would be inappropriate to award and does not do so.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that Respondent's payment ledger adequately documents off-work benefits paid to Petitioner, and Respondent is entitled to a total credit of $481,664.79, representing $361,592.09 for paid TTD and $120,072.70 for paid maintenance. [R. Ex. 3 at pg. 6-8, 11-18] Respondent claims that it is entitled to a credit pursuant to 820 ILCS 305/8(j). The Arbitrator finds that Respondent is also entitled to a credit under Section 8(j) of the Act for medical bills paid through its group medical plan.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027337
Case Name	Andrew Schwiesow v. Homewood Disposal
Consolidated Cases	20WC027338
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0259
Number of Pages of Decision	10
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Stephen Smalling
Respondent Attorney	Timothy O'Gorman

DATE FILED: 7/12/2022

/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

Andrew Schwiesow,

Petitioner,

vs. NO: 20WC 027337

Homewood Disposal,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 13, 2021 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $44,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 12, 2022

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027337
Case Name	SCHWIESOW, ANDREW v. HOMEWOOD DISPOSAL
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	7
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Stephen Smalling
Respondent Attorney	Timothy O'Gorman

DATE FILED: 12/13/2021

/s/ Roma Dalal, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 7, 2021 .10%

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

Andrew Schwiesow
Employee/Petitioner

v.

Homewood Disposal
Employer/Respondent

Case # **20**WC **27337**

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 **Roma Dalal**, Arbitrator of the Commission, in the city of Kankakee, on October 22, 2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ 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 30, 2019, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being on the date of trial ***is*** causally related to these accidents.

In the year preceding the injury, Petitioner earned $**94,582.80**; the average weekly wage was $**1,818.90.**

On the date of these accidents, Petitioner was **42** years of age, ***married*** with 1 dependent child.

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

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

The parties stipulated all temporary benefits owed have been paid.

ORDER

The Arbitrator finds Petitioner sustained an accident arising out of and in the course of his employment on April 30, 2019, underwent a period of treatment which resulted in a successful recovery thereupon which he was placed at MMI on February 12, 2020.

The Arbitrator finds Petitioner has received all reasonable and necessary medical services in relation to his alleged work injury on April 30, 2019. The Arbitrator finds Respondent has paid all appropriate charges for all reasonable and necessary medical services.

The Arbitrator awards permanency benefits in the amount of **11% of a person as a whole or 55 weeks of PPD of $813.87 amounting to $44,472.85 for Petitioner's right shoulder injury. The Arbitrator awards permanency benefits in the amount of 5% loss of use of the right arm i.e. 12.65 weeks or $10,295.46 for petitioner's right elbow injury.**

The Arbitrator has addressed petitioner's August 6, 2020 alleged injury in the Arbitrator's decision for Case Number 20WC27338.

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

December 13, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF Kankakee)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Schwiesow,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 20 WC 27337
Homewood Disposal Service,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACTS

This matter proceeded to hearing on October 22, 2021 on case 20 WC 27337.

The parties stipulated to the occurrence of accident on April 30, 2019**.** Issues in dispute include causal connection and nature and extent. (Arb. Ex. 1).

Petitioner testified that he was employed by Homewood Disposal Services in August of 1997. (Tr. 7). On April 30, 2019 he was working as a residential garbage man. His job duties consisted of picking up any garbage to include garbage cans, beds, dressers, washing machines, dryers, and hot water heaters. (Tr. 9). He also noted that he operated a front load residential truck or Curotto truck which has "claws" operated by a remote control. (Tr. 10). He noted that when the claws cannot lift items, they must manually lift them. Petitioner testified he stands in the truck while driving. (Tr. 11). Petitioner testified he spent 70% inside the truck and 30% outside the truck. (Tr. 11).

Petitioner testified in 2019, every other week he would work six days and the opposite week he would work five days for about ten hours a day. (Tr. 12). Once the truck was loaded, the driver would drive to a transfer station and dump the contents. (Tr 13). Petitioner advised that the seats had an air lever that could add air or take air away to control the level of bouncing. (Tr. 13-14). He noted the more air he put in the more he would bounce. It was much different that driving a SUV, a much rougher ride. Petitioner testified he was constantly bouncing around all the time. (Tr. 15). He noted that he bounced enough to where his head hit the ceiling. (Tr. 16).

Petitioner testified on April 30, 2019, he was picking up old windows to throw into the truck when one of the wires attached to the window caught his right arm and yanked it back as he went to throw it in. Petitioner testified he had a prior shoulder surgery in 2012 but had no complications between 2012 and 2019. (Tr. 16-17).

Following the accident, he came under the care of Dr. Michael Corcoran at Oak Orthopedics. (Tr. 17, PX 1). Petitioner presented to Dr. Corcoran on May 6, 2019. Petitioner was a 42-year-old male who presented for right shoulder and elbow pain. He stated he was throwing windows into the garbage at work on April 30, 2019 and his shoulder and elbow locked up feeling an instant burning sensation. Petitioner was diagnosed with right

shoulder impingement syndrome and right elbow medial and lateral epicondylitis due to a work-related injury on April 30, 2019. Petitioner was prescribed an MRI. (PX 1).

On May 13, 2019, Petitioner underwent an MRI of his right shoulder. The exam revealed (1) moderate tendinosis and undersurface fraying of the supraspinatus, (2) mild to moderate tendinosis and undersurface fraying of the infraspinatus, (3) mild tendinosis of the superior distal fibers of the subscapularis and (4) labral abnormalities as detailed above. (PX 1).

In a May 22, 2019 follow up, Dr. Corcoran assessed a right shoulder rotator cuff tendonitis and labral tear due to the work injury on April 30, 2019. Petitioner underwent an injection to his right shoulder and would undergo physical therapy. Petitioner was also taken off work until the next follow up in four weeks. (PX 1).

On June 19, 2019, Petitioner returned to Dr. Corcoran who recommended a right shoulder arthroscopy. Petitioner remained off work. (PX 1).

On August 16, 2019, Petitioner underwent (1) right shoulder revision arthroscopy, (2) revision Bankart repair, (3) chondroplasty of the humerus and glenoid, (4) labral debridement anterior and posterior, (5) debridement of the undersurface tearing of the rotator cuff as well as thorough bursectomy. Petitioner was diagnosed pre—and post—operatively with (1) right shoulder recurrent labral tear, (2) extensive grade III chondromalacia both on the humerus and glenoid, (3) 20% undersurface tearing of the rotator cuff and (4) impingement syndrome. (PX 1).

On August 26, 2019, Petitioner returned to Dr. Corcoran for a follow up and was to remain off work. In a September 23, 2019 follow up, petitioner continued to complain of increased right elbow pain since the surgery. Petitioner was to undergo an MRI of the right elbow. Petitioner continued with physical therapy and remained off work. (PX 1).

On September 25, 2019, Petitioner underwent an MRI of the right elbow. The exam revealed (1) short segment intrasubstance tear of the common extensor tendon, and (2) small joint effusion. (PX 1).

On October 21, 2019, Petitioner returned to Dr. Corcoran for a follow up of his right elbow and right shoulder. Dr. Corcoran noted Petitioner's MRI demonstrated a small tear of the common extensor tendon. Petitioner was diagnosed with lateral epicondylitis due to the work-related injury of April 30, 2019. Petitioner would undergo physical therapy and was given restrictions of no work with the right arm. (PX 1).

On November 18, 2019, Petitioner returned to Dr, Corcoran for a follow up of his right elbow and right shoulder. Petitioner stated his right shoulder was doing well but had continued complaints of right elbow pain. Petitioner requested an injection for his right elbow, which he underwent the same day. Petitioner was to continue physical therapy. (PX 1). On December 16, 2019, Petitioner returned to Dr. Corcoran for a follow up of his right shoulder and right elbow conditions. Petitioner advised the injection helped his right elbow. Petitioner reported mild pain to his shoulder with persistent weakness. Petitioner continued therapy with restrictions of no work with the right arm. (PX 1).

On January 13, 2020, Petitioner returned to Dr. Corcoran for a follow up of his right shoulder and right elbow conditions. Petitioner advised he was not attending physical therapy as it was not approved by workers compensation insurance but was doing well otherwise. Petitioner was encouraged to continue a home exercise program. Restrictions were provided. (PX 1).

On February 12, 2020, Petitioner returned to Dr. Corcoran for a follow up of his right shoulder and right elbow conditions. He was 6-month status post-surgery. At this point petitioner was placed at MMI and advised to return to work full duty with no restrictions as of February 13, 2020. Petitioner was encouraged to ice three times daily after activities and continue with a home exercise program. (PX 1).

Petitioner testified that after surgery and therapy he returned to work full duty as of February 14, 2020. (Tr. 18). He testified that upon discharge his shoulder was weak, but he was still able to perform his job duties as a garbage man. (Tr. 19, 35). He testified he did not seek any medical care until August 6, 2020.

On August 6, 2020, Petitioner alleges another injury to his right shoulder, the facts of which are addressed in the Arbitrator's decision for Case Number 20WC27338. (Arb. Ex 1, 2).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). 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/her testimony. Where a claimant's testimony is inconsistent with his/her 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).

The Arbitrator is presented with a situation wherein Petitioner has filed two claims for injuries sustained to his right shoulder. The first claim in 2019 necessitated surgery with Petitioner reaching MMI in February 2020 and a successful return to work. The second claim of August 6, 2020 alleges an injury to the same shoulder with surgery having been prescribed. Where a Petitioner sustains separate and distinct injuries from two different accidents, he should be allowed to seek a permanency award for each accident. National Freight Industries, v. IWCC 2013 Il App (5th) 120043WC. The Commission was faced with an identical situation in Ahnert v. Pon North America, 211WCC0097 albeit involving a cervical injury. Therein, the Commission held that awarding PPD in the first claim and adjudicating the subsequent 19(b) claim was appropriate under the circumstances.

In support of the Arbitrator's decision relating to ("F"), is Petitioner's current condition of ill-being causally related to the injury for the April 2019 injury, the Arbitrator finds the following:

To establish medical causation, Petitioner is not required to prove that the hazards to which he was exposed constitute the sole cause of the injury, or even the principal cause. It is sufficient if the work activity was a causative factor. This is true if Petitioner had a pre-existing condition which was aggravated or accelerated by his employment. Sisbro, Inc. v. Industrial Com'n, 207 Ill.2d 193 (2003).

Prior to the subject accident, Petitioner had undergone a right shoulder surgery on February 8, 2013. He was discharged and able to perform his full job duties without incident until April 30, 2019. On that date he sustained injuries to his right shoulder while throwing windows as part of his job duties. He underwent surgery with a post-operative diagnosis of recurrent labral tear, extensive grade III chondromalacia of the humerus and glenoid together with a 20 percent undersurface tearing of the rotator cuff and impingement syndrome. Following a course of rehabilitation, Petitioner was deemed to have reached MMI as of February 13, 2020. At that time, Petitioner was encouraged to ice three times daily after activities and continue with a home exercise program. At trial petitioner testified that he was able to meet the demands of his job but noted that his shoulder was weaker after the injury. The causal relationship along with the nature and extent of the disability arising from that injury is established by the office notes of Dr. Corcoran and Petitioner's testimony. The Arbitrator finds the Petitioner's current condition of ill being in regard to this injury causally related to the injury reaching MMI for this injury on February 12, 2020.

With Regards to Issue (L) what is the nature and extent of Petitioner's injury, the Arbitrator finds the following:

Consistent with the Illinois Workers' Compensation Act, the Arbitrator is to base the permanency determination on the following factors:

i. The reported level of impairment pursuant to subsection (a) (e.g., the AMA rating)
ii. The occupation of the injured employee
iii. The age of the employee at the time of the injury
iv. The employee's future earning capacity
v. Evidence of disability corroborated by the treating medical records.

No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of § 8.1b(b), the Arbitrator notes no party introduced an impairment rating at trial and as such, no weight is given to this factor.

With regard to subsection (ii) of § 8.1b(b), the Arbitrator notes Petitioner testified 70% of his job required emptying of garbage cans via a mechanism referred to as a Curotto arm. The other 30% he would have to manually lift, making it a physically demanding job. Given the heavy nature of the work, the Arbitrator gives great weight to this factor.

With regard to subsection (iii) of § 8.1b(b), the Arbitrator notes Petitioner was 42 years old on the date of his accident. The Arbitrator notes Petitioner will be performing his job for a significant amount of years ahead. As such, the Arbitrator assigns significant weight to this factor.

With regard to subsection (iv) of § 8.1b(b), the Arbitrator concludes Petitioner is capable of working with no restrictions and as such, is capable of making the same amount in wages as Petitioner was previous to his injury. As Petitioner's injury did not affect his earning capacity, the Arbitrator assigns significant weight to the lack of effect Petitioner's injury had on his wages.

With regard to subsection (v) of § 8.1b(b), the Arbitrator notes Petitioner's medical records indicate Petitioner sustained a significant right shoulder injury that required an eventual surgical repair. The Arbitrator notes Petitioner's recovery lasted approximately six months and resulted in a return to full duty work which remained uncomplicated for another six months until Petitioner's alleged second injury. Petitioner testified until his alleged second injury, he had no difficulty performing any tasks at work and only mildly modified his process at work to use his right arm less. Petitioner testified he did not feel he could not perform his job at any point after his release to full duty. Petitioner's medical records indicate a significantly more benign course of treatment to his right elbow. Petitioner underwent a short course of injection therapy which resulted in an eventual release to full duty with no ongoing complaints. The Arbitrator also notes petitioner did not complain of elbow pain at every visit as the shoulder was the primary issue. The Arbitrator assigns significant weight to Petitioner's successful recovery and continued ability to perform his job after recovery.

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 11% loss of use of person as a whole pursuant to §8(d)2 of the Act for the injury sustained to his right shoulder. Respondent shall pay Petitioner permanent partial disability benefits of $813.87/week for 55 weeks.

The Arbitrator further finds that Petitioner sustained permanent partial disability to the extent of 5% loss of use of the right arm pursuant to Section 8(e) of the Act. Respondent shall pay Petitioner permanent partial disability benefits of $813.87/week for 12.65 weeks.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027338
Case Name	Andrew Schwiesow v. Homewood Disposal
Consolidated Cases	20WC027337
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0260
Number of Pages of Decision	13
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Stephen Smalling
Respondent Attorney	Timothy O'Gorman

DATE FILED: 7/12/2022

/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

ANDREW SCHWIESOW,

Petitioner,

vs. NO: 20 WC 27338

HOMEWOOD DISPOSAL SERVICES,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical treatment and temporary total 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 further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's decision in its entirety, however adds the following analysis under Issue (C), the Conclusions of Law section of the Arbitrator's decision:

The Commission also finds that Petitioner was a traveling employee. The determination of whether an injury suffered by a traveling employee, such as the Petitioner in this case, arose out of and in the course of his employment is governed by different rules than are applicable to other employees. *Nee v. Ill. Workers' Comp. Comm'n*, 2015 IL App (1st) 132609WC *citing Hoffman v. Industrial Comm'n,* 109 Ill.2d 194, 199 (1985).

In the instant case, the Petitioner testified that he worked as a residential garbage man picking up garbage cans from residences. (T. 8) Once his truck is loaded, he drives it to a transfer station and dumps it. (T. 13) At the time of the incident on August 6, 2020, the Petitioner was

driving in from his route to dump his truck when he was going over a bridge. The truck bounced and jarred his arm up. (T. 21) By the very nature of his job, Petitioner was required to be on the road and in and out of his truck in order to complete his job duties.

A traveling employee is one for whom travel is an essential element of his/her employment where (s)he must travel away from his/her employer's premises to perform his/her job. *Cox v. Illinois Worker's Compensation Comm'n*, 406 Ill.App.3d 541, 545 (2010). Accordingly, traveling employees are exposed to hazards of the street and to the hazards of automobiles much more than the general public. *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶19. Therefore, "[t]he test for determining whether an injury to a traveling employee arose out of and in the course of [her] employment is the reasonableness of the conduct in which [she] was engaged and whether the conduct might normally be anticipated or foreseen by the employer." *Cox*, 406 Ill.App.3d at 545-46.

Finally, the Commission corrects the following scrivener's errors: Under the "Findings of Facts" portion of the Arbitrator's decision, in the second to last sentence of the fourth paragraph, the Commission replaces "February 14, 2020" with "February 12, 2020". Under Conclusions of Law, under Issue (F), in the third sentence of the second paragraph, the Commission replaces "February 14, 2020" with "February 12, 2020".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,212.60 per week for a period of 14 2/7 weeks, from August 11, 2020 through November 18, 2020, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner reasonable and necessary medical services pertaining to Petitioner's shoulder and elbow condition pursuant to §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

The 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.

July 12, 2022

MEP/dmm
O: 061422
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/s/ *Maria E. Portela*
Maria E. Portela

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027338
Case Name	SCHWIESOW, ANDREW v. HOMEWOOD DISPOSAL
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Stephen Smalling
Respondent Attorney	Timothy O'Gorman

DATE FILED: 12/13/2021

/s/ Roma Dalal, Arbitrator

Signature

INTEREST RATE WEEK DECEMBER 7, 2021 0.10%

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)

Andrew Schwiesow
Employee/Petitioner

Case # **20**WC **27338**

v.

Consolidated cases:

Homewood Disposal
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 **Roma Dalal**, Arbitrator of the Commission, in the city of Kankakee, on October 22, 2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other _____

FINDINGS

On August 6, 2020, Respondent ***was*** operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship ***did*** exist between Petitioner and Respondent.

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

Timely notice of these accidents ***was*** given to Respondent.

Petitioner's current condition of ill-being on the date of trial ***is*** causally related to these accidents.

In the year preceding the injury, Petitioner earned $**94,582.80**; the average weekly wage was $**1,818.90.**

On the date of these accidents, Petitioner was **42** years of age, ***married*** with 1 dependent child.

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 **$17,322.86** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**17,322.86.**

ORDER

The Arbitrator finds Petitioner sustained an accident arising out of or occurring in the course of his employment on August 6, 2020.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule regarding petitioner's shoulder and elbow condition as provided in Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Pursuant to Section 8(a) of the Act, the Respondent shall authorize and pay for, pursuant to the fee schedule, the treatment recommended by Dr. Cole, including, but not limited to a right shoulder arthroscopy, debridement, evaluation of the rotator cuff and biceps tenodesis and right elbow lateral epicondyle platelet rich plasma injection and all necessary ancillary care.

Respondent shall pay Petitioner temporary total disability benefits of **$1,212.60/week** for 14 2/7 weeks, commencing August 11, 2020 through November 18, 2020, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

The Arbitrator has addressed petitioner's April 30, 2019 alleged injury in the Arbitrator's decision for Case Number 20WC27337.

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.

December 13, 2021

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Andrew Schwiesow,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 20 WC 27338
Homewood Disposal Service,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACTS

This matter proceeded to hearing on October 22, 2021 on case 20 WC 27338. Issues in dispute include accident, notice, causal connection, TTD and medical. (Arb. Ex. 2).

Petitioner testified that he was employed by Homewood Disposal Services in August of 1997. (Tr. 7). On April 30, 2019 he was working as a residential garbage man. His job duties consisted of picking up any garbage to include garbage cans, beds, dressers, washing machines, dryers, and hot water heaters. (Tr. 9). He also noted that he operated a front load residential truck or Curotto truck which had "claws" operated by a remote control. (Tr. 10). He noted that when the claws could not lift items, he had to manually lift them. Petitioner testified he stands in the truck while driving. (Tr. 11). Petitioner testified he spent 70% inside the truck and 30% outside the truck. (Tr. 11).

Petitioner testified in 2019, every other week he would work six days and the opposite week he would work five days for about ten hours a day. (Tr. 12). Once the truck was loaded, he drove the car to a transfer station and dumped the contents. (Tr 13). Petitioner advised that the seats had an air lever that could add air or take air away to control the level of bouncing. (Tr. 13-14). He noted the more air he put in the more he would bounce. It was much different that driving a SUV, a much rougher ride. Petitioner testified that he was constantly bouncing around all the time. (Tr. 15). He noted that he bounced enough to where his head hit the ceiling. (Tr. 16).

Petitioner testified on April 30, 2019, he was picking up old windows to throw into the truck when one of the wires attached to the window caught his right arm and yanked it back as he went to throw it in. Petitioner testified he had a prior shoulder surgery in 2012 but had no complications between 2012 and 2019. (Tr. 16-17). He subsequently came under the care of Dr. Michael Corcoran who performed surgery on August 16, 2019. Petitioner testified he underwent a course of post-operative care and was eventually released to full duty and maximum medical improvement on February 14, 2020. Petitioner testified he returned to work for Homewood Disposal after being released by Dr. Corcoran. (PX 1 and Tr. 18-19).

Petitioner testified he worked continuously up until August 6, 2020 with no treatment. (Tr. 20). He testified that he worked on Thursday, August 6, 2020. On that date he was driving in from his route to the dump heading north on Wolf Road when he was going over a bridge that went over a creek and hit the edge of the bridge. As

he hit the edge of the bridge the truck bounced, and it jarred his right arm up. (Tr. 21). Petitioner testified that he noticed pain in his shoulder at that time. He testified that he was traveling approximately 40 miles per hour. (Tr. 22). After he hit the bump, he felt pain in the edge of the front of his shoulder. (Tr. 23). Petitioner finished work that day and returned the truck after unloading it. Petitioner advised that he did not report it right away as he was hoping it was not severe and he could go home and ice it. (Tr. 24). He also noted that he was reluctant to call in sick as it would impact his coworkers, so he worked Friday as well. After being off work for two days and utilizing ice/heat Petitioner notified his supervisor Frazier Gully of the incident on Monday when he reported to work.

Petitioner testified that he finished his route on Monday and then went to see Occupational Health at the end of the day. He then chose to obtain a second opinion. He testified he did research online and given his two previous shoulder surgeries, he wanted a different opinion regarding his shoulder. (Tr. 27). Based on the same he presented to Dr. Brian Cole of Midwest Orthopedics on August 31, 2020. Petitioner further clarified that it took a long time to get an appointment due to COVID-19.

On August 13, 2020, Petitioner provided a recorded statement whereby he provides a history similar to that provided in his testimony. Petitioner describes experiencing pain while driving over a bump while taking a truck back to the dump. (RX 4).

On August 31, 2020 petitioner presented to Dr. Brian Cole. Dr. Cole noted petitioner was a 43-year-old Workers' Compensation patient who presented today with right shoulder and right elbow pain. Petitioner noted he had two prior shoulder surgeries. Dr. Cole noted petitioner was driving in a truck over a large bump and felt an immediate onset of pain and instability in his right shoulder. He noticed pain primarily in the anterior aspect of the shoulder. Dr. Cole examined petitioner and diagnosed him with a recurrence of his superior labral symptoms and biceps tendinitis. He was given a prescription for a right shoulder MRI. Dr. Cole noted this was a work-related injury. Petitioner was provided restrictions of a desk job only. (PX 2).

On September 10, 2020, Petitioner underwent an MRI at Midwest Orthopedics at Rush which demonstrated distal supraspinatus tendinosis with an articular-sided partial tear, posteriorly, with infraspinatus tendinosis and an interstitial laminar tear. Petitioner's imaging also demonstrated diffuse glenohumeral cartilage loss, senescent changes in the labrum and small posterior subacromial bursitis with mild capsular hypertrophy in the AC joint. (PX 2, p. 50, 52).

On September 10, 2020, Petitioner followed up with Dr. Cole for his right shoulder and right elbow. The doctor examined petitioner. He noted the MRI of the right shoulder demonstrated normal post-operative changes with mild degenerative changes, biceps tendon appeared to be present in the groove. Petitioner also had tenderness of the lateral epicondyle. Dr. Cole noted Petitioner had exhausted conservative treatment and had two prior labral surgeries. As such, he recommended a right shoulder arthroscopy, debridement, evaluation of the rotator cuff and biceps tenodesis. At that time of surgery, they would also do a right elbow lateral epicondyle platelet rich plasma injection. Petitioner reported with previous shoulder surgeries his lateral epicondylitis was aggravated when wearing a sling. Petitioner was provided work restrictions of no lifting, pushing, or pulling greater than five pounds. (PX 2).

On October 28, 2020 petitioner presented to Dr. Bryan Neal for a Section 12 examination. Dr. Neal took a detailed history, conducted a physical examination, reviewed radiographs, and reviewed Petitioner's medical records to the date of his examination. Based on the examination, Dr. Neal diagnosed petitioner with right lateral epicondylopathy (lateral epicondylitis) and right shoulder pain consistent with impingement syndrome/rotator cuff tendinopathy. (RX 1). Dr. Neal opined that there was no accident or injury on August 6, 2020. It was his opinion that this symptomatology was from preexisting conditions. Dr. Neal explained Petitioner's subjective complaints and objective findings were consistent, that he was capable of working full duty irrespective of cause and that further intervention may be necessary, however unrelated to his alleged incident on August 6, 2020. (RX 1, pg. 20-21). Independent of causation, he noted there would be reasonable treatment options for his subjective

complaints. He would recommend petitioner undergo a right lateral epicondyle corticosteroid injection and right wrist extension splinting. Regarding his right shoulder, he would consider a subacromial corticosteroid injection. He noted he would not recommend surgery and treatment to date was reasonable and necessary but not causally related to his work accident. (RX 1, p.21).

Dr. Neal provided an addendum report dated February 24, 2021. He specifically opined petitioner's right shoulder pain and complaints were not causally related to any alleged work injury on or around April 30, 2019 and/or May 6, 2020. He did qualify his ability to make any comment on the April 30, 2019 accident was limited to some degree. (RX 2).

On November 18, 2021, Petitioner was sent a letter citing Dr. Neal's opinions that he may return to work and was requested to contact Petitioner's supervisor to return to work on November 19, 2021. (RX 3). Petitioner testified he returned to work and had been working until the date of trial. (Tr. 29). Petitioner testified that it was painful to do his job and he tries not to use his right arm. He also has received cortisone shots for his elbow and takes hydrocodone. (Tr. 30).

Petitioner testified that if he was recommended surgery, he would undergo the same. (Tr. 30). During cross examination, Petitioner testified from the period between February 13, 2020 and August 6, 2020, he did not experience any sensation, other than weakness, in his right shoulder. (Tr. 34). Petitioner testified that on August 6, 2020 he felt a similar pain like he experienced on April 30, 2019 with a burning sensation. (Tr. 35). Petitioner testified he was not lifting anything at the time of his onset of pain. (Tr. 36). Petitioner testified no one was driving with him that day and he continued to work the following three days. (Tr. 36-37).

The Arbitrator has addressed petitioner's April 30, 2019 alleged injury in the Arbitrator's decision for Case Number 20WC27337. (Arb. Ex. 1, 2).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). 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/her testimony. Where a claimant's testimony is inconsistent with his/her 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).

It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence and assign weight to witness testimony. O'Dette v. Industrial Commission, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); Hosteny v. Workers' Compensation Commission, 397 Ill. App. 3d 665, 674 (2009). 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).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds his testimony to be persuasive. The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions that would deem the witness unreliable.

The Arbitrator is presented with a situation wherein Petitioner has filed two claims for injuries sustained to his right shoulder. The first claim in 2019 necessitated a surgery with Petitioner reaching MMI in February 2020 and a successful return to work. The second claim of August 6, 2020 alleges an injury to the same shoulder with surgery having been prescribed. The Commission was faced with an identical situation in Ahnert v. Pon North

America, 21 IWCC 0097 albeit involving a cervical injury. Therein, the Commission held that awarding PPD in the first claim and adjudicating the subsequent 19(b) claim was appropriate under the circumstances.

The Arbitrator finds with respect to Issue (C), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent and the Issue (E) was timely notice of the accident given to the Respondent, the Arbitrator finds as follows:

For accidental injuries to be compensable under the Workers' Compensation Act, a claimant must show such injuries arose out of and in the course of his or her employment. Navistar Intern. Transp. Corp. v. Industrial Com'n, 315 Ill.App.3d 1197 (2000).

After a careful review of the record, including Petitioner's testimony and the medical evidence available in this case, the Arbitrator finds Petitioner did sustain an "accident" as defined by the Act. Petitioner's description that he drove over a bump is consistent throughout the evidence both testimonial and medical. Petitioner's histories are consistent, and it appears that Petitioner did experience pain while driving over a bump in the road on August 6, 2020.

Petitioner also testified consistently with the medical records that he sustained injuries to his right shoulder on Thursday, August 6, 2020. When the symptoms failed to resolve, he notified his supervisor Frazier Gully of the accident on Monday, August 10, 2020. He was then directed to be seen at the Occupational Health clinic. Petitioner's testimony is corroborated with the medical records. Respondent did not introduce any evidence to the contrary. Based on the foregoing, the Arbitrator finds timely notice of the accident was given to the Respondent.

The Arbitrator finds with respect to Issue (F), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was *a* causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

In this case, the Arbitrator finds that petitioner's current condition of ill-being is causally related to her work accident. Petitioner testified that he had a history of shoulder conditions that required two surgeries. Petitioner was placed at MMI as of February 14, 2020. He further testified that he returned to work for Homewood Disposal after being released by Dr. Corcoran. (PX 1 and Tr. 18-19). Petitioner worked continuously up until August 6, 2020 with no treatment. (Tr. 20). Dr. Cole noted this was a work-related injury. (PX 1). Dr. Neal opined petitioner did not sustain any accident thus did not find causal connection. (RX 1). As there was no alleged accident, he noted petitioner's condition was related to a preexisting condition. The Arbitrator finds Dr. Cole's opinions more persuasive.

First, as the Arbitrator finds an accident occurred, Dr. Neal does not address whether this would be related to the August 6, 2020 event. Rather he just indicates petitioner has pain that is preexisting. The fact that he had pre-existing conditions, even though the same result may not have occurred had the Petitioner been in normal health, does not preclude a finding that the employment was a causative factor. St. Elizabeth Hospital v. IWCC 371 Ill.

App.3d 882, 885 (5th Dist. 2007) Every natural consequence that flows from an injury which arose out of and in the course of the Petitioner's employment is compensable under the Act. Cent. Rug & Carpet v. IWCC 361 Ill. App.3d 684, 690 (1st Dist. 2005) It is also well-settled that an employee is fully entitled to benefits if a pre-existing condition has been aggravated, exacerbated or accelerated by an accidental injury. See Lopez v. Braner USA Inc. 07 IWCC 8678. Causation in a workers' compensation claim may be established by a chain of events showing prior good health, an accident and a subsequent injury. Schroeder v IWCC, 2017 Il App (4th) 160192WC

In Schroeder, the Petitioner had an extensive history of back injuries and treatment (including two surgeries) leading to a third surgical recommendation by her treating physician. On the eve of having surgery, Petitioner declined to go forward and instead discontinued treatment, secured her CDL and went to work for the Respondent as an over the road truck driver. Eight months later she fell and injured her back while working. This injury led to surgery being performed and the imposition of permanent restrictions. In addressing the issue of causal connection, the Appellate Court utilized the "chain of events" analysis wherein a previous condition of good health coupled with an accident and subsequent injury may be sufficient circumstantial evidence to establish a causal nexus between the accident and the employee's injury. The Court further noted that 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 79 N.E. 3d at 839. See also Duffin v. City of Chicago 21 I.W.C.C.0001.

In this case, Petitioner had gone for a period of six months without symptoms, treatment or restrictions imposed on his activities. The last treatment having been performed in February 2020 with no follow up or work restrictions recommended. (PX. 1) It is undisputed Petitioner was fully capable of performing his job duties until the accident of August 6, 2020. Since that time, he has been treated by the Respondent's Occupational Clinic, Dr. Brian Cole and examined by Dr. Neal who concurs treatment is necessitated for his shoulder condition.

The evidence establishes that Petitioner has never returned to the "baseline" he was at immediately before the subject accident. As noted in Schroeder, the salient factor is not the precise previous condition but rather the resulting deterioration from whatever the previous condition had been. The Petitioner went from a fully functioning individual able to perform his job duties to one whose shoulder is symptomatic and in need of further medical treatment.

There was no medical evidence introduced that Petitioner sustained any other injuries or trauma to his shoulder subsequent to the accident in question. There has been no interruption in the Petitioner's consistent complaints of significant shoulder pain following the accident necessitating treatment and a surgical recommendation. Even Dr. Neal noted that petitioner had subjective complaints that required additional medical care. Therefore, the Arbitrator finds that the Petitioner's current condition of ill-being is causally related to the subject accident.

With respect to Issue (J) whether the medical services that were provided to the Petitioner were reasonable and necessary and Issues (K) whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the follows:

The Arbitrator incorporates by reference the above Findings of Fact and refers to them by reference herein. The medical records entered evidence demonstrate Petitioner sustained injuries to his right shoulder and right elbow. Based on the record in its entirety, the Arbitrator finds Petitioner's treatment to be reasonable and necessary. Given the Arbitrator's finding of causation between Petitioner's August 6, 2020 work accident and his condition of ill-being regarding his right shoulder/elbow, Respondent is liable for reasonable and necessary medical treatment of the causally related condition.

The Arbitrator orders Respondent to pay Petitioner all other reasonable and necessary medical expenses incurred in connection with the care and treatment of his causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid.

Regarding the issue of whether the Petitioner is entitled to any prospective medical care, following consideration of the testimony and evidence presented, the same is incorporated by reference, it is found that Petitioner's condition is causally related to his work accident and has not stabilized or otherwise reached MMI. Dr. Cole opined Petitioner had exhausted conservative treatment and had two prior labral surgeries, recommending a right shoulder arthroscopy, debridement, evaluation of the rotator cuff and biceps tenodesis and right elbow lateral epicondyle platelet rich plasma injection. The Arbitrator finds that Petitioner is entitled to prospective medical care as recommended by his treating physicians. For the reasons stated above, Respondent shall authorize and pay for this and such other reasonable medical treatment pursuant to the statutory fee schedule.

With respect to Issue (L), what temporary benefits are in dispute, the Arbitrator finds as follows:

In order to prove entitlement to TTD benefits, a claimant must establish not only that he did not work, but that he was unable to work. Sharwarko v. Illinois Workers' Compensation Comm'n, 2015 IL App (1st) 131733WC. An employee is temporarily totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. Archer Daniels Midland Co. v. Industrial Comm'n, 138 Ill. 2d 107, 118 (1990). Once an injured employee's physical condition stabilizes or he has reached MMI, he is no longer eligible for temporary total disability benefits. Archer Daniels Midland Co., 138 Ill. 2d at 118. A claimant reaches MMI when he is as far recovered or restored as the permanent character of his injury will permit. Nascote Industries v. Industrial Comm'n, 353 Ill. App. 3d 1067, 1072 (2004). Factors to be considered in determining whether a claimant has reached MMI include whether he has been released to return to work, medical evidence, testimony concerning the claimant's injury, the extent of his injury, and whether the injury has stabilized. Nascote Industries, 353 Ill. App. 3d at 1072. The period of time during which a claimant is temporarily and totally disabled is a question of fact to be determined by the Commission, and its resolution of the issue will not be disturbed on appeal unless it is against the manifest weight of the evidence. Archer Daniels Midland, 138 Ill. 2d at 119-20.

Petitioner is claiming TTD benefits beginning on August 11, 2020 through November 18, 2020, when petitioner returned to work. Based on the same, TTD benefits are awarded at a rate of $1,212.60 for 14 2/7 weeks. Respondent shall receive credit for amounts paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC000171
Case Name	Mauro Sanchez v. Securitas Security
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0261
Number of Pages of Decision	19
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Eduardo Salgado
Respondent Attorney	Patrick D. Duffy

DATE FILED: 7/12/2022

/s/Maria Portela, Commissioner

Signature

22IWCC0261

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MAURO SANCHEZ,

Petitioner,

vs. NO: 17 WC 171

SECURITAS SECURITY SERVICES, USA, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability benefits, permanent partial disability benefit and whether 8(a) benefits are paid directly to Petitioner for distribution 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 finding regarding causation. However, the Commission modifies the award of temporary total disability benefits, medical expenses and permanent partial disability benefits as outlined below.

Findings of Fact

Petitioner sustained an unwitnessed, yet unrebutted work accident, while attempting to move a 30-gallon bucket that contained concrete bricks. (T. 12, Px1) Petitioner had a co-worker take him to Mercy Hospital wherein he was diagnosed with a lumbar strain. (Px3) He was instructed to follow up with his personal physician.

On December 16, 2016, Petitioner presented to Dr. Maura Woznica for his lower back pain. Dr. Woznica's diagnosis was acute low back pain and she placed him on light duty. (Px4)

On December 22, 2016, when Petitioner reported to Dr. Woznica, he had continued complaints of back pain. Dr. Woznica prescribed physical therapy, advised it could take 4-6 weeks for the pain to resolve and took Petitioner off work. (Px4)

On December 30, 2016, Petitioner returned to Dr. Woznica with continued pain and she ordered an MRI for evaluation of a possible herniated disc. (Px4) On January 18, 18, 2017 he returned to Dr. Woznica with continued complaints of pain and got an extension of his off work slips. (Px4) Petitioner's MRI showed lumbar spine pathology. (Px6)

Petitioner began receiving physical therapy, chiropractic care, and pain management at Hyde Park Medical Center. Petitioner also had an initial visit with Dr. Divya Agrawal on February 8, 2017. At this visit, Petitioner described some symptoms of radiculopathy. Dr. Agrawal reviewed Petitioner's MRI and interpreted it to show a disc protrusion at L5-S1 as well a bilateral foraminal narrowing. He also believed there were disc bulges at L5-6 and L3-4. He diagnosed Petitioner with a lumbar sprain, lumbar radiculitis and a lumbar disc herniation and causally connected Petitioner's diagnoses to the work accident of December 15, 2016. He also continued to keep Petitioner off work. (Px8)

On February 22, 2017, Petitioner returned to Dr. Woznica to discuss the results of the MRI scan. There is a questionable entry wherein it appears Petitioner requested time off work so he could spend his 60th birthday with his children and remain off work. However, Dr. Woznica also noted that Petitioner was having continued complaints and felt it best to transfer Petitioner to PMNR for further management and kept Petitioner off work until he could be seen by them. She did not release Petitioner regarding his low back and made it clear she was keeping him off work until he could be seen by a specialist. (Rx2)

On March 6, 2017, Petitioner returned to Dr. Agrawal with continued complaints of radicular symptoms. Dr. Agrawal recommended nerve testing and a trial of lumbar epidural steroid injections. (Px8) On March 15, 2017, Petitioner underwent an EMG/NCV which showed electrodiagnostic evidence of right L5-S1 radiculopathies. (Px8) Petitioner returned to Dr. Agrawal on April 5, 2017, who, at that time, noted the abnormal EMG findings and again recommended lumbar epidural steroid injections. (Px8) The epidural steroid injections provided minimal relief and by May 3, 2017, Dr. Agrawal issued a referral for a spine specialist. (Px8) On May 31, 2017, Dr. Agrawal saw Petitioner again and continued to keep Petitioner off work. (Px8)

On June 16, 2017, Petitioner attended an initial evaluation with Dr. Cary Templin. Dr. Templin reviewed the MRI and noted evidence of a spondylolisthesis grade I at L3-4 and L4-5 with facet arthropathy. Dr. Templin opined this pathology was aggravated by the December 15, 2016, incident. Dr. Templin recommended flexion-extension x-rays and also wanted to observe how Petitioner responded to additional injections, but mentioned that if Petitioner had continued pain, he might be a surgical candidate. Dr. Templin kept Petitioner off work. (Px5)

On June 26, 2017, Petitioner underwent an independent medical exam with Dr. Kern Singh. In his report, Dr. Singh noted that he reviewed no records other than the MRI. (Rx1) Additionally, Dr. Singh did not perform the examination and only spent approximately 10

minutes with Petitioner. (T. 36-37) Dr. Singh opined Petitioner merely suffered a soft tissue strain which should have resolved after 4 weeks, the injections were unnecessary, and Petitioner displayed positive Waddell signs. (Rx1)

On June 28, 2017, Petitioner returned to the pain clinic/Dr. Agrawal with continued complaints of severe pain. Dr. Agrawal continued Petitioner's off work status. (Px8) Petitioner underwent medial branch blocks on July 24, 2017, which provided no relief. (T. 37-38, Px7, Px8 (7/26/17 visit))

On August 6, 2017, Petitioner presented to the ER due to severe low back pain with radiculopathy. He was instructed to follow up with his primary doctor. (Px3)

On August 23, 2017, Petitioner again presented to Hyde Park Medical Center where he continued to complain of severe pain with radiculopathy. Dr. Larry Najera noted Petitioner might be a candidate for surgery and again kept Petitioner off work. On September 20, 2017, Petitioner again presented to Hyde Park Medical Center where it was noted he continued to complain of radicular pain and that he had plateaued with conservative care. He was discharged by Dr. Najera at Hyde Park Medical Center and noted he would be unable to work and remained disabled until cleared by Dr. Templin. (Px8)

On October 20, 2017, Petitioner was again seen by Dr. Templin. Dr. Templin recommended surgery at that time due to Petitioner failing conservative care. (Px5) On November 17, 2017, Petitioner returned to Dr. Templin with continued complaints of radicular pain. Dr. Templin again recommended surgery. Dr. Templin also disagreed with Dr. Singh's opinion that Petitioner's condition was merely degenerative and he opined it was clear from the imaging that Petitioner had more significant pathology. (Px5) Petitioner attended a pre-op visit with Dr. Templin on April 13, 2018 and underwent a 2-level fusion on April 18, 2018. (Px5)

Following surgery, Petitioner reported that all of his radicular symptoms resolved and his pain level went from 8/10 to 1-2/10. Dr. Templin was pleased with Petitioner's progress and as of January 21, 2019, found Petitioner to be at MMI as it pertained to the low back. (Px5)

Conclusions of Law

The Commission modifies the Arbitrator's award for temporary total disability benefits. The Petitioner's primary care physician, Dr. Woznica, took Petitioner off work on December 22, 2016 (T. 21 and Px4) and at no point thereafter did Petitioner receive a release from any of his treating physicians to return to work. The Commission modifies the Arbitrator's award of temporary total disability benefits for the period from April 13, 2018, through January 21, 2019 (40 3/7 weeks) and awards Petitioner total temporary disability benefits for the period from December 22, 2016, through January 21, 2019 (108 5/7 weeks).

The Commission affirms the Arbitrator's award of medical expenses of $114.33 to Mercy Hospital, $28,651.00 to Hinsdale Orthopaedics and $1,104.00 to UIC Physicians Group. However, the Commission also awards Petitioner's out of pocket expenses of $35.00 in conjunction with the bill from UIC Physicians Group.

However, the Commission reverses the Arbitrator's denial of medical expenses as follows:

Archer Open MRI: the evidence supports the award of bills of $3,900.00 for the MRIs performed on January 29, 2017, and $200.00 for the x-rays performed on October 28, 2017. Both radiologic studies are causally connected to the treatment for the low back injury and are awarded pursuant to the fee schedule. Based on the evidence, Respondent paid $3,900.00 (Rx4) and it appears the only outstanding amount at the time of Review is $200.00 which is awarded and adjusted pursuant to the fee schedule.

Pathology Consultants of Chicago: The Arbitrator denied the $195.00 related to blood work performed when Petitioner went to the Mercy Hospital ER for back pain on August 6, 2017. While Mercy Hospital billed for the treatment at the ER related to Petitioner's low back, the hospital did not bill for the lab technician that performed Petitioner's blood work on August 6, 2017. Rather, the physician's bill was provided by Pathology Consultants of Chicago, which at the time of trial reflected an unpaid and related balance of $195.00. The records clearly document that Petitioner underwent a series of lab work and blood work that is corroborated by the itemized bill provided by Pathology Consultants of Chicago. Accordingly, the Commission awards the payment of the $195.00 bill to be adjusted pursuant to the fee schedule.

Hyde Park Medical Center: Petitioner attended physical therapy and other pain management services at Hyde Park. These were required conservative treatment measures Petitioner needed to undergo before fully determining he was a surgical candidate. The bills and treatment records support that the treatment received from Hyde Park was for Petitioner's continued low back complaints and, based on the finding of causation, the bills in the amount of $10,041.00 are awarded pursuant to the fee schedule.

The Commission clarifies that all medical expenses are to be paid directly to the Petitioner.

The Commission further affirms the credit to the Respondent in the amount of $65,220.95 however strikes the fifth paragraph on page 6 of the Arbitrator's decision, and replaces it with the following:

> The Petitioner testified Blue Cross Blue Shield paid some of his bills, that the Blue Cross Blue Shield policy was secured through Respondent, and that Respondent, Securitas, also paid a part of the premium. (T. 64) Blue Cross Blue Shield payments totaled $65,220.95. (Px10) Accordingly, the Commission finds Respondent is entitled to a credit in the amount of $65,220.95 pursuant to §8(j) of the Act.

As to nature and extent, the Commission affirms the Arbitrator's §8.1b(b) analysis, though modifies factor "iii" to "some" weight. Although Petitioner reported little to minimal pain following surgery, Petitioner missed work and struggled with activities of daily living for nearly 1.5 years post-accident. Given his age, combined with the fact that his employer of 17 years did

not offer him a position post-accident, the award of permanency is increased from 10% loss of person as a whole, to 20% loss of person as a whole.

Finally, the Commission strikes the last sentence of the fourth paragraph on page 2; strikes the sentence that reads: "Whatever that meant." in the tenth line of the first paragraph on page 3; strikes the last two sentences of the first paragraph on page 3; and strikes the sentence beginning with "There is no corroboration…" in the third paragraph on page 3. The Commission also corrects the scrivener's error in the third paragraph on page 5 under "Conclusions of Law" in the sixth sentence and replaces "Kern" with " Singh".

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $474.33 per week for a period of 108 5/7 weeks, from December 22, 2016, through January 21, 2019, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $426.89 per week for a period of 100 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 20% loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $40,340.44 ($114.33 to Mercy Hospital; $28,651.00 to Hinsdale Orthopaedics; $1,104.00 to UIC Physicians Group and $35.00 to Petitioner for out-of-pocket expenses; $200 to Open MRI; $195 to Pathology Consultants of Chicago; and $10,041.00 to Hyde Park Medical Center) 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 $52,644.00. 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.

July 12, 2022

/s/ *Maria E. Portela*

MEP/dmm
O: 052422
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0261

SANCHEZ, MAURO
Employee/Petitioner

Case# **17WC000171**

SECURITAS SECURITY SERVICES USA INC
Employer/Respondent

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

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

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

0059 BAUM RUFFOLO & MARZAL LTD
EDUARO SALGADO
33 N LASALLE ST SUITE 1710
CHICAGO, IL 60602

1739 STONE & JOHNSON CHARTERED
PATRICK DUFFY
111 W WASHINGTON ST SUITE 1800
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

Mauro Sanchez
Employee/Petitioner

v.

Securitas Security Services, USA, Inc.
Employer/Respondent

Case # 17 WC 000171

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Thomas L. Ciecko**, Arbitrator of the Commission, in the City of **Chicago**, on **February 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. ☒ 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 15, 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 $**36,997.48**; the average weekly wage was $**711.49**.

On the date of accident, Petitioner was **59** 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 $**16,831.50** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**16, 831.50**.

Respondent is entitled to a credit of $**65,220.95** under Section 8(j) of the Act.

ORDER

Medical benefits

Respondent shall pay reasonable and necessary medical services of $114.33 directly to Mercy Hospital; $28,651.00 directly to Hinsdale Orthopaedics; $1104.00 directly to UIC Physicians Group, if not already paid or written off, pursuant to the medical fee schedule as provided in Section 8(a) and 8.2 of the Act.

Respondent shall be given a credit of $65,220.95 for 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.

Temporary total disability

Respondent shall pay Petitioner temporary total disability benefits of $474.33/week for 40 3/7 weeks, commencing April 13, 2018 through January 21, 2019 as provided in Section 8(a) of the Act.

Respondent shall be given credit of $16,831.50 for temporary total disability that have been paid.

Permanent partial disability

Based on the factors in Section 8.1b, and the record taken as a whole, as well as considering the testimony of the Petitioner, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 10% loss of a person as a whole, pursuant to Section 8(d)2 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

5/26/2020
Date

MAY 28 2020

Mauro Sanchez v. Securitas Security Services, USA, Inc., No. 17 WC 000171

Preface

The parties proceeded to hearing February 28, 2020, on a Request for Hearing indicating the following disputed issues: whether Petitioner's current condition of ill-being is causally connected to an injury that occurred December 15, 2016; whether Respondent is responsible for unpaid medical bills; whether Petitioner is entitled to a period of temporary total disability; what is the nature and extent of the injury; and whether Respondent is entitled to certain credits. Mauro Sanchez v. Securitas Security Services, USA, No. 17 WC 171 Transcript of Proceedings on Arbitration at 4; Arbitrator's Exhibit 1. Petitioner testified with the aid of an interpreter. Neither party offered any medical testimony.

Findings of Fact

Mauro Sanchez (Petitioner), a 59 year old male, after some initial confusion, testified that on December 15, 2016, he was working for Securitas (Respondent) as a field manager, inspecting cars belonging to the fleet to make sure they can be driven. He was at a service garage getting a car when he had to move a container blocking the overhead door. He tried to push the container away and felt pain in his back and was very nauseous. Sanchez at 10-16.

The mechanism of injury was described by Petitioner to various doctors as: pulling a garbage can; lifting a 200 pound garbage can; lifting a 300 pound garbage container; and lifting a 30 gallon garbage can covered in snow. Petitioner's Exhibit 3; Respondent's Exhibit 2; Petitioner's Exhibit 8; Respondent's Exhibit 1; Petitioner's Exhibit 5.

However, the parties have stipulated Petitioner sustained accidental injuries that arose out of and in the course of employment. Arbitrator's Exhibit 1.

Petitioner testified a manager took him to Mercy Hospital. The records of Mercy Hospital and Medical Center indicate Petitioner arrived in the emergency room December 15, 2016, at 9:40 a.m. He complained of the abrupt onset of lumbar pain. It was noted that Petitioner had chronic pain in his left knee secondary to arthritis, so he was using his lower back and right leg to pull a garbage can. A chest x-ray revealed degenerative disease identified throughout the thoracic spine. The emergency room impression was a lumbar strain with symptoms consistent with acute right lower back muscle spasms. Petitioner was discharged home with Flexeril. Petitioner's Exhibit 3; Sanchez at 17.

Petitioner testified he followed up with his primary care physician, Dr. Woznica. The records of the University of Illinois Hospital and Health Services System, Family Medicine Pilsen, indicate Petitioner saw Dr. Woznica December 16, 2016. She diagnosed Petitioner with acute low back pain and placed him on light duty for six weeks, and told him to avoid heavy lifting. Woznica noted Petitioner works in a mechanic shop and at times lifts heavy equipment. That is contrary to Petitioner's testimony that his job was to inspect cars in order for them to be driven. Sanchez at 19, 10; Petitioner's Exhibit 4.

Petitioner testified he was able to return to work with restrictions. He said his primary care physician did not want him to return to work due to the intensity of the pain. That is completely untrue. Petitioner saw Woznica December 22 and 30, 2016; and January 18, 2017. It was Petitioner who wanted to be excused from work and said he would not like to work at all, if possible. There seems to be no medical reason Petitioner could not continue to work light duty. Woznica simply facilitated Petitioner not wanting to work. But even she had enough. During a visit February 2, 2017, Petitioner requested time off so he could have his 60th birthday with his children without having to go to work. That was too much for Woznica, who noted she could not give disability for her patient to celebrate his birthday. She diagnosed Petitioner with acute low back pain, not having found any abnormal neurological deficits on examination, and ended her care of Petitioner. All Woznica ever did for Petitioner was to prescribe medication and accede to his requests to be off work after first indicating he could perform light duty. Sanchez at 20, 21; Petitioner's Exhibit 4; Respondent's Exhibit 2.

Petitioner testified Woznica sent him and recommended he see a back specialist. That is also untrue. Petitioner told Woznica his lawyer said he needed a specialist. Petitioner never saw the doctor Woznica offered. Sanchez at 25; Petitioner's Exhibit 4; Respondent's Exhibit 2.

Petitioner implied in his testimony that based on Woznica's recommendation, he started treatment at Hyde Park Medical Center. That is a misrepresentation. The records of Hyde Park Medical Center note this Petitioner saw Dr. Divya Agrawal February 8, 2017. There is no indication how Petitioner came to see Agrawal. Agrawal diagnosed Petitioner with lumbar strain, lumbar radiculitis, and lumbar disc herniation, and indicated a review of MRI images. Agrawal does not identify the dates or types of MRI, nor indicate when they were done. His plan was therapeutic exercises, home exercises, therapeutic massage, and Diclofenac and Tramadol. Agrawal placed Petitioner off work, but does not indicate a specific reason. Sanchez at 25; Petitioner's Exhibit 8.

Petitioner had 13 chiropractic and massage visits before he saw Agrawal again March 6, 2017. Agrawal noted Petitioner's pain in low back continued without improvement. As he did with Woznica, Petitioner told Agrawal he felt ". . . unable to perform the duties required in order to return to work." Agrawal noted poor tolerance and progress with physical therapy, and said Petitioner required opiates, and gave Petitioner an EMS/TENS combination rental unit. Despite the poor tolerance and progress with physical therapy, Agrawal continued his plan for therapeutic exercises. Predictably Agrawal put Petitioner off work, writing Petitioner ". . . is under our care for medical reasons, which are preventing him/her from performing any work activities at this time." An anemic pronouncement if there ever was one. Petitioner's Exhibit 8.

Petitioner had 17 chiropractic and massage visits before he saw Agrawal again April 5, 2017. During those visits, Petitioner had a lower extremity EMG study, which indicated electrodiagnostic evidence of right L5-S1 radiculopathies. Agrawal again noted poor tolerance and progress with physical therapy, and use of opiates. Again, Petitioner told Agrawal he felt unable to perform the duties required in order to return to work. There is no indication Agrawal ever knew what exactly were Petitioner's duties. Petitioner's Exhibit 8.

On April 24, 2017, Petitioner underwent right L5-S1 and S1-2 transforaminal epidural steroid injections, without any relief. Petitioner testified relief was temporary. Agrawal thought Petitioner may be a candidate for surgery. It appears Agrawal was unaware, as far back as January 18, 2017, Petitioner told Dr. Woznica he would not want surgery. Agrawal, in an unusual referral on a blank piece of paper, handwrote, "Spine Specialist Referral. Please evaluate the above patient for persistent lumbar radicular pain refractory to meds, PT, LE SI." Petitioner continued to visit Hyde Park Medical Center through September 20, 2017. He received right L2-L3 and L4 medial branch blocks, without significant relief. Petitioner was discharged from care September 20, 2017, by Dr. Larry Najera as "Disabled until cleared by Dr. Templin." Whatever that meant. Najera, as had Agrawal, noted Petitioner felt unable to perform the duties required in order to return to work. He thought Petitioner was a service man, so like Agrawal, he knew nothing about Petitioner's duties. The records of Hyde Park Medical Center indicate they did nothing in five months to cure or relieve from any effects of Petitioner's accidental injury. Petitioner's Exhibit 8; Sanchez at 31; 820 ILCS 305/8(a).

Petitioner testified he submitted to an independent medical examination by Dr. Kern Singh. Singh examined Petitioner June 26, 2017, with physician's assistant Christopher McGee. Petitioner testified the evaluation took ten minutes with Singh's assistant doing the physical examination. Singh's report indicates Petitioner said he was lifting a 300 pound garbage container and noticed increasing back pain. That is different from the testimony at the hearing. Petitioner told Singh he had been seen by Agrawal, but did not tell him he had been seen by Mercy Hospital or Dr. Woznica. Unbelievably, Singh was not given any of Petitioner's medical records. Petitioner told Singh he had low back pain localized in his right buttock, but no leg pain. At the same time, Petitioner was telling Agrawal he had right thigh pain. Singh noted Petitioner had medicolegal representation, which is essentially meaningless in the context of an IME. Singh noted Petitioner was five foot seven and weighed 230 pounds. Petitioner had all five Waddell findings positive. Singh reviewed Petitioner's MRI of the thoracic spine and lumbar spine done January 29, 2017. In the thoracic spine, he noted normal kyphosis and no evidence of central or foraminal stenosis. In the lumbar spine he noted mild bilateral L4-5 facet fluid with no evidence of spondylolisthesis and normal disk signal intensity with no evidence of stenosis. Singh diagnosed Petitioner with lumbar muscular strain and degenerative disk disease at L4-5. Singh said Petitioner could work full duty without restrictions, had no neurological deficits, an essentially normal MRI, and no radicular findings on examination. He thought four weeks of physical therapy appropriate for a soft tissue strain, and put Petitioner at MMI. He found epidural injections were not indicated. Sanchez at 36, 37; Respondent's Exhibit 1; Sanchez at 11-12; Petitioner's Exhibit 8.

Petitioner testified he saw Dr. Cary Templin on June 16, 2017, after being referred by Hyde Park Medical Center. There is no corroboration in either the records of Hyde Park Medical Center or Dr. Templin of Hinsdale Orthopaedics of such a referral. The records of Hinsdale Orthopaedics indicate Petitioner was seen six months after the alleged accident, June 16, 2017. Petitioner told Templin he was lifting a 30 gallon garbage can covered in snow, and in the process had an onset of lower back pain and midback pain. His story was different than his testimony and different from what he told Dr. Singh. Petitioner told Templin he had pain in his lumbosacral junction and, as he told Singh, had no radiation. He said pain extended into his thoracic region. Templin reviewed Petitioner's MRIs of January 2017. He noted, in the

thoracic, no evidence of central or foraminal disc protrusion. In the lumbar, he noted mild degeneration to L3-L4 and L4-L5 disc, evidence of spondylolisthesis grade 1 at L3-L4 and L4-L5 with facet arthropathy, no significant central stenosis, mild to moderate foraminal stenosis at C3-C4 and C4-C5. His assessment was spondylolisthesis, degenerative in nature at L3-L4 and L4-L5, aggravated by his lifting injury. Templin recommended facet blocks and x-rays. He thought if Petitioner had continued pain, surgical stabilization may be beneficial. Templin did not place Petitioner off work, but noted Petitioner remained off work. Sanchez at 11; Respondent's Exhibit 1.

Petitioner returned to Dr. Templin October 20, 2017, having had the facet blocks with minimal temporary relief. Petitioner testified he never noticed any improvement at all. Petitioner failed to obtain the x-rays Templin ordered. Templin wanted to proceed with a fusion of L3-L4 and L4-L5. Petitioner also wanted to proceed. Templin again did not place Petitioner off work, but noted Petitioner remained off work. Petitioner had an x-ray of the lumbar spine October 28, 2017. It revealed: early spondylosis in the lumbar spine, spondylolisthesis grade 1 L4-L5, and atherosclerotic plaquing abdominal aorta. Petitioner's Exhibit 5; Sanchez at 38.

Petitioner returned to Templin November 17, 2017. Templin, based on Petitioner's MRI and flexion-extension x-rays, lack of response to therapy injections, and medication, recommended surgical intervention. Templin found it clear from the imaging that Petitioner was not simply suffering from a degenerative disc condition. Templin placed Petitioner off work pending surgery. In a final report for medical clearance, Dr. Woznica, on April 2, 2018, noted Petitioner said he has back and knee pain that limited movement at times. She noted Petitioner was on a host of medications including a daily 10 mg dose of Cialis, and had 12 active medical problems including diabetes, hypertension, and obesity. Petitioner's Exhibit 5; Petitioner's Exhibit 2.

Petitioner had surgery April 18, 2018, at Presence Saint Joseph Medical Center, an L3-L4, L4-L5 lateral interbody fusion; application of interbody cage device at L3-L4, L4-L5 posterior spinal instrumentation of L3, L4, L5 using the spine wave sniper system, application of allograft bone for fusion at L3-L4, L4-L5, neuroelectrophysiologic monitoring. He was discharged April 20, 2018, doing well. Petitioner's Exhibit 2; Petitioner's Exhibit 5.

Templin saw Petitioner in May, June, July, and October 2018, noting Petitioner was doing well, without pain in the lumbar spine and the absence of radiculary symptoms. Templin recommended an FCE for Petitioner's back, but Petitioner never had one. By January 21, 2019, Templin placed Petitioner at MMI indicating from a spine perspective Petitioner could return to his previous level of function. Petitioner's Exhibit 5.

Petitioner testified he had physical therapy at ATI. The records of ATI physical therapy indicate Petitioner was initially evaluated July 2, 2018, after his lumbar fusion. He had 15 visits as of August 2, 2018. The discharge summary of August 13, 2018, indicates Petitioner completed "a few weeks" of physical therapy relating to the lumbar fusion, and had to discontinue physical therapy for surgery on his knee. Petitioner testified he had a knee replacement August 7, 2018. Petitioner contradicted the records of ATI, testifying he had finished his low back therapy before having his knee surgery. The discharge summary indicated

a myriad of stated limitations claimed by Petitioner and a pain scale of 7/10. Yet Petitioner testified surgery helped alleviate his symptoms and he had no problem with activities of daily living, and told Templin he had only mild aching in the back. Sanchez at 49; Petitioner's Exhibit 9; Sanchez at 57, 58, 52; Petitioner's Exhibit 5.

Petitioner testified he had not returned to work anywhere since his fusion. He was forced to admit he began working for STS Security in June 2019. He testified to an insurance policy through Respondent where Petitioner and Respondent both paid part of the premium, paid some of his medical bills. Sanchez at 55, 56, 64.

Conclusions of Law

Disputed issue **F** is, is Petitioner's current condition of ill-being causally connected to the injury sustained by Petitioner December 15, 2016. To obtain compensation under the Act, an employee must establish, by a preponderance of the evidence, a causal connection between a work related injury and the employee's condition of ill-being. Vogel v. Illinois Workers' Compensation Commission, 354 Ill. App. 3d 780, 786 (2005). In preexisting cases, recovery depends on an employee's ability to show that a work related accidental injury aggravated or accelerated a preexisting condition such that the employee's current condition of ill-being can be said to have been causally connected to the work injury, not simply the result of a normal degenerative process of the preexisting condition. Employers take their employees as they find them. Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. Sisbro v. Industrial Commission (Rodriguez), 207 Ill. 2d 193, 204-205 (2003).

The parties have stipulated to the fact that Petitioner sustained accidental injuries, in an unwitnessed accident in inconsistent circumstances and descriptions, that arose out of and in the course of employment. That stipulation binds the parties. Walker v. Industrial Commission, 345 Ill. App. 3d 1084 (2004).

As to causal connection, there is conflicting medical opinion between Petitioner's treating physician and surgeon, Dr. Cary Templin, and Dr. Kern Singh, retained by Respondent to examine Petitioner. Although not required or obligated to give more weight to a treating physician that that of an examining physician, See Prairie Farms Dairy v. Industrial Commission, 279 Ill. App. 3d 546, 550-51 (1996), I do so here based on Dr. Templin's being in a superior position to Kern. Petitioner offered unrebutted testimony his physical examination was not done by Singh and lasted ten minutes. Singh had no medical records available for his examination. Singh did not receive or comment on Petitioner's EMG or x-rays done by Templin. Templin treated Petitioner for a year and a half, performed surgery on him, ordered and reviewed diagnostics, and followed him post surgery.

I find as a conclusion of law, Petitioner's current condition of ill-being causally related to the injury sustained December 15, 2016. I rely on the records of Dr. Templin and his assessment that Petitioner's degenerative condition was aggravated by his lifting injury. Templin found it clear from imaging that Petitioner was not simply suffering from a degenerative condition.

Disputed issue **J** is, is Respondent responsible for unpaid medical bills. An employer shall pay according to a fee schedule or negotiated rate, all necessary first aid, medical services, and hospital services incurred, reasonably required to cure or relieve from the effects of an accidental injury. 820 ILCS 305/8(a). The claim is stated in the Request for Hearing. Arbitrator's Exhibit 1.

Petitioner claims Respondent is liable for unpaid medical bills of $28,651.00 to Hinsdale Orthopaedics. Petitioner's Exhibit 5 indicates a balance due Hinsdale Orthopaedics of $28,651.00. Having found Petitioner's current condition causally connected, those services are awarded pursuant to Section 8(a).

Petitioner claims Respondent is liable for unpaid medical bills of $4,100.00 to Archer Open MRI. As stated in Section 16 of the Act, the submission of Health Insurance Claim Forms sent to Ankin Law Office in Petitioner's Exhibit 6, which are not even bills, is not conclusive proof of anything. They are not discernable bills or itemized changes and are directed to a law firm. This amount is denied.

Petitioner claims Respondent is liable for unpaid medical bills of $18,608.80 to UIC Physicians Group. Petitioner's Exhibit 4 contains a purported statement of an account for Petitioner that is grossly inflated concerning the accidental injury in question (i.e. injections, vaccines, knee condition, colonoscopy, etc.). The records only support charges for six visits, December 16, 22, and 30, 2016; January 18, 2017; February 2, 2017; and April 2, 2018. By the account, rejecting duplicate charges, the charges are $1,104.00. Those services are awarded pursuant to Section 8(a).

Petitioner claims Respondent is liable for unpaid medical bills of $65,220.95 to Anthem Blue Cross Life and Health Insurance. Neither party offers a coherent argument on liability, or even ties Anthem to Petitioner's testimony that Blue Cross Blue Shield paid some of his bills. It is Petitioner's burden to prove all elements of his case. Petitioner has failed to prove this was a necessary medical expense. This seems supportive of Respondent's claim it paid $65,220.95 in medical bills through its group medical plan, for which credit may be allowed.

Petitioner claims Respondent is liable for unpaid medical bills of $195.00 to Pathology Consultants of Chicago. Buried in the 109 pages of records from Mercy Hospital is a document entitled "Accounts Not on Payment Plans:" with a notation "Details for services rendered by Pathology Consultants of Chicago." It references a date of service of August 6, 2017, for apparent blood work. The records of Mercy Hospital indicate Petitioner was seen in the emergency room August 6, 2017, complaining of low back pain. The orders of that day indicate all blood work was completed in the hospital laboratory and already billed in the hospital charges. There is nothing in the records of August 6, 2017, indicating any services performed by Pathology Consultants of Chicago. Petitioner's Exhibit 3 at 53-109, 4. Such bill is denied.

Petitioner claims Respondent is liable for unpaid medical bills of $4,244.72 to Mercy Hospital and Medical Center. The records of Mercy Hospital indicate a balance due of only $114.33, and that is awarded. Petitioner's Exhibit 3 at 4.

Petitioner claims Respondent is liable for unpaid medical bills of $10,041.00 to Hyde Park Medical Center. An award of medical expenses should only reflect those services which are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. What is reasonable and necessary is a question of fact to be determined on a case by case basis. University of Illinois v. Industrial Commission, 232 Ill. App. 3d 154, 163 (1992).

There is nothing in the records of Hyde Park Medical Center that indicates any provider did anything to cure Petitioner's condition, and no support in the record any provider helped relieve any effect of his injury. Time after time, visit after visit, Petitioner's pain scale was 7/10 or 8/10; his pain was always the same; he always had difficulty with exercises; he constantly complained of low back pain and stiffness and difficulty with daily activities. A month into treatment, Dr. Agrawal noted Petitioner did not improve, had severe pain and spasms, and that physical therapy caused pain. Yet he continued physical therapy and opiates in the face of poor tolerance and progress with physical therapy. Petitioner offered no testimony of cure or even relief while treating at Hyde Park.

While there is nothing in the Act that limits compensability to treatment that is successful, doing essentially nothing for seven months that did not at all help relieve the effects of Petitioner's injury leads to the denial of these expenses.

Petitioner claims Respondent is liable for unpaid medical bills of $198,481.13 to Presence St. Joseph Medical Center. The records show these charges were incurred for Petitioner's back surgery done by Dr. Templin. Petitioner's Exhibit 2 indicate they have been paid by Respondent's Group Medical Plan and further adjusted. The bills are paid and no further payment is awarded.

Disputed issue **K** is whether Petitioner is entitled to temporary total disability benefits from December 15, 2016, to January 21, 2019. A claimant is temporarily totally disabled from the time an injury incapacitates him from work until the time he is recovered or restored as the permanent character of the injury will permit. The dispositive inquiry is whether the claimant's condition has stabilized, reached maximum medical improvement as an example. Considerations are given to a release to return to work, medical testimony, and evidence concerning the injury and extent of the injury. Interstate Scaffolding, Inc. v. Workers' Compensation Commission, 385 Ill. App. 3d 1040, 1043 (2008).

Petitioner was placed on light duty December 16, 2016, by Dr. Woznica. Petitioner testified he returned to work with restrictions the next day. His testimony that on December 22, 2016, Woznica did not want him to return to work due to the intensity of pain, was fabricated. The record is clear. Petitioner did not want to work, going so far as to specifically request being off work to celebrate his birthday. He continued to tell his treating providers he was unable to perform his duties. The providers simply perpetuated keeping Petitioner off work for no reason. I find Petitioner's testimony and actions on this issue not at all credible. I note the positive Waddell findings by Dr. Singh. Petitioner's Exhibit 4; Sanchez at 20, 21; Respondent's Exhibit 1.

Dr. Templin placed Petitioner off work, in advance of surgery April 13, 2018. Surgery was performed and Templin placed Petitioner at MMI January 21, 2019, finding he could return to his previous level of function. Petitioner's Exhibit 5.

I find as a conclusion of law Petitioner is entitled to temporary total disability from April 13, 2018, to January 21, 2019, 40 and 3/7 weeks at the rate of $474.33 per week.

Disputed issue **L** is, what is the nature and extent of the injury. I find as a conclusion of law, Petitioner sustained an aggravation of spondylolisthesis, degenerative in nature at L3-L4-L4-L5 necessitating surgical intervention, as indicated by Dr. Cary Templin. Here, permanent partial disability is established using the criteria found in 820 ILCS 305/8.1b. As to the level of permanent partial disability, this Arbitrator finds as follows.

With regard to subsection (i) of Section 8.1b(b), this Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. Because of this, I give this factor no weight in determining the level of disability.

Regarding subsection (ii) of Section 8.1b(b), the occupation of the employee, Petitioner testified he was a field manager for Respondent, inspecting cars belonging to Respondent's fleet to make sure they could be driven. Dr. Templin returned Petitioner to his previous level of function January 21, 2019. Petitioner failed to have the FCE recommended by Templin in October 2018. Petitioner testified he is currently working at another security company. I give this factor no weight in determining the level of disability.

Regarding subsection (iii) of Section 8.1b(b), this Arbitrator notes Petitioner was 59 years old at the time of the accident. He will not heal with the speed and completeness of a younger man. I give this factor weight in determining the level of disability.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings, neither party provided evidence on this factor. I give this factor no weight in determining the level of disability.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records. Petitioner underwent a lumbar fusion and subsequent physical therapy. When released, he had minimal back pain. Petitioner testified he has no problems with activities of daily living and that surgery helped alleviate his symptoms. I give this factor some weight in determining the level of disability.

Based on the above factors, and the record taken as a whole, as well as considering the testimony of Petitioner, this Arbitrator finds Petitioner sustained permanent partial disability to the extent of 10% (50 weeks) loss of a person as a whole pursuant to Section 8(d)2 of the Act.

Disputed issue **N** is, is Respondent due any credit under Section 8(j) of the Act and for payment of temporary total disability.

I find as a conclusion of law, based on Petitioner's testimony and Petitioner's Exhibit 10, Respondent is entitled to a credit of $65,220.95 under Section 8(j) of the Act. Sanchez at 64; Petitioner's Exhibit 10.

I find as a conclusion of law, based on Respondent's Exhibit 4, Respondent is entitled to a credit of $16,831.50 for temporary total disability payments.

Arbitrator

5/24/2022
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005171
Case Name	Michael Timmerman v. Paccar Parts Division
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0262
Number of Pages of Decision	15
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	William Brewster

DATE FILED: 7/13/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WINNEBAGO

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL TIMMERMAN,

Petitioner,

vs. NO: 20 WC 05171

PACCAR PARTS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current condition of ill-being is causally related to the undisputed September 17, 2019 work accident, entitlement to temporary disability benefits as well as calculation of benefit rates, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as set forth below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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 (1980).

Temporary Disability

On the Request for Hearing, Petitioner alleged he was entitled to temporary partial disability (TPD) benefits from March 12, 2020 through November 3, 2020; Respondent disputed this and claimed "the correct TPD period is 3/12/20 – 7/31/20 (20 & 2/7 weeks), and respondent overpaid TPD in the sum of [$]872.91 (2&5/7 weeks X $321.60)." Arb.'s Ex. 1. In finding Petitioner entitled to TPD benefits after July 31, 2020, the Arbitrator relied on the opinions of Dr. Alexander and Dr. Borchardt and concluded Petitioner remained under workday limitations from July 31, 2020 through September 7, 2020 as well as from September 28, 2020 through November 22, 2020. While the Commission agrees that Petitioner was under valid workday restrictions and thus entitled to temporary partial disability benefits, we calculate the benefits differently.

Initially, the Commission disagrees that Respondent's claim for an alleged overpayment credit represents a stipulation that $321.60 is the proper TPD rate. Rather, the only benefit rate stipulation herein is the parties' stipulation that Petitioner's pre-accident average weekly wage is $941.22. Arb.'s Ex. 1. The Commission emphasizes that temporary partial disability benefits by their very nature are fluid: pursuant to §8(a), temporary partial disability benefits are equal to two-thirds of the difference between the average amount the claimant would be making in the full performance of the pre-accident job and "the gross amount which he or she is earning in the modified job provided to the employee by the employer or in any other job that the employee is working" (*820 ILCS 305/8(a)*); as such, the "gross amount" for each pay period generates a distinct benefit calculation.

The record reflects Petitioner's regular workweek is 40 hours, which yields an hourly rate of $23.5305 ($941.22 / 40 = $23.5305). The Commission finds Petitioner was restricted to four-hour workdays from March 12, 2020 through Friday, September 4, 2020; on that day, Petitioner was informed that he would be returned to eight-hour days as of Tuesday, September 8 (September 7, 2020 was Labor Day). T. 68. This initial period of temporary partial disability spans 25 2/7 weeks. The gross amount Petitioner earned per week while working the modified job was $470.61 ($23.5305 x 4 x 5 = $470.61), which yields a TPD rate of $313.74 ($941.22 – $470.61 = $470.61; $470.61 / 3 x 2 = $313.74). The Commission finds Petitioner entitled to TPD benefits of $7,933.14 for this period (25 2/7 x $313.74 = $7,933.14).

Petitioner returned to full-time hours from September 8, 2020 through September 27, 2020. Petitioner's paystubs reflect his hourly rate had increased to $24.11825: for the pay period from September 14 through September 27, Petitioner earned $1,929.46 for 80 regular hours worked. Pet.'s Ex. 2. The Commission finds this evidence establishes that Petitioner's earnings in the full performance of his job would be $1,929.46 bi-weekly as of September 14, 2020.

The Commission finds Petitioner was once again under shift-length restrictions from September 28, 2020 through November 3, 2020. The Commission observes Dr. Borchardt's September 23, 2020 office note does not expressly include a four-hour restriction but instead imposes "restrictions per Scott Egge's recommendations." Pet.'s Ex. 1. Petitioner testified Egge is Respondent's ergonomist and it was Egge who recommended gradually increasing Petitioner's workday from four hours to six hours to eight hours. T. 23-24. The Commission finds Petitioner's testimony is credible and is consistent with Dr. Borchardt's October 23, 2020 notation that Petitioner would be advancing his work restriction. Pet.'s Ex. 1.

Petitioner's Exhibit 2 contains Petitioner's paystubs for September 28 through November 8. Petitioner's regular earnings per two-week pay period are as follows: $1,061.20 for September 28 to October 11; $868.26 for October 12 to October 25; and $1,495.33 for October 26 through November 8. Pet.'s Ex. 2. The Commission notes Petitioner was under restrictions for the entirety of the first two bi-weekly pay periods; as such, utilizing $1,929.46 as full performance of Petitioner's job as found above, the Commission calculates the temporary partial disability benefit for these pay period as follows:

- September 28 – October 11: $1,929.46 - $1,061.20 = $868.26 / 3 x 2 = $578.84.
- October 12 – October 25: $1,929.46 - $868.26 = $1,061.20 / 3 x 2 = $707.47.

The Commission observes the final paystub covers Petitioner's earnings through November 8, however, Petitioner resumed eight-hour workdays on November 4, 2020. T. 23-24. As such, in order to calculate Petitioner's TPD benefit through November 3, the 24 hours (8-hour workdays on November 4, 5, and 6, 2020) of full-time earnings must be factored out of the data. First, we must determine full performance of Petitioner's job for a 56-hour pay period, and we find that amount equals $1,350.62 ($24.11825 x 56 = $1,350.62). Next, Petitioner's 24 hours of full-time earnings ($578.84[1]) are subtracted from his regular earnings for that pay period, which yields $916.49 in modified earnings through November 3 ($1,495.33 – $578.84 = $916.49). The Commission finds Petitioner entitled to TPD benefits of $289.42 for October 26 through November 3 ($1,350.62 - $916.49 = $434.13 / 3 x 2 = $289.42). The combined temporary partial disability benefits for September 28, 2020 through November 3, 2020 equals $1,575.73.

The Commission finds Petitioner is entitled to accrued temporary partial disability benefits totaling $9,508.87 ($7,933.14 + $1,575.73 = $9,508.87). Respondent's payment ledger establishes it has paid $7,396.80 in temporary partial disability benefits. Resp's Ex. 1.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 28, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner temporary partial disability benefits in the amount of $9,508.87, as provided in §8(a) of the Act. Respondent shall have a credit of $7,396.80 for TPD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred through the date of arbitration, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Responent shall provide and pay for cervical spine surgery as recommended by Dr. Alexander and Dr. Borchardt as provided in §8(a) of the Act.

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

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

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

[1] $24.11825 x 24 = $578.84.

a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $2,200.00. 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.

July 13, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 5/25/22

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005171
Case Name	TIMMERMAN, MICHAEL v. PACCAR PARTS
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Tracy Jones
Respondent Attorney	Olga Sheinman

DATE FILED: 7/28/2021

THE INTEREST RATE FOR THE WEEK OF JULY 27, 2021 0.05%

/s/ Gerald Napleton, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Michael Timmerman
Employee/Petitioner

v.

Paccar Parts
Employer/Respondent

Case # **20** WC **005171**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Rockford**, on **4/20/21**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **9/17/19**, 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 $**48943.60**; the average weekly wage was $**941.22**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **2** dependent children.

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

Respondent shall be given a credit of $**0** for TTD, $**7396.80** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**7396.80**.

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

ORDER

Arbitrator orders respondent to pay to petitioner additional TPD benefits from 7/31/20 to 11/22/20 in the amount of $2,687.60. Arbitrator finds that the TPD owed from 3/11/20 to 7/30/20 was paid in full at $321.60 per week by stipulation of the parties. Arbitrator finds that from 7/31/20 to 9/7/20 respondent owes TPD of $321.60/week for a total of $1,745.83 ($321.60 x 5 3/7 weeks) less a credit for TPD paid of $643.20 leaving a balance of $1,102.63. Arbitrator finds TPD of $1,578.97 is owed from 9/28/20 to 11/22/20 pursuant to the paystubs offered by Petitioner. Arbitrator orders Respondent to pay the additional TPD owed of $2,687.60 to Petitioner.

Arbitrator orders respondent to approve prospective medical treatment including the cervical spinal fusion recommended by Dr. Alexander and Dr. Borchardt pursuant to Section 8(a) of the Act.

Arbitrator orders Respondent to pay all reasonable and related medical bills through the date of trial pursuant to the Illinois Medical Fee Schedule and section 8(a) of the Act.

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

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

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

/s/ Gerald W. Napleton — **JULY 28, 2021**

Signature of Arbitrator

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL TIMMERMAN,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. **20 WC 005171**
	)	
PACCAR, INC.,	)	
	)	
Respondent.	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner was employed by the respondent as a distribution associate where he worked for 21 years. His job duties involved stocking and picking orders and bringing product into the building. It would require scanning the products, putting it on shelves, and picking and shipping products.

On September 17, 2019, petitioner was using a "Gaylord" order picker - a drivable lift machine that has a big crate on wheels with parts in it. He traveled to the location required and picked up the needed part box. There were two compressors within the same box. His job required him to take the compressors out of the box. When he went to lift the compressors out, he felt a sharp pain shooting through his left arm. He testified that the compressors weighed approximately 20 pounds. Petitioner testified that he had to turn around and bend down into the box to pick it off the floor, set the box at approximately waist high, and then lift the compressors out. As he lifted, he felt pain. He immediately reported it to his supervisor and was instructed to park his Gaylord and go to the receiving dock to finish out his day. He was feeling pain in the front of the left shoulder and in the front of the upper chest from the shoulder area. Because the pain did not improve by the next day, he requested medical treatment through his HR representative, Phil Tyler, and was instructed to go to ortho Illinois.

On September 18, 2019 petitioner was evaluated by Dr. Borchardt at Ortho Illinois. Petitioner gave a history that he was lifting a compressor out of a box and felt pain in his left shoulder. He reported anterior pain 6/10 with tightness and weakness. Physical examination findings revealed that Petitioner's neck was normal with normal range of motion, including flexion, extension, rotation, and lateral flexion with no radicular complaints. He was diagnosed with a shoulder sprain and shoulder pain. Dr. Borchardt noted that the physical examination was suspicious for internal derangement of the left shoulder and ordered an MRI. He was given a five-pound work restriction.

The MRI revealed no tear, minimal to mild cuff tendinosis, mild peritendinobursitis, outlet decompression, and a bicep tenodesis. On October 11, 2019, Dr. Borchardt noted that the pain was worse than the prior visit, there was tightness through the neck, and ordered physical therapy. He was examined by Dr. Borchardt again on October 31, 2019 but still reported left shoulder pain. It was noted that he was making improvement with therapy but continued to have pain, tightness, and soreness. When he was evaluated on November 21, 2019, Dr. Borchardt noted he had difficulty gripping and radiating pain of the anterior left shoulder. He also reported numbness and tingling in the right hand. Petitioner testified that he did not have symptoms in his right hand but that the numbness and tingling was in his left hand. Dr. Borchardt diagnosed left shoulder pain and noted a new symptom of numbness and tingling with radicular symptoms in the posterior

shoulder radiating down the arm. Dr. Borchardt was unable explain the radiating symptoms as being related to shoulder pathology and indicated it may be coming from the cervical spine. An MRI of the neck was prescribed.

Dr. Borchardt evaluated the Petitioner again on December 3, 2019 noting that he was still complaining of pain and soreness in the posterior and anterior aspects of the shoulder as well as some numbness, tingling, clicking, and popping. Dr. Borchardt reviewed the MRI results with the Petitioner and explained that there is a lack of significant findings on the MRI which would explain his left-sided symptoms. Dr. Borchardt noted that Petitioner's complaints were consistent with cervical radiculopathy and that he should be evaluated with an EMG of the left upper extremity to assess for nerve compression. He also referred him to a shoulder orthopedic surgeon for evaluation.

The petitioner was evaluated on December 19, 2019 by Dr. Trenhaile, an orthopedic shoulder surgeon. Dr. Trenhaile noted a positive cervical Spurling's sign on examination but that the left shoulder MRI showed only minimal to mild cuff tendinosis. He noted that the MRI did not show any tears in the left shoulder. Dr. Trenhaile also reviewed the cervical MRI and found a broad-based mixed spondylotic disc protrusion with ventral thecal sac effacement at C5-6. He also interpreted the cervical MRI is showing a C6 – 7 broad-based disc protrusion slightly eccentric rightward with minimal caudal migration and mild right ventral thecal sac effacement. He diagnosed cervicalgia and felt that the symptoms were coming from his neck pathology. Dr. Trenhaile recommended that he be evaluated by a spinal surgeon. He noted the shoulder had full range of motion and that he had nothing to offer regarding treatment to the shoulder.

Petitioner obtained an EMG which was interpreted to be normal. On December 27, 2019, Petitioner returned to see Dr. Borchardt. Petitioner reported he was feeling worse and complained of weakness, stiffness, and swelling. Spurling's test was positive again. Dr. Borchardt diagnosed unspecified strain of the left shoulder and cervicalgia. Petitioner was noted to report continued cervical pain radiating into the scapula and left anterior shoulder/clavicle. He recommended a cervical epidural steroid injection.

On January 14, 2020 Dr. Ahmad performed a left-sided cervical epidural steroid injection at C5-6. Petitioner denied numbness and tingling according to Dr. Ahmad's notes. Petitioner testified that he had relief of his symptoms temporarily following the injection. He followed up with Dr. Alexander, a neurosurgeon, on January 20, 2020, where he reported pain of 1/10 at rest and 9/10 with activity in the left shoulder with numbness, tingling, and weakness. The numbness and tingling reported was mostly in the shoulder but occasionally went down to the thumb. Diminished sensation in the right thumb and first finger were noted as well. Dr. Alexander noted that there was slight improvement with the epidural steroid injection, but the physical therapy and injections therapy did not benefit Petitioner. Dr. Alexander stated that the MRI showed a C5-6 broad-based disc and osteophyte complex with some narrowing of the canal with some left-sided foraminal stenosis as well as a C6 –7 broad-based and right-sided disc with narrowing. He noted that neck pain was primarily on the left side and also that there were sensory radicular symptoms in the right. He recommended surgical intervention and discussed surgical options consisting of discectomies, allograft, interbody fusion, and anterior instrumentation.

Petitioner reported to Dr. Edward Goldberg on January 31, 2020 for a Section 12 examination. Dr. Goldberg examined the Petitioner. A negative Spurling test was noted and, according to Dr. Goldberg, Petitioner denied radicular pain in the upper extremities. Dr. Goldberg reviewed the MRI of the cervical spine and opined that there were no disc protrusions or spinal cord compression noted. Dr. Goldberg did not have a copy of the EMG report. Dr. Goldberg opined that the patient was neurologically intact and suffered from

degenerative disc disease that had been aggravated by the work accident. Dr. Goldberg opined that the cervical spine disease predated his accident, but the accident caused his condition to become symptomatic. He did not feel that surgery was indicated. He recommended an additional cervical epidural steroid injection and work conditioning. He opined that all treatment to date was reasonable and necessary and recommended the continuation of work restrictions.

Petitioner was evaluated by Dr. Borchardt on February 5, 2020 and indicated that his neck pain was worse on the left side with burning in the left shoulder. He noted that the epidural injection in January did not provide any lasting relief. Dr. Borchardt agreed with Dr. Alexander that surgery was indicated for the cervical spine and referred him back to Dr. Alexander. Dr. Borchardt's physical exam noted normal range of motion, normal strengths, decreased sensation in the left thumb and index fingers and also noted that the Spurling sign was positive. He recommended continued restrictions at work. On February 13, 2020 Dr. Borchardt evaluated him again after reviewing the Section 12 report of Dr. Goldberg. Again Dr. Borchardt noted that the Sperling sign was positive and recommended an additional epidural steroid injection at C5-6 on the left. Dr. Ahmad performed a second epidural steroid injection on February 28, 2020.

Dr. Borchardt saw the patient on March 12, 2020 and indicated that symptoms were getting worse with pain in the left shoulder and cervical spine. Petitioner reported he was unable to work more than four hours. Patient also reported sharp shooting pain, tightness and burning. It was noted that the recent epidural steroid injection only provided temporary relief and had worn off. Again Dr. Borchardt referred the Petitioner to Dr. Alexander for further treatment including surgery. Dr. Borchardt saw the Petitioner on April 1 of 2020 and his opinions and recommendations remained the same. According to the OrthoIllinois records, an adjuster with Respondent's workers' compensation carrier contacted Ortho Illinois to ask if his doctors would order work conditioning corresponding with Dr. Goldberg's recommendation. The records from Ortho Illinois indicate that Dr. Alexander refused to order work hardening it was not the treatment recommended.

Respondent had Petitioner examined again by Dr. Goldberg under Section 12 on July 31, 2020. Again Dr. Goldberg indicated that the work injury aggravated his degenerative disc disease at C5-6 and C6-7. He also opined that the ongoing neck pain was due to the aggravation of the degenerative disc disease. However, he opined that the majority of the pain was in the dorsum of the shoulder and in the left trapezius and, therefore, was likely due to shoulder pathology and not cervical pathology. He recommended that he returned to work full duty from the standpoint of the cervical spine but that his ultimate return to work will depend on his left shoulder.

Dr. Borchardt saw the Petitioner again on September 23, 2020 at which time the Petitioner was reporting pain worse than the prior visit along with numbness, tingling, weakness, limited range of motion, stiffness, and tightness. He also reported it was worse with the tilting of his neck forward or to the side. Petitioner reported that he had been working full duty according to his employer's request but was having increasing pain shooting down the left side of his neck to the shoulder. He reported being unable to look down due to pain in the neck. Dr. Borchardt placed the petitioner back on restrictions and limited him to working no more than four hours per day.

He was next evaluated on October 23, 2020. He reported a pain level of 7/10 and that his symptoms had slightly improved with the addition of gabapentin. Spurling maneuver was still positive on the left side along with noted tenderness to palpation of the left paraspinous muscles in the left trapezius muscles. Range of motion was limited in the neck. He was to continue his work restrictions and medication.

A follow-up appointment was November 13, 2020 at which time he presented with continued left shoulder and neck pain. Petitioner was reporting numbness and tingling in the left hand and back to the shoulder as well as weakness, limited range of motion, and problems gripping with the first and second digits. Due to the gabapentin helping the symptoms, Dr. Borchardt recommended continued use of that as well as tramadol for pain control. The Petitioner was evaluated by Dr. Borchardt on December 29, 2020 and February 9, 2021 with similar complaints and results. His treatment recommendations remained the same. On March 18, 2021, which was the most recent visit before trial, petitioner was seen by Dr. Borchardt who continued to recommend the use of gabapentin and tramadol as well as continued work restrictions. Petitioner was to continue to try to follow up with Dr. Alexander for consideration of surgery.

At the time of trial, petitioner had not undergone the surgery recommended by Dr. Alexander. He also had not been reevaluated by a shoulder orthopedic subsequent to Dr. Goldberg's addendum report of July 31, 2020. Petitioner testified that he wants to undergo the surgery recommended by Dr. Alexander as he still is experiencing symptoms including pain in the front of his shoulder down his arm with numbness and tingling in the left hand.

CONCLUSIONS OF LAW

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 is causally related to the work injury. It is long recognized that in pre-existing condition cases recovery will depend on the employee's ability to show that a work-related injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally connected to the work related injury and not simply the result of a normal degenerative process of that pre-existing condition. *Sisbro vs. Industrial Commission*, 207 Ill. 2d 193, 205 (2003). It is well-settled that employers take their employees as they find them. *Id*. Thus, even though an employee has a pre-existing condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it is shown that the employment was a causative factor, not even the primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Id*.

Based on the opinions of Dr. Borchardt, Dr. Alexander, and Dr. Goldberg, respondent's own section 12 examining physician, the Arbitrator finds that the petitioner's cervical spine condition and left shoulder condition are causally related to the work injury. The Arbitrator notes that Dr. Goldberg testified that he "felt that he did have degenerative disc disease of the cervical spine that was aggravated by the work accident." He opined further that he did not believe the petitioner's condition was a natural progression of his pre-existing condition.

Dr. Goldberg then reiterated his opinion on July 31, 2020 that the petitioner's ongoing neck pain was due to an aggravation of degenerative disc disease by the work injury. Given that respondent's own section 12 expert opined and testified that the petitioner's current condition of ill being in the cervical spine and shoulder was related to the work injury, the Arbitrator finds that petitioner's current condition of ill being is causally related to the 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?

The Arbitrator finds that the medical services that were provided to the petitioner through the date of trial were reasonable and necessary, and orders the respondent to pay for the reasonable and necessary medical services rendered at Ortho Illinois through the date of trial.

The Arbitrator finds that based on the opinions of Dr. Alexander, Dr. Borchardt, and Dr. Goldberg, the petitioner's treatment to his left shoulder and neck including physical therapy, office visits, MRI diagnostic tests, physical therapy, medication, and epidural steroid injections were reasonable and necessary medical treatments pursuant to section 8(a) of the Act. The Arbitrator specifically notes the opinion of Dr. Goldberg which affirms the opinions of Dr. Alexander and Dr. Borchardt that the petitioner required such treatment. Dr. Goldberg opined that all the treatment rendered had been reasonable and necessary. He recommended additional treatment including epidural steroid injections and work conditioning and continued to suggest additional treatment options but also suggested that the Petitioner be evaluated by a shoulder specialist. Dr. Goldberg, again, in his second Section 12 opinion, stated that treatment to date had been reasonable and necessary and related to the work injury.

Based on the above, the Arbitrator finds that the medical services rendered to the petitioner by Ortho Illinois through the date of trial were reasonable, necessary, and causally related to the work injury of September 17, 2019. Petitioner offered into evidence unpaid medical bills associated with that treatment showing an outstanding balance of $1182.00. The Arbitrator orders respondent to pay this unresolved medical bill pursuant to the Illinois Worker's Compensation Fee Schedule.

K. Is petitioner entitled to any prospective medical care?

The Arbitrator finds the petitioner is entitled to prospective medical care related to his left shoulder and cervical spine as recommended by Dr. Alexander and Dr. Borchardt. Petitioner presented originally reporting symptoms in his shoulder shooting down his arm. The history provided to the doctor reflected the work-related accident. The initial work-up done by Dr. Borchardt focused on the left shoulder. However, as shoulder treatment progressed, Petitioner noticed pain in the neck along with as numbness and tingling in the left hand during physical therapy. As treatment continued and the shoulder symptoms did not improve, Dr. Borchardt began evaluating the Petitioner for other causes of symptomatology and suspected cervical radiculopathy. Petitioner underwent an MRI of the cervical spine which, according to the radiologist, suggested pathology that could result in a radiculopathy. Dr. Borchardt sought to evaluate whether the left hand and arm symptoms could be related to the pathology noted on the MRI so he ordered an epidural steroid injection to be performed at C5-6 on the left side. After performing the injection on January 14, 2020, it was noted that there was temporary relief of symptoms at C5-6 on the left. Based on the result of that injection, Dr. Alexander opined that there was cervical radiculopathy and that the Petitioner needed to undergo surgery. Dr. Trenhaile, an orthopedic surgeon, further ruled out any potential pathology in the left shoulder that may be contributing to the symptoms. Dr. Trenhaile felt the symptoms were coming from the cervical spine as well. Dr. Borchardt evaluated the Petitioner after Dr. Ahmad perform two injections and after Dr. Alexander recommended surgery. Dr. Borchardt continued to note positive Spurlings sign. Based on that, Dr. Borchardt agreed with the recommendation for surgery to the cervical spine.

Respondent disputed the reasonableness and necessity of the cervical spine surgery based on the report of Dr. Goldberg. Dr. Goldberg testified that he did not think the Petitioner had any "true radicular pain." However, the medical records contradict that as radicular symptoms are documented in the records of OrthoIL and petitioner testified he had numbness and tingling and radiating pain down his left arm and hand. The

medical records note several positive spurling's test findings. Further, Dr. Goldberg testified that numbness and tingling of the hand as well as decreased sensation in the left thumb and index finger "could be" neurological symptoms. More importantly though, Dr. Goldberg didn't address that the Petitioner had symptomatic relief on a temporary basis following the epidural injection at C5-6 on the left and further did not acknowledge the clinical and diagnostic significance of that. Instead Dr. Goldberg suspected that the symptoms were coming from the left shoulder and recommended further evaluation of the left shoulder. Dr. Trenhaile is a shoulder specialist that has already ruled out shoulder issues. This, along with the opinions of Dr. Borchardt and Dr. Alexander are persuasive evidence that suggest Petitioner should proceed with the treatment recommended.

Based on all the evidence taken as a whole, the Arbitrator finds the opinions of Dr. Trenhaile, Dr. Alexander, and Dr. Borchardt persuasive on the issue of future medical treatment. The Arbitrator does not find the opinion of Dr. Goldberg to be persuasive when compared to the opinions of the other three doctors' along with the temporary relief that the petitioner received from his cervical epidural steroid injections. Based on all the above, the Arbitrator finds that the prospective cervical surgery recommended by Dr. Alexander is reasonable, necessary and causally related to the work injury. Respondent is ordered to authorize additional medical treatment as recommended by Dr. Alexander.

L. What temporary benefits are in dispute?

Respondent disputed temporary partial disability benefits for only a specific period of time after July 30, 2020. The parties stipulated that the petitioner was entitled to temporary partial disability benefits from March 11, 2020 through July 31, 2020 when he was limited to working only four hours per day. The parties stipulated that temporary partial disability was paid at $321.60 per week during that time. Respondent disputes entitlement to TPD benefits from July 31 through September 7, 2020. Petitioner testified, and the medical records confirm, that he was limited to four hours of work per day between July 31, 2020 and September 7, 2020. Respondent relied on the opinion of Dr. Goldberg who opined that petitioner should be able to return to work full duty from the cervical spine standpoint as of July 31, 2020. Dr. Goldberg did not offer an opinion as to whether Petitioner could return to work full duty from his left arm or shoulder standpoint. In contrast, Dr. Alexander and Dr. Borchardt both opined that the petitioner still required restrictions of no working more than four hours and with limitations on lifting. As such, the Arbitrator finds that petitioner was entitled to temporary partial disability benefits from July 31, 2020 through September 7, 2020 at $321.60 per week for 5 3/7 weeks for a total amount owed of $1,745.83. The Arbitrator notes the respondent did pay temporary partial disability benefits after July 30, 2020 of $643.20. Respondent is entitled to that credit leaving a balance of $1,102.63.

The petitioner then returned to work eight hours per day from September 8 through September 27. No temporary partial disability benefits are owed during that time. Petitioner was taken back off of work and limited to four hours per day on September 28, 2020 until November 22, 2020 per Dr. Borchardt. Petitioner offered pay stubs into evidence to document the hours he worked and the vacation time he was forced to use to cover hours he could not work. The paystubs are for biweekly pay periods. Petitioner's biweekly average weekly wage is $1,882.44. After subtracting the regular and holiday hours paid between September 28 and November 22 and then taking two thirds of the difference, the arbitrator finds that the petitioner is entitled to benefits of $1,570.97.

Therefore, the Arbitrator orders the respondent to pay to the petitioner temporary partial disability benefits of $2,681.60 for the period of July 31, 2020 through September 7, 2020 and September 28, 2020 through November 22, 2020.

N. Is respondent due any credit?

The respondent sought a credit at trial for non-occupational disability benefits in the amount of $10,418.76. Petitioner disputed that entitlement to credit for nonoccupational disability benefits alleged. Respondent notes that Petitioner's Exhibit 2 referenced short term disability payments paid to date by Respondent's group carrier. The amount totals $10,418.76. There is no evidence in the record regarding the source or funding of this disability policy. The paystubs only reflect such payments were made and referenced under a "STD 100%" designation. There is no evidence that Respondent contributed to this policy.

The Arbitrator finds that the respondent is not entitled to a credit as the record does not contain proof that the $10,418.76 in purported non-occupational indemnity disability benefits meets the requirements of Section 8(j). Respondent failed to offer any evidence or testimony establishing that the nonoccupational indemnity disability benefits were paid pursuant to a policy which was offered by the respondent and paid in part by the respondent pursuant to section 8(j) of the Act. Accordingly, the Arbitrator finds that the respondent failed to prove their entitlement to a credit under section 8(j) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005293
Case Name	David Depaolo v. Village of Lynwood
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0263
Number of Pages of Decision	14
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Marc Stookal
Respondent Attorney	Gina Panepinto

DATE FILED: 7/15/2022

/s/ Thomas Tyrrell, Commissioner

Signature

22IWCC0263

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 TTD	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

David DePaolo,

Petitioner,

vs. NO: 20 WC 5293

Village of Lynwood,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, prospective medical treatment, and temporary total disability ("TTD") benefits, and being advised of the facts and law, modifies the Decision of the Arbitrator. The Commission modifies the award of TTD and corrects certain scrivener's errors. 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).

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. Petitioner has worked as a police officer for Respondent for 17 years. At approximately 10:30 p.m. on January 1, 2020, Petitioner injured his right knee while helping to track a murder suspect with a group of officers along Steger Rd. Petitioner testified that he felt immediate right knee pain and notified the scene commander as well as Deputy Chief Shubert, his supervisor, regarding his injury that same night. He testified that his supervisor told him to rest and take a few days off before returning to work. Petitioner returned to work on January 6, 2020, and his supervisor sent him to the occupational clinic due to Petitioner's continued right knee complaints. The nurse practitioner diagnosed a right knee sprain and ordered an MRI of the right knee. She also prescribed work restrictions. The January 15, 2020, right knee MRI revealed high-grade degenerative changes as well as medial meniscal tearing. Dr. Plank, Petitioner's orthopedic surgeon, diagnosed a right knee meniscal tear superimposed on osteoarthritis.

On February 20, 2020, Dr. Plank wrote that the only treatment that would provide long-term pain relief to Petitioner and return him to full activity is a right knee replacement. Dr. Plank

opined that the January 1, 2020, work incident exacerbated Petitioner's underlying right knee arthritis. X-rays of the right knee performed on April 20, 2021, revealed severe bone-on-bone medial arthritis. Petitioner has undergone various right knee injections since the date of accident, including a series of three viscosupplementation injections in May 2021. Petitioner testified that he only received temporary relief from the injections. Dr. Plank last examined Petitioner on June 1, 2021.

On May 18, 2020, Dr. Cole conducted a Section 12 examination of Petitioner's right knee on behalf of Respondent. After reviewing the medical records and examining Petitioner, Dr. Cole diagnosed preexisting right knee advanced medial compartment osteoarthritis in the setting of morbid obesity. While he agreed that the proposed right knee replacement surgery is appropriate given Petitioner's condition, Dr. Cole opined that Petitioner's need for surgery is not causally related to the work incident. He further opined that due to Petitioner's body mass index as well as the severity of the arthritis seen in the diagnostic studies, the work incident did not significantly alter the natural course of Petitioner's right knee condition. In a July 22, 2020, addendum, Dr. Cole opined that Petitioner did not require any work restrictions related to the work incident; instead, any work restrictions were related to his advanced preexisting osteoarthritis and comorbidity of obesity.

Petitioner has remained off work since January 6, 2020, and testified that he received his full salary through January 1, 2021. He has not received any benefits, including salary or TTD benefits, since that date. Petitioner testified that due to his right knee condition, he is unable to stand or walk for prolonged periods. He testified that he continued to experience intermittent swelling and inflammation in the right knee and that certain movements aggravated his pain. Petitioner testified that he must walk down stairs very slowly and no longer can jump into his SUV. He testified that he did not believe he could safely perform his duties as a police officer and that he would like to proceed with the recommended right knee replacement surgery.

The Commission affirms the Arbitrator's conclusions regarding the issues of accident, causal connection, medical expenses, and prospective medical treatment. However, after considering the totality of the evidence, the Commission modifies the Arbitrator's award of TTD benefits.

The Arbitrator determined that Petitioner met his burden of proving an entitlement to TTD benefits for a total of 80-1/7 weeks for the period of January 1, 2020, through July 14, 2020. There is a clear error in the Arbitrator's award of benefits as the period of January 1, 2020, through July 14, 2020, is only 28 weeks. However, a TTD period from January 1, 2020, through July 14, **2021**—the date of hearing—equals 80-1/7 weeks. The Commission notes that Petitioner made a nearly identical error on the Request for Hearing. (Arb. Exh. 1). Petitioner claimed an entitlement to TTD for a total of 79-6/7 weeks for the period of January 1, 2020, through July 14, 2020. It appears the Arbitrator's award of TTD benefits through July 14, 2020, was either a scrivener's error or an attempt to conform the award of benefits to the benefits Petitioner claimed on the Request for Hearing form. Based on the calculation of the total weeks of TTD claimed by Petitioner and awarded by the Arbitrator, the Commission finds the Arbitrator's award of TTD benefits through July 14, 2020, is a scrivener's error. Instead, the Commission finds that the Arbitrator intended to award TTD benefits for a total of 80-1/7 weeks for the period of January 1, 2020, through July 14,

2021.

After considering the totality of the evidence, the Commission modifies the award of TTD. On the Request for Hearing, Respondent claimed it paid TTD benefits totaling $28,208.49 for the period of January 1, 2020, through July 24, 2020. Respondent also claimed Petitioner received benefits in the form of his salary pursuant to the Public Employee Disability Act. Petitioner agreed with both claims. Petitioner testified that his supervisor told him to take a few days off work to rest following his injury on January 1, 2020. He returned to work on January 6, 2020. On that day, he sought medical care for the first time. There is no evidence that any medical provider prescribed work restrictions for Petitioner from January 2, 2020, through January 5, 2020. In fact, Petitioner did not receive work restrictions until his first visit to the clinic on January 6, 2020. Therefore, the Commission finds the evidence proves the first date Petitioner was entitled to TTD is January 6, 2020.

Petitioner testified that he has remained off work since January 6, 2020. He testified that he received his full salary from the date of injury until January 1, 2021. He credibly testified that he received neither his salary nor TTD benefits from January 2, 2021, until July 14, 2021. The Commission agrees with the Arbitrator's conclusion that Petitioner's work restrictions through the date of hearing are causally related to the January 1, 2020, work injury. The Commission also agrees with the Arbitrator's determination that the opinions of Dr. Plank that Petitioner's ongoing right knee condition as well as his need for additional treatment and work restrictions are causally connected to the work injury, were the most credible. After reviewing the evidence, the Commission finds Petitioner proved an entitlement to TTD benefits from January 6, 2020, through July 14, 2021, or 79-3/7 weeks.

It is undisputed that Respondent appropriately compensated Petitioner's time off work due to the work injury from January 6, 2020, through January 1, 2021. It is also undisputed that Respondent is entitled to receive credit for the TTD and full salary it has paid to Petitioner regarding that period. Therefore, the Commission finds that Respondent is liable for the period of TTD from January 2, 2021, through July 14, 2021, or 27-5/7 weeks.

As a final matter, the Commission corrects two scrivener's errors in the Decision. On page five (5) of the Decision, when quoting Dr. Cole's Section 12 report the Arbitrator wrote, "'…I do not find that the incomplete slip and twist incurred on January 1, **20202**, likely changed the natural course…'" Additionally, on page six (6) of the Decision, the Arbitrator wrote, "His buckled and he felt a pop in his right knee immediately." The Commission hereby modifies the above-referenced sentences to read as follows:

> "With a body mass index of 49 and the amount of radiographic arthritis seen, he certainly maintained such a diathesis for symptomatic osteoarthritis that I do not find that the incomplete slip and twist incurred on January 1, **2020**, likely changed the natural course of his right knee to any large degree." (pg. 5 of the Decision)

> His **right knee** buckled, and he felt a pop in his right knee immediately. (pg. 6 of the Decision)

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on September 2, 2021, is modified as stated herein.

IT IS FURTHER ORDERED that Petitioner's current condition of ill-being regarding the right knee is causally related to the January 1, 2020, work accident.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of $**901.63**/week for **27-5/7** weeks, commencing **January 2, 2021,** through **July 14, 2021**, as provided in Section 8(b) of the Act. Respondent has fully compensated Petitioner for any time off work due to the work accident through January 1, 2021.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical charges pursuant to Sections 8(a) and 8.2 of the Act. Respondent shall receive credit for medical expenses it has paid.

IT IS FURTHER ORDERED that Respondent shall approve and pay for reasonable and necessary prospective medical treatment in the form of the right knee replacement surgery recommended by Dr. Plank.

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

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

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

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.

July 15, 2022

o: 5/24/22
TJT/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005293
Case Name	DEPAOLO, DAVID v. VILLAGE OF LYNWOOD
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Marc Stookal
Respondent Attorney	Gina Panepinto

DATE FILED: 9/2/2021

THE INTEREST RATE FOR THE WEEK OF AUGUST 31, 2021 0.05%

/s/Carolyn Doherty, Arbitrator

Signature

STATE OF ILLINOIS)
)
COUNTY OF Will)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

David DePaolo **Case #** **20 WC 05293**
Employee/Petitioner

v.

Village of Lynwood
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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Joliet**, on **July 14, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☒ Is Respondent due any credit?
O. ☒ Other 8a- prospective medical

FINDINGS

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

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

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

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

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

In the year preceding the injury, the Petitioner earned $**70,327.92**; the average weekly wage was $**1352.45**.

On the date of accident, Petitioner was **54** years of age, **married** with **0** children under 18.

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

Respondent is entitled to a credit of **$2,695.85** under Section 8(j) of the Act. ARB EX 1.

Respondent shall be given a credit of **$28,208.49** for TTD, $0 for TPD, $0 for maintenance, and credit for all PEDA benefits paid. ARB EX 1.

ORDER

Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of his causally related injury pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid. ARB EX 1. RX 2.

Respondent shall authorize and pay for the surgical treatment and its attendant care as recommended by Dr. Plank pursuant to Sections 8 and 8.2 of the Act.

Respondent shall pay Petitioner temporary total disability for a period of 80-1/7 weeks commencing 1/1/20 through 7/14/20. Respondent shall receive credit for amounts paid. ARB EX 1.

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.

Carolyn M. DeReesty

Signature of Arbitrator

SEPTEMBER 2, 2021

FINDINGS OF FACT

At trial, Petitioner testified that as of 1/1/20, he had been employed by Respondent Village of Lynwood for 17 years. He began his career as a part time police officer in 2004 and in 2013 he began work as a full-time officer. In 2015, Petitioner was promoted to detective. As a detective, he took a role with a major crimes task force in Illinois. In that role, he was charged with investigating murders which required him to walk door to door while canvasing neighborhoods. On a daily basis, Petitioner worked emergency services, traffic stops and investigations which required him to get in and out of a squad car multiple times per day. He estimated getting in and out of standard cars and SUVs 50 to 75 times per day while at work.

Petitioner testified that on 1/1/20 he was working a murder investigation in Stegar, Illinois. He was part of a group that was using a dog to track a suspect in the area of the murder. Petitioner testified that he was walking along Stegar road following the dog toward an apartment complex. Due to the absence of sidewalks, Petitioner had to walk on the road. Petitioner testified that he walked off the road to avoid oncoming traffic. He was required to step over the street curb and onto a grassy snowy area taking a slight step downward off the road. He described the area as a swale. Petitioner testified that as he stepped off the road he stepped down into the swale planting his left foot to then step over the curb with his right foot but he took a misstep while so doing. His right knee buckled, and Petitioner testified that felt a pop in his right knee. He testified that he tried to balance, wobbled, but did not fall.

Petitioner testified that he continued to walk another 100 feet and noticed burning on inside of his right knee. Petitioner testified that he walked a total of 300 feet and noticed that the right knee was sore with intermittent burning. Petitioner testified that he eventually walked back on stable ground when he reached the driveway to the apartment complex and at that time told his partner he needed a rest. The rest of the group continued on with the dog. Petitioner testified that he again tried to continue walking but at that point the pain became worse so he left the scene. Petitioner told his Commander that he slipped and that he may have hurt his knee. Petitioner testified that he gave a similar history of the incident to his Chief and was told to take a few days off. Petitioner continued to feel tenderness and soreness in his right knee.

On 1/6/20 Petitioner returned to work and was sent for medical treatment at Working Well by his supervisor. Petitioner testified that he gave the same history of injury at his first visit on and was recommended x-rays, right knee MRI, and conservative treatment. Petitioner was restricted to desk work/light duty but remained off work as no light duty work was available.

1/15/20 he had an MRI and the result was abnormal. Petitioner remained restricted from work. He then went to see Dr. Plank on 2/6/20. Dr. Plank was his treating orthopedic. Petitioner provided the same history of injury at work and was given an injection to his right knee which provided temporary relief. Dr. Plank's diagnosis was "osteoarthritis in the right knee, tear of the medial meniscus, current injury, right knee…" and the impression was "R knee medial meniscal tear superimposed on OA." PX 2.

On 2/20/20, Petitioner advised Dr. Plank that his symptoms were worse. On that date, Dr. Plank prescribed a total knee replacement and placed Petitioner on restrictions of seated work only. Dr. Plank noted that the onset of the right knee problem was acute and started after an injury at work with symptoms present since the accident on 1/1/20. In noting that he would request approval for the total knee replacement surgery, Dr. Plank stated, "He reports that his knee arthritis is related to his job requirements over the past 30 years." PX 2.

Respondent sent Petitioner to a Section 12 exam with Dr. Cole on May 18, 2020. Dr. Cole examined Petitioner and indicated that Petitioner was 377 pounds and 6 feet 2 inches tall with a BMI of 49.2. He noted that Petitioner denied any previous problem with the affected right knee prior to the alleged date of injury in January 2020. RX 1. Petitioner reported that on the date of injury he was working as a detective walking along an icy road when he "inadvertently stepped into an ice/snowy ditch and tripped and incurred an incomplete fall and immediately felt a painful poo in the right knee." RX 1. Petitioner reported continued and extreme pain, catching, and instability in the right knee since the accident.

Dr. Cole noted Dr. Plank's diagnosis of medial meniscal tear and high-grade degenerative changes with a loose body in the joint per the MRI. He noted the recommendation for a total knee replacement given the "amount of arthritis." RX 1. Following his exam and x-rays indicating bone on bone arthritis Dr. Cole assessed "right knee advanced medial compartment osteoarthritis in the setting of morbid obesity; preexisting." RX 1. He agreed with the knee for a total knee replacement but opined that the need for this treatment was not related to the "innocuous event" that occurred on January 1, 2020. He opined, "His trip and fall certainly did not cause his osteoarthritis seen on the x-rays. With a body mass index of 49 and the amount of radiographic arthritis seen, he certainly maintained such a diathesis for symptomatic osteoarthritis that I do not find that the incomplete slip and twist incurred on January 1, 20202, likely changed the natural course of his right knee to any large degree." RX 1. He further opined, "He has noted worsening symptoms in the knee despite not being able to work and this, in conjunction with his body mass index, likely suggests that he is simply experiencing the continued manifestation of symptoms of underlying advanced preexisting osteoarthritis and not the ill effects of a work-related injury. It is my opinion, therefore, that on a more likely than not basis, his need for a total knee replacement is not related to any work event but rather his advanced preexisting osteoarthritis in association with concurrent morbid obesity." RX 1.

In his addendum report dated 7/22/20, Dr. Cole further opined that Petitioner's need for workplace restrictions was not related to the work accident but rather the preexisting degenerative arthritis. RX 1.

Dr. Plank again recommended the total knee replacement on 8/11/20 and Petitioner remains under work restrictions of seated work only. On 8/11/20, Dr. Plank noted, "He was working as a police officer normally before this accident or injury. He did not take medication or seek treatment for his knee prior to injury. This injury did not cause his arthritis, but it does represent an exacerbation of an underlying injury." PX 2.

Petitioner testified that the again saw Dr. Plank on 4/20/21 after he applied for public benefits in the state of Indiana following the termination of his benefits by Respondent. Petitioner again complained of continued pain, swelling, clicking, instability and laxity in his right knee. Dr. Plank subsequently administered 3 visco injections from April to May 2021 with only minimal relief to Petitioner's right knee symptoms.

At present, Petitioner notices that his right knee affects his ability to walk. Petitioner testified that his right knee is still stiff, sore and unstable. He testified that he is unable to be on his feet for any extended period and if he moves the wrong way his knee will swell. He must take stairs one step at a time and he moves at a slow pace. Petitioner takes prescribed medication. He testified that he would have the surgery to his right knee as prescribed by Dr. Plank. Currently, he does not feel he could safely perform the job duties of a police officer.

Petitioner testified that he underwent prior right knee treatment in 2015 and 2016 from his primary care doctor, Dr. Medina. Petitioner was never taken off work, no restrictions were given, and no surgery was recommended. Petitioner was working full duty when he saw Dr. Medina in 2015 and 2016 and continued to work full duty thereafter. Between 2016 and the 2020 date of accident in this case, Petitioner did not lose time from work or receive any treatment for his right knee. Petitioner testified that in no way was his job effected by the right knee before this accident and that he was able to perform any and all job duties as a police officer.

On cross-exam, Petitioner testified that he received his full salary/PEDA benefits from the date of accident through 1/1/21. Thereafter, he did not receive any additional benefits.

Petitioner agreed that he did not provide Dr. Cole with a history of right knee problems. When describing the accident to Dr. Cole, Petitioner indicated that he slipped on a snow and ice covered swale.

Petitioner's prior medical records reflect that on July 10, 2014 he had right knee Xray for Internal derange of right knee with findings of moderate degenerative changes noted at the lateral patellofemoral joint compartment RX 3 page 9. On November 13, 2015 he saw Dr. Jorge Medina to establish himself as a new patient with a primary diagnosis of chronic right knee pain. In the history he recalled a prior history of internal derangement of the right knee. He recalled worsening right knee pain, stating it was chronic, and that he had degenerative joint disease and has taken Meloxicam with poor control of symptoms. Petitioner was prescribed Ultram. RX 4 page 28. On January 18, 2016, Petitioner complained of bilateral knee pain and prescribed Ultram. In September 2016, Dr. Medina again prescribed Ultram. Dr. Medina did not provide any additional treatment or testing with regard to Petitioner's right knee at any of these visits.

Petitioner testified at trial that between 2016 and January 1, 2020, he did not seek any treatment for his right knee, did not lose any time from work, was not placed on restricted duty, did not receive any assistance in performing his work duties, and that he fully performed all of his police and detective duties without incident. Petitioner's testimony at trial was unrebutted.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

C.F.K.O Accident, causal connection and prospective medical treatment

Based on the records in its entirety, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment for Respondent on 1/1/20. Petitioner was in his capacity as a Detective investigating a crime at the scene when he was forced to step off the roadway onto a snowy, grassy, sloped surface. Petitioner credibly testified that when he stepped over the curb, he took a misstep causing him to stumble. His buckled and he felt a pop in his right knee immediately. Petitioner's trial testimony is unrebutted and the Arbitrator is not dissuaded in finding accident based on any minor discrepancies between Petitioner's trial testimony and the histories documented in the medical records presented.

The Arbitrator further finds that Petitioner's right knee condition and his need for prospective medical treatment in the form of the prescribed total knee replacement are causally related to the work-related accident and injury. In so finding, the Arbitrator notes that 3 years passed between Petitioner's last mention of right knee complaints to his treating physician and the accident of 1/1/20. During that time, Petitioner did not seek or receive treatment to his right knee and was able to work all of this varied and physically difficult job duties as a police officer and detective without missing work or necessitating restrictions due to any right knee complaints. However, immediately after this accident on 1/1/20, Petitioner felt pain in his right knee and sought consistent treatment thereafter. Objective testing supported Petitioner's complaints of knee pain and symptomology immediately after the accident. Under the chain of events theory, Petitioner's right knee condition and the need for replacement surgery are causally related to the accident and injury of 1/1/20. In so finding, the Arbitrator places greater weight on Petitioner's testimony as supported by the objective medical records and testing, the opinions of Dr. Plank, and the logical chain of events, over the opinion of Dr. Cole. The record in its entirety supports the Arbitrator's finding that the accident of 1/1/20 was sufficient to aggravate and accelerate Petitioner's underlying right knee degenerative condition such that Petitioner developed acute symptoms currently necessitating a total knee replacement.

Based on the foregoing, the Arbitrator finds that Respondent shall authorize and pay for the surgery recommended by Dr. Plank and its attendant treatment pursuant to Sections 8 and 8.2 of the Act.

J. **Medical expenses**

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable, necessary and causally related medical expenses incurred in connection with Petitioner's care and treatment of his causally related condition pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid. RX 2 and ARB EX 1.

L. **TTD**

Based on the Arbitrator's findings on the issues of accident and causal connection and on the medical records containing off work authorizations, the Arbitrator finds that Respondent shall pay Petitioner temporary total disability for a period of 80-1/7 weeks commencing 1/1/20 through 7/14/20. Respondent shall receive credit for amounts paid. ARB EX 1.

N. **Credit**

Respondent is entitled to credit for TTD and medical expenses paid as noted above and in the amounts stipulated to on ARB EX 1, including PEDA benefits paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC035060
Case Name	Margaret L Bourque v. Jewel Food Store #3084
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0264
Number of Pages of Decision	16
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Jones
Respondent Attorney	Paul Krauter

DATE FILED: 7/19/2022

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Margaret Bourque,

Petitioner,

vs. NO: 18 WC 35060

Jewel Food Store,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 18, 2022, 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 $61,000.00. 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.

July 19, 2022

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

o7/13/22
DLS/rm
046

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC035060
Case Name	BOURQUE, MARGARET v. JEWEL FOOD STORE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Matthew Jones
Respondent Attorney	Paul Krauter

DATE FILED: 1/18/2022

THE INTEREST RATE FOR THE WEEK OF JANUARY 11, 2022 0.27%

/s/ Jessica Hegarty, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Margaret Bourque
Employee/Petitioner

v.

Jewel Food Stores
Employer/Respondent

Case # **18** WC **35060**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **June 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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, **7/20/18**, 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 $**33,696.00**; the average weekly wage was $**648.00**.

On the date of accident, Petitioner was **59** 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 $**5,525.00** for other benefits, for a total credit of $**5,525.00**.

Respondent is entitled to a credit of $**5,525.00** under Section 8(j) of the Act.

ORDER

Temporary Total Disability
Respondent shall pay temporary total disability for the periods of March 7, 2019 through June 15, 2021, the date of trial, as provided in Section 8(b) of the Act.

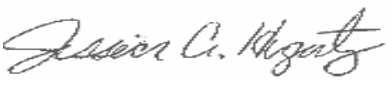
Medical Benefits
Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of ION, $3920.81; Midwest Specialty Pharmacy, $3268.74, La Clinica, $4500.

Prospective Medical
The Arbitrator orders Respondent to authorize and pay the recommended bilateral cubital tunnel releases as recommended by Dr. Irvin Wiesman.

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

JANUARY 18, 2022

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION
IN THE STATE OF ILLINOIS

MARGARET BOURQUE,	)	
	)	
Petitioner,	)	
	)	**18 WC 35060**
vs.	)	
	)	
JEWEL FOOD STORE.	)	
	)	
Respondent.	)	

This matter proceeded to hearing on June 15, 2021. Arb.1. Petitioner alleges she sustained work-related, repetitive bilateral carpal and cubital tunnel syndrome while working for Respondent. Petitioner is asking for prospective medical treatment in the form of a left cubital tunnel release followed by a right cubital tunnel release as recommended by Dr. Wiesman

FINDINGS OF FACT

Petitioner, Margaret Bourque, testified that she was employed by the Respondent for over 25 years in July of 2018. Tx5-6. In July of 2018, Petitioner worked for Respondent as a cashier, personnel coordinator, and back-up scan coordinator eight hours per day, five days a week. Id. at 6.

As a cashier, Petitioner operated an ordinary cash register and conveyor belt that one typically sees at a grocery store. She also bagged items. Tx8 Petitioner scanned and bagged every product the grocery store carried, ranging from soda cases to 20-pound turkeys. Id at 8-9.

As a personnel coordinator, Petitioner worked in an office shared with the front-end manager. Her duties included reviewing job applications, hiring, and training employees. Id. at 6, 9. Petitioner testified that about 80 percent of this role was behind the desk while the remainder was spent on the floor training new hires. Id. at 10. At the desk, Petitioner typed at a computer without an ergonomic station. Id. at 11.

As a back-up scanner, Petitioner operated a 7-10 lb., handheld scanner, with her left hand wrapped around the handle and extended her arm in front of her body with her elbow bent at a 90-degree angle. Id. at 14. She would then squeeze the trigger to scan an item. The scanner did not have any kind of holster for support for holding it up. Id. at 14-15. Petitioner further testified the scan gun trigger required some force to squeeze. Id. at 15. Petitioner testified that she is right-handed, but always used the scan gun with her left hand. Id. at 17. Petitioner testified she would use her right hand to enter things into the scan gun and pick up the products to be scanned. Id. at 19. The purpose of scanning the products was to generate signage. Once Petitioner scanned the necessary items, she would print signs in the office and then manually place the signs in the sign holder. Id.at 13. Depending on the number of products that needed scanning, she would spend 2-5 hours scanning products. Id. Petitioner further testified that on a typical day "we" made 100-200 signs. Id. at 12.

At the time of her alleged accident, Petitioner had been working as a cashier and scan coordinator for the prior 24 years and performing personnel coordinator duties for the prior 16 years. Id. at 17.

Regarding the manifestation of her bilateral repetitive trauma injuries in July of 2018, Petitioner testified to the following:

> I would get sharp pains, I always felt like I was getting electric shock kind of pain that would go from just under my elbow up to my hands. I also was getting like a tingling in my fingers and depending how I would move something over the scanner with both hands, I might get like electric shock pain in both my arms. Id. at 18.

Regarding the tingling in her fingers, she testified, "It was mainly the first 3 fingers but once in a while it would start [in the] the little finger". Id. Petitioner testified she experienced these symptoms in both her hands and arms but her left arm and hand was bothering her more than her right Id. at 19. As she continued working, Petitioner's symptoms increased, "Those electric shock things I was feeling were more intense. When I go home in the evening, I wouldn't have as much strength in my hands if I cook dinner. It was really hard to sleep at night. Id. at 20.

Petitioner did experience some symptoms before June of 2018, but testified it was "essentially was under control" until June of 2018 when "it got to be significantly worse." Id. at 22. Pursuant to her testimony, in June of 2018 she started "getting the pains in [her] elbows to [her] fingers" and "started to lose feeling in [her] fingers". She testified she "didn't have that prior to June 2018".

On July 20, 2018, her primary doctor recommended she consult with a specialist. Petitioner initially saw Dr. Lombardi at DuPage Medical Group and "he jumped right in" and recommended a left carpal tunnel release. surgery" for her left hand after diagnosing carpal tunnel syndrome. Id. at 23. Petitioner testified she did not seek immediate authorization from Respondent for the surgery because she did not want to leave Respondent without a cashier during the holidays, the busiest time of the year. Id. at 23-24.

As Petitioner continued to work, she noticed her arms and hands were progressively worsening, so she sought a second opinion with Dr. Wiesman at Illinois Orthopedic Network on November 29, 2018 at which time Dr. Wiesman recommended an EMG of her upper extremities and took Petitioner off of work. Id. at 25.

Petitioner testified that the night before she saw Dr. Wiesman, she tripped in her bedroom at home striking her upper right arm on her husband's dresser which fractured her humerus. At the hearing, gestured between her elbow and shoulder to indicate the location of the fracture. Petitioner testified that she didn't treat with Dr. Wiesman for the fracture and she did not have surgery for that condition. Id. at 5. Petitioner testified that her prior symptoms related to her arms and hands remained consistent after her proximal humerus fracture. Id. at 25-26.

The medical records of Dr. Wiesman note that Petitioner reported a history of pain to her left wrist with radiation of pain, numbness, and tingling in the first three digits of her fingers. Px2. Petitioner reportedly had fallen the night before suffering a proximal humerus fracture. Id. On physical examination of the left wrist, Dr. Wiesman noted flattening of the thenar eminence, positive carpal compression test with increased numbness and tingling of the first three digits. Id. Dr. Wiesman noted his physical examination of Petitioner's right wrist was limited because that arm was in a sling. Dr. Wiesman suspected bilateral carpal tunnel syndrome, recommended an EMG of the upper extremities, and took Petitioner off work. Id. Throughout Dr. Wiesman's treatment of Petitioner, he continued her off work restrictions.

On December 13, 2018, Petitioner followed up with Dr. Wiesman at Illinois Orthopedic Network with continued pain and numbness and tingling in the first through third digit. Id. Dr. Wiesman noted similar physical examination findings on the left, but was unable to assess the right due to the sling. Id. Before Petitioner could undergo the EMG, Dr. Wiesman noted that Petitioner's humerus fracture had to heal. Id.

On February 9, 2019, Petitioner underwent EMG testing that noted the following:

> 1. Reduced left median motor CMAP findings indicate a median motor neuropathy at an electrodiagnostically indeterminate site. In this patient's clinical context, consider focal neuropathy at the wrist-palm/carpal tunnel segment. Clinical correlation warranted.
>
> 2. Evidence of possible bilateral ulnar motor neuropathy of unclear etiology. Focal neuropathy at the elbow, plexus, and less likely C8/T1 radiculopathy cannot be ruled out in their entirety, and as such, clinical correlation as it pertains to the patient's case is recommended. Id.

Following the EMG, Petitioner presented to Dr. Wiesman on March 7, 2019 with persistent pain, numbness and tingling about her wrists bilaterally despite conservative treatment. Px2. Petitioner's pain reportedly began in the elbow and radiated down to the forearm in the fourth and fifth digit. Id. On physical examination, Dr. Wiesman noted positive Tinel's sign over the cubital tunnel bilaterally with abnormal discrimination in the fourth and fifth digit. Id. Further, he noted positive Tinel's sign in the carpal tunnel, but that it was worse with the cubital tunnel. Id. Dr. Wiesman reviewed the EMG report noting possible carpal tunnel syndrome, as well as evidence of possible bilateral ulnar motor neuropathy of unclear etiology.

Dr. Wiesman assessed Petitioner with bilateral cubital tunnel syndrome, worse on the left when compared to the right, recommended using a splint and potentially injections later if the splint did not work. Id.

On April 4, 2019, Petitioner followed up with Dr. Wiesman at Illinois Orthopedic Network where Petitioner reportedly had no relief with the use of her nighttime splints. Id. Dr. Wiesman noted similar physical examination findings as the previous visit and recommended a left elbow injection. Id. Petitioner agreed to the injection and a 1 mL half triamcinolone and half lidocaine was administered into Petitioner's left cubital tunnel. Id.

On April 25, 2019, Dr. Wiesman noted Petitioner had relief from the injection for about one day, and then the pain returned. Id. On physical examination of the left elbow, Dr. Wiesman noted Tinel's sign over the cubital tunnel, pain and numbness going into the fourth and fifth digits, paresthesia's in the fourth and fifth digits, and decreased sensation in the ulnar first and second digits. Id. On physical examination of the right elbow, Dr. Wiesman noted positive Tinel's sign over the cubital tunnel with similar symptoms as left, but less severe, with associated numbness, tingling, and paresthesia's in the fourth and fifth digits. Id. As Petitioner had failed conservative treatment, Dr. Wiesman recommended and Petitioner wished to proceed with surgery, left cubital tunnel release and likely a right cubital tunnel release after the left procedure. Id.

Petitioner continued to follow up with Dr. Wiesman on June 21, 2019 and July 19, 2019 with similar complaints and Dr. Wiesman noted the same physical examination findings. Id.

On August 8, 2019, Petitioner presented to Dr. Vender from Hand to Shoulder Associates for an independent medical examination at the request of Respondent. Rx1. Petitioner presented to Dr. Vender with symptoms in both upper extremities, left worse than right, pain and tingling in both hands. Id. Petitioner complained of numbness and tingling in the ulnar aspect of the hand and also into the ring and small fingers. Id. Finally, Petitioner complained of pain in the radial aspect of the hand, not numbness or tingling. Id. On physical examination, Dr. Vender noted ulnar nerves in the cubital tunnel were stable, but tender to palpation bilaterally. Id. Dr. Vender noted palpation of the lateral aspect of both elbows demonstrated tenderness, two-point discrimination demonstrated inability to feel anything in the ring and small fingers bilaterally, and A1 pulley areas were tender at the ring and small fingers bilaterally. Id.

Dr. Vender reviewed the EMG report and found it to be non-definitive other than possibility of an ulnar neuropathy and possible tendinitis. Id. Dr. Vender opined that Petitioner's work activities were that of a cashier, scanning products and making tags. Dr. Vender did not find this to be sufficient to cause Petitioner's elbow conditions. Id. Overall, Dr. Vender opined that Petitioner did not suffer from a work-related condition. Id. Following the IME, Petitioner followed up with Dr. Wiesman at Illinois Orthopedic Network on September 25, 2019 and December 23, 2019 presenting with continued symptoms in her bilateral arms. Px2. Further, Dr. Wiesman noted similar physical examination findings as previous visits. Id. During those visits, Dr. Wiesman and Petitioner continued to wait for approval for authorization of surgery. Id.

On January 3, 2020 Petitioner presented to Dr. Wiesman for her last visit. Id. At that time, Dr. Wiesman had the August 7. 2019 IME report to review and noted the following:

> I respectfully disagree with the IME physician in stating that she did not [have] definitive clinical physical exam. In clinic today, she had a very definitive physical exam with extreme tenderness over the cubital tunnel with associated numbness and tingling into the fourth and fifth digit immediately after examination. She did not have diffuse tenderness throughout the elbow and localized all of her tenderness to the cubital tunnel. On physical exam, I did not appreciate any tenderness over the ring or A1 pulley region. With regards to her work activities, she would hold the left elbow in a flexed position and the scanner gun was somewhat heavy for her. She had to constantly maintain her elbow in a flex position and repetitively squeeze the scanner continuously throughout the day, doing this for 25 years. I would respectfully disagree that doing this type of work would not cause any type of neuropathy, as the IME physician does not actually describe the mechanism for which she had to do the scanning. Doing this repetitive flexion and gripping certainly could cause compression on the ulnar nerve, especially given the extent that she was performing these activities. Furthermore, she was a cashier and constantly had to maintain her elbows in a flexed position and scanning heavy things, such as cases of soda. I would respectfully disagree that there is no definitive condition or diagnosis. There is a clear diagnosis of cubital tunnel syndrome confirmed by clinical exam findings, mechanism of injury, as well as EMG findings that suggest possible cubital tunnel syndrome. Given her severe clinical exam findings and failure of conservative treatment and mechanism of injury related to the job, I would recommend proceeding with a left cubital tunnel release. Id.

Petitioner testified that she still has pain in her arms bilaterally, and that the pain will wake her up at night. Tx30. Petitioner specified that her pain, numbness, and tingling were right under her elbow, down into her hands. Id. at 31. Prior to June of 2018, she had no issues with her hands and arms. Id. at 31. Petitioner testified that her left side is worse than the right, consistent with the medical records. Id. at 31. Further, Petitioner testified that her condition is affecting her daily activities, including cooking, washing clothes, lifting a laundry basket, doing puzzles with beads, and all aspects of her life. Id. at 32-33, 35. Petitioner testified that she has four grandchildren ranging in age from 2 to 7 years old, and that her condition is affecting her ability to interact with her grandchildren such as being able to pick them up. Id. at 33. Finally, Petitioner testified that she had no injuries since the manifestation date, is not a smoker, and not diabetic. Id. at 34.

On cross-examination, Petitioner testified she worked as a back-up scanner 24 hours per week. Id. at 37. Petitioner testified that she did not have initial left elbow complaints when she saw Dr. Lombardi from DuPage Medical Group. Id. at 39. Further, Petitioner testified that her initial visits with Dr. Wiesman were about her pain in her hands. Id. Petitioner testified that her right arm was in a sling from November 28, 2018 to March of 2019 due to her right humerus fracture and performed daily activities with her left hand and arm. Id. at 40-42. Petitioner agreed she did not complain about elbow pain to Dr. Wiesman until April 4, 2019. However, Petitioner testified that throughout her treatment, she pointed to underneath her elbows from the ulnar nerve, along the bottom of her forearm towards the ring and pinky finger as the source of pain. Tx43. When asked about the puzzles with beads,

Petitioner testified that up until October of 2018, she would use a tool to make puzzles with beads using her right hand about an hour a day, three days a week. Id. at 44-45.

On re-direct examination, Petitioner testified her husband and son would help her with daily activities including cooking, driving, and grocery shopping while Petitioner's right arm was in a sling. Id. at 48. Petitioner testified that the activity during the period she was in a sling was less strenuous and that her left arm had not worsened at all. Id. Finally, Petitioner testified that she performed physical therapy with Dr. Murphy at DuPage Medical Group for her right arm for about three months when her arm was in the sling. Id. at 49.

Testimony of Carol Lambe

Carol Lambe [hereinafter "Carol"] was called by Respondent to testify. Id. 53. Carol testified that she worked for Jewel Osco in Shorewood, Illinois for 48 years as a scan coordinator. Id.. She worked with Petitioner and that Petitioner's job duties in July of 2018 were personnel coordinator and back-up scanner. Id. at 54. Carol testified that she was the main scanner while Petitioner assisted in the scanning. Id. at 55. When shown pictures of the scan gun, Carol testified that she did not know how much the scan guns approximately weighed. Tx56. She thinks Petitioner worked around 16 hours per week as a scan coordinator. ID. at 56. As a scan coordinator, Carol would have a cart to push around to each display, take the scan gun to scan the sign, and then look at the scan gun to see if it was the correct price. Id. at 57. If it was the incorrect price, Carol testified that she would push a button on the scan gun to send to the computer and then repeat this process. Tx57. Carol testified that the shelves in which she scanned the products varied in height. Id.

On cross-examination, Carol testified that she did not review any prior work logs, time sheets, or pay records of Petitioner for 2018. Id .at 59. Carol testified that there was nothing going on that made the role of scan coordinator or back-up scan coordinator memorable in 2018. Id at 59-60. Carol testified that she estimated that Petitioner was working 16 hours a week as a back-up scan coordinator but also doing personnel coordinator work too. Id. at 60. When asked if it was possible if Petitioner was performing more hours than that, Carol testified that it was not possible. Id at 60. Finally, Carol testified that the back-up scanner had the same job duties as the primary scanner and that Carol was positive Petitioner used the cart. Id .at 60-62.

Testimony of Dr. Irvin Wiesman

On July 7, 2020, Dr. Irvin Wiesman testified in this matter. Px4. Dr. Wiesman testified regarding his treatment of Petitioner including her subjective complaints, physical examinations, and diagnostic testing. Id. Dr. Wiesman testified that Petitioner had to wait to undergo her EMG until her right humerus fracture was healed because there couldn't be access to the right upper extremity due to the fracture. Id. at 13. Dr. Wiesman testified that on March 7, 2019, Petitioner started to have pain originating around the elbow and shooting down her forearm, with numbness and tingling in the ring and small finger. Id. at 14.

Dr. Wiesman testified that Petitioner's EMG testing showed left median neuropathy and some swelling of bilateral ulnar nerves indicative of cubital tunnel syndrome. Id. at 16. Dr. Wiesman reviewed the EMG report noting the speed and amplitude portion of the EMG were slowed down, especially on the ulnar nerve region of the elbow. Id. at 17. Dr. Wiesman testified that there were indications of possible neuropathy, but Petitioner's examination was more consistent with cubital tunnel syndrome noting she had pain in the medial elbow region and decreased sensation along the fourth and fifth fingers that correlated with the ulnar nerve. Id. at 18. Further, Petitioner had tenderness along the medial side of the elbow and a positive Tinel's test. Id.

Dr. Wiesman still believed Petitioner had carpal tunnel syndrome, but believed most of Petitioner's complaints were focusing more on the ulnar nerve in the elbow region. Id. at 19. Dr. Wiesman testified that carpal tunnel syndrome and cubital tunnel syndrome can overlap as to symptoms, but are in different anatomic regions of the arm. Id. at 19. When asked regarding Petitioner's job duties, Dr. Wiesman testified:

> She basically again stated that she had been working for 25 years and that oftentimes at work she keeps her elbow in a flexed position and is repetitively squeezing a scanner throughout the day, and she attributes this type of work to causing her to be symptomatic. . . . I think it's reasonable that if you are keeping your elbow in a flexed position and gripping or squeezing a scanner or some type of instrument that you can cause irritation to the ulnar nerve in the cubital tunnel. Id. at 24-25.

Dr. Wiesman believed Petitioner's job duties could cause increased pressure in the cubital tunnel resulting in cubital tunnel syndrome. Id. at 26. He further testified that a cubital tunnel release would help alleviate Petitioner's symptoms and that all treatment he recommended had been reasonable and necessary. Id. at 26.
Finally, Dr. Wiesman testified that he kept Petitioner off work completely throughout her treatment pending surgery because she was healing from the fracture in the beginning of treatment, but since that fracture healed, still has not had any relief of her symptoms. Id. at 27.

On cross-examination, Dr. Wiesman testified he is board certified in general and plastic surgery, and has a certificate of added qualification in hand surgery. Id. at 30. He is not an orthopedic surgeon. He performs nerve entrapment release surgery on the upper extremities. It is common for him to treat the cubital tunnel. Id. at 28-29. Regarding his causation opinions, Petitioner's use of the scan gun was significant, but he does not know the size or weight.

However, on redirect examination, Dr. Wiesman noted that Petitioner stated that the scan gun was somewhat heavy for her and that he believed that some force was required in squeezing the scan gun. Id. at 35, 42. Dr. Wiesman believed that Petitioner's cubital tunnel syndrome was caused by repetitive trauma. Id. at 41-43.

On redirect examination, Dr. Wiesman testified that he took Petitioner off work completely because of the fracture of the humerus and Petitioner's severity of bilateral arm pain. Id. at 47.

Testimony of Dr. Michael Ian Vender

On July 17, 2020, Dr. Vender from Hand to Shoulder Associates testified regarding his independent medical examination of Petitioner on August 7, 2019. Rx2. Dr. Vender reviewed the EMG, written job description of a job title cashier, Dr. Lombardi's records, Dr. Wiesman's records, and pictures of a scan gun. Id. at 12. Regarding the EMG report, Dr. Vender disagreed with the reading of the EMG noting, "so either you have lots of nerve abnormalities, meaning this person just really has a lot of nerve abnormalities for some reason, or you have to question the validity of the study." Id. at 13. According to Dr. Vender, an EMG can be a subjective test dependent on the person performing the test and the interpretation of the results. Id. at 14. Dr. Vender noted that a technician performed the test which could make the report less credible. Id. at 14.

If Dr. Vender were to come up with a diagnosis of Petitioner, he would consider the possibility of ulnar neuropathies. Id. at 16. Dr. Vender had no diagnosis for Petitioner related to her elbows. Id. at 17. Further, since he had no diagnosis, it is impossible to determine a causal relationship and here was no reason Petitioner could not perform normal work activities. Id. at 18, 20.

On cross examination, Dr. Vender testified that numbness and tingling in the ulnar aspect of the hand and into the ring and small fingers were indicative of cubital tunnel syndrome. Id. at 24. Further, Dr. Vender testified that

Petitioner had tenderness and sensitivity of the ulnar nerve which could be indicative of cubital tunnel syndrome. Id. at 25. When asked about Petitioner's job duties as a cashier using the scan gun, Dr. Vender testified that he did not know what position Petitioner's elbow and arm would be in when using the scan gun. Id. at 32. When asked about the EMG test, Dr. Vender testified that the technician had some credentials listed after his name, but he was not familiar with American Association of Electrodiagnostic Technologists. Id. at 33-34. Finally, Dr. Vender testified he does not perform EMG tests as part of his practice. Id. at 33.

CONCLUSIONS OF LAW

(C) ACCIDENT

Petitioner credibly testified to highly repetitive and pervasive use of a 7-10 lb. scan gun, which required excessive and forceful gripping and squeezing with her left hand wrapped around the scan gun handle and trigger while her left arm was extended in front of her body, her left elbow flexed at a 90-degree angle. Tx14 Petitioner performed this job 24 hours a week, 2-5 hours per day, for the last 24 years.

As a cashier, Petitioner pushed, pulled, lifted, and scanned every product that Jewel carries ranging from soda cases to 20-pound turkeys. She performed these tasks in 8-hour long shifts for 24 years prior to her alleged accident. The
.
Based on a preponderance of the credible testimony contained in the record, the Arbitrator finds the Petitioner's bilateral carpal and cubital tunnel syndrome arose out of and in the course of the repetitive work duties she performed in the course of her employment with Respondent.

(F) CAUSAL CONNECTION

The Arbitrator finds that the Petitioner's repetitive work-related duties, at the very least, were *a* cause of her current condition of ill-being. This is based on the testimony of the Petitioner regarding her repetitive work duties for the 24-year-long period prior to July 20, 2018 and the medical opinions and diagnoses set forth by Dr. Wiesman. The Arbitrator found Dr. Wiesman's opinions credible regarding the nature of Petitioner's injuries and their causal relationship to the claimed work-place injury.

When asked regarding Petitioner's job duties, Dr. Wiesman testified:

> She basically again stated that she had been working for 25 years and that oftentimes at work she keeps her elbow in a flexed position and is repetitively squeezing a scanner throughout the day, and she attributes this type of work to causing her to be symptomatic. . . . I think it's reasonable that if you are keeping your elbow in a flexed position and gripping or squeezing a scanner or some type of instrument that you can cause irritation to the ulnar nerve in the cubital tunnel. Id. at 24-25.

Petitioner first presented to Dr. Lombardi at DuPage Medical Group with bilateral wrist pain, tingling, and numbness on July 20, 2018. Dr. Lombardi recommended a left carpal tunnel release. Between July 20, 2018 and Petitioner's initial visit with Dr. Wiesman on November 29, 2018, Petitioner was working full duty for Respondent. During that first visit with Dr. Wiesman, Petitioner had a right proximal humerus fracture which made it difficult to assess Petitioner on physical examination. However, Dr. Wiesman noted flattening of the thenar eminence, positive carpal compression test and found similar findings on the right wrist. Dr. Wiesman suspected bilateral carpal tunnel syndrome but needed an EMG to confirm however, the right humerus fracture needed to heal before the testing could be performed. Once Petitioner's fracture healed, she underwent the EMG on February 9, 2019. Dr. Jason

Croxford performed the EMG and Dr. Goldvekht noted the testing was indicative of median motor neuropathy and possible bilateral ulnar motor neuropathy.

Regarding the absence of elbow-related complaints in the initial medical records, Petitioner agreed on cross exam that she first *verbally* complained of pain in her elbows on April 4, 2019 to Dr. Wiesman:

Q: And that was also the very first time you complained to him or any other physician in this case about pain with your elbows, is that correct?

A: Correct. The pain that I would tell him was underneath my elbows, would come down like this. That's what I tell him. I never said the word elbow. I would show them it was right underneath my elbow coming down my hand like this.

THE ARBITRATOR: For the record the witness is exhibiting -- can you describe that counsel?

MR. JONES: Gesturing down, I keep want to say the ulnar nerve, along the bottom of her forearm towards the ring finger and pinkie finger.

Initially, the Arbitrator was wary of Petitioner's testimony that she *non-verbally* complained of elbow pain to her doctors however, the February 9, 2019 records from La Clinica contain a pain diagram, completed by Petitioner, before she underwent EMG testing, in which she indicated stabbing pain in her bilateral forearms by drawing a slash mark on the forearms of the cartoon diagram. (Px. 3). There is no indication in the accompanying records from that day that Petitioner verbally complained of such pain, nor was she asked about the marks she drew on the pain diagram. Petitioner did not testify regarding the pain diagram at the hearing. Nonetheless, this record corroborates Petitioner's testimony that she did have symptoms in her elbows that she non-verbally communicated to medical personnel before the first verbal complaint documented in the medical records (which was on March 7, 2019 not April 4).

Following the EMG, Petitioner continued to follow up with Dr. Wiesman and had symptoms consistent with bilateral cubital tunnel syndrome as noted in the records of Dr. Wiesman who consistently found positive Tinel's sign over the cubital tunnel, pain and numbness going into the fourth and fifth digits, paresthesia's in the fourth and fifth digits, and decreased sensation in the ulnar first and second digits. Dr. Wiesman testified in his deposition that when reviewing the EMG, it showed left median neuropathy and some swelling of the ulnar nerve bilaterally, which could possibly be indicative of cubital tunnel syndrome. Thus, because Petitioner's symptoms, physical examinations, and the EMG findings correlated with cubital tunnel syndrome, Dr. Wiesman diagnosed Petitioner with cubital tunnel syndrome and recommended a left cubital tunnel release followed by a right cubital tunnel release. Dr. Wiesman testified that although he still believed Petitioner may have carpal tunnel syndrome, her subjective complaints were focused more on the ulnar nerve in the elbow region.

As noted in the medical records and through testimony, Petitioner's job duties included using a scan gun consistently. There is no dispute that Petitioner had to squeeze the trigger of the scan gun consistently when performing her job as the back-up scanner. Further, Petitioner testified that she used her left hand for the scan gun in a flexed position while her right hand typed into the scan gun or picked up items. Dr. Wiesman testified and opined that this mechanism of using the scan gun in a flexed position can cause cubital tunnel syndrome. Respondent offered no evidence to dispute that Petitioner used her left hand for the scan gun and the medical records further corroborate by showing that Petitioner's cubital tunnel syndrome on her left was worse than her right. Additionally, Petitioner had been working for Respondent for over 25 years performing this task at a consistent rate throughout her week. Dr. Wiesman even testified that depending on the anatomy of the person, it

would take at least two weeks to develop cubital tunnel syndrome. Again, Petitioner had been working for Respondent for over 25 years. The Arbitrator should note the importance of Petitioner having worked for Respondent for such a length of time.

Respondent had Petitioner examined by Dr. Vender who opined and testified that he could not come to a diagnosis of Petitioner's elbow condition, did not believe it was causally related as there was no condition, and found Petitioner could work full duty without restrictions. During the IME, Petitioner complained of numbness and tingling in the ulnar aspect of the hand and into the ring and small fingers, which Dr. Vender testified was indicative of cubital tunnel syndrome. Further, on physical examination of Petitioner, Dr. Vender found tenderness and sensitivity of the ulnar nerve, which again, Dr. Vender testified was indicative of cubital tunnel syndrome.

Regarding the EMG, Dr. Vender disagreed with Dr. Wiesman and Dr. Goldvekht's interpretations and testified that in his reading of the EMG, "so either you have lots of nerve abnormalities, meaning this person just really has a lot of nerve abnormalities for some reason, or you have to question the validity of the statement." Dr. Vender admitted that Petitioner's subjective complaints *could be* indicative of cubital tunnel syndrome and that Petitioner's physical examination *could be* indicative of cubital tunnel syndrome. However, regarding the EMG testing, Dr. Vender, noted that the EMG was performed by a technician. However, the individual in question is a Doctor of Chiropractic radiology and a member of an organization that specializes in electrodiagnostic testing. Dr. Vender does not perform EMG's and is not familiar with the American Association of Electrodiagnostic Technologists. Based on a preponderance of the credible evidence contained in the record, the Arbitrator finds that Petitioner's cubital tunnel conditions are causally related to her repetitive work duties, and manifested on July 20, 2018. At the very least, the record established that the Petitioner's employment activities aggravated a preexisting condition. This is supported by Petitioner's testimony, the medical records, and Dr. Wiesman's testimony.

(J) MEDICAL BILLS

The Arbitrator finds that the medical services provided to Petitioner were reasonable and necessary. This is supported by Petitioner's medical records from Dr. Wiesman.

The Arbitrator finds that the medical opinions and treatment plans set forth in the medical records from Dr. Wiesman is both credible and appropriate for his work-related injuries. As Petitioner's treating physician that saw Petitioner on several occasions, Dr. Wiesman was the most equipped physician to diagnose Petitioner and recommend treatment based on Petitioner's subjective complaints and their own objective findings. the Arbitrator finds Dr. Vender's Independent Medical Examination uncredible and unpersuasive on this issue. Also, of importance, Respondent submitted no utilization review reports with respect to the reasonableness or necessity of the treatment.

As such, the Arbitrator finds that the medical services provided to Petitioner throughout the course of her treatment were both reasonable and necessary, and orders the Respondent to pay all medical bills as claimed by Petitioner.

(K) PROSPECTIVE MEDICAL CARE

The Arbitrator finds that Petitioner is entitled to the left cubital tunnel release followed by a right cubital tunnel release as recommended by Dr. Wiesman. Petitioner attempted all conservative treatment available to her including splints and injections. As Petitioner's condition worsened, Dr. Wiesman recommended the surgeries.
The Arbitrator finds that the surgeries recommended by Dr. Wiesman are reasonable, necessary, and causally related to her accident at work for the Respondent. The Arbitrator relies on the medical records and Petitioner's testimony

regarding the necessity of the surgeries at this time. The Arbitrator does not find Dr. Vender's independent medical examination to have been credible or persuasive on this issue. Therefore, the Arbitrator orders the Respondent to authorize and pay for the recommended surgeries and associated care.

(L) TEMPORARY TOTAL DISABILITY BENEFITS

Although Petitioner claims entitlement to TTD beginning on November 29, 2018, the Arbitrator does not find sufficient evidence in support. Pursuant to her testimony, Petitioner had been working throughout the Thanksgiving holiday of 2018. On the evening of November 29, 2018, she suffered an accident at home resulting in a fractured right humerus. Dr. Wiesman testified that when he first examined Petitioner on November 29, 2018 she was not capable of working due to her humerus fracture. (Px #4, pg. 44) Dr. Wiesman testified that Petitioner's work status would no longer be attributable to the humerus sometime between March and June of 2019. (Px #4, pg. 45) Once Petitioner's fracture healed, she underwent EMG testing on February 9, 2019. Petitioner's first visit with Dr. Wiesman following the EMG was on March 7, 2019 at which time he continued to keep Petitioner off of work.

The Arbitrator finds that March 7, 2019 is the first day that Dr. Wiesman's off work restrictions were due to her work-related condition rather than her unrelated humerus fracture. Accordingly, the Arbitrator awards TTD from March 7, 2019 through June 15, 2021.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012195
Case Name	Danny Shepherd v. Qik-N-Ez
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0265
Number of Pages of Decision	17
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Damon Young
Respondent Attorney	Jessica Bell

DATE FILED: 7/19/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANNY SHEPHERD,

Petitioner,

vs. NO: 19 WC 12195

QIK-N-EZ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review under §19(b) having been filed by the Petitioner and Respondent[1] herein and notice given to all parties, the Commission, after considering the issues of whether "choice of physicians" was properly identified as an issue at arbitration and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

CONCLUSIONS OF LAW

I. Choice of Physicians

The Arbitrator found Petitioner's treatment with Dr. Kube and Dr. Trudeau was reasonable, necessary, and causally related to his undisputed November 2, 2018 work accident but outside his

[1] Respondent's Petition for Review identifies causation, necessity of medical treatment, outstanding medical expenses, and prospective medical treatment as its issues on Review. The Commission observes that Respondent did not file a Statement of Exceptions to argue its position on those issues, and its Brief in Response to Petitioner's Statement of Exceptions requests that the Decision of the Arbitrator be affirmed in its entirety.

allowed choice of physicians. The Commission views the evidence differently. The Commission finds that whether Petitioner exceeded the number of physicians allowed under section 8(a) of the Act was not specifically identified as an issue at trial and therefore was not properly before the Arbitrator.

At the start of the hearing, the Arbitrator reviewed the Request for Hearing for the record:

> Arbitrator: The parties have submitted a Request for Hearing form indicating the following issues in dispute: Causation, prospective medical, medical bills and TTD. Does that accurately state the disputed issues for the Petitioner?
>
> Petitioner's Counsel: Yes, your Honor.
>
> Arbitrator: And for the Respondent?
>
> Respondent's Counsel: Yes. T. 4.

The Commission emphasizes that whether Petitioner exceeded his "choice of physicians" was not identified as a dispute. When the hearing proceeded, no testimony was elicited by either party regarding how Petitioner came to treat at OSF Occupational Health on November 5, 2018. However, the Arbitrator concluded the occupational health facility represented Petitioner's first choice. On Review, Respondent argues the Arbitrator properly reached the issue because checking "disputes" in Paragraph 7 of the Request for Hearing automatically put Petitioner on notice that "choice of physicians" was at issue. We disagree and note the Commission has historically rejected that argument. See *Larry Luster v. Arkansas Best Corporation/ABF Freight Systems, Inc.*, 10 IWCC 0266 ("Because Respondent did not specifically raise the defense that Petitioner had exceeded his choice of physicians, Petitioner had no notice of a need to establish whether there was a chain of referral or other evidence that would show why the medical bills were Respondent's responsibility, such as Respondent selected the doctor.")

The Commission finds *Robert Bounds v. C&B Steel Corp.*, 13 IWCC 0864, subsequently affirmed by the appellate court, is instructive. In *Bounds*, the Commission concluded the employer's "choice of physicians" argument was not properly before it "as it was not raised at trial before the Arbitrator and was only raised for the first time in the Respondent's proposed decision." On appeal, the employer made the same argument that Respondent proffers herein, *i.e.*, disputing causal connection and liability for unpaid medical bills on the Request for Hearing is all that is required. In its order affirming the Commission's decision, the appellate court rejected that argument:

> Thus, the issue before us is whether the employer's act of checking the boxes on the request for hearing form to indicate it disputed causal connection and liability for unpaid medical bills was sufficient to put the arbitrator and claimant on notice of a claim that claimant had exceeded the number of physicians allowed under section 8(a) of the Act. We find it was not.

> As noted, the request for hearing form reveals the employer disputed liability for unpaid medical bills. However, the employer did not clearly indicate on the form, or otherwise timely bring to the arbitrator's attention, that its dispute regarding liability for medical bills related to claimant's treatment by more than the allowed two physicians. Based on the information before it, it was reasonable for the arbitrator to assume that the employer's dispute regarding claimant's unpaid medical bills was related only to their causal connection. *C&B Steel Corp. v. Illinois Workers' Compensation Commission*, 2015 IL App (1st) 142176WC-U, ¶ 53-54 (Emphasis added).

In the Commission's view, whether a claimant exceeded his/her "choice of physicians" is a unique issue that must be identified at hearing and if it is not, it is forfeited. See *C&B Steel Corp*., ¶ 52 ("It has long been established that a party's failure to raise an issue before the arbitrator results in its forfeiture.") As such, the Commission finds the "choice of physicians" issue was not properly before the Arbitrator. Our determination necessarily implicates the award of incurred medical expenses and prospective medical treatment.

II. Medical Expenses

The Commission finds the treatment Petitioner received from Dr. Kube and Dr. Trudeau was reasonable, necessary, and causally related to the accidental injury. We note the Arbitrator reached the same conclusion, and Respondent presented no argument challenging that finding on Review. The Commission modifies the award of medical expenses to find Petitioner is also entitled to the charges incurred for the services rendered by Dr. Kube and Dr. Trudeau.

III. Prospective Medical Treatment

The Commission observes there is no dispute as to whether or not Petitioner requires additional care. Rather, the parties' dispute concerns what form that treatment should take: Petitioner wishes to proceed with the surgery proposed by Dr. Kube, while Respondent argues the recommendations of its §12 examiner, Dr. Crane, for work hardening followed by an FCE are more appropriate. Having considered the competing recommendations, the Commission finds Dr. Kube's opinions to be most credible and persuasive.

On March 31, 2020, Dr. Kube evaluated Petitioner for the first time. After obtaining Petitioner's history, conducting an examination, and reviewing the diagnostic studies, Dr. Kube's assessment was Petitioner "predominantly is dealing with the L5 radiculopathy on the left side." Pet.'s Ex. 4. Dr. Kube concluded Petitioner was a candidate for surgical decompression and detailed the procedure he recommended:

> Given the appearance of the L4-5 disc, one could consider a fusion at that level; however, given the nature of the other discs above and below and the spinal curvature above, I do not think fusion is a good idea on this patient. I would consider strongly a Coflex® device at L4-5. Given some of the improvement that he had in the past with radiofrequency ablation, there is some facetogenic pain noted, and the Coflex® device would help to offload those facets and also to some degree the

> posterior aspect of the L4-5 disc. That is the best opportunity I think he has at addressing his back pain surgically. I think there is a strong likelihood of improvement of what he looks like from the radicular standpoint with the decompression, but certainly, decompression alone is not considered a back-pain-resolving operation. I think to obtain any kind of significant back pain relief he would need to do something more, and I would not, in his particular situation, recommend anything more aggressive than the Coflex® device that I am discussing. Pet.'s Ex. 4.

During his deposition, Dr. Kube further explained why the Coflex® device is particularly suited to addressing Petitioner's symptoms and pathology:

> Historically speaking, you know, decompression with the spondylolisthesis would typically be something, you know, historically would have led to a fusion operation, but the Level 1 studies that were published here in the U. S. comparing [Coflex®] to fusion in those types of patients showed the [Coflex®] device performed quite well. It had a lower reoperation rate long term. That's also mixed with, in this case, since the gentleman also has, I mean, it would be a very very mild scoliosis…But I think the more important thing is that you wouldn't want to be going in and fusing a patient right below that point, because if you go in and start fusing this gentleman at L4-5, you're going to have a high risk of deterioration of the other component of his spine above that. So if this gentleman did perhaps, you know, require an L4-5 fusion, most people would probably extend that fusion up at least two or three levels to get past that curvature. So now you're talking about needing a much larger operation to be able to safely achieve the same thing. So the [Coflex®] device is able to avoid that fusion, avoid having to deal with the instrumented level, or deal with instrumented levels above where the area of where the nerve pain aspect is going on, and it also allows us to still be able to address the different components of the pain that he is actually having…and since we're not waiting for bone to fuse or grow together, that device, once he gets through the sort of postoperative muscular issues, he's able to get back with it a lot more quickly…recovery time is about half for the [Coflex®] that it would be for the fusion, and certainly if you're talking about multilevel fusion, certainly would be something that has a much higher likelihood of returning to greater activity levels after that surgery than - - you know, in a [Coflex®] procedure, than, say, a multiple-level spine fusion. Pet.'s Ex. 2, p. 14-16

The only contrary medical opinion addressing the specific surgery[2] recommended by Dr. Kube is Dr. Crane's September 3, 2020 §12 addendum: "It is my opinion that he is suffering from low back pain. I also feel there is nothing further that can be done surgically for the back pain. I would not recommend the surgery as outlined by Dr. Kube on 04/01/2020." Resp.'s Ex. 4. This general statement of his disagreement is the extent of Dr. Crane's conclusions. In contrast to the

[2] Dr. Nardone's June 24, 2019 consultation report reflects that when Dr. Nardone opined Petitioner was not a surgical candidate, the surgery he was contemplating was a multilevel fusion: "At this point a multilevel decompression and fusion in the spine does not represent a suitable option for him to improve. He has a very high risk of failure…I highly doubt that any lumbar surgery in the form of a multilevel fusion would really help him." Pet.'s Ex. 6..

detailed reasoning provided by Dr. Kube, Dr. Crane did not supply the basis for his opinion that proceeding with the Coflex® procedure is not appropriate. See *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶ 36 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.) The Commission finds Dr. Crane's opinions are further diminished by his illogical conclusion that, should Petitioner not comply with Dr. Crane's recommendation for work hardening and an FCE to determine "his overall work restrictions," then "I would recommend that he return to work without restrictions." Resp.'s Ex. 4. The Commission finds Dr. Crane's opinions are entitled to little weight.

The record demonstrates that Petitioner's condition has continued to deteriorate. In the Commission's view, Dr. Kube's discussion of the benefits of the Coflex® procedure in addressing Petitioner's pathology was persuasive and we adopt Dr. Kube's conclusions. The Commission finds Dr. Kube's surgical recommendation to be reasonable, necessary, and causally related to the November 2, 2018 work accident. The Commission orders Respondent to provide and pay for the surgical option recommended by Dr. Kube.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 3, 2021, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $264.50 per week for a period of 123 weeks, representing November 5, 2018 through August 18, 2020 and September 3, 2020 through March 29, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall have a credit of $12,219.09 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $69,371.20 for medical expenses as detailed in Petitioner's Exhibit 11, as provided in §8(a), subject to §8.2 of the Act. Respondent shall have a credit of $13,766.88 for medical benefits already paid, as detailed in Respondent's Exhibit 5.

IT IS FURTHER ORDERED BY THE COMMISSION that Resporent shall provide and pay for surgery as recommended by Dr. Kube, including but not limited to implantation of a Coflex device and post-operative rehabilitative treatment, as provided in §8(a) of the Act.

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

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

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

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

July 19, 2022

/s/ *Deborah J. Baker*

DJB/mck

O: 5/25/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012195
Case Name	SHEPHERD, DANNY v. QIK-N-EZ
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Adam Hinrichs, Arbitrator

Petitioner Attorney	Damon Young
Respondent Attorney	Jessica Bell

DATE FILED: 6/3/2021

/s/ Adam Hinrichs, Arbitrator
Signature

INTEREST RATE WEEK OF JUNE 2, 2021 0.03%

22IWCC0265

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Danny Shepherd
Employee/Petitioner

v.

Qik – N - Ez
Employer/Respondent

Case # **19** WC **12195**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Adam Hinrichs**, Arbitrator of the Commission, in the city of **Peoria**, on **3/29/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

On this date, Petitioner ***did*** 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 $**20,631.00**; the average weekly wage was $**396.75**.

On the date of accident, Petitioner was **57** 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 $**12,219.09** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**12,219.09**.

Respondent is entitled to a credit of $**13,766.88** for medical benefits paid.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of **$264.50/week** commencing from **11/5/2018 through 8/18/2020 and from 9/3/2020 through 3/29/2021**, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $**12,219.09** for TTD benefits paid.

Respondent shall pay reasonable and necessary medical bills totaling **$59,433.95**, pursuant to the fee schedule, as provided in Section 8(a) of the Act. Respondent shall pay these amounts directly to Petitioner pursuant to Section 8(a) and 8.2 of the Act, and subject to reductions under the medical fee schedule. Respondent shall be given a credit of **$13,766.88** for medical benefits that have been paid. The Respondent is entitled to a credit for payments made by the group health insurance carrier under Section 8(j).

Respondent is ordered to provide and pay for necessary medical care as recommended by Petitioner's treating physicians: Dr. Christopher Rink, Dr. Theodore Cohen, and Dr. Emilio Nardone.

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

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

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

Signature of Arbitrator

JUNE 3, 2021

FINDINGS OF FACT

Danny Shepherd, Petitioner, testified that he worked for Qik-N-Ez, Respondent, as a maintenance worker. Petitioner testified that on the date of accident, November 2, 2018, he and several other coworkers were carrying a countertop weighing between 300 and 400 pounds from the parking lot into the building where they were working. There were four employees carrying the counter. Petitioner was one of two employees carrying the back end of the countertop. Two other employees were carrying the front end. When the group attempted to step up on the curb to enter the building, the weight shifted to the back end of the countertop. Petitioner felt a jerk and sharp pain in his low back when the weight of countertop shifted back to him. Petitioner felt immediate pain that seemed to subside and the group continued carrying the countertop into the building and set it on top of the cabinets.

Petitioner felt pain in his lower back, but continued working, finishing his shift and getting off work at his usual time. Petitioner testified the pain really started to intensify later that evening, a Friday. Petitioner assumed his muscles were sore because he had not used them in a while. Petitioner testified that the pain was excruciating the next morning. By Sunday, the Petitioner could hardly move.

Petitioner went to work the following Monday, but after five to ten minutes trying to work, he told his manager, Kim, that he had to go to the hospital due to his back pain.

On November 5, 2018, Petitioner presented to OSF Occupational Health in Bloomington. Petitioner saw Dr. Michele Krieger-Johnson and complained of back pain after putting in new countertops and lifting heavy commercial coffee makers. Dr. Krieger-Johnson diagnosed low back pain, muscle spasm, and strain of the low back. Petitioner was placed on light duty restrictions. Respondent did not accommodate Petitioner's restrictions.

On November 12, 2018, Petitioner returned to OSF St. James and saw Dr. Mary Yee-Chow. Petitioner gave a consistent history of accident, and reported he was not doing much better. His complaints were consistent with low back pain, characterizing it as stabbing pain with spasms. Dr. Yee-Chow diagnosed low back pain with spasm and with a strain. She recommended physical therapy ("PT"), medication, and continued light duty restrictions.

On December 28, 2018, Petitioner returned to Dr. Yee-Chow. Petitioner reported the PT at Advanced Rehab & Sports Medicine was helping a little. Dr. Yee-Chow recommended continuing PT and work restrictions, and noted an MRI might be warranted if the Petitioner's condition did not improve. On January 18, 2019, Petitioner returned to Dr. Yee-Chow. Petitioner reported occasional numbing dull pain in his left hip, but denied any radicular symptoms. Dr. Yee-Chow ordered an MRI of the lumbar spine to include L5-S1 due to the Petitioner's continuing low back pain.

On January 22, 2019, Petitioner underwent an MRI at Ft. Jesse Imaging Center. The MRI report noted multi-level moderate to advanced degenerative changes of the lumbar spine. On January 25, 2019, Petitioner followed up with Dr. Yee-Chow reporting his back pain was 3-4/10, though he had a sharp pain now and then, especially in the morning getting out of bed. Dr. Yee-Chow reviewed the MRI results with the Petitioner, noting multi-level moderate to advanced degenerative changes, and recommended additional PT.

On February 1, 2019, Petitioner was discharged from PT. On February 15, 2019, Petitioner returned to Dr. Yee-Chow, and was referred to pain management.

On February 27, 2019, Petitioner presented to Dr. Theodore Cohen with OSF Pain Medicine. Dr. Cohen examined Petitioner, reviewed the MRI of January 22, 2019, and recommended an L2-3 interlaminar lumbar epidural steroid injection ("ESI"). Dr. Cohen also noted that Petitioner may be a candidate for medial branch blocks or radiofrequency ablation ("RFA"). On March 27, 2019, Dr. Cohen performed the lumbar ESI.

On April 10, 2019, Petitioner presented to McLaughlin Chiropractic complaining of low back pain since his November 2, 2018 work accident. Petitioner testified he presented to McLaughlin Chiropractic for treatment of

his work-related low-back condition. Petitioner made one visit to McLaughlin Chiropractic and did so without a referral from any of his prior treating physicians.

On April 5, 2019, Dr. Cohen followed up with the Petitioner over the phone. Petitioner reported no relief from the ESI. Dr. Cohen ordered an FCE for the Petitioner.

On April 29, 2019 and April 30, 2019, Petitioner completed the FCE at OSF St. Joseph Medical Center. The therapist noted the Petitioner was pleasant and cooperative, giving a consistent performance throughout two days of testing. Findings and restrictions from the FCE are as follows: material handling at a light physical demand level; normal prolonged sitting and standing; normal crouch, crawl and kneel with a slight difficulty rising from each; reduced material handling ability; reduced tolerance to bend at the waist; reduced tolerance to walking and stairs and ladders; reduced range of motion of the trunk; reduced strength of trunk; general reduction in strength in the lower extremities. Upon completion of the testing, the therapist recommended restrictions consistent with the FCE, with a short course of work conditioning to build Petitioner's tolerances and strength.

On May 3, 2019, Dr. Cohen referred Petitioner to Dr. Christopher Rink, D.O. for evaluation post-FCE. On May 16, 2019, Dr. Rink noted Petitioner had pain complaints of 4-5/10, with his pain characterized as a shooting, throbbing discomfort. Dr. Rink reviewed the January 22, 2019 MRI and the April 2019 FCE, and recommended a lower extremity EMG.

On May 24, 2019, Dr. Rink performed an EMG noting findings consistent with a subacute to chronic left lumbar 4 radicular pattern. Dr. Rink referred Petitioner to Dr. Emilio Nardone, a neurosurgeon.

On June 24, 2019, Petitioner presented to Dr. Nardone examined the Petitioner and reviewed the MRI. Dr. Nardone noted the failed conservative treatment, but advised the Petitioner would not be a good candidate for a spinal fusion surgery. Dr. Nardone recommended treatment around the facet joints, and noted a spinal cord stimulator would likely be the best option.

On June 27, 2019, Petitioner followed up with Dr. Rink who reviewed Dr. Nardone's recommendations. Dr. Rink also reviewed Dr. Cohen's recommendations of additional ESIs and/or RFA. Dr. Rink positively reported that the claimant was not taking any prescription medications for his pain, and noted he did not require PT until Petitioner's pain was more controlled. Dr. Rink referred Petitioner back to Dr. Cohen for medial branch blocks and RFA. Dr. Rink continued Petitioner's work restrictions.

On July 10, 2019 Petitioner returned to Dr. Cohen. Dr. Cohen discussed the RFA, and noted the appropriateness of that depended on the results of the medial branch blocks. Dr. Cohen recommended possible medication management, in the form of opioids and/or NSAID, both of which Petitioner declined. Dr. Cohen prescribed a TENS unit.

On August 12, 2019, at the Respondent's request, Petitioner submitted to a Section 12 examination with Dr. Benjamin Crane at Signature Orthopedics. Dr. Crane noted a history of a work accident in November 2018, and performed x-rays at his office on the date of the exam. Dr. Crane also reviewed the January 22, 2019 MRI, and reviewed medical records documenting the Petitioner's treatment relative to the work injury prior to the time of his exam. Dr. Crane opined the November 2, 2018 accident was the cause of the Petitioner's back pain, and agreed that the treatment thus far had been reasonable and necessary to address that injury. Dr. Crane opined that no surgical intervention was appropriate to address Petitioner's complaints. Dr. Crane noted he would not recommend any further injections or a spinal cord stimulator for Petitioner, instead noting he recommended a course of work hardening, followed by an FCE. Dr. Crane recommended work restrictions of no bending, pulling, pushing, or stooping, no lifting over ten-pounds, and no overhead lifting.

On October 2, 2019, Petitioner saw Dr. Cohen for bilateral medial branch blocks. On October 24, 2019, Petitioner saw Dr. Cohen for a second round of medial branch blocks. On November 7, 2019, Dr. Cohen administered a third series of bilateral medial branch blocks. Following the first round of blocks, Petitioner

reported he experienced significant relief, noting he did laundry, walked around, and walked up and down the stairs. He noted the pain came back approximately 4 ½ hours after the procedure and was at a 3-4/10.

On December 6, 2019, Petitioner returned to Dr. Rink. Petitioner reported 50% reduction in his back pain. Dr. Rink indicated that, given the circumstances, this is the best result Petitioner could achieve. Petitioner denied radicular issues and weakness in the legs, and reported pain primarily in the facet joints. Dr. Rink recommended the Petitioner complete the prescribed PT and then follow-up, at which time he will determine whether Petitioner should move forward with work hardening or an FCE. Dr. Rink noted that Respondent was denying PT and the RFA, so Petitioner needed to go through his private insurance. Petitioner reported that Respondent would not bring him back to work unless he could return to work full duty.

On January 16, 2020, Petitioner returned to Dr. Rink. Dr. Rink noted Petitioner had participated in additional PT, intended to be a general conditioning and strengthening program to determine if further work hardening would be appropriate. Petitioner did not progress with his general PT conditioning course. So, instead of work hardening, Dr. Rink ordered an updated MRI. Dependent on the MRI findings, Dr. Rink discussed proceeding with another FCE.

On February 12, 2020, Petitioner underwent a repeat lumbar MRI. Petitioner did not return to Dr. Rink, Dr. Cohen, Dr. Nardone, or any other physician he treated with at that point for follow-up after the MRI.

On March 3, 2020, Petitioner presented to Andrew Ketterman, PA, at Dr. Richard Kube's office, complaining of axial back pain and radicular symptoms into his left leg. Petitioner reported that his back pain accounted for 60 percent of his pain, and the radicular pain accounted for 40 percent. An EMG was ordered.

At the March 3, 2020 visit to Dr. Kube's office, Petitioner completed a "New Patient: Lumbar Spine Form." When asked for a referring doctor's name and full address, Petitioner left this blank. At trial, Petitioner testified that he was referred to Dr. Kube by his attorney.

On March 17, 2020, Dr. Trudeau performed the EMG, and found moderate to severe L5 radiculopathy.

On March 31, 2020, Dr. Kube performed a physical exam and reviewed Petitioner's medical treatment, including the MRIs of January 2019 and February 2020, as well as the recent EMG. At his deposition, Dr. Kube confirmed the February 2020 MRI ordered by Dr. Rink was consistent with the January 2019 MRI, with the exception of a minor change at L2-3, which Dr. Kube stated was not significant as no treatment was being recommended at that level. Dr. Kube also testified that the Lumbar Motion Analysis Scan of March 4, 2020, showed no significant instability, however, there were abnormal findings consistent with the Petitioner's scoliosis.

Dr. Kube testified that the Petitioner was suffering from L5 radiculopathy, mostly on the left. Dr. Kube felt that Petitioner was not a good candidate for a spinal fusion due to his mild scoliosis, but thought that a Coflex device with decompression could address the stenosis at L4-5 and L5-S1, stabilize the spine, reduce Petitioner's pain, and prevent the need for any further surgical intervention. Dr. Kube testified Petitioner's current complaints were related to the November 2, 2018 work accident. Dr. Kube further testified that Petitioner's medical care to date was reasonable and necessary and related to the November 2, 2018 work accident.

On August 18, 2020, Petitioner returned to Dr. Kube's office, was fit for a custom AFO brace for his foot drop, and released back to work with sedentary restrictions. Respondent accommodated Petitioner's restrictions. Petitioner testified he returned to work for four hours per day, four days per week but was unable to perform the work. Petitioner testified that the Respondent was doing everything they could to accommodate his restrictions during his attempted return to work, however, he just could not do the work.

On September 1, 2020, Petitioner returned to Dr. Kube's office with complaints of worsening pain and foot drop. Petitioner testified at trial he was having low-back pain that radiated down his leg. Petitioner also stated he was having trouble with his drop foot causing him to trip when there is not anything there. Petitioner testified

he did not have these symptoms prior to this accident. Dr. Kube took Petitioner off work. Presently, Dr. Kube recommends surgical intervention and continues the Petitioner off work.

On September 3, 2020, Dr. Crane offered an addendum report, without re-examination, at the Respondent's request. Dr. Crane reviewed the additional treatment records from the offices of Dr. Rink, Dr. Cohen, and Dr. Kube, as well as the updated MRI. Dr. Crane reported that his opinions from his August 2019 IME were unchanged. Dr. Crane reiterated his opinion that the Petitioner was not a surgical candidate, specifically noting he would not recommend the surgery proposed by Dr. Kube. Dr. Crane again recommended work hardening and an FCE. Dr. Crane noted that if Petitioner is unwilling to undergo work hardening and an FCE, then he should be released to return to work full duty with no restrictions. Petitioner did not undergo work conditioning and an FCE following Dr. Crane's addendum report.

CONCLUSIONS OF LAW

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

Incorporating the above findings, the Arbitrator finds that the Petitioner's current condition of ill-being in his lumbar spine is causally related to the work injury of November 2, 2018.

All of the Petitioner's treating physicians, as well as Respondent's Section 12 examiner, agree that Petitioner's current condition of ill-being in his lumbar spine is causally related to the work accident of November 2, 2018.

Given the preponderance of the evidence in the record, the Arbitrator finds the Petitioner's current condition of ill-being in his lumbar spine is causally related to Petitioner's work accident on November 2, 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?

Incorporating the above, the record indicates that the treatment provided by Dr. Kube and Dr. Trudeau, was reasonable, necessary, and related to Petitioner's work accident. However, this treatment was outside of the Petitioner's allowed choice of physicians pursuant to the Act. Therefore, the Respondent is not responsible for those bills stemming from Dr. Kube and Dr. Trudeau's treatment per Section 8(a) of the Illinois Workers' Compensation Act. (*See* **Appendix to 19WC 12195 19(b) Arbitration Decision: Petitioner's Physician Referral Chains** herein below for a graphical representation of Petitioner's physician choices).

The Arbitrator finds the medical treatment provided from November 5, 2018 through February 12, 2020, to be reasonable, necessary and related to the November 2, 2018 work accident. The Arbitrator finds this treatment falls within Petitioner's allowed choice of physicians pursuant to Section 8(a).

Respondent shall pay reasonable and necessary medical bills totaling $59,433.95, pursuant to the fee schedule, as outlined in Petitioner's Exhibit 11, and as provided in Section 8(a) of the Act. Respondent shall pay these amounts directly to Petitioner pursuant to Section 8(a) and 8.2 of the Act, and subject to reductions under the medical fee schedule. Respondent shall be given a credit of $13,766.88 for medical benefits that have been paid. Respondent is entitled to a credit for any payments made by the Respondent's group health insurance carrier under Section 8(j).

K. Is Petitioner entitled to any prospective medical treatment?

Incorporating the above, the Arbitrator finds that the Petitioner is entitled to prospective medical treatment.

The treating physicians Dr. Rink, Dr. Cohen, and Dr. Nardone, as well as Respondent's examiner, Dr. Crane, all agree that the Petitioner is in need of further care to address the current condition of ill-being in Petitioner's lumbar spine. The treating physicians and Respondent's examiner differed as to the nature of the necessary care.

The Petitioner has undergone a great deal of conservative care and treatment including PT, injections, and medial branch blocks which have failed to cure and relieve the effects of his work-related injury. Petitioner's treating physicians were working to stabilize the Petitioner's condition in his lumbar spine with further medical interventions, followed by a course of work hardening and another FCE. Petitioner's treating physicians, Dr. Rink, Dr. Cohen, and Dr. Nardone's recommended course of care was denied by the Respondent in reliance on the opinions of Dr. Crane. Dr. Crane opined that Petitioner should only undergo a course of work conditioning and an FCE.

Respondent denied Petitioner's treating physicians recommended course of care in reliance on Dr. Crane's opinions. As a consequence, Petitioner's condition of ill-being in his lumbar spine did not stabilize sufficiently to allow him to undergo a course of work conditioning and another FCE. Dr. Rink ordered an updated MRI and has yet to review that with Petitioner to determine a course of care in conjunction with Petitioner's other treating physicians, Dr. Cohen and Dr. Nardone.

The Arbitrator is persuaded by the treatment recommendations of Petitioner's treating physicians, Dr. Rink, Dr. Cohen, and Dr. Nardone, and finds that the Petitioner has yet to reach maximum medical improvement. The Arbitrator orders Respondent to provide and pay for office visits to Petitioner's treating physicians: Dr. Rink, Dr. Cohen, and Dr. Nardone. Following those visits, the Respondent is ordered to provide and pay for the treating physicians prescribed course of care, pursuant to Section 8(a) and 8.2 and subject to the medical fee schedule, which is reasonable and necessary to cure and relieve Petitioner's current condition of ill-being in his lumbar spine.

L. Is Petitioner entitled to any TTD benefits?

Incorporating the above, the Arbitrator finds that the Petitioner is entitled temporary total disability benefits from November 5, 2018 through August 18, 2020 and from September 3, 2020 through March 29, 2021.

There is no evidence in the record to dispute that Petitioner is entitled to TTD from November 5, 2018 to August 18, 2020. Petitioner was restricted from full duty work by his medical providers beginning November 5, 2018, and Respondent did not accommodate those restrictions.

Petitioner testified he returned to work August 18, 2020, as Respondent was able to accommodate his sedentary duty restrictions. Petitioner testified that the Respondent was willing to accommodate his restrictions during this attempted return to work light duty, however, he just could not do the work. Dr. Kube took Petitioner back off work September 1, 2020, pending surgery.

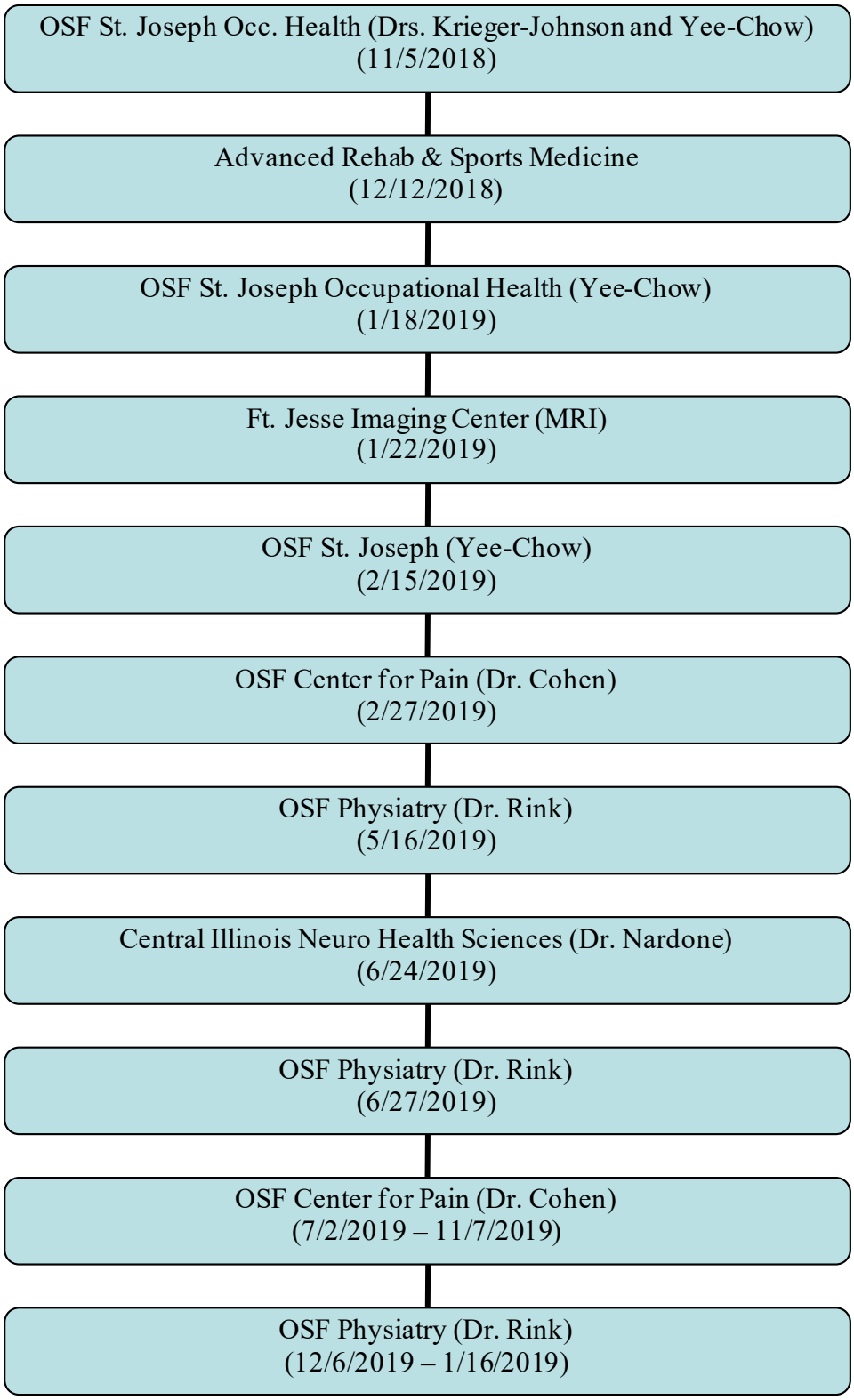
On September 3, 2020, Dr. Crane noted that if Petitioner is unwilling to undergo work hardening and an FCE, then he should be released to return to work full duty with no restrictions. Petitioner did not undergo work conditioning and an FCE after Dr. Crane's addendum. Therefore, Dr. Crane released Petitioner to full duty on September 3, 2020. There is no credible evidence in the record to suggest that the Petitioner was capable of returning to full duty work on September 3, 2020. The Respondent is relying on the opinion of Dr. Crane that on September 3, 2020, the Petitioner was capable of returning to work full duty.

The preponderance of the evidence in the record indicates that Petitioner required light duty restrictions consistent with the findings of the April 2019 FCE. The Arbitrator finds the work restrictions given by Petitioner's treating physician, Dr. Rink, to be consistent in the April 2019 FCE and persuasive as to Petitioner's work capacity. Respondent failed to accommodate Petitioner's restrictions following the full duty release by their Section 12 examiner, Dr. Crane, on September 3, 2020.

Respondent shall pay Petitioner temporary total disability benefits from November 5, 2018 through August 18, 2020 and from September 3, 2020 through March 29, 2021, as provided in Section 8(b) of the Act. Respondent shall be given a credit of $12,219.09 for TTD payments previously made.

Appendix to 19WC 12195 19(b) Arbitration Decision: Petitioner's Physician Referral Chains

Petitioner's 1st Referral Chain



Petitioner's 2nd Referral Chain

McLaughlin Chiropractic
(4/10/2019)

Petitioner's 3rd Referral Chain

Prairie Spine & Pain Institute (Dr. Kube)
(3/3/2020)

Dr. Trudeau (EMG)
(3/17/2020)

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017232
Case Name	Arthur Cohrs v. XPO CNW Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0266
Number of Pages of Decision	14
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Charles Given
Respondent Attorney	Nicole Breslau

DATE FILED: 7/19/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARTHUR COHRS,

Petitioner,

vs. NO: 20 WC 017232

XPO CNW, 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 medical expenses, causal connection, duration of disability,and prospective medical care, and being advised of the facts and law, corrects and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission corrects the clerical errors in the Arbitrator's Decision to conform to the evidence adduced at hearing. Page 3, line 10 should read "moderately severe hypertrophy". Page 4, first full paragraph at line 5 the word "accident" should be added following the date May 6, 2020. Page 4, first full paragraph, line 8 should be corrected to read "equivocal". Page 5, first full paragraph, line 4 should be corrected to read "equivocal". Page 6, second full paragraph line 2 should be corrected to read January 21, 2021. All else is affirmed and adopted.

IT IS THERFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 26, 2021, is hereby corrected as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to temporary partial disability benefits totaling $11,406.24, which has been previously paid by Respondent, for the period between July 1, 2020 through November 16, 2020, representing 19 and 6/7 weeks as provided in Section 8(a), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $11,406.24 for temporary partial disability benefits previously paid and finds all benefits have been previously paid and so no such benefits are due, as set forth in the corrected Conclusions of Law attached hereto and set forth incorporated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to reasonable and necessary medical expenses under §8(a) of the Act and finds all expenses have been previously paid and no benefits are due. This award in no instance shall be a bar to further hearing, pursuant to Section 19(b) of the Act and determination of a further amount of compensation for reasonable and necessary medical expenses.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is to be re-evaluated by Dr. An, which may include radiographic testing, to determine whether Petitioner's condition is still symptomatic and to determine whether Dr. An continues to recommend surgery, pursuant to Sections 8.2 and 8(a) of the Act subject to the Medical Fee schedule, as set forth in the corrected Conclusions of Law attached hereto and incorporated herein

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit of $11,406.24 for benefits for temporary partial disability benefits previously paid pursuant to Section 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent is entitled to a credit for medical expenses previously paid in the amount of $7,217.92 and Respondent shall hold Petitioner harmless for any medical expenses for which Respondent claims a credit pursuant to Section 8(j), as set forth in the corrected Conclusions of Law attached hereto and incorporated herein.

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 $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.

July 19, 2022

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

SJM/msb
o-05/25/2022
44

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC017232
Case Name	COHRS, ARTHUR v. XPO CNW INC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Charles Given
Respondent Attorney	Nicole Breslau

DATE FILED: 8/26/2021

THE INTEREST RATE FOR THE WEEK OF AUGUST 24, 2021

/s/Frank Soto, Arbitrator

Signature

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)

Arthur Cohrs
Employee/Petitioner

v.

XPO, CNW Inc.
Employer/Respondent

Case # **20** WC **017232**

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 **July 29, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **May 6, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**80,745.60**; the average weekly wage was $**1,552.80**.

On the date of accident, Petitioner was **52** years of age, ***Married*** with **0** dependent children.

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

Respondent shall be given a credit of $**0** for TTD**, $11,406.24** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**11,406.24**.

Respondent is entitled to a credit of $7,217.92 under Section 8(j) of the Act.

ORDER

Petitioner is entitled to be re-evaluated by Dr. An, which may include radiographic testing, to determine whether Petitioner's condition is still symptomatic and to determine whether Dr. An continues to recommend surgery, pursuant to Sections 8.2 and 8(a) of the Act subject to the Medical Fee schedule, as set forth in the Conclusions of Law attached hereto and incorporated herein;

Petitioner is entitled to temporary partial disability benefits totaling $11,406.24 for the period between July 1, 2020 through November 16, 2020, representing 19 and 6/7 weeks, as provided in Section 8(a) of the Act. Respondent is entitled to a credit of $11,406.24 for benefits previously paid and finds all benefits have been paid and so no such benefits are due, as set forth in the Conclusions of Law attached hereto and incorporated herein;

Respondent is entitled to a credit for medical treatment in the amount of $7,217.92 and Respondent shall hold Petitioner harmless for any medical expenses of which Respondent claims a credit pursuant to Section 8(j) , as set forth in the Conclusions of Law attached hereto and incorporated 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.

By: /o/ *Frank J. Soto* **AUGUST 26, 2021**
Arbitrator

ICArbDec19(b)

Procedural History:

This case proceeded to trial pursuant to Sections 19(b) and 8(a) of the Act. The dispute issues were whether Petitioner's current condition of ill-being is causally connected to his injury; whether Petitioner is entitled to TPD benefits; whether Respondent is entitled to a credit for benefits paid; and whether Petitioner is entitled to prospective medical care. (Arb. Ex. #1).

Findings of Fact

Arthur Cohrs (hereafter referred to as "Petitioner") testified that on May 20, 2020 he has been employed by XPO CNW, Inc., (hereafter referred to as "Respondent) for 28 years. Petitioner testified he was employed as a driver/sales representative and as driver/sales representative he was required to drive a truck and move freight.

Petitioner testified that on May 6, 2020, he was trying to raise landing gear on a trailer which he could barely move due to a mechanical issue. Petitioner testified he gripped the handle with both hands and applied pressure to the handle when he felt a pop in his low back. Petitioner testified he thought the back pain would go away and, when it did not, he went to Physicians Immediate care.

On May 26, 2020, Petitioner presented to Physicians Immediate care complaining of constant low back and buttock pain since May 6, 2020. Petitioner reported a sudden onset of radiating pain after yanking on a trailer crank when he felt a pop in his low back. Petitioner said the pain and numbness was abnormal. Petitioner reported he had a similar problem 5 years ago on the same side.[1] X-rays were taken which showed no fractures or dislocations. Petitioner was diagnosed with low back pain and proscribed Acetaminophen and Naproxen. Petitioner returned to work without restriction and told to use a back brace. (Px1). Petitioner underwent an MRI on June 24. 2020, placed on light duty restrictions and referred to Suburban Orthopedics. (Px1, Px2).

On July 20, 2020, Petitioner presented to Dr. Novoseletsky, of Suburban Orthopedics. At that visit, Petitioner reported experiencing sharp low back pain radiating down the right buttock into the posterior aspect of the right leg while cranking on equipment at work. The records state that Petitioner reported the accident to his supervisor and he continued to work a few weeks with pain. Petitioner reported he was unable to stand for long periods of time and, when he does, this right leg becomes numb and the pain increases. Petitioner rated his pain as 2 out of 10 but, he said, his pain increases with prolong standing and sitting. Petitioner told Dr. Novoseletsky that he previously underwent a L5 discectomy in 2014 which he fully recovered. Dr. Novoseletsky examination noted negative Waddell signs. The MRI, dated June 24, 2020, identified severe right and moderately severe left foraminal narrowing at L5-S1 due to lateralizing disc bulging and spondylitic spurring with moderately severe hypertrophic. Dr. Novoseletsky diagnosed lumbar radiculitis and foraminal stenosis and he prescribed physical therapy and placed Petitioner on light duty. (Px 2). Petitioner testified he

[1] Dr. Howard An testified that Petitioner underwent a laminectomy, microdiscectomy and foraminotomy at L5-S1 on May 1, 2014. Petitioner was released to return to work without any restrictions on July 11, 2014. (Px 3).

started working light duty work on July 1, or 2, 2020 and started physical therapy on July 23, 2020 at Athletico. (Px7).

On August 11, 2020, Petitioner presented to Dr. An, of Midwest Orthopaedics at Rush, who performed Petitioner's 2014 back surgery.[2] Petitioner testified he had not seen Dr. An since being discharge from his care in 2014. In his report dated August 11, 2020, Dr. An stated Petitioner previously underwent a right-sided microdiscectomy in 2014 with a relief of his symptoms and that Petitioner had been doing well until sustaining a May 6, 2020. Petitioner experienced a pop in his back and the sudden onset of extreme right lower extremity pain after performing an extension event at work. At that visit, Petitioner reported pain goes from the posterior buttock down the posterior thigh down into the posterior calf. The examination noted 4/5 strength at the right gastric and an unequivocal straight leg raise test on the right side. Dr. An indicated the MRI showed a paracentral disc protrusion at L5-S1 which was severe on the right side. Dr. An also noted the MRI also showed severe right-sided lateral recess stenosis at the L4-L5 level. Dr. An stated Petitioner's symptoms correspond to the imaging and Petitioner has double crush pathology of the L5 and S1 nerve roots with lateral recess stenosis at L4-5 and lateral recess stenosis at L5-S1. Dr. An recommended L4-S1 decompression and fusion. Dr. An issued sedentary work restrictions and no lifting greater than of 10 pounds. (Px 4).

On November 10, 2020, Petitioner attended a Section 12 examination with Dr. Babak Lami. At that visit, Petitioner reported injuring his low back on May 6, 2020 while cranking landing gear. Dr. Lami testified that Petitioner complained of low back pain and numbness going down his posterior thigh, posterior calf, and the bottom of his right foot. Dr. Lami also testified that Petitioner reported undergoing back surgery six years ago but denied experiencing back problems prior to his injury. Dr. Lami testified Petitioner reported pain levels of 9 out of 10. (Rx 1, pgs. 12-13). Petitioner testified that he did not discuss a pain scale with Dr. Lami.

Dr. Lami testified the MRI showed degenerative changes from L5-S1 with a loss of disc height at every level and postoperative changes at L5-S1. Dr. Lami opined the MRI does not show any traumatic findings. (Rx. 1, pg. 19). Dr. Lami diagnosed axial back pain and multiple degenerative changes. (Rx. 1, pg. 22). Dr. Lami opined that Petitioner's condition was not related to the alleged injury. Dr. Lami testified that waiting three weeks before seeking medical attention was not consistent with someone who needs a two-level spinal fusion. (Rx. 1, pg. 22). Dr. Lami opined that Petitioner's condition is a manifestation of a long-standing back problem unrelated to any work. (Rx. 1, pg. 23). Dr. Lami further opined that Petitioner does not require further medical treatment and could return to work full duty. (Rx. 1, pg. 24).

Dr. An testified he examined Petitioner on August 11, 2020 after Petitioner suffered a new injury while cranking landing gear at work. Dr. An testified that he previously performed surgery on Petitioner in May of 2014 and Petitioner returned to full duty work as of July 16, 2014. (Px 3, pg. 9-10). Dr. An testified he

[2] Petitioner underwent back surgery on May 1, 2014 consisting of a laminectomy, microdiscectomy and foraminotomy at L5-S1 on the right. The postoperative diagnosis was right L5-S1 paracentral disk herniation, right S1 radiculopathy and axial back pain. (Px 4).

recommended surgery consisting of decompression and fusion from L4 to S1 after reviewing the MRI and examining Petitioner. (Px. 3, pg. 10). Dr. An testified the mechanism of injury caused an aggravation of Petitioner's L4-L5 and L5-S1 condition beyond its normal progression. Dr. An testified that prior to May 6, 2020 Petitioner's low back was not symptomatic. Dr. An testified that is not aware of Petitioner's current complaints so he is unable to offer an opinion as to Petitioner's current state. (Px. 3, pg. 25). Dr. An opined the need for surgery was related to Petitioner's May 6, 2020 injury and, if Petitioner was still symptomatic, he would continue to recommend surgery. (Px 3, pg. 13). Dr. An testified he would expect Petitioner to be still be in pain or have symptoms after returning to work full duty. (Px. 3, pg. 15). Regarding the time it took Petitioner to seek medical care after his injury, Dr. An testified it is not uncommon for someone to receive medical treatment three weeks after being injured and the delay in receiving treatment would not change his opinions. (Px. 3, pg. 14).

Dr. An testified he had reviewed Dr. Lami's independent medical examination report. Dr. An identified two areas of discrepancies. Dr. An had noted 4/5 gastroc muscle strength whereas Dr. Lami noted 5/5. Dr. An testified weakness in the lower extremities can vary from day to day so it would not be unusual that he noted 4/5 while Dr. Lami noted 5/5. Dr. An also testified he noted an unequivocal straight leg raising test which he defined as "not clearly positive, but also not negative." (Px 3, pg. 22). He testified just like strength the findings could vary from day to day. (Px 3, pg. 22).

Petitioner testified he returned to work full duty in November of 2020 because his benefits were cut off, he is married with two children and has a mortgage. Petitioner testified things changed at work so he no longer moves freight. Petitioner testified Respondent hired dock workers who now move the freight. Petitioner testified he can work if he puts zero stress on his back. Petitioner testifies he also takes precautions at work by using a chair and pillow. Petitioner testified if he stands more than 5 minutes, he experiences pain in his low back so he uses a chair when right leg goes numb. Petitioner testified he has problems lifting, pulling, or pushing and these activities cause tightness and pain which radiates down his right leg. Petitioner testified he usually experiences these symptoms 1-2 times a day but sometimes it does not. Petitioner testified each day, when he returns home from work, he places ice and heat on his back before going to bed.

Petitioner testified his back is sore every day and the pain wakes him up at night. Petitioner testified uses a chair while showering and a stool while cooking. Petitioner said he continues to take over the counter medications for pain. Petitioner testified the pain effects his quality of life and he is unable to do things like go for a walk with his wife. Petitioner testified he would like to undergo the surgery recommend by Dr. An.

Hector Iga testified for Respondent. Mr. Iga testified he is the senior manager at the Elgin terminal and has worked for Respondent for 17 years. Mr. Iga testified Petitioner is a good employee and does a good job. Mr. Iga testified that Petitioner is a credible person. Mr. Iga testified Petitioner's job is a physically demanding job requiring one to climb in and out of trailers, pulling overhead doors and lifting between 50-75 pounds. Mr.

Iga testified Respondent has more dock hands than they had in 2020 and the dock workers were hired to keep the drivers off the docks.

Mr. Iga testified he reviewed Petitioner's timecards and did not note any deficits or any inability to perform his job duties after the May 6, 2020 injury. Mr. Iga testified after returning to work Petitioner was not given any accommodations. Mr. Iga testified the supervisors have more involvement with the drivers than he does.

Mr. Iga testified Petitioner obtained his U.S. Department of Transportation Medical Examiner's Certificate on January 21, 2023. (See Rx. 6). The certificate is required to maintain employment. Mr. Iga testified the exam does not require any lifting. Petitioner testified he underwent the exam at Physicians Immediate Care and he received a two year certification.

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).

Regarding issue "F" is Petitioners current condition of ill being caused related to the injury, the arbitrator finds as follows:

In pre-existing condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the pre-existing disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of a pre-existing condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill.2d 30, 36-37. When a worker's physical structures, diseased or not, give way under the stress of their usual tasks, the law views it as an accident arising out of and in the course of employment. *General Electric Co. v. Industrial Comm'n,* 89 Ill.2d 432, 60 Ill.Dec. 629, 433 N.E.2d 671 (1982). When an employee with a preexisting condition is injured in the course and of his employment the Commission must decide whether there was an accidental injury which arose out of the employment, whether the accidental injury aggravated or accelerated the preexisting condition or whether the preexisting condition alone was the cause of the injury. *Sisbro, Inc. Industrial Comm'n*, 207 Ill.2d 193, 278 Ill.Dec. 70,797 N.E.2d 665, (2003). Even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill.2d 52, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989). Accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was "a" causative factor in the resulting condition of ill-being. *Rock Road Construction Co. v. Industrial Comm'n*, 37 Ill.2d. 123, 127; 227 N.E.2d 65 (1965).

The Arbitrator finds Petitioner has proven by the preponderance of credible evidence that his current condition of ill being is causally related to his work accident of May 6, 2020. As stated above, the Arbitrator found Petitioner to be credible. Petitioner testified he was not having problems with his lumbar spine prior to his May 6, 2020 work accident. The records reflect Petitioner underwent surgery in 2014 but returned to work full duty for Respondent, in a physically demanding position, and continued to work for Respondent without seeking medical treatment for his low back until his May 6, 2020 work accident. The Arbitrator notes that Petitioner provided consistent histories to his medical providers. The courts presume that when a person seeks treatment for an injury, he will not falsify statements to a physician from whom he expects to receive medical aid. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill.2d 590, 592, 119 N.E.2d 224, 226 (1954). The fact that Petitioner underwent a previous surgery at the same level is a factor to consider in determining causal connection but the Arbitrator finds it significant Petitioner started experiencing his symptoms after the accident of May 6, 2020. The Arbitrator notes no medical evidence was produced showing underwent medical treatment after being released to return to work full duty in 2014 nor was any evidence proffered showing that Petitioner complained of low back problems or could not perform his job duties after returning to work full duty for Respondent in 2014.

Petitioner testified to a sudden onset of pain that radiated down his leg and feeling a pop in his back while cranking a handle of the truck. Dr. An testified the mechanism of injury was consistent with causing an aggravation of Petitioner's underlying degenerative condition. (Px 3). The Arbitrator finds the opinions of Dr. An more persuasive than Dr. Lami. The Arbitrator notes that Dr. An had the benefit of performing surgery the prior surgery and, therefore, was more familiar with Petitioner and his medical history than Dr. Lami, who only examined Petitioner on one occasion. The Arbitrator also notes that Dr. An testified it was not uncommon for one to receive medical care three weeks after sustaining a back injury. Petitioner testified that he believed his back pain would go away but when it did not, he sought medical treatment. An employee should not be penalized who diligently worked through progressive pain until it affected his ability to work or require medical treatment. *Durand v. Industrial Comm'n*, 224 Ill.2d 53, 862 N.E.2d 918, 923 (2006).

With Respect to Issue "K", Prospective Medical Treatment, the Arbitrator Finds as Follows:

Section 8(a) of the Act entitles a claimant to compensation for all necessary medical, surgical, and hospital services "thereafter incurred" that are reasonably required to cure or relieve the effects of injury. Procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of the statute, even if they have not yet been paid. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 710 (2nd Dist. 1997).

The Arbitrator finds Petitioner has proven by the preponderance of credible evidence that he is entitled to be re-evaluated by Dr. An which could include radiographic testing, pursuant to Sections 8.2 and the fee schedule. If Dr. An finds that Petitioner continues to by symptomatic and Dr. An continues to recommend the

same surgery, the Arbitrator would endorse the surgery. After the Section 12 examination, Petitioner's medical care was denied. Dr. An testified that he was not aware of Petitioner's current complaints so he was unable to offer an opinion as to Petitioner's current state. (Px. 3, pg. 25). Dr. An testified he was not aware if Petitioner was still symptomatic but, if he was, Dr. An would continue to recommend surgery. (Px 3, pg. 13). Dr. An testified that Petitioner previously needed surgery and the need for surgery was related to Petitioner's May 6, 2020 injury. Dr. An testified he would expect Petitioner to be still be in pain or have symptoms after returning to work full duty. (Px. 3, pg. 15).

Petitioner testified he still wants the surgery to recommended by Dr An. Petitioner testified he returned to work in a full duty capacity November 17, 2020, because Respondent would no longer accommodate his light duty restrictions and terminated his benefits. Petitioner testified he returned to work because he is the main wage earner for the family. Petitioner testified at work he tries to avoid heavy lifting and uses a lumbar pillow while in his truck and a chair while on the dock. Petitioner testified he also uses a chair while showering and a stool while cooking. Petitioner testified that after returning home from work he places ice and heat on his back.

With respect to issue "L" whether Petitioner is entitled to TPD benefits, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, "*i.e.,* until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Effective June 29, 2020, Petitioner was on restricted duty pursuant to the medical providers at Physicians Immediate Care. (Px 1). On July 20, 2020, Dr Novoseletsky updated the work restrictions. (Px 2). He was then given light duty restrictions by Dr. An on August 11, 2020. (Px 4). Respondent accommodated the restrictions between July 1, 2020 and November 16, 2020. Petitioner returned to work in a full duty capacity November 17, 2020 following Dr Lami's report. Petitioner provided check stubs for this period and Respondent provided print outs showing the hours Petitioner worked. (Px 6, Rx1 and Rx 5). Based upon the Arbitrator's findings in Section F above and the evidence, Petitioner is entitled to TPD benefits between July 1, 2020 and November 16, 2020. Respondent is entitled to a credit for the TPD benefits they paid totaling $11,406.24. As such, the Arbitrator finds that all TPD benefits were paid and no additional benefits are due.

With respect to issue "N", whether Respondent is not entitled to a credit under Section 8(j), the Arbitrator finds as follows:

Respondent is claiming a credit in the amount of $7,217.92 for medical treatment Respondent previously paid, pursuant to Section 8(j). (Arb. Ex. #1). Respondent submitted into evidence medical payment logs. The Arbitrator finds that Respondent is entitled to a credit for medical treatment in the amount of $7,217.92 and Respondent shall hold Petitioner harmless for any medical expenses of which Respondent claims a credit pursuant to Section 8(j).

By: /o/ *Frank J. Soto* August 25, 2021
Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC025058
Case Name	Christopher Rios v. City of Chicago Fleet Management
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0267
Number of Pages of Decision	30
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Quinn Brennan

DATE FILED: 7/21/2022

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund (§4(d))
☒ Affirm with clarification	☒ 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

CHRISTOPHER RIOS,

Petitioner,

vs. NO: 09 WC 25058

CITY OF CHICAGO - DEPARTMENT OF FLEET 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 medical expenses both current and prospective, 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 following clarification.

Before testimony, the Arbitrator noted that the Request for Hearing form "reflects that there are really no disputes in this case, except as to the nature and extent of the injury." In her decision, the Arbitrator awarded Petitioner all medical bills submitted into evidence, 638&4/7 weeks of temporary total disability/maintenance benefits (for which Respondent received total credit in the amount of $320,307.90), and she found Petitioner permanently and totally disabled as of August 20, 2019. The Arbitrator awarded medical bills including the prescriptions that a Utilization Review found not indicated, even though she held that all but Lunesta excessive and unreasonable. She specified that the parties stipulated that Respondent would pay all outstanding medical and she concluded that stipulation included the prescription medications she found excessive. Finally, the Arbitrator also noted that "as of this hearing, no provider had prescribed a formal detoxification program but the Arbitrator views this claim as ripe for an evaluation as to the best method of weaning Petitioner off the listed medications."

Respondent argues that the Decision of the Arbitrator is inconsistent. It stresses that the Arbitrator found the medications prescribed by Dr. Xia unreasonable and excessive and therefore the Commission should vacate the award of those prescriptions.

The Commission concludes that the Decision of the Arbitrator is not inconsistent. The Arbitrator decided that the stipulation of the parties included Respondent's agreement that it shall pay prescription medication Petitioner already received, even though the Arbitrator did not believe the prescriptions were reasonable and necessary. We agree. She did not award prospective treatment of Petitioner with those prescription medications. In fact, the Arbitrator did not award any prospective medical treatment.

The Commission agrees with the Arbitrator's findings that Dr. Xia's prescriptions for Norco, Tramadol, Cyclobenzaprine, Topiramate, Ondansetron, Rabeprazole, Metro Health A3 Compound Cream, and Lidopro are unnecessary, unreasonable, and excessive. However, the Commission affirms the awards for these enumerated medications based on the parties' stipulation. In addition, with respect to a detoxification program, the Arbitrator correctly noted that no provider had prescribed a formal detoxification program as of the date of the arbitration hearing. Additionally, the Commission also agrees with the Arbitrator that this claim is ripe for an evaluation of the best method of weaning Petitioner off the listed medications. Nevertheless, like the Arbitrator, the Commission is constrained to award any such prospective detoxification because the issue is technically not before the Commission on review and no specific program has been presented to the Commission.

In addition, the Commission notes that there is a clerical error in the Order section of the Decision of the Arbitrator. The Arbitrator's award specifies a benefit rate of $753.08 for temporary total disability and maintenance benefits. However, that is the average weekly wage cited by the Arbitrator and stipulated by the parties. In fact, the benefit rate for temporary total disability and maintenance is 66&2/3% of the average weekly wage, as is the permanent total disability rate. *See*, 820 ILCS 320 §§ 8(b), 8(b)2. That would translate to a benefit rate of $502.05, which was the rate the Arbitrator correctly cited as the permanent total disability rate. In addition, the credit that the Arbitrator awarded (also stipulated by the parties) corresponds with the benefit rate of $502.05 and not $753.08. Finally, the Order section correctly cites the period of total temporary total disability/maintenance of 352&2/3 and 286&2/3 weeks, respectively. The Commission modifies the Decision of the Arbitrator to correct the clerical errors noted above.

Finally, the Commission notes that in the Arbitrator's "Procedural History" section she wrote "the disputed issues include the reasonableness and necessity of medication prescribed by Dr. Xia and nature and extent." The Commission concludes that that sentence may be somewhat inconsistent with the Decision of the Commission. Accordingly, the Commission deletes that sentence from the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that pursuant to Sections 8(a) and 8.2 of the Act, Respondent shall pay the lesser of the fee schedule or negotiated rate with providers or lienholders and shall hold Petitioner harmless for the same for all outstanding medical bills and expenses.

IT IS FURTHER ORDERED BY THE COMMMISSION that Respondent shall pay Petitioner temporary total disability benefits in the sum of $176,722.77 ($502.05 per week for a period of 352&2/7 weeks), subject to Respondent's stipulated credit.

IT IS FURTHER ORDERED BY THE COMMMISSION that shall pay the sum of maintenance benefits of $143,587.25 ($502.05 per week for a period of 286&2/7 weeks), subject to Respondent's stipulated credit, as the parties stipulated that Petitioner was entitled to maintenance benefits through the hearing of August 19, 2021.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner permanent total disability benefits of $502.05 per week for life beginning August 20, 2021, as provided in Section 8(f) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

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.

July 21, 2022

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

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

DLS/dw
O-5/25/22
46

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC025058
Case Name	RIOS, CHRISTOPHER v. CITY OF CHICAGO FLEET MANAGEMENT
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	26
Decision Issued By	Molly Mason, Arbitrator

Petitioner Attorney	Steven Seidman
Respondent Attorney	Quinn Brennan

DATE FILED: 10/12/2021

/s/Molly Mason, Arbitrator

Signature

INTEREST RATE WEEK OF OCTOBER 5, 2021 0.05%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION – PERMANENT TOTAL DISABILITY

Christopher Rios
Employee/Petitioner

v.

City of Chicago Fleet Management
Employer/Respondent

Case # **09** WC **025058**

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 **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **September 20, 2021.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 29, 2009**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**39,160.16**; the average weekly wage was $**753.08**.

On the date of accident, Petitioner was **30** years of age, single with **0** dependent children.

Petitioner has in part received reasonable and necessary medical services.

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

Respondent shall be given a credit of $**176,721.60** for TTD, $**0** for TPD, $**143,586.30** for maintenance, and $**0** for other benefits, for a total credit of $**320,307.90**.

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

ORDER

PURSUANT TO SECTIONS 8(A) AND 8.2 OF THE ACT, RESPONDENT SHALL PAY THE LESSER OF THE FEE SCHEDULE OR NEGOTIATED RATE WITH PROVIDERS OR LIENHOLDERS AND SHALL HOLD PETITIONER HARMLESS FOR THE SAME FOR ALL OUTSTANDING MEDICAL BILLS AND EXPENSES, INCLUDING DR. XIA'S PRESCRIPTIONS FOR NORCO, TRAMADOL, CYCLOBENZAPRINE, TOPIRAMATE, ONDANSTERON, RABEPRAZOLE, METRO HEALTH A3 COMPOUND CREAM, AND LIDOPRO; HOWEVER, THE ARBITRATOR FINDS THESE ENUMERATED MEDICATIONS UNNECESSARY, UNREASONABLE AND EXCESSIVE. AS OF THE HEARING, NO PROVIDER HAD PRESCRIBED A FORMAL DETOXIFICATION PROGRAM BUT THE ARBITRATOR VIEWS THIS CLAIM AS RIPE FOR AN EVALUATION AS TO THE BEST METHOD OF WEANING PETITIONER OFF THE LISTED MEDICATIONS.

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $176,722.77 (352 WEEKS X 2/3 X $753.08), SUBJECT TO RESPONDENT'S STIPULATED CREDIT.

RESPONDENT SHALL PAY PETITIONER MAINTENANCE BENEFITS OF $143,587.25 (286 WEEKS X 2/3 X $753.08), SUBJECT TO RESPONDENT'S STIPULATED CREDIT.

RESPONDENT SHALL PAY PETITIONER PERMANENT TOTAL DISABILITY BENEFITS OF $502.05 / WEEK FOR LIFE, BEGINNING AUGUST 20, 2021, AS PROVIDED IN SECTION 8(F) OF THE ACT. THE PARTIES STIPULATED THAT PETITIONER WAS ENTITLED TO MAINTENANCE BENEFITS THROUGH THE HEARING OF AUGUST 19, 2021. ARB EXH 1. COMMENCING ON THE SECOND JULY 15TH AFTER THE ENTRY OF THIS AWARD, PETITIONER MAY BECOME ELIGIBLE FOR COST-OF-LIVING ADJUSTMENTS, PAID BY THE Rate Adjustment Fund***, AS PROVIDED IN SECTION 8(G) OF THE ACT.***

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

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

Molly C Mason

Signature of Arbitrator

October 12, 2021

Christopher Rios v. City of Chicago Fleet Management
Case No. 09 WC 025058

PROCEDURAL HISTORY

This case was previously consolidated with 07 WC 30203. [In 07 WC 30203, the Commission found, in a decision issued on July 13, 2011, that Petitioner sustained a lumbar strain on June 15, 2007 but failed to establish a causal connection between that strain and his then current lumbar spine condition. At the hearing held on August 19, 2021, Petitioner agreed to voluntarily dismiss this claim. The claim has since been voluntarily dismissed.]

On August 4, 2010, former Arbitrator DeVriendt conducted a hearing in both cases pursuant to Sections 19(b) and 8(a) of the Act. In the decision he issued in 09 WC 25058, he found that Petitioner suffered a compensable accident on May 29, 2009 while working as a garage attendant for Respondent. He further found that Petitioner established causation as to a lower back injury. He found that Petitioner's medical treatment was reasonable and necessary. He awarded various medical expenses, temporary total disability from May 29, 2009 through August 4, 2010 and prospective lumbar surgery. The Commission modified the award of prospective care by awarding a re-evaluation by Dr. Michael "for the purpose of clarifying his surgical recommendation" but otherwise affirmed and adopted the Arbitrator's decision. PX 1. Neither party appealed the Commission's decision.

Arbitrator Mason conducted a permanency hearing in 09 WC 25058 on August 19, 2021. Respondent agreed to satisfy any outstanding medical expenses "per the lower of the fee schedule or negotiated rate" and hold Petitioner harmless for same. Petitioner agreed that Respondent is entitled to Section 8(j) credit for the medical expenses it previously paid. The disputed issues include the reasonableness and necessity of medication prescribed by Dr. Xia and nature and extent. Arb Exh 1. At the parties' request, the Arbitrator left proofs open. Proofs were closed on September 20, 2021, with Petitioner offering various job search records (PX 27) and Respondent offering a utilization review report (RX 4).

ARBITRATOR'S FINDINGS OF FACT

Medical

On May 29, 2009, Petitioner was working at a fuel site for Respondent, using a pressure washer to clean a grease pit. (PX18.) He was pulling a power washer line when the line snapped, jerking his body and producing intense back pain. (PX18.)

Later that day, Petitioner presented to Dr. James Egan complaining of 10/10 bilateral lower back pain as well as 5/10 pain radiating down both legs. (PX5.) On examination, Petitioner's lumbar range of motion was severely limited by pain. (PX5.) Palpation revealed severe tenderness in the lumbar region. Straight leg raise tests were positive bilaterally. (PX5.) Dr. Egan noted severe tenderness and spasm in the lumbar extensor paraspinal muscles, with moderate tenderness and spasm over the piriformis muscles. (PX5.)

Dr. Egan diagnosed Petitioner with lumbar sprain/strain, lumbar radiculitis, and myalgia.

(PX5.) He opined that Petitioner's prognosis was guarded. He ordered Petitioner to attend three weeks of physical therapy, referred him to Dr. Alexander for pain management, and instructed him to go to the emergency room for any new or increased symptoms. (PX5.)

Petitioner presented to the Emergency Room at Mercy Hospital and Medical Center later in the evening of May 29, 2009. (PX4.) Petitioner was diagnosed with sacral strain, muscle spasm, and low back pain. He was discharged on May 30, 2009 with prescriptions for acetominophen-hydrocodone, cyclobenzaprine, and ibuprofen. (PX4.)

On June 1, 2009, Petitioner presented to MercyWorks on Ashland where he saw Dr. Joseph Mejia. (PX2.) Petitioner reported his history of injury; he was pulling on a hose at work Friday night when he felt a twinge in his back that progressed to excruciating pain. (PX2.) Petitioner complained of back pain at 9/10. (PX2.) On examination, Petitioner had reduced range of motion in his back as well as a positive straight leg raise test on both sides. (PX2.) Dr. Mejia assessed Petitioner with a lumbosacral strain. He gave Petitioner Ibuprofen and Flexeril and took him off work until further notice. (PX2.)

On June 5, 2009, Petitioner's MercyWorks file was updated with the note: "COF is denying this claim, close case." (PX2.)

Petitioner continued treating with Dr. James Egan through September 14, 2009 with consistent complaints of lower back pain and radicular pain down one or both legs. (PX5.)

On June 16, 2009, Petitioner underwent a lumbar spine MRI at The Open MRI and CT Center on referral from Dr. Egan. (PX6.) The MRI revealed disc herniations at L4-5 and L5-S1 as well as an annular tear at L5-S1. (PX6.) In particular, the radiologist noted a broad-based central disc herniation at L4-5 compressing the thecal sac and causing spinal stenosis. (PX6.) He further observed a mild misalignment—anterolisthesis—between L4 and L5. (PX6.)

On July 7, 2009, Dr. Egan referred Petitioner to Dr. Tian Xia at Fullerton Medical Center. (PX5.) Petitioner first presented to Dr. Xia on July 14, 2009 complaining of lower back pain. (PX10.) Dr. Xia performed a transforaminal epidural steroid injection at L5-S1 and L4-5 under fluoroscopic guidance and instructed Petitioner to return in 7-10 days. (PX10.) Petitioner returned to Dr. Xia on July 28, 2009, where he received a second set of injections. (PX10.) On August 11, 2009, Petitioner received a third set of such injections from Dr. Xia. (PX10.)

On October 5, 2009, Petitioner presented to neurologist Dr. David Calimag for an EMG study on referral from Dr. Xia. (PX7.) Dr. Calimag stated that the results showed evidence of bilateral nerve root irritation at L5-S1, compatible with bilateral L4-S1 radiculopathy. (PX7.)

On November 17, 2009, Petitioner presented to Dr. Calimag for a second EMG/NCV study on referral from Dr. Xia. (PX7.) Dr. Calimag stated: "EMG of both lower extremities shows evidence of bilateral L5S1 root irritation." (PX7.) He further noted low amplitude results from the NCV of the peroneal, tibial and sural nerves. (PX7.) Dr. Calimag opined that these results were compatible with bilateral L5-S1 radiculopathy and with early axonal neuropathy. (PX7.)

On December 19, 2009, Petitioner underwent a three-level lumbar discogram at Fullerton-

Kimball Surgical Center performed by Dr. Xia. (PX9.) Petitioner's pre-operative pain of 4/10 increased to 8/10 with injection to L5-S1, but did not increase with injection at the other levels. (PX9.) A lumbar spine CT scan taken that same day at MRI Lincoln imaging Center revealed a moderate central disc protrusion at L4-5 with diffuse extravasation along the right side of the annulus, as well as a moderate central disc protrusion at L5-S1 with diffuse extravasation along the left side of the annulus. (PX3.) Both protrusions were estimated at 5mm in size. (PX3.)

On October 19, 2011, Petitioner underwent a lumbar discogram at Fullerton-Kimball Surgical Center performed by Dr. Xia. (PX9.) On this occasion, Petitioner's pain increased with injection to L4-5. (PX9.)

On December 17, 2011, Petitioner underwent a non-contrast MRI of the lumbar spine at MRI of River North. (PX17.) The MRI was limited by a motion artifact. (PX17.) It demonstrated a broad-based central disc protrusion at L4-5 with mild facet arthrosis impressing on the ventral thecal sac surface and producing mild central canal stenosis; moderate left neural foraminal stenosis and moderate right neural foraminal stenosis at L4-5; and a central disc protrusion at L5-S1 without significant central canal or foraminal stenosis. (PX17.)

On March 22, 2012, Petitioner presented to MetroSouth Medical Center where he saw Dr. Ronald Michael on referral from Dr. Xia. (PX18.) Petitioner reported continuing lower back pain radiating into his legs, right worse than left. (PX18.) He was experiencing numbness, tingling, and weakness in his lower extremities, left worse than right. (PX18.) Petitioner related his history of injury and summarized his treatment to date. (PX18.) By this point Petitioner had received three epidural steroid injections and had undergone two and a half months of physical therapy. Petitioner indicated these measures provided only temporary relief. (PX18.)

Dr. Michael interpreted the lumbar spine MRI as showing herniated discs at L4-5 and L5-S1, as well as an annular tear at L5-S1. (PX18.) Dr. Michael also reviewed a concordant lumbar diskogram demonstrating "significant tear and focal herniation toward the left" at L5-S1, as well as a "large disc bulge" at L4-5. (PX18.)

Dr. Michael stated that Petitioner had "clearly failed conservative measures, which have included the long long passage of time, medical management, physical therapy, and lumbar epidural steroid injections." (PX18.) Dr. Michael opined that Petitioner had two options: learn to live with the pain or undergo a lumbar spinal fusion surgery. (PX18.) Petitioner related that he had been living with the injury for three years and that he felt incapacitated by it—he could no longer live with the pain. (PX18.) Petitioner chose surgery. (PX18.)

Later on March 22, 2012, Dr. Michael performed surgery on Petitioner at MetroSouth Medical Center. (PX18.) Specifically, Dr. Michael performed a posterolateral decompressive diskectomy, diskogram, and posterior lumbar interbody fusion at L4-5 and L5-S1. (PX18.)

Subsequently, Petitioner resumed treatment with Dr. Xia. (PX9.) On June 27, 2012, Dr. Xia administered transforaminal epidural steroid injections to Petitioner's spine at L5-S1 and L4-5 at Fullerton-Kimball Surgical Center; and on July 24, 2012, Dr. Xia administered a second set of transforaminal epidural steroid injections to Petitioner's spine at L5-S1 and L4-5, with an injection to L3-4 as well. (PX9.) Pre- and post-operatively, Dr. Xia diagnosed Petitioner with lumbar radiculitis

and post lumbar surgery syndrome. (PX9.)

On August 6, 2012, Petitioner returned to Dr. Xia complaining of severe right leg pain unimproved by the injections. (PX11.) He reported falling against a wall while trying to walk on crutches two to three days post-injection. (PX11.) Dr. Xia ordered a closed MRI and another EMG test with Dr. Calimag; he opined that Petitioner might require another surgery or a spinal cord stimulator. (PX11.) He diagnosed Petitioner with post-laminectomy syndrome. (PX11.)

On August 17, 2012, Petitioner underwent a repeat non-contrast MRI of the lumbar spine at MRI of River North. (PX11.) The radiologist identified a magnetic susceptibility artifact in the image related to the interbody fusion cage at L5-S1, appearing to show the cage extending into the right neural foramen at L5-S1 and contacting the nerve root within the right neural foramen. (PX11.) The radiologist recommended correlating this finding with a CT scan. (PX11.) In addition, the scan disclosed moderate right neural foraminal stenosis at L4-5 that appeared to have remained stable since the scan prior. (PX11.)

On August 30, 2012, Petitioner returned to MetroSouth Medical Center with stabbing pain radiating down his right leg as well as rashes appearing all over his body during the prior two weeks. (PX18.) He reported rashes on his head and face, lower back, and his upper and lower extremities. (PX18.) The rashes began during a bout of physical therapy. (PX18.) Petitioner reported that he had allergies to certain low-gold content jewelry and possibly to zinc, and that he had been attempting to manage the rashes at home with Benadryl. (PX18.)

Upon consultation with Dr. Ronald Michael, Dr. Michael observed rashes diffusely in Petitioner's upper extremities from the forearms down, about the lumbar spine posteriorly, in Petitioner's forehead, and in the lower extremities distally in the legs. (PX18.) Dr. Michael started Petitioner on steroids and sought a consultation with an allergist and immunologist. (PX18.) He noted that it was possible Petitioner suffered from a titanium allergy, and that the pedicle screws, rods, and interspinous process plates installed in Petitioner's spine were each made of a medical-grade titanium alloy and could be a cause of the allergic reaction. (PX18.) On September 2, 2012, Dr. Michael noted that Petitioner's rash was improving with steroids but that the etiology of the rashes remained unclear. (PX18.)

On September 4, 2012, Petitioner underwent surgery to remove his lumbar spine hardware. (PX18.) The rods and pedicle screws were removed from Petitioner's spine bilaterally, followed by an osteotomy to reveal and remove the interspinous process plates at L4-5 and L5-S1. (PX18.) A radical laminotomy was then performed at L5-S1 as well as medial facetectomy to expose the cage, which was then removed from the spine. (PX18.) A biological film was observed around one of the pedicle screws, though this did not appear infected. (PX18.) There did not appear to be tissue change aside from discoloration that sometimes occurs with titanium. (PX18.)

Having removed the old hardware, the surgeons then decided to reconstruct Petitioner's spine. (PX18.) A radical diskectomy was performed with insertion of a new cage and placement of a new prosthetic interbody device. (PX18.) New rods, pedicle screws, and set screws were inserted and torque tightened. (PX18.)

Post-operatively, Petitioner was diagnosed with possible pseudoarthrosis, possible hardware

irritation, and possible allergy. (PX18.) He was discharged home with a back brace on September 8, 2012. (PX18.)

Petitioner followed up with Dr. Xia over the months post-surgery. (PX11.) On September 17, 2012, Petitioner reported pain from his lower back into his left thigh and down his right leg into the calf and foot. (PX11.) On October 8, 2012, Petitioner reported that he had fallen at home. (PX11.) He continued to experience the same level of back pain, but with some increased pain and tingling in his posterior thighs. (PX11.) On October 29, 2012, Petitioner reported that his rash was now much better, (PX11.) On November 26, 2012, Petitioner reported that his pain remained the same. (PX11.) Dr. Xia stated that Petitioner was to begin physical therapy the next week. (PX11.) On December 31, 2012, Petitioner complained of continuing right leg pain barely controlled with medications. (PX11.)

On January 8, 2013, Petitioner underwent a Section 12 examination with Dr. Kenneth Candido. (RX2.) Dr. Candido opined that Petitioner was exaggerating his symptoms, but that "the most recent MRI available for my review from 8/17/12 and which predates the second spinal surgery appears to indicate that the surgical hardware originally placed was impinging upon the right L5 nerve root in the neural foramen." (RX2.) Dr. Candido expressed concern that a complication of the original lumbar fusion had caused the hardware to migrate inappropriately into contact with the nerve root, or else that the hardware had simply been misplaced to begin with. (RX2.) Dr. Candido stated that Petitioner may indeed have suffered L5 nerve root compression from such an event, and that this would explain why his right leg pain was significantly worse after the surgery than before. (RX2.)

Asked about causation, Dr. Candido wrote: "Yes, the condition and diagnosis are related to the work accident as described." (RX2.) He opined that Petitioner's pain management treatment was medically necessary and was causally related to the work accident. (RX2.) Dr. Candido opined that Petitioner was unable to return to regular job duties; he imposed restrictions of sedentary work only, no bending or stooping, no climbing stairs, no crawling, no lifting or carrying more than 10 pounds, and no sitting for more than 15 minutes without being provided the opportunity to stand and stretch. (RX2.) Dr. Candido recommended that Petitioner undergo an EMG/NCV; he stated that although Petitioner had already undergone such a test, the results had not been provided to him by Respondent. (RX2.) He stated that his restrictions were contingent upon the results of an EMG study as well as an updated MRI scan. (RX2.) Dr. Candido opined that Petitioner was not yet at MMI. (RX2.)

Petitioner returned to Dr. Xia on January 28, 2013. (PX11.) He had been going to PT; Dr. Xia noted a small improvement in Petitioner's condition. (PX11.)

On February 25, 2013, Petitioner returned to Dr. Xia. (PX11.) Petitioner's pain complaints remained the same; Dr. Xia restarted Petitioner on physical therapy (PX11.) Dr. Xia stated that he agreed with Dr. Candido's recommendation for an EMG/NCV test, and referred Petitioner to Dr. David Calimag to obtain one. (PX11.)

Petitioner underwent another EMG test with Dr. Calimag on March 4, 2013. (PX7.) Dr. Calimag wrote: "EMG of both lower extremities shows evidence of bilateral L5S1 root irritation. NCV of both peroneal, tibial and sural nerves are slow for his age, with low amplitude responses." (PX7.) Dr. Calimag opined that these results were compatible with bilateral L5-S1 radiculopathy, right worse than left, as well as axonal neuropathy. (PX7.) Dr. Calimag opined that these results were, in fact, worse than the results from Petitioner's EMG of November 7, 2011. (PX7.)

On March 12, 2013, Petitioner underwent a non-contrast lumbar spine CT scan at Southlake MRI & Diagnostic Center. (PX19.) The CT scan revealed facet arthrosis at L4-5 and L5-S1 with mild to moderate bilateral foraminal narrowing at L4-5 and mild to moderate left foraminal narrowing at L5-S1; a minimal disc bulge at L3-4 with moderate facet arthrosis and mild bilateral foraminal narrowing; and a revised lumbar interbody fusion with hardware. (PX19.)

On October 1, 2013, Petitioner was seen by University of Chicago dermatologist Dr. Min Deng on Dr. Michael's referral to address his continuing rashes. (PX21.) Dr. Deng assessed Petitioner with contact dermatitis of unspecified cause. (PX21.) He was prescribed hydroxizine and triamcinolone ointment. (PX21.)

Petitioner began to treat with Dr. Michael at the Illinois Neurospine Institute. (PX8.) On October 2, 2013, Petitioner presented to Dr. Michael with complaints of unchanged low back and right leg pain. (PX8.) Dr. Michael ordered repeat imaging of the lumbar spine and kept Petitioner off work with instructions to return in two weeks. (PX8.)

On October 30, 2013, Petitioner returned to Dr. Michael with updated films. (PX8.) He reported that he had been unable to move the prior week due to extreme left lower extremity pain. (PX8.) On examination, Petitioner remained neurologically unchanged. (PX8.) Dr. Michael reviewed the new lumbosacral spine films, which he opined showed the new hardware to be in good alignment. (PX8.) He instructed Petitioner to maintain his current activity level and restrictions and to return after his allergy panel. (PX8.)

On November 21, 2013, Petitioner underwent patch tests with Dr. Andrew Scheman on referral from the University of Chicago. (PX22.) Dr. Scheman stated that the patch tests returned positive for nickel sulfate, indicating contact allergy to certain metals. (PX22.) He further stated that nickel is present in surgical stainless steel and in one titanium alloy: nitinol. (PX22.)

On January 22, 2014, Petitioner returned to Dr. Michael. (PX8.) Petitioner complained of low back back as well as bilateral lower extremity pain, numbness, and tingling, worse on the right than on the left. (PX8.) Dr. Michael reviewed Petitioner's allergy panel demonstrating a nickel allergy. (PX8.) Dr. Michael stated that the titanium hardware should not have nickel in it, but that there may be a possible impurity. (PX8.) Dr. Michael opined that the appearance of the rash two distinct times 6 months apart after each surgery cannot be a coincidence; he offered Petitioner surgical exploration of the fusion and removal of the hardware as an option. (PX8.)

On February 25, 2014, Petitioner followed up with Dr. Michael complaining of lower back and lower extremity pain worsened by the cold weather. (PX8.) The pain in his right leg now extended down the back of his knee into the dorsum of the foot. (PX8.) Petitioner opted not to go ahead with exploratory surgery at the time. (PX8.)

On May 15, 2014, Petitioner returned to Dr. Deng for treatment of his continued rashes. (PX21.) Dr. Deng stated that Petitioner's presentation was clinically consistent with contact dermatitis; he stated that Petitioner had tested positive for allergy to nickel, and that "Inciting agent is most likely nickel." (PX21.)

On August 19, 2014, Petitioner returned to Dr. Michael complaining of lower back pain with numbness and tingling past his knees. (PX8.) The pain again radiated down his right leg, through the back of his knee into the dorsum of his foot. (PX8.) Petitioner presented with a slight facial rash as well as a flare-up of the rash on his arms. (PX8.) Petitioner expressed his desire to go ahead with the surgery. (PX8.)

On September 5, 2014, Dr. Michael performed a surgical removal of Petitioner's pedicle screws, removal of Petitioner's instrumentation hardware, removal of Petitioner's interspinous process plates at L4-5 and L5-S1, exploration of fusion, and intraoperative EEG at MetroSouth Medical Center. (PX8.) A midline skin incision was performed in Petitioner's back under fluoroscopic guidance; the subcutaneous tissues were incised, exposing the spine. (PX8.) The interspinous process plates were exposed with the soft tissue removed and reflected laterally. (PX8.) A torque screwdriver was used to disassemble each interspinous process plate, with two sides of each plate then removed sequentially. (PX8.) Dr. Michael then continued the process of exposure until the pedicle screw and rod constructs were exposed bilaterally; he then used a set screwdriver to remove the set screws on the right side, freed the rod from the soft tissues, and removed the rod; and then repeated the process on the left side. (PX8.) Pedicle screwdrivers were then inserted into the right L4 and L5 screw heads, but attempts to move the pedicle screws produced no movement. (PX8.) He repeated this with each set of pedicle screws; Dr. Michael opined that there was no movement for any of them, indicating a proper fusion. (PX8.) The pedicle screws were then removed and Dr. Michael irrigated the wound with bacitracin and sutured the deep muscle and fascia in Petitioner's back into an approximation of their original positions. (PX8.) Petitioner was then stapled up and his wound dressed. (PX8.) Both pre- and post-operatively, Dr. Michael diagnosed Petitioner as status post-lumbar fusion with possible metal allergy. (PX8.)

Following surgical removal of the hardware, Petitioner returned to Dr. Michael for follow-up on September 20, 2014. (PX8.) Petitioner reported intermittent soreness in his lower back; he reported that the rash was improving. (PX8.) Dr. Michael examined Petitioner and noted, "The rash was indeed resolving." (PX8.)

On October 22, 2014, Petitioner underwent a lumbar spine MRI at Stand-Up Open MRI. (PX20.) The MRI demonstrated severe right neural foraminal stenosis at L5-S1 as well as moderate left neural foraminal stenosis; mild bilateral neural foraminal stenosis at L4-5; facet hypertrophic changes at L4-5 and L5-S1; 12 degrees of levoscoliosis; and a posterior fluid collection likely representing a post-operative seroma. (PX20.)

On November 4, 2014, Dr. Michael observed that Petitioner's rash continued to improve. (PX8.) He prescribed Petitioner a 6-week course of physical therapy. (PX8.) On November 8, 2014, Dr. Michael reviewed Petitioner's MRI of October 22, 2014; he opined that it showed a widely patent spinal canal, but expressed concern at what appeared to be "increased buckling of the posterior longitudinal ligament on the upright scanning at L3-4 relative to the disks that were fused inferiorly, L4-5 and L5-S1." (PX8.)

On December 23, 2014, Petitioner returned to Dr. Michael presenting with low back pain, lower extremity pain worse on the right, and a rash. (PX8.) Regardless, Petitioner reported tremendous improvement in his rash as well as dramatic improvement of his lower back pain despite flare-ups with bad weather and activity. (PX8.) Dr. Michael continued him on physical therapy. (PX8.)

On February 17, 2015, Petitioner followed up Dr. Michael; his back pain was worse, with worsened lower extremity pain on the right and a shocking sensation in his right foot. (PX8.)

On March 31, 2015, Petitioner presented to Dr. Michael once more. (PX8.) Petitioner reported falling in his garage the week prior after catching his foot and tripping, hitting a snow blower and landing on plastic totes. (PX8.) He broke his fall with his left arm. (PX8.) Petitioner reported hip pain as well as increased twinges of lower back pain and increased right foot pain. (PX8.) Dr. Michael prescribed four weeks of physical therapy. (PX8.)

Petitioner followed up with Dr. Michael again on April 28, 2015 complaining of bilateral hip ache and right lower extremity pain from his knee down to his toes with numbness and tingling. (PX8.) Dr. Michael prescribed Petitioner medications, as Dr. Xia was not able to see him at that time. (PX8.) Dr. Michael instructed Petitioner to return in 8 weeks for routine follow-up. (PX8.)

On August 11, 2015 Petitioner returned to Dr. Michael reporting worsened back pain with bilateral shooting pains down his lower extremities worsened by recent rains. (PX8.) He reported left lateral thigh numbness as well as numbness and tingling in his right foot. (PX8.) Petitioner reported that he had been experiencing right lower extremity weakness, and that he had recently stumbled once or twice. (PX8.) Dr. Michael prescribed Petitioner analgesic cream for symptom relief. (PX8.)

Petitioner next followed up with Dr. Michael on October 6, 2015 with complaints of aches and pains due to the weather. (PX8.) He reported left low back pain with aches and pains in the right lower extremity, worse in the posterior thigh with activity. (PX8.)

On December 5, 2015, Petitioner returned to Dr. Michael complaining of pain and soreness in the midline and paraspinal areas of his back as well as shock-like right foot dysesthetic pains accompanied by twitching. (PX8.) He reported that his pain worsened with prolonged sitting, standing, or walking. (PX8.) Dr. Michael had Petitioner follow up with Dr. Xia. (PX8.)

Petitioner resumed treating with Dr. Xia on January 6, 2016. (PX11.) Dr. Xia performed a transforaminal epidural steroid injection at L3-4, L4-5, and L5-S1 under fluoroscopy. (PX11.)

Petitioner returned to Dr. Xia on February 1, 2016—he reported having done very well after the injection. (PX11.) Petitioner's pain was gradually returning, but at a baseline better than before the injection. (PX11.)

On examination, Dr. Xia observed continued significant restriction of Petitioner's lumbar range of motion with flexion and extension but improved from prior examinations. (PX11.) Dr. Xia had scheduled an FCE for Petitioner. (PX11.) Petitioner expressed a desire to return to work as a firefighter; Dr. Xia stated: "I explained to him that I do NOT think it is possible with his condition." (PX11.)

On February 25, 2016, Petitioner underwent the FCE at Athletico. (PX24.) The test was terminated, however, after testing demonstrated that Petitioner's blood pressure and heart rate had spiked to levels in excess of safe testing parameters. (PX24.)

On March 7, 2016, Petitioner followed up with Dr. Xia complaining of severe pain down his right leg. (PX11.) He reported that he was experiencing a lot of pain going down his right leg during the FCE; Dr. Xia noted that Petitioner's heart rate went up so much that the FCE had to be stopped. (PX11.) On examination, Petitioner exhibited restricted flexion and extension, with a positive straight-leg raise test on the right at 15 degrees. (PX11.) Dr. Xia scheduled repeat transforminal epidural steroid injections. (PX11.)

On March 31, 2016, Petitioner underwent a Section 12 examination with Dr. Jesse Butler. (RX2.) Dr. Butler opined that Petitioner had reached MMI from a surgical standpoint, but that he had yet to achieve maximum therapeutic benefits. (RX2.) He encouraged Petitioner to continue pain management treatment. (RX2.)

On follow-up on April 25, 2016, Petitioner complained of continued pain from his lower back radiating down his right leg. (PX11.) The epidural steroid injections had been denied by Respondent's insurance carrier. (PX11.) Petitioner was in the emergency room for his uncle the night before. (PX11.) He reported that sitting in the Emergency Room all night caused a lot of pain for him. (PX11.)

Petitioner returned to Dr. Xia on June 6, 2016 with the same complaints. (PX11.) Petitioner was unchanged on examination. (PX11.) Dr. Xia had reviewed Dr. Butler's Section 12 report. (PX11.) Dr. Xia opined that Petitioner was not a candidate for a spinal cord stimulator (SCS) due to his nickel allergy; he recommended repeat epidural steroid injections to the lumbar spine to return Petitioner to his pre-FCE baseline. (PX11.) Absent that, he opined, Petitioner was at MMI from a pain management perspective. (PX11.)

On July 13, 2016, Dr. Xia performed a transforaminal epidural steroid injection at L3-4, L4-5, and L5-S1 under fluoroscopy. (PX11.)

On August 1, 2016, Petitioner followed up with Dr. Xia reporting lower back pain with tingling down to the right foot, but with his symptoms overall much improved following the epidural steroid injection. (PX11.) He reported that his pain was controlled with the use of medications and that Zofran helped him control his nausea, but that Petitioner did have severe pain when it rains. (PX11.)

Petitioner continued to follow up with Dr. Xia, reporting on September 12, 2016 that his pain was controlled and that he was able to perform activities of daily living. (PX11.) Dr. Xia opined at this time that Petitioner was able to work a light-duty job. (PX11.)

On September 26, 2016, Petitioner reported to Dr. Xia he had begun limping again but that his pain was still better than before the epidural steroid injections. (PX11.) On October 17, 2016, however, Petitioner followed up with a report that his right leg pain was worsening and that he was starting to have a little bit of pain in his left leg again. (PX11.) Dr. Xia noted that Petitioner was limping badly. (PX11.) Dr. Xia opined that given Petitioner's condition, he would need epidural steroid injections in his spine three to four times per year going forward. (PX11.)

Petitioner's pain continued to worsen until December 3, 2016, when he received another set of epidural steroid injections from Dr. Xia. (PX11.) On January 9, 2017, Petitioner reported that his pain was 50% better. (PX11.) Dr. Xia administered another set of injections on February 4, 2017. (PX11.)

On February 20, 2017, Petitioner reported that his pain was 40% better; Dr. Xia stated that Petitioner was essentially back to pre-FCE levels. (PX11.) Petitioner expressed interest in undergoing physical therapy so that he could take an FCE, find a job, and get back to work. (PX11.) Dr. Xia prescribed physical therapy three times a week for four weeks. (PX11.)

On April 10, 2017, Petitioner followed up with Dr. Xia reporting that his pain had been better ever since the last injection, barring increased pain over the few days prior coinciding with damp weather. (PX11.) On examination, Dr. Xia observed improved ambulation and range of motion. (PX11.) Dr. Xia began weaning Petitioner off of medications with the goal of containing his pain with the minimum amount of medication. (PX11.) Dr. Xia stated that Petitioner should find a job within restrictions set by FCE. (PX11.)

Petitioner was able to control his pain with medications for the next two months or so with periodic worsening based on the weather. (PX11.) However, on June 12, 2017, Petitioner's condition began to worsen again, particularly with respect to his right leg. (PX11.) At this time, Dr. Xia opined that Petitioner could do desk work. (PX11.)

By July 17, 2017, Petitioner was in misery. (PX11.) Petitioner reported that his back and right leg pain had worsened considerably over the prior month, and that he was essentially bed-ridden any time it rained. (PX11.) Dr. Xia opined that it was time for further epidural steroid injections. (PX11.)

However, the steroid injections were not approved by insurance. (PX11.) Petitioner's condition degenerated over the following months. (PX11.) On October 30, 2017, Dr. Xia stated that Petitioner's right leg and foot were getting worse daily, and that Petitioner was asking for more medications to control the pain "for the first time in a long time." (PX11.)

On November 27, 2017, Petitioner returned to Dr. Xia. (PX11.) He reported burning pain from his lower back, down his right leg and into his right foot, worse with movement and barely controlled with pain medication. (PX11.)

On examination, lumbar flexion was limited to 45 degrees (versus a normal 90-degree range of motion) and extension was limited to 10 degrees (as opposed to a 30-degree normal range of extension). (PX11.) Petitioner was unable to walk on either his heels or his toes. (PX11.) Lumbar facet loading was positive on both sides, and straight-leg raise tests were positive bilaterally. (PX11.) Dr. Xia specifically observed that Petitioner was negative for Waddell's signs. (PX11.)

On January 10, 2018, Petitioner presented to Susan Foundos-Biegel, DDS complaining of broken teeth and cavities. (PX23.) Petitioner related his history of injury and of his treatment for said injury; he asked whether his medications had played a role in producing his cavities and broken teeth. (PX23.) Foundos-Biegel identified eight teeth in need of extraction and a bridge and more teeth more to receive fillings, but only after treating the decayed surfaces. (PX23.)

On January 24, 2018, Petitioner returned to Foundos-Biegel with a bag of his medications so that Foundos-Biegel could identify which medications might be causing his tooth problems. (PX23.) She listed them in a chart. (PX23.) Upon examination of Petitioner's mouth, Foundos-Biegel noted gingival inflammation. (PX23.) Foundos-Biegel employed Ultracare anesthetic gel and gum brushing,

then irrigated Petitioner's mouth with Chlorhexidine. (PX23.)

Petitioner returned to Foundos-Biegel on February 2, 2018. (PX23.) Foundos-Biegel employed a combination of "B," "A2," "A3," and calcium hydroxide to treat decay in three teeth. (PX23.) On further follow-up, Foundos-Biegel observed minimal plaque and minimal bleeding. (PX23.) However, on March 9, 2018, Foundos-Biegel stated that Petitioner was starting to show more areas of decay. (PX23.) She opined that he would require an examination every three months. (PX23.) She instructed Petitioner to purchase high-fluoride Prevident toothpaste. (PX23.)

Petitioner continued to follow up with Dr. Xia, reporting the same symptoms and demonstrating the same limitations on physical examinations. (PX11.) Dr. Xia continued to prescribe medications to control his symptoms while awaiting approval of further steroid injections. (PX11.) Eventually, approval was given and on March 21, 2018, Dr. Xia again administered transforminal epidural steroid injections to Petitioner's spine at L3-4, L4-5, and L5-S1. (PX11.) On April 16, 2018, Petitioner reported that his pain was a lot better, albeit with fluctuations due to the weather. (PX11.)

Petitioner returned to Foundos-Biegel on March 30, 2018 where she treated decay in four new teeth. (PX23.) On May 9, Foundos-Biegel observed plaque and bleeding in Petitioner's mouth. (PX23.) He reported that he had been using Prevident fluoride varnish as instructed. (PX23.) Foundos-Biegel set forth a treatment plan involving 6-11 crowns as well three teeth to be replaced by implants or a bridge. (PX23.)

On May 15, 2018, Petitioner underwent another Section 12 examination with Dr. Candido. (RX2.) Petitioner reported pain of 8/10 at rest, and 10/10 with activity. (RX2.) He reported difficulty sleeping, nausea, lack of appetite, constipation, drowsiness, diarrhea and headaches. (RX2.) On examination, Dr. Candido noted that Petitioner was ambulating with a cane and favoring his left leg with notable foot drop on the right side. (RX2.) Dr. Candido observed pain to palpation over the dorsal surgical incision area, positive straight-leg raise examinations at 30 degrees while seated, and limited range of motion of the spine and lower extremities. (RX2.) Dr. Candido observed reduced sensation in Petitioner's legs above the knee bilaterally, with hypersensitivity in his right toes. (RX2.) Dr. Candido also noted a "marked decrease in right foot motor function with respect to inversion, plantar and dorsiflexion." (RX2.)

Dr. Candido diagnosed Petitioner with a chronic pain condition—post-laminectomy syndrome—refractory to treatment. (RX2.) He opined that Petitioner's prognosis for recovery was extremely poor: "his symptoms are likely permanent and are likely due to some chronic changes in his central nervous system (brain and spinal cord)." (RX2.) Dr. Candido opined that Petitioner's symptoms were related to his work accident. (RX2.) Dr. Candido opined that Petitioner was at MMI, as the only treatment not yet attempted—a spinal cord stimulator—was contraindicated due to Petitioner's nickel allergy. (RX2.) Dr. Candido opined that Petitioner may have been suffering from opioid-induced hyperalgesia, and recommended that he begin a program of opioid cessation under physician supervision. (RX2.) Dr. Candido opined that Petitioner could work at a light-duty level due to dynamometer readings suggesting high muscle strength in his quadriceps and iliopsoas muscles. (RX2.)

On June 2, 2018, Petitioner followed up with Dr. Xia complaining of constant pain down both legs. (PX11.) His sleep was poor, but Petitioner was trying to remain active. (PX11.) He remained

unchanged on examination; Dr. Xia refilled his medications. (PX11.) The problems continued as of July 30, 2018. (PX11.) Dr. Xia read Dr. Candido's report, which he agreed with "most of." (PX11.) Physical examination continued to produce the same limitations and no Waddell's signs. (PX11.)

Over the year that followed, Petitioner continued to follow up with Dr. Xia with consistent complaints of lower back pain radiating down his legs, right worse than left. (PX11.) On October 22, 2018, Petitioner complained that he felt very weak; he requested physical therapy, which Dr. Xia agreed would be helpful. (PX11.) On November 26, 2018, Dr. Xia observed that Petitioner was limping again and that his ambulation was stable only when he used a cane. (PX11.)

On December 24, 2018, Dr. Xia noted that results from drug toxicity testing had come back negative for abuse. (PX11.) Petitioner was still experiencing pain radiating down both legs and walked with a limp. (PX11.) Petitioner was again limited in range of motion; Petitioner again could not stand on his heels or his toes; and he again presented with positive straight leg raise and lumbar facet loading tests, as well as no Waddell's signs. (PX11.)

Petitioner's condition continued to worsen. (PX11.) On March 25, 2019, Petitioner could no longer stand up straight due to his back pain—he was observed to wear a back brace that Dr. Xia had given him years prior. (PX11.) Dr. Xia noted that injections and physical therapy had all been denied. (PX11.)

On April 12, 2019, Petitioner returned to his dentist Foundos-Biegel complaining of having lost filling #11. (PX23.) On this date, Foundos-Biegel performed gingivectomy surgery to address hyperplasia in Petitioner's gums. (PX23.)

By July 1, 2019, Petitioner was experiencing increased numbness in his right leg as well as increased feelings of urinary urgency. (PX11.) Dr. Xia observed that Petitioner's right leg had atrophied to the point that it was visibly smaller than his left leg. (PX11.) He stated: "his condition is now worse, probably due to delay of treatment….I am very worried about this, further delay of treatment can cause more permanent injury and more disability." (PX11.)

At his follow-up of August 5, 2019, Petitioner was reporting more urgency not just in urination, but also in fecal movement. (PX11.) On October 21, 2019, Petitioner reported that pain, numbness, and tingling now reached down to his feet bilaterally for the first time. (PX11.) Petitioner reported that he was on multiple pain medications but was trying to control the amount he used. (PX11.) Dr. Xia observed that Petitioner was losing muscle strength in both legs. (PX11.) Dr. Xia stated that Petitioner was begging for physical therapy and another spine injection. (PX11.)

On November 14, 2019, Petitioner followed up with Foundos-Biegel; he reported that the filling in tooth #8 had fallen out. (PX23.) Foundos-Biegel placed a temporary cement filling into the tooth and referred him to an oral surgeon to extract teeth #8, 9, and 14. (PX23.) On December 5, 2019, Petitioner returned with moderate bleeding and light plaque. On January 30, 2020, he returned complaining of swelling in tooth #19. (PX23.) Foundos-Biegel referred Petitioner to Dr. Pulver for extraction of teeth #1, 8, 9, 14, 16, 17, 19, 30, and 32. (PX23.)

On March 16, 2020, Dr. Xia noted that further injections were finally approved; on March 21, 2020, Dr. Xia administered them. (PX11.) Petitioner returned on April 13, 2020 reporting that the

injection removed the pain almost entirely for two weeks; it had gradually returned, but was still 50% better than before. (PX11.) Petitioner's pain returned with bad weather over the following months, and Dr. Xia performed repeat injections on August 8, 2020. (PX11.)

On July 6, 2020, Petitioner expressed interest in a spinal cord stimulator despite his nickel allergy; and on August 17, 2020, Dr. Xia discussed the possibility of spinal cord stimulator therapy with Nalu, which did not involve an implanted battery. (PX11.) Dr. Xia postulated that this might be the solution to his issue with metal allergies. (PX11.) Petitioner expressed excitement at the idea, as he was eager to get off of pain medications due to increased issues from their side effects. (PX11.)

On September 14, 2020, however, Petitioner returned to Dr. Xia having undergone a skin test with the spinal cord stimulator leads from Nalu. (PX11.) The leads caused him to develop a rash again; Dr. Xia stated that the rash was apparent on Petitioner's hands and face. (PX11.) Dr. Xia opined that Petitioner was not a candidate for any spinal cord stimulator on the market due to his metal allergies; he opined that Petitioner would need 4 injections a year going forward, as well as 24 to 36 sessions of physical therapy and continued PO and topical medications for pain control. (PX11.)

On October 14, 2020, Petitioner returned to Foundos-Biegel with bright red swollen gums. (PX23.) Moderate calculus was found throughout his mouth; Petitioner was prescribed more Prevident. (PX23.)

Petitioner continued to treat with Dr. Xia. (PX11.) On October 19, 2020, Petitioner reported pain down both legs—he reported that he was unable to stand or sit for a long time due to the pain. (PX11.) Petitioner presented Dr. Xia with the list of medications that Foundos-Biegel believed to be damaging his teeth: they were cyclobenzaprine, topamax, lunesta and setraline. (PX11.) Dr. Xia changed Petitioner's pain medications based on this list. (PX11.) Among other things, Petitioner was taken off of cyclobenzaprine; however, on November 16, 2020, Dr. Xia observed that Petitioner was having increased back spasms without it. (PX11.)

On December 28, 2020, Dr. Xia noted that Petitioner continued to have leg pain bilaterally as well as inability to stand or sit for long periods. (PX11.)

Petitioner continued to treat with Dr. Xia through to August 2, 2021. (PX11.) Petitioner's symptoms continued in his back and both legs during that period; worse with ambulation and better with rest. (PX11.) Petitioner reported that he was using Norco sparingly to manage his symptoms. (PX11.)

At the arbitration hearing, Petitioner testified that he still treats with Dr. Xia. (T 33.) He sees Dr. Xia approximately once a month, and Dr. Xia uses pads to electrically stimulate Petitioner's muscles. (T 33-34.) At the hearing, Petitioner was presented with a bag of 18 different medications, including hydrocodone and topical creams. (T 34-37.) Petitioner testified that he takes two of each pill daily on normal days—and when he is in excruciating pain from humid conditions, twice that amount. (T 35-36.) He uses the topical medicines when he has back spasms, as when he sits in a chair too long. (T 35.) In addition, Petitioner takes four Excedrin up to two or three times per day. (T 37.)

Petitioner testified that his medication regimen has changed quite a bit over the course of his treatment due to the fact that he will build up a tolerance to one medication or another and have to

switch to something different. (T 65-66.) For instance, he was once on Vicodin, but he no longer takes it. (T 66.)

Petitioner testified that his teeth have continued to deteriorate as a result of taking all of these medications. (T 37-38.) Petitioner has lost six teeth as of the date of hearing; Foundos-Biegel has informed him that 78% of his teeth will need to be removed due to the fact that they are rotting above the gumline. (T 38.)

On August 31, 2021, Respondent received a utilization review from MedInsights conducted by Dawn Keith, RN and Eddie Sassoon, M.D., a physiatrist. (RX4.) In the review, Keith and Dr. Sassoon scrutinized Dr. Xia's treatment between February 27, 2017 and November 16, 2020 for medical necessity and appropriateness. They concluded that the treatment was "partially medically necessary and appropriate." (RX4.) Keith and Dr. Sassoon opined that the epidural steroid injections were medically necessary and appropriate, due to Petitioner's radicular complaints, but that the medications prescribed were "in gross excess of ODG recommendations." (RX4.)

In particular, the reviewers stated that Norco and Tramadol are not intended for long-term use and that they should not be continued without documented functional improvement compared to baseline. They opined that there was no documentation of such functional improvement in Dr. Xia's records. (RX4.) Keith and Dr. Sassoon opined that Cyclobenzaprine is not intended for long-term use, and that it should be prescribed for less than two weeks at a time, no more than two to three times per year. (RX4.) Keith and Dr. Sassoon also stated that Lunesta was not indicated because there was no documented pain-induced insomnia in Dr. Xia's records. (RX4.)

Keith and Dr. Sassoon stated that Topiramate is not recommended to treat low-back pain or radiculopathy. (RX4.) They indicated that Ondansteron is not recommended for nausea or vomiting secondary to opioid use. (RX4.) They also opined that Rabeprazole was not indicated without documentation that Petitioner was at risk for NSAID-related ulceration or that he had an appropriate gastric disease. (RX4.)

As for the topical medications, Keith and Dr. Sassoon stated that there was not clearly established necessity for Metro Health A3 compound cream. They described this cream as a second-line treatment and indicated that, without trial and failure (or inability to tolerate) first-line oral adjuvant medications, necessity for such treatment was not established. (RX4.) Similarly, they stated that Lidopro was not recommended because topical analgesics are not first-line treatments for chronic pain. (RX4.)

Vocational Rehabilitation and Job Search

On September 21, 2017, rehabilitation counselor Kari Stafseth of Vocamotive authored an initial evaluation and labor market survey determining whether vocational rehabilitation would be appropriate for Petitioner. (RX1.) Petitioner was reliant on a cane to walk; he reported that he was in constant pain. (RX1.) Stafseth opined that Petitioner could no longer perform his job as a garage attendant. (RX1.) Stafseth opined that Petitioner could find a job within the desk-work-only restrictions Dr. Xia had imposed at that time, however. (RX1.) She identified desk-only jobs available in September 2017 as an administrative assistant, office clerk, hospital admitting clerk, receptionist, customer service representative, personnel scheduler, and dispatcher, each paying between $10 and $15 an hour. (RX1.)

She recommended that Petitioner undergo vocational rehabilitation for 8 hours a day, 5 days a week, including vocational testing "in order to assess [his] aptitudes and interests." (RX1.)

Petitioner underwent vocational testing with Vocamotive on January 11, 2018. (RX1.) The WRAT-4 test revealed that Petitioner possessed sentence comprehension below a 10th-grade level, word-reading and math computation each below a 7th-grade level, and spelling below a 5th-grade level. (RX1.) He only spelled 13 words correctly out of 42. (RX1.) With respect to math, Petitioner demonstrated difficulties with fractions, decimals, and percentages; he likewise demonstrated difficulty with both long division and basic algebra. (RX1.) A career ability placement survey scored Petitioner in the below-average range for verbal reasoning, and in the low range for both numerical ability and language usage. (RX1.) Stafseth opined that these results correlated with his WRAT-4 test. (RX1.)

In mid-January 2018, Petitioner began to undergo vocational rehabilitation with Vocamotive. (RX1.) Petitioner reported that he had difficulties traveling to the office, as it required him to be in a car for 1 hour each way. (RX1.) Further, he reported not taking his pain medications on those days he had to come in, as he did not want to crash or get a DUI. (RX1.) Petitioner underwent a keyboarding program; he demonstrated an ability to type at 19 words per minute. (RX1.) On subsequent sessions coinciding with inclement weather, Petitioner was observed to be in tremendous pain. (RX1.) Stafseth noted that Petitioner would not complain about pain overtly, but would exhibit signs such as paleness, turning red in the face, and leaning on the wall for support. (RX1.) On one occasion, Stafseth observed Petitioner unable to sit still: "His face was very pale, and he appeared as if he was going to vomit." (RX1.)

In her progress report of March 11, 2018, Stafseth concluded that vocational rehabilitation was not appropriate for Petitioner at that time: "He is giving a diligent effort when at this office; however, his level of pain is impacts [sic] him on a fulltime basis and at this time he would not be able to be placed in any job at this time. Medical case management is required." (RX1.)

On September 6, 2019, approximately one-and-a-half years later, Petitioner was interviewed by certified rehabilitation counselor Susan A. Entenberg; on November 6, 2019, Entenberg authored a vocational rehabilitation evaluation. (PX25.) As part of the evaluation, Entenberg reviewed a selection of Petitioner's pertinent medical records between 2012 and 2019, including three operative reports, the FCE report of February 25, 2016, Dr. Candido's May 15, 2018 Section 12 report, and Dr. Xia's progress reports of July 1, 2019 and August 26, 2019. (PX25.) Entenberg also reviewed Petitioner's vocational rehabilitation evaluation and records from Vocamotive. (PX25.)

Entenberg opined that Petitioner was not able to return to his prior work with Respondent as a garage attendant. (PX25.) Based upon Petitioner's inability to safely complete his FCE; his age of 42 years; his long work history as a garage attendant; his having been out of the work force for more than 10 years; his numerous medications to control his symptoms (including narcotics); his use of two canes or crutches to walk or stand; his limited functional tolerances, greatly affected by weather conditions; and the bilateral lower extremity weakness, right leg atrophy, and urinary urgency reflected in his medical records with Dr. Xia, Entenberg opined that Petitioner was functionally unemployable, was without access to a stable labor market, and that he was not an appropriate candidate for vocational rehabilitation. (PX25.)

With respect to the *National Tea* standard, Entenberg opined that Petitioner had suffered a loss

in both earning power and job security due to his medical restrictions and the nature of his prior job; that Petitioner's prior vocational training had been terminated after 2 months due to Petitioner's inability to participate and commute to the training; that Petitioner was not a good training candidate based on his prior vocational training experience; that his past experience as a garage attendant provided him with no skills transferable to lighter duty work; that Petitioner had a work life expectancy of approximately 25 years; that he had cooperated in all treatment to date; and that he required ongoing pain management to maintain his work capacity per his medical records. (PX25.)

On March 30, 2020, Susan Entenberg testified at an evidence deposition. (PX26.) Entenberg is a vocational rehabilitation counselor as well as a vocational expert. (PX26, 5.) She has worked in vocational rehabilitation for approximately 45 years. (PX26, Ex. 1.) Her job is to help individuals with some type of impairment reach their maximum level of functioning. (PX26, 6.)

Entenberg testified that age, education, certifications, licenses, and military experience are the most important biographical data she looks at during an evaluation. (PX26, 8.) Entenberg testified that Petitioner is 42 years old, a high school graduate who attended college for 6 months before dropping out. (PX26, 8.) He had an EMT license and a defibrillator certification at one point, but these are no longer valid. (PX26, 8.) Petitioner's primary goal had been to enter the fire academy and become a firefighter, though this never happened for him. (PX26, 8.) Petitioner had no military experience. (PX26, 8.)

Entenberg testified that Petitioner's godfather drove Petitioner to the evaluation. Petitioner walked into the room using two canes that Dr. Xia had prescribed. (PX26, 8-9.) Entenberg noted that Petitioner walked very slowly and with great difficulty. (PX26, 9.) Petitioner did not sit down during the entirety of the interview. Instead, he leaned against a wall for support. (PX26, 9.)

Enterberg performed a job analysis, which means describing the duties and responsibilities of Petitioner's job as a garage attendant. (PX26, 10.) His former job responsibilities included changing oil, lubricating, and changing filters for trucks and other city vehicles; checking fluid levels; checking and rotating tires; washing the vehicles; pressure washing their motors; cleaning the garage facility; and recording services in the computer. (PX26, 10.) In his old job, Petitioner was lifting 80 pounds occasionally and 50 pounds frequently, as well as standing, walking, squatting and kneeling. (PX26, 11.) Enterberg opined that this was considered a low-level semiskilled job without any skills transferable to lighter duty work. (PX26, 11.)

Entenberg opined to a reasonable degree of vocational rehabilitation certainty that Petitioner could not return to his past work. (PX26, 12.) Enterberg based this opinion on the fact that Petitioner's old position required heavy exertion, on the fact that Dr. Xia restricted Petitioner based on his FCE, and on the fact that Petitioner was not even able to complete said FCE safely. (PX26, 12.) Entenberg further opined to a reasonable degree of vocational rehabilitation certainty that Petitioner was not an appropriate candidate for vocational rehabilitation. (PX26, 12.)

Enterberg opined that Petitioner would need to develop computer skills in order to access employment. (PX26, 13.) However, his attempt to do that with Vocamotive was terminated after two months, as Petitioner was not able to commute to the training and could not participate in the program. (PX26, 13.) She further noted that Petitioner had very limited functional tolerances greatly affected by weather conditions; she noted that he took numerous medications, including narcotics; she noted that

Petitioner ambulates with difficulty using two canes, crutches, or a walker; and that per Dr. Xia, Petitioner has bilateral lower extremity weakness, atrophy of the right leg, urinary urgency, and a worsening of his condition. (PX26, 13.) She testified that the combination of all those factors led her to opine that Petitioner is not a good candidate for vocational rehabilitation and that he "really has no functional access to a labor market." (PX26, 13.)

Entenberg testified that Petitioner would not be able to succeed with an online computer skills course. The testing with Vocamotive showed Petitioner to have too many skills essential for clerical work—such as reading and sentence comprehension—at below-average levels. (PX26, 20.) He would need one-on-one help to learn. (PX26, 20.) Even then, it would be very hard for him to do it for any length of time due to his inability to sit for extended periods of time without significant pain. (PX26, 20.) A standing desk such as the one Vocamotive provided presents its own problems, as Petitioner requires a cane for balance while standing. (PX26, 20.) Any vocational program Petitioner were to undergo would have to be extremely customized for his needs. (PX26, 21.) She further noted that being able to perform at a basic functional level is not enough to get Petitioner clerical work—he would have to improve to the point where he possessed marketable skill. (PX26, 21.)

On August 19, 2021, Petitioner offered testimony before the Arbitrator. Petitioner testified that he began working for the City of Chicago in 1998 as a tollbooth attendant on the Skyway. (T 46-47.) He later transferred to a job performing roadside service assistance, and then the union got him a job as a garage attendant after the City leased out the Skyway. (T 47-48.) Petitioner is a high school graduate, but he left college after attending for 6 months in 2000. (T 45-46.) Petitioner used to be physically active outside of work: he belonged to a paintball team, and would engage in baseball games, football games, and wrestling with friends. (T 45.) Petitioner testified that he used to play video games, but otherwise developed no computing skills during his life. (T 44-45.) He does not know how to use Microsoft Word and he does not engage with social media aside from the console gaming platform Xbox Live. (T 45.)

Petitioner testified that Vocamotive personnel were attempting to help him get sedentary work back in 2018. (T 51-53.) Petitioner testified that he gave the program his best effort. (T 63.) He recalled that it was Vocamotive that chose to stop him from continuing to attend vocational rehabilitation in person due to concerns about his safety; however, Petitioner testified that he was then hampered in his attempts to participate in the training remotely due to spotty internet. (T 63.)

After Vocamotive suspended vocational rehabilitation, Petitioner began to look for work on his own at Respondent's request. (T 52-53.) He was given a form where he was to enter 20 applications per week and submit them to the Department of Finance. (T 54-55.) Petitioner documented his job search in the form of screenshots taken on his Android phone with dates ranging from June 16th to August 28th, 2019. (T 54; PX27.) Petitioner's dozens and dozens of applications largely focused on positions involving mechanical and automotive expertise. (PX27.)

These applications did not lead to any interviews or success at all. (T 56.) At a certain point, the Department of Finance ceased to handle workers' compensation cases and Petitioner received no further communication indicating that he was to continue his job search or instructing him as to where he might continue sending job search logs. (T 57-58.)

Petitioner testified he had to move back in with his mother beginning with his first surgery. He

was still living with her as of the hearing. (T 44.) Petitioner testified his typical day consists of watching his mother, who is a senior citizen, "doing everything," including taking care of his two dogs. Petitioner testified he is not physically able to perform 99 percent of the housework. (T 44.) He cannot kneel without help. (T 49.) He tries to limit his walking and is careful to avoid tripping over stoops, door jambs, or objects on the floor. (T 43.) He tries to avoid traversing stairs as well. (T 49-50.) Petitioner testified that he uses canes from Dr. Xia, a walker from Dr. Michael, and crutches left over from surgery. (T 41.) Petitioner testified that he always hangs onto walls and braces himself against counter tops and the like. (T 44.) Carrying anything further reduces Petitioner's ability to walk. (T 49.) He cannot carry anything heavier than a gallon of milk. (T 49.) Petitioner testified that his grandfather had better posture and an easier time walking in his 80s than he himself has today at age 45. (T 60.)

Petitioner testified that he is also restricted from driving while on medications, and that he is restricted to sedentary work only by Dr. Candido. (T 43, 58.) Petitioner further testified that he is restricted from sitting, standing, or walking for more than 30 minutes at a time on doctor's orders. (T 42-43.) Petitioner gets uncomfortable sitting for more than 30 to 45 minutes; he expressed discomfort at the arbitration hearing due to the length of time he had been sitting in a chair. (T 18-19, 48.)

Petitioner testified that he is frequently unable to sleep from the pain; he stated that there are times where he will go nearly a week without sleeping due to the amount of pain he is in. (T 40.) Petitioner testified that his ability to tolerate humid conditions has deteriorated over time. (T 41.) He used to be able to tolerate higher humidity, but now anything over 46% humidity lays him out. (T 41.) He has had a new air conditioner unit and a dehumidifier installed at his mother's house to try to combat this. (T 41.)

Petitioner testified that, prior to the work accident, he enjoyed working, paintballing and engaging in sports. His current recreational activities consist of playing games online.

Under cross-examination, Petitioner testified he first met with Stafseth at Vocamotive on April 26, 2017. Stafseth administered various tests and showed him around the office. If the Vocamotive records show he worked with Stafseth for three months in 2018, he would agree. Vocamotive stopped providing rehabilitation services in April 2018. On a couple of occasions Vocamotive personnel sent him home and walked him to his car. He believes he "gave it his all" but he was concerned he would kill himself driving to Vocamotive's offices, due to his pain and medication needs. He does not recall Dr. Candido recommending that he wean off narcotics. He is still seeing Dr. Xia. The pain medications that Dr. Xia prescribes work for a while and then lose their effectiveness. He has not continued submitting job search records because no one told him to do this. He has not recently looked for work because he feels no one would hire him. He is barely able to walk.

ARBITRATOR'S CONCLUSIONS OF LAW

J. Were the medical services that were provided to Petitioner reasonable and necessary?

The parties have stipulated as to all issues except for the reasonableness and necessity of Petitioner's medical treatment, and nature and extent. (*See* T 6.) The Arbitrator turns first to the question of whether the medical services provided to Petitioner were reasonable and necessary.

Interestingly, Respondent's Section 12 expert Dr. Candido never directly addressed the question when asked to render an opinion on whether Petitioner's medical care had been reasonable and necessary in his May 15, 2018 report. (RX2.) Rather, he opined that Petitioner's condition had been refractory to treatment, that Petitioner was at risk for opioid abuse, and that Petitioner should cease using opioids going forward. (RX2.) However, Dr. Xia stated in his records that Petitioner was using Norco sparingly; subsequently, he performed a toxicology screen to test Petitioner for opioid abuse, which test returned negative on December 24, 2018. (PX11.)

The only other medical personnel to render an opinion as to the reasonableness and necessity of Dr. Xia's treatments were Dawn Keith, R.N. and Eddie Sassoon, M.D. (RX4.) In the utilization review of August 31, 2021, Keith and Dr. Sassoon opined that Dr. Xia's treatment between February 27, 2017 and November 16, 2020 was partially reasonable and necessary. (RX4.) In particular, they found the epidural steroid injections medically necessary but took exception to many of the medications Dr. Xia prescribed. (RX4.)

The Arbitrator finds that Keith's and Dr. Sassoon's opinion concerning Lunesta is not supported by the records. Keith and Dr. Sassoon stated that Lunesta was not indicated because there was no documented pain-induced insomnia in Dr. Xia's records. (RX4.) However, Dr. Xia's records do in fact document sleep-related insomnia. On July 2, 2018, for instance: "Patient's pain is constant and his sleep is poor." (PX11.) Petitioner credibly testified to suffering this very symptom at trial, stating that he can go days without sleeping at all from the pain he experiences. (T 40.)

However, the Arbitrator finds persuasive Keith's and Dr. Sassoon's opinions with respect to Norco, Tramadol, Cyclobenzaprine, Topiramate, Ondansteron, Rabeprazole, Metro Health A3 compound cream, and Lidopro. (RX4.) Without appropriate documentation in the medical records establishing the necessity for these, the Arbitrator finds that they are not reasonable and necessary to treat Petitioner's condition. (RX4.)

Due to the above, the Arbitrator finds that all of Petitioner's treatments for his condition of ill-being have been reasonable and necessary with the sole exceptions of Dr. Xia's prescriptions for Norco, Tramadol, Cyclobenzaprine, Topiramate, Ondansteron, Rabeprazole, Metro Health A3 compound cream, and Lidopro. The Arbitrator finds Dr. Xia's prescriptions for Norco, Tramadol, Cyclobenzaprine, Topiramate, Ondansteron, Rabeprazole, Metro Health A3 compound cream, and Lidopro to be unreasonable, excessive and unnecessary. As of the hearing, no formal prescription for "detoxification" existed but the Arbitrator views the claim as ripe for an evaluation as to the best method of weaning Petitioner off the listed medications.

The parties have stipulated that Respondent will satisfy all outstanding medical expenses and bills for the lesser of the fee schedule or negotiated rate with providers or lienholders and shall hold Petitioner harmless for the same. This includes Dr. Xia's prescriptions for Norco, Tramadol, Cyclobenzaprine, Topiramate, Ondansteron, Rabeprazole, Metro Health A3 compound cream, and Lidopro. The Arbitrator so orders.

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

Petitioner asserts that he is permanently and totally disabled from participation in a stable labor

market via an "odd lot" theory. Respondent concedes that Petitioner cannot resume his former occupation but asserts that his job search was inadequate and that permanency should be awarded under Section 8(d)2 of the Act.

"A person is totally disabled when he cannot perform any services except those which are so limited in quantity, dependability, or quality that there is no reasonably stable market for them." *See South Motor Imports, Inc. v. Indus. Comm'n*, 52 Ill.2d 485, 489 (1972). "There are three ways that a claimant can establish permanent and total disability, namely: by a preponderance of medical evidence; by showing a diligent but unsuccessful job search; or by demonstrating that, because of his age, training, education, experience, and condition, there are no jobs available for a person in his circumstances." *Fed. Marine Terminals, Inc. v. Illinois Workers' Comp. Comm'n*, 371 Ill. App. 3d 1117, 1129, 864 N.E.2d 838, 848 (1st Dist. 2007). A claimant who proves permanent and total disability via one of the latter two methods is referred to as an "odd lot" employee. *City of Chicago v. Illinois Workers' Comp. Comm'n*, 373 Ill. App. 3d 1080, 1091, 871 N.E.2d 765, 775 (1st Dist 2007).

Age, training, education, experience, and condition

The Arbitrator finds that because of Petitioner's age, training, education, experience, and condition, there are no jobs available for a person in his circumstances. On June 12, 2017, Dr. Xia opined that Petitioner was limited to desk work—a restriction he has never withdrawn. (PX11.) However, Petitioner's considerable physical limitations make it difficult to see what desk work he could actually perform on a full-time basis.

Petitioner is unable to tolerate sitting for more than 30 minutes and unable to tolerate standing for more than 30 minutes. (T 42-43.) He is unable to function at all whenever the ambient humidity exceeds 46 percent. (T 41.) Petitioner is restricted from driving while on medications, and Kari Stafseth observed that when Petitioner skipped his medications to drive in to Vocamotive, he would not complain about pain overtly but would nonetheless exhibit signs such as paleness, turning red in the face, and leaning on the wall for support. (RX1.) On one occasion, Stafseth observed: "His face was very pale, and he appeared as if he was going to vomit." (RX1.)

Petitioner cannot sit for extended periods, and yet he lacks the stability to use a standing desk without relying upon a cane. Although it is possible that Petitioner could perhaps use a standing desk, he is likewise restricted from standing for more than 30 minutes, and it is difficult to imagine how Petitioner might operate a mouse and keyboard at speeds competitive with other prospective employees with one of his hands perpetually occupied with grasping a cane or a walker for balance.

Petitioner's demonstrated limitations make it apparent that he would have to work from home—and yet, Petitioner does not possess the skills necessary to market himself for the work-from-home jobs that exist within his limitations. Petitioner's Vocamotive evaluation of September 21, 2017 noted that Petitioner suffered from dyslexia. (RX1.) Upon vocational testing on January 11, 2018, Petitioner demonstrated sentence comprehension below a 10th-grade level; word-reading and math computation each below a 7th-grade level; and spelling below a 5th-grade level, spelling only 13 words correctly out of 42. (RX1.) Petitioner performed little better with math, demonstrating difficulties with fractions, decimals, and percentages as well as long division and basic algebra. (RX1.) Vocamotive's career ability placement survey scored Petitioner as below-average for verbal reasoning and in the low range for both numerical ability and language usage. (RX1.) Petitioner never attained a typing speed above

24 words per minute during his time with Vocamotive. (RX1.)

Petitioner has been out of the job market for a decade; he possesses work experience in only a single area which he now lacks the physical ability to return to, and he possesses no transferable skills from that one area. (PX26.) Combined with his limited education, dyslexia, lack of typing ability, reading comprehension and math difficulties, vocational expert Susan Entenberg credibly opined that Petitioner simply has no functional access to a labor market without intensive vocational rehabilitation. (PX26, 13.)

Further, the Arbitrator finds that Petitioner is not a candidate for said vocational rehabilitation. Petitioner credibly testified that he gave vocational rehabilitation with Vocamotive his best effort. (T 63.) This account is corroborated by Kari Stafseth's final progress report of March 11, 2018, in which she opined that vocational rehabilitation was ultimately not appropriate for Petitioner given his condition: "He is giving a diligent effort when at this office; however, his level of pain is impacts [sic] him on a fulltime basis and at this time he would not be able to be placed in any job at this time. Medical case management is required." (RX1.)

Unfortunately, medical case management did not produce the turn-around in Petitioner's condition that Stafseth likely hoped for. The evidence shows that Petitioner's medical condition has not improved since March 11, 2018. On the contrary, Dr. Xia documented the condition worsening, with atrophying of Petitioner's right leg and increased urinary urgency. (PX11.) Petitioner's own unrebutted testimony establishes that he has only grown more sensitive to humid weather conditions and less able to tolerate the symptoms they cause. (T 41.) As such, Entenberg's opinion that Petitioner remains a poor candidate for vocational rehabilitation remains entirely in line with Stafseth's own March 11, 2018 opinion. There exists no substantive dispute between the two sides' respective experts on this point; as such, the Arbitrator finds that Petitioner is not a good candidate for vocational rehabilitation.

Because Petitioner demonstrably lacks the skills to find work within his limited physical capabilities, and because Petitioner is not a candidate for the vocational rehabilitation necessary to acquire him those skills, the Arbitrator finds that there are no jobs available for a person in Petitioner's circumstances because of his age, training, education, experience, and condition. This establishes Petitioner as an odd lot employee—and pursuant to Illinois law, Petitioner is therefore permanently and totally disabled. The Arbitrator so finds.

A diligent but unsuccessful job search

In addition to the above, the Arbitrator finds that Petitioner has performed a diligent but unsuccessful job search. "The question of how long a search must continue before it becomes apparent that the possibility for realistic employment is futile is one of fact for the Commission." *City of Green Rock v. Indus. Comm'n*, 255 Ill. App. 3d 895, 902, 625 N.E.2d 1110, 1114 (3d Dist. 1993). Here, Petitioner documented a job search between June 16th to August 28th, 2019. (T 54; PX27.) Petitioner submitted dozens and dozens of applications for positions predominantly involving mechanical and automotive expertise—work adjacent to the skillsets that Petitioner actually cultivated in his career. Petitioner did not testify that he disclosed his physical disability, and the Arbitrator notes that that these jobs were much more aligned with Petitioner's qualifications than computer-based clerical work would be; and yet even with these advantages, Petitioner nonetheless received not even a single interview. (T

56.)

The facts as they appear in this case are analogous to those in *City of Green Rock v. Industrial Commission*, 255 Ill.App.3d 895 (3rd Dist. 1993). In *City of Green Rock*, the claimant was a 52-year-old seasonal laborer. He sustained a knee injury requiring surgery. Postoperatively he was initially subject to a 15-pound lifting restriction. He resumed working, while wearing a brace, in March 1988. The restriction was lifted at the end of 1988. He was not rehired the following season and began applying for work, with his wife's assistance. He was unable to read or write and testing showed he was "in the borderline range of intellectual functioning." Most of his employment history was devoted to heavy labor, including cutting down trees. 255 Ill. App. 3d at 901. Although one vocational counselor believed the claimant might be able to assume certain jobs, he conceded the claimant would require extensive training to learn them and doubted that he would be able to compete for those jobs successfully. *Id.* The evidence revealed that the claimant stopped applying for work approximately eight months before the hearing. Regardless, the arbitrator and the Commission each found that the claimant's job search was sufficiently diligent to establish that he had no realistic prospects for employment. The Circuit and Appellate Courts affirmed this result.

Here, much as in *Green Rock*, the claimant possesses limited education and a cognitive disability (in this case, dyslexia) that limit his ability to compete for jobs within his physical limitations. Just as in *Green Rock*, Petitioner's skills lie exclusively within jobs which demand physical labor outside those limitations. Just as in *Green Rock*, a vocational rehabilitation expert credibly opined that Petitioner will not be able to compete for jobs within his limitations without extensive training; and much as in *Green Rock*, the expert testified that even if he did get the training he required, the likelihood that Petitioner would improve to the point of competing successfully for jobs was slim. (PX26, 21.) Further, as discussed above, Petitioner is not a viable candidate for the extensive vocational training that he would require to begin with.

Although one could argue that Petitioner's intellectual disability is less severe than that of the claimant in *Green Rock*, this is counterbalanced by the fact Petitioner's physical disabilities are clearly much more severe. The claimant in *Green Rock* underwent one knee surgery and subsequently managed to return to work for a period of months while Petitioner has undergone multiple lumbar interventions. Moreover, Petitioner has experienced significant dermatological and dental problems as a result of his lumbar treatment.

Based on the facts and legal authority set forth above, the Arbitrator finds that Petitioner's job search was sufficiently diligent to demonstrate that there is no reasonably stable market for him. On this basis, too, the Arbitrator finds that Petitioner is permanently and totally disabled under an "odd lot" theory.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC016627
Case Name	Peter Olivo v. Sumitomo Electric Carbide
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0268
Number of Pages of Decision	41
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Christopher Mose
Respondent Attorney	Bradley Brejcha

DATE FILED: 7/21/2022

/s/ Thomas Tyrrell, Commissioner

Signature

22IWCC0268

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

Peter Olivo,

Petitioner,

vs. NO: 12 WC 016627

Sumitomo Electric Carbide,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses, temporary total disability, maintenance, and permanent partial disability ("PPD"), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

The Commission vacates the Arbitrator's award of permanent partial disability benefits. The Commission remands this matter to the Arbitrator with instructions to order Respondent to provide a vocational assessment pursuant to Section 9110.10(a) of the Rules Governing Practice Before the Commission.

Section 9110.10(a) of the Commission's rules provides as follows:

> "(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." 50 Ill. Adm. Code 9110.10(a) (2016).

In so finding, the Commission found persuasive the case of *CDW Corp. v. Ill. Workers' Comp. Comm'n*, 2021 IL App (2d) 200562WC-U. In *CDW Corp.,* the Commission found that the claimant's injury "precluded her from returning to her usual and customary occupation." *CDW Corp.*, at P28. Both parties entered opinions from vocational rehabilitation consultants. The Appellate Court noted

that while these experts disagreed on whether a stable labor market existed for the claimant, they were in agreement that the claimant might benefit from vocational rehabilitation. *Id*., at P27.

The Appellate Court concluded, "In Section 9110.10(a), the only condition for a vocational rehabilitation assessment is that the work-related injury rendered the claimant unable to resume her regular duties. The Commission explicitly found that condition to exist. Therefore, a vocational rehabilitation assessment, which was never done in this case, is 'required.'" *Id.*, at P28.

In the instant matter, there is no dispute that Petitioner lacks the physical capacity to return to his former career as a warehouse picker. Both parties entered vocational consultant opinions that Petitioner would be a candidate for vocational rehabilitation services. Therefore, a vocational rehabilitation assessment pursuant to Section 9110.10(a) is required.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 21, 2021, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical expenses identified in Petitioner's Exhibit 18, subject to §8(a)/§8.2 of the Act. Respondent shall reimburse Medicare to the extent required.

IT IS FURTHER ORDERED that Respondent shall receive a credit of $69,791.05 under Section 8(j) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $220.00/week for 382-6/7 weeks, commencing August 10, 2012 through December 18, 2012, and from March 26, 2013 through February 22, 2019, as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner maintenance benefits of $220.00/week for 55-3/7 weeks, commencing February 23, 2019 through March 17, 2020, as provided under Section 8(a) of the Act.

IT IS FURTHER ORDERED that Respondent shall receive credit of $5,969.85 for temporary total disability benefits paid to Petitioner on account of this injury, and a credit of $25,276.00 for permanent partial disability benefits already paid.

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 Respondent is hereby fixed at the sum of $65,300.00. 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.

July 21, 2022

o: 5/24/2022
TJT/ahs
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	12WC016627
Case Name	OLIVO, PETER v. SUMITOMO ELECTRIC CARBIDE
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	37
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	CHRISTOPHER MOSE
Respondent Attorney	Bradley Brejcha

DATE FILED: 4/21/2021

INTEREST RATE WEEK OF APRIL 20, 2021 0.04%

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

PETER OLIVO
Employee/Petitioner

v.

SUMITOMO ELECTRIC CARBIDE
Employer/Respondent

Case # **12** WC **16627**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Chicago**, on **October 21, 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 **January 25, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**16,770.00**; the average weekly wage was $**322.50**.

On the date of accident, Petitioner was **40** 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 $**5,969.85** for TTD, $**0** for TPD, $**0** for maintenance, and $**25,276.00** for other benefits, for a total credit of $**31,245.85**.

Respondent is entitled to a credit of $**69,791.05** under Section 8(j) of the Act.

ORDER

Respondent shall pay to the Petitioner the sum of $220.00 per week for a period of 382 and 6/7 weeks. Respondent shall pay temporary total disability benefits for the period from August 10, 2012 through December 18, 2012 and again from March 26, 2013 through MMI date of February 22, 2019 pursuant to Section 8(b) of the Act and shall also pay maintenance benefits at the TTD rate from February 23, 2019 through March 17, 2020 under Section 8(a) of the Act. Respondent shall receive a credit in the amount of $5,969.85 for TTD amounts previously paid.

Respondent shall pay for the reasonable and necessary medical treatment identified in Petitioner's Exhibit 18 in accordance with the provisions and Medical Fee Schedule of Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit under Section 8(j) for amounts that have been paid. Respondent shall reimburse Medicare to the extent required as evidenced in Petitioner's Exhibit 18.

Respondent shall pay permanent partial disability benefits of $220.00/week for 250 weeks as the Arbitrator finds that Petitioner sustained a loss of trade and is permanently partially disabled to the extent of 50% loss of use of the person as a whole. Respondent is entitled to a credit of $25,276.00 for PPD advances already paid.

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 21, 2021

PETER OLIVO v. SUMITOMO ELECTRIC CARBIDE
12 WC 16627

ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Petitioner's Testimony and Medical Treatment

The Petitioner testified that he worked for Respondent as a warehouse picker, first as a temporary employee for 10 to 12 months after which he was then hired to work full time. He testified that he had never had any back problems which required medical treatment before January of 2012. Petitioner testified that on January 25, 2012 he was unloading a truck in the warehouse by moving boxes to pallets which were on a forklift. He testified that the forklift driver had positioned the pallet about waist high and when he moved to place a box onto the pallet the forklift driver lowered the forks and the weight of the box of 60 or 65 pounds took him down. He testified that he noticed pain in his low back that progressed into his left side, buttock, hip, calf, and toe.

Petitioner testified that he went home and rested after the accident. He did not work the following day. The following Monday the Respondent directed him to go to the company doctor at Concentra where he was prescribed physical therapy. He continued to have pain in his lower back and pain and numbness in his left leg. Petitioner was referred to Dr. Charles Mercier. Dr. Mercier provided him with two epidural injections and ordered physical therapy. Petitioner testified that the injections helped for "[m]aybe like a few days." Petitioner was working light duty at that time.

Petitioner then sought treatment on his own with Dr. Theodore Fisher at Illinois Bone & Joint Institute. Dr. Fisher recommended surgery and on August 10, 2012 Petitioner underwent an L5-S1 microdiscectomy. Petitioner testified that he was still in pain in his leg and back after the surgery. He was referred for work hardening which he found difficult and testified that his back was still in pain. He did return to work on a light duty basis in December 2012 but testified that he had an episode at work in January 2013 when his left leg buckled causing him to feel unable to move. He was taken to the emergency room at Lutheran General Hospital where he was admitted and kept for the weekend. After he was discharged, he was able to return to work on a light duty basis where he mostly checked orders and boxed items.

Petitioner reported for a Section 12 examination with Dr. Steven Mather in March 2013. Petitioner testified that the exam was uncomfortable and painful for him. He testified that he was honest and cooperative with Dr. Mather, but that Dr. Mather was rude. After he saw Dr. Mather, light duty work was no longer available to Petitioner. Petitioner was not paid workers' compensation benefits at this time.

Dr. Fisher discussed the possibility of a three-level lumbar fusion with Petitioner and this surgery was ultimately performed on September 22, 2013. Petitioner testified that initially the surgery had gone well but there was an issue with the hardware in his back which required Dr. Fisher to perform another surgery to remove hardware. Petitioner then sought pain management treatment at the Health Benefits Pain Management Clinic where he saw multiple doctors.

Petitioner, over several years, underwent epidural injections, nerve blocks, and radiofrequency ablations as well as physical therapy and work-conditioning. Petitioner testified that these procedures only helped a little bit for a few days but then his pain returned. Petitioner also took pain medications such as Norco, Oxycodone, and Topamax.

Dr. Randolph Chang at the Health Benefits Clinic recommended Petitioner have a Spinal Cord Stimulator implanted. Petitioner underwent the implantation and had a trial performed but testified that it did not work well for him. After that, Dr. Chang referred him for a functional capacity evaluation, and this was performed at ATI physical therapy in 2016.

Petitioner continued to see Dr. Fisher who recommended an injection into his left sacroiliac joint. This was performed and provided pain relief for two days. Dr. Fisher then performed a fusion of his left SI joint on August 29, 2017 and Petitioner said that after his surgery he felt a little bit better, but he still had a lot of pain. Another Spinal Cord Stimulator trial was recommended but Petitioner declined because it did not work the first time.

At the request of his attorney, Petitioner saw Dr. Matthew Ross. He also sought treatment with a new doctor, Dr. Sameer Shah at Stellar Pain Management Group. Dr. Shah performed further nerve blocks and nerve ablations which only provided temporary relief. Dr. Shah recommended a trial of a newer model of a Spinal Cord Stimulator which Petitioner agreed to as it was a newer and improved model. This trial was beneficial, and Petitioner had a permanent Spinal Cord Stimulator installed on February 22, 2019. He testified that it helped and has made his life a more comfortable. He has been able to discontinue use of the Norco because of the benefit from the stimulator.

Petitioner testified that his present condition is painful and is a struggle. He has pain in his lower back all the time. Petitioner states the pain in his lower back is on the left side and it shoots down into his buttocks and left hip all the way down his left leg into his toe. He does have good days and bad days. On a good day he can put on his shoes without his back hurting, but this is rare. His uses an assistive device to help put on his socks. Cold weather increases his pain. He has good days in the summer, but the winter is difficult. His pain is worsened by standing and sitting for long periods of time or doing something aggressive like when he's in the shower or goes out walking. He testified that he can stand for about 20 to 25 minutes before his pain becomes severe, that he can sit for 20 minutes or up to a half-hour on a good day, though it does depend on the weather. He felt he could walk for 8 to 10 minutes before needing a break. He has a cane which he uses every day to help him with his balance. Petitioner also testified that his left foot is numb all the time. During his hearing, Petitioner asked to stand and sit at various intervals to get comfortable.

Petitioner further testified that he spends about half of his day lying down in order to relieve the pain. He cannot spend a whole day without laying down and testified that there has not been a day in the last year when he didn't spend some time laying down.

Petitioner underwent a second FCE in 2019 which took place over two days. He acknowledged the FCE findings that he could lift as much as 30 pounds and explained that he does not have a problem with upper body strength. He stated that he could hold a box, but he

could not hold it and walk with it for more than a few seconds because it will put pressure on his lower back.

Petitioner testified that he met with Vocational Counselors Ed Pagella and Ed Rascati. He affirmed that he is a high school graduate and can use a computer and had used the program Lotus Notes before, though it was 20 years ago. He testified that he has no experience with any other programs, including Microsoft programs. At hearing, Petitioner did not remember any recommendations or details for vocational rehabilitation or training with either vocational counselor.

On cross-examination, Petitioner re-iterated that his accident occurred when he was attempting to place a heavy box on a pallet when the forklift driver lowered the pallet causing the weight of the box to pull Petitioner down causing him to injure his back. He felt immediate back pain and dropped everything and stumbled but did not fall. He did not feel radiating symptoms immediately, but they did begin in his right leg and he testified that he told the company doctor about that he had pain in his leg. He continued to work in the six months following the accident on restricted duty, which was primarily checking orders and boxing them. He underwent his first surgery on August 5, 2012 and returned to work on December 19, 2012.

Petitioner was shown Respondent's Exhibit 11, a work-slip dated December 5th, 2012. When compared to the work slip in Dr. Fisher's subpoenaed records two additional boxes of "no standing" and "light duty" were checked off on the slip that was given to the employer. The Petitioner acknowledged that the process for submitting work slips involves giving HR a copy of the work-slip so that they can photocopy it. He denied checking the boxes himself. Petitioner opined that his HR representative may have checked them off. No testimonial evidence from Respondent was offered to confirm or rebut this.

Petitioner continued to work through March 25, 2013 at which time he underwent a Section 12 examination with Dr. Mather. Petitioner testified that he told Dr. Mather that he did have pain in his lower back and leg. He claims to have been unaware of any previously scheduled and missed Section 12 examinations.

Petitioner acknowledged that Dr. Fisher's March 13, 2013 restrictions authorized him to return to work with restrictions of no lifting over 25 pounds or repetitive bending or twisting. Petitioner testified that he did not seek employment within his restrictions at that time and focused on his back getting better. He has not worked since March of 2013.

When Petitioner was asked whether he attempted to find a job in March 2018 after Dr. Fisher had released him for sedentary work with the option to alternate sitting and standing, no lifting over 10 pounds, and no repetitive bending/twisting, Petitioner stated he was unable to go back to work. Around that time, he met with vocational counselor Ed Pagella. He recalled Mr. Pagella asking him to fill out forms but does not recall Mr. Pagella offering to help him find an accommodating employer. He did not recall following up with Mr. Pagella. He was unaware why Mr. Pagella stated that Petitioner was unable to identify prior employers for the past 20 years. The Arbitrator notes he was able to identify three during his testimony. He testified that he worked as a picker for North Shore Supply, a shipping clerk for Safety Kleen, and an

independent contractor and project manager with his sister who flipped houses. He testified that he has not filled out any job applications online, but he did recall calling people for employment and using the library when he needed a computer. Petitioner also testified to previously having some training with the Chicago Regional Council of Carpenters but did not complete the course.

Petitioner did not recall reading the vocational reports from Mr. Rascati which identified a number of potential employment positions. Petitioner acknowledged that he never followed up with Mr. Pagella or Mr. Rascati regarding job leads or vocational training. Petitioner admitted that he currently lives out of his car.

On Redirect examination, the Petitioner acknowledged that he was in some degree of pain and physical distress during the hearing. He explained that he is not taking pain medications because he has the Spinal Cord Stimulator instead of prescriptions from Dr. Shah. Regarding the discrepancy in the work restrictions on the work status note of December 5 2012, Petitioner said normally the doctor's office would fax a work status note to his employer and he would also get one himself and deliver it himself to his employer. He did not recall having any issues with his employer about what his restrictions were. He did go back to work on December 19, 2012 on light duty and didn't recall that he was ever questioned about his restrictions. Nor did he recall ever asking Dr. Fisher to clarify his work restrictions.

Summary of Medical Records

The Arbitrator was provided two bankers' boxes full of medical records. Petitioner's medical treatment begins at Concentra Occupational Medicine on January 30, 2012. At Concentra, Petitioner reported that he was lowering a box to a forklift and he jerked forward with the weight of the box. He used heat on his back and felt better the next day, but the pain returned after performing more lifting. Petitioner denied leg pain and stated that his pain did not radiate. Waddell signs were negative, and Petitioner was prescribed medication, physical therapy and given work restrictions of no lifting over 20 pounds, no prolonged standing or walking longer than tolerated, no bending, and no pushing or pulling over two pounds. X-rays showed degenerative facet sclerosis at L5-S1. Diagnosis was a lumbar and sacral strain.

On February 9th, the Concentra records show that Petitioner reported that his symptoms were improving and described his pain as moderate and dull in the left lumbosacral region and were aggravated by sitting and bending. On exam, he had pain at the L5 paraspinous area and the sciatic area on the left. His restrictions were continued, and he was advised to continue physical therapy. Physical therapy records from February 9th noted decreased lumbar flexion and limits in his ability to lift and the Petitioner reported that he had more pain than he had previously. On February 20th, he reported continued improvement and both work restrictions and physical therapy were continued. On February 27th, he reported that his pain was about the same on both the right and left side with right side pain being greater. No numbness or radiation noted. An MRI was ordered. On March 19th it was reported that his pain was unchanged and focused on the left lumbosacral region which is aggravated by bending or lifting. An MRI was performed on March 15, 2012 and revealed several findings consisting of degenerative discogenic disease between L3-S1, a disc protrusion at L3-L4 with mild facet arthrosis and central canal narrowing, a central disc protrusion at L4-L5 with mild facet arthrosis and central canal narrowing, and a

posterior 3mm disk bulge at L5-S1 with a superimposed left paracentral disk extrusion with left subarticular encroachment. Petitioner was referred to Dr. Charles Mercier for an orthopedic spinal consultation.

Petitioner saw Dr. Mercier, an orthopedic surgeon and specialist, on March 22, 2012. During the examination, Dr. Mercier noted pain at L5 upon extension. Dr. Mercier diagnosed Petitioner with a herniated disk at L5-S1 (center and left). Dr. Mercier recommended and performed a caudal epidural steroid injection on April 5, 2012 using fluoroscopy with an epidurogram and then performed a second a second epidural on May 11, 2012. Petitioner did not improve much after the injections and wanted to consider surgery.

Petitioner sought treatment with Dr. Theodore Fisher at Illinois Bone and Joint Institute on June 14, 2012. Dr. Fisher noted that Petitioner complained of left-sided low back pain which began with his injury while working for Respondent and which had persisted since that time. Dr. Fisher noted Petitioner had never had any back problems before this. Petitioner reported occasional episodes of numbness which extended to the toes of his left foot and last for approximately an hour but resolve when he walks. The doctor noted that Petitioner had been in physical therapy and had two prior epidural injections, the first providing relief for two weeks while the second was unhelpful. On exam, Dr. Fisher noted tenderness to palpation, pain with forward flexion which was relieved by extension. Dr. Fisher stated that the previous MRI revealed a broad-based herniation at L5-S1 with a large left paracentral component displacing the nerve root. Because of a positive response to the first epidural, Dr. Fisher recommended a left L5-S1 microdiscectomy. Dr. Fisher later had an occasion to review this MRI and noted that the herniation at L5-S1 could be seen displacing the transversing nerve root, and there was also a broad-based central disc herniation at L4-5 and an annular tear at L3-4.

Petitioner wished to proceed with surgery and underwent his first surgery on August 10, 2012 with Dr. Fisher. This surgery consisted of a left-sided L5-S1 hemilaminotomy, foraminotomy, needle facetectomy and microdiscectomy. Following surgery, Petitioner followed up with Dr. Fisher in August and again in September. He reported soreness in his lower back but did not complain of any radicular symptoms. He was able to walk three miles every other day for exercise. Dr. Fisher prescribed physical therapy and released him to work on a light duty basis. He began physical therapy on October 2, 2012 with United Rehab Providers. On November 1, 2012, Petitioner saw Dr. Fisher and reported that he would occasionally experience numbness in the lateral aspect of his left leg and rated his pain between 0/10 and 6/10. On exam, Dr. Fisher noted that straight leg raising produced slight numbness in the left leg. He recommended that Petitioner transition to a work conditioning program.

On December 5, 2012, Dr. Fisher noted that Petitioner had been in work conditioning and experienced a significant exacerbation of his symptoms. He was experiencing severe back pain from 5/10 to 10/10 and numbness and tingling in both legs, worse in the left than the right, and extending to the left foot and toes and occasionally to the right foot. On exam, Dr. Fisher noted reduced range of motion and decreased sensation in both thighs, the lateral left leg, the sole of the left foot and all his toes. A straight leg test was positive on the left and negative on the right. Dr. Fisher recommended an MRI with gadolinium and a Medrol Dosepak. The records from physical therapy on December 6, 2012 note that Petitioner was reporting increased back pain. Dr.

Fisher's records from December 5, 2012 show that the Petitioner was given work restrictions of no lifting over 40 pounds with no repetitive bending, twisting, or lifting.

An MRI was performed at St. Joseph Hospital on December 10, 2012 which showed mild annular bulging suggestive of an annular tear at L3-4, diffuse annular bulging at L4-5 with left lateralization that resulted in mild narrowing of the neural foramen, and at L5-S1 there was diffuse annular bulging with a suggestion of an annular tear and which resulted in mild bilateral foraminal stenosis. The MRI results were suggestive for paraspinal muscle strain, and myositis could not be excluded. Petitioner saw Dr. Fisher again on January 16, 2013. Dr. Fisher noted the MRI showed scar tissue at the left L5-S1 surgical site and disc herniations at L3-4 and L4-5, with an annular tear at L3-4 and at L4-5 the herniation had a left paracentral component. Dr. Fisher recommended an epidural injection and allowed Petitioner to work on a light duty basis of no lifting over 25 pounds, and no repetitive bending, twisting, or lifting. Dr. Fisher also suggested changing positions from sitting to standing every thirty minutes.

On January 17, 2013, Petitioner sought treatment at the emergency room of Lutheran General Hospital complaining of low back pain which radiated down to his toes. Petitioner reported he had been in physical therapy following surgery and was at work that day when his legs buckled and he was unable to ambulate. His co-workers helped him to a taxi and the taxi brought him to the emergency room. He also complained of numbness and tingling in his legs. He was admitted to the hospital and an MRI was performed. The radiologist noted the findings were limited due to motion. He opined that it showed degenerative disc disease at L3-4 and L4-5 with a diffuse disc bulge centrally located at L4-5 along with a prominent disc protrusion resulting in spinal stenosis. Petitioner was diagnosed with an acute-on-chronic exacerbation of low back pain due to lumbar disc disease and was prescribed a Medrol Dosepak and Norco. Petitioner requested an off-work slip for Monday January 21, 2013 but was given work restrictions of no lifting greater than 10 pounds.

On January 28, 2013, Petitioner underwent another epidural steroid injection at L4-5 and a repeat injection was provided on February 11, 2013. On March 13th, Dr. Fisher noted that Petitioner reported that the first injection did not help at all and the second one helped for one day only. He continued to report severe low back pain and decreased sensation to both feet and 1st toes. Dr. Fisher reviewed the MRI from December 10, 2012 and noted it showed evidence of the prior hemilaminectomy and discectomy at L5-S1, a broad based herniation at L4-5 which resulted in bilateral subarticular stenosis, left greater than right, and at L3-4 there was an annular tear and disc desiccation with loss of disc height. Dr. Fisher and Petitioner discussed the possibility of lumbar fusion and Dr. Fisher requested a lumbar discogram to evaluate whether he was a candidate for fusion.

On March 22, 2013 Petitioner underwent a discogram with Dr. Anas Alzoobi. At L4-5, the pressure was 60 psi and noted significant extravasation laterally to the left side and was concordant for Petitioner's every day pain. At L5-S1 the psi was 130 and this was concordant for everyday pain. At L3-L4 the pressure was 55 psi and was concordant for everyday pain. At L2-3 the pressure was 102 psi and was not concordant for everyday pain. The administrator therefore concluded this was positive L3-4, L4-5, and L5-S1 though negative at L2-3. A post-discogram CT scan was also performed and this showed that at L3-4 there was a disc bulge which resulted

in bilateral foraminal stenosis with the contrast from the discogram reaching the outer margin of the annulus possibly representing a full thickness tear of the annulus. The CT also showed at L4-5 a posterior-lateral left side bulge of the disc associated with mild spinal canal stenosis, mild foraminal stenosis on the right and moderate foraminal stenosis on the left with the contrast material again reaching the outer margins of the annulus suggesting a full thickness tear of the annulus. At L5-S1 a posterior disc bulge was seen as well as a soft tissue density on the left side, which was considered to be either extruded disc material or scar tissue from the previous surgery, and the contrast material from the discogram was again seen to be suggestive of an annular tear. The results of the exam indicated possible levels of discogenic disease and a failed laminectomy at L5-S1. The deposition testimonies of Drs. Fisher, Ross, and Mather note some level of disagreement on the exam's findings and validity.

Respondent had Petitioner examined pursuant to Section 12 by Dr. Steven Mather on March 27, 2013. His report is mislabeled as March 27, 2012 and should read 2013. Dr. Mather's report stated that he reviewed the MRIs of December 10, 2012 and January 17, 2013 and noted several mild objective findings. Dr. Mather stated that Petitioner showed several positive Waddell signs and it was "poor judgement" to offer a lumbar fusion and that performing a lumbar fusion based upon a discogram does not offer good results. He also opined that the discogram was not properly done because a discogram should not be pressurized to above 50 psi and this therefore invalidated the test. He concluded that Mr. Olivo's medical history, physical exam, and diagnostic testing did not correlate with each other which he felt indicated symptom magnification or functional overlay. He concluded that Mr. Olivo had sustained a lumbar sprain and could return to work without restrictions and did not require surgery. Dr. Mather's testimony is discussed in greater detail below.

When Petitioner returned to see Dr. Fisher on April 18, 2013, Dr. Fisher noted the discogram had shown concordant pain at the levels L3-S1 with disconcordant pain at L2-3. He noted the post-operative CT scan (mis-labeled an MRI) showed scar tissue on the left at L5-S1 from the prior surgery, and also showed disc herniations at L3-4 and L4-5 with a left paracentral component at L4-5 and an annular tear at L3-4. Based upon these findings and upon Mr. Olivo's reports of difficulties with activities of daily living, Dr. Fisher suggested that Petitioner undergo a lumbar fusion from L3 to S1.

Respondent had Dr. Mather issue an addendum to his Section 12 report on May 17, 2013. Dr. Mather stated that he reviewed the actual film of the MRI from March 15, 2012 and he opined it showed small central disc bulges that were noncompressive, He stated that patients without compression on nerve roots will not improve with a discectomy.

On August 15, 2013, Dr. Fisher noted that Petitioner continued to complain of severe lower back pain which was worse with activity. He had difficulty with sitting and standing, difficulty rising from the toilet, pain with sleeping and occasional radicular symptoms bilaterally going down his posterior thighs and legs to his feet. He walked with an antalgic gait and range of motion testing increased low back pain. Based upon MRI studies and CT scan taken after the discogram, Dr. Fisher concluded that Petitioner had disc herniations at L3-4 and L4-5 as well as post-laminectomy syndrome at L5-S1. Petitioner desired to move forward with surgical intervention.

On September 23, 2013 Dr. Fisher performed a 3-level microdiscectomy and interbody fusion from L3 to S1. After surgery, Petitioner reported significant improvement of his back pain with complete resolution of his right leg symptoms but reported continued numbness in his left foot and toe.

Petitioner began physical therapy at St. Elizabeth and St. Mary's Medical Center on December 17, 2013. Petitioner continued his physical therapy through January 31, 2014. He was re-evaluated on January 15th and January 31st and on both occasions found to have 60% impaired sensation to light touch.

On January 17, 2014, Petitioner was re-evaluated by Dr. Fisher and reported that his pre-operative severe pain had resolved along with his radicular pain in the right leg. He continued to experience radicular pain and numbness in the left leg, however, that extended to his left foot and toes. He also reported weakness in the left leg after walking. Dr. Fisher ordered continued physical therapy and Norco on a p.r.n. basis.

Respondent had Dr. Mather perform another Section 12 examination on February 27, 2014. Dr. Mather noted that Petitioner reported pain across his lower back that went into his left buttock, left lateral and anterior thigh and the medial aspect of his left foot. He reported that he needed his fiancé's help to put on his socks and shoes and could only drive for very short distances. During his exam, Dr. Mather noted that Petitioner was seated comfortably but on standing had limited range of motion limited by complaints of pain. Dr. Mather noted diminished reflexes at the left knee compared to the right, and that Petitioner could distinguish between sharp and dull sensation in the left dermatome despite his complaints of numbness. Petitioner reported he could not heel to toe walk because he was too weak and could not feel his feet. Dr. Mather reported that X rays taken in his office show that the screws at S1 were loose and did not engage the anterior cortex and no fusion was seen anywhere and the cages at L4-5 and L5-S1 were retropulsed. Dr. Mather recommended further surgery to revise the instrumentation and the cages and criticized the prior decision to proceed with fusion. He re-iterated his opinion that Petitioner's current condition was not causally related to his work injury as Mr. Olivo did not need his original surgery.

On February 27, 2014, Petitioner saw Dr. Fisher as well and reported continued back pain and radicular symptoms. X-rays taken showed that the spacer which had been placed at L5-S1 had moved to the right side, which was the asymptomatic side. Dr. Fisher prescribed a CT-myelogram to evaluate the screws, the position of the spacer and the fusion mass. This CT was performed on February 28, 2014 and showed the pedicle screws at L5 and S1 had loosened and caused some bony erosion and the spacer at L5-S1 had displaced. Dr. Fisher believed there was a solid fusion from L3 to S1 in the posterolateral gutters but that the interbody spacers had retropulsed slightly and were most likely causing nerve root irritation which produced symptoms in his lower extremities. Petitioner reported that his back was feeling better, but his main problem continued to be radicular symptoms in his left leg. On March 3, 2014, Dr. Fisher recommended surgery to remove the hardware.

On March 25, 2014, Dr. Fisher performed surgery removing the pedicle screws and removed the interbody spacers at L4-5 and L5-S1. Dr. Fisher explored the fusion and found it to be contiguous and without gross motion. On April 2, 2014, Dr. Fisher explained to Petitioner that he did not address the L3-4 and L4-5 levels in the first surgery because he wanted to have the smallest surgery possible and thus operated only at L5-S1.

Respondent had Dr. Mather issue another Section 12 report on April 29, 2014. Dr. Mather criticized Dr. Fisher's statement that he did not operate on Petitioner's L4-5 disc space in the first surgery because he wanted to perform the smallest surgery possible. Dr. Mather characterized this as a poor explanation because "one- and two-level discectomies" are done as in an out-patient setting anyway. Dr. Mather re-iterated his previous opinions that Petitioner's condition is not causally related to his injury because he stated the original MRI showed a non-compressive disc and because the lumbar fusion should not have been performed.

The records of Presence St. Joseph Hospital in Elgin show Petitioner began physical therapy on May 6, 2014. On May 27, 2014, Dr. Fisher noted that Petitioner reported back pain in the area of L5-S1 and increased numbness in his left leg with increased activity. On exam, Dr. Fisher noted decreased range of motion, difficulty bending, and decreased sensation to the left anterolateral leg, foot, and great toe. Dr. Fisher ordered an MRI in anticipation of an epidural injection.

An MRI was performed on May 29, 2014, which revealed post-operative changes from L3 to S1 with areas of enhancing signal which gave rise to a differential diagnosis of post-surgical granulation changes or infectious etiology. There was a suspected large posterior soft tissue seroma which extended into the left anterolateral recess of L3-4 and right anterolateral recess of L5-S1. Dr. Fisher stated the seroma which the radiologist observed was more likely a cerebrospinal fluid collection which resulted from a dural tear at the time of surgery. Dr. Fisher prescribed physical therapy which Petitioner continued at Presence St. Joseph Hospital on July 25, 2014 and through September 26, 2014. It was noted that Petitioner was moving residences and would continue therapy elsewhere. He described his pain as 8/10 and was still limited in activity. He had not met objective goals of walking 200 feet without weight shifting or rising from a chair without pain. A repeat MRI on August 5, 2014 showed a decrease in the seroma and surrounding edema and fluid at L4-5 and L5-S1.

Petitioner then began therapy at St. Joseph Hospital in Elgin on October 8, 2014 upon the referral of Dr. Fisher. Petitioner described previous electrical stimulation had been helpful. It was noted that he had decreased range of motion in all ranges and decreased strength as well.

On October 27, 2014, Petitioner followed up with Dr. Fisher where he reported moderate low back pain on the left side and an examination discovered decreased sensation to the L5 nerve distribution. He was taking Ibuprofen and Norco. X rays showed a contiguous bone between the transverse processes at L3-4 and L4-5 and extension-flexion films showed no gross motion. Dr. Fisher prescribed Cymbalta, an exercise program and a further lumbar MRI. The MRI was performed on November 7, 2014 which showed post-surgical changes and a possible seroma in the soft tissues of the posterior to the spinal canal at L4 and L5.

On November 19, 2014, Petitioner reported an increase in back pain and continued radicular symptoms into his left leg. Petitioner reported that he had completed physical therapy but that the exercises had increased his pain. Dr. Fisher noted he had reviewed the MRI from November 7, 2014 and noted a fluid collection near L4 and L5 where the spinous processes and lamina had been resected during surgery and also the presence of scar tissue near the left L5 nerve root. Dr. Fisher recommended a home exercise program, weight loss, and referred him to pain management for aspiration of the fluid collection.

On December 17, 2014, Dr. Fisher noted that Petitioner reported his symptoms were unchanged and that he still had numbness in the left posterolateral thigh, leg, dorsum of foot and great toe. Dr. Fisher recommended a CT-myelogram study in order to evaluate fusion and evaluate the fluid collection seen on the MRI with the possibility of aspiration in the future.

On January 23, 2015, Dr. Fisher noted that the CT-myelogram showed a fluid collection which was likely a seroma and that there was solid fusion at L3-4 and L5-S1, with a less solid fusion at L4-5 which did appear to be fused. He further noted that the CT scan revealed degenerative changes in the SI joints. Petitioner's main complaints were pain over the left side and some tingling in the left posterolateral thigh, lateral leg, dorsum of foot, and first 3 toes. Petitioner reported that his pain was 9/10 without Norco but was 4/10 after. On exam, Dr. Fisher noted Petitioner had decreased sensation of first 3 toes and a positive FABER test of the left SI joint with positive compression and positive posterior thigh thrust. Dr. Fisher diagnosed left sacroiliitis and recommended further exercise and weight loss as well as an injection into his left SI joint.

Petitioner underwent a lumbar/sacral/coccyx epidural steroid injection on February 9, 2015 by Dr. Jay Kiokemeister. When Petitioner saw Dr. Kiokemeister on February 16th, he reported he had little to no pain immediately after the procedure, but his pain returned over the next several days. This pain tended to be localized to the left SI joint with slight radiation to the lateral aspect of his left leg.

On March 2, 2015, Dr. Fisher noted that Petitioner reported the SI injection had eliminated his pain for an hour, but the pain had returned and worsened. Petitioner complained of continued left-sided low back pain and radiculopathy in the left leg extending to the first and second toes on the left. Dr. Fisher recommended a nerve ablation to the SI joint, with the possibility of a percutaneous fusion and spinal cord stimulator in the future.

On March 9, 2015, Dr. Kiokemeister referred Petitioner to see Dr. Alzoobi for consideration of the medial branch black and radiofrequency ablation which had been recommended by Dr. Fisher. Dr. Alzoobi performed the facet injections at L3-4, L4-5, and L5-S1 on April 23, 201. Petitioner reported improvement but it was temporary. Given the lack of benefit, Dr. Alzoobi concluded on June 11, 2015 that radiofrequency was not an option. He noted that Petitioner was waiting for an EMG and would decide the next step after that was performed. The EMG was done on June 19, 2015 and revealed a left L4-S1 nerve root/disc syndrome. Dr. Alzoobi concluded that a spinal cord stimulator would be an option along with any further surgical intervention that Dr. Fisher recommends. When Petitioner returned to see

Dr. Alzoobi on July 23, 2015, Dr. Alzoobi discussed a spinal cord stimulator again but noted he was leaving that clinic and Petitioner would have to address it with a new physician.

Respondent had Petitioner examined pursuant to Section 12 again by Dr. Steven Mather on April 30, 2015. Dr. Mather noted that Petitioner described the starting point of his pain as the left lumbosacral area, and Dr. Mather commented that it did not appear to start over the SI joint. He noted that Petitioner again exhibited limited range of motion on exam. Petitioner was able to heel to toe walk though there was slight weakness of the left foot dorsiflexors. He had numbness in the left L4 dermatome and reflexes were essentially absent in the left knee. Dr. Mather felt he had a positive straight leg raising on the left and hip range of motion was full and painless. Waddell signs were negative. Dr. Mather had X rays performed in his office and opined that they showed motion on flexion-extension views and a spondylosis on the left side at L4. He opined there was essentially no posterolateral fusion bone present from L4 to S1 and no interbody bone. Dr. Mather concluded that Petitioner had persistent left L4 radiculopathy and a non-union of his fusion from L4 to S1. He requested a CT myelogram be performed to further evaluate it and opined that Petitioner required another fusion at L4-5 and L5-S1.

Dr. Mather issued another report on June 13, 2015. In this report, Dr. Mather repeated his prior opinions that Petitioner's condition lack of fusion was not related to his work injury on January 25, 2012.

Petitioner was re-evaluated by Dr. Fisher on July 29, 2015. Dr. Fisher observed that the point of maximum pain was over Petitioner's left SI joint and that provocative tests for the SI joint (FABER, thigh thrust, compression and distraction) all reproduced increased pain centered at the left SI joint. Straight leg raising was negative and the patella reflex was diminished on the left. Based upon his findings and the reported relief after the SI injection, Dr. Fisher recommended a radiofrequency ablation to the nerves at the SI joint which he felt also might benefit the L5 radicular symptoms because the L5 nerve root moves anteriorly to SI joint itself.

Dr. Fisher also reviewed the report from Dr. Mather and specifically disagreed with Dr. Mather's opinion that there was a non-union of the lumbar fusion because Dr. Fisher had specifically tested the fusion during the surgery on March 25, 2014 and found it to contiguous and had no motion when he stressed it. Further, Dr. Mather stated that flexion and extension X-Rays did not show any motion, and CT scans performed on 12/24/14 showed a solid fusion from L4 through S1. Dr. Fisher further pointed out that an MRI taken seven weeks after the accident revealed a disc herniation extending behind the body of L5 and it can be seen displacing the S1 nerve root. He noted that this was consistent with the initial presentation of back pain, left lower extremity radiculopathy and gastroc-soleus weakness in the left S1 distribution and that his symptoms were present from the time of injury up through the date of his first surgery. This was inconsistent with Dr. Mather's belief that Petitioner had only sustained a sprain. Therefore, Dr. Fisher concluded, based upon a reasonable degree of medical certainty, that the Petitioner's injury caused a disc herniation at L5-S1 and that his current condition is a direct result of that. He further opined that a large portion of Petitioner's current symptoms were coming from the SI joint which was most likely secondary to increased forces from his L3-S1 fusion onto the SI joint.

Petitioner's care at the Health Benefits Pain Management Clinic (formerly by Dr. Alzoobi) was then taken over by Dr. Randolph Chang on September 18, 2015. Dr. Chang noted that Petitioner stated that the lumbar fusion and the subsequent injections had provided short term pain relief, but his pain had returned. Petitioner reported taking Norco four times per day along with Ibuprofen. Dr. Chang noted that Petitioner walked with an antalgic gait, could walk on his heels and toes with pain, and was tender to palpation at the sacroiliac joints. Range of motion to lumbar spine was limited to 50%. Dr. Chang recommended Petitioner undergo a spinal cord stimulator trial and to start Lyrica.

In his follow up four weeks later, Dr. Chang noted that Petitioner was still waiting for approval of a spinal cord stimulator and had could not tolerate Lyrica nor could he tolerate Neurontin or Mobic. Dr. Chang performed a spinal cord stimulator trial on February 5, 2016 but the Petitioner did not report good pain relief. Dr. Chang therefore recommended on February 11th that he undergo a diagnostic medial branch nerve block to the lumbar facet joints from L2 through L5 on the left side under C-arm guidance. This was performed on March 10, 2016 and was repeated on April 8, 2016.

In his follow up appointment on April 21st, 2016, Petitioner reported that he had significant relief from these nerve blocks. Dr. Chang therefore prescribed radiofrequency ablations to be done at the facet joints from L2 through L5 on the left side. During a follow up visit on May 19, 2016, Dr. Chang noted that Petitioner still reported pain which fluctuated with the weather but there was some overall improvement.

On June 16, 2016, Dr. Chang remarked that Petitioner had exhausted all of the interventional treatments which could be done and was being maintained by medications and therefore concluded he was at MMI. Petitioner continued to see Dr. Chang for prescriptions and on September 29, 2016 he prescribed a Functional Capacity Evaluation.

Petitioner underwent a Functional Capacity Evaluation on October 24, 2016 at ATI. Petitioner demonstrated that he was able to occasionally lift 39 lbs. above his head, occasionally lift 23.6 lbs. from desk to chair, occasionally lift 19.2 lbs. from chair to floor, and occasionally carry 37 lbs. It was further observed that he could sit for only 15 minutes duration, up to a total of 1 to 2 hours per day, stand for 20 minutes duration up to a total of 1 to 2 hours per day and walk short distances occasionally for a total of 2 to 3 hours per day. Petitioner was found to make a good effort and the results were considered valid. The therapist noted that Petitioner reported that Petitioner reported increased lower back and left leg pain at that time.

On December 8, 2016, Petitioner saw Dr. Darrel Saldanha at Midwest Anesthesia and Pain Specialists for pain management. He reported pain shooting from his left low back down his left hip and the side of his left thigh and into his big toe. The pain was worse with walking and better with Norco and Topamax. On exam, Dr. Saldanha noted a negative straight leg exam and no sensory deficits. Facet loading did reproduce Petitioner's pain, there was tenderness to paraspinal muscles and the SI joints, and Patrick's test was positive at the left SI joint and negative on the right. He reviewed the CT scan from December 24, 2014 and diagnosed lumbar radiculopathy, post-laminectomy syndrome, spondylosis, spinal stenosis, chronic pain syndrome, and sacroiliitis which were secondary to his accident of January 25, 2012.

Dr. Saldanha recommended an injection into Petitioner's left SI joint and on January 6, 2017, Dr. Saldanha performed a left-sided intraarticular Sacroiliac Joint injection. Petitioner later reported that the injection provided 90% reduction in his pain for about two days and then the pain returned. Dr. Saldanha referred Petitioner back to Dr. Fisher for further evaluation, though Petitioner's medications continued to be monitored and prescribed by the doctors at the Centers for Pain Control.

On February 16, 2017, Dr. Fisher noted that Petitioner continued to report radicular symptoms with a band like sensation into the left great toe but that his chief complaint was pain in the left posterior sacroiliac spine. He had undergone a spinal cord stimulator trial which did not help. He had an injection into the SI joint which eliminated his pain for 2 days. On exam, Dr. Fisher noted that Petitioner indicated the area over his left SI joint was the area of his maximum pain. Dr. Fisher performed provocative testing of the SI joint with FABER, thigh thrust, compression and distraction and all reproduced pain centered on the left SI joint. X rays taken that day showed subchondral sclerosis in the inferior two-thirds of the SI joint. Dr. Fisher recommended a percutaneous fusion of Petitioner's left SI joint.

Respondent had Petitioner examined pursuant to Section 12 again by Dr. Mather on May 20, 2017. Dr. Mather had X-Rays taken in his office and described them as showing the prior fusion at L4-5 and L5-S1 as "indistinct." He continued to opine that there was a non-union at L4-5 and L5-S1. He dismissed the diagnosis of a SI joint dysfunction as a "subjective" opinion by a physician "who wants to do surgery." He further noted that the Petitioner reported significant relief when the facet joints were injected and only got partial relief from the original sacroiliac block. Dr. Mather again recommended another CT scan be performed to evaluate Petitioner's fusion.

A CT scan on July 11, 2017 of Petitioner's pelvis showed some bony irregularity about the endplates of L4-5 and L5-S1 with calcified appearance of the discs with lack of complete fusion with screw tracts visualized in the sacrum and within L5 and significant irregularity. Hypertrophy of L4 and L5 posterior elements, and a cystic mass/collection of fluid at L4-5 and L5-S1 extending posteriorly into the laminectomy defect and paraspinal muscles was also seen.

On July 14, 2017, Dr. Fisher noted that Petitioner wanted to move forward with a fusion of the SI joint. He reviewed the CT scan and noted a solid fusion at L5-S1 and copious bone growth at L4-5 though it was difficult to tell if there was bridging. Dr. Fisher noted the questions from Dr. Mather regarding fusion versus non-fusion and agreed to order another CT scan. Petitioner next had an MRI on July 31, 2017 which showed moderate L4-5 stenosis with a left-sided protrusion and L5-S1 right-sided protrusion with moderate stenosis, along with a post-operative seroma. On August 14, 2017, a CT scan of Petitioner's pelvis showed a complete fusion at L4-5 and a sub-total fusion at L3-4 and L5-S1 along with multilevel facet arthropathy, and a posterior paraspinal seroma.

At an office visit with Dr. Fisher on August 18, 2017, Dr. Fisher noted that Petitioner localized his pain in the area over the left SI joint and that he had experienced relief of his symptoms for 48 hours after he had an injection into the SI joint. On exam, Dr. Fisher noted tenderness over this PSIS and a positive FABER maneuver. Dr. Fisher noted previous testing

was also consistent with sacroiliitis. Dr. Fisher noted a questionable lucent line present on at L4-5 on the CT scan but felt that the lack of motion on flexion-extension X rays meant a good chance of L4-5 fusion. Considering the prior success of the injection into the SI joint, Dr. Fisher diagnosed sacroiliitis and recommended a fusion of the SI joint.

On August 29, 2017, Dr. Fisher performed a surgical fusion of the left SI joint. On October 11th, Petitioner was evaluated and informed Dr. Fisher he was doing better in that his radicular symptoms were intermittent and his back pain was slightly improved though he continued to have a significant amount of back pain. On exam, Dr. Fisher noted an antalgic gait and slow, methodical movements with noticeable discomfort.

On November 27, 2017, Petitioner told Dr. Fisher that his symptoms had significantly improved after the fusion of his SI joint and that his pre-operative pain and the "band like" feeling to his left great toe had completely resolved, though he still had residual numbness in his left foot and some back pain as he was being weaned off of his medications. Petitioner saw Dr. Saldanha on January 3, 2018. Dr. Saldanha prescribed Percocet though he noted the cold weather was causing increased pain. Dr. Saldanha noted that Petitioner had previously undergone a trial of a Spinal Cord Stimulator from Medtronic in 2016 which didn't give good coverage, and the doctor noted that it was an older model and a trial of a newer system would be warranted.

On January 11, 2018 the Petitioner was examined by Dr. Matthew Ross at Petitioner's request under Section 12. Dr. Ross opined that Petitioner's lumbar and sacroiliac complaints were related to his initial injury and that the medical treatment to date had been reasonable and necessary. His report and testimony are discussed in greater detail below.

On January 24, 2018, Dr. Fisher re-evaluated Petitioner who reported back pain primarily in the left buttock. Dr. Fisher noted that the CT scan showed a bridging osteophyte but did not ensure completely the fusion was solid, though Dr. Fisher noted that he stressed the fusion during the last surgery, and it did not move. Dr. Fisher noted that Petitioner had previously had a spinal cord stimulator trial but recommended he have another to see if it could relieve his symptoms.

When Petitioner returned to Dr. Fisher on March 9, 2018, he reported continued back pain and numbness down to his left toe. He expressed a desire to work at a sit-down job, provided he would have the opportunity to change positions. On exam, Dr. Fisher noted a positive straight leg test, a positive FABER, and a positive thigh thrust test on the left. Dr. Fisher provided trigger point injection to the left PSIS and again recommended implantation of a spinal cord stimulator. Dr. Fisher completed a work status form which listed Petitioner's restrictions of sedentary work with no lifting over 10 pounds and no repetitive bending, twisting, or lifting and that Petitioner must be able to alternate from sitting to standing. Dr. Fisher did not check the box indicating Petitioner was at MMI.

Petitioner was last seen at Midwest Anesthesia and Pain Specialists on April 4, 2018 and the doctor continued to recommend a Spinal Cord Stimulator though he noted that it continued to be denied by insurance. He therefore discharged Petitioner finding him to be at maximum medical improvement.

The records from Stellar Pain & Spine Specialist show Petitioner saw Dr. Sameer Shah at Swedish Covenant Hospital on June 13, 2018. This was a referral from Dr. Rebecca Levine. Dr. Shah recorded that the Petitioner had right-sided gluteal pain and left lower back pain which radiated down his left leg. Petitioner informed the doctor of his long-standing history of back and leg pain and his prior surgeries which he described as given him minimal relief. Petitioner described his pain as throbbing in his lower back which radiated down his left leg with numbness and tingling which was made worse with prolonged walking. Dr. Shah noted that the Petitioner used a cane to assist with walking. On examination, Dr. Shah noted that Petitioner had decreased range of motion in his lumbar spine. He diagnosed Petitioner of having chronic spondylosis of the lumbar spine, chronic lumbar radicular syndrome and a chronic post-laminectomy syndrome of the lumbar region. Dr. Shah recommended another CT scan, x-rays, and a trial of a spinal cord stimulator. He referred Petitioner to a Dr. Choi for a psych evaluation prior to the trial of the spinal cord stimulator and recommended that the Petitioner wean himself from his pain medication.

An x-ray done at Swedish Covenant Hospital on June 13, 2018 showed a prior laminectomy at L4-5. It also showed that the facet joints appeared to be fused from L2-3 through L5-S1. There had also been a discectomy at L3-5. Mild degenerative disc disease was seen at L4-5 and L5-S1 as well as surgical fusion of the left sacroiliac joint. A CT scan was performed on July 3, 2018. This showed post-operative findings related to laminectomies at L4 and L5 with fusions from L3-L4 through L5-S1 and it further noted a four-centimeter fluid collection which extends to the dorsal epidural space which was felt to represent either a post-operative seroma or hematoma.

Petitioner followed up with Dr. Shah on June 28, 2018 and Dr. Shah recommended bilateral medial branch blocks from L2 through L5 for diagnostic purposes in order to evaluate for lumbar facet-based pain in addition to the spinal cord stimulator trial. The medial branch blocks were performed on July 20, 2018 and this was repeated on July 27, 2018. When Petitioner followed up with Dr. Shah on August 14, 2018, Petitioner reported a 90% improvement for one day after each injection, however he was back to his baseline after that. He had undergone his psychological examination for the spinal cord stimulator trial and Dr. Shah recommended further medial branch blocks with radio frequency ablations from L2 through L5 before considering the spinal cord stimulator trial. This procedure was performed on August 31, 2018 at Swedish Covenant Hospital and was repeated on September 7, 2018. When Petitioner followed up with Dr. Shah on September 20, 2018, the Petitioner reported improvement in his back pain, but he was experiencing numbness and tingling which were radiating into his hips. Petitioner reported increased pain while walking. Dr. Shah recommended a Medrol dose pack for the numbness and tingling and a caudal epidural steroid injection in order to treat the radicular symptoms. Dr. Shah performed the caudal epidural steroid injection on September 28, 2018. On October 16, 2018, Petitioner reported that his lumbar pain had improved 40%-50% but he was now focusing on pain over his SI joint and he was still experiencing some numbness and tingling into his legs which was not as intense as before. Dr. Shah therefore recommended an injection into Petitioner's right SI joint and another caudal epidural steroid injection. Dr. Shah also noted that the Petitioner was asking to hold off on the spinal cord stimulator as a last resort. The SI steroid

injection was performed on October 31, 2018 and the caudal epidural steroid injection was done on November 9, 2018.

When Petitioner followed up with Dr. Shah on November 21, 2018, he reported that the steroid injection had provided temporary relief and he continued to have worsening lower back pain and leg pain which he had reported had worsened due to the weather. Dr. Shah then made plans to provide a spinal cord stimulator trial as well as a third caudal epidural steroid injection until the spinal cord stimulator trial is approved, in order to provide some pain relief. The third caudal epidural steroid injection was performed on November 28, 2018. When Petitioner followed up with Dr. Shah on December 11, 2018, he reported that he continued to have significant lower back and leg pain and that the epidural injection had provided only temporary relief and his pain had returned to baseline. On January 4, 2019, Dr. Shah performed surgery to place spinal cord stimulation leads for a spinal cord stimulator trial. On January 15, 2019, the Petitioner followed up with Dr. Shah and reported 80% relief of his pain and he was able to walk without a cane.

Dr. Shah provided a permanent implantation of a spinal cord stimulator on February 22, 2019. When Petitioner followed up with Dr. Shah on March 21, 2019, he reported a great relief with his back and leg pain and had reduced usage of pain medication.

When he followed up with Dr. Shah on March 5, 2019, Petitioner reported that his pain was 60% better. On April 18, 2019, Petitioner returned to see Dr. Shah and informed him that the stimulator was providing relief for his leg pain, but he was having increasing pain in his lower back. Dr. Shah noted that the last radiofrequency ablation had been performed seven months ago and therefore recommended he undergo another from L2 through L5 bilaterally. This was performed on May 10, 2019 and repeated on May 17, 2019. Petitioner reported 80% relief from these procedures and Dr. Shah prescribed further physical therapy.

Petitioner underwent a Functional Capacity Evaluation on October 9, 2019 and on October 10, 2019. Petitioner's effort was found to be valid and reliable. Petitioner was able to meet the "light" physical demand level by lifting 10lbs from floor to waist, 20lbs from waist to shoulder height, and 15lbs overhead. During the FCE, the therapist noted that Petitioner could stand for occasional intervals and walk for occasional intervals, bend for occasional intervals, perform trunk rotations on an occasional basis, squat and kneel occasionally, and perform frequent reaching at waist height and overhead. It was noted that Petitioner lacked the physical capacity to return to his former job as a warehouse picker.

Petitioner returned to Dr. Shah on November 5, 2019 complaining of back pain across his lower back which he rated as 7/10. His pain diagram demonstrated pain going down both legs. He reported 70-80% relief from the radiofrequency ablation six months prior and wanted to repeat this. Dr. Shah recommended the ablations and reprograming of the Spinal Cord Stimulator. The ablations were performed on November 15, 2019 and November 22, 2019. Petitioner reported 90% relief from pain but in his follow up on December 24, 2019 reported that he was having increasing pain in his SI joint.

Testimony of Dr. Fisher

Dr. Theodore Fisher testified via evidence deposition on July 30, 2014. Dr. Fisher is a Board-Certified Spine Surgeon and has specialized in spine surgery since 2007. Dr. Fisher testified to the history that Petitioner provided on June 14, 2012 of low back pain with recurrent episodes of numbness in his left lower extremity extending to his toes and that he had previously had physical therapy and two epidural injections which had temporary relief. Dr. Fisher reviewed the MRI films which had been performed on March 15, 2012 and observed a "high intensity zone" at L3-4 consistent with an annular tear, a broad based central herniation at L4-5 with disc desiccation, and a broad-based disc herniation at L5-S1 with a larger left paracentral component displacing nerve roots. Because prior treatment had not been successful, he recommended a left-sided microdiscectomy at L5-S1. Dr. Fisher explained that L5-S1 appeared to be the most symptomatic level based upon his reports of pain and though the other discs had small herniations he wanted to do the smallest surgery possible. During the surgery, Dr. Fisher visualized the L5-S1 disc space and observed a loose piece of disc material that was extending behind the body of L5 which he believed had likely been causing Petitioner's symptoms.

Dr. Fisher testified that Petitioner appeared to be doing better post-operatively, but this was before he began lifting weights in therapy. He agreed that the increased symptoms which Petitioner reported on December 5, 2012 were consistent with the condition he had been treating and he believed the increase in pain was due to increased physical activity in work conditioning. He opined that as Petitioner progressed to lifting weights in work conditioning this exacerbated his condition and caused additional symptoms. Dr. Fisher also reviewed the MRI films taken on December 10, 2012 personally and noted that there was no recurrent herniation at L5-S1 but there was scar tissue consistent with the previous surgery. At L3-4 and L4-5, he observed disc herniations with an annular tear at L3-4 and a left paracentral component at L4-5. He recommended a lumbar discogram in order to see if he was a candidate for lumbar fusion.

Dr. Fisher acknowledged that the test discogram can be imprecise and needed to be viewed in conjunction with an MRI and the physical exam findings as well. A CT scan performed after the discogram can will detect the dye which was injected during the discogram and therefore can also give additional information such as whether the discs have tears in them. Dr. Fisher noted that the discogram showed Petitioner had pain at three levels that showed herniations on the MRI and the CT scan also showed these three levels, mild bilateral foraminal stenosis at L3-4 and at L4-5 there was central stenosis with right foraminal stenosis and moderate left stenosis.

Dr. Fisher stated that although Petitioner was a candidate for a 3-level fusion from L3 to S1, this would be a last resort. Petitioner was reporting severe pain and had tried injections, physical therapy, and medication but had not shown any improvement so Dr. Fisher offered it as an option and Petitioner chose to pursue it. Dr. Fisher reviewed the operative report and noted that he actually viewed disc herniations during surgery at L3-4, L4-5, and L5-S1 with the herniation at L4-5 being described as large. He explained that the prior laminectomy was performed on the left side of L5-S1 while the fusion surgery was approached from the right side which explained why he found a herniation at L5-S1. Dr. Fisher opined that all three of these findings were producing Petitioner's pre-operative symptoms to various degrees.

Dr. Fisher noted that on October 9, 2013 the Petitioner reported that he was doing very well and "felt like a million bucks" and that there was hope that Petitioner would be able to get back to full duty work. However, Dr. Fisher went on to explain that while Petitioner initially did well after surgery, the screws placed during surgery loosened and the disc spacers moved and irritated his nerve roots. This required a subsequent surgery to revise the hardware. In this surgery, he removed a cage which caused a tear of the dura which he subsequently repaired. As a result, this resulted in a fluid collection which developed posterior to Petitioner's lumbar spine and was seen on subsequent MRIs. Dr. Fisher testified that the fusion was solid, but he had continued pain due to the irritation of the nerve roots.

As of the date of the deposition, Dr. Fisher felt that Petitioner was not yet at maximum medical improvement. Dr. Fisher did agree that his condition was causally related to Petitioner's injury. He concluded that he sustained an acute disc herniation at L5-S1 at the time of the accident. He further explained that the other levels may have become symptomatic from the injury to L5-S1 along with the surgeries and the work conditioning because Petitioner had never had any problems in his lower back before his injury. He elaborated that the MRIs demonstrated he had a component of degenerative changes at L3-4 and L4-5, but these were asymptomatic prior to his injury. Accordingly, he concluded that the L3-4 and L4-5 discs were either accelerated or exacerbated by the injury itself or the subsequent treatment plus the work-conditioning where his symptoms had increased.

Dr. Fisher disagreed with the opinion of Dr. Mather that Petitioner never had a disc herniation and surgery was not necessary. Dr. Fisher pointed out that Dr. Mather claimed that L5-S1 only had degenerative disc disease but noted that the radiology report from the 3/10/12 MRI described a left-sided disc herniation at L5-S1 which was supportive of Dr. Fisher's own reading of the scan. Dr. Fisher pointed out that the radiologist's interpretation along with his own and the surgical findings all pointed to the existence of a herniated disc at L5-S1. Dr. Fisher also confirmed that he did not detect any Waddell signs or any indication that Petitioner was overreacting to pain – he believed that his exam findings were all consistent. On cross-examination, Dr. Fisher was shown Dr. Mather's May 17, 2013 report which discusses the MRI from March 2012 and notes that Dr. Mather didn't appear to comment upon the L5-S1 disc level.

Dr. Fisher was asked about his description of the March 15, 2012 MRI which he stated showed herniations when compared to the radiologist's interpretation who described disc protrusions. Dr. Fisher explained that a protrusion is a smaller herniation that hasn't extruded out of place although the L5-S1 disc space was discussed as an extrusion which has torn through the annulus. Dr. Fisher explained that a disc herniation is a generalized term which covers all protrusions, herniations, and tears. Dr. Fisher reiterated his opinion that the L5-S1 disc extrusion happened acutely during Petitioner's injury, while the L3-4 and L4-5 levels had some degeneration changes. Dr. Fisher acknowledged that his initial assessment from June 14, 2012 discussed only the disc herniation at L5-S1 and did not discuss the discs at L3-4 and L4-5. Dr. Fisher explained that he discussed these levels in the discussion of the diagnostic studies and in the section labeled "diagnosis" but reserved his final assessment for the L5-S1 which is where he believed the majority of Petitioner's problems were coming from and where Dr. Fisher wanted to perform surgery. Dr. Fisher also repeated that he did not address the L3-4 and L4-5 levels at the

time of the first surgery because he believed the radicular symptoms were coming from the L5-S1 level and he could alleviate those with a simple microdiscectomy, which has only a 6-week recovery time. Unfortunately, Petitioner failed to recover in work conditioning which led the doctor to look at other levels.

Dr. Fisher acknowledged that he did not treat petitioner until approximately five months after the accident and that Petitioner had treated with a Dr. Charles Mercier. He further acknowledged that he has no record of right lower extremity symptoms prior to the first surgery in August 2012 though he admitted that he did not review any of the prior treatment records from Dr. Mercier. Dr. Fisher stated that the first mention of lower extremity pain bilaterally was in December of 2012 and that there were no significant changes between the March 15, 2012 MRI and the December 12, 2012 MRI. He acknowledged that in his notes of the January 16, 2013 note he identified herniated discs in L3-4 and L4-5 in his final assessment. He explained, however, that he did identify and discuss them in his initial note from June 14, 2012.

Dr. Fisher denied that he based his decision to perform lumbar fusion solely on the results of the discogram. He explained that he considered the discogram, the MRIs, the CT scans, and his physical exam findings in conjunction with Petitioner's reports of severe pain. He stated the discogram is an important piece of information but not the only one. Regarding the amount of pressure used in discograms, Dr. Fisher noted that different pain management doctors use different amounts based on different techniques and he had no opinion regarding the appropriate amount of pressure.

Testimony of Dr. Ross

Dr. Matthew Ross testified via evidence deposition on August 1, 2018. Petitioner was examined by Dr. Ross at the request of Petitioner under Section 12. Dr. Ross is a Board-Certified Neurosurgeon and spine surgeon and examined Petitioner on January 11, 2018. In his exam, Dr. Ross noted Petitioner was in mild distress during the examination. The examination revealed mildly restricted mobility in his lumbar spine on forward flexion. Straight leg raising aggravated the back pain at 80 degrees on the right and 70 degrees on the left with pain radiating down his left leg as well. Bilateral bent leg raising and hip rotation aggravated the back pain. Sensation was diminished to light touch over the left medial shin as well as the dorsum of the left foot and great toe. Pinprick is diminished over the left medial and lateral lower leg as well as over the dorsum of the left foot and great toe. The lateral aspect of the left foot is mildly reduced. Vibratory sensation is present but diminished in the left foot. Proprioception is diminished in the left foot. Deep tendon reflexes were slightly reduced in the left knee, and absent in both ankles. Dr. Ross also observed that Petitioner was able to complete a physical exam without using a cane though he used a cane when coming in and out of the office. He requested Petitioner not use the cane during the exam and he was able to demonstrate walking without the cane. Dr. Ross described this as a common phenomenon for patients who use a cane as a kind of "security blanket." Despite Petitioner's complaints, Dr. Ross was pleased with Petitioner's mobility.

Dr. Ross found no evidence of any symptom magnification, though he observed that Petitioner's rating of his pain on a scale of 1-10 was higher than the average person – Petitioner was rating his pain as a 9/10 that sometimes exceeded 10/10 – to which Dr. Ross noted that

cognitive behavior counseling or therapy could help in terms of adjusting Petitioner's expectations.

Dr. Ross reviewed the medical records and concluded that Petitioner has chronic back and radicular leg pain following multiple spinal and left SI joint surgeries. His condition could be diagnosed as failed back surgery syndrome. Dr. Ross stated that Petitioner's ongoing pain complaints are causally connected to the work injury of January 2012 and/or the treatments he received in an effort to address the symptoms caused by the work injury. This is based upon the fact that he has been continuously symptomatic ever since the work injury. Dr. Ross felt that Petitioner had an exacerbation of his symptoms when he began work conditioning in December 2012 rather than a re-herniation. He did not see any evidence of a re-herniation.

The medical treatment Petitioner received including the microdiscectomy, discogram, lumbar fusion, revision of the fusion, spinal cord stimulator trial, sacroiliac joint block, and sacroiliac joint fusion were appropriate treatments for his condition caused by the work injury of January 2012. These were reasonable and necessary to treat his complaints of ongoing back and left leg pain. Dr. Ross testified that Petitioner complained of left leg pain prior to the August 2012 surgery but acknowledged that he had not reviewed all the records, nor had he reviewed the films from the March 2012 MRI.

Dr. Ross testified that that the fusion of the SI joint was indicated based upon the Petitioner's positive though temporary response to the SI joint injection, and this was confirmed by Petitioner's reports of doing well after the procedure. He opined that the SI joint became symptomatic due to the stress placed upon it after the 3-level fusion from L3 to S1, though it was possible the joint was injured in the original injury. At the time of his exam, Dr. Ross concluded that Petitioner's complaints were due to the condition of his lumbar spine rather than the SI joint because that joint had been fused.

Regarding the discogram, which was performed on March 22, 2013, Dr. Ross opined that lumbar provocative diskography is an important albeit imperfect tool in decision making regarding lumbar fusion surgery in patients with chronic back pain. Unfortunately, there is not perfect correlation between the results of diskography and the outcome from fusion surgery. Dr. Ross referenced Dr. Eugene Carragee's studies of diskography at Stanford University which indicate that the test predicts pain improvement following a fusion surgery in only 50% to 75% of patients. Good to excellent pain relief is seen in only 50% of patients following a positive diskogram. 25% of those patients further indicate that if they knew the amount of relief they would receive they would not have done it. The discogram Petitioner underwent on March 22,2013 was performed in a standard fashion. He had no criticism of the pain specialist's technique with the diskogram. Dr. Ross also explained that he almost never performs a lumbar fusion without first having a discogram done and he does rely upon them frequently. He used to perform discograms himself but as the surgeon he now has them done by a separate anesthesiologist. He was unconcerned about the level of pressure used in the discogram and felt that Dr. Mather's concerns were ill-founded. Based on the results of the test and the results of the CT Scan that followed the discogram along with Petitioner's complaints Dr. Ross believed fusion surgery was reasonable.

Dr. Ross recommended that he have a CT scan of the lumbar spine and sacroiliac joints with thin sections from L3-S1 in order to determine if there were solid fusions. If his fusions are solid, no additional surgery would be indicated. In that case, he advised that Petitioner enroll in a physiatry based chronic pain management program with cognitive behavioral therapy. When asked if a CT scan showed solid fusion at L3-4 and L5-S1 with L4-5 showing fusion at the facets, Dr. Ross agreed that this would indicate Petitioner had a solid fusion.

On cross-examination, Dr. Ross acknowledged the Petitioner did not immediately complaint of left leg pain after his accident. He testified that it is rare for a patient to have immediate radicular symptoms after experiencing a herniated disc because a herniated disc might cause direct pressure on a nerve or release chemicals which in time will aggravate a nerve. He reiterated his recommendation for an FCE and stated that he believed the Petitioner would be employable but that he would likely need vocational counseling and cognitive behavior counseling or therapy. He acknowledged a difference between a physical capability to perform some work and the likelihood of finding a job, which is a question for a vocational counselor.

Testimony of Dr. Mather

Dr. Steven Mather testified via evidence deposition on August 8, 2014. Dr. Mather is a Board-Certified spine specialist and first examined Petitioner at the request of Respondent on March 25, 2013. Dr. Mather took a history from Petitioner where the Petitioner reiterated that he injured his back lowering a box onto a forklift, underwent physical therapy, two injections, did not improve, and was referred to Dr. Fisher who performed an L5-S1 microdiscectomy which also did not improve his condition. Petitioner reported back pain and weakness and numbness in his legs at the time of the exam. Dr. Mather testified that Petitioner told him that he did not have any leg pain prior to the L5-S1 microdiscectomy. Petitioner further reported that he really did not get better after the surgery and that during work conditioning his legs started to give out and when he went back to work light duty his legs buckled when he was simply standing and stacking light parts. The doctor noted that Petitioner reported his legs continued to buckle and he had numbness in the calves and the outer aspect of the left foot and the soles of both feet.

Dr. Mather reported during his exam he observed the Petitioner's movements were slow and guarded, range of motion was limited to 5 degrees extension and forward flexion and reported pain with axial loading and axial rotation of the lumbar spine. He reported that Petitioner said it was too painful to walk on his tiptoes.

Dr. Mather also claimed that the Petitioner told him that he had no leg pain at the time of his exam but further testified that during his exam that Petitioner reported weakness and numbness in his calves. Dr. Mather stated that Petitioner stated he could not distinguish between a pinprick and a brush but nevertheless jerked away quickly during pinprick testing. Dr. Mather found reflexes to be symmetrical and reported that Petitioner had giveaway weakness during his exam and reported he could not sense whether his toes were pointing up or down. Dr. Mather found these reactions inconsistent and the doctor considered them to be non-organic. He testified that he found further found non-organic findings when manipulated Petitioner's toes up or down and the Petitioner was unable to tell which way they were pointing and when he reported he could not feel vibration in his feet.

Dr. Mather confirmed that he had reviewed all prior treatment records and concluded that Petitioner sustained a lumbar strain in his accident of January 25, 2012 and did not require any surgery because his pain was not nerve root pain or sciatic pain. Dr. Mather based his opinion on his belief that Petitioner had multiple non-organic pain findings and a normal physical exam.

Further, Dr. Mather testified that Petitioner should not have had a 3-level lumbar fusion because patients who have this procedure are never able to go back to heavy work and they frequently are worse than their pre-operative state. It was Dr. Mather's opinion that two of Petitioner's discs were of normal height and one had only minimal loss of height. Dr. Mather further opined that the discogram performed on March 22, 2013 was done improperly because the discs are supposed to be pressurized between 15 psi and 50 psi, but at pressures much higher than that it can cause pain in anybody. Dr. Mather was therefore critical of the decision to pressurize the L5-S1 disc to 130 psi. Dr. Mather also felt that a fusion was not indicated for the Petitioner because of his age, his clinical complaints, the number of levels involved, along with the kind of work he does and his transferrable skills. He therefore concluded that Petitioner did not require any further treatment for his work injury and that he could return to work full duty. Dr. Mather described his view of the March 15, 2012 MRI and stated that it showed a small central disc bulge that was non-compressive at L5-S1 and a non-compressive disc bulge at L4-5. He concluded that there was no nerve compression.

During Dr. Mather's second examination of Petitioner which occurred on February 27, 2014 – after Petitioner's fusion surgery – Dr. Mather noted a history of low back, left buttock, left thigh, and foot pain at that time. No right-sided pain was noted. He stated that he took X rays in his office which showed the pedicle screw at S1 appeared to be loose and the cages at L4-5 and L5-S1 appeared to have retropulsed near the spinal canal toward the nerves. At that time, he diagnosed the Petitioner as having signs of nerve compression, status post-fusion attempt at L3-S1 with loose hardware which was likely from the cages which had moved. He concluded that Petitioner needed another surgery to revise his hardware. He agreed that the revision surgery performed March 25, 2014 was reasonable and necessary but stated that the need for this surgical revision was not related to the work accident because he didn't think he needed surgery in the first place but instead needed a conservative program and maybe even work restrictions. Again, Dr. Mather emphasized that Petitioner did not have any radicular pain prior to his initial surgery.

On cross-examination, Dr. Mather acknowledged that there should have been a push for a core strengthening program, a functional restoration program, in an effort to find out what activities the Petitioner couldn't do, restrict him from those, have the employer make accommodations at work and maybe even do a vocational rehabilitation program if the employer did not accommodate him. Further, Dr. Mather admitted that Petitioner needed treatment and likely needed work restrictions as a result of his accident. Further still, Dr. Mather acknowledged that the medical records from Dr. Fisher recorded that the Petitioner had been complaining of numbness in his left leg prior to his first surgery. He further acknowledged that numbness in the left leg can be considered a radicular complaint. He maintained, however, that Dr. Fisher's report of numbness contrasted with "all the other medical providers."

Although Dr. Mather diagnosed Petitioner as having a back sprain, he acknowledged that Dr. Fisher reported observing a herniated disc at L5-S1 when he performed surgery on August 10, 2012 but observed that this was not consistent with his own reading of the 3/15/12 MRI. When asked if an MRI was more reliable than a surgeon's eyes, Dr. Mather observed that sometimes an MRI will show a disc herniation and the surgeon will miss it during surgery. When it was pointed out that Dr. Fisher didn't "miss" a disc herniation but rather stated he observed a herniation, Dr. Mather replied, "[t]hat's what he said." He acknowledged that he had no reason to disbelieve Dr. Fisher but only reiterated that he didn't see a disc herniation when he reviewed the MRI.).

Dr. Mather testified that he performs IMEs about 4-5 times per week and 95 percent of them are for the insurance industry. When discussing his belief that the Petitioner was inconsistent in his reports of numbness and jerking away when touched with pinprick, Dr. Mather acknowledged that he didn't ask the Petitioner how often he felt numbness in his legs. Dr. Mather maintained his opinion that Petitioner was malingering during his first exam based upon his belief that there were signs of symptom magnification. When describing Waddell signs, Dr. Mather acknowledged that some people say that Waddell signs are not signs of malingering but are signs of psychological overlay - but not in his opinion. He believes Waddell signs to be a sign of malingering.

When asked to read the radiologist report from the CT scan which was performed after the discogram on March 22, 2013, Dr. Mather acknowledged that the radiologist reported a likely full thickness tear of the annulus at L3-4 and acknowledged that this can be a painful condition. Regarding the radiologist's report of the L4-5 level, Dr. Mather acknowledged that it showed a disc bulge which caused mild right foraminal stenosis and moderate left foraminal stenosis and which was also consistent with an annular tear and that this could represent a painful condition. Regarding the L5-S1 disc level, he acknowledged that the radiologist reported findings consistent with either scar tissue or extruded disc material along the left nerve root and an annular tear.

Regarding the discogram itself, Dr. Mather acknowledged that only one of the disc levels – L5-S1 – was pressurized to a level that he felt was excessive. The levels at L3-4 and L4-5 were not pressurized excessively but were still reported as painful. Regarding the decision to perform a lumbar fusion, Dr. Mather insisted that the kind of work a patient does and their lack of transferrable skills are factors to consider when making such a recommendation because a doctor shouldn't offer a fusion to someone who only knows how to bend and lift for work because the patient would have to know what to do with their life after fusion. Asked if this was a decision for the patient to make, he responded, "You have to get inside their head and a lot of people don't do that."

Dr. Mather authored a subsequent opinion on Petitioner's care in April of 2015 where he opined that Petitioner has a nonunion at L4-L5-S1 with persistent left L4 radiculopathy and spondylolysis which would require a fusion at L4-L5 and L5-S1 with posterior segmental instrumentation, L3 to S1. Dr. Mather maintained his belief that this fusion surgery as well as the non-union were unrelated to the work accident at issue. In May of 2017 Dr. Mather reiterated his

opinion that Petitioner had a non-union at L4-L5-S1 which was not related to the work accident and was a result of the fusion surgery performed based on an improper discogram.

Testimony of Petitioner's Vocational Counselor – Edward Pagella

On September 21, Petitioner was examined by vocational rehabilitation consultant, Edward Pagella, at Petitioner's counsel's request to perform a vocational analysis. Mr. Pagella is a Licensed Clinical Professional Counselor and has consulted on matters before the Social Security Administration and the Railroad Retirement Board. At the time of their meeting, Petitioner was post L3-S1 lumbar fusion.

Mr. Pagella noted that Dr. Ross had recommended an FCE which had not yet been completed and that Dr. Fisher had restricted Petitioner to sedentary work wit the ability to alternate between standing and sitting with no lifting over 10 pounds and no repetitive bending, twisting, or lifting. Mr. Pagella noted that when he met with the Petitioner, he was advised that Petitioner needed to stand up every ten minutes and walk around because of back pain from sitting. Petitioner was under pain management at that time which involved taking narcotic medication at the time. Mr. Pagella testified that jobs may drug test candidates.

Petitioner was noted to be 46 years old at the time of this meeting and had a high school education. Petitioner advised Mr. Pagella of his prior work experience which consisted of working in a warehouse with Respondent since 2011 and North Shore Care Products prior to that. Mr. Pagella identified Petitioner's prior work as warehouse picker to have a Specific Vocational Preparation (SVP) level of two which means he would be considered an unskilled worker meaning it took him less than 90 days to learn a job and he would have no transferable skills. It was noted that Petitioner had not attended any training programs, was not certified in any other areas, and had no resume or job seeking skills at that time.

Mr. Pagella concluded that, based upon the restrictions set forth by Dr. Fisher, that Petitioner would be unable to return back to his former job as a warehouse picker because he was no longer able to be on his feet throughout the day and could only lift up to 10 pounds occasionally. He further concluded that sedentary work with no repetitive movements and a sit-stand option would require an accommodation from the employer and that there is not a stable labor market for such.

Mr. Pagella testified that it was possible that there was an accommodating position for the Petitioner and that Petitioner would be a candidate for retraining and rehabilitation. He offered to assist Mr. Olivo in attempting to find an accommodating employer though he cautioned that there are no guarantees especially when Petitioner would have to explain why he hasn't worked in 10 years and is on narcotic pain medication. A job which is an "accommodation" is not a viable occupation within the local or national economy because such positions do not exist in numbers. He therefore concluded that Mr. Olivo was unable to make any kind of contribution to the work force and that there was not a reasonably stable labor market for Petitioner.

After Petitioner underwent an FCE in October 2019, Mr. Pagella issued a second report on December 5, 2019. Mr. Pagella noted that this report indicated that it was fully reliable and reported Petitioner could lift up to 10lbs from floor to waist, carry up to 15 pounds, occasional pushing and pulling up to 30 pounds but would still need a sit/stand type of job. It was noted that the FCE revealed increased capacity over petitioner's previous restrictions of 10 pounds. The FCE did not note how long the petitioner could sit. Nevertheless, Mr. Pagella opined that there was not suitable employment within the economy for Petitioner and that Petitioner was permanently and totally disabled under the "odd lot" category. This was based upon Petitioner's high school education, no other certifications or degrees, a lack of transferable skills, and his physical limitations.

Mr. Pagella explained that Petitioner has no computer skills which will help him find work because he does not have the ability to use Microsoft Office, Word, Excel, PowerPoint, or to use any type of program which might be used by a specific company. The Petitioner, however, expressed that he would be able to learn how to perform an internet job search. Mr. Pagella was unaware if this had ever been done. He further explained that the ability to use Facebook or social media is not a computer skill in a practical environment.

He concluded while no employer would likely hire Petitioner it was possible that vocational services could find Petitioner an accommodating employer. He estimated these services would cost between $25,000 and $35,000. He further testified that he wouldn't recommend vocational services unless there was a good chance of finding the Petitioner a good result. The Petitioner, however, did not follow up with Mr. Pagella regarding vocational services. Mr. Pagella had no further contact with petitioner at any time after his initial examination.

On cross-examination Mr. Pagella acknowledged that Petitioner was unable to provide any employment history between the time he graduated high school in 1990 and 2010. He further acknowledged that while he believed that the Petitioner's use of narcotics could bar him from obtaining employment, he did not ask Petitioner how much Norco he was taking or how often it was taken. Similarly, he acknowledged that there could be employees who could accommodate a Petitioner on narcotics and that it was his recommendation to try and assist the Petitioner in finding an accommodating position.

Testimony of Respondent's Vocational Counselor – Edward Rascati

Respondent retained Edward Rascati, a Certified Professional Vocational Consultant, to address Petitioner's employability. Mr. Rascati has his own vocational consulting practice, EJR Consulting, which has been in operation since 1996. Mr. Rascati met with Petitioner on November 12, 2018. This was prior to the last Functional Capacity Evaluation and at that time, Mr. Rascati understood Petitioner's restrictions from Dr. Fisher to be no lifting beyond 10 pounds, no repetitive bending, twisting, or lifting, and a requirement that he alternate between sitting and standing. In his meeting with Petitioner, the Petitioner reported that he could stand for approximately 15 minutes and he could sit for 10 to 20 minutes at a time. He also noted that Petitioner had a felony conviction when he was 19 years old for retail theft and was taking Norco approximately four times daily for pain relief. Petitioner stated that he owned a smartphone and was able to handle e mail and attachments and could use a keyboard with two hands a little, and

he had previously used the program Lotus Notes when he was working for an old employer. Petitioner reported minimal daily activities. Petitioner told Mr. Rascati that he possessed a valid driver's license and can drive short distances.

Mr. Rascati noted that Petitioner worked as a warehouse picker for Respondent, which meant that he would write down part and order numbers, label, and perform quality control which meant ensuring that the orders that were accurate. He would then box, wrap, and scale packages for delivery utilizing a UPS shipping terminal and inputting recipient's information, printing, and applying the shipping label. The Petitioner identified three prior employers. He previously worked at North Shore Medical for approximately three years in essentially the same capacity as a warehouse picker. Prior to that he worked for SafetyClean for approximately one year doing UPS and FedEx labeling and shipping. He also worked as a warehouse picker and panel van driver for Associated Fastening Products.

Mr. Rascati concluded that Petitioner's work history along with DOT information would put Petitioner in the shipping and receiving clerk categorization as opposed to warehouse picker due to Petitioner's quality control and shipping and receiving experience.

Based on Petitioner's work history and Petitioner's qualifications, Mr. Rascati believed that Petitioner qualified for the occupational title of shipping and receiving clerk. Transferrable skills were noted as performing a variety of duties, making judgments and decisions, compiling data, taking instructions, and helping and handling. He noted Petitioner's good interpersonal skills and that he was friendly and pleasant. He noted Petitioner's consistent work history, his high school education, basic computer skills, and history of low wages. Mr. Rascati then reviewed the Department of Labor's Dictionary of Occupational Titles for a Shipping and Receiving Clerk and noted that this job required six months to a year of vocational training and required reasoning and math aptitudes at the 7th and 8th grade level.

Mr. Rascati recommended a Labor Market Survey to determine what employment opportunities existed for Petitioner. On December 4, 2018 Mr. Rascati was able to identify nine positions which he felt given the Petitioner's work history, skills, and in conjunction with his current level of physical function, would be available to him. He considered positions in customer service, light production, packaging, quality control, security gate guard, and usher positions. These possible positions included working as a collections representative, a sit-down assembly position, a picker/packer position, a customer service representative, call center work, and a front desk agent for the Hampton Inn. He testified that 8 of the 9 positions he found were within the restrictions set forth by Dr. Fisher and some required minimal computer skills. The wages for these positions ranged from $9.62 an hour to $16.83 an hour with the average being $12.61 per hour. Mr. Rascati acknowledged Petitioner may need to enhance his computer skills.

Mr. Rascati testified that he believed Petitioner would benefit from professional vocational services. He acknowledged the gap in employment could "raise an eyebrow" with prospective employers but that the Petitioner had an adequate explanation for this gap. He further testified that Petitioner would benefit from vocational services to prepare him for completing job applications, interviewing and addressing concerns about an employment gap and that there are several factors that go into a proper job placement for Petitioner.

A second vocational report was authored by Mr. Rascati on March 17, 2020. At this point Petitioner had completed an FCE which indicated Petitioner could lift 10 pounds floor to waist, 20 pounds waist to shoulder, 15 pounds overhead, 15 pounds carry, 20 pounds push and pull and, overall, that Petitioner was placed at the "light" level of physical function. Consistent with the FCE results, he found positions available as a gate guard and/or cashier/ticket seller. These jobs were categorized in the light duty restriction range. Alternatively, if it was deemed that the petitioner would be restricted at the sedentary level of physical function then possible position would be production clerk, customer service representative and/or security clerk. He again believed that the petitioner would benefit from professional vocational assistance. He confirmed that those nine positions identified in his earlier labor market survey would still be viable options for the petitioner given his restrictions following the FCE.

On cross-examination, Mr. Rascati acknowledged that Petitioner faced significant barriers to finding employment, such the Petitioner's physical limitations, and a lack of education beyond high school. Regarding Petitioner' past felony conviction when he was 19, Mr. Rascati disputed that this would be a barrier to finding employment apart from the field of armed security. Mr. Rascati noted that the petitioner's narcotic use at the time could potentially be a hurdle for employment but noted that employers are not allowed to discriminate against someone with chronic pain. It would certainly preclude him from particular occupations. Specifically, Mr. Rascati indicated if he was to pursue occupations as an airline pilot or a bus driver then certainly the effects of him taking narcotics could have an effect. However, he believed that would not be the case in the positions identified in his Labor Market Survey. Mr. Rascati identified that on page two of the FCE report it indicated that the petitioner was capable of lifting 15 pounds floor to waist, 15 pounds waist to shoulder, 10 pounds overhead, carrying 15 pounds and push pull 30 pounds occasionally. Mr. Rascati took these restrictions into consideration along with the sit stand perimeters as noted by Dr. Fisher. While Mr. Rascati was aware of the restriction from Dr. Fisher that Petitioner be allowed to sit or stand as needed, he did not review the positional tolerances tested in the FCE and was not aware that the longest period for which Petitioner could sit was 21 minutes on one day and 26 minutes on another. He indicated that the sit stand option would come into play of course but it is a misnomer to think that someone is only sitting at sedentary job or only standing. He indicated the job might be classified as sedentary but that person at a desk would be able to stand up and sit down and rotate as necessary and is not going to interfere with course of his employment.

Regarding his Labor Market Survey, Mr. Rascati, identified a position as a collections representative for Global Payments whose job solicitation asked for "one year of call center experience preferred, talk and type effectively at the same time." He acknowledged that Petitioner had no call center experience nor was it know if he could talk and type at the same time. It was also unknown if the job allowed a worker to sit or stand whenever he or she wanted. The survey also identified a position with RHM staffing doing sit-down assembly but it is unknown whether the job allowed an employee to sit or stand as required. The third job noted was as a picker/packer for Randstand, but Mr. Rascati was unable to ascertain the specific physical requirements of that job. The fourth through eight jobs identified were for customer service representatives which preferred bilingual and Microsoft experienced candidates that

could sit for long periods of time. The ninth job required occasional lifting up to 20 pounds which Mr. Rascati acknowledged was not "sedentary."

Mr. Rascati, however, stressed that that there is a difference between "preferred" as opposed to "required" in job descriptions. He also indicated that there was no identification on the job descriptions that stated explicitly that a sit-stand option was available as would seemingly be implied. He acknowledged that he was not identifying positions for which the Petitioner would be a perfect candidate but rather options that were available within his restrictions. He did not believe that the job descriptions stating the ability to sit for long periods of time would preclude the Petitioner from being allowed to stand up or stretch during the day. He was not aware of any position that required sitting for six to eight hours straight.

Mr. Rascati testified that he did not agree with Mr. Pagella's categorization that the petitioner's work was unskilled and that he had no transferrable skills. Specifically, Mr. Rascati noted that the petitioner was responsible for picking orders, writing down parts and order numbers, labeling items, performing quality control to ensure accuracy of orders, shipping duties, including boxing, wrapping, sealing and scaling for delivery, utilization of UPS shipping terminal as well as FedEx and driving panel van doing local deliveries. He confirmed that this would be considered skilled work by the Dictionary of Occupational Titles and that categorization in the shipping and receiving clerk position was appropriate. He also disagreed with Mr. Pagella's findings that the petitioner had zero transferrable computer skills. Specifically, he noted that the petitioner reported that he used a computer and was knowledgeable with handling attachments, uploading and downloading, and comfortable with traditional two-hand keyboarding. He also noted some experience with software programs.

CONCLUSIONS OF LAW

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

Petitioner had no prior problems with his lumbar spine before his accident on January 25, 2012. The records from Concentra demonstrate that he was complaining of low back pain immediately after the accident. They also reflect that Petitioner had some symptoms of sciatica, contrary to the assertions of Dr. Mather, in that they show he had pain at the sciatic area on the left side on February 9th. Moreover, when Petitioner first saw Dr. Fisher on June 14, 2012, he reported that he had experienced episodes of numbness in his left foot since the injury. Such numbness is a radicular symptom and is a sign of a herniated disc. As Dr. Ross noted in his deposition, disc herniations rarely produce radicular pain following an injury but usually take time before they produce such symptoms.

The Arbitrator further notes that the MRI in March 2012 revealed objective findings which were noted by the radiologist and then again by Dr. Fisher upon his own review of the films. The performance of epidural injections on the left at L5-S1 is a further indication of that ongoing left-side and radicular symptoms reported by Petitioner.

The Arbitrator finds the opinions of Petitioner's treating surgeon, Dr. Fisher and Petitioner's Section 12 examiner, Dr. Ross, to be more credible than the opinions of Respondent's Section 12 examiner, Dr. Mather. A fundamental issue in this matter is one of whether Petitioner sustained a herniated disk. Drs. Fisher and Ross opined that he did sustain a herniated disc whereas Dr. Mather believed that he did not based on a review of the MRI films. The testimony of Dr. Fisher notes that Dr. Fisher observed a herniated disc with his own eyes when he performed surgery on August 10, 2012. This is convincing evidence in favor of the existence of a herniated disk at L5-S1.

Both Dr. Fisher and Dr. Ross opined within a reasonable degree of medical and surgical certainty that Petitioner's herniated disc at L5-S1 was a result of his injury on January 25, 2012. Both Dr. Fisher and Dr. Ross concluded that, while Petitioner did begin to improve following the August 10, 2012 surgery, he suffered a setback in work conditioning which exacerbated his condition. Dr. Fisher's opinion was that Petitioner's subsequent problems with back pain and sciatica were either caused directly by his January 25, 2012 injury which served to aggravate his pre-existing condition at L3-4 and L4-5 or developed as a consequence of the medical treatment and the stress of work conditioning. It was therefore concluded that the L3-4 and L4-5 disc problems were either accelerated or exacerbated by the injury itself or accelerated or exacerbated by the subsequent treatment plus the work-conditioning where his symptoms were noted to have increased.

Dr. Mather's opinion that Petitioner suffered only a lumbar strain is simply not credible. Dr. Mather consistently disputed that Petitioner even had a herniated disk at L5-S1, despite the fact this was reported by the initial radiologist, Dr. Fisher (who also reviewed the MRI films), and, of course, is in direct conflict with the testimony of Dr. Fisher who testified to observing a herniated disc when he performed the hemilaminotomy on August 10, 2012. When Dr. Mather was advised that Dr. Fisher viewed the herniation during surgery, Dr. Mather only said that sometimes a surgeon doesn't see a herniated disc which is observed on an MRI. This doesn't apply to the situation here where Dr. Fisher did, in fact, observe the herniated disc. Dr. Mather also repeatedly failed to mention that Petitioner had complained of episodes of numbness in his left foot when he argued that the Petitioner showed no signs of radicular symptoms prior to the discectomy. The Arbitrator further notes that Dr. Mather originally stated in his report that Petitioner should have been released to work without any restrictions but in his deposition stated that he should have been placed on restrictions and given vocational rehabilitation rather than undergo the lumbar fusion performed by Dr. Fisher. The Arbitrator does not find Dr. Mather's conclusion that Petitioner was malingering during his exam to be convincing as it seems based primarily around a possible overreaction to a pinprick test. Dr. Mather testified that Petitioner jerked his leg away when he poked him with a pin, which he said was inconsistent with Petitioner's complaints of *episodic* numbness. Dr. Fisher and Dr. Ross disagreed with Dr. Mather's assessment on Petitioner's credibility. Further, the Arbitrator is not convinced that the discogram, being the imperfect diagnostic tool it is, was the precipitating factor that led to Petitioner's surgery. The evidence has shown that the discogram was one of several factors (e.g. the MRI films, Petitioner's Complaints, and Dr. Fisher's examination findings) that led Dr. Fisher to perform surgery. Lastly, the Arbitrator observed Petitioner's demeanor during his testimony and found Petitioner's testimony and complaints to be credible.

The Arbitrator finds that Petitioner's treatment, his immediate and ongoing complaints of pain, his post-laminectomy syndrome, his failed back syndrome, and his SI joint dysfunction are a continuing result of his original injury and the treatment received in response. Specifically, the Arbitrator finds that Petitioner's condition of SI joint dysfunction is a consequence of his injury based on the testimony of Dr. Ross who opined that the fusion from L3 to S1 put greater stress on Petitioner's SI joint, causing it to become painful and require medical treatment. Accordingly, the Arbitrator finds that Petitioner's condition of ill-being is causally connected to his injury of January 25, 2012.

With regards to the issue of whether the medical services that were provided to Petitioner reasonable and necessary, the Arbitrator finds as follows:

Having found that a causal connection exists between Petitioner's accident and his condition of ill-being, The Arbitrator further finds that Petitioner's medical treatment was reasonable and necessary to relieve the effects of his injury. The arbitrator finds that the surgeries performed by Dr. Fisher, the hemilaminotomy, the lumbar fusion from L3-S1, and the percutaneous fusion of the SI joint were all reasonable and necessary. This is based on Dr. Fisher's testimony and the opinion of Dr. Ross. The Arbitrator also finds Petitioner's pain management treatment to be reasonable and necessary to relieve the effects of his condition.

Petitioner's Exhibit #18 contains the following medical bills with the following balances:

	PROVIDER	UNPAID	PAID
1)	ATI Physical Therapy	$ 2,432.70	
2)	Hyde Park Surgical Center	$ 3,500.00	
3)	Illinois Anesthesia Specialist	$ 1,268.00	
4)	Illinois Bone & Joint Institute	$158,617.50	
5)	Injured Workers Pharmacy	$ 22,379.82	
6)	Integrated Health Care (Nu Wave Monitoring)	$ 7,800.00	
7)	Metro Health Solutions	$ 3,800.00	
8)	Midwest Imaging Professionals	$ 1,389.00	
9)	Midwest Anesthesia & Pain Specialists	$ 3,527.80	
10)	Northwestern Medicine	$ 2,168.53	
11)	Presence St. Joseph – Chicago	$259,958.99	
12)	Presence St. Joseph – Elgin	$ 16,189.44	
13)	Presence Medical Group (aka Lincoln Park Internal Med)	$ 1,200.00	
14)	Presence Health St. Mary & St. Elizabeth	$ 5,927.40	
15)	Stellar Pain & Spine Specialists	$ 7,040.00	
16)	Summit Pharmacy	$ 3,567.73	$ 6,803.84 by Medicare
17)	Swedish Covenant Hospital	$ 2,123.85	$170,623.20 by Medicare
18)	Total Rehab	$ 27,128.00	
19)	Windy City Anesthesia	$ 1,075.00	
20)	Windy City Medical Specialists	$ 8,170.00	
21)	Health Benefits Pain Management	$ 67,195.83	

22) United Rehab Chicago		$ 10,817.76	
23) Lincoln Park Anesthesiologist		$ 0	
	Totals:	$617,277.35	$177,427.04

Respondent shall pay for the reasonable and necessary medical treatment identified in Petitioner's Exhibit 18 in accordance with the provisions and Medical Fee Schedule of Sections 8(a) and 8.2 of the Act. Respondent is entitled to a credit under Section 8(j) for amounts that have been paid. Respondent shall reimburse Medicare to the extent shown above.

With regards to the issue of TTD, the Arbitrator finds as follows:

Petitioner testified that he went home after his injury on January 25, 2012 and did not return to work until the following Monday on January 30th, 2012 and was then sent to Concentra. The records from Concentra show he was provided with work restrictions and the parties agree that Respondent provided Petitioner with light duty work until his surgery on August 10, 2012. He was thereafter paid TTD benefits through December 18, 2012 when he returned to work on a light duty basis.

Respondent's Exhibit #11 shows conflicting work status notes dated December 5, 2012 from Dr. Fisher. One of these notes, matches the Work Status Note found in Dr. Fisher's records which provides no lifting over 40 pounds with no repetitive bending, twisting, or lifting. The other work status note reflects the additional restriction of no standing. There is no testimony or other evidence regarding the discrepancy between these two. While Respondent argues that Petitioner modified Dr. Fisher's restrictions, there were witnesses to offer testimony regarding this issue. It does not appear that this potential modification caused any investigation nor was Petitioner ever disciplined. Further, Respondent has not sought a credit for TTD paid after December 5, 2012. By all accounts, Petitioner returned to work less than two weeks later on a light duty basis.

Respondent stopped accommodating Petitioner's light duty work restriction after Dr. Mather's report of March 25, 2013 which stated that he could return to work full duty. As previously mentioned, the Arbitrator does not find Dr. Mather's opinions on Petitioner's injury to be persuasive. The Arbitrator finds Dr. Fisher's opinion that Petitioner continued to require work restrictions to be more credible. Petitioner was unable to work and entitled to temporary total disability benefits as of the date of his Lumbar fusion on 9/23/2013 and there is no evidence to suggest that he was capable of returning to work at his former job with Respondent, which required lifting 75 pounds after that. The first FCE performed at ATI on 10/24/16 indicated that Petitioner was limited in his ability to lift and stand.

The Arbitrator finds that Petitioner is entitled to TTD benefits from March 26, 2013 up until the date that he reached maximum medical improvement. Petitioner last saw Dr. Fisher on March 9, 2018, but Dr. Fisher specifically declined to find him to be at MMI. When he set forth the restrictions on the work status note, he did not check the box indicating that Petitioner was at MMI. While a physician's assistant at Midwest Anesthesia and Pain Specialists did discharge him on April 4, 2018 finding him to be at MMI, this was because the recommendation for a

Spinal Cord Stimulator was not pursued. Respondent would not authorize it and Petitioner was not interested in it because his previous spinal cord stimulator trial did not help. Petitioner did not stop his medical care, however but rather sought treatment with a different doctor, Dr. Sameer Shah who performed more procedures for Petitioner, including ultimately implanting a Spinal Cord Stimulator on February 22, 2019.

The Arbitrator therefore finds that Petitioner reached maximum medical improvement on February 22, 2019 when he received the permanent Spinal Cord Simulator. Petitioner has continued to see Dr. Shah since that date, but the visits with Dr. Shah are simply for medication management and an occasional radiofrequency ablation. This treatment appears to be designed to simply maintain his condition and mitigate lingering complaints of pain.

The Arbitrator therefore finds that Petitioner was temporarily and totally disabled from August 10, 2012 through December 18, 2012 (a period of 18 and 5/7 weeks) and again from March 26, 2013 through February 22, 2019. The Arbitrator also finds that Petitioner is entitled to maintenance benefits at the TTD rate from February 23, 2019 through March 17, 2020. March 26, 2013 through March 17, 2020 is a period of 364 and 1/7 weeks. The Arbitrator has found that Petitioner has not met its burden to demonstrate that Petitioner is entitled to permanent total disability benefits due to an insufficient cooperation with vocational rehabilitation efforts. Vocational Counselor Mr. Rascati authored his final report - the final vocational report in this matter – which recommended that Petitioner would benefit from vocational rehabilitation services on March 17, 2020. As will be discussed later, Petitioner made no effort to follow up with either Vocational Counselor despite both counselors agreeing that Petitioner would benefit from vocational services and made no further effort to attempt to return to any kind of gainful employment. Accordingly, the Arbitrator finds that Petitioner is entitled to maintenance through March 17, 2020 and is not entitled to maintenance or PTD benefits thereafter.

The minimum TTD rate for Petitioner's date of injury of January 25, 2012 is $220. Respondent shall pay the sum of $220.00 for a combined period of 382 and 6/7 weeks, subject to a credit for amount of $5,969.85 already paid.

With regards to the issue of the nature and extent of the injury, the Arbitrator finds as follows:

The valid FCE performed on October 9th and October 10, 2019 demonstrates that Petitioner has severe functional limitations and could work at the "light" physical demand level which limits his ability to lift and also requires that he be able to sit and stand as needed. It was noted that he had trouble sitting and standing for long periods of time.

There is no dispute that Petitioner lacks the physical capacity to return to his former career as a warehouse picker. Edward Pagella, the vocational counselor retained by Petitioner, opined that Petitioner should fall in to the "Odd Lot" category of permanent total disability because though he has some ability to function there is no reasonably stable labor market for him, based upon his narcotic use, education, lack of skills, and functional limitations. Mr. Pagella discussed the possibility of finding an employer who would be willing to accommodate his severe limitations but opined that the possibility of an accommodation does not make for a

reasonably stable labor market. In addition to acknowledging that it was possible that Petitioner may be able to find an accommodating position he further testified that Petitioner would be a candidate for retraining and rehabilitation. He offered to assist Mr. Olivo in attempting to find an employer but Petitioner did not follow up with Mr. Pagella. He testified that he wouldn't recommend vocational services unless there was a good chance of finding a good result for the Petitioner.

A claimant is permanently and totally disabled when he is incapable of performing services except for those for which there is no reasonably stable labor market. *A.M.T.C. of Illinois, Inc. v. Industrial Comm'n*, 77 Ill.2d 482, 487, 389 N.E.2d 804, 34 Ill.Dec. 132 (1979). However, Inability to perform strenuous work is not enough to constitute permanent total disability. *Id.* If an employee can perform some form of employment without seriously endangering health or life, he or she is not entitled to a total disability award. *Id.* The Arbitrator acknowledges that Petitioner has substantial functional limitations. In such a case where the evidence demonstrates substantial but not a complete inability to work the burden is on the employee to prove there is no reasonably stable labor market but the burden then shifts to the employer to show that some kind of suitable work is regularly and continuously available. *Sterling Steel Casting Co. v. Industrial Comm'n,* 74. Ill.2d 273, 384 N.E.2d 1326, 1329 (1979).

Mr. Pagella's testimony is competent and credible, however, his testimony is stale in part as it ignores the fact that Petitioner is no longer on narcotic pain medication as he was able to stop taking narcotic pain medication after the successful spinal cord stimulator implantation. Removing this hurdle from Mr. Pagella's considerations makes his opinion slightly less persuasive. Further, the Arbitrator points to the fact that Mr. Pagella acknowledged that an employer may be willing – if not legally obligated to – accommodate petitioner's legal narcotic use if its use did not affect petitioner's ability to perform his job.

Mr. Rascati, Respondent's vocational counselor, agreed with Mr. Pagella that Petitioner would benefit from professional vocational services to address the difficulties Petitioner may have in finding work. Mr. Rascati's assessment of Petitioner's skills differed from Mr. Pagella's. Mr. Pagella classified Petitioner as "unskilled" based on his work history and lack of proficiency with Microsoft products. Mr. Rascati, based on Petitioner's work history, opined that Petitioner demonstrated skills in a variety of duties such as making decisions, gathering data, taking instructions, helping, handling, and having pleasant interpersonal skills. Further, Mr. Rascati believed Petitioner's existing ability to use a smart phone and computer provided a foundation upon which he could build future computer literacy with training.

Mr. Rascati acknowledged Petitioner had to address concerns that potential employers may have regarding his skills, gap in employment, physical limitations, and felony retail theft conviction from 20 years prior. In the Arbitrator's opinion, this is where professional vocational services could have proven beneficial. Again, Mr. Rascati noted Petitioner had factors working in his favor such as his demeanor, interpersonal skills, experience, and consistent work history prior to his accident,

Mr. Rascati believed Petitioner would be capable of performing in the capacity of customer service, call center worker, front desk agent, picker/packer, sit-down assembly worker,

or collections representative. He performed a Labor Market Survey where he found nine positions which he opined Petitioner would be capable of performing. Again, he acknowledged that these were positions where Petitioner may not be a perfect candidate, but they were options available within Petitioner's physical restrictions. The Arbitrator takes note of Mr. Rascati's opinion that light or sedentary jobs would likely not require Petitioner to sit for extended periods of time of or prohibit him from sitting or standing as needed. The Arbitrator notes that Petitioner did not submit any job logs reflecting potential employment positions that Petitioner attempted to secure. The Arbitrator notes a lack of follow-up from Petitioner regarding any attempt at proceeding with professional vocational services with either Mr. Pagella or Mr. Rascati. No evidence of any self-directed job search was submitted into evidence.

Based upon the above, the Arbitrator finds that the Petitioner is not permanently and totally disabled. The Arbitrator finds that Petitioner has not sufficiently demonstrated that there is no reasonably stable job market based upon Petitioner's inadequate effort to participate in any meaningful job search or participate in any professional vocational rehabilitation endeavors. That said, since Petitioner's permanent restrictions prevent him from returning to his pre-injury line of work Petitioner has suffered a loss of trade and is permanently partially disabled commensurate with a 50% loss of use of the person as a whole. Accordingly, Respondent shall pay PPD benefits of $220.00/week for 250 weeks. Respondent is entitled to a credit of $25,276.00 for PPD advances already paid.

ENTERED: 

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC034016
Case Name	Bernell Love v. Kraft Heinz
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0269
Number of Pages of Decision	25
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	John Winterscheidt
Respondent Attorney	James Clune

DATE FILED: 7/22/2022

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
WILLIAMSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

BERNELL LOVE,

Petitioner,

vs. NO: 19 WC 034016

KRAFT HEINZ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of causation, medical expenses and prospective medical and being advised of the facts and law, reverses the Decision of the Arbitrator on the issues of causation after May 19, 2020, and prospective medical and modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission affirms and adopts the Arbitrator's Statement of Facts, except where modified below, however, views the evidence differently than the Arbitrator. The Commission finds that Dr. Bernardi's opinion that Petitioner was at maximum medical on May 19, 2020, is more reliable than Dr. Gornet's opinion that prospective surgery for cervical disc replacement at C5-C6 and C6-C7 is warranted based upon the totality of the evidence including the records and opinion contained therein of Petitioner's family physician Dr. Hong, the conclusions and opinion of Dr. deGrange, a member of the Fellow of the American Academy of Orthopaedic Surgeons (FAAOS), and the opinions and testimony of Dr. Racenstein, a board certified radiologist, and Dr.

Kimberly Terry, a neurosurgeon pursuant to Section 8.7 of the Act. Thus, the Commission reverses the Arbitrator's award of prospective medical as recommended by Dr. Gornet for the following reasons.

Section 8(a) of the Act requires Respondent to pay for medical expenses which are "reasonably required to cure or relieve from the effects of the accidental injury…" *820 ILCS 305/8(a)* (West 2013). See *F & B Manufacturing Co. v. Industrial Commission of Illinois*, 325 Ill. App. 527, 534, 758 N.E.2d 18 (2001) ("Under Section 8(a) of the Act, the claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of claimant's injury.")

The Commission modifies the Findings on page 2 of the Arbitrator's Findings so that sentence now reads as follows: "Petitioner's current condition of ill-being is causally related to the accident through May 19, 2020."

Findings of Fact

The Commission modifies the fifth paragraph on page three of the Arbitrator's Decision adding the following, "A Problem List was reviewed and it was noted that Petitioner had "Hyperglycemia" with an onset on November 6, 2015, as well as hypothyroidism, mixed hyperlipidemia and benign hypertension all with the same "onset date" of November 6, 2015." (PX2)

The Commission strikes the phrase, "At the direction of Respondent" beginning the last paragraph on page 3, of the Arbitrator's Decision. The Arbitrator notes that Petitioner was examined by Dr. Donald deGrange on November 14, 2019, and that Dr. deGrange reviewed the November 5, 2019, MRI and opined it revealed disc bulges at C5-C6 and C6-C7. Dr. deGrange authored a letter addressed to the claims representative as a result of this visit, however, Dr. deGrange noted the consultation was done to "evaluate and provide treatment, if indicated," for Petitioner for the work accident on October 20, 2019. The Commission notes that this examination took place after Petitioner signed his Application for Adjustment of Claim on November 11, 2019, but before it was filed on November 22, 2019. (ArbX2)

Dr. deGrange noted that Petitioner reported that the pain, tingling, and numbness down the left arm had resolved and that aside from his neck pain with symptoms that radiated along the medial order and spine of the left scapula, Petitioner denied any other musculoskeletal complaints including shoulders, mid back, low back, hips, knees, and ankles. (RX1, DepX3)

Dr. deGrange further noted that the November 5, 2019 MRI was of excellent quality. Dr. deGrange disagreed with the radiologist, and found no evidence of disc bulges at C2-3, C3-4, and C4-5. Dr. deGrange further opined C5-6 reveals a very mild broad-based bulge with a moderate degree of left foraminal stenosis primarily due to facet hypertrophy and a mild degree of uncal hypertrophy and that C6-7 reveals perhaps a one millimeter broad-based bulge. Dr. deGrange saw

no foraminal stenosis in contradistinction to the bilateral foraminal stenosis noted on the report and found that C7-T1 is completely normal. The Commission finds this interpretation is significant as this MRI was taken shortly after the accident. Dr. deGrange found Petitioner's "self-described mechanism of injury" was consistent with his subjective complaints and objective findings on physical examination and diagnostic studies. His diagnosis was cervical contusion and post-concussive syndrome. (RX1, DepX3)

Dr. deGrange further documented that Petitioner's physical examination was generally unremarkable except for a very mild foramen compression test, which is explained by the foraminal narrowing on the left at C5-6. Dr. deGrange opined that, "[t]his is preexisting as I saw no acute signal changes on the MRI and this would represent, more likely than not, post-injury swelling which will be of a temporary nature. I would conclude therefore he has had a temporary aggravation of his preexisting asymptomatic degenerative condition at C5-6. His post-concussive symptoms persist, and as I have told him today these will take several months not several weeks to resolve but they will resolve." He put physical therapy on hold, assigned restrictions and planned to see Petitioner in two weeks on November 25, 2019. (RX1, DepX3)

The Commission strikes the first full paragraph on page 4 of the Arbitrator's Decision and substitutes the following three paragraphs:

Petitioner saw his primary care physician, Dr. Jim Hong, four days after his consult with Dr. deGrange, on November 18, 2019. In the "History of Present Illness" Dr. Hong noted that Petitioner was seen by his "company recommended neurosurgeon who told him to do PT. He wants 2nd opinion." Next, Dr. Hong diagnosed Petitioner with new onset diabetes mellitus noting Petitioner "eats a lot of ice cream, drinks a lot of soda, eats a lot of pizza and junk food." (PX2)

In the Assessment/Plan section, the first numbered Assessment, Patient Plan, states:

> New onset type 2 diabetes. Sugar around 400… Told him at this point, no need to retest. He definitely has type 2 diabetes. His A1c is overnight. Start him on Metformin and Amaryl. Discussed with patient about signs of hypoglycemia, including chest pain, palpitations, sweating, seizure, if blood sugar less than 70, drink OJ and coughing (as I see). I gave him a glucometer and testing supplies. Told him to check his blood sugar in the morning and once during the day. He deferred diabetes education class. Told him to (do) research on diabetic diet right now and because of soda, ice cream, carbon (sic) sweet…Told patient to keep well hydrated. If unable to tolerate, let me know. Pt agrees. He may benefit from insulin but he does NOT want insulin. (PX2, 11/18/19)

In the last, and only unnumbered paragraph, Dr. Hong noted that Petitioner was already seen by a "neck specialist but wants a 2nd opinion. His MRI does not suggest any surgical indication. He wants to see Dr. Gornett (sic). I will refer him to Dr. Gornett (sic)." (PX2)

The Commission strikes the remainder of the Arbitrator's Findings of Fact beginning with the second full paragraph on page four and modifies the Findings of Fact to read as follows:

Petitioner first consulted Dr. Gornet on December 19, 2019, and provided a history of his accident of October 20, 2019. For the first time, two months after the accident, Petitioner complained of central low back pain to both buttocks, both hips and down both legs to the knees, as well as his initial complaints after the accident of neck pain, bilateral trapezial pain, left more than right, left shoulder and down his left arm to his elbow with occasional tingling all the way down his arm into his hand, as well as headaches. Dr. Gornet reviewed the cervical MRI and opined it was of moderate/poor quality, contrary to Dr. deGrange's opinion, and that it revealed annular tears at C5-C6 and C6-C7. (PX4)

Dr. Gornet documented that Petitioner's Review of Systems was unremarkable. His Past Medical History was negative. His Physical Examination documented that Petitioner "motions pain into the base of his neck into predominantly the left trapezius. He has mild decreased range of motion in extension and flexion, as this seems to bother him the most." Dr. Gornet's impression was that Petitioner had sustained an axial load injury to his cervical spine which could either aggravate asymptomatic degeneration in the neck versus cause a new disc injury. He recommended Petitioner undergo epidural steroid injections (ESIs) at C5-C6 and C6-C7 and that a higher resolution MRI scan be performed. He also imposed work/activity restrictions. The medical information history form signed by Petitioner states that Petitioner did not report having diabetes to Dr. Gornet. (PX4)

Pursuant to Dr. Gornet's recommendations, the Petitioner underwent ESIs on January 21, 2020, at C6-7 and on February 4, 2020, at C5-C6 with Dr. Helen Blake, a pain management specialist. (PX6)

On February 7, 2020, the physical therapist at Athletico documented that the Petitioner had been to 17 appointments since starting therapy, with one more scheduled on Monday February 10. The therapist further noted, Petitioner "has been cooperative and compliant with his therapy, and consistently displays good effort. Patient's overall subjective reports are improved from when therapy was started, however, he still reports having good and bad days in which his bad days limit what he's able to do. His objective measures have been consistent with his subjective reports in which they are decreased during his bad days and near normal on his good days. Overall though, his objective measures are improved since his evaluation. An FSR (Function Status Report) was performed today which looked at his lifting tolerances per his job demands, and he was able to demonstrate the ability to perform all required lifts with corresponding weight and proper mechanics. At this point in time, he continues to report pain with cervical range of motion, and continues to display weakness in UEs. Patient may benefit from continued therapy through a work conditioning program if prescribed by MD." (PX5)

On March 26, 2020, Dr. Gornet dictated a note regarding a telemedicine visit with Petitioner. Petitioner reported that the injections had helped some of his arm complaints, but he reported still having significant neck pain and also that he still had low back pain. Dr. Gornet wrote

that the next step would be further diagnostics, a new MRI with foraminal views and a plain CT scan. Dr. Gornet wrote that "we have placed his low back on hold, although he is still symptomatic there." Petitioner reported that he was working light duty. Dr. Gornet wrote he saw no reason why he could not continue to work light duty. Dr. Gornet noted they would set Petitioner up for a follow-up visit but it could be some time because of COVID-19. (PX4)

There was a follow-up visit on April 23, 2020. Petitioner reported some left shoulder and left arm symptoms, but he reported being significantly better after the injections. Exam for the most part showed a subtle weakness in left wrist dorsiflexion at 4 to 4+/5, but otherwise he is 5/5. He reported still having some low back pain, "which is again somewhat improved." According to Dr. Gornet, the April 23, 2020, MRI "reveals disc pathology out into the foramen particularly at C5-6, best seen on image #8 of 15 of the foraminal views, #7 of 15, but also significantly on image #10 of 15. He also has a fragment of disc at C3-4, which was not noticed on the previous MRI and this is in large part due to the previous MRI quality and lack of foraminal views." Dr. Gornet wrote that "[t]his may play a role in some of his trapezial pain. The CT scan showed no evidence of facet arthropathy." His recommendation was for trial of return to work full-duty, no restrictions beginning Wednesday April 29, 2020, and a follow up with Dr. Gornet in six to eight weeks. If Petitioner was not improved at that time, consideration could be given to disc replacement at C5-6 and C6-7, "but there is a possibility given the MRI pathology that he may also require treatment to cure and relieve the effects of his injury at C3-4." (PX4)

Petitioner was evaluated on May 19, 2020, by Dr. Robert Bernardi, a board certified neurosurgeon, who prepared a report on the same date. (RX1, 6, 9; DepX2) Dr. Bernardi reported that Petitioner told him the day after the accident he woke with a worsened headache and severe pain in his neck and over his left shoulder blade. After having been seen at Gateway Regional Occupational Health Services and his family physician, his attorney sent him to Dr. Gornet. (RX1, DepX2, 2)

Dr. Bernardi reported that Petitioner had a hard time telling him precisely when his back pain started in relation to his accident. Petitioner reported that his pain is concentrated at the lumbosacral junction but does not radiate. Petitioner reported his legs cramp when he sits on his forklift too long. When this happens, he has to get off and stretch. Petitioner reported that prolonged sitting can also cause perineal numbness. He has not noticed any focal weakness. (RX1, DepX2, 2)

Dr. Bernardi documented that Petitioner's health history is notable for hypertension and diabetes. Dr. Bernardi did not detect any overt signs of symptom magnification. (RX1, DepX2, 4)

Dr. Bernardi reviewed the MRI of November 5, 2019, and opined it revealed degenerative disc disease and degenerative foraminal narrowing at C5 and C6 with similar but less prominent changes at C3-4 but no central stenosis. He reviewed the MRI of April 23, 2020, and opined it was unchanged when compared to the prior MRI. He also reviewed the CT scan of April 23, 2020, and opined it revealed degenerative changes, calcifications at C6-7 and spur formation to the left at

C3-4 with similar but bilateral changes at C5-6 with mild foraminal compromise and subtle facet disease on the right at C4-5. (RX1, DepX2, 4)

Dr. Bernardi diagnosed Petitioner's cervical condition as multilevel degenerative disc disease (spondylosis); multilevel degenerative foraminal stenosis and neck and non-radicular left shoulder/arm pain of uncertain etiology. Dr. Bernardi did not believe that Petitioner was a candidate for surgical intervention. He did not believe that he required additional medical treatment other than a muscle relaxant and the anti-inflammatory agent he was taking at the time. (RX1, DepX2, 5)

Dr. Bernardi opined Petitioner's shoulder symptoms were not radicular and there were no nerve root tension signs. He also opined that all of the findings noted in the MRI scans were degenerative, present before the work accident, and not acute or post-traumatic. He diagnosed Petitioner with a cervical strain/sprain, opined Petitioner was at MMI and could continue to work without restrictions. (RX1, DepX2, 5)

Dr. Bernardi further opined that it is reasonable to conclude that Petitioner suffered an aggravation of his underlying degenerative disease although it is impossible to tell from clinical evaluation which segment may have been affected. These are also self-limiting. Dr. Bernardi opined, "I do not believe his will be a permanent one-in fact, I believe the notion of a permanent aggravation is an oxymoron." (RX1, DepX2, 5)

Petitioner saw Dr. Gornet on June 4, 2020, and complained of neck and left shoulder and bilateral trapezius pain. Dr. Gornet reviewed Dr. Bernardi's Section 12 opinion report. He also had Dr. DeGrange's report from November 14, 2019. Dr. Gornet opined that there are objective findings in his cervical spine consistent with a disc injury from his October 20, 2019, accident. Dr. Gornet opined the findings on the MRI correlate very well with Petitioner's subjective complaints of predominant neck pain more to the left trapezius and left shoulder. He further opined that the C5-6 area clearly radiates also to the left side and could easily cause the nerve irritation seen. Dr. Gornet disagreed with Dr. Bernardi and found Petitioner still symptomatic. Dr. Gornet requested (authorization for) cervical disc replacements at C5-6 and C6-7. (PX4)

Petitioner saw Dr. Gornet on October 5, 2020, with complaints of neck and left arm and shoulder pain and headaches. Dr. Gornet continued to recommend disc replacement surgery at C5-C6 and C6-C7. The medical information history form now included a history of diabetes. (PX4)

Dr. Gornet testified via evidence deposition on November 23, 2020. He testified at his first consult on December 19, 2019, Petitioner's primary complaint was neck pain, and then a secondary complaint of low back pain, but neck pain was the biggest issue for him. It was axial with frequent headaches, bilateral trapezial pain, more on the left side, left shoulder and left arm. (PX11, 9-10) Physical examination revealed decrease in wrist dorsiflexion, volar flexion and right volar flexion, all at four over five. Dr. Gornet testified generally that is a sign of C5-6 nerve irritation. His lower extremity exam was normal. Dr. Gornet believed that his symptoms were consistent with the

sudden axial load to his spine. After reviewing the November 5, 2019, cervical MRI scan, he felt there was pathology present consistent with disc injuries at C5-6 and C6-7, at least on that initial scan. He thought that the MRI was of moderate to poor quality. (PX11, 11-12)

Dr. Gornet recommended further conservative care and ESIs at C5-6 and C6-7. He placed Petitioner on light duty. Petitioner underwent that therapy at Athletico. He underwent the injections in January and February. According to Dr. Gornet, the purpose of the ESIs, is to cure and relieve the effects of the work injury. In this situation, it relieved some of Petitioner's arm complaints, but not his neck complaints. (PX11, 13-14) Dr. Gornet testified that the CT scan showed no evidence of fracture or arthritis. (PX11, 15) Dr. Gornet opined that Petitioner's MRI showed pathology at C5-6 and C6-7 and those were Petitioner's main issues. (PX11, 15-16) Dr. Gornet recommended C5-6, C6-7 disc replacement surgery. (PX11, 17)

Dr. Gornet further testified that on October 5, 2020, he opined that Petitioner could continue to work full-duty. (PX11, 18) He further testified that Petitioner has objective pathology in the form of a structural injury with an annular tear fissure into the disc, central herniations, more left-sided herniations that are present and documented by both himself and the independent radiologist. Petitioner's symptoms of left shoulder, left arm pain are causally related to his work injury of October 20, 2019. He has never returned to baseline although he's had some improvement with the ESIs. (PX11, 21) He further opined surgical intervention is Petitioner's only option and the need for surgery was directly causally related to Petitioner's work injury of October 20, 2019. Dr. Gornet opined that Petitioner's symptoms of low back pain are causally related, assuming his history was factually correct, but his low back treatment was put on hold and "it has trended better." (PX11, 22)

On cross-examination, Dr. Gornet testified that Petitioner's condition is unchanged because he's working. (PX11, 24)) He believed the findings of herniation at C5-6, and the annular tear and fissure at C6-7 are directly, causally related, within a reasonable degree of medical certainty. He believed those findings were consistent with Petitioner's subjective complaints, his physical exam, and a disc injury produced by his description of the injury he sustained and his verbal history of not having any previous problems. For this reason he did not believe those findings pre-existed the work accident. (PX11, 25-26)

Dr. Gornet believed Petitioner has some level of pre-existing disc degeneration and that because of his age, Petitioner has age-appropriate degeneration. That is his medical condition. (PX11, 26-27) Dr. Gornet conceded that pain is subjective. He has objective pathology present on his MRI, that he opined is consistent with Petitioner's subjective complaints of pain. He confirmed that there had been no diagnostics of Petitioner's lumbar spine, and again, that his low back "trended better" despite some symptoms but "it was never hitting the bar where I felt there was an urgency." (PX11, 32)

On December 11, 2020, Dr. Bernardi testified via evidence deposition, which was admitted into evidence. On direct examination, Dr. Bernardi's testimony was consistent with his opinion

report. (RX1) He testified that Petitioner's first mention of having any low back issues was on December 19, almost two months after the accident, when he saw Dr. Gornet for the first time. Further, that Petitioner specifically denied having any issues with his lower back when he saw Dr. deGrange, one month before he saw Dr. Gornet, on November 14, 2019. (RX1, 12)

Dr. Bernardi explained that the fact that Petitioner had leg cramps but not radiating pain is significant that the pain is not due to some type of neurological compression. When you have a pinched nerve in your back, generally the predominant symptom that people describe is buttock and radiating pain that goes past your knee. (RX1, 13-14)

Dr. Bernardi testified that on physical examination, Petitioner's neurological examination was normal. (RX1, 16-17) He reviewed the first and second cervical MRI scans and opined that they were basically the same. Dr. Bernardi opined that Petitioner had multi-level degenerative disc disease, multi-level disc arthritis, probably a little worse between C5 and C6. He had some degenerative foraminal stenosis between C4-5 and C5-6 and similar but less prominent changes between C3-4 He reviewed the cervical CT scan which confirmed similar findings, multi-level degenerative changes. (RX1, 18-19).

Dr. Bernardi further testified that Petitioner has no disc herniation. He has neck pain that is not associated with radicular features, so not due or related to any irritation of a nerve root in his neck. Dr. Bernardi testified that the basis for that opinion is that Petitioner's symptoms are, first off, atypical—"most people who have a pinched nerve in their neck really don't have neck pain. It's actually one of the striking features of that particular problem. They complain of pain around their shoulder blade and pain that goes into their arm, but not much neck pain." (RX1, 21-22)

Dr. Bernardi further opined that Petitioner's arm pain does not follow a dermatomal distribution, meaning the distribution of a particular nerve. He confirmed that Petitioner does not have nerve root tension signs, which are the equivalent of a straight leg raise test in his low back. Dr. Bernardi testified that Petitioner's exam is normal, he has normal strength, and normal and symmetric reflexes. Dr. Bernardi agreed that Petitioner has some narrowing in his neck at two levels, but so do the vast majority of people over about the age of 40 or 45. Dr. Bernardi opined that there is nothing to suggest that the narrowing is symptomatic. Dr. Bernardi opined Petitioner has neck pain without neurological features. (RX1, DepX2, 22)

Dr. Bernardi testified: "It is my opinion that that is not an indication for surgical intervention, and it's not only my opinion. I mean, there is no spine group, whether it's the American Academy of neurological surgeons, the American Academy of Orthopaedic Surgeons, the North American Spine Society, Congress of Neurological Surgeons, none of them recommend surgery to address neck pain that is not associated with either nerve root or spinal cord symptoms. So I don't think this gentleman is a candidate for surgery." (RX1, 22-23)

Dr. Bernardi testified that at the time that he saw Petitioner, he had been working full duty and he could continue to work full duty. (RX1, 23)

On cross-examination, Dr. Bernardi disagreed with Dr. deGrange's statement that Petitioner had aggravated his degenerative disc disease clarifying that "these kinds of aggravations are relatively short-lived and usually resolve within four, six, eight weeks. When I saw him, it was, like eight months after his accident, and an aggravation should have been gone by then. I think his initial complaints were certainly consistent with either a muscular injury or an aggravation. My problem had to do with the fact that eight months later the nature of his pain was a little more obscure." (RX1, 33-34)

Dr. Bernardi agreed that he diagnosed multilevel degenerative disc disease or spondylolysis, multilevel degenerative foraminal stenosis, neck and non-radicular left shoulder arm pain of uncertain etiology. He agreed that he testified that the first two diagnoses preexisted the work accident, but the neck and arm pain Petitioner described, as best as he could tell, were not present prior to his accident. So with respect to those first two diagnoses, the multilevel degenerative disc disease and the multilevel degenerative foraminal stenosis, usually are asymptomatic. They were asymptomatic in Petitioner prior to October 20, 2019. These conditions, can be made symptomatic by trauma. That doesn't mean they were made symptomatic. (38-40)

Dr. Bernardi agreed if a condition is symptomatic longer than six months, it is considered chronic. (RX1, 41)

On redirect examination, Dr. Bernardi opined that one could not conclude that Petitioner's pre-existing degenerative conditions were changed on a permanent basis as a result of this accident. (RX1, 41) Dr. Bernardi opined the findings in Petitioner's neck are "the equivalent of gray hair or losing your hair and getting wrinkles in your skin. They are part and parcel of the aging process, and so they really don't have any meaning unless the person's symptoms and physical findings correlate with them. And cervical radiculopathy, which is really the only indication for surgery on the neck, is a very specific set of complaints….It's not vague. It's not wishy-washy. It is very specific." Dr. Bernardi opined that he did not think Petitioner's complaints, nor his physical exam, nor his neurologic exam are consistent with the notion that he aggravated his foraminal stenosis. (RX1, 42)

Dr. Racenstein, a board certified diagnostic radiologist, reviewed Petitioner's medical records and diagnostics at Respondent's request, and authored a report on February 25, 2021. In his report, Dr. Racenstein opined that the MRI of the cervical spine performed on April 23, 2020, appears completely unchanged compared with the prior study from November 5, 2019. He further opined that both studies are of good diagnostic quality and demonstrate no evidence of fracture, subluxation or acute disc injury. He opined that there are no imaging evidence of an acute repairable injury as a result of the work-related trauma. "There are no imaging findings to indicate the need for surgical intervention. Dr. Bernardi is of the opinion that Mr. Love is not a candidate for surgical intervention. Based on the imaging that has been provided for my review, I agree with this conclusion. Dr. Bernardi believes that there is no imaging finding that would be

deemed acute or post traumatic. I, again, concur with this finding. A cervical strain would have no imaging findings on CT, plain film or MRI examinations. His chronic ongoing complaints are most likely self-limiting. Mr. Love did inform Dr. Bernardi that he had recently returned to work without restrictions. Based on this information. and review of the imaging studies, Mr. Love has, more likely than not, reached maximum medical improvement from the perspective of his work-related incident on October 20, 2019." (RX2, DepX2)

In subsequent testimony at his evidence deposition on May 26, 2021, Dr. Racenstein testified that as part of his job he is a consulting physician to other doctors. Specifically, he consults with and provides advice to spine surgeons. (RX2, 6) The treatment that Petitioner received after the work accident was summarized in his report between pages one and three. (RX2, 13) Dr. Racenstein reviewed Petitioner's plain films from shortly after the injury, an MRI of the cervical spine performed in November 2019 and a follow-up CT scan, and an MRI of his cervical spine in April of 2020. (RX2, 13-14)

Dr. Racenstein concluded that in Petitioner's diagnostics, that the series of images that were obtained, were all concordant with each other and demonstrate chronic degenerative disc disease of the cervical spine. Dr. Racenstein noted the most pronounced changes are at C5-6 and C6-7, evidenced by disc space narrowing and inter-osteophyte formation, which, he opined, is something that takes quite a long time to form. In addition, Petitioner's diagnostics show he had some osteophytic spurs, which are small bone spurs that cause narrowing of the neuroforamen on the right side and left-sided C5-6, the left-sided C4-5 and very minimally at C6-7. The diagnostics showed no compression of the spinal cord, no acute compression or fracture, no subluxation or malalignment, no edema in the cord and no stenosis of the central canal where the spinal cord lives. Petitioner's diagnostics showed no evidence of acute injury, meaning a fracture, which would show swelling or edema in the bone, or a ruptured disc, which would have acute fluid inside of it to show that it came from the center portion of the disc or malalignment or subluxations, which would indicate injury to the ligaments or soft-tissue injuries surrounding the spine in the paravertebral soft tissues and the posterior aspect of the neck. (RX2, 14-15)

Dr. Racenstein opined that an MRI is the best test for an annular tear and another diagnostic tool you can use is a discogram. Dr. Racenstein did not see any evidence of an annular tear. When asked if annular tears can be degenerative in causation, he replied, "[y]ou can get friable annular degeneration. That usually leads to narrowing of disc space, but the tears themselves are not immediately apparent as a tear so-to-speak." Dr. Racenstein explained that there must be some associated findings with that tear to actually say, the annulus is definitely torn. That means you have a bulging of the nucleus through that tear to say the annulus is definitely torn. He also testified that there can be bulging discs without the annulus being torn. Discs can get narrowed and they can bulge, which Petitioner has, but without seeing the nucleus herniated through it, you cannot really conclude that there is an annular tear. The bone formation that's seen at C5-6 and C6-7 on Petitioner's diagnostics takes years to form. This is not something that happened at the time of his injury or a month before his injury. This was happening for years before his injury. (RX2, 16-18)

Dr. Racenstein then testified that when you see that bone, then you know that is something there that is long-standing. On top of that, you have narrowing of the disc space, which is again a chronic problem. Disc space narrowing associated with an acute herniated disc, that could be more acute, but Petitioner does not have any evidence of a herniated disc to suggest that any of that narrowing was the result of acute trauma. Additionally, he has spurs around the exit sites where the nerves leave the spinal canal and head out through the periphery. Those spurs are chronic events and do not form acutely. (RX2, 18-19)

Dr. Racenstein further testified that, "[t]here was nothing in my review of the films that I am familiar with that could be corrected surgically and would result in improvement in his situation." He reviewed the reports of Dr. Gornet and Dr. Bernardi and he did not agree with the findings and conclusions of Dr. Gornet. He agreed with Dr. deGrange's assessment of the diagnostic films that he saw. In fact, he testified that he did not see anything in the diagnostic films he would relate to the work incident of October 20, 2019. He found nothing reflective in any of the images submitted, whether it was the original plain films, the two MRIs or the CT scan, that reflect any sort of acute trauma whatsoever. (RX2, 19-20)

Dr. Racenstein would defer to Petitioner's treating physician with respect to further treatment modalities. He agreed that in the appropriate setting, spinal surgery can be appropriate to treat neck pain. (RX2, 33-34)

On March 19, 2021, Dr. Kimberly Terry, a neurosurgeon, licensed in Illinois, authored a Utilization Peer Clinical Review Report and concluded the disc replacement surgery recommended by Dr. Gornet was not certified and not medically necessary. (RX3, DepX2) In the report, Dr. Terry opined the submitted records indicated that Petitioner has a history of diabetes which ODG lists as a contraindication to the procedure. As such, and based upon the available information she had, which was from nine months prior to her report, Petitioner's clinical status was unknown. Based on the available information, Dr. Terry opined that there is insufficient clinical evidence to support the medical necessity of the requested procedure. Amongst the criteria listed for artificial disc replacement was the absence of the following contraindications which included the presence of underlying comorbid diseases such as insulin-dependent diabetes among other conditions. (RX3, DepX2)

At her evidence deposition on July 8, 2021, Dr. Terry testified that she made two attempts to discuss the case with Dr. Gornet, having made phone calls to him on March 17 and March 18 with callback numbers, however, she never received a call back. (RX3, 13) Dr. Terry testified diabetes may be a contraindication to an artificial disc, however, she would have to do further reading to determine if that is a hard indication or a relative contraindication. (RX3, 13-14) Dr. Terry testified that facet arthritis is a contraindication. She opined that it depends on how you define facet arthritis. If it is really severe then that might be a contraindication to an artificial disc. (RX3, 18) Dr. Terry confirmed that at the time of her conclusions she did not review the repeat MRI report nor Dr. Gornet's final office visit note. Dr. Terry testified that the primary reason that

she reached the conclusions that she reached was because he had not been seen for nine months and things could have changed. And his diabetes was a secondary concern. (RX3, 19)

On cross-examination, Dr. Terry testified that she would have to look at the new MRI and if the latest exam was consistent with the findings on imaging before she could say whether or not at the time of the deposition the surgery recommended by Dr. Gornet is reasonable and necessary. (RX3, 22-23)

Conclusions of Law

Prospective Medical

> Awards resulting from the Commission's reliance on the testimony of an examining physician over that of a treating physician have been affirmed. See, *e.g., Hartsfield v. Industrial Comm'n,* 241 Ill. App. 3d 1055, 1061, 182 Ill. Dec. 833, 610 N.E.2d 702 (1993); *Presson v. Industrial Comm'n,* 200 Ill. App. 3d 876, 881, 146 Ill. Dec. 164, 558 N.E.2d 127 (1990). The law is clear; it is the Commission's province to determine what weight to give testimony and to resolve any conflicts in testimony. This includes medical testimony and evidence. *Freeman United Coal Mining Co. v. Industrial Comm'n,* 263 Ill. App. 3d 478, 485, 200 Ill. Dec. 886, 636 N.E.2d 77 (1994); *Lo Russo v. Industrial Comm'n,* 258 Ill. App. 3d 59, 71, 196 Ill. Dec. 208, 629 N.E.2d 753 (1994).

As to whether or not the award of cervical disc replacement surgery as recommended by Dr. Gornet is warranted, the Commission relies on the opinions of Dr. Robert Bernardi, neurosurgeon, who testified that at the time he examined Petitioner, Petitioner's cervical and lumbar neurological examinations were normal, and coupled with Petitioner's cervical diagnostics, he did not believe Petitioner was a candidate for surgical intervention. (RX1, RX1, DepX2) Dr. Hong, Petitioner's primary care physician documented that he did not believe an MRI was indicated and documented that Petitioner was not a surgical candidate. (PX2) Dr. Donald deGrange, an orthopedic spine surgeon, referred by the Occupational Clinic, opined that Petitioner is not a surgical candidate. (RX1, DepX3) Subsequent utilization review reports by Dr. Racenstein, a board certified radiologist (RX2, RX2, DepX2) and Dr. Terry, a neurosurgeon (RX3, RX3, DepX2) concurred that the disc replacement surgery is not medically necessary.

While in many instances, the question as to whether or not a surgery is warranted would not turn on the number of same or similar opinions, in this case, the reasons each of the concurring opinions were reached, are persuasive. Dr. Racenstein and Dr. Bernardi determined that the April 24, 2020, MRI was unchanged when compared to the earlier November 5, 2019, cervical MRI. Dr. deGrange opined that the November 5, 2019, cervical MRI was high quality. All three of those doctors' opinions reached the same conclusion that surgery was not medically warranted or necessary.

Although Dr. Terry never reviewed the last of Dr. Gornet's office notes or the April 24, 2020, cervical MRI, and she conceded she would want to review those records to see if the exam was consistent with the findings on imaging, she had a secondary reason for finding that the cervical disc replacement surgery was not medically necessary. Dr. Terry noted that diabetes was a contraindication to having cervical disc replacement surgery, either a relative contraindication or an absolute contraindication, per the Official Disability Guidelines. The Commission finds it is significant that in November 2019, Dr. Hong notes that with a blood sugar level of 400 that Petitioner should be on insulin but Petitioner at that time refused to comply. The record is devoid of subsequent treating records from Dr. Hong, and silent as to Dr. Gornet's consideration of this factor. The Commission notes that Petitioner's sole mention of diabetes while treating with Dr. Gornet was to mark a medical history form at Dr. Gornet's October 2020 office visit, however, the office notes dictated by Dr. Gornet never acknowledge or mention Petitioner's diabetic status or that Dr. Gornet was even aware of it. In addition to that caveat, the Commission further defers to Dr. deGrange's, Dr. Hong's, Dr. Bernardi's, Dr. Racenstein, and Dr. Terry's opinions that cervical disc replacement surgery is not warranted and/or not medically necessary.

These arguments are bolstered by the Petitioner's therapy records. As early as February 7, 2020, the Athletico therapist documented that Petitioner reported overall he had gotten better and it had been easier to look around. A functional status report was performed that showed he was able to demonstrate the ability to perform all required lifts with corresponding weight and proper mechanics. He did report pain with cervical range of motion and although he had some weakness in his upper extremities, the therapist thought he would benefit from continued therapy through a work conditioning program if prescribed by his doctor. (PX5) Without the work conditioning, Petitioner was returned to work full-duty without restrictions by Dr. Gornet on April 23, 2020.

Finally the surveillance video and reports are compelling evidence in favor of Dr. deGrange and Dr. Bernardi's opinions that Petitioner suffered a temporary aggravation of a pre-existing condition. Video of Petitioner carrying various bags, and especially his activities cleaning his car which included multiple times bending, lifting, vacuuming, pulling the back seat cushions of his automobile out of the vehicle, laying down using a power drill in his back seat, and getting up and entering/exiting the vehicle while pulling it apart, and putting it back together, belie Petitioner's subjective pain complaints. Therefore, for all of the afore referenced reasons, the Commission finds that Petitioner reached maximum medical improvement as of May 19, 2020, and reverses the Arbitrator's award of prospective medical for cervical disc replacement surgery as recommended by Dr. Gornet.

Lumbar Back

The Commission further finds that the Petitioner's low back condition is unrelated to the work accident based upon the fact that the medical records contain no history of lumbar or low back complaints for two months following the work accident, and not until Petitioner was seen by Dr. Gornet on December 19, 2019. Further, Petitioner specifically denied having any low back

complaints when he saw Dr. deGrange on November 14, 2019, one month prior to Dr. Gornet's visit and one month after the accident. (RX1, DepX3)

Finally, Dr. Bernardi testified that Petitioner told him that in terms of his low back, he had problems that do not radiate, but instead that he has leg cramps. Dr. Bernardi testified, "I'm not entirely sure what that is, to be honest with you. The non-radiating part is significant that the pain is not due to some type of neurological compression." (RX1, 12-13)

In addition, Dr. Gornet's opinion that Petitioner's low back condition was trending upward comports with the video surveillance showing Petitioner engaged in various physical activities. Therefore, the Commission finds Petitioner's low back symptoms or condition is not related to the work accident on October 20, 2019.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on September 13, 2021, is hereby reversed on the issue of causation after May 19, 2020, and reversed on the issue of prospective medical and modified for the reasons stated herein.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of prospective medical treatment including, but not limited to, cervical disc replacement surgery as recommended by Dr. Matthew Gornet, is hereby vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall be given a credit of $2,775.32 for TTD paid, for a total credit of $2,775.32. The parties stipulated TTD benefits were paid in full to the date of trial. This award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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

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

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

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

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

July 22, 2022

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

KAD/bsd
O05/24/22
42

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC034016
Case Name	LOVE, BERNELL v. KRAFT HEINZ
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	John Winterscheidt
Respondent Attorney	James Clune

DATE FILED: 9/13/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 8, 2021 0.05%

/s/William Gallagher, Arbitrator

Signature

22IWCC0269

STATE OF ILLINOIS)
)SS.
COUNTY OF WILLIAMSON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Bernell Love
Employee/Petitioner

Case # 19 WC 34016

v.

Consolidated cases: n/a

Kraft Heinz
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Herrin, on August 16, 2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, October 20, 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 $54,118.48; the average weekly wage was $1,040.74.

On the date of accident, Petitioner was 50 years of age, married with 0 dependent child(ren).

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

Respondent shall be given a credit of $2,775.32 for TTD, $0.00 for TPD, $0.00 for maintenance, and $0.00 for other benefits, for a total credit of $2,775.32. The parties stipulated TTD benefits were paid in full to the date of trial.

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

ORDER

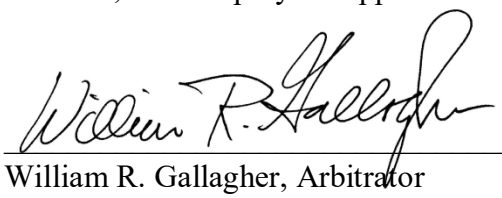
Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 10, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, cervical disc replacement surgery as recommended by Dr. Matthew Gornet.

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.



SEPTEMBER 13, 2021

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained accidental injuries arising out of and in the course of his employment by Respondent on October 20, 2019. According to the Application, Petitioner was "Struck in the head by falling case of juice" and sustained an injury to the "Head, neck and body as a whole" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills as well as prospective medical treatment. The prospective medical treatment sought by Petitioner was cervical disc replacement surgery as recommended by Dr. Matthew Gornet, an orthopedic surgeon. Respondent disputed liability on the basis of causal relationship and also disputed the reasonableness and necessity of the cervical disc replacement surgery (Arbitrator's Exhibit 1).

Petitioner became employed by Respondent in June, 2011, and worked as a forklift driver. On October 20, 2019, Petitioner was in the process of cleaning up a spill when a case of juice fell approximately 10 to 12 feet and struck the top of Petitioner's head. Petitioner estimated the case of juice weighed approximately 15 to 16 pounds. At the time of the accident, Petitioner experienced a headache, dizziness, neck and shoulder pain, but he was able to complete his shift.

The following day, October 21, 2019, Respondent directed Petitioner to go to Gateway Occupational Health where Petitioner was evaluated by Mitra Schultz, a Physician Assistant. PA Schultz diagnosed Petitioner with a cervical sprain and head contusion. She imposed work/activity restrictions which included no operation of a forklift (Petitioner's Exhibit 1).

Petitioner was seen at Gateway Occupational Health on October 23, 2019, by Dr. Christopher Knapp. He diagnosed Petitioner with a cervical strain and ordered physical therapy (Petitioner's Exhibit 1).

On October 23, 2019, Petitioner was also seen by Dr. Jim Hong, his family physician. Dr. Hong diagnosed Petitioner with a concussion and neck/upper shoulder pain. He ordered an MRI scan of Petitioner's cervical spine (Petitioner's Exhibit 2).

The MRI was performed on November 5, 2019. According to the radiologist, the MRI revealed multiple disc bulges and facet arthropathy from C3-C4 to C6-C7 as well as foraminal stenosis, especially at C4-C5 and C5-C6 (Petitioner's Exhibit 3).

When PA Schultz saw Petitioner on November 1, 2019, she diagnosed Petitioner with a cervical strain with radiculopathy. She subsequently reviewed the report of the MRI and noted the findings of the radiologist (Petitioner's Exhibit 1).

At the direction of Respondent, Petitioner was examined by Dr. Donald deGrange, an orthopedic surgeon, on November 14, 2019. In connection with his examination of Petitioner, Dr. deGrange reviewed medical records and the MRI scan which were provided to him by Respondent. Petitioner informed Dr. deGrange of the circumstances of the accident of October 20, 2019. When seen by Dr. deGrange, Petitioner complained of neck and left shoulder/scapular pain. Dr. deGrange reviewed the MRI and opined it revealed disc bulges at C5-C6 and C6-C7. He diagnosed Petitioner with a cervical contusion and post-concussive syndrome. He said Petitioner had sustained a

temporary aggravation of a pre-existing degenerative condition at C5-C6, was not at MMI and imposed work/activity restrictions (Respondent's Exhibit 1; Deposition Exhibit 3).

Dr. Hong saw Petitioner on November 18, 2019, and Petitioner continued to complain of neck and left shoulder pain. He referred Petitioner to Dr. Matthew Gornet (Petitioner's Exhibit 2).

Petitioner was evaluated by Dr. Gornet on December 19, 2019. At that time, Petitioner informed Dr. Gornet of the accident of October 20, 2019, and that he had neck/low back pain, bilateral trapezial pain, left more than right, as well as headaches. Dr. Gornet reviewed the MRI and opined it was of moderate/poor quality, but that it revealed annular tears at C5-C6 and C6-C7. Dr. Gornet opined Petitioner had sustained an axial load injury to his cervical spine which could either aggravate asymptomatic degeneration in the neck or cause a new disc injury. Dr. Gornet recommended Petitioner undergo epidural steroid injections at C5-C6 and C6-C7 and that a higher resolution MRI scan be performed. He also imposed work/activity restrictions (Petitioner's Exhibit 4).

Dr. Gornet referred Petitioner to Dr. Helen Blake, a pain management specialist. Dr. Blake saw Petitioner on January 21, 2020, and February 4, 2020, and administered epidural steroid injections at C6-C7 and C5-C6, respectively (Petitioner's Exhibit 6).

Dr. Gornet subsequently saw Petitioner on March 26, 2020. At that time, Petitioner advised the injections had relieved some of his arm complaints, but he continued to have significant neck pain as well as some low back pain. Dr. Gornet renewed his recommendation Petitioner undergo another MRI scan as well as a CT scan (Petitioner's Exhibit 4).

The MRI and CT scans were performed on April 23, 2020. According to the radiologist, the MRI revealed an annular tear/protrusion at C6-C7, a disc bulge at C5-C6 and foraminal protrusions at C3-C4, C4-C5 and C7-T1. According to the radiologist, the CT scan revealed disc protrusions at C3-C4, C5-C6 and C6-C7 (Petitioner's Exhibit 8).

Dr. Gornet saw Petitioner on April 23, 2020, and reviewed the MRI and CT scans at that time. His reading of the diagnostic studies was consistent with the radiologist and he authorized Petitioner to return to work without restrictions on a trial basis. He noted that if Petitioner's condition did not improve, disc replacements at C5-C6 and C6-C7 should be considered (Petitioner's Exhibit 4).

At the direction of Respondent, Petitioner was examined by Dr. Robert Bernardi, an orthopedic surgeon, on May 19, 2020. In connection with his examination of Petitioner, Dr. Bernardi reviewed medical records and diagnostic studies provided to him by Respondent. At that time, Petitioner complained of pain in the neck and shoulder blades, more on the left than right. Petitioner also advised that repetitive neck movements at work aggravated his symptoms. Dr. Bernardi reviewed the MRI of November 5, 2019, and opined it revealed degenerative disc disease and degenerative foraminal narrowing at C5 and C6. He reviewed the MRI of April 23, 2020, and opined it was unchanged when compared to the prior MRI. He also reviewed the CT scan of April 23, 2020, and opined it revealed degenerative changes, calcifications and spur formation (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Bernardi opined Petitioner's shoulder symptoms were not radicular and there were no nerve root tension signs. He also opined that all of the findings noted in the MRI scans were degenerative and not acute or post-traumatic. He diagnosed Petitioner with a cervical strain/sprain, opined Petitioner was at MMI and could continue to work without restrictions. He also opined the notion of a permanent aggravation was an "oxymoron" (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Gornet saw Petitioner on June 4, 2020. At that time, he reviewed Dr. Bernardi's report. Dr. Gornet noted Petitioner had disc protrusions which correlated with Petitioner's complaints of neck and left shoulder/trapezius pain. He opined a severe mechanical load such as a blow to the head could cause a cervical disc injury. Dr. Gornet noted Petitioner had no significant prior symptoms and was credible as he tried to return to work. Dr. Gornet recommended Petitioner undergo disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 4).

Petitioner last saw Dr. Gornet on October 5, 2020. At that time, Petitioner continued to complain of neck and left arm/shoulder pain. Dr. Gornet renewed his recommendation Petitioner undergo disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 4).

Dr. Gornet was deposed on November 23, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified Petitioner had sustained disc injuries at C5-C6 and C6-C7 which were identified in the MRI scans and were causally related to the accident of October 20, 2019. He described the accident as being a sudden axial mechanical load to the cervical spine. Dr. Gornet initially provided Petitioner with conservative treatment including epidural steroid injections. When Petitioner did not experience enough relief, Dr. Gornet then recommended disc replacement surgery at C5-C6 and C6-C7 (Petitioner's Exhibit 11; pp 12-21).

On cross-examination, Dr. Gornet agreed Petitioner had pre-existing disc degeneration; however, he described this as being "age-appropriate." Dr. Gornet reaffirmed his opinions that the condition he diagnosed was related to the accident because Petitioner had no prior problems, the mechanism of injury was consistent with a disc injury, the MRI correlated with Petitioner's subjective complaints and Petitioner's radicular symptoms had improved with the injections (Petitioner's Exhibit 11; pp 24-28).

Dr. Bernardi was deposed on December 11, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bernardi's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Bernardi testified Petitioner had degenerative conditions in his neck and sustained a cervical sprain/strain as a result of the accident. Dr. Bernardi also testified disc replacement surgery was not indicated, primarily because Petitioner did not have any radicular symptoms (Respondent's Exhibit 1; pp 21-22).

On cross-examination, Dr. Bernardi agreed Petitioner was "forthright" and was no evidence of symptom magnification. He agreed that a pre-existing condition can be made symptomatic as a result of trauma. Because of the duration of Petitioner's symptoms, Petitioner's condition was now a chronic one (Respondent's Exhibit 1; pp 33, 39-40).

Respondent obtained video surveillance of Petitioner on May 18, May 19 and May 20, 2020, and again on November 21, November 23 and November 27, 2020. The videos and surveillance reports were received into evidence at trial. The videos revealed Petitioner performing day-to-day activities which included cleaning/vacuuming his car, getting gas, using a leaf blower, removing bags of groceries from his car and taking his car to a service facility where he assisted pushing the vehicle out of a service bay (Respondent's Exhibit 4).

At the direction of Respondent, Dr. Michael Racenstein, a radiologist, reviewed medical records, diagnostic studies and surveillance reports provided to him by Respondent. He did not examine Petitioner and prepared a report dated February 25, 2021. Dr. Racenstein opined the findings noted in the MRI scans were identical with one another and confirmed the lack of an acute injury as a result of the accident. He agreed with Dr. Bernardi that surgery was not appropriate, but the degenerative discs at C5-C6 and C6-C7 were likely aggravated by the accident. He opined that, based on his review of the diagnostic studies, Petitioner was at MMI, but would defer to the clinicians directly involved in his treatment (Respondent's Exhibit 2; Deposition Exhibit 2).

Dr. Racenstein was deposed on May 26, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Racenstein's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Racenstein testified the MRI scans revealed degenerative disc disease at C5-C6 and C6-C7, but there was no evidence of compression of the spinal cord, no fractures, no subluxation or malalignment, no edema and no stenosis. Based on the preceding, Dr. Racenstein said there was no evidence of an acute injury. He further said that there was no evidence of an annular tear (Respondent's Exhibit 2; pp 14-16).

On cross-examination, Dr. Racenstein agreed that, as a radiologist, he does not perform spinal surgeries nor does he make spinal surgical recommendations. He agreed that if Petitioner was asymptomatic prior to the accident of October 20, 2019, it was possible the abnormalities he observed in the MRI scans could be causing Petitioner to experience chronic neck pain (Respondent's Exhibit 2; pp 25-30).

At the direction of Respondent, Dr. Kimberly Terry, a pediatric neurosurgeon, conducted a Utilization Review of Petitioner's medical records to determine whether the disc replacement surgery recommended by Dr. Gornet was medically reasonable and necessary. Dr. Terry reviewed medical records and diagnostic studies provided to her by Respondent and prepared a report dated March 19, 2021. Based upon the "Official Disability Guidelines" (ODG), Dr. Terry opined the disc replacement surgery recommended by Dr. Gornet was not medically necessary. She also noted the most recent medical records she had of Dr. Gornet was his office record of June 4, 2020 (Respondent's Exhibit 3; Deposition Exhibit 2).

Dr. Terry was deposed on July 8, 2021, and her deposition testimony was received into evidence at trial. On direct examination, Dr. Terry's testimony was consistent with her medical report and she reaffirmed the opinions contained therein. Dr. Terry testified the primary reason she opined disc replacement surgery was not appropriate was because Dr. Gornet had not seen Petitioner for nine months and Petitioner's condition could have changed (Respondent's Exhibit 3; p 19).

On cross-examination, it was noted Dr. Terry had not reviewed the MRI of April, 2020, and had not reviewed Dr. Gornet's most recent record October 5, 2020 (Respondent's Exhibit 3; p 22).

At trial, Petitioner testified he had no prior neck/low back symptoms. Petitioner continued to complain of significant neck pain and a lack of strength in both arms, the left more so than the right. Petitioner wants to proceed with the surgery as recommended by Dr. Gornet. Petitioner said he was fired by Respondent in July, 2021, because of some disciplinary issues. Petitioner subsequently obtained employment at a lumberyard where he does inventory. He drives a forklift to pick up and move lumber.

Conclusions of Law

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being is causally related to the accident of October 20, 2019.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on October 20, 2019.

Petitioner's testimony that he had no prior neck, low back or shoulder symptoms prior to the accident of October 20, 2019, was credible and unrebutted.

Dr. Gornet, Petitioner's primary treating physician, opined Petitioner sustained an axial load injury to the cervical spine which either aggravated or caused disc injuries at C5-C6 and C6-C7. Dr. Gornet made specific note of the mechanics of how the injury was sustained, the findings of the MRI and the fact that they correlated with Petitioner's complaints.

Respondent's Section 12 examiner, Dr. Bernardi, opined Petitioner's cervical spine condition pre-existed the accident and called a permanent aggravation of a pre-existing condition an "oxymoron." However, on cross-examination, Dr. Bernardi agreed a pre-existing condition could be rendered symptomatic as a result of trauma.

Respondent's radiologist, Dr. Racenstein, agreed the degenerative discs were likely aggravated by the accident.

Based on the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than those of Dr. Bernardi and Dr. Racenstein in regard to causal relationship.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 10, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

In regard to disputed issue (K) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the cervical disc replacement surgery recommended by Dr. Matthew Gornet.

In support of this conclusion the Arbitrator notes the following:

As noted in disputed issue (F) the Arbitrator concluded Petitioner's current condition of ill-being was causally related to the accident of October 20, 2019, and Dr. Gornet's opinion regarding causal relationship was persuasive.

Even though Dr. Bernardi opined cervical disc replacement surgery was not appropriate because of the lack of radicular symptoms, he agreed Petitioner now has a chronic condition.

Respondent's Utilization Review physician, Dr. Terry, opined that disc replacement surgery was not appropriate; however, this opinion was based, to a large extent, upon her understanding Dr. Gornet had not seen Petitioner since June, 2020, because she had not been provided with his most recent medical report of October 5, 2020. Further, Dr. Terry was not provided with a copy of the MRI of April 23, 2020.

Based on the preceding, the Arbitrator finds the opinion of Dr. Gornet be more persuasive than those of Dr. Bernardi and Dr. Terry in regard to Petitioner's need for prospective medical treatment.

In regard to the surveillance video, the Arbitrator did not observe Petitioner performing any tasks inconsistent with his cervical spine condition. The Arbitrator finds the surveillance video to have, at most, minimal probative value.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003861
Case Name	Kenija Ewings v. West Side Transport Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0270
Number of Pages of Decision	23
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	
Respondent Attorney	Kenneth Smith

DATE FILED: 7/25/2022

/s/Carolyn Doherty, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kenija Ewings,

Petitioner,

vs. NO: 19 WC 3861

Westside Transport Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 14, 2021, is hereby affirmed and adopted.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $8,200.00. 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.

July 25, 2022

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

o: 07/21/22
CMD/ma
045

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC003861
Case Name	EWINGS, KENIJA v. WEST SIDE TRANSPORT INC.
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b)/8(A) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Molly Mason, Arbitrator

Petitioner Attorney	David Feuer
Respondent Attorney	Kenneth Smith

DATE FILED: 10/14/2021

THE INTEREST RATE FOR THE WEEK OF OCTOBER 13, 2021 0.05%

/s/Molly Mason, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)/8(A)

Kenija Ewings
Employee/Petitioner

v.

Westside Transport Inc.
Employer/Respondent

Case # **19** WC **3861**

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 21, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☒ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☒ TTD
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. X Other **Did Petitioner exceed the choices afforded by Section 8(a) of the Act?**

FINDINGS

On the date of accident, **January 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.

For the reasons set forth in the attached decision, the Arbitrator finds that Petitioner established causation as to a right knee condition that required treatment on January 15, 2019 and as to spinal conditions that required treatment through August 5, 2019, the date of Petitioner's visit to Dr. Mekhail.

In the year preceding the injury, Petitioner earned $**62,400.00**; the average weekly wage was $**1,200.00**.

On the date of accident, Petitioner was **42** years of age, ***single*** with **1** dependent child.

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

Respondent shall be given a credit of $**16,686.90** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**16,686.90**.

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 $**800.00**/week for **28** weeks, commencing 1/22/2019 through 8/5/19, as provided in Section 8(b) of the Act. Respondent shall receive credit for its stipulated TTD payment of $16,686.90. Arb Exh 1.

Medical expenses pursuant to Sections 8(a) and 8.2 of the Act.

Respondent shall pay reasonable and necessary medical services of $**1,781.00 (South Holland, PX 3)** as provided in Sections 8(a) and 8.2 of the Act, with Respondent receiving credit for any payments it has already made. Respondent shall also pay reasonable and necessary medical services of **$586.18 (EQMD)** as provided in Sections 8(a) and 8.2 of the Act, to the extent said amount does not represent improper balance billing. The Arbitrator declines to award any of the other claimed medical expenses.

For the reasons stated in the attached decision, the Arbitrator finds 1) that Petitioner failed to establish causation as to the need for treatment rendered after August 5, 2019; and, alternatively, 2) the treatment that Petitioner underwent after August 5, 2019 was rendered by providers beyond the two choices afforded by Section 8(a) of the Act. The Arbitrator views Petitioner as reaching maximum medical improvement on August 5, 2019. The Arbitrator declines to award prospective care.

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.

Molly C Mason

OCTOBER 14, 2021

Signature of Arbitrator

ICArbDec19(b)

Kenija Ewings v. West Side Transport, Inc.
19 WC 3861

Summary of Disputed Issues

The parties agree that Petitioner, a truck driver, sustained an accident while working for Respondent on January 15, 2019. They also agree that Petitioner provided Respondent with timely notice of the accident. Arb Exh 1.

Petitioner testified she fell on ice twice on January 15, 2019, injuring various body parts. She underwent Emergency Room care on the day of the accident. Emergency Room personnel noted complaints of pain in the right knee, upper back and left scapular area. On January 22 and 26, 2019, Petitioner saw Dr. Hawkins, her primary care physician. Dr. Hawkins noted complaints relative to the left upper back. She made no mention of the right knee. Petitioner testified that Dr. Hawkins talked with her but did not actually treat her. The records reflect that Dr. Hawkins examined Petitioner on two occasions and prescribed laboratory studies and medication. PX 1. Petitioner acknowledged that Dr. Hawkins did not refer her to any other provider. T. 19.

Petitioner testified that, at the direction of her former attorney, she stopped seeing Dr. Hawkins and began seeing Drs. Hooten, Foreman and Najera at South Holland Medical Center. She underwent spinal MRI scans, therapy, massage and ultimately a functional capacity evaluation, which, according to Dr. Najera, showed she was capable of resuming her truck driver job. Dr. Najera indicated that Petitioner declined to follow his recommendation that she return to work. [See PX 3, last page.] At Petitioner's request, Dr. Najera provided a referral to a spine surgeon. On August 5, 2019, Dr. Mekhail, a spine surgeon affiliated with Parkview Orthopaedic Group, told Petitioner that her MRIs showed no compromise and that she did not require any additional care. RX 4, pp. 4-5.

On November 5, 2019, Respondent's examiner, Dr. Singh, diagnosed resolved cervical, thoracic and lumbar sprains and found Petitioner capable of full duty. Singh Dep Exh 2.

In 2020, Petitioner moved to Milwaukee and resumed treatment. On June 2, 2020, she saw Dr. Mubanga. She later saw a chiropractor and a pain physician. She also saw an orthopedic surgeon for knee pain. She was still under treatment as of the hearing of September 21, 2021. She acknowledged she did not undergo any accident-related care between her August 5, 2019 visit to Dr. Mekhail and June 2, 2020.

The disputed issues include but are not limited to causal connection, medical expenses and temporary total disability from January 16, 2019 through the hearing. Petitioner seeks prospective care while Respondent asserts that Petitioner exceeded her choice of physicians and is at maximum medical improvement. Arb Exh 1.

Arbitrator's Findings of Fact

Petitioner testified she currently lives in Milwaukee, Wisconsin. She previously lived in Gary, Indiana.

Petitioner testified she worked as a truck driver for Respondent as of her accident of January 15, 2019. On that date, she sustained two falls on ice in Respondent's terminal yard. She initially slipped and fell while trying to detach a trailer. She injured her right knee in that fall. She then fell backward, with her legs going up in the air. She landed on her back. T. 13. The two accidents occurred within twenty minutes of one another. T. 12. Paramedics came to the yard and transported Petitioner to Community Hospital Anderson in Anderson, Indiana. She testified she did not choose to go to this hospital. T. 14.

Records in PX 2 reflect that Petitioner saw Dr. Short and a physician's assistant in the Emergency Room and indicated she had twice fallen on ice, with the second fall occurring about ten minutes after the first. Petitioner reported coming down on her right knee when she first fell and going backward when she fell the second time, injuring her neck and upper back. Petitioner also reported having a slight headache but did not recall striking her head. PX 2, pp. 16-17, 29. On right knee examination, the physician's assistant noted a full range of motion and pain to the anterior/medial aspect without bruising or swelling. On upper back examination, he noted mild cervical and thoracic pain to palpation. He also noted pain to palpation over the left scapular area. Thoracic spine and left scapular X-rays were normal. PX 2, pp. 6, 10. Right knee X-rays showed moderate degenerative changes, especially in the medial compartment. PX 2, p. 4. Cervical spine X-rays showed no evidence of fracture, straightening of the normal cervical lordosis, possibly related to muscle spasm, and degenerative changes at C4-C5 and C5-C6. PX 2, p. 8. The assistant indicated that Petitioner "appears in no acute distress" and that there were "no concerning exam findings." Petitioner was discharged with instructions to apply ice, take over the counter medication if needed for pain and follow up with her primary care physician. PX 2, pp. 30-31.

Petitioner testified that she experienced pain in her right knee, upper left shoulder, mid back and lower back at the Emergency Room. She denied having problems with any of these body parts prior to her two falls on January 15, 2019. T. 14-15.

Petitioner testified she initially sought follow-up care from Dr. Rochelle Hawkins, her primary care physician. She saw Dr. Hawkins three times. She testified, however, that Dr. Hawkins merely talked to her and did not actually render any treatment. T. 20. Dr. Hawkins did not refer her to anyone. T. 19.

Records in PX 1 reflect that Petitioner saw Dr. Rochelle Hawkins on January 22, 2019. The doctor recorded a consistent history of the two falls and the Emergency Room visit. She noted that Petitioner remained symptomatic and rated her pain at 6/10. On examination, she described Petitioner's neck as supple and noted pain and reduced strength in the left shoulder. There is no indication that she examined Petitioner's right knee. She prescribed Naprosyn and Flexeril, ordered laboratory studies and directed Petitioner to use ice and rest. PX 1.

Petitioner returned to Dr. Hawkins on January 26, 2019 and reported some benefit from the medication. Petitioner indicated she was "still having left-sided back and scapular pain." There is no indication Petitioner complained of her right knee. On re-examination, Dr. Hawkins noted tenderness to palpation in the left paraspinal region and a full range of motion. There is no indication that she examined Petitioner's right knee. She directed Petitioner to continue the medication and "continue to stay home from truck driving job." She instructed Petitioner to return on February 1, 2019. It is unclear whether Petitioner returned on that date. PX 1.

Petitioner testified that her previous attorney told her she should see the doctors he recommended rather than returning to Dr. Hawkins. She followed his recommendation and began a course of treatment at South Holland Medical Center. Records in PX 3 reflect that Petitioner saw Dr. Hooten, a chiropractor, at this facility on February 5, 2019. Dr. Hooten noted that Petitioner sustained two falls on ice on January 15, 2019, landing hard on her right knee in the first fall and falling backward, landing on her back, in the second fall. He also noted that Petitioner had initially undergone care and X-rays at an Emergency Room and had then seen Dr. Hawkins, who prescribed medication and therapy.

Dr. Hooten noted that Petitioner initially experienced right knee pain but that this pain "has since subsided." He also noted persistent, 8/10 pain in the neck and upper back, along with numbness in both arms extending down to the fingertips. He further noted complaints of pain in the mid and lower back, rated 7/10, along with numbness in both anterior thighs. He indicated that Petitioner's job involved sitting, standing and connecting/disconnecting trailers and that she had been off work since January 15, 2019. He noted a history of a work-related low back injury in 2007 but indicated that this injury required only a course of therapy, with Petitioner eventually being discharged "pain free." He reviewed the previous X-rays results. On examination, he noted tenderness and hypertonicity in the paraspinals and right scalenes, a limited range of cervical spine motion, tenderness and hypertonicity in the paraspinals and left rhomboids, tenderness and hypertonicity in the erectors and a painful and limited range of lumbar spine motion. There is no indication he examined Petitioner's right knee. He diagnosed a cervical sprain, cervical radiculitis, a thoracic sprain, a lumbar sprain and lumbar radiculitis. He linked these diagnoses to the work falls. He prescribed home exercises and indicated that Petitioner should undergo lumbar spine X-rays "once pregnancy is ruled out." He kept Petitioner off work. He recommended that Petitioner begin physical therapy and see Dr. Foreman. PX 3.

Petitioner underwent physical therapy on February 6th, 7th and 8th. On each of these dates, Petitioner described her symptoms as unchanged. PX 3.

On February 12, 2019, Petitioner saw Dr. Foreman at Associated Medical Centers of Illinois. The doctor recorded a history of the work falls. He noted "primary complaints" of neck, upper back and lower back pain along with intermittent numbness in both arms and fingertips and in both anterior thighs. He did not note any right knee complaints. He prescribed physical therapy. He told Petitioner to discontinue her previous medication and

start taking Meloxicam, Omeprazole and Tramadol. He also directed Petitioner to avoid strenuous activities. PX 3.

Petitioner participated in a physical therapy session on February 13, 2019, with the therapist noting no change in her symptoms. PX 3.

There is then a two-month gap in care. After February 13, 2019, Petitioner next saw Dr. Najera on April 8, 2019. In his note of that date, Dr. Najera indicated he was seeing Petitioner at Dr. Foreman's request to see whether she was a candidate for pain procedures and/or EMG testing. He noted that Petitioner reported improvement and that she had run out of medication "since her last visit on 2/13." He administered electrical stimulation and prescribed a TENS rental unit. He ordered MRIs of the cervical, thoracic and lumbar spine along with continued therapy and Tramadol ER instead of Tramadol. He continued to keep Petitioner off work. PX 3.

Petitioner underwent "therapeutic massage" on April 10 and 26, 2019 and physical therapy on April 11, 16, 17, 19, 24, 25 and 30, 2019. PX 3.

On April 18, 2019, Petitioner underwent the recommended MRI scans at Preferred Open MRI. The cervical spine MRI showed posterior herniations at C4-C5, C5-C6 and C6-C7, with the interpreting radiologist noting various degrees of stenosis at all three levels. The thoracic spine MRI showed no herniations and multi-level mild spondylosis. The lumbar spine MRI showed no herniations, multi-level circumferential bulging impinging the ventral thecal sac, multi-level mild spondylosis at L4-S1 and straightening of the normal lordosis. The radiologist commented that there was "loss of signal limiting evaluation" due to Petitioner's body habitus. PX 4.

Petitioner saw Dr. Najera again on May 6, 2019. The doctor described Petitioner's neck and upper back pain as "improving," noting a pain rating of 3/10. He described Petitioner's mid and low back pain as "resolved." He indicated that Petitioner "feels unable to perform regular work duties." He reviewed the MRIs. He put therapy on hold but indicated Petitioner should continue getting massages and performing home exercises. He refilled the Meloxicam and Tramadol ER and prescribed Gabapentin on a trial basis "for neuropathic pain." He directed Petitioner to remain off work. PX 3.

Petitioner underwent "therapeutic massage" on May 11, 13, 20, 22 and 29, 2019. PX 3.

Dr. Najera performed EMG/NCV studies of both upper extremities on May 30, 2019. He described these studies as revealing evidence of mild right carpal tunnel syndrome and no radiculopathy or other abnormalities. He discontinued the Gabapentin, refilled the Meloxicam and Tramadol ER and prescribed Lidocaine patches. He also recommended a functional capacity evaluation followed by four weeks of work conditioning and a second functional capacity evaluation. He directed Petitioner to remain off work. PX 3.

Petitioner underwent a functional capacity evaluation on June 5, 2019. The evaluator, Dr. Hooten, rated Petitioner's pain drawing and dermatome pattern as invalid/abnormal. He described Petitioner as demonstrating "marginal" body mechanics. He indicated that Petitioner was "generally cooperative" during the testing process. Using Dictionary of Occupational Titles standards, he rated Petitioner's job as "medium" physical demand level. He noted a post-evaluation pain rating of 9/10. PX 3.

Petitioner underwent another therapeutic massage on June 7, 2019. On June 10, 2019, she started a course of work conditioning with Dr. Hooten. At a subsequent session, on July 2, 2019, another chiropractor noted a flare-up of lower back pain over the weekend, indicating that Petitioner "could not complete the lifting exercises." PX 3.

Petitioner returned to Dr. Najera on July 8, 2019, having completed eight work conditioning sessions. The doctor noted that Petitioner "feels she is not making progress and does not wish to continue work conditioning." He also noted that the functional capacity evaluation met validity criteria and that Petitioner "met PDC for her job (medium)." He refilled the Meloxicam and Tramadol ER, referred Petitioner to an unidentified spine specialist "for 2nd opinion" and discharged Petitioner from care. He found Petitioner to be "disabled until cleared by spine specialist." PX 3.

Petitioner testified she asked Dr. Najera to refer her to a spine specialist. T. 21.

On July 11, 2019, Dr. Najera wrote a note appealing a non-certification of the functional capacity evaluation. He indicated that the reviewer non-certified the evaluation "based on [Petitioner] having not tried to return to work." He described Petitioner as having "complex injuries" and "complex issues hampering management including an unwillingness to return to work for fear of further injury." He indicated that the evaluation in fact showed that Petitioner "could safely return to work" and that he recommended Petitioner do so. He went on to state: "she continues to be unwilling which further supports the difficulty with case management." See last page of PX 3.

On July 19, 2019, Meaghan Nolan of Parkview Orthopaedic Group wrote to the adjuster and indicated Petitioner had been referred to Dr. Mekhail "for an orthopaedic spine surgery consult." Nolan stated she was "writing to obtain WC approval" for the consultation along with "possible X-rays and treatment." RX 4, p. 8.

Records in RX 4 reflect that Petitioner saw Dr. Mekhail on August 5, 2019. An encounter form bearing that date documents a referral from Dr. Najera. RX 4, p. 17. Dr. Mekhail indicated that Petitioner fell on black ice at work on January 15, 2019, landing on her left side. He also noted that Petitioner complained of neck pain radiating to her left shoulder, back pain and pain "in the left side along the leg with some swelling." He noted a pain rating of 7/10. He indicated that Petitioner reported some benefit from massage therapy and no benefit from therapy. He noted that Petitioner's job involved unhooking trucks but no loading/unloading and that Petitioner did not think she could resume working as a truck driver.

Dr. Mekhail described Petitioner's gait as good. He noted a good range of neck motion and pain "mostly in the upper and mid back." He noted negative straight leg raising, intact sensation, normal motor power, no abnormal reflexes in the extremities and negative Spurling's in the upper extremity for the cervical spine. He obtained X-rays which showed some kyphosis around C5-C6 and no lumbar spine abnormalities.

Dr. Mekhail described the thoracic and lumbar spine MRI films as unremarkable. He indicated he did not have the cervical spine MRI but noted that the thoracic spine MRI "shows the lower aspect of the cervical spine which is unremarkable." He noted that Petitioner reported having been told she had "three ruptured discs." He indicated he "told her that the MRI shows mild bulging but they are not causing any compromise for her." He recommended that Petitioner perform home exercises and "advance activity as tolerated." He found Petitioner to be at maximum medical improvement "with no need for any intervention." He directed Petitioner to follow up with him as needed. RX 4, pp. 4-5.

A print-out marked as RX 2 reflects that Respondent paid temporary total disability benefits to Petitioner from February 6, 2019 through August 12, 2019.

At Respondent's request, Dr. Singh performed a Section 12 examination of Petitioner on November 4, 2019. In his report of that date, the doctor indicated he reviewed Emergency Room records along with records from DH Medical Group, Dr. Foreman, Dr. Najera, Dr. Hooten and Dr. Mekhail in connection with his examination. He noted that Petitioner complained of 9-10/10 pain in her entire spine. He also noted that Petitioner denied relief from physical therapy and was limited in her ability to sit, stand and walk. He described Petitioner's past medical history as unremarkable. He reviewed a description of Petitioner's truck driver job and noted that Petitioner remained off work.

Dr. Singh described Petitioner as 5 feet, 1 inch tall and weighing 384 pounds. He noted no abnormalities on examination. He noted 5/5 negative Waddell findings. He interpreted the cervical, thoracic and lumbar spine MRI images as showing no evidence of stenosis. He diagnosed cervical, thoracic and lumbar strains. Based on his negative examination and the normal EMG, he described these strains as having resolved. He found Petitioner capable of full duty. He described the treatment to date as excessive, indicating that Petitioner required only four weeks of physical therapy, three times per week. Singh Dep Exh 2.

Under cross-examination, Petitioner acknowledged that she saw no doctors relative to her work injuries between her visit to Dr. Mekhail and June 2, 2020. Petitioner testified that she moved to Milwaukee, Wisconsin, at some point and began seeing a new physician, Dr. Nicole Mubanga of Milwaukee Health Services.

Records in PX 5 reflect that, on June 2, 2020, Dr. Mubanga recorded a history of Petitioner's work falls and noted that Petitioner had been having problems with her right knee since the first fall. She also noted that Petitioner reported injuring her tailbone, back and left

shoulder in the second fall. She described Petitioner as struggling with stairs and having difficulty with prolonged sitting and standing. She noted complaints of left-sided sciatica and right knee instability.

Dr. Mubanga recommended that Petitioner use a four-wheeled walker with a seat for safety with walking. She also recommended pain management and chiropractic care. She prescribed Tizanidine and Tramadol. PX 5.

Petitioner began undergoing osteopathic manipulative treatment (OMT) at Milwaukee Health Services on June 5, 2020. PX 5.

On June 6, 2020, Petitioner began a course of chiropractic care with Dr. Lang of Downtown Chiropractic. T. 26. Dr. Lang noted complaints of 5/10 neck pain and constant left-sided lower and upper back pain. He attributed these complaints to the work accident. PX 11.

Petitioner continued seeing Dr. Lang on a regular basis after June 6, 2020. PX 11.

On June 17, 2020, Petitioner had a telemedicine visit with Dr. Thomas-King of Pain Management and Treatment Center in Milwaukee. Petitioner complained of neck, bilateral shoulder, low back and bilateral hip pain secondary to the January 2019 work falls. Petitioner indicated she had been seen in an Emergency Room for pain management "between 1-5 times in the last year." [With the exception of the January 15, 2019 records, no Emergency Room records are in evidence.] Dr. Thomas-King reviewed the office's opioid policy with Petitioner. She prescribed physical therapy, a brace and trigger point injections. PX 9.

On June 24, 2020, Petitioner returned to Dr. Mubanga and reported increased pain in both knees with walking. Petitioner indicated she would like to resume her previous job but was "very concerned that it may not be possible." The doctor noted an antalgic gait favoring the left. She recommended that Petitioner continue with chiropractic care and pain management. PX 5.

On August 28, 2020, a physician's assistant at Pain Management & Treatment Center administered right-sided trigger point injections. PX 9.

On October 7, 2020, Petitioner had a telemedicine visit with a physician's assistant at Pain Management & Treatment Center. The assistant noted that Petitioner experienced eight hours of pain relief following the injections. PX 9.

On October 12, 2020, a physician's assistant at Pain Management & Treatment Center renewed the Zanaflex, Narcan and Tramadol and noted that Petitioner was scheduled for left-sided medial branch blocks. PX 9.

Petitioner was discharged from therapy on October 13, 2020. PX 9.

On October 19, 2020, Dr. Thomas-King administered left-sided medial branch blocks. PX 9.

On October 22, 2020, Petitioner saw Dr. Wall at Milwaukee Health Services. On examination, Dr. Wall noted pain on palpation of the lumbar paraspinal muscles and pain on palpation of the right infrapatellar tendon. He referred Petitioner to an orthopedic surgeon for her right knee and prescribed a knee brace. PX 5.

On November 2 and 17, 2020, Dr. Thomas-King administered left-sided medial branch blocks. PX 9.

On December 8 and 21, 2020, Dr. Thomas-King and Dr. Berezovski of Pain Management & Treatment Center, S.C. administered right-sided lumbar medial branch blocks. PX 9.

Petitioner saw Dr. Wall again on December 22, 2020. The doctor noted a complaint of 5/10 right knee pain. He described this pain as chronic and dating back to the January 2019 work falls. He noted that Petitioner has seen an orthopedic surgeon "who thought the problem was osteoarthritis" but that Petitioner "thinks she has a different injury since she was fine before she fell." He indicated that Petitioner was seeing Dr. King for low back pain. At Petitioner's request, he provided a referral to Dr. Wichmann. PX 5.

On January 19, 2021, Dr. Thomas-King performed a lumbar radiofrequency ablation and right-sided medial branch blocks. PX 9.

At the next visit, on January 29, 2021, Dr. Wall noted that Petitioner had undergone an ablation at L2-L5 and was improving. He also noted that Petitioner was still experiencing right knee pain and had an upcoming appointment with an orthopedic surgeon. PX 5.

Petitioner testified she saw a doctor for her right knee and underwent a cortisone injection at this doctor's recommendation. The doctor might have been named Dr. Freedman. She could not recall exactly. [No records concerning right knee treatment in 2021 are in evidence.]

On February 4, 2021, Dr. Lang noted that Petitioner had recently undergone a right knee injection that "helped immensely." He also noted that Petitioner was "targeting returning to work in April 2021." PX 11.

On February 5, 2021, Petitioner underwent an initial physical therapy evaluation at Alliant Physical Therapy Group in Milwaukee. Petitioner testified that Dr. Mubanga referred her to Alliant. The evaluating therapist recorded a history of the work falls. He noted that Petitioner had moved to Milwaukee in 2020 and had seen Dr. King, a pain physician, who had administered nerve blocks and lumbar ablations. He also noted that Petitioner had recently seen an orthopedic surgeon for her right knee and had undergone a cortisone injection, "which greatly reduced her pain."

Petitioner began participating in physical therapy following the evaluation. PX 6.

On February 16, 2021, Petitioner had a telemedicine visit with a physician's assistant at Pain Management & Treatment Center, S.C. Petitioner reported experiencing relief after the radiofrequency ablation and medial branch blocks. The assistant renewed the Valium, Tizanidine, Narcan and Tramadol. PX 9.

On March 3, 2021, Dr. Wall noted that Petitioner had attended seven physical therapy sessions and was now experiencing "minimal" pain. He also noted "good lower back strength and good leg strength." He cleared Petitioner to return to work as a truck driver "with no restrictions" as of the following day. PX 5.

On March 9, 2021, a physician's assistant at Pain Management & Treatment Center, S.C. recommended trigger point injections. He administered these injections on April 9, 2021. PX 9.

On May 4, 2021, Dr. Wall noted ongoing complaints of low back pain, rated 4/10. He also noted that Petitioner was taking Tylenol with Codeine per Dr. King. He referred Petitioner to a bariatric surgeon, noting a BMI of 68. PX 5.

On May 6, 2021, Petitioner saw a physician's assistant at Pain Management & Treatment Center. Petitioner reported having experienced two hours of pain relief following the trigger point injections. The assistant noted that Petitioner had not filled her Tramadol prescription and that Petitioner told him "Tramadol [was] no longer helping." The assistant renewed the medications and noted a urine screening was within normal limits. PX 9.

A therapy note dated June 10, 2021 reflects that Petitioner rated her bilateral knee pain at 1/10 and her low back pain at 4/10. Petitioner reported having been able to stand at a store for about an hour. PX 6.

Dr. Singh, Respondent's Section 12 examiner, testified by way of evidence deposition on June 16, 2021. RX 3. Dr. Singh identified Singh Dep Exh 1 as his current CV. He testified he graduated from medical school in 1999, completed an orthopedic surgery residency at Rush in 2004, underwent spine fellowship training at Emory University in 2005 and went into practice the same year. He testified he was originally board certified in orthopedic surgery in 2005 and was recertified in 2015. RX 3, p. 7.

Dr. Singh testified he exclusively treats patients with spinal disorders. He sees approximately 150 to 200 patients per week and performs 500 to 600 surgeries annually. During the last fifteen to twenty years, he has focused his research on disc degeneration and traumatic spinal injuries. RX 3, p. 7. He is a full professor at Rush University Medical Center. RX 3, p. 7.

Dr. Singh testified he devotes 95% of his practice to treating patients. RX 3, pp. 7-8. He performs approximately four to six independent medical examinations per week. Of these examinations, approximately 65 to 70% are for respondents. He also testifies on behalf of patients he treats. He charges $1,250 to review records, perform an examination and issue a report. RX 3, p. 8. He charges $1,250 per hour for deposition testimony. RX 3, p. 9.

Dr. Singh acknowledged he has no independent recollection of examining Petitioner. He identified Singh Dep Exh 2 as the report he generated concerning the examination. The report is dated November 4, 2019. RX 3, p. 9. He reviewed various records prior to examining Petitioner. He also reviewed the images concerning the cervical, thoracic and lumbar spine MRIs performed on April 18, 2019. RX 3, p. 11. Petitioner told him she slipped and fell on ice twice. She landed on her right knee in the first fall and on her lower back in the second fall.

Dr. Singh testified he diagnosed Petitioner with cervical, thoracic and lumbar muscular strains. The MRI images he reviewed were normal. There was no evidence of stenosis or nerve compression. RX 3, p. 12. Nor was there any evidence of a traumatic spine injury. RX 3, p. 12. The upper extremity EMG of May 30, 2019 was normal. It showed no evidence of radiculopathy. RX 3, p. 12.

Dr. Singh testified he physically examined Petitioner and noted no abnormalities. Petitioner had normal, 5/5 strength and normal sensation in her arms and legs. He tested sensation with a monofilament, or soft brush. This is "much more accurate" than light touch. RX 3, p. 13. Petitioner also exhibited a normal range of neck and lower back motion. She exhibited no neurological abnormalities. RX 3, p. 13. He concluded that Petitioner did not require any additional treatment, based on her normal examination and MRIs. He concluded that Petitioner "just had a soft tissue sprain that had resolved." RX 3, p. 14. If Petitioner was still undergoing treatment as of November 2019, that treatment would not have been reasonable or necessary. There was "nothing to objectify [Petitioner's] pain complaints." No treating physician had recommended surgery. RX 3, pp. 14-15.

Dr. Singh testified that Petitioner described herself as a truck driver and indicated she was required to lift at a heavy physical demand level. Petitioner reported having worked for Respondent for 1 ½ years prior to the accident. She was off work as of his examination. RX 3, p. 15. The job description indicated Petitioner's job was at the medium physical demand level. RX 3, p. 15. He concluded that Petitioner was capable of full duty without restriction. RX 3, p. 15. He based this conclusion on the normal examination and MRIs. RX 3, p. 16. If, hypothetically, Petitioner resumed lumbar spine treatment after his examination, that would not change any of his opinions. RX 3, pp. 16-17.

Under cross-examination, Dr. Singh testified he did not note any symptom magnification during his examination. All five Waddell signs were negative. RX 3, p. 17. He is unable to conclude that Petitioner's subjective complaints were legitimate based on the negative Waddell findings. Petitioner complained of 10/10 pain in her entire spine, from her neck to her lower back. Petitioner indicated her pain was preventing her from performing

multiple activities. He "cannot objectify [Petitioner's] pain complaints." RX 3, p. 18. A patient with such complaints who, like Petitioner, has no neurological deficits and normal MRIs can take over the counter anti-inflammatories and continue with activities as normal. RX 3, p. 19. From a spine perspective, he does not believe Petitioner should be seeing a mental health specialist. He does not believe he is in a position to decide whether Petitioner was truthful, based on his one encounter with her. RX 3, p. 20. He is not sure whether he looked for evidence of lack of truthfulness. RX 3, p. 20.

On redirect, Dr. Singh testified that Petitioner's pain complaints are out of proportion to her normal examination and the normal imaging. RX 3, pp. 20-21.

A therapy note dated June 17, 2021 reflects that Petitioner complained of increased low back pain, primarily on the left side. PX 6.

A therapy note dated July 2, 2021 reflects that Petitioner rated her low back pain at 7/10 and indicated she was only experiencing knee pain when using stairs. PX 6.

On July 7, 2021, Dr. Wall noted that Petitioner was still experiencing low back pain and was undergoing therapy and pain management. He indicated that Petitioner had benefited from two months of therapy and wanted to continue "and then try to get in to a work hardening program to see if she can get back to her job as a truck driver." He also noted that Petitioner was still experiencing bilateral knee pain and requested bilateral sleeves for support. He prescribed the sleeves along with additional therapy and a repeat lumbar spine MRI. PX 5.

On July 28, 2021, Dr. Lang noted that Petitioner's low back pain was "intense" and that she was scheduled to undergo an MRI on August 2, 2021. [The Arbitrator notes that no MRI report of August 2, 2021 is in evidence.] He also noted that Petitioner was awaiting a lumbar injection. PX 11.

On July 28, 2021 Petitioner saw a physician's assistant at Pain Management & Treatment Center. Petitioner complained of pain in her neck, bilateral shoulders, hips and right knee. The assistant renewed the medications. He ordered a urine toxicology screening and recommended a repeat radiofrequency ablation. PX 9.

The last therapy note in evidence is dated August 9, 2021. This note reflects that Petitioner rated her low back pain at 3/10 and reported having undergone another ablation procedure the previous week. Petitioner requested bilateral knee sleeves, indicating she never received them from her doctor. PX 6.

On August 10, 2021, Dr. Lang noted that Petitioner reported having undergone an ablation rather than a lumbar injection. He also noted that Petitioner's knee pain was "intense." PX 11.

Petitioner testified she was scheduled to begin work hardening on September 27, 2021. Dr. Mubanga recommended work hardening.

Petitioner testified that, since moving to Milwaukee, she has seen no doctors other than those recommended by Dr. Mubanga. She has not worked since the accident. After the accident, she could not stand or walk and was experiencing constant, burning pain in her left shoulder and right knee. Her knee was unstable. She did not improve until she began seeing the "new" doctors in the Milwaukee area. She has made progress with respect to extended sitting and activities such as bathing herself. She is able to walk half a block. If she exceeds this distance, she experiences burning in her knee. She has made "great progress" but is "not 100%." She feels she would not be able to resume working as a truck driver because her current medications make her drowsy and she cannot sit for more than two hours. She is also required to step up into the truck and this would cause right knee pain. T. 34-35. She is scheduled to see a vocational counselor the Monday after the hearing. Dr. Mubanga scheduled her to see this counselor. She is currently taking Tizanidine and Tylenol with Codeine. T. 35.

Petitioner denied experiencing any accidents since the work falls of January 15, 2019.

Petitioner testified she had one previous workers' compensation claim stemming from an accident that occurred in 2007. T. 36. She worked for a bus company at that time and was pregnant. She injured her back. Mark Shuman represented her. She settled the claim in 2007 or 2008. She returned to work after she had the baby. T. 37.

Under cross-examination, Petitioner testified that the hospital she was transported to on January 15, 2019 was the closest. She later underwent care at South Holland. On July 8, 2019, the doctors at South Holland told her she was at maximum medical improvement. She indicated she wanted a second opinion and then saw Dr. Mekhail at Parkview. Dr. Mekhail is a spine surgeon. Dr. Mekhail did not tell her she was not a candidate for surgery. He did not discuss surgery with her. He told her there was nothing wrong with her spine. He did not recommend any additional care. Between her August 7, 2019 visit to Dr. Mekhail and her June 2, 2020 visit to Dr. Mubanga she saw no doctors for her work injuries. *** pain meds/weaning?

Arbitrator's Credibility Assessment

The Arbitrator had some problems with Petitioner, credibility-wise. For example, Petitioner acknowledged seeing Dr. Hawkins, her primary care physician, after the work accident but claimed that Dr. Hawkins merely talked to her and did not render any treatment. Dr. Hawkins' records reflect she examined Petitioner and prescribed medication. PX 1. Petitioner also testified she has been off work since the accident and does not feel she could resume truck driving. She failed to mention that, on March 3, 2021, Dr. Wall described her pain as "minimal" and released her to unrestricted truck driver duty as of the following day. PX 5.

Dr. Singh, Respondent's examiner, did not note any symptom magnification or positive Waddell signs but testified he could not objectify Petitioner's subjective pain complaints. RX 3, p. 17.

Arbitrator's Conclusions of Law

Did Petitioner establish a causal connection between the undisputed work falls of January 15, 2019 and her claimed current conditions of ill-being?

The Arbitrator finds that Petitioner established causation as to a right knee contusion that required Emergency Room treatment on January 15, 2019 and as to spinal conditions that required treatment through August 5, 2019, the date of Dr. Mekhail's evaluation. The Arbitrator further finds that Petitioner failed to establish causation as to the need for the treatment she underwent after August 5, 2019.

In finding that Petitioner established causation as to the need for right knee treatment on but not after January 15, 2019, the Arbitrator relies on the following: 1) Petitioner's denial of any pre-accident right knee problems; 2) Petitioner's testimony that she landed on her right knee in the first fall; 3) the Emergency Room records of January 15, 2019, which reflect that Petitioner "came down" on her right knee but exhibited no right knee abnormalities; and 4) the fact that no other records from 2019 or 2020 mention right knee complaints. Dr. Hawkins made no mention of the right knee when she saw Petitioner in the latter part of January 2019. Dr. Hooten, a chiropractor, noted on February 5, 2019 that Petitioner described her initial right knee pain as having subsided.

The Arbitrator acknowledges that Petitioner resumed knee treatment in June 2020, when she began seeing Dr. Mubanga in Milwaukee. Petitioner testified she saw an orthopedic surgeon and underwent a knee injection. The Arbitrator notes, however, that Petitioner voiced bilateral knee complaints in 2020 and that the orthopedic surgeon's records are not in evidence. There is simply no medical evidence that the knee problems Petitioner complained of in 2020 stemmed from the January 15, 2019 work accident.

In finding that Petitioner established causation as to the need for spinal treatment only through August 5, 2019, the Arbitrator relies on Petitioner's denial of pre-accident spinal problems, the functional capacity evaluation, the fact that Dr. Najera discharged Petitioner from care on July 8, 2019 and the fact that Dr. Mekhail recommended no additional spine treatment when he saw Petitioner on August 5, 2019.

Is Petitioner entitled to reasonable and necessary medical expenses?

Petitioner claims various unpaid medical bills, some of which relate to treatment rendered after August 5, 2019. The Arbitrator has previously found that Petitioner reached maximum medical improvement as of August 5, 2019 and failed to establish causation as to the need for the treatment she underwent after that date.

Of the claimed bills, the Arbitrator awards two. The first is the $1,781.00 bill from South Holland Medical Center/AMCI (Drs. Hooten, Foreman and Najera), subject to the fee schedule. This bill relates to therapy Petitioner underwent between February 5, 2019 and February 13, 2019. PX 3. Respondent's medical payment print-out documents several payments to AMCI but the print-out does not reflect any service dates. To the extent Respondent may have already paid the $1,781.00 bill, Respondent is entitled to credit. The Arbitrator also awards the EQMD balance of $586.18, to the extent this does not represent improper balance billing. The EQMD bill relates to medication prescribed between February 12, 2019 and July 8, 2019. PX 8.

The Arbitrator declines to award the claimed bill from Milwaukee Health Services (PX 7) for the following reasons: 1) the bill relates to treatment rendered beyond the two choices of physicians and after the maximum medical improvement date of August 5, 2019; and 2) some of the enumerated charges relate to treatment of personal health conditions. The Arbitrator also declines to award the bills from Pain Management & Treatment Center (PX 9) and Dr. Lang (PX 11) as the enumerated charges relate to treatment rendered after August 5, 2019. The Arbitrator has previously found that Petitioner reached maximum medical improvement on August 5, 2019 and failed to establish causation as to the need for the treatment she underwent after that date.

Petitioner also claims an outstanding bill of $3,479.00 from Alliant Physical Therapy. Petitioner has indicated that this bill was marked as PX 7 but PX 7 is in fact an itemized bill from Milwaukee Health Services for physician services rendered by Drs. Mubanga and Wall. The Alliant Physical Therapy bill appears in PX 6 and reflects an outstanding balance of $455.00. The Arbitrator declines to award this balance because it relates to treatment rendered after August 5, 2019. The Arbitrator has previously found that Petitioner reached maximum medical improvement on August 5, 2019 and failed to establish causation as to the need for the treatment she underwent after that date. The Arbitrator also views the treatment rendered after August 5, 2019 as beyond the choices afforded by Section 8(a) of the Act. See further below.

Is Petitioner entitled to temporary total disability benefits?

Petitioner proceeded to trial pursuant to Sections 19(b) and 8(a) of the Act. She claims she was temporarily totally disabled from January 16, 2019 (the day after the undisputed accident) through the hearing of September 21, 2021. Respondent disputes this claim and maintains that Petitioner was temporarily totally disabled from February 6, 2019 (the day after Petitioner's initial visit to South Holland Medical Center) through August 5, 2019 (the date of Dr. Mekhail's examination). The parties agree that Respondent paid $16,686.90 in temporary total disability benefits. Arb Exh 1.

The Arbitrator finds that Petitioner was temporarily totally disabled from January 22, 2019 (the date Dr. Hawkins instructed Petitioner to rest) through August 5, 2019, a period of 28 weeks. The Arbitrator declines to award temporary total disability benefits from January 16,

2019 through January 21, 2019 because there is no evidence indicating that the Emergency Room physician took Petitioner off work on January 15, 2019. The Emergency Room records reflect that Petitioner did not appear to be in acute distress and that there were "no concerning" findings on examination. The Arbitrator declines to award temporary total disability benefits after August 5, 2019 because Dr. Mekhail did not recommend any additional treatment or work restrictions on that date. After her visit to Dr. Mekhail, Petitioner did not resume treatment until June 2020. The Arbitrator has previously found that Petitioner failed to establish causation as to the need for the treatment she underwent from June 2, 2020 through the hearing.

In considering the issue of temporary total disability, the Arbitrator also notes the following: 1) in an appeal letter dated July 11, 2019, Dr. Najera indicated that Petitioner could safely resume working, based on the functional capacity evaluation, but that she was "unwilling" to do so (see last page of PX 3); 2) Respondent's examiner, Dr. Singh, found Petitioner capable of full duty as of November 5, 2019; and 3) Dr. Wall noted "minimal pain" and released Petitioner to full duty on March 3, 2021 (PX 5).

Respondent is entitled to credit for its payment of $16,686.90 in temporary total disability benefits, in accordance with the parties' stipulation. Arb Exh 1.

Did Petitioner exceed her choice of physicians?

As an alternative to its causation argument, Respondent contends that Petitioner exceeded the two choices of physicians afforded by Section 8(a) of the Act. The Arbitrator agrees with this contention.

Section 8(a) provides that an employer's liability for medical expenses is limited to "all first aid and emergency treatment" plus all services provided by the injured employee's first and second choices of physicians "or any subsequent provider of medical services in the chain of referrals" from those two choices.

Petitioner's initial Emergency Room visit does not constitute a "choice" under the plain language of Section 8(a). Petitioner testified that paramedics transported her from the jobsite to the Emergency Room on January 15, 2019 the day of the undisputed accident. There is no evidence suggesting that the visit of January 15, 2019 was not a bona fide emergency. See Wolfe v. Industrial Commission, 138 Ill.App.3d 680 (4th Dist. 1985). The Arbitrator views Dr. Hawkins as Petitioner's first choice. Petitioner's testimony that Dr. Hawkins merely talked with her and did not actually treat her is contradicted by the doctor's records. Petitioner readily acknowledged that Dr. Hawkins did not refer her to any other provider. T. 19. The Arbitrator views Drs. Hooten, Foreman and Najera of South Holland Medical Center/AMCI, along with Dr. Mekhail, as Petitioner's second choice. Petitioner testified she went to South Holland Medical Center at the direction of her former attorney. The Arbitrator views Dr. Mekhail as within the chain of referrals based on Dr. Najera's note indicating he was referring Petitioner to a spine

surgeon and Dr. Mekhail's records, which identify Dr. Najera as the referring physician (RX 4, p. 17).

The Arbitrator has previously found that Petitioner failed to establish causation as to the treatment she underwent after August 5, 2019. The Arbitrator also views the treatment rendered after August 5, 2019 as beyond the choices afforded by Section 8(a). Petitioner conceded she began seeing "new" physicians of her own selection after she moved to Milwaukee in 2020. There is no evidence suggesting that any medical provider who treated Petitioner in 2019 referred her to these "new" physicians.

Has Petitioner reached maximum medical improvement and is this case ripe for a permanency determination?

As noted at the outset, Petitioner elected to proceed pursuant to Sections 19(b) and 8(a) of the Act. Petitioner maintains her current conditions stem from the work accident and remain unstable. Respondent argues that Petitioner is at maximum medical improvement and that this case is ripe for a permanency determination. The Arbitrator agrees with Respondent. For the reasons stated above, the Arbitrator has found that Petitioner reached maximum medical improvement as of August 5, 2019, the date Dr. Mekhail assured her the MRIs showed nothing significant. The Arbitrator declines to make a permanency finding in this decision because Petitioner did not agree to this. This case is ripe for such a finding.

Is Petitioner entitled to prospective care?

The Arbitrator has previously found that Petitioner reached maximum medical improvement on August 5, 2019 and that this case is ripe for a permanency determination. The Arbitrator declines to award prospective care.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC035949
Case Name	Mauricio Gracida v. Dutch American Foods
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0271
Number of Pages of Decision	14
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Tammy Paquette

DATE FILED: 7/25/2022

/s/ Deborah Simpson, 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

Mauricio Gracida,

Petitioner,

vs. NO: 16 WC 35949

Dutch American Foods,

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, medical, notice, permanent disability and temporary disability 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.

As indicated above, this matter was arbitrated under §19(b) of the Act. The Arbitrator found that Petitioner failed to meet his burden of proving a compensable accident. The Commission affirms that finding. However, in the "ORDER" section of the decision, the Arbitrator included the language that "in no instance shall this award be a bar to subsequent hearing and determination of any additional amount of medical benefits or compensation for a temporary or permanent disability, if any." Because the claim was denied in its entirety and there is no award, the matter will not be remanded for determination of any benefits. Therefore, the Commission strikes the above quoted language from the "ORDER" section of the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 7, 2021, is hereby affirmed and adopted with the changes noted above.

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.

July 25, 2022

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

o5/25/22
DLS/rm
046

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC035949
Case Name	GRACIDA, MAURICIO v. DUTCH AMERICAN FOODS
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Roma Dalal, Arbitrator

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Tammy Paquette

DATE FILED: 12/7/2021

THE INTEREST RATE FOR THE WEEK OF DECEMBER 7, 2021 0.10%

/s/ Roma Dalal, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF KANKAKEE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mauricio Gracida
Employee/Petitioner

v.

Dutch American Foods
Employer/Respondent

Case # **16 WC 35949**

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 Roma Dalal, Arbitrator of the Commission, in the city of **Kankakee**, on **October 22, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **June 30, 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.

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

In the year preceding the injury, Petitioner earned **$26,512.20**; the average weekly wage was $**509.85.**

On the date of accident, Petitioner was **47** years of age, ***married*** with **1** dependent children.

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

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

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

ORDER

The Arbitrator finds that Petitioner did not sustain accidental injuries that arose out of and in the course of his employment on June 30, 2016, nor is any condition of ill-being, as it pertains to his bilateral elbows, causally related to any work injury. Based upon this finding, all benefits are hereby 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

DECEMBER 7, 2021

STATE OF ILLINOIS)
) SS
COUNTY OF KANKAKEE)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mauricio Gracida, Petitioner,	)	
vs.	)	No. 16 WC 35949
	)	consolidated with 18 WC 30841
Dutch American Foods, Respondent.	)	

FINDINGS OF FACT

This matter proceeded to trial on October 22, 2021. The Petitioner, Maurcio Gracida (hereinafter referred to as the "Petitioner") alleged a June 30, 2016 injury and March 25, 2018 injury. The issues in dispute were accident, causal connection, medical bills, TTD benefits, and prospective medical. (Arb Ex. 1 and 2).

Petitioner testified that in June of 2016 he was employed by a company called Dutch American Foods. He began working there in April of 2014. (Tr. 7). Petitioner was employed as a general laborer. He testified that he did not have any problems with his elbows prior to June 30, 2016. (Tr. 28).

On May 26, 2016 petitioner presented to Dr. Rita Saldanha, his primary care physician. Petitioner was a 47-year-old male who presented for elbow pain. Petitioner was diagnosed with pain and medial epicondylitis. He was recommended to wear a brace and return in four weeks. (PX 1).

Petitioner followed up with Dr. Saldanha on June 13, 2016 for elbow pain. He noted that it had not resolved. The prescribed medications did not help. Petitioner underwent bilateral x-rays of the elbows revealing no acute abnormalities and was referred to an orthopedic. (PX 1).

Petitioner followed up with Dr. Saldanha on June 27, 2016. He advised that his right elbow was feeling better, but his left elbow was still painful with only slight improvement. He was having trouble finding an orthopedic due to his insurance. Petitioner was diagnosed with left elbow medial epicondylitis. Petitioner was also diagnosed with Type 2 diabetes mellitus with hyperglycemia. Petitioner was to follow up in four weeks. (PX 1).

Petitioner testified he did not notice anything unusual about his arms until the moment that one of the bags slipped out of his hand. He testified that on June 30, 2016 he grabbed a bag of 80 pounds and lifted the bag and it slipped. He then went to see his doctor, Dr. Saldanha. (Tr. 9-10). He testified that he felt like his strength went away when the bag went down. (Tr. 11). He advised that he felt the pain in his elbows. (Tr. 12). He complained of numbness and tingling from his fourth and fifth fingers. (Tr. 12). Petitioner testified he went to see Dr. Saldanha one day after his accident. (Tr. 31).

The medical records indicate petitioner returned to Dr. Saldanha on July 11, 2016. Petitioner followed up with elbow pain. He noted was advised to wear the elbow brace at work. He was referred to an orthopedic. (PX 1).

In an August 11, 2016 follow up petitioner noted he was having a hard time finding an orthopedic physician that takes his insurance. He was still having elbow pain. Petitioner was provided a referral for pain management. (PX 1).

Petitioner followed up on August 25, 2016. Petitioner was referred to Dr. Gregory Primus and was to undergo a left elbow MRI. (PX 1). In an October 21, 2016 follow up petitioner noted he was going to undergo the MRI on Monday. He started to complain of numbness and burning sensation of his bilateral feet and legs. (PX 1).

On October 24, 2016 petitioner underwent an MRI of the left elbow. It was noted that petitioner had to lift 80-pound bags at work. The MRI revealed possible mild medial epicondylitis/common flexor tendinosis with no evidence of focal tear. (PX 1).

On November 21, 2016 petitioner began occupational therapy at MetroSouth. Petitioner noted symptoms began several months ago when lifting a heavy bag.

On November 29, 2016 petitioner presented to Dr. Irvin Wiesman for bilateral elbow pain. He came in today for an initial evaluation of an injury he sustained at work. He noted he was lifting 80-pound bags of salt and doing this repetitively. When he did it, he felt like his elbow was giving out on him. By the end of the shift he was in a lot of pain. Petitioner had bilateral medial epicondylitis and bilateral cubital tunnel syndrome. The epicondylitis was confirmed by the MRI. Petitioner was to undergo bilateral cortisone injections. He was to return to work with 5-pound restrictions. (PX 2)

Petitioner followed up on December 19, 2016 with Dr. Wiesman. Petitioner noted he was 50% improved from the cortisone injections. Petitioner was to undergo a bilateral EMG and undergo therapy two times a week. Petitioner was able to work full duty.

On January 3, 2017 Petitioner began therapy at ATI. On January 6, 2017 petitioner returned for his epicondylitis. He was undergoing therapy and noted he was doing much better. (PX 1). As of January 11, 2017, Petitioner was able to return to work with limited pushing and pulling up to 10 pounds. (PX 1). Petitioner underwent an EMG on January 17, 2017 which revealed bilateral medial elbow ulnar neuropathy, right moderate carpal tunnel syndrome and left mild carpal tunnel syndrome.

On February 6, 2017 petitioner was seen by Dr. Saldanha. He was still in therapy. He was 75% improved. Petitioner was to continue with therapy and see an orthopedic. (PX 1). Petitioner was able to return to work with limited pushing and pulling up to 10 pounds.

On February 13, 2017 petitioner followed up with Brittany Macleod, PA. Petitioner was recommended repeat cortisone injections. He would also continue with medications, splinting and work modifications. (PX 2). On February 16, 2017 petitioner was discharged from therapy. He was still having pain in the left medial elbow. Petitioner returned on February 27, 2017 with Brittany Macleod, PA. The cortisone injections dropped his pain to 1/10. He was to return to full duty work and return in three months. (PX 2).

On March 13, 2017 petitioner followed up with Dr. Saldanha. He finished therapy three weeks ago and was doing better. Petitioner was to return in two weeks. (PX 1). Petitioner also returned to Brittany Macleod, PA on March 17, 2017. He was working for three months and his symptoms had now returned. Petitioner was recommended

a left sided cubital tunnel release with anterior transposition, followed by 12 weeks later by a right cubital tunnel decompression with anterior transposition. He also received a cortisone injection. (PX 2).

Petitioner returned on April 21, 2017. Petitioner continued to complain of numbness. He noted he dropped something out of his left hand. Petitioner was to continue with medication while awaiting surgery authorization. (PX 2).

On May 1, 2017 petitioner underwent an MRI of the left shoulder. It was noted petitioner was complaining of left shoulder pain radiating down his arm. The MRI revealed fluid in subscapularis recess. No other obvious abnormality. (PX 2).

Petitioner followed up on May 5, 2017 noting his arm had worsened. He was recommended surgery.

On August 27, 2017 petitioner was seen by Dr. Kevin Walsh for a Section 12 examination. (RX 2). Petitioner was a 48-year-old right-handed male who reported a work-related injury in June 2016. He noted he tried to lift a bag of salt that weighed 80 pounds. Both arms went weak when he had a sudden onset of numbness. The doctor reviewed petitioner's medical records and job description. The work does involve stacking full bags, mostly 50 pounds, with exception of 80-pound bags occasionally. The doctor examined petitioner and noted petitioner had evidence of subluxing ulnar nerves with numbness in the ulnar distribution consistent with cubital tunnel syndrome due to subluxation of the nerve. Petitioner also had tenderness in his medial epicondyle area consistent with medial epicondylitis. Dr. Walsh noted that petitioner's bilateral cubital tunnel syndrome and bilateral medial epicondylitis was not related to a single event of lifting a bag of 80-pound slat on the day of injury. More likely than not it was associated with repetitive activities.

Dr. Walsh authored an addendum report. He noted that petitioner's condition was not the result of a single event of lifting an 80-pound bag but rather it was the result of a repetitive activity. The doctor noted that a review of additional medical records indicated petitioner had a preexisting condition of medial epicondylitis which predated the work-related event. More likely than not, the medial epicondylitis was not caused by the work-related event but was a preexisting condition. (RX 3).

Petitioner followed up on October 23, 2017 for an evaluation of a work-related injury with Dr. Wiesman. Petitioner does a lot of repetitive forearm and elbow flexion and extension with forceful grasping, gripping which resulted in golfer's elbow with inflation. Petitioner was recommended surgery. (PX 2).

On January 29, 2018 petitioner followed up with Dr. Wiesman and was still pending authorization of surgery. On March 12, 2018 petitioner followed up and was still waiting for authorization of surgery. Petitioner was to continue with pain medications and his work restrictions remained the same. Petitioner followed up on April 23, 2018. There was no change in recommendations.

On May 25, 2018 petitioner alleged a second injury. (Tr. 18). Petitioner testified that he was driving the forklift in the mixing area. As he was driving the forklift, the steering wheel turned once or twice but fast. The wheel moved his hands super-fast and he felt pain in the left shoulder. (Tr. 18-19). Petitioner subsequently notified his supervisor. (Tr. 21).

On June 4, 2018 petitioner followed up with Dr. Wiesman noting his left arm was worsening. Petitioner indicated that he had pain radiating proximal to his arm and in his left and right triceps area. There is no mention of any shoulder injury. Petitioner was once again recommended surgery.

On July 16, 2018 petitioner followed up with Dr. Wiesman for bilateral cubital tunnel syndrome. The doctor noted he worked for a company and does heavy lifting where he does repetitive heavy lifting of over 50-pound bags. He developed pain acutely in June of 2016. He now is complaining primarily of left shoulder pain and left deltoid pain he developed acutely seven weeks ago while he was driving the forklift. Based on the same a repeat MRI was recommended. (PX 2).

Petitioner underwent a shoulder MRI on July 27, 2018 which revealed fluid subscapularis recess, small subacromial/subdeltoid bursal effusion and biceps tenosynovitis. (PX 2).

On August 6, 2018 petitioner followed up with Dr. Wiesman. Petitioner was recommended physical therapy for his left shoulder. (PX 2). Petitioner followed up on October 29, 2018 with Dr. Wiesman. Petitioner had decreased range of motion and stated the left shoulder was extremely painful. He was recommended therapy and a possible steroid injection.

On November 2, 2018 petitioner began physical therapy. Petitioner was to undergo therapy two to three times a week for 4 weeks.

On November 6, 2018 petitioner presented to Dr. Tu. Petitioner was a 50-year-old male who was seen for an evaluation of the left shoulder. Petitioner claimed a work injury on June 30, 2016 noting he lifted bags of salt weighing approximately 80 pounds and started experiencing left shoulder pain as well as bilateral elbow pain. Petitioner was diagnosed with left shoulder adhesive capsulitis. He was recommended manipulation under anesthesia. (PX 2).

On December 7, 2018 petitioner followed up with Dr. Wiesman. Petitioner was not recommended any more steroid injections because he was diabetic. He was still recommended surgery. (PX 2). In a January 7, 2019 follow up petitioner's treatment plans did not change. Petitioner followed up on February 25, 2019. Petitioner was still pending surgery and was provided medication. His restrictions remained the same. Petitioner followed up on May 20, 2019. He was to continue to work light duty and was still awaiting surgery. (PX 2). Petitioner followed up through 2020 with no change in treatment plans. Petitioner was recommended surgery and restrictions of no carrying, lifting, pulling, or pushing greater than 10 pounds. (PX 2).

On August 28, 2019 petitioner was seen by Dr. Nikhil Verma for a Section 12 Examination. Petitioner was a 50-year-old right-handed male who was employed for Dutch American Foods for 5 years. Petitioner noted an initial onset of bilateral elbow pain that began about 3 years ago due to repetitive lifting of heavy bags of salt. When specifically asked about his shoulder Petitioner noted that in May or June of 2018, he was driving a forklift rapidly turning the wheel and developed left shoulder pain. Petitioner advised that he had an MRI in May 2017 noting that he developed bilateral elbow pain and his whole arm became sore. To date he underwent therapy and received some oral medications. Dr. Verma reviewed the medical records beginning with May 26, 2016 through February 25, 2019. Dr. Verma examined petitioner and reviewed the MRI scan from May 1, 2017 and from July 26, 2018. Based on the same Dr. Verma diagnosed petitioner with left shoulder capsulitis. He noted that this was not a work-related condition. Specifically, adhesive capsulitis occurs commonly as an insidious condition within the general population and specifically has associated with insulin-dependent diabetes. At this point he did not see any indication that petitioner sustained any injury because of either 2016 or 2018 work injuries. The gradual onset of shoulder pain was consistent with underlying adhesive capsulitis condition. No evidence to suggest any aggravation or material worsening of the condition as result of any work activities. (RX 1)

Petitioner was last seen on November 3, 2020 for his left shoulder. Petitioner was awaiting the authorization of the left shoulder manipulation under anesthesia. (PX 2).

Petitioner testified that following the injury he began light duty. He worked driving a forklift while standing up. (Tr. 13). He testified that he stopped working in March 2021 because he was on FMLA for his son. (Tr. 16). Petitioner also signed an employee exit form terminating his employment dated September 19, 2021 as he ran out FMLA. (Tr. 44, RX 8). Petitioner also testified that he owned a company called DJ Maurcio Air and Sound. (Tr. 40). Prior to the injury he would DJ twice per month, sometimes weekends. He would bring his own equipment like speakers, CDS, boxes, and lights. (Tr. 40-41).

CONCLUSIONS OF LAW

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

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). 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/her testimony. Where a claimant's testimony is inconsistent with his/her 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).

Issue C, whether the accident arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

A decision by the Commission cannot be based upon speculation or conjecture. *Deere and Company v Industrial Commission*, 47 Ill.2d 144, 265 N.E. 2d 129 (1970). A petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d 236, 369 N.E.2d 853 (1977). Where a petitioner fails to prove by a preponderance of the evidence that there exists a causal connection between work and the alleged condition of ill-being, compensation is to be denied. Id. The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v Industrial Commission*, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).

The burden is on the Petitioner seeking an award to prove by a preponderance of credible evidence all the elements of his claim, including the requirement that the injury complained of arose out of and in the course of his or her employment. *Martin vs. Industrial Commission*, 91 Ill.2d 288, 63 Ill.Dec. 1, 437 N.E.2d 650 (1982). The mere existence of testimony does not require its acceptance. *Smith v Industrial Commission*, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much his testimony might be contradicted by the evidence, or how evident it might be that his story is a fabricated afterthought. *U.S. Steel v Industrial Commission*, 8 Ill.2d 407, 134 N.E. 2d 307 (1956).

It is not enough that the petitioner is working when an injury is realized. The petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission*, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969); see also *Hansel & Gretel Day Care Center v Industrial Commission*, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).

The Illinois Supreme Court has held that a claimant's testimony standing alone may be accepted for the purposes of determining whether an accident occurred. However, that testimony must be proved credible. *Caterpillar Tractor vs. Industrial Commission*, 83 Ill.2d 213, 413 N.E.2d 740 (1980). In addition, a claimant's testimony

must be considered with all the facts and circumstances that might not justify an award. *Neal vs. Industrial Commission*, 141 Ill.App.3d 289, 490 N.E.2d 124 (1986). Uncorroborated testimony will support an award for benefits only if consideration of all facts and circumstances support the decision. *See generally*, *Gallentine v. Industrial Commission*, 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), *see* also *Seiber v Industrial Commission*, 82 Ill.2d 87, 411 N.E.2d 249 (1980), *Caterpillar v Industrial Commission*, 73 Ill.2d 311, 383 N.E.2d 220 (1978). It is the function of the Commission to judge the credibility of the witnesses and to resolve conflicts in the medical evidence, and assign weight to the witness' testimony. *O'Dette v. Industrial Commission*, 79 Ill.2d 249, 253, 403 N.E.2d 221, 223 (1980); *Hosteny v Workers' Compensation Commission*, 397 Ill.App. 3d 665, 674 (2009).

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 witness' demeanor and any external inconsistencies with 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).

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 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

The courts presume that when a person seeks treatment for an injury, he will not falsify statements to a physician from whom he expects to receive medical aid. *Shell Oil Co. v. Industrial Comm'n, 2 Ill.2d 590, 592 119 N.E. 2d 224, 226 (1954).*

Petitioner alleges two dates of accident, June 30, 2016, and May 25, 2018 (Arb. Ex. 1 and 2). The Arbitrator will address each one individually

June 30, 2016

After reviewing the medical exhibits admitted at trial in conjunction with petitioner's testimony, the Arbitrator finds petitioner's accident of June 30, 2016 did not arise out of and in the course of petitioner's employment. Petitioner testified that he was lifting a bag of flour when his arms gave out on June 30, 2016. He advised that he did not have any problems with his elbows prior to June 30, 2016 (Tr. 28). In addition, he testified that he went to his physician immediately and reported the history to his physician (Tr. 29-31). The medical records submitted into evidence show that petitioner had bilateral elbow complaints as early as May 26, 2016. In addition, there is no mention of a work injury within the records. (PX 1). This is contradicted by petitioner's testimony that he advised his physician of issues occurring at work. The records also document that petitioner could not find an orthopedic due to his insurance. It was not until the MRI dated October 24, 2016, almost three months later, where was there any mention of an alleged work. (PX 1). In addition, Dr. Wiesman does not mention any type of work injury until November 29, 2016, almost five months later. In that medical note he notes a repetitive type injury, however, it is clear by the testimony petitioner is alleging a June 30, 2016 specific injury when he grabbed an 80-pound bag and dropped it through his arms. He further indicated he had no pain prior to the same. (Tr. 35).

In connection with the above, the Arbitrator finds the opinion of Dr. Walsh that Petitioner's elbow condition was pre-existing and not related to the June 30, 2016 persuasive. As Dr. Walsh points out, Petitioner was treating for epicondylitis prior to the alleged accident of June 30, 2016. (RX 2 and RX 3). The Arbitrator notes Petitioner described to Dr. Walsh a very specific incident in June of 2016 when he tried to lift an 80-pound bag of salt and

his arms went weak and he developed sudden weakness. (RX 2, p. 1). This contrasts with the fact that he saw Dr. Saldanha a month before and indicated he had a two-week history of elbow pain and there was no indication of a work accident. (PX 1).
Looking at the totality of the evidence presented at trial, the Arbitrator finds that there are many inconsistencies in Petitioner's testimony and version of events. She finds that Dr. Walsh's opinion is more persuasive. Based on this, the Arbitrator finds that Petitioner has failed to prove an accident arising out of and in the course of his employment.

May 25, 2018

After reviewing the medical exhibits admitted at trial in conjunction with petitioner's testimony, the Arbitrator finds petitioner's accident of May 25, 2018 did not arise out of and in the course of petitioner's employment. At trial petitioner testified that he was driving a forklift, hit a drainage hole, when the steering wheel started turning very fast, jerking his left arm. (Tr. 18-19). Petitioner testified he injured his left shoulder noting that he his pain began that day. (Tr. 21 and 24).

The Arbitrator notes the medical records submitted into evidence show petitioner did have preexisting medical care as he underwent an MRI on May 1, 2017. (PX 2). In addition, petitioner was seen by Dr. Wiesman on June 4, 2018 right after this alleged injury occurred. Petitioner does not mention any left shoulder injury. In contrast, he simply noted his pain radiating proximally to his arm and in his left and right triceps area was getting worse since the last visit. It was not until July 16, 2018 that petitioner noted he developed acute pain seven weeks ago. (PX 2).

The Arbitrator notes the different histories as well within the medical records. Petitioner presented to Dr. Tu on November 6, 2018 and claimed a left shoulder injury stemming from the June 30, 2016 date of accident. He does not mention any injury while driving a forklift that occurred on May 25, 2018. (PX 2). This is once again contradicted to the history given to Respondent's Section 12 examiner, Dr. Verma, where he noted an injury in May or June 2018 while driving a forklift rapidly turning the wheel. (RX 1).

Moreover, the Arbitrator finds the opinion of Dr. Verma credible and persuasive. Dr. Verma agreed with the diagnosis of left shoulder adhesive capsulitis but disagreed that this was work related. He opined that there is an association between this condition and insulin dependent diabetes. (RX 1 p. 4). The Arbitrator finds this significant as Petitioner admitted on cross examination that he had been hospitalized for his diabetes in 2017 and Petitioner's complaints of shoulder pain began in 2017 prior to the alleged accident on May 25, 2018. (Tr. 40 and PX 2). Moreover, the records from Dr. Saldanha also reveal Petitioner had been treating for diabetes prior to either of his alleged dates of loss. (PX 1). Additionally, Dr. Verma opined that treatment would be for the pre-existing adhesive capsulitis, which again would correspond with the fact that Petitioner had left shoulder complaints even prior to the alleged work injury. (RX p. 4).

Looking at the totality of the evidence presented at trial, the Arbitrator finds that there are many inconsistencies in Petitioner's testimony and version of events. She finds that Dr. Verma's opinion is more persuasive. Based on this, the Arbitrator finds that Petitioner has failed to prove an accident arising out of and in the course of his employment.

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

The Arbitrator adopts her findings in Section (C) above, that Petitioner did not sustain accidental injuries arising out of and in the course of his employment on June 30, 2016 or May 25, 2018. As such, this issue is moot.

With regard to (J), whether medical services that were provided to Petitioner were reasonable and necessary, and whether or not Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds the following:

As the Arbitrator finds that Petitioner failed to prove he sustained accidental injuries arising out of and in the course of his employment on June 30, 2016 or May 25, 2018, as set forth above, Petitioner's claim for medical expenses is denied.

With regard to (K), whether Petitioner is entitled to any prospective medical care, the Arbitrator finds the following:

As the Arbitrator finds the Petitioner failed to prove he sustained an accident arising out of and in the course of his employment on June 30, 2016 or May 25, 2018, Petitioner's claim for prospective medical care is hereby denied.

With regard to (L) whether temporary total disability is owed, the Arbitrator finds the following:

As the Arbitrator finds Petitioner failed to prove that he sustained an accident arising out of and in the course of his employment on June 30, 2016 or May 25, 2018, TTD benefits are hereby denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031082
Case Name	Charles Brandal v. Commonwealth Edison
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0272
Number of Pages of Decision	19
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Peter Schlax
Respondent Attorney	Kisa Sthankiya

DATE FILED: 7/25/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CHARLES BRANDAL,

Petitioner,

vs. NO: 20 WC 31082

COMMONWEALTH EDISON,

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, date of accident, notice, causal connection, medical expenses, temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, and evidentiary issues, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 30, 2021 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $34,400.00. 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 the Circuit Court.

July 25, 2022

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

CAH/pm
O: 7/21/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC031082
Case Name	BRANDAL, CHARLES v. COM ED
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Peter Schlax
Respondent Attorney	Kisa Sthankiya

DATE FILED: 11/30/2021

THE INTEREST RATE FOR THE WEEK OF NOVEMBER 30, 2021 0.09%

/s/Gerald Napleton, Arbitrator

Signature

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

Charles Brandal
Employee/Petitioner

v.

Com Ed
Employer/Respondent

Case # **20** WC **31082**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Rockford**, on **July 20, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **November 6, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**114,296.00**; the average weekly wage was $**2,198.00**.

On the date of accident, Petitioner was **56** 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.

ORDER – SEE ALSO ATTACHED FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Arbitrator finds that Petitioner's November 6, 2020 repetitive trauma claim arose out of an in the course of his employment with Respondent.

The Arbitrator finds that Petitioner's condition of ill-being is related to his employment.

Respondent shall pay Petitioner temporary total disability benefits of $1,465.31/week for 6 2/7 weeks, commencing 12/15/2020 through 01/28/2021, as provided in Section 8(b) of the Act.

Respondent shall be given credit for $8,954.47 for short term disability benefits paid under Section 8(j) of the Act and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay for any and all unpaid reasonable and necessary medical services reflected in Petitioner's Exhibits 3, 4, 5, and 7 as provided in Section 8(a) and pursuant to the medical fee schedule in Section 8.2 of the Act.

Respondent shall be given a credit of $3,230.94 for medical benefits that have been paid as provided in Section 8(j) of the Act and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay $871.73/week for 32.25 weeks reflecting permanent partial disability to the extent of 15% loss of use of the leg pursuant to §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.

/s/ Gerald W. Napleton **NOVEMBER 30, 2021**

Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES BRANDAL,	)	
Petitioner,	)	
v.	)	Case No. 20 WC 031082
COM ED,	)	
Respondent.	)	

FINDINGS OF FACT

John Haluzak's Testimony

Mr. John Haluzak was called to testify as an adverse witness by petitioner during petitioner's Case in Chief. Mr. Haluzak testified that he is the operations manager at Commonwealth Edison. He testified that he was a lineman for 15 to 16 years and has known the Petitioner for 25 years as they worked together as linemen. He testified that he knows Petitioner to be a hardworking, honest, and credible person. Petitioner advanced to his current position because he was a reliable, hardworking, and trusted employee. As a crew leader, Petitioner was still involved with physical work.

Mr. Haluzak testified Petitioner's physical job duties include electrical and construction work, lifting 100 pounds, being available for call outs, climbing poles and ladders, digging and backfilling holes, climbing in and out of holes, bending, stooping, squatting, reaching, kneeling, having a CDL, traversing slippery and muddy ground, and working in awkward positions up to two hours or more at a time multiple times during the day. Haluzak acknowledged the job was physically demanding and that the physical tasks varied on the tasks being performed. Petitioner would also be required to climb in and out of a boom truck, which has higher steps than a normal car or SUV. Petitioner would use three points of contact to get in and out of the truck as that is the safest way to do so. Mr. Haluzak testified that Petitioner would climb up and down the back of the truck also with three point of contact to collect materials a couple times per day.

Mr. Haluzak testified that the bucket on the boom truck had a side entrance that you would climb up, so one would climb into the truck, then step on one or two steps into the boom itself. The steps into the boom would be slightly higher than one's home stair and the walls were approximately three and half to four feet. He testified that while in the bucket of the boom, one can reach strenuously if there is not something directly in front of you because they cannot always position the truck and bucket in an optimum position.

Linemen were also responsible for hooking up ground transformers where they would often kneel in front of the box for a varying amount of time. They performed excavation work for power lines that require digging could be five to six feet deep, which could be done either by a backhoe or by hand. He stated to dig by hand one would step onto the back of the shovel to drive it into varying ground conditions when digging. Digging with a shovel was more or less difficult based on different ground conditions, and one could twist to flip the dirt away. He testified that these activities could be done in a work area and sometimes they would slide ladders down into the holes

themselves, or they would create shelf-like steps into the ground for climbing and tapering the hole.

He further testified that a lineman would plant utility poles which could be up to 80 feet tall with the help of a truck lifting the poll and the lineman subsequently applying force to the pole to drop it into the hole. He testified that a lineman used to carry approximately 50-pound bags of aggregate for a hole. He admitted now a lineman would carry two buckets of foam weighing less than 10 pounds in total. He did admit that lineman performed work on muddy and uneven ground but that rubber boots were required in the winter.

He testified that Petitioner, when he performed his job duties as a lineman, traversed uneven, wet, icy, muddy, slippery terrain only on occasion. He further testified that the ravines at Lake Forest were part of their area so they would work in them. He testified they used ropes to get up and down the ravines in Lake Forest. He testified that Petitioner volunteered to go to Puerto Rico after the hurricane on behalf of ComEd. Petitioner had told him that the Petitioner was going to be having knee surgery before he had it in 2020. He did not recall if the conversation mentioned workers compensation.

Upon cross-examination, Mr. Haluzak testified there were different levels of a lineman including an apprentice level, single phase apprentice, three phase journeymen, Crew Leader, and lead Crew Leader. He confirmed Petitioner was an upgraded Crew Leader and he would oversee two to four guys in his crew which Petitioner had been for five years. As a Crew Leader, Petitioner was required to watch the employees to ensure they were performing their duties safely, keep time for his crew, do a job brief twice a day, and keep a log for the lines under the ground. He testified typically a Crew Leader would work an eight-hour workday with an additional eight hours of Voltan hours per week. He testified that less than an hour of a Crew Leader's workday would be record keeping. He further admitted a Crew Leader is not often in the bucket and that is usually a lineman's duty, but a Crew Leader would go into the back of the truck a varying amount day to day. However, he stated a Crew Leader did not typically climb in the bucket or climb poles because that was a lineman's duty. He testified that Petitioner could do groundwork as well which would be more often than any bucket work. He further testified that Petitioner would work on a transformer two to five times per month, but it would vary.

Mr. Haluzak further testified that as a Crew Leader, he usually ran the machine for underground transformers and hand digging the hole typically would not happen for a Crew Leader, such as Petitioner. He further testified that as a Crew Leader he would generally sit in the machine while excavating the hole approximately once a week - the holes are typically four feet deep, only 15% of holes were deeper. Mr. Haluzak speculated the Petitioner would hand dig with a shovel approximately once a week. He testified digging the average hole by hand could be anywhere from five minutes to one hour, which depended on ground conditions. However, Mr. Haluzak did admit that Petitioner would alternate with his team for a one-hour dig, so a team of four would only be digging approximately 20 minutes per person. He further admitted that as a Crew Leader, Petitioner would climb in and out of a hole zero times per month; however, he testified in Petitioner's position as lineman it would be weekly

He testified Petitioner would put rope on a pole to ascend the pole into place two to three

times a week, but typically the Crew Leader would run the controls and someone else would hook up the rope, however Haluzak acknowledged that Petitioner could be controlling the pole or controlling the winch as the job may call for a skilled lineman. He acknowledged that Petitioner traversed muddy grounds various times based on the weather, but required footwear was only worn in the winter. Petitioner only worked the ravines three times per year and that Petitioner would have gone down into the ravine as a Crew Leader.

Upon redirect examination, Mr. Haluzak testified that Petitioner used gaffs, which are straps on the legs with spikes on the end, to push the spike into the pole, lift one's leg up, push weight down on the other leg, and then vertically lift one leg up and repeat. He admitted that people used gaffs differently and some people stepped higher and made larger steps somewhere between the average height of a stair in one house and above. Mr. Haluzak confirmed that while at the top of a pole, a lineman could be there anywhere from five minutes to multiple hours because it varied by job. He subsequently testified that when a lineman climbed down a pole using gaffs a lineman would take one leg out to come down and then set the gaff back in the pole after releasing one leg putting one's whole weight on the other leg and so on. He stated from his personal experience, he never jarred any part of his body no matter how long he was on top of a pole on his gaffs.

Upon re-cross examination Mr. Haluzak testified that although gaffs never phased out completely, they now currently had a rear lot bucket cart which they started using in the last six to 10 years. He further admitted that as a lineman, one would use gaffs approximately two times a week, but it varied week to week. However, Mr. Haluzak testified that a Crew Leader typically does not climb, so most likely Petitioner climbed zero times a week. He testified a Crew Leader may climb to help a new employee. He further admitted that he does not know how Petitioner himself climbed a poll or used gaffs.

Upon direct examination during Respondent's Case in Chief, Mr. Haluzak reviewed Respondent's Exhibit 3, a job description. He testified that all union members were required to lift 100 pounds which included Crew Leaders. Mr. Haluzak testified that a Crew Leader was required to know all the job tasks on Respondent's Exhibit 3 page 2, but a Crew Leader would not perform all tasks such as jack hammering and using the compressor. He testified that the time crawling would be accurate, squatting would not be and should be reduced to approximately one hour, and that one was always bending. Mr. Haluzak testified a lineman was always reaching, but only approximately one hour a day as a Crew Leader which is consistent with kneeling as well. He further stated that reaching in an awkward position was approximately half an hour, not two hours as a Crew Leader. He testified that the job duties listed in Respondent's Exhibit 3 was more for a lineman's job description than a Crew Leader. He testified that the job of a Crew Leader was less demanding than that of a lineman.

Petitioner's Testimony

Petitioner, Charles Brandal, testified that he is employed by Respondent, ComEd, as an upgraded crew leader. He testified he worked as a lineman for 30 years and became a Crew Leader in the last five years but still works as a lineman whenever he works overtime. He testified that when he works as a crew leader he is still performing physical labor. He further testified that he regularly climbed in and out of the back of a truck, which was approximately 1 1/2 feet high, as

well as in and out of the truck itself which is one and a half to two feet steep. Petitioner testified that as a Crew Leader he had supervisory responsibilities that regular linemen did not have, and the physical labor that he performed was somewhat lessened than a full-time, dedicated lineman.

When he works as a lineman during overtime he still physically climbs in and out of the lift bucket which are three to three and a half feet high. Petitioner testified that as a 30 year lineman and Crew Leader he worked in varying worksite conditions including conditions with slippery ground when wet, muddy ground when the ground was wet, snowy, or rutted ground almost 90% of the time, icy conditions during the winter, and snow-covered terrain during winter. He that he traversed the conditions while carrying equipment both as a lineman and as a Crew Leader.

He testified that during some weeks in his 30-year career he hand-dug excavations every day or every week depending on his crew assignments. The holes dug could be six feet deep. Petitioner acknowledged at other times he did not hand dig for weeks at a time. (Tr. 76-77). He also had to set utility poles which involved him placing his entire body weight against the poles, which weighed hundreds of pounds to position them correctly. Petitioner admitted that he used gaffs to climb poles (more commonly in his earlier career than in his later career) which required jamming the gaff spike into the pole and flexing his knees higher than required to normally ascend or descend household steps. Petitioner testified that his entire body weight would be on one gaff spike at a time and that standing at the top of the pole could take minutes or hours.

Petitioner testified that he performed utility work two to three times a year at the Lake Forest ravines. Petitioner testified that he got up and down the ravine in Lake Forest by tying two hand lines together to hold onto because there was nothing to grab. He described routinely bending and crawling in confined spaces. He described twisting movements while digging excavations or shoveling dirty away from augured utility pole holes. Petitioner testified that he did not dig holes bigger than needed so he was confined at times.

Petitioner testified that he volunteered to work in Puerto Rico for ComEd in 2017 to repair hurricane damaged electrical utilities in mountainous, hilly, unlevel, and overgrown countryside which was challenging. While in Puerto Rico, Petitioner testified they reset a few utility poles and performed overhead transformer work, but no underground transformer work was performed.

Petitioner testified he may kneel in front of transformer boxes for hours at a time, five to six hours a day, setting up electrical services in new subdivisions. He testified that he is essentially on his feet all day whether working as a lineman or upgraded crew leader.

Petitioner testified that he first saw Dr. Pavlatos on November 6, 2020 where he reported right knee pain that bothered him while sleeping and working as a lineman which began approximately six months prior to his visit but was worsening. Petitioner testified his condition progressively worsened in the six-month period which is why he went to the doctor. Petitioner testified he subsequently underwent an MRI on November 13, 2020, and Dr. Pavlatos eventually recommended surgery.

Petitioner testified he told his foreman, Mr. Techmanski, that he needed surgery and was going to start a workers' compensation claim by contacting their nurse, Nurse Marilyn. Petitioner

testified he believed his injury was a repetitive work injury not a specific incident. Petitioner testified he advised Nurse Marilyn after his MRI and prior to surgery which was performed on December 15, 2020. Petitioner further testified that he was subsequently off work from the date of surgery pursuant to Dr. Pavlatos' orders until January 28, 2021.

Petitioner testified that his knee was currently better than before surgery but is not totally pain free. Petitioner has been back to work since January 28, 2021 and testified that he traversed on uneven ground every day. He takes ibuprofen two to three times a month to alleviate pain. Petitioner acknowledged he was paid short term disability benefits by MBA from ComEd while off. Petitioner testified he did nothing else to injure his right knee. Finally, Petitioner admitted his present job duties were not as difficult now.

On cross-examination, Petitioner admitted he suffered from "normal aches and pains" in both knees prior to May of 2020 and acknowledged telling his family physician in February 2019 about bilateral knee pain. Petitioner admitted he had a prior workers' compensation claim where he underwent a similar knee surgery to his left knee in 2010. He did not recall complaining of right knee pain at that time. Petitioner reiterated that his right knee pain began around May of 2020 and became progressively worse especially while he was on his feet for long periods of time rather than at home on the weekends.

Petitioner testified that he became a Crew Leader in 2015. He denied using gaffs, and further denied going into the buckets and working on the overhead power lines on a daily basis. He testified that he did go in and out of the boom truck to collect materials out of the work truck and that the amount of times he had to do this varied day to day and week to week depending on what job he was doing. He testified that he believes his job still involves physical work, disputing the assertion that it is no longer a physical job, but he acknowledged that it is less physical than it was prior to 2015. Petitioner testified that he would work as a lineman for overtime hours which were based on whomever had the least amount of overtime hours to the most amount of overtime hours. Petitioner testified that overtime duties vary per week, but he was always on the overtime list. He regularly worked 40 hours per week plus eight hours of overtime hours per week was usual for Petitioner and his crew. The overtime was voluntary but regularly worked.

Petitioner testified that he had to hand excavate weekly, but he did not do it on a daily basis and it varied week to week. Petitioner further admitted that putting utility poles into the ground varied week to week as well and was approximately one to five times per week. Petitioner stated that he used gaffs when he was a lineman but the last time he used gaffs, at the time of trial, was months ago. Petitioner testified that he used gaffs to climb a pole zero times between May of 2020 and November of 2020. Petitioner further admitted that transformer work in subdivisions was performed no more than a couple times per year. Petitioner noted that his knee pain was experienced when he was on his feet for long periods of time at work rather than at home on weekends.

Petitioner testified that his knee condition got progressively worse in the 6 months prior to November of 2020. Petitioner denied any acute injury. He testified that before May of 2020 he experienced only normal aches and pains in his knee. Petitioner testified that he saw Dr. Pavlatos on November 6, 2020 and told Dr. Pavlatos that he was a lineman. Petitioner testified that he told

Dr. Pavlatos that his pain was on and off during his November 6, 2020 visit and that he did a lot of squatting and twisting while at work. Petitioner testified that after his MRI on November 13, 2020 he had a discussion with Dr. Pavlatos where surgery was recommended. Petitioner testified he told Mr. Techmanski about his alleged injury after he was told he needed surgery and before hiring his attorney on November 18, 2020.

Petitioner testified that he saw Dr. Cherf for a Section 12 examination on March 8, 2021 where he told Dr. Cherf he was a lineman for 30 years. He testified Dr. Cherf did not otherwise inquire about his particular job duties. Petitioner testified he did not discuss his visit with Dr. Cherf with Dr. Pavlatos. Petitioner did not provide Dr. Pavlatos with a written job description. He testified he told Dr. Pavlatos that he climbed poles, goes up and down form the buck, get in and out of truck and normal day to day things. He admitted he discussed his job duties for only a couple minutes with Dr. Pavlatos.

Petitioner testified he was paid his full salary from December 15, 2020 through January 28, 2020 through group short term disability benefits. Petitioner testified that his medical treatment was paid for by his group insurance, Blue Cross Blue Shield. Petitioner did testify however that he had some out of pocket expenses which he paid to Illinois Bone & Joint.

Petitioner testified that he had been a full-duty lineman since his return back to work on January 28, 2021 which included working overtime hours. Petitioner testified that per his union contract he received a raise on April 1, 2021. Petitioner testified he had no upcoming visits with Dr. Pavlatos nor was he given any medications at his last appointment. Petitioner testified he was eligible for a pension at age 57 and he was 57 years old. Petitioner confirmed he planned to retire in the next few years.

Medical Records

Petitioner first saw orthopedic surgeon Dr. Pavlatos at Illinois Bone and Joint on November 6, 2020. Dr. Pavlatos' records document a history of some right knee pain off and on for the past six months, that he works for Com Ed, and does a lot of squatting and twisting. A prior left knee meniscal tear in 2010 was noted. The records further note that Petitioner may have twisted his knee about a month to month and a half ago that caused increased pain – a different type of pain – than what he normally has. Some swelling was reported. Dr. Pavlatos' impression was of patellofemoral arthritis of the right knee with possible medial meniscal tear. Dr. Pavlatos noted he is concerned that this may have occurred as a result of a twisting injury at work based on his type of activities and that Petitioner is experiencing a different type of pain. An MRI was prescribed.

Some previous records note that Petitioner was seen on February 21, 2019 by Dr. Braunlich his primary care specialist. At this visit, petitioner reported problems with his bilateral knees. Petitioner also saw Dr. Braunlich on October 26, 2020. He reported that his bilateral knees did bother him. There were no complaints or history at this visit regarding his work activities causing his right knee pain.

Petitioner underwent an MRI of the right knee on November 13, 2020. The MRI revealed a complex tear of the posterior horn and body of the medial meniscus and a moderate sprain of the

MCL. The MRI also documented moderate medial and mild tibiofemoral osteoarthritis, end stage patellofemoral arthritis, joint effusion, and complex Baker's cyst.

Dr. Pavlatos' November 16, 2020 note states Petitioner was informed that his MRI showed a complex meniscal tear with significant patellofemoral arthritis and some medial and lateral compartment arthritis. The notes further state the tear may be a result of a twisting injury he suffered at work and that he was looking to proceed through workers' compensation.

Petitioner underwent arthroscopic surgery on December 15, 2020 with Dr. Pavlatos consisting of chondroplasty of the patellofemoral compartment with partial medial and lateral meniscectomy. Petitioner's post-operative diagnosis was degenerative arthritis of the patellofemoral compartment with medial and lateral meniscus tears.

Petitioner saw Dr. Pavlatos post-operatively on December 22, 2020. Dr. Pavlatos' records note Petitioner was suffering from a work-related right knee injury and diagnosed with a large flap tear of his medial meniscus in addition to grade IV changes I the patellofemoral compartment. Petitioner reported that he was doing much better and was going to start therapy in a week. Dr Pavlatos noted that he believed that Petitioner's arthritis could be related to the ladder work that he does working for Commonwealth Edison. It was further noted that petitioner may require a knee replacement in the future if he fails non-operative measures. Post-operatively, petitioner underwent nine total sessions of physical therapy from December 22, 2020 to January 19, 2021.

Petitioner saw Dr. Pavlatos on January 19, 2021. Petitioner reported that there was drainage at a portal site. A deep stitch was removed and cleaned. Dr. Pavlatos recommended that petitioner keep the wound clean and dry and put him on Duricef for one week. They recommended follow-up in three weeks or sooner if there were any problems. Petitioner was recommended to continue the quad PRE program. Dr. Pavlatos noted no swelling in petitioner's knee with motion at 125º and good quad developing. He returned petitioner back to work as of January 28, 2021.

Dr. Pavlatos saw petitioner on February 9, 2021. Petitioner reported he was doing well and noted occasional discomfort at the end of the day. His exam showed no effusion, full range of motion and minimal patellofemoral and medial joint line pain. His McMurray's was negative, no ligamentous instability was noted, and his quad strength was good but not quite 100%. He was put on Meloxicam and recommended to continue the quad PRE program and follow up if his symptoms remained.

On April 19, 2021 Petitioner was seen by Dr. Pavlatos who noted that Petitioner had done well with surgery and noted further, "it is my feeling at this point that the Petitioner's meniscus tear that resulted in a surgery in November 2020 is related to the type of work he does as a lineman with all the squatting, kneeling, and twisting activity he does and with the type of tear that was noted at the time of the arthroscopy is consistent with this patient having torn his meniscus as a result of the activities he does at work." Petitioner was released to follow up as needed.

Dr. Cherf – Section 12 Reports

Petitioner was examined at Respondent's request by Dr. Cherf on March 22, 2021. Dr. Cherf noted that Petitioner reported that he was a senior lineman that worked for Commonwealth Edison for 31 years and typically worked from 7 a.m. to 3:30 p.m. Dr. Cherf noted that Petitioner stated he worked as a lineman for over 30 years with repetitive movement that caused pain in his right knee. Pain was note for two years that worsened over the two months prior to filing his claim in November 2020. Specific injury was denied, and normal aches and pains for years were reported.

Dr. Cherf reviewed the records of Evanston Hospital, Illinois Bone and Joint, Dr. Pavlatos and Dr. Braunlich along with the MRI, operative report, and x-rays. Dr. Cherf noted that at the time of his exam, post-surgically, Petitioner stated he had no pain in either knee but experienced aching at the end of the day in both knees. Petitioner reported that his right knee became more symptomatic over the last two months but that he had symptoms of approximately two years of duration. He was not taking any medication for his knee pain.

Upon physical examination, Dr. Cherf noted Petitioner's right knee had no swelling, erythema, or ecchymosis. Petitioner had some crepitation. There was no patellar tilt or retinacular tenderness. Petitioner had some posteromedial joint line tenderness and posterolateral joint line tenderness. Otherwise, the examination was normal.

Dr. Cherf answered several questions posed to him. In answering the question as to what he believed Petitioner's mechanism of injury was, Dr. Cherf stated Petitioner denied a specific injury and that no specific mechanism of injury was reported but that Petitioner described pain increasing over two years and becoming most symptomatic over the past two months.

Dr. Cherf diagnosed Petitioner with primary idiopathic osteoarthritis of the right knee. He opined that this was not related to a work-related claim of November 6, 2020. He noted that petitioner had similar pathology in his left knee documented in an x-ray and MRI dating back to 2010. He further stated that the symmetric findings suggest that the degenerative pathology in petitioner's knee was a systemic condition consistent with primary idiopathic osteoarthritis of the right knee.

Dr. Cherf was advised that "[p]etitioner's cumulative trauma injury due to pole climbing for the left knee was ten years prior to the right knee." He was asked "if it is reasonable for a ten-year gap for a cumulative trauma claim for the act of pole climbing" and to provide a basis for his opinion. In answering, Dr. Cherf again stated Petitioner has primary idiopathic osteoarthritis of the right knee and opined that petitioner had risk factors that could cause idiopathic osteoarthritis of the right knee including his age, body habitus and his genetics. He did not believe that petitioner's "act of pole climbing" was a risk factor for osteoarthritis. Dr. Cherf did not reference or go into further detail regarding Petitioner's job duties aside from his remark concerning pole climbing. Dr. Cherf believed Petitioner's act of pole climbing was an insignificant contributing factor to the primary idiopathic osteoarthritis of the right knee.

Dr. Cherf reviewed the MRI of the right knee from November of 2020 and found that it suggested moderate to advanced tricompartmental osteoarthritis of the right knee. Dr. Cherf did not refer to any meniscal pathology. He believed that given petitioner's age, obesity and gender,

petitioner was not a candidate for an arthroscopy. However, he did note that petitioner had a good recovery from surgery and reported he had no pain in his right knee. He felt that petitioner could have possibly responded to conservative treatment including an intra-articular cortisone injection, anti-inflammatory medication, icing and establishment of a home exercise program. Dr. Cherf noted that Petitioner was working full time with no restrictions and should continue in his capacity. Lastly, he found petitioner had reached MMI at the time of his report and requires no further treatment.

On July 12, 2021 Dr. Cherf issued an addendum report to his prior findings. Dr. Cherf in this instance had an opportunity to review billing information from Illinois Bone and Joint, an office note from Dr. Pavlatos dated April 19, 2021, and a physical demand/functional job analysis for a job title of "Ovhd Elect +78" completed on August 22, 2005.

The findings in this addendum note that Dr. Cherf's review of the MRI report note a baker's cyst, massive fragmented osteophytes, obliteration of the lateral patellofemoral joint space, subchondral cysts, medial and lateral tibiofemoral compartment joint spacing, areas of high-grade chondromalacia, subchondral bone marrow edema, and a complex tear of the medial meniscus consistent with degenerative pathology. Dr. Cherf stated these findings are very typical for patients with moderate-to-advanced osteoarthritis of the knee. It is unclear if Dr. Cherf reviewed the MRI films or just the MRI report.

Dr. Cherf noted that the physical demand/functional job analysis from August 22, 2005 indicated that the general job description includes "Overhead Electrician required to do electrical and construction work. Should be able to lift up to 100 pounds. Need to be available for call outs for restoration of customers' power. Required to climb poles and ladders [d]ig holes and backfill [sic]. Required to have a CDL license." The physical demands listed include bending/stooping twice a day for up to an hour each, squatting twice a day up to an hour each, no crawling, reaching above shoulder level twice a day for two hours each, kneeling up to twice a day for two hours each and working in awkward positions up to four times a day for half-an-hour each, sitting for two hours, and standing for six hours a day. When asked to advise if the activities listed in the job description provided could have aggravated petitioner's right knee and caused his right knee condition, Dr. Cherf stated the MRI findings were typical for patients with moderate-to-advanced osteoarthritis; Petitioner has risk factors for idiopathic osteoarthritis consisting of genetics, age, and body habitus; and that the information provided does not change his opinion from March 22, 2021 that Petitioner's degenerative pathology of his right knee is independent of his job.

CONCLUSIONS OF LAW

Regarding Issues (C) Accident, (D) Date of Accident, (E) Notice, and (F) Causal Connection, the Arbitrator finds as follows:

The Arbitrator notes at the outset that Petitioner testified credibly at trial. Petitioner is claiming a repetitive trauma injury to his right knee with a manifestation date of November 6, 2020 – the date he first sought treatment for his right knee with Dr. Pavlatos. Petitioner testified that he

experienced normal aches and pains in his knees and that his right knee worsened in the six months proceeding his seeking medical treatment with Dr. Pavlatos. Petitioner did not recall any specific injury to his right knee during his testimony and described his 30 years of work with Respondent. Petitioner testified about the repetitive and demanding physical requirements and activities associated with his job. He was required to squat, climb, crouch, kneel, twist, and carry while negotiating treacherous surfaces and incline. He regularly climbed in and out of trucks and lift buckets. He had to routinely maneuver over wet, icy, snowy, and rutted ground 90% of the time. He routinely excavated holes, sometimes by hand, and would set utility poles using his body weight to position the poles correctly. Several times a year Petitioner would ascend and descend a ravine using hand lines. He was routinely working in confined spaces and utilized twisting movements while digging. He may have to knee in front of transformer boxes for hours at a time. He is on his feet all day.

The Arbitrator believes that the testimony of Mr. Haluzak essentially confirmed Petitioner's description of the physical nature of his job. Mr. Haluzak further confirmed Petitioner's credibility as a reliable, hardworking, and honest worker.

Petitioner's description of his right knee problem is consistent with the history documented in Dr. Pavlatos' initial records. Petitioner testified his knee began bothering him six months prior but was worsening and denied any acute injury. Petitioner advised Dr. Pavlatos of the squatting and twisting he does at work. Dr. Pavlatos noted Petitioner's work with Respondent and mentioned that he does a lot of squatting and twisting. Dr. Pavlatos noted Petitioner may have twisted his knee a month and a half ago that caused increased pain but no specific injury or description was noted. Petitioner denied a specific incident. Dr. Pavlatos noted that he is concerned that his knee issue may have occurred as a result of his work activities.

After an MRI, Dr. Pavlatos noted Petitioner had significant patellofemoral arthritis and a complex meniscal tear. Dr. Pavlatos again noted that this meniscal tear may be a result of twisting at work. In December 2020, the records reflect that Dr. Pavlatos also noted that petitioner's patellofemoral arthritis could be related to ladder work that he did for his employer. Post-surgery and as Petitioner's treatment ended, Dr. Pavlatos noted in April 2021 that Petitioner's meniscal tear is related to the type of work he does as a lineman with all the squatting, kneeling, and twisting activity he does and that the type of tear was consistent with such activities.

Dr. Cherf, Respondent's Section 12 examiner, noted that Petitioner gave a history of repetitive movement at work that caused pain in the knee but Dr. Cherf did not note any specific movements or work duties that were either given or discussed by either Petitioner or Dr. Cherf. Dr. Cherf, having reviewed the medical records and MRI, diagnosed Petitioner of pre-existing advanced tricompartmental osteoarthritis of the knee. Dr. Cherf in his initial report did not refer to any meniscal pathology.

In his addendum report, which did not involve re-examining or speaking with Petitioner, Dr. Cherf refers to a job description of "Ohvd Elect +78" from 2005 in his opinion. The Arbitrator's review of this report, Respondent's Exhibit 3, notes that under general job description and specific job requirements, the report states as follows: " Overhead electrician required to do electrical and construction work. Should be able to lift up to 100 lbs. Need to be available for

callouts for restoration of customer's power. Required to climb poles and ladders Dig holes and backfill. Required to have a CDL license." Under the physical demands section a checklist notes several physical activities and the number of hours per day, per hour at one time, and number of days per month in which those activities are performed. For the entries concerning bending/stooping and squatting it lists 2 hours per day for one hour at a time, 10 times per week, 15 times per month and 180 times per year. It stated crawling was not required at all. Kneeling was 2 hours per day for an hour at a time, 10 times a week, 15 times per month, and 180 times per year. Working in awkward position (including contorting, crouching, reclining) was 2 hours per day at a half hour per time, 10 times a week, 10 days per month, and 120 times per year. It further listed "Employee must use lower extremities and feet for repetitive movements, such as operating foot controls" for both the right and lower extremity it noted repetitive leg movements 2 hours per day, 1 hour at a time, 10 days a week, 40 times a month, and 480 times per year. It also stated that an employee is required to climb stairs and ladders 0 to 1 time per day and trenches and poles 1 to 2 times per day.

When asked to advise if the activities listed in the job description provided could have aggravated petitioner's right knee and caused his right knee condition, Dr. Cherf stated the MRI findings were typical for patients with moderate-to-advanced osteoarthritis and that Petitioner has risk factors for idiopathic osteoarthritis consisting of genetics, age, and body habitus; and that the information provided does not change his opinion from his prior report that Petitioner's degenerative pathology of his right knee is independent of his job duties. Dr. Cherf again seems to ignore meniscal pathology and its role in Petitioner's knee issue. The Arbitrator does not find Dr. Cherf's opinion to be as credible as the opinion of Dr. Pavlatos.

The date of injury in repetitive trauma cases is the date on which the injury manifests itself, meaning the date on which the fact of injury and the causal relation to work would have become plainly apparent to a reasonable person. *Edward Hines Precision Components v. Industrial Comm'n,* 356 Ill. App 3d 186, 194 (2005).

The Appellate Court has held that "[t]here is no requirement that a certain percentage of time be spent on a task in order for [claimant's work] duties to meet a legal definition of 'repetitive.'" *Id.* An employee must still show that his injury is work-related and not the result of a normal degenerative aging process. See *Gilster Mary Lee Corp. v. Industrial Comm'n,* 326 Ill. App. 3d 177, 182 (2001).

The Arbitrator notes that Respondent's exhibit 1 is a form 45 report of injury dated November 22, 2020. The form notes Petitioner reported right knee pain, no specific incident, and that his knee has been painful and increasing over the last few weeks due to a work injury. Petitioner testified that he had a conversation with Dr. Pavlatos after his MRI on November 13, 2020 and that shortly thereafter he notified his supervisor, Brian Tekmanski.

Having considered the evidence as a whole, the Arbitrator finds that the date of accident in this case was November 6, 2020 when Petitioner first sought treatment with Dr. Pavlatos. Further, the Arbitrator finds that Petitioner's credible testimony, the opinions of Dr. Pavlatos, the medical records, and the record as a whole support's Petitioner's claim that he suffered an accident based on a repetitive trauma injury as a result of his employment. The Arbitrator finds that timely notice

was given based on Petitioner's unrebutted testimony that he notified his supervisor after his conversation with Dr. Pavlatos in November 13 and that Respondent's exhibit 1 confirms that Respondent was aware of this claim as of November 22, 2020. Concerning the issue of medical causation, the Arbitrator again finds Dr. Pavlatos' opinion to be more credible than Dr. Cherf's. Taking this in conjunction with Petitioner's credible testimony as to his physically demanding job duties and the fact that he did not seek any specific treatment for a right knee issue prior to seeing Dr. Pavlatos on November 6, 2020, the Arbitrator finds a causal relationship between Petitioner's condition of ill-being and his repetitive trauma injury to his right knee.

Regarding Issue (J) concerning Medical Services, the Arbitrator finds as follows:

Having found for Petitioner on the above-mentioned issues, the Arbitrator reiterates those conclusions and further finds that Petitioner's treatment was reasonable and necessary, and that Respondent shall be responsible for the payment of any unpaid medical bills pursuant to the fee schedule.

Regarding Issue (K) concerning Temporary Total Disability benefits, the Arbitrator finds as follows:

Having found for Petitioner on the above-mentioned issues, the Arbitrator reiterates those conclusions and further finds that Petitioner was restricted from work from the date of his surgery on December 15, 2020 until he was returned to work on January 28, 2021 - a period of 6 and 2/7 weeks. The Arbitrator awards TTD benefits in the amount of $1,465.31 for a period of 6 and 2/7 weeks. Respondent is entitled to a credit of $8,95447 for short term disability benefits paid.

Regarding Issue (L) concerning the Nature and Extent of the injury the Arbitrator finds as follows:

An award for permanent partial disability must be evaluated under the five factors set forth in Section 8.1b of the Act. These five factors are: 1) the reported level of impairment pursuant to the AMA Guidelines in subsection (a); 2) the occupation of the injured employee; 3) the age of the employee at the time of injury; 4) the employee's future earning capacity; and 5) the evidence of disability corroborated by the medical treatment records. The Act under Section 8.1(b) further states that no single enumerated factor shall be the sole determinant of disability.

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 first factor. Regarding subsection (ii), the occupation of the employee, the Arbitrator notes that Petitioner was employed as an upgraded crew leader at the time of the accident and that he has returned to work in his full, pre-accident capacity. Petitioner testified that he plans to retire in a few years. Accordingly, the Arbitrator gives some weight to this factor. Regarding subsection (iii), the Arbitrator notes that Petitioner was 56 years old at the time of the accident. Petitioner testified that he plans to retire in a few years. The Arbitrator therefore gives some weight to this factor. Regarding subsection (iv), Petitioner's future earnings capacity, the Arbitrator notes there is no evidence of any impairment of earning. The Arbitrator gives little weight to this factor. Lastly, regarding subsection (v), evidence of disability corroborated by the treating medical records, the

Arbitrator notes that Petitioner testified his knee was better but not totally pain-free. He takes over-the-counter ibuprofen once every two-to-three weeks. Dr. Pavlatos' last note from April 19, 2021 notes that Petitioner is doing well overall. His last exam showed no swelling, no joint line pain, motion 120 to 125 degrees, negative McMurray's test, and intact CMS. Petitioner was to continue with home exercises. The Arbitrator gives this final factor the most weight.

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 15% loss of use of right leg pursuant to §8(e) of the Act.

Regarding Issue (N), Credit due Respondent, the Arbitrator finds as follows:

The parties have stipulated that the Respondent is owed a credit under Section 8(j) in the amount of $3,230.94 for medical bills paid pursuant to a group medical policy and $8,954.47 for group short term disability benefits paid. The Arbitrator finds Respondent is entitled to such credit and shall hold Petitioner harmless from any claims by these group benefit providers.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC030841
Case Name	Mauricio Gracida v. Dutch American Foods
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0273
Number of Pages of Decision	8
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Tammy Paquette

DATE FILED: 7/25/2022

/s/ Deborah Simpson, 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: Accident Causal Connection	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☐ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MAURICIO GRACIDA,

Petitioner,

vs. NO: 18 WC 30841

DUTCH AMERICAN FOODS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, reverses the Decision of the Arbitrator and finds that Petitioner sustained accidental injuries arising out of and in the course of his employment on May 25, 2018 and that the current condition of his left shoulder is causally related to said accident. 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).

This matter proceeded to a §19(b) hearing on October 22, 2021 with the consolidated case of 16 WC 35949, in which the Arbitrator found that Petitioner failed to prove that he sustained compensable bilateral elbow injuries after lifting an 80-pound bag on June 30, 2016. The consolidated claim of 16 WC 35949 is addressed by the Commission in a separate Decision. The present Decision concerns only Petitioner's left shoulder injury associated with the accident date of May 25, 2018.

I. FINDINGS OF FACT

Petitioner began working for Respondent as a general laborer in April 2014 with job duties that included stocking, lifting 50 to 80-pound bags, and lifting boxes of varying sizes. However, following his June 30, 2016 accident, Petitioner was placed under light duty restrictions that Respondent accommodated by switching him to a forklift driving position. Petitioner drove the stand-up forklift until January 2021, at which time he was moved to a production job. Shortly

thereafter, in March 2021, Petitioner went on FMLA leave due to his son's medical problems. He remained on leave until his son's death on September 10, 2021. Petitioner testified that after his son's passing, he tried to return to work by sending Respondent's HR department an e-mail; however, Respondent answered that it could no longer offer him a job. On September 19, 2021, Petitioner signed a form titled "Employee Exit Form," stating that he was voluntarily resigning from Respondent's company due to personal reasons. Petitioner testified that he was told to sign this form, because he had run out of FMLA time.

Before Petitioner stopped working for Respondent, on May 25, 2018, he was driving the stand-up forklift in reverse when the steering wheel quickly turned twice and pulled his left arm, causing immediate left shoulder pain. When describing this, the Arbitrator noted for the record that Petitioner gestured as though he was holding a steering wheel and his left arm jerked back from the wheel at waist-level. Petitioner immediately notified his supervisor, Timothy Dykstra, of his left shoulder pain but still proceeded to finish his regular shift.

Petitioner testified that prior to the accident, he never had any problems with his left shoulder, although he acknowledged undergoing a prior left shoulder MRI. The first pre-accident treatment note concerning Petitioner's left shoulder is a bilateral shoulder X-ray obtained on June 13, 2016, which revealed an olecranon spur but no acute abnormalities. The treatment records did not indicate why this X-ray was sought, and Petitioner did not obtain left shoulder treatment again until April 21, 2017. Petitioner reported left shoulder pain to Dr. Irvin Wiesman's physician assistant, Brittany Macleod, at a follow-up appointment for his bilateral elbows on April 21, 2017. PA Macleod ordered a left shoulder MRI, which was obtained on May 1, 2017 and showed fluid in the subscapularis recess with no other obvious abnormalities. Following the MRI, Petitioner did not seek or receive any further care for left shoulder complaints until after the May 25, 2018 work accident.

At the time of the accident, Petitioner was actively treating for his bilateral elbow conditions at issue in 16 WC 35949 and was being prescribed various medications, such as Meloxicam and Celebrex. Following the accident on May 25, 2018, Petitioner initially presented to Dr. Wiesman for a pre-scheduled follow-up appointment for his elbow conditions on June 4, 2018. Petitioner reported pain that was radiating proximal to his arm into his bilateral triceps. He indicated that this pain had worsened compared to his last visit a month and a half prior. Petitioner did not mention any new work accident occurring on May 25, 2018. Dr. Wiesman kept Petitioner on light duty restrictions related to his bilateral cubital tunnel syndrome. No diagnosis or treatment was made as to Petitioner's left shoulder at that time.

However, when Petitioner returned to Dr. Wiesman on July 16, 2018, he complained of left shoulder and deltoid pain that had developed acutely seven weeks prior while driving a forklift at work. Dr. Wiesman noted that Petitioner had repetitively turned the wheel and felt acute pain. Dr. Wiesman further stated that although Petitioner had a left shoulder MRI a year prior, it was unclear why it was ordered and yielded normal results. Petitioner reported that his current pain was much more severe than his prior pain. Dr. Wiesman was concerned that Petitioner had developed an acute left rotator cuff tear while operating the forklift, since he was now unable to forwardly elevate or internally rotate his shoulder and he had significant pain with provocative testing. He recommended a left shoulder MRI and continued work restrictions.

On July 27, 2018, the left shoulder MRI revealed fluid in the subscapularis recess, a small subacromial/subdeltoid bursal effusion, and biceps tenosynovitis, which was not seen in the prior May 2017 MRI. Upon review of the MRI, on August 6, 2018, Dr. Wiesman diagnosed Petitioner with left shoulder biceps tendonitis and ordered physical therapy for the left shoulder. He also continued Petitioner's medications and work restrictions as he awaited cubital tunnel surgery.

On October 29, 2018, Dr. Wiesman opined that Petitioner was likely developing adhesive capsulitis in addition to his left shoulder biceps tendonitis, since he had decreased range of motion and extreme pain with spasming. Dr. Wiesman again recommended physical therapy for Petitioner's left shoulder as well as an orthopedic referral for a possible injection. Petitioner thereafter began physical therapy on November 2, 2018.

Upon Dr. Wiesman's referral, Petitioner presented to Dr. Kevin Tu for a left shoulder consultation on November 6, 2018. Dr. Tu's record states that Petitioner reported the work injury to his left shoulder occurred on June 30, 2016 and that he had been lifting 80-pounds of salt at his job when he started experiencing shoulder pain as well as bilateral elbow pain. However, at the hearing, Petitioner clarified that he did not hurt his shoulder until May 25, 2018. The Commission notes that the form medical records of both Dr. Wiesman and Dr. Tu have a place to list the "DOI," and even though Petitioner told Dr. Wiesman that he sustained another work injury, specifically an injury to his left shoulder, this section in their form records does not appear to have been updated to reflect the second "DOI" date of May 25, 2018. At the November 6, 2018 visit, Dr. Tu diagnosed Petitioner with left shoulder adhesive capsulitis. Dr. Tu explained that a cortisone injection was not a reasonable treatment option for Petitioner, since Petitioner had a previous history of an elbow injection sending him to the emergency room secondary to ketoacidosis from elevated blood sugars. Petitioner is diabetic, and at the time of the hearing, he had his diabetes under control with insulin. Therefore, Dr. Tu opined that a manipulation under anesthesia was Petitioner's only option. Nevertheless, he recommended waiting until Petitioner completed treatment for his elbows before treating the shoulder. In the interim, he kept Petitioner on 10-pound work restrictions.

Petitioner next presented to Dr. Wiesman on December 7, 2018, at which time the focus of the treatment was his bilateral cubital tunnel syndrome. Petitioner thereafter attended regular follow-up appointments with Dr. Wiesman for his bilateral elbows through November 3, 2020. At these visits, Dr. Wiesman continued to recommend bilateral cubital tunnel surgery and kept Petitioner on light duty restrictions and medication.

During this period in which Petitioner continued to treat for his bilateral cubital tunnel conditions with Dr. Wiesman, he also presented for a §12 examination for his left shoulder with Dr. Nikhil Verma on August 28, 2019. Petitioner, who was noted to be a poor historian by Dr. Verma, reported that his left shoulder injury had occurred in May or June 2018 when he was driving a forklift and rapidly turned the wheel. Dr. Verma opined that Petitioner had left shoulder adhesive capsulitis that was not work-related, as it occurred commonly as an insidious condition within the general population and was associated with insulin-dependent diabetes. Dr. Verma stated that Petitioner's shoulder symptoms had onset prior to his work injury, as evidenced by his prior MRI showing adhesive capsulitis. Moreover, Dr. Verma found no evidence to suggest an

aggravation or worsening of Petitioner's condition as a result of any work activities. Putting causation aside, Dr. Verma nevertheless acknowledged that Petitioner's subjective complaints were keeping with the objective findings and opined that appropriate treatment could include therapy and a trial of injections, although Petitioner's diabetes needed to be controlled first. He also believed that Petitioner could be a candidate for an arthroscopic release and manipulation under anesthesia if he failed conservative treatment. Nevertheless, Dr. Verma clarified that additional treatment would not be work-related and would instead be related to his preexisting adhesive capsulitis. Similarly, he found that restrictions of no lifting more than ten pounds and no overhead activity would be appropriate but not work-related.

After the §12 examination, Petitioner returned to Dr. Tu on December 3, 2019. At that time, Dr. Tu continued to recommend a left shoulder manipulation under anesthesia once Petitioner's elbow treatment was completed. Dr. Tu kept Petitioner under light duty restrictions in the interim. He also reiterated that Petitioner was not a candidate for a cortisone injection secondary to his ketoacidosis. At follow-up appointments on January 28, 2020 and March 10, 2020, Dr. Tu continued to recommend the left shoulder manipulation and light duty restrictions.

On June 9, 2020, Dr. Tu stated that Petitioner's left shoulder condition had developed acutely after a work-related injury in June 2016. He again recommended a left shoulder manipulation under anesthesia and light duty restrictions. Petitioner last treated with Dr. Tu on November 3, 2020. At this visit, Dr. Tu again stated that Petitioner's adhesive capsulitis was due to a work-related injury sustained on June 30, 2016. Dr. Tu continued his recommendations for a left shoulder manipulation under anesthesia and light duty restrictions. Petitioner testified that at the time of the hearing, his left shoulder remained painful, sore, and numb. He testified that his left shoulder symptoms did not let him do many things, including preventing him from raising his left arm past a certain point without pain. Petitioner further indicated that when he moved his fingers, he experienced numbness and tingling.

II. CONCLUSIONS OF LAW

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator and finds that Petitioner sustained accidental injuries arising out of and in the course of his employment on May 25, 2018 and that the current condition of Petitioner's left shoulder is causally related to said accident.

In doing so, the Commission relies on Petitioner's credible testimony at the hearing describing how his accident occurred on May 25, 2018. Petitioner testified that he was driving a forklift in reverse when the steering wheel quickly turned twice, moved his hands, and caused immediate left shoulder pain. Petitioner's testimony is consistent with the accident history he provided to Dr. Wiesman on July 16, 2018. At that visit, Petitioner reported left shoulder pain that developed acutely seven weeks prior while driving a forklift at work. Petitioner told Dr. Wiesman that he experienced the acute pain during the repetitive motion of turning the wheel. Petitioner also consistently reported to Dr. Verma at his §12 examination on August 28, 2019 that his left shoulder injury had occurred in May or June 2018 when he was driving a forklift and rapidly turning its wheel. Petitioner's testimony, corroborated by the accident histories he provided to Dr. Wiesman and Dr. Verma, establish that his accident arose out of and in the course of his

employment on May 25, 2018 while he was performing his assigned job duty of driving the forklift. The Commission finds that any inconsistencies in the record were minor and did not rise to the level of diminishing Petitioner's credibility. In so finding, the Commission acknowledges that Petitioner was a poor historian and reiterates that, even though Petitioner reported a new accident occurring on May 25, 2018, the form records of Dr. Wiesman and Dr. Tu were never updated and subsequently continued to list only June 30, 2016 as the accident date.

The Commission nevertheless acknowledges that the treatment records document a pre-accident history of left shoulder complaints. The earliest relevant pre-accident treatment note was the bilateral shoulder X-ray obtained on June 13, 2016 that demonstrated an olecranon spur with no other acute abnormalities. There was no indication in the record as to why this X-ray was sought, as none of Petitioner's doctors otherwise documented any left shoulder issues around that time. Petitioner did not thereafter raise any left shoulder complaints until over ten months later on April 21, 2017, at which time PA Macleod ordered a left shoulder MRI in response to Petitioner's complaints of left shoulder pain. The left shoulder MRI, which was obtained on May 1, 2017, revealed fluid in the subscapularis recess. After this MRI, Petitioner did not seek nor receive any further treatment for his left shoulder until after the May 25, 2018 work accident. Petitioner was also able to perform his job duties between May 2017 and May 2018, albeit Petitioner worked with light duty restrictions related to the bilateral elbow injures he claimed in 16 WC 35949.

Despite this pre-accident treatment, the Commission finds there to be persuasive diagnostic evidence showing a worsening of Petitioner's left shoulder condition after the accident. Specifically, Petitioner's post-accident left shoulder MRI obtained on July 27, 2018 found biceps tenosynovitis that was specifically noted as not being present in the prior May 2017 MRI. The post-accident treatment was also much more substantial than the minimal and sporadic treatment that preceded the accident. Most notably, surgery was not recommended for the left shoulder by any treating doctor until after the accident. Moreover, Dr. Wiesman expressed uncertainty as to why Petitioner's prior left shoulder MRI had even been ordered and noted that it had yielded only normal results. Petitioner also told Dr. Wiesman that his pain was presently much more severe than his prior pain. Since these factors all indicate that Petitioner's left shoulder condition worsened after his accident, the Commission finds that the current condition of Petitioner's left shoulder is causally related to the May 25, 2018 accident based on a chain of events analysis.

The Commission is further persuaded by the opinions of Dr. Wiesman and Dr. Tu, which attribute Petitioner's left shoulder condition to his work accident. On July 16, 2018, Dr. Wiesman expressed concern that Petitioner had developed a left rotator cuff tear several weeks prior while driving his forklift, since Petitioner was unable to forwardly elevate and internally rotate his shoulder and had significant pain with provocative testing. Thereafter, Dr. Tu opined that Petitioner's adhesive capsulitis was due to the work-related injury sustained on June 30, 2016. Although Dr. Tu confused Petitioner's accident date with his first alleged work injury in 2016, the causal opinions of Dr. Tu and Dr. Wiesman are supported by the Commission's chain of events analysis, given that the treatment records document a substantial worsening of Petitioner's left shoulder complaints and MRI findings after the forklift incident on May 25, 2018.

Consistent with its findings of a compensable accident and current causation, the Commission awards prospective care in the form of the left shoulder manipulation under

anesthesia as recommended by Dr. Tu. The Commission further awards all reasonable and necessary medical expenses incurred for Petitioner's left shoulder treatment after the accident date of May 25, 2018. This award specifically excludes any pre-accident treatment of Petitioner's left shoulder before May 25, 2018, as well as any treatment related to Petitioner's bilateral cubital tunnel syndrome that is at issue in 16 WC 35949.

Lastly, the Commission declines to award the period of TTD benefits that Petitioner claims entitlement to from September 19, 2021 through October 22, 2021, and instead finds that Petitioner voluntarily removed himself from the workforce on September 19, 2021. Subsequent to an FMLA leave of absence related to his son's illness, Petitioner signed an Employee Exit Form on September 19, 2021, which stated that he was voluntarily resigning from Respondent's company due to personal reasons. The Commission relies on the representation Petitioner made in the Employee Exit Form, specifically his statement that he was voluntarily resigning from his employment, to find that Petitioner voluntarily removed himself from the workforce as of September 19, 2021, and as a result, is not thereafter entitled to TTD benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated December 7, 2021 for 18 WC 30841 is hereby reversed as stated herein.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved that he sustained accidental injuries arising out of and in the course of his employment on May 25, 2018 and that the current condition of his left shoulder is causally related to said accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's left shoulder treatment only occurring after the accident date of May 25, 2018 through the hearing date of October 22, 2021 pursuant to §8(a) and §8.2 of the Illinois Workers' Compensation Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for prospective medical care for his causally related left shoulder condition in the form of the manipulation under anesthesia as recommended by Dr. Tu.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner voluntarily removed himself from the workforce on September 19, 2021 by signing the Employee Exit Form and representing that he was voluntarily resigning from Respondent's company due to personal reasons. As a result, the Commission finds that Petitioner is not entitled to the TTD benefits he sought after his voluntary resignation on September 19, 2021.

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

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

IT IS FURTHER ORDERED BY THE COMMISSION 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 $10,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 25, 2022

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC030510
Case Name	Sharee Tanksley v. First United Methodist Child Care Center
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0274
Number of Pages of Decision	24
Decision Issued By	Stephen Mathis, Commisioner, Deborah Baker, Commissioner (Dissent)

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Emily Schlecte

DATE FILED: 7/25/2022

/s/Stephen Mathis, Commissioner
Signature

DISSENT

/s/Deborah Baker, Commissioner
Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Sharee Tanksley,

Petitioner,

vs. NO. 18WC 30510

First United Methodist Child Care Center,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 20, 2021, is hereby affirmed and adopted.

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

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

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

July 25, 2022

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

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

DISSENT, IN PART

I agree with the Arbitrator's finding that Petitioner suffered a compensable work accident on February 16, 2018, which arose out of and in the course of her employment with Respondent. However, I disagree with the majority's decision to affirm the Arbitrator's finding that Petitioner's lower back (lumbar spine) condition resolved on or about December 27, 2018 and that her current lower back condition of ill-being is not causally related to the February 16, 2018 work accident. As a result, I also disagree with the permanent partial disability award of 7 percent loss of the person-as-a-whole. In my view, Petitioner established by a preponderance of the evidence that her current lower back condition of ill-being is causally related to the February 16, 2018 work accident and Petitioner sustained more serious permanent disability to her lower back due to the work accident.

On February 16, 2018, Petitioner injured her lower back when she lifted an infant from the floor while working for Respondent as a teacher's assistant. Petitioner sought treatment at Carle Foundation Hospital in the emergency department and followed up with Dr. James DeSalvio, a physician at Carle Foundation Hospital. Petitioner underwent various treatments for her lower back recommended by Dr. DeSalvio, including physical therapy, pain medication, work conditioning, which provided some relief. However, on November 30, 2018, Dr. DeSalvio noted that Petitioner continued to have low back pain but was making fairly significant progress. Dr. DeSalvio noted that work conditioning had helped Petitioner's forward mobility and she was no longer experiencing lower extremity radicular symptoms, but she still had pain in her lumbar spine area. Dr. DeSalvio agreed with the work conditioning therapist's recommendation for work restrictions that limited the ages of the children she could work with to minimize her bending. Dr. DeSalvio renewed Petitioner's prescriptions and released Petitioner to work with the following restrictions: "Limit working to preschool 2 or pre-K school rooms only."

On December 27, 2018, Petitioner followed up with Dr. DeSalvio for the last time. At that visit, Petitioner reported that bending and crouching positions aggravated her lower back. Dr. DeSalvio diagnosed Petitioner with an acute lumbar strain, which was clinically resolving,

and a broad-based disc herniation at L4-5; opined that Petitioner had reached maximum medical improvement (MMI); and released Petitioner to work with the following permanent restrictions: (1) Avoid bending and twisting at the waist; (2) Limit working to preschool 2 and pre-K rooms only; and (3) Okay to work nap time restricted to sitting in a chair. Petitioner testified that she was unable to continue working full duty for Respondent due to her restrictions, so she obtained employment elsewhere. Petitioner testified that she obtained a new job in February 2019 as a teacher's assistant in a kindergarten classroom, which was within her restrictions. Petitioner testified that her new position was different from the position with Respondent in that her new position was in an elementary school and the chairs are not as low as they were when she worked for Respondent as an early learning teacher's assistant. Additionally, she was not required to bend, stoop, or sit on the floor in her new position. Petitioner testified that her low back problems never went away completely after Dr. DeSalvio released her from care.

On November 17, 2019, Petitioner returned to Carle Foundation Hospital and sought emergency treatment for radiating lower back pain. The emergency room note indicates Petitioner had positive straight leg raise testing at that time. Petitioner continued to seek treatment with her primary care physician, Dr. Tipirneni (a physical medicine and rehabilitation physician), Nurse Practitioner Jisook, and also underwent additional physical therapy.

On January 10, 2020, Dr. Lawrence Li examined Petitioner at Respondent's request pursuant to section 12 of the Act. In his report, Dr. Li noted that after Petitioner had been released from Dr. DeSalvio's care, her pain continued and in November 2019, her pain worsened without any specific injury. Petitioner believed it was due to doing daily activities such as dishes and laundry. Petitioner was interested in undergoing an injection at this time. On examination, Petitioner had some back pain with straight leg raise testing on the right, and slightly decreased quad reflex on the right compared to the left. Dr. Li agreed with Dr. DeSalvio's interpretation of Petitioner's lumbar spine MRI and opined that Petitioner had a broad-based disk bulge with slight right paracentral protrusion mildly narrowing the right lateral recess and lumbar spondylosis. Dr. Li noted that Petitioner was working full duty in her new job (which she had obtained after the accident to accommodate her permanent restrictions). Dr. Li opined further:

> The diagnosis was not necessarily caused by the February 16, 2018, work injury, **but it would have definitely been aggravated by the February 16, 2018, injury, because the mechanism of injury is consistent with one that could aggravate a pre-existing lumbar spondylosis and narrowing of the lateral recess.** Lifting a 30-to 40-pound child from the floor is a mechanism that could aggravate this condition. (Emphasis added).

Additionally, Dr. Li opined: "**She has not reached MMI** as she would benefit from a lumbar epidural steroid injection." (Emphasis added).

On January 11, 2021, Dr. Li was deposed in regard to his examination of Petitioner. Dr. Li reiterated that Petitioner's diagnoses of a broad-based disk bulge at L4-5 and lumbar spondylosis were aggravated by the work accident. Dr. Li also reiterated that Petitioner had not reached MMI as of the date of his section 12 examination. Dr. Li opined that the work restrictions Petitioner's treating physicians gave her in addition to the medical treatment for her

lumbar spine from the date of the accident to the date of his examination were related to the accident. Dr. Li further opined that if Petitioner was given work restrictions to avoid bending and twisting, those restrictions would not allow her to perform some aspects of her job.

Throughout January and February of 2020, Petitioner continued to seek treatment and underwent a lumbar epidural steroid injection as recommended by Dr. Li, and an updated MRI of the lumbar spine. Petitioner also underwent bilateral foraminal injections in January of 2021. Petitioner testified that she has continued to experience daily pain and limited functioning since she was released from Dr. DeSalvio's care. Petitioner testified that she has sought emergency medical treatment a few times due to her ongoing back pain. Petitioner acknowledged that she had some intermittent back pain prior to the February 16, 2018 work accident, however, she had been able to control the pain with pain medication until the accident.

In finding that Petitioner's preexisting lumbar spine condition was aggravated by the February 16, 2018 accident and is currently causally related to that accident, I would have relied on Petitioner's credible testimony (as also found by the Arbitrator), and the opinions of Dr. Li, Respondent's own section 12 examining physician. Both Petitioner and Dr. Li were credible and accordingly, the Decision of the Arbitrator should be modified to extend causation. A contrary finding would completely ignore Dr. Li's credible opinions and the majority of the evidence in this case. Although Dr. DeSalvio found Petitioner had reached MMI as of December 27, 2018, no doctor opined that Petitioner's condition had completely resolved or that Petitioner would not need additional medical treatment. I would have awarded all medical expenses related to Petitioner's lumbar spine condition, and I would have found Petitioner sustained the loss of 15 percent of the person-as-a-whole, taking into consideration her permanent work restrictions.

For the above reasons, I respectfully dissent.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC030510
Case Name	TANKSLEY, SHAREE v. FIRST UNITED METHODIST CHILD CARE CENTER
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Matthew Brewer
Respondent Attorney	Emily Schlecte

DATE FILED: 12/20/2021

/s/ Dennis OBrien, Arbitrator

Signature

INTEREST RATE WEEK DECEMBER 14, 2021 0.13%

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

SHAREE TANKSLEY
Employee/Petitioner

v.

FIRST UNITED METHODIST CHILD CARE CENTER
Employer/Respondent

Case # **18** WC **030510**

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 **Dennis O'Brien**, Arbitrator of the Commission, in the city of **Springfield**, on **October 15, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 16, 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.

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

In the year preceding the injury, Petitioner earned $**23,566.40**; the average weekly wage was $**453.20**.

On the date of accident, Petitioner was **29** years of age, ***married*** with **1** dependent child.

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

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

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

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

ORDER

Petitioner suffered an accident on February 16, 2018 which arose out of and in the course of her employment by Respondent.

Petitioner's medical condition, an aggravation of degenerative disk disease, low back strain, lumbar radiculopathy, aggravation of very mild neural foraminal stenosis at L4/5 and L5/S1, aggravation of a broad-based disk bulge with slight right paracentral protrusion at L4/5, and aggravation of generalized lumbar spondylosis, is causally related to the accident of February 16, 2018, and had resolved on or about December 27, 2018 when last seen by Dr. Desalvio.

Petitioner's current complaints of low back pain voiced at arbitration are not causally related to the accident of February 16, 2018.

All of the bills introduced as part of Petitioner Exhibit #3 are related to Petitioner's aggravation of degenerative disk disease, low back strain, lumbar radiculopathy, aggravation of very mild neural foraminal stenosis at L4/5 and L5/S1, aggravation of a broad-based disk bulge with slight right paracentral protrusion at L4/5, and aggravation of generalized lumbar spondylosis injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident and are to be paid pursuant to the medical fee schedule, with the exception of the billings for treatments noted on the following pages of Petitioner Exhibit #3, which are found to be either not causally related to the accident of February 16, 2018 and/or are not supported by medical records introduced into evidence at arbitration:

- **Pages 18-20**
- **Pages 23-31**
- **Pages 38,39**
- **Pages 45-47**
- **Pages 50,51**

- **Pages 54-206**
- **Page 207 for services on August 2, and 29, 2018 only**
- **Pages 208-219**
- **Page 221 for services on August 2 and 29, 2018 only**
- **Pages 222-232**
- **Page 236**

Petitioner sustained permanent partial disability to the extent of 7% loss of use of the person as a whole pursuant to §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 20, 2021

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that she had a bachelors degree in general studies from Eastern Illinois University. She said she had been employed at First United Methodist child care center in Champaign on February 16, 2018 as a teacher assistant. She said she had worked in that position for approximately 2 1/2 years at that point. As a teacher assistant she said she typically assisted the head teacher of the classroom who performed duties similar to hers. She said her work involved changing diapers, bottle feeding, doing learning activities on the floor, and maintenance around the classroom.

She said that on February 16, 2018 she was about to pick up an infant off of the floor to do a diaper change, when, while picking the child up, she felt a pull in her lower back which caused her to stumble with the child. She said this was witnessed by a coworker who took the child from her and assisted at the diaper changing table to complete that task. Petitioner said that she was having excruciating pain. The pain was in her lower back and on the right side. She advised her supervisor of this. She finished her shift though she was in pain and her supervisor gave her different work to do for the rest of the day.

Petitioner said she insisted on going to work and doing light duty to help her coworkers in that room. Petitioner said she sought care a couple of days later at Carle Hospital. They took x-rays during that visit of February 18, 2018, gave her some pain medication, and discharged her, telling her to see her primary care physician , Dr. Amanda Walker. She said she saw Dr. Walker on March 1 2018. Dr. Walker ordered an MRI of the lumbar spine and updated her medication. She continued working light duty and her employer cooperated with that. The MRI was conducted on March 19, 2018. She was then referred to the Carle Spine Institute , where she was seen on March 30, 2018, and physical therapy was ordered. She said the first round of physical therapy was painful, and did not help.

In September of 2018 she saw Dr. Desalvio at the occupational medicine clinic at Carle and he ordered additional physical therapy. Petitioner said she continued taking prescription medication but it only gave very minimal relief. She said she continued working light duty and was alternating sitting and standing every 30 minutes. She returned to see Dr. Desalvio on November 1, 2018 and he wanted to move her from physical therapy into work conditioning. Petitioner said the work conditioning helped her a bit more than the physical therapy had, increasing some functionality. At that point her pain level was 7 out of 10. Petitioner said she last saw Sr. Desalvio on December 27, 2018, at which point he placed her at maximum medical improvement. He gave her work restrictions which she believed included avoiding bending and twisting at the waist, limiting the rooms she worked in, as well as working the nap time while sitting in a chair. She said she was released from his care at that time.

Petitioner said that she could not do her original job full duty with the restrictions issued by the doctor. She then sought employment elsewhere and found a job in February of 2019 for Champaign Unit 4 Schools. Petitioner said she was hired as a teacher assistant for kindergarten. The work differed as the early learning setting had different chairs that were not as low as early learning at the elementary level and she did not have to bend over and stoop and sit on the floor. She did not have to do bottles and make diaper changes in this employment. She said that as of the date of arbitration she was still working for that employer in the same position.

Since ending her medical care she has not been able to do much on a day to day basis. She has to rotate her sitting and standing and has a hard time with day-to-day tasks, household chores. She has experienced depression and she had never had that problem before. She has had to handle pain every day. She's not been able to travel much and has used a grabber to get things off the floor. It has taken a mental toll on her and she has gained weight. Petitioner said she had lost over 100 pounds before this accident and since has gained the 100 pounds back. She is still taking Cyclobenzaprine, Gabapentin and over the counter Tylenol and Lidocaine pain patches. She said she has had to go back to the emergency room on a couple of occasions. She said she is not injured her low back since the date of this injury. She said she goes to the emergency room because the pain is unbearable, that getting out of bed hurts and slight movements will give her pain throughout the day. She said she had driven over to Springfield from Champaign for the hearing. She said she would not times use a pillow in her lower back while driving and the hour and a half drive from Champaign hurt. While waiting in the hallway she would stand, walk, and sit to get relief from her lower back.

Petitioner said she was seen by Dr. Li at the Respondent's Request in January of 2020. She said she also had an epidural steroid injection at Carle Spine Institute that same month. She said the injection helped for about a week. She then had an updated MRI ordered by the Spine Institute and thereafter the institute continued to recommend conservative care. Petitioner testified that as of the day of arbitration she continued to do a home exercise program based on the documents that have been given to her when she left the hospital , and the exercises helps sometimes to relieve the pain , though it was not permanent. She said doing simple things such as tying her shoes were affected by her condition, as she could not do the physical bending and due to the weight gain. She said she could not work out and go to the gym because of the strain that would put on her back. She said just moving about during the day bothered her and she became tired quickly. She said she relied on family members to do shopping for her but would use a motorized cart to shop. She said having all of this when she was only 33 bothered her. She said prior to this accident she was 100 pounds lighter and was enjoying life, getting out with her family and doing the finer things. She said prior to this accident she was not under any work restrictions for her low back.

On cross examination she said she first experienced low back pain months prior, but she had been working that job months prior, also. She said the back pain prior to February 16, 2018 was tolerable with the use of Tylenol. She said on the date of accident she experienced the pain as she got the infant from the floor and stood up. She said the strain in her lower back at that point caused her to buckle. She said that when she stumbled she had not tripped over anything or slipped on anything.

The Petitioner said she'd been truthful with her doctors and with Dr. Li, the independent examiner. She said she had no reason to doubt the accuracy or information contained in her medical records.

Petitioner agreed that she had been placed at maximum medical improvement by Dr. Desalvio on December 27 2018. She agreed that her medical records show she had a motor vehicle accident on March 27, 2019. She said she never told Dr. Desalvio, Dr. Walker or Dr. Li of that accident, saying she had no reason to tell them.

Petitioner said the co-workers who were with her when this occurred were Lori and Angie, and that it was Angie, who helped by taking the infant when she stumbled. Petitioner said she filled out an accident report and a witness statement. She believed she did that on the day of the accident.

Petitioner said that after ceasing treatment with Dr. Desalvio she saw Dr. Walker a couple of times for low back problems. She said she last saw Dr. Walker on March 5, 2020. Petitioner said she subsequently also saw Dr. Walker on other occasions for problems unrelated to the low back. She said Dr. Walker recommended bilateral foraminal injections on March 5, 2020, and that she had those. She said those were performed in January of 2021 bye Samantha Tipirneni.

Petitioner agreed the doctor Walker in March of 2020 did not give her any work restrictions and she had not been given any work restrictions for her low back since that visit. She said she was not working with restrictions. She said she had not gone back to any physician about her low back causing her to be unable to perform household chores. She said she had seen her primary care physician in regards to her depression. She said that the medical records do not show that her depression was related to her work accident. She said her primary care physician, Dr. Walker was prescribing her medication for her at this time.

While she was not sure who Dr. Chen was, she said she would have no reason to doubt that he was the physician who prescribed her Gabapentin if medical records showed that. She could not recall if she has been back to see Dr. Chen for Gabapentin prescription.

MEDICAL EVIDENCE

On February 18, 2018 Petitioner went to Carle foundation hospital emergency room. The history they recorded was that she had lower back pain that was progressively worsening over the past couple of months. Their record indicates she denied any injury. X-rays Of the lumbar spine were interpreted as negative. They discharge diagnosis was sacroiliac joint inflammation, and Petitioner was to follow up with her primary care physician. (PX 2 p.4,6,7)

Petitioner was again seen in the emergency room at Carle Foundation Hospital on February 28, 2018. The history on this occasion was of having had a history of chronic low back pain which she managed with exercise and the use of over the counter medication . She advised them that in the past two to four weeks she had had worsening of her back pain with a burning sensation going up her back. Pain was exacerbated with bending forward, lifting and going from sitting to standing position. Physical examination revealed a mild restriction in her range of motion for lumbar extension and right sided rotation but no sensory deficits. Petitioner gave additional history at that time, noting that she worked at a nursery with constant bending over and lifting of infants daily. The diagnosis on this occasion was left lumbar radiculitis and acute exacerbation of chronic low back pain well as lumbar paraspinal muscle spasm and sacroiliac joint dysfunction on the left side. She was again advised to follow up with her primary care provider. (PX 2 p.8,10,11)

On March 1, 2018 petitioners saw her primary care provider, Dr. Walker, telling her nothing had happened out of the ordinary. Dr. Walker's physical examination showed positive straight leg testing and faber testing for hip and back pain. Dr. Walker diagnosed chronic back pain of greater than three months duration.

Petitioner saw Dr. Tipirneni again on March 30, 2018 with low back pain and right leg symptoms, which she stated was not associated with a work-related injury. Petitioner told her that it radiated to the low back, buttock, posterior thigh, into her foot, and worsened with any type of prolonged standing walking or bending. On this date the doctor noted that Petitioner had a slight antalgic gait due to her right leg symptoms. Her lumbar flexion was reduced to about 40 degrees and she had muscle spasms noted during extension and rotation though she was not in pain for those movements. Dr. Titirneni interpreted Petitioner's MRI as showing premature degenerative disease at L4/5 with a slight right paracentral disc protrusion mildly narrowing the right greater than left lateral recess and mild to moderate right and left foraminal narrowing. The impression on this visit was of premature lumbar degenerative disc disease, acute lumbar radiculopathy, herniated disc at L4/5, and lumbar spondylosis without myelopathy. Dr. Tiptrneni recommended physical therapy. An injection was recommended at that time, but petitioner wanted to think about that. Petitioner asked the doctor for a work note as her light duty note from her primary care physician would soon expire. She was told she would have to go through her primary care physician for any future notes as hers was not a work-related injury. Dr. Tipirneni did believe the light duty temporary restrictions were reasonable until her pain got better. (PX 2 p.12,16,17,21,23,24)

Petitioner was seen by Advanced Practice Registered Nurse (APRN) Jisook on June 7, 2018. Petitioner advised APRN Jisook that she had complaints of low back pain that had been present since November and that she had injured her back in February at work. She noted she worked in childcare and felt a pull in her lower back when bending over to pick up an infant to change her diaper. She was working with light duty restrictions at present and that had been helping. She wanted to continue working with those restrictions. During her physical examination Petitioner complained of low back pain while bending, twisting, and walking. Petitioner said she was agreeable to try physical therapy for strengthening exercises and for a functional capacity evaluation for further recommendations and restrictions with work. (PX 2 p.37,40,41)

On September 4, 2018 Petitioner was seen by Dr. Desalvio. The record notes the case was brought to him in the Department of Occupational Medicine by the workers' compensation carrier for review and coordination of restrictions and care. Petitioner told him her injury was on February 16, 2018, she bent over to pick up a child to change the diaper and as she performed that task she noted the onset of low back pain. That was followed by visits to the emergency room and a nurse practitioner. She had also been seen by Dr. Tipirneni and had received six physical therapy sessions. Petitioner's current complaints or of diffuse lumbar pain with intermittent sharp, stabbing pain that radiated down the posterior aspect of the right side to the level of the knee. She did not have chronic ongoing right lower extremity radicular symptoms. Physical examination on that date showed her to have a decrease in forward bending at the lumbar spine, minimal ability to extend the lumbar spine and diffuse palpable pain in the lumbar area. His review of the March 1, 2018 MRI was of the loss of disk signal and hide it L4/5 and a broad-based disc bulge with slight right paracentral protrusion mildly narrowing the right greater than left lateral recess. There was also mild to moderate right and left foraminal narrowing in his opinion. His impression was lumbar strain and sprain, broad based disc herniation at L4/5 and lumbar spondylosis without my myelopathy. Dr. Desalvio recommended physical therapy. He gave her restrictions of

alternating sitting, standing, and walking every 30 minutes and avoiding bending and twisting at the waist. (PX 2 p.47-49)

Petitioner received physical therapy at Carle Therapy Services from September 7, 2018 through September 26, 2018. When seen on September 7, 2018 the history Petitioner gave was of onset being February 20, 2018 while bending over to pick up a child. (PX 2 p.50-62)

Petitioner was seen by Dr. Desalvio on November 1, 2018. He noted that Petitioner appeared to be making progress in physical therapy though she continued to have some back pain, and the therapist had recommended that she be transitioned to work conditioning. Dr. Desalvio agreed. His impression on that date was acute lumbar strain and lumbar disc disease with broad based disc herniation at L4/5. (PX 2 p.62,63)

Petitioner had a work conditioning evaluation on November 7, 2018, and received therapy at Carle therapy Services from November 9, 2018 through November 28, 2018. (PX 2 p.64,66-75)

Petitioner returned to work conditioning on November 30, 2018. They noted Petitioner had met at least three of her four goals, including full trunk range of motion in all planes without an increase in back pain and an ability to return to work without restrictions, the ability to left and carry 20 to 25 pounds at waist level without an increase in back pain, and an ability to push and pull 50 pounds occasionally They recommended she be discharged from work conditioning and that she continue with an independent gym program and return to work but with a transition to full duty. (PX 2 p.78,79)

Petitioner later saw Dr. Desalvio on November 30, 2018. He noted she was still complaining of pain in the lumbar spine area but had no lower extremity radicular symptoms. The report he received from work conditioning was that Petitioner should be allowed to return to work with restrictions of what ages of preschoolers she worked with, in effect a work restriction that helped to limit her bending at the spine. He felt this was an appropriate restriction. Petitioner's physical examination on that date showed improved forward flexion and extension of the lumbar spine. Dr. Desalvio felt she had good strength in her leg muscles. His impression at that time was of acute lumbar strain which was clinically resolving as well as the broad-based disc herniation at L4/5. (PX 2 p.76,77)

Dr. Desalvio next saw Petitioner on December 27, 2018. He felt she had done reasonably well in work conditioning and she had been working and avoiding significantly bent and crouched positions which are the things that aggravated her back. He believed she had reached maximum medical improvement by the date of this visit. His final impression was that of acute lumbar strain which was clinically resolving as well as the broad-based disc herniation at L4/5. He released her from his care and said her restrictions would be ongoing. (PX 2 p.79,80)

Nearly eleven months later, on November 17, 2019, Petitioner was again seen in the Carle Foundation Hospital emergency room. She was complaining of low back pain that radiated to her left buttock and leg which had begun about 48 hours earlier. Physical examination at this time showed pain worsened with flexion of the left leg at the hip. In the emergency room Petitioner's pain was unremitting, even with multiple rounds of medications given to her, so she was admitted to the hospital. The impression during that emergency room visit was sciatica of left side and chronic left-sided low back pain with left-sided sciatica. (PX 2 p.162,167)

As a result of that emergency room visit, Petitioner was admitted to Carle Foundation Hospital on November 17, 2019 with a history of "severe backache since Friday along with associated left-sided sciatica," and describing her pain as 10/10 in intensity. Physical examination was neurologically normal except for a positive straight leg raising test on the left. Petitioner received physical therapy during her admission. By the morning of November 18, 2019 Petitioner was reporting her back pain mildly improved. She was to be discharged that day but was not due to hypotension making her feel lightheaded, weak, and shaky. Petitioner was discharged on November 19, 2019 with final diagnoses of intractable back pain, herniated disc, and presyncope with dizziness. (PX 2 p.167,168,171, 181,187)

Petitioner saw Dr. Walker in a post-hospitalization follow-up on December 2, 2019. She advised Dr. Walker that she had been having back problems ever since her accident in February of 2018. She said her pain was currently 3-4/10 and worse with activity. Her physical examination on that date was normal, but she complained of low back pain with bending, twisting and walking. (PX 2 p.192,193,195,196)

On December 19, 2019 Petitioner saw Dr. Tipirneni. Dr. Tipirneni noted she had previously seen Petitioner on March 30, 2018 for with low back pain and right radicular symptoms. At that time she had considered a right-sided L4/5 transforaminal epidural injection but Petitioner wanted to think about it and was not seen again until this date. Petitioner told her the pain had gotten better in the interim, but had gotten worse in the last couple of months with pain in the low back, buttock and right leg, especially with prolonged walking or standing. On physical examination Petitioner was noted to have slight antalgia due to right radicular symptoms, but her motor, sensory and reflexes were unchanged. Dr. Tipirneni's impression was chronic lumbar degenerative disease, lumbar radiculopathy, herniated disc at L4/5 and lumbar spondylosis. She offered Petitioner physical therapy, which she wanted to defer, and a right-sided L4/5 transforaminal epidural steroid injection, which was performed on that date. (PX 2 p.197,198,201,202)

Petitioner saw APRN Jisook on January 27, 2020 to discuss pain management. She had recently had a back injection, and said her back was sore. On physical examination she had a normal range of motion, no tenderness or swelling, but complained of low back pain with bending, twisting, and walking. The impression was degenerative disc disease, lumbar radiculopathy, and lumbar spinal stenosis. (PX 2 p.203,206,207)

Petitioner was seen in the emergency room of Carle Foundation Hospital on February 10, 2020. She reported that she had walked on the treadmill the preceding Saturday and had been having severe back pain ever since. She said the epidural injection had not helped her pain at all. She said her pain was across her low back and down her right leg, and that while it had previously gone down to her right knee, it now went down to the foot. The emergency room staff did not find any neurologic deficits which required additional imaging. Lorazepam was given and Petitioner said it reduced her pain from her normal chronic level of 7/10 down to 5/10. The diagnosis on this visit was acute bilateral low back pain with right-sided sciatica. (PX 2 p.208,211,212)

Dr. Tipirneni saw Petitioner again on February 12, 2020. Petitioner told her of her pain increasing when she was walking on the treadmill. Petitioner said most of her pain was in the back, buttock, legs, and especially with walking and standing. Her pain level was 8/10. The doctor felt a new MRI was warranted. (PX 2 p.213,214)

Petitioner was assessed for physical therapy on February 26, 2020, and it was recommended. Petitioner did not return for her scheduled therapy sessions. (PX 2 p.215-218)

An MRI of Petitioner's lumbar spine was performed on February 28, 2020. It revealed degenerative changes of the lumbar spine which were most pronounced at L4/5 with a circumferential disc bulge and a posterior disc protrusion contributing to mild bilateral neural foraminal stenosis, but no significant spinal canal compromise. (PX 2 p.236,237)

Following her obtaining a new MRI, Petitioner returned to see Dr. Tipirneni on March 5, 2020. Petitioner advised her that the right leg symptoms were 80% improved, to the point she did not have much pain on the right side, most of the pain was in the left low back and buttock. The doctor's impression on this date was premature lumbar degenerative disc disease, lumbar radiculopathy, history of herniated disc at L4/5, very mild neural foraminal stenosis at L4/5 and L5/S1 and morbid obesity. Petitioner was to return to physical therapy for more strengthening. She said she would do another epidural injection if Petitioner wanted one, but otherwise they would continue with conservative care. (PX 2 p.218-220)

Petitioner was seen in the emergency room of Carle Foundation Hospital on January 6, 2021 with acute left lower back non-radiating pain which she had experienced in the past. Physical examination revealed a positive straight leg raising test on the left, but grossly normal strength and sensation in all extremities. A muscle relaxer was prescribed and she was to return if worsening. Her diagnosis for this visit was acute left-sided low back pain without sciatica. (PX 2 p.432,435,437,438)

DEPOSITION TESTIMONY OF DR. LAWRENCE LI

Dr. Li was deposed as a witness for Respondent. Dr. Li testified that he was a board certified orthopedic surgeon. He said 10 to 15 percent of his practice involved the spine, with two-thirds of that involving the low back. He said in the course of his practice he performed workers' compensation examinations, reviewing medical records, diagnostic reports and diagnostic imaging, as well as examining the petitioner. He said he examined Petitioner at the request of the Respondent on January 9, 2020, with his report being issued on January 10, 2020. (RX 1 p.5-9)

Dr. Li said he reviewed a pre-injury analysis, as well as medical records from February through April, September through December 2018, and the MRI of March 1, 2018 interpretation which was in Dr. Desalvio's notes. He said that on the weekend prior to his deposition he reviewed additional records, including the emergency room records from February 18, 2018, and the MRI images from February 28, 2018, emergency room records from March 27, 2019, physical therapy notes from October and November of 2018 and Dr. Chen notes of March 1, 2019. He said he reviewed the images from both the 2018 and 2020 lumbar MRIs. (PX 2 p.10-12)

Petitioner provided Dr. Li with a history of the accident of February 16, 2018, which was consistent with her testimony at arbitration, as well as her history of subsequent treatment. (RX 1 p.12,13)

On the date of his examination Dr. Li said Petitioner was complaining of pain in her back that went down her right leg, she had no left leg pain. She said she had tingling in her right leg but did not have numbness in either leg. (RX 1 p.13,14)

Dr. Li testified that during his physical examination of Petitioner he found that her forward flexion was good, she could touch her hands to her ankles. Straight leg raising was painful on the right at 60 degrees. Petitioner had intact sensation, motor strength and reflexes and no atrophy, which meant she was not favoring one leg over the other. He diagnosed her as having a broad-based disk bulge with slight right paracentral protrusion which mildly narrowed the right lateral recess, and some generalized lumbar spondylosis. (RX 1 p.14,15)

Dr. Li was of the opinion that Petitioner's condition was not caused by the accident of February 16, 2018, but the accident was consistent with an aggravation of Petitioner's preexisting lumbar spondylosis, rendering it symptomatic. He recommended she get a lumbar epidural steroid injection, which, if successful, could be repeated one or two times. He said he reviewed later records which indicated Petitioner had such an injection and received no relief from the injection. Dr. Li was of the opinion that Petitioner did not need any restrictions as she was already working full time. (RX 1 p.15-17)

Dr. Li said he reviewed the MRI images from February 28, 2018 and agreed with the radiologist's interpretation that the circumferential disk bulge and posterior disk protrusion caused no significant spinal canal compromise. He said that meant the space was capacious, the spinal cord was free, nothing was tight, nothing was compressing it. Dr. Li said that no additional medical treatment was indicated as the epidural steroid injection did not work. (RX 1 p.17-19)

On cross examination Dr. Li said that none of the additional records he had recently reviewed had caused him to change any of the opinions he had given in his January 2020 report. He said the images from the March 2018 MRI were just seen by him in the last few days prior to the deposition. He said all of the records he was in possession of when he did his examination were mentioned in his report. He said the pre-injury job analysis form he reviewed was a one-page document dated June 13, 2018. He said he did not have a job analysis form for the job Petitioner was working as of the date of the deposition. The form he did have indicated Petitioner would occasionally have to lift or carry up to 25 pounds and she would occasionally have to turn and twist. (RX 1 p.20-25)

Dr. Li said that Dr. Desalvio's diagnosis had been the same as his. He agreed that it was his opinion that those diagnoses were aggravated by the work accident. He said he did not think she was at maximum medical improvement on the date he examined her. He said he did not recall Petitioner being on work restrictions from her treating doctors, but if she were, he would agree with that, and they would be related to the accident. He also agreed that all medical care she had undergone for her lumbar spine was elated to this accident, including the epidural steroid injection that had been performed. (RX 1 p.25,26,27)

Dr. Li said that if Petitioner was given restrictions to avoid bending and twisting, that would not allow her to do parts of her job. (RX 1 p.28)

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner appeared to testify truthfully and to the best of her ability. She did not appear to attempt to refuse to answer or evade questions asked of her by counsel for Respondent. While Petitioner may have a low pain threshold or tolerance, she did not appear to be intentionally exaggerating her complaints. The Arbitrator finds Petitioner to be a credible witness.

Dr. Li also appeared to testify truthfully and did not appear to refuse to answer any question, evade any question of argue with the attorney questioning him. The Arbitrator finds Dr. Li to be a credible witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether an accident occurred which arose out of and in the course of Petitioner's employment by Respondent on February 16, 2018, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

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

The medical records indicate that Petitioner in the months and years prior to the date of the claimed accident had experienced low back pain. The initial history to the emergency room staff on February 18, 2018 was of lower back pain that was progressively worsening over the last couple of months. On cross examination Petitioner testified that she had first experienced low back pain months prior to the date of accident, saying she had been working that job months prior, and that the back pain she had prior to February 18, 2018 was tolerable with the use of Tylenol.

When seen at the emergency room on February 18, 2018 Petitioner stated that she had a history of chronic low back pain which she had managed with exercise and the use of over the counter medication. She told the emergency room staff on that occasion that her back pain had been worsening in the past two to four weeks and she had a burning sensation going up her back.

At her second emergency room visit of February 28, 2018, Petitioner gave a history of chronic low back pain which she had managed with exercise and over the counter medication, and that the back pain had been worsening in the past two to four weeks and her pain was exacerbated with bending forward, lifting, and going from sitting to standing position.

When Petitioner saw Dr. Walker, her primary care physician, on March 1, 2018, she told her that nothing out of the ordinary had happened. On March 30, 2018 Petitioner

At arbitration Petitioner testified that on February 16, 2018, while picking up an infant off of the floor, one of her normal work activities, she felt a pull in her lower back which caused her to stumble with the child. She said she was having excruciating pain and a co-worker took the child from her and assisted at the diaper changing table. Petitioner said she advised her supervisor of this and was given different work to do for the rest of the day. This is the history Petitioner gave to APRN Jisook on June 7, 2018, Dr. Desalvio on September 4, 2018, Physical Therapy on September 7, 2018 and Dr. Li on January 9, 2020.

Petitioner testified there was a co-worker witness, Angie, who immediately came to her assistance and helped her with the infant and the changing of the diaper. Petitioner said she immediately reported this accident to her supervisor and filled out an accident report and a witness report. She said the supervisor assigned her to lighter duties for the rest of the day. This testimony was unrebutted, Respondent introduced no evidence to contradict or disprove these statements.

While Petitioner gave a history of prior back pain which had been worsening when seen at the emergency room on February 18, 2018, February 28, 2018 and that nothing out of the ordinary had happened when she spoke to Dr. Walker, Petitioners are not experienced workers' compensation attorneys or even general practice attorneys, they do not know what the term "accident" means, or what legally constitutes an "accident" for workers' compensation purposes. As noted in her testimony and in the medical records, bending over exacerbated her back pain. She, and most employees, do not know that aggravating, exacerbating, or accelerating a condition can constitute an "accident" for the purposes of workers' compensation. Denying the occurrence of an accident can well mean nothing hit her back, she did not slip or fall, nor was a vehicle she was in hit by another vehicle. Those are the types of things the non-attorney public might easily understand to be "accidents."

Bending over to pick up an infant from the floor to change the child's diapers is certainly a customary and expected activity for a person in Petitioner's job. Dr. Li testified that the job analysis form he had received describing Petitioner's position indicated Petitioner would occasionally have to lift or carry up to 25 pounds and she would occasionally have to turn and twist. This meets the requirements set out in McAllister vs. Illinois Workers' Compensation Commission, 2020 IL 124848.

The Arbitrator finds that Petitioner suffered an accident on February 16, 2018 which arose out of and in the course of her employment by Respondent.

In support of the Arbitrator's decision relating to whether Petitioner's current condition of ill-being, an aggravation of degenerative disk disease, low back strain, lumbar radiculopathy, very mild neural foraminal stenosis at L4/5 and L5/S1, a broad-based disk bulge with slight right paracentral protrusion at L4/5, and some generalized lumbar spondylosis, is causally related to the accident of February 16, 2018, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

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

The findings in regard to accident, above, are incorporated herein.

Petitioner testified that she had low back complaints in the weeks and months, perhaps even years, prior to February 16, 2018. She testified that she was able to control those symptoms with exercise and over the counter medication. She also told the emergency room staffs that her low back complaints had been progressively getting worse. The event then occurred on February 16, 2018 which caused her symptoms to be considerably worse, which caused her to go to the emergency room repeatedly, and which caused her to see first her primary care physician, Dr. Walker, and then, at her employer's request, Dr. Desalvio. Those physicians

felt she needed MRI testing, prescription medication and physical therapy, modalities which had not been required prior to February 16, 2018.

Petitioner worked throughout her treatment of this condition, and Respondent accommodated the restrictions placed on Petitioner by her doctors.

Petitioner received medical treatment for this injury throughout 2018. During that time she improved, reporting her pain at different times as anywhere from 0 to 4 on a 10 point scale, often at 0 or 1. She reported improvement to physical therapy at times as being 70 percent, and then later, 80 percent or more.

Petitioner saw Dr. Desalvio on November 30, 2018 with no radicular symptoms. Dr. Desalvio noted that work conditioning reported Petitioner should be allowed to return to work with restrictions of what ages of preschoolers she worked with, in effect a work restriction that helped to limit her bending at the spine. Petitioner's physical examination on that date showed an improved forward flexion and extension of the lumbar spine, and Dr. Desalvio felt Petitioner had good strength in her leg muscles. His impression at that time was of acute lumbar strain which was clinically resolving as well as the broad-based disc herniation at L4/5.

Dr. Desalvio next saw Petitioner on December 27, 2018. He felt she had done reasonably well in work conditioning and she had been working and avoiding significantly bent and crouched positions which are the things that aggravated her back. He believed she had reached maximum medical improvement by the date of this visit. His final impression was that of acute lumbar strain which was clinically resolving as well as the broad-based disc herniation at L4/5. He released her from his care and said her restrictions would be ongoing.

In February of 2019, Petitioner started working as a teaching assistant for Champaign Unit 4 School. Her duties at that school are quite similar to those she performed for Respondent. Petitioner testified that her current employment with the Champaign schools is in a full duty capacity and she is not working with any restrictions.

On November 17, 2019 Petitioner was again seen in the emergency room at Carle Foundation Hospital complaining of low back pain. Her history at that time was of back pain which had started about 48 hours earlier. This is the first record reflecting a low back complaint to a medical provider since being released by Dr. Desalvio on December 27, 2018, nearly 11 months earlier. As a result of this emergency room visit Petitioner was admitted to the hospital for the first and only time for low back complaints, with pain complaints of 10/10.

Petitioner underwent a lumbar steroid injection at L4/5 on the right on December 19, 2019. This was the first actual lumbar treatment in over a year.

Petitioner was seen in the emergency room of Carle Foundation Hospital again on February 10, 2020. She reported that she had walked on the treadmill the preceding Saturday and had been having severe back pain ever since. She said the epidural injection had not helped her pain at all. She said her pain was across her low back and down her right leg, and that while it had previously gone down to her right knee, it now went down to the foot.

Dr. Li was of the opinion that Petitioner's condition was not caused by the accident of February 16, 2018, but said the accident was consistent with an aggravation of Petitioner's preexisting lumbar spondylosis, rendering it symptomatic. He recommended she get a lumbar epidural steroid injection, which, if successful,

could be repeated one or two times. He said he reviewed later records which indicated Petitioner had such an injection and received no relief from the injection. (RX 1 p.15-17)

Dr. Li said he reviewed the MRI images from February 28, 2018 and agreed with the radiologist's interpretation that the circumferential disk bulge and posterior disk protrusion caused no significant spinal canal compromise. He said that meant the space was capacious, the spinal cord was free, nothing was tight, nothing was compressing it. Dr. Li said that no additional medical treatment was indicated as the epidural steroid injection did not work. (RX 1 p.17-19)

The Arbitrator finds that Petitioner's medical condition, an aggravation of degenerative disk disease, low back strain, lumbar radiculopathy, aggravation of very mild neural foraminal stenosis at L4/5 and L5/S1, aggravation of a broad-based disk bulge with slight right paracentral protrusion at L4/5, and aggravation of generalized lumbar spondylosis, is causally related to the accident of February 16, 2018, and had resolved on or about December 27, 2018 when last seen by Dr. Desalvio. This finding is based upon the medical records cited above and the testimony of Dr. Li.

The Arbitrator further finds that Petitioner's current complaints of low back pain voiced at arbitration are not causally related to the accident of February 16, 2018. This finding is based upon Dr. Delsavio's findings in November and December of 2018, including her lack of radicular symptoms, her physical therapy findings, her improved physical examination findings, including forward flexion and extension, her good leg strength and Dr. Desalvio's statement that her acute lumbar strain and broad-based disc herniation was clinically resolving. Petitioner subsequently began full duty work as a teacher assistant with the Champaign schools, and following her performing those duties she did not seek medical treatment for her low back until November 17, 2019, nearly 11 months later, when Petitioner was again seen in the emergency room at Carle Foundation Hospital complaining of low back pain that radiated to her left buttock and leg. Her history at that time was of back pain which had started about 48 hours earlier. Her pain on this occasion was so intense that even after multiple rounds of medications given to her, her pain was unremitting and, for the first time, she had to be admitted to the hospital for two days due to low back pain. Petitioner underwent a lumbar steroid injection at L4/5 on the right on December 19, 2019. This was the first actual lumbar treatment in over a year. Petitioner was seen in the emergency room of Carle Foundation Hospital again on February 10, 2020. She reported that she had walked on the treadmill the preceding Saturday and had been having severe back pain ever since. She said the epidural injection had not helped her pain at all. She said her pain was across her low back and down her right leg, and that while it had previously gone down to her right knee, it now went down to the foot. The 11 month gap in treatment after Dr. Desalvio found Petitioner's low back problems to be resolving and his release of her from his care, followed by Petitioner performing full duty work for a new employer from February of 2019 to November 17, 2019 at which time she had a very acute onset of pain and a history of onset within the past 48 hours, which led to her admission to the hospital for unremitting low back pain. This constitutes a new aggravation of her preexisting low back condition as the 11 month gap in complaints and treatment confirms Dr. Desalvio's December 27, 2018 statement that her low back strain and broad-based herniation at L4/5 was resolving.

In support of the Arbitrator's decision relating to whether the medical services that were provided to Petitioner were reasonable and necessary as a result of the Accident of February 16, 2018, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

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

The findings in regard to accident and causal connection, above, are incorporated herein.

As noted above, all low back injuries, testing and treatment from the date of accident through December 27, 2018 are causally related to the accident of February 16, 2018, at which point Petitioner's aggravation of low back injuries had resolved or was soon to resolve per Dr. Desalvio, and after which there was a lengthy period of non-treatment.

The Arbitrator finds that all of the bills introduced as part of Petitioner Exhibit #3 are related to Petitioner's aggravation of degenerative disk disease, low back strain, lumbar radiculopathy, aggravation of very mild neural foraminal stenosis at L4/5 and L5/S1, aggravation of a broad-based disk bulge with slight right paracentral protrusion at L4/5, and aggravation of generalized lumbar spondylosis injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident and are to be paid pursuant to the medical fee schedule, with the exception of the billings for treatments noted on the following pages of Petitioner Exhibit #3, which are found to be either not causally related to the accident of February 16, 2018 and/or are not supported by medical records introduced into evidence at arbitration:

- **Pages 18-20**
- **Pages 23-31**
- **Pages 38,39**
- **Pages 45-47**
- **Pages 50,51**
- **Pages 54-206**
- **Page 207 for services on August 2, and 29, 2018 only**
- **Pages 208-219**
- **Page 221 for services on August 2 and 29, 2018 only**
- **Pages 222-232**
- **Page 236**

This finding is based upon the medical summary, above, and the findings in reference to causal connection, as well as the review of the medical records indicating no records for treatment on many of the dates of billing.

The Arbitrator further finds that based upon the medical records of Dr. Desalvio, Petitioner reached maximum medical improvement on or about December 27, 2018.

In support of the Arbitrator's decision relating to the nature and extent of the injury the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

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

The findings in regard to accident, causal connection, and medical, above, are incorporated herein.

As the accident occurred after September 1, 2011, the nature and extent of the injury must be determined through the five-factor test set out in §8.1b(b) of the Act.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as an assistant teacher in a daycare center at the time of the accident and that she *is* able to return to work in his prior capacity as a result of said injury. The Arbitrator notes Petitioner was hired in a similar capacity but with slightly older children by the Champaign public school system in February of 2019 and was still working in that capacity as of the date of arbitration. Because of her working without restrictions in the same type of employment, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 29 years old at the time of the accident. Because of the large number of years left in Petitioner's expected work life, 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 no evidence was introduced at arbitration in regard to Petitioner's pay in her curent employment. Because of the lack of evidence in that regard, the Arbitrator therefore gives *no* weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner returned to work immediately after this accident, with restrictions being accommodated by Respondent. Petitioner lost no time from work as a result of this accident.Work Hardening felt Petitioner could return to work with restrictions of what ages of preschoolers she worked with, which would help her limit her bending at the spine. Dr. Desalvio agreed with that assessment. When he released her from his care on December 27, 2018 it was with the understanding that those restrictions as to the age of the children she could care for would continue. Petitioner thereafter obtained employment similar to what she had done for Respondent but with the age difference suggested by Work Hardening and Dr. Desalvio. She said she was performng that work full duty, without restrictions. Petitioner had not seen Dr. Desalvio since December 27, 2018 and testified she had not seen her primary care provider, Dr. Walker, for back problems since March of 2020. The medical records do not corroborate Petitioner's complaints at arbitration of difficulty with day-to-day tasks, problems traveling, need for the use of a grabber, weight gain or depression. In regard to the weight gain it is noted that medical records indicate Petitioner had previously had weight problems and had undergone

bariatric surgery. Petitioner had sustained several later aggravations to her low back which have been found to not be causally related to this accident. Because of her need to change the scope of her work and her subjective complaints, 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 7% loss of use of the person as a whole pursuant to §8(d)(2) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC020640
Case Name	Gabriel Smith v. Barry's Bootcamp
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0275
Number of Pages of Decision	15
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Andrew Makauskas

DATE FILED: 7/26/2022

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gabriel Smith,

Petitioner,

vs. NO: 17 WC 20640

Barry's Bootcamp,

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, temporary total disability, causal connection, permanent partial disability, medical expenses, and notice, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 22, 2021, is hereby affirmed and adopted.

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

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

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

July 26, 2022

/s/ *Marc Parker*
Marc Parker

MP:yl
o 7/21/22
68

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC020640
Case Name	SMITH, GABRIEL v. BARRY'S BOOTCAMP
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Kelly Kamstra

DATE FILED: 12/22/2021

/s/Charles Watts, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

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

Gabriel Smith
Employee/Petitioner

v.

Barry's Bootcamp
Employer/Respondent

Case # **17** WC **20640**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **November 12, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **July 4, 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 not*** sustain an accident that arose out of and in the course of employment.

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

In the year preceding the injury, Petitioner earned $**n/a**; the average weekly wage was $**409.97**.

On the date of accident, Petitioner was **44** years of age, ***single*** with **0** dependent children.

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

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

ORDER

Because the petitioner did not sustain an injury that arose out of and in the course of his employment with the respondent all benefits are denied.

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

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

.

Signature of Arbitrator

December 22, 2021

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GABRIEL SMITH,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 17 WC 20640
	)	
BARRY'S BOOTCAMP,	)	
	)	
Respondent.	)	

RESPONDENT'S STATEMENT OF FACTS AND CONCLUSIONS OF LAW

This action was pursued under the Illinois Workers' Compensation Act by Gabriel Smith (hereinafter "Petitioner") and sought relief from Barry's Bootcamp (hereinafter "Respondent"). This matter proceeded to hearing on November 12, 2021 in Chicago. The issues in dispute are: accident, causal connection, medical bills, temporary total disability benefits and permanency.

Petitioner's Testimony and Medical Treatment

Petitioner testified he was hired by Respondent in Summer 2016. (Trial Transcript, "TX" 6). On cross-examination, Petitioner clarified he was hired in November 2016, when the studio opened. TX at 17. Barry's Bootcamp is a health club providing personal training to clients. Petitioner was employed as a maintenance worker. *Id.* Petitioner straightened up equipment areas, cleaned bathrooms, folded towels, took out garbage and put dumbbells back on their racks. *Id* at These dumbbells weighed up to 95 pounds. *Id.* Petitioner lifted these dumbbells with two other employees. TX at 42.

Petitioner further testified that he would re-align treadmills. TX at 7. Petitioner spent an hour completing this task. *Id.* Petitioner stated he would use a bar and a piece of wood to lift the treadmills on his back to move them. TX at 8. These treadmills weighed 300 pounds. *Id.* When they were delivered to the gym, the treadmills were brought in by forklift. *Id.* Petitioner would move all 31 treadmills in the gym every other week. *Id* at 8. He moved them a couple of inches. *Id.* Petitioner then stated the whole process of moving treadmills takes an hour and a half, when questioned on cross-examination. *Id.* Further, he stated that he had to physically pick up each treadmill because they were not on wheels and the area on the gym floor was carpeted. TX at 49.

Petitioner alleges on July 4, 2017 while re-aligning treadmills, he felt a sharp pain in his low back. TX at 9. However, Petitioner testified that in Spring of 2017, he was feeling some pain in his back when he was moving treadmills. *Id* at 10. He also had left knee pain and left shoulder mobility issues, which have now resolved. *Id.*

On June 19, 2017, Petitioner began treating at Chiro One. (TX 11, Petitioner's Exhibit "PX" 1). At this time, Petitioner completed New Patient Paperwork. PX 1. On this paperwork, Petitioner reported low back pain since the age of 15. *Id,* TX at 19.. He further stated his last episode of low back pain occurred in March 2017. *Id,* TX at 19.. He did not report this as a workplace injury. *Id.* He claimed was unknown. *Id* at 15. He also reported left shoulder tightness that started one week prior. *Id.*

Petitioner underwent chiropractic treatment for his low back at Chiro One in June and July 2017 with no improvement of his pain. TX 11, PX 1. He continued working full duty during this time. *Id.* His last examination at Chiro One was on August 16, 2017. PX 1 at 22. Petitioner was diagnosed with degenerative disk disease and hyper lordosis (an exaggerated inward curve of the low back.) PX at 27. On July 6, 2017, Petitioner reported neck pain. PX 1 at 64. On July 12, 2017, he also reported mid back pain. PX 1 at 65. No reported mechanism of injury was reported in any of these appointments.

On December 28, 2017 he began treating at Illinois Orthopedic Network with Dr. Murtaza. *Id* at 12. This is confirmed in Petitioner's medical records. PX 2. At this appointment, Petitioner reported a workplace injury on November 22, 2016. PX at 18. He reported moving approximately 15 treadmills when he felt a sharp pain in his low back. *Id.* He then treated at Chiro One for several months without improvement of his pain. *Id.* He also reported this is when he started wearing a back brace and knee brace. *Id.* Petitioner denied any prior low back issues. *Id.* On cross-examination, Petitioner admitted that he always wore a back brace at work since starting there in 2016. TX at 18. He wore this brace everyday working at Barry's. *Id.*

Petitioner smoked cigarettes and marijuana. PX at 18. MRIs of the low back and left shoulder were ordered and Petitioner was placed on work restrictions of no heavy lifting. *Id.*

On January 5, 2018, a lumbar MRI revealed disc bulging with mild bilateral neural foraminal stenosis at L5-S1. PX 2 at 19. An MRI of the left shoulder was consistent with scattered interstitial micro-tearing involving a majority of the supraspinatus and infraspinatus tendons. *Id* at 22.

Petitioner began treating with Dr. Chunduri at Illinois Orthopedic Network on February 15, 2018 for pain management. PX 2 at 27. He was authorized off of work at this visit. *Id.* At this appointment, Petitioner reported low back pain, left leg pain, left shoulder pain, and right hand pain. *Id.* Petitioner reported to Dr. Murtaza that his right hand pain was due to his work not respecting his restrictions. *Id.* Petitioner was authorized off of work on this date. *Id.*

He returned to see Dr. Chunduri on July 26, 2018. PX 2 at 41. He was diagnosed with a left disk herniation with left radiation. He was recommended for a left L5-S1 TESI. *Id.*

Regarding petitioner's left shoulder, he treated with Dr. Giannoulias at Illinois Orthopedic Network. PX 2 at 23. This treatment began on January 24, 2018. *Id.* At this appointment, Petitioner reiterated that he injured his left shoulder in November 2016. *Id.* Petitioner was diagnosed with a partial-thickness rotator cuff tear and was provided an injection. *Id.* On March 14, 2018,

Petitioner's left shoulder was doing great. PX 2 at 30. He was provided a Medrol Dose Pak for his right hand. *Id.* He was released to light duty for his shoulder. *Id* at 31. On April 4, 2018, Petitioner returned complaining of right shoulder pain. PX 2 at 32. His right wrist was not problematic at this appointment. *Id.* On May 9, 2018, Petitioner's left shoulder pain had flared up. PX 2 at 35. He was not working at this time. *Id.* Petitioner underwent a second injection on this date. *Id.* Petitioner was released from care on June 13, 2018 with no restrictions regarding his left shoulder. TX at 12, PX 2 at 37.

On July 5, 2018, Petitioner underwent an independent medical examination with Dr. Lieber regarding his left shoulder. RX 2, PX 2 at 38. He reported that on July 4, 2017, after moving 25 treadmills, he felt increasing left shoulder pain. *Id.* He reported to Dr. Lieber he would lift these treadmills from ground to waist level. *Id.* At this examination, Petitioner complained of ongoing popping and pain in his left shoulder. *Id.* He also reported having to lift up to 100 pounds at work. *Id.* On physical examination, Petitioner had no swelling, no deformity, no atrophy, no crepitus, no AC tenderness, no apprehension, his strength testing was all 5/5 with no pain and no instability. *Id.* He was positive for impingement. *Id.* Dr. Lieber diagnosed Petitioner with no abnormality in his left shoulder as it relates to July 4, 2017. Petitioner had reached maximum medical improvement, could return to work full duty and did not require any further treatment. *Id.*

On July 30, 2018 Petitioner underwent an independent medical examination with Dr. Lami. RX 1. Petitioner reported having to move approximately 25 treadmills, this task would take 1.5 to 2 hours and he had to perform this task every two months. *Id,* TX at 34.. He reported to Dr. Lami that as a result of this repetitive maneuvering, he developed low back pain. *Id.* He did not report a specific incident on July 4, 2017. *Id.* Petitioner reported his symptoms started in 2016, but he went to an attorney in 2017, so that is why his accident is listed as 2017. *Id.* Petitioner described his pain as a 9/10. RX 2. He didn't use a dolly or other equipment to move the treadmills. He also told Dr. Lami that each treadmill weighed between 50-150 pounds. TX at 35. Petitioner further testified at hearing that he did not know how much they weighed. TX at 35.

Petitioner denied any prior back problems. *Id.* Petitioner reported working full time at Barry's Bootcamp until January 2018. *Id.* For the last two months, he had been working at a restaurant doing security. *Id.* On physical examination, his cervical, thoracic and lumbar spine were nontender to palpation. *Id.* Straight leg raise was negative. *Id.* Faber test was negative bilaterally. *Id.*

Dr. Lami reviewed medical records from Chiro One and Illinois Orthopedic Network in connection with his exam. He reviewed the actual diagnostic study of the lumbar MRI. *Id.* Dr. Lami noted the MRI revealed age-appropriate degenerative changes with no traumatic finding. *Id.* He diagnosed Petitioner with age-appropriate degenerative changes at L5-S1. *Id.* Petitioner kept describing a repetitive injury since 2016 as the cause of his symptoms. He did not report a specific incident on July 4, 2017. Dr. Lami opined that the repetitive task of aligning treadmills every two months was not a competent cause of Petitioner's low back symptoms. *Id.*

Dr. Lami further opined that petitioner's lumbar treatment was due to his personal health. That physical therapy for 4-6 weeks was appropriate, any additional therapy and injections would not be appropriate to treat Petitioner's condition irrespective of cause. *Id.*

On November 9, 2018 Petitioner presented to Dr. Koutsky at Illinois Orthopedic Network for his low back. PX 2 at 48. Dr. Koutsky noted radiculopathy at this appointment. He recommended a lumbar injection and EMG study. *Id* at 49. An EMG on December 6, 2018 revealed nonspecific findings which may correlate to left femoral neuropathy of uncertain origin. *Id* at 51. Most femora neuropathies are caused by nerve compression in the pelvis or beneath the inguinal ligament. *Id.* The study was also positive for tarsal tunnel syndrome. *Id.* On December 13, 2018 Petitioner was diagnosed with lumbar spondylosis and was recommended for a branch block. *Id* at 53. Petitioner's EMG was not consistent with any radiculopathy. *Id* at 55. His last day of treatment was on January 14, 2019. *Id.*

Petitioner testified that he continues to have low back pain while sitting down, standing improve his pain. *Id.* He had no further appointments scheduled for any body part. TX at 43.

On cross-examination, there was some discussion regarding petitioner's employment. He testified originally that he was terminated by Respondent in 2017, yet he then clarified that in February 2018 he told his doctor the Respondent was not honoring his current work restrictions. TX at 44. On cross-examination, Petitioner stated he never received any termination paperwork. TX at 46, 28. His attorney informed him he was terminated. *Id.* Petitioner did not know the date he was terminated. TX at 47. He never returned to work for the Respondent. *Id.* Petitioner denied receiving any leave of absence paperwork in 2018. TX at 29.

Petitioner admitted on cross-examination he was not happy working for the respondent. TX at 29. He admitted three days after starting at the studio in November 2016, he was treated differently by Respondent. *Id.* He was having issues with a fellow employee, Anthony. TX at 30. He felt Anthony was conceited and got a big head after a promotion. *Id.* In fact, he complained to HR about his issues with Anthony. TX at 31. He emailed Devin Murphy about these issues. *Id.* Devin Murphy was the VP of Operations at Barry's during this time TX at 39. She opened the studio and hired the Petitioner. *Id.* Petitioner stated he felt unappreciated at Barry's. TX at 31. He admitted to emailing HR about not being appreciated for all the work he was doing at the gym. TX at 32.

Petitioner currently works at Howard Brown Health doing light maintenance work, cleaning bathrooms, emptying garbage, etc. TX at 15. He was up for a promotion but could not accept it because the promotion required more heavy lifting. *Id.* Petitioner admitted on cross examination that he was not on any work restrictions. TX at 42. He started that job approximately 7 months ago. *Id.* In June 2018, Petitioner worked at Kingston Mines. *Id.* On cross-examination, he clarified he began working there in December 2018. TX at 41. Petitioner worked at City Winery, checking IDs in June 2018 and was seasonally laid off in August 2018. TX at 40-41.

Petitioner emailed the head of human resources, Sam Sharon that he was the only person being asked to align treadmills. TX at 36. Petitioner at first stated he never emailed Sam Sharon, then admitted that he did email him. TX at 36.

Devin Murphy Testimony

Devin Murphy is the Senior Vice President of Operations at Barry's Bootcamp. TX at 51. In July 2017, she was Vice President of Operations. TX at 52. In July 2017, Barry's Bootcamp had 15 studio locations. *Id.* In her role at Vice President of Operations, Ms. Murphy she was responsible for the four wall operations of the gym studios. *Id.*

Ms. Murphy oversaw the opening of the River North Chicago location of Barry's Bootcamp in November 2016. TX at 53. The studio officially opened on November 19, 2016. *Id.* She overall the hiring and training of employees. *Id.* Ms. Murphy testified she was familiar with the Petitioner. TX at 54.

Ms. Murphy was also involved in the day-to-day operations of the studios. *Id.* She visited the River North studio 7 times within the first 6 months of the studio opening. *Id.* Ms. Murphy confirmed each time she saw Petitioner in the studio, he was wearing a soft back brace. TX at 55. Petitioner never reported a November 22, 2016 workplace injury to her. *Id.*

In her role with the Respondent, Ms. Murphy was also looped into HR situations at the River North studio. TX at 56. In fact, Petitioner emailed her directly about issues he had with other employees. *Id.* Petitioner only emailed her once regarding his low back. *Id.* This email was sent on September 14, 2017. *Id.*

Following receipt of this email, the Senior head of Human Resources, Sam Sharon, held multiple meetings with Petitioner to discuss his condition. TX at 57. Mr. Sharon also requested medical documentation regarding Petitioner's work restrictions. *Id.* Ms. Murphy further explained the procedures in place at Barry's for documenting workplace injuries. *Id.* Every manager is trained in the google based documentation form, when completed, automatically gets emailed to HR. TX at 58. Every incident involving employees and clients is documented. *Id.* There is a manger on duty at each location all hours the studio is open. *Id.* Ms. Murphy testified that no accident form for Petitioner was completed in November 2016 or July 2017. *Id.*

Following the September 14, 2017 email mentioning Petitioner's low back accident, Petitioner continued working for Respondent. TX at 59. Petitioner never provided Respondent any documentation for work restrictions. *Id.* Ms. Murphy clarified that on November 14, 2018 Petitioner was let go because he did not provide Respondent any medical documentation and did not complete the leave of absence forms he was sent. *Id.*

Ms. Murphy was familiar with the gym equipment at the River North Studio, and testified each treadmill weighed approximately 400 pounds. TX at 61. Petitioner's supervisor was Wes Hight, the Studio Manager. *Id.* When questioned about the lack of accident reporting, Ms. Murphy reiterated that Petitioner directly emailed her and Sam Sharon of HR multiple times. TX at 63, 65. Petitioner did not reach out to them reporting an injury (work related or otherwise) until September 14, 2017. TX at 63. Ms. Murphy did not review Petitioner's personnel file. TX at 64. No area of the studio was carpeted. TX at 64.

CONCLUSIONS OF LAW

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law.

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

To obtain compensation under the act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill.2d 249, 253 (1980) including that the accidental injury both arose out of and occurred in the course of his employment (Horvath v. Industrial Commission, 96 Ill.2d. 349 (1983)) and that there is some causal relationship between the employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, I29 Ill. 2d 52, 63 (1998). 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).

Credibility is the quality of a witness which renders her 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 her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much her testimony might be contradicted by the evidence, or how evidence it might be that her story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also Hansel & Gretel Day Care Center v. Industrial Commission, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

The Petitioner 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). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" Shell Petroleum Corp. v. Industrial Commission, 10 N.E.2d 352 (1937). The burden of proof is on a claimant to establish the elements of her 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. Revere Paint & Varnish Corp. v. Industrial Commission, 41 Ill.2d. 59 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. Spankroy v. Alesky, 45 Ill. App.3d 432 (1st Dist. 1977).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner testified in open hearing before the Arbitrator who viewed his demeanor under direct examination and under cross-examination. Petitioner's body language and pace of speaking markedly changed between direct and cross examination. Petitioner was evasive during cross examination and seemed to be searching for words as if to recall rehearsed testimony during direct examination. The Arbitrator's overall impression was that Petitioner was completely and absolutely not credible. In contrast, Respondent's witness, Devin Murphy, was completely credible. Her mannerisms, body language, and pace and tone of voice while answering questions stood in stark contrast to that of Petitioner. Ms. Murphy was familiar with the case and so completely rebutted Petitioner's testimony that it became impossible to believe anything that Petitioner said that was contradicted by Ms. Murphy.

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

As an initial matter, the Arbitrator notes Petitioner has the burden of proving all of his case by a preponderance of the evidence. *Chicago Rotoprint v. Industrial Comm'n,* 157 Ill.App.3d 996, 1000 (1987). Liability cannot rest upon imagination, speculation or conjecture. *See United Airlines v. Comm'n*, 991 N.E.2d 458, 463 (2013).

Petitioner in the present case alleges a low back and left shoulder injury on July 4, 2017 when re-aligning treadmills at work. To address the reported mechanism of injury, Petitioner's own testimony is wildly inconsistent. Initially Petitioner testifies he moved treadmills weighing 300 pounds by himself, on his back. He then admits to telling both his treating physicians and Respondent's experts, that the treadmills weighed 50-150 pounds each. He then testifies to seeing the treadmills delivered via forklift. This Arbitrator finds it highly suspicious and not probable that one individual, this Petitioner would be lifting a 300 pound treadmill on his back by himself, let alone performing this act 31 times as alleged. There were also inconsistent statements made by Petitioner regarding the need to physically lift each treadmill. Petitioner alleges the workout area is carpeted. This assertion is rebutted by Ms. Devin Murphy, the Senior Vice President of Operations who oversaw the opening of this gym location.

In regards to the reported date of accident, Petitioner's testimony and medical records are inconsistent. While providing Petitioner with deference in his testimony, this Arbitrator cannot ignore the numerous and significant inconsistent histories provided by Petitioner during his live testimony, as reported to his treating physicians and reported to Respondent's experts in this case.

Petitioner asserts he injured his low back on November 22, 2016 three days after starting his employment with Respondent. Petitioner admitted at hearing that he did not treat for his low back until June 19, 2017. TX at 23. Ms. Devin Murphy credibly testified that she was present at the gym studio during the opening week in November 2016 and that no workplace accident was reported at that time.

While undergoing his initial chiropractic treatment in this case, at no point does Petitioner state any work duties caused or contributed to his pain. He does not mention noticing increased pain following any specific job duties.

Petitioner further testified he had no prior low back complaints. He told orthopedic physicians at Illinois Orthopedic Network he had no prior low back complaints. However, Petitioner completed a new patient report when he began treatment at Chiro One on June 19, 2017 where he reported chronic low back complaints since the age of 15. He further reported his last flare up of low back pain occurred in March 2017. Both Petitioner and Ms. Murphy testified that Petitioner always wore a soft low back brace to work.

With regards to an alleged November 22, 2016 date of accident, there are no accident reports, medical documentation or credible testimony to support this date of accident. While all of Petitioner's orthopedic physicians relate his low back and left shoulder treatment to his workplace accident on November 22, 2016, no specific mechanism of injury is noted.

With regards to an alleged July 4, 2017 date of accident, this Arbitrator weighed both the live testimony of the Petitioner and Ms. Murphy, as well as the treatment records in this case and Respondent's expert opinions. Petitioner had already started chiropractic treatment for his low back on June 19, 2017. Further, Petitioner did not report any increased low back pain following July 4, 2017 to his chiropractor. PX 1. Petitioner testified and Ms. Murphy confirmed Petitioner continued working his regular job duties following July 4, 2017. Ms. Murphy confirmed the first report to HR about any low back injury was in an email from Petitioner to HR specialist Sam Sharon on September 14, 2017.

Both Dr. Lami and Dr. Lieber, Respondent's experts, further dispute the specific incident on July 4, 2017 as reported by Petitioner was a competent cause of his low back and left shoulder complaints.

If Petitioner is alleging a repetitive trauma, although unclear if that is what he is alleging, there is conflicting evidence regarding Petitioner's manifestation date for his low back and left shoulder complaints in this case. Petitioner's first date of treatment for his low back occurred on June 19, 2017. However, he reported in his own handwriting, and signed a form stating his most recent flare up of low back pain was in March 2017. This does not support a manifestation date of November 22, 2016, June 19, 2017 nor July 4, 2017.

The Petitioner did not prove that an accident occurred that arose out of and in the course of his employment by a preponderance of the evidence. After weighing all relevant evidence in this case, this Arbitrator finds that no accident occurred on July 4, 2017 that arose out of and in the course of Petitioner's employment with the Respondent.

4. Is Petitioner's current condition of ill-being causally connected to her injury or exposure?

As this Arbitrator finds Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment with Respondent on July 4, 2017, this issue is moot.

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

As this Arbitrator finds Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment with Respondent on July 4, 2017, this issue is moot.

8. Is Petitioner entitled to any temporary total disability benefits?

As this Arbitrator finds Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment with Respondent on July 4, 2017, this issue is moot.

9. What is the nature and extent of Petitioner's injury?

As this Arbitrator finds Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment with Respondent on July 4, 2017, this issue is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC015425
Case Name	Alfredo Garcia v. Smithfield Foods, Inc
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0276
Number of Pages of Decision	25
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Heather Boyer

DATE FILED: 7/26/2022

/s/Christopher Harris, Commissioner

Signature

fSTATE 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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ALFREDO GARCIA,

Petitioner,

vs. NO: 21 WC 15425

SMITHFIELD FOODS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, and prospective medical treatment, and being advised of the facts and applicable law, reverses the Decision of the Arbitrator and finds that Petitioner, Alfredo Garcia, sustained an accident that arose out of and in the course of his employment on March 15, 2021. The Commission further finds that Petitioner's right shoulder condition is causally related to the accident and, therefore, awards Petitioner prospective medical treatment as recommended by Dr. Theodore Suchy. 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).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Alfredo Garcia has been employed as a raw utility worker with the Respondent since August 10, 2010. T.11. This position requires him to know every position at the manufacturing level as he fills in for absent employees. *Id.* His duties include, in part, setting up between 3 to 6 grinders. T.13. Petitioner stated that the grinders are approximately 4 feet tall and weigh between 500 and 800 pounds. *Id*. He has to physically push an auger a/k/a worm into the grinder. *Id*. He stated that this is a physically demanding job. Petitioner also works on the frozen grinder. T.22. This requires him to open a 60-pound box of frozen meat, flip the box and push the meat onto the

convey belt where it then moves to the grinder. T.23. He would push anywhere from 960 to 1080 pounds of meat through the conveyor per shift. T.24. This was a physically demanding position. *Id*. On cross-examination, Petitioner stated that the worm is suspended by a crane and he is not moving any weight. T.69. If it doesn't slide in, then he has to use force to physically push it in. *Id*.

Mr. Ricardo Duran is the production supervisor and testified on behalf of the Respondent. He confirmed that the raw utility worker has to know all 6 positions on the production floor. T.82. The first position is the receiving dock. This position utilizes a forklift to remove the meat from the trailer and weigh it. T.83. The second position is the service person. The service person uses the forklift to get the meat for the grinders. T.84. The third position is the grinder. This person is responsible for assembling the machine and loading the grinders from the back of the machine utilizing controls. The fourth position is the fresh grinder. This person grinds the fresh meat and large combos coming out of the trailer. There is also the frozen grinder, which is essentially the same but there are 30 to 45 boxes per pallet. T.85. The grinder operator pulls the boxes off the pallet and pushes the meat onto the conveyor. Each box weighs 60 pounds. *Id*. The fifth position is the blender. This person uses a PIT and moves the vats of pre-determined weight into the blender. T.86. The sixth position is the wolf king, which is the final grinder. This person moves the meat to the final grinder. *Id*.

Mr. Duran testified that a raw utility worker typically performs a position for a week. T.87. Set up is the same every morning. *Id*. This requires the auger (worm) to be guided into the machine. The blades are then put in and the plate and the grinder hood is assembled. T.88. He stated that the auger is held up by a cross beam and support and the worker simply glides it into the grinder. T.89-90. If it is aligned, the worker simply pushes it in with one hand and it does not require a whole lot of force. *Id*. If it doesn't align, the worker then pulls it back and slides it in again. T.92.

On cross-examination, Mr. Duran stated there is more than one auger that has to be set up. T.100. He stated that the frozen grinder is a physically demanding position. T.104. The boxes weigh 60 pounds and they have to pull the boxes but not lift them. *Id*. In the frozen grinder position, the worker pulls the box, flips it over and pushed it onto the conveyor. T.112.

Petitioner testified that he developed shoulder soreness in late November 2020. T.25. He also had shoulder soreness prior to this date. *Id.* He informed his supervisor, Mr. Duran, of the soreness. T.26. He asked to be moved from the set up position to see if that would help. *Id*. He was moved away from the set up position for about a month but had to go back as an employee did not come into work. *Id*. He returned to set up in March 2021. *Id*.

Mr. Duran testified that Petitioner did not report a shoulder injury in June 2020 or Fall 2020. T.92. He did mention generalized soreness in his right upper extremity in the Fall of 2020. T.93. Petitioner did not mention that it was related to his work. T.94. Between June 2020 and March 14, 2021, Petitioner did not request a less demanding job and did not work a different job during this period. T.95. He did not request to seek any medical treatment. T.96. He was able to perform his full duties. *Id*.

Petitioner testified that he sustained an injury on March 15, 2021 while working on both the fresh and frozen grinders. T.27, 30-31. He noticed a sharp pain in his right shoulder as he was

putting the food in the grinder. T.27. While on the frozen grinder, he noticed pain while he was sliding the 60-pound boxes onto the conveyor. T.31. Petitioner stated that his supervisor was standing behind him and saw him touching his shoulder. T.28. His supervisor asked him what happened and he informed his supervisor of what occurred. *Id*. He reported the incident to Laurie Lebose. T.32. Petitioner testified that his shoulder soreness was different from the previous soreness. *Id*. It was a sharp, heated pain in his right shoulder. *Id*. He could not lift his arm above his right shoulder. *Id*.

Mr. Duran testified that Petitioner told him that he had right shoulder soreness from assembling the auger on March 15, 2021. T.97. Petitioner was sent to the safety manager. T.98. He returned to the blender operator position. *Id*. He further testified that Petitioner was working full duty prior to March 15, 2021. T.102.

Petitioner was sent to the company clinic for shoulder discomfort. Per the March 16, 2021 record, Petitioner's discomfort had been present for 181-365 days and he reported pain for the past 9 months. It was noted that this was work-related. Petitioner made his supervisor aware of his pain some months ago and believed it was related to stock prep. His discomfort actually got worse despite not performing that job for a few months. His pain was 10, at worse, and currently was a 9 out of 10. Under the health status section "none" was checked. The options included, among other conditions, thyroid disease, diabetes, and diabetes medication. Examination revealed adhesions and tenderness in the "b/l" shoulder girdle musculature. His active range of motion on the right was decreased in flexion. His pain was a 6 out of 10 when he was released. An additional 4 sessions were recommended. It was noted that the employee never returned for visits and the case was closed. PX.4.

On cross-examination, Petitioner testified that this was his only visit to the company clinic. He denied telling the clinic that his shoulder discomfort had been present for 9 months. T.44. He does not know what stock prepping is despite the record indicating that he related his pain to stock prepping. T.45.

In a prior medical record, Petitioner was seen by Dr. Angel Gomez-Galan on September 14, 2018. It was noted that he had hypothyroidism. There was no edema, cyanosis or clubbing of the extremities. RX.3.

Petitioner was seen by Dr. Derek Urban of Tyler Medical Services on March 19, 2021 for right shoulder pain. He reported that his right shoulder has been bothering him for 9 months. He was working in an alternate position but was having increased pain. He was recently emptying bags of frozen meat which caused him to have increased shoulder pain. He saw the physical therapist through ART one time. There were no activities outside of work that precipitated or aggravated the above and no prior right shoulder injuries. He had bilateral carpal tunnel releases 7 years ago. Examination revealed tenderness directly over the right AC joint and pain with abduction past 90 degrees. The Jobe's/Empty Can test caused pain and weakness. He had a positive AC impingement. X-ray of the right shoulder revealed no fracture of dislocation. The diagnosis was chronic right shoulder pain, possible AC impingement versus rotator cuff tear. An MRI was recommended and Petitioner was given restrictions of no lifting, pushing, or pulling over 25 pounds and no over the shoulder level reaching or lifting. PX.5.

Petitioner underwent an MRI of the right shoulder on April 2, 2021. There was diffused fraying of the superior labrum/anchor. The impression was superior labrum tear/maceration and an intact rotator cuff. PX.5.

Dr. Pappas referred Petitioner to Dr. Theodore Suchy of The Centers for Sports Orthopedics. Petitioner first saw Dr. Suchy on April 8, 2021. The date of onset of his shoulder pain was listed as June 2020 and was from twisting, work injury, and overuse. He would perform repetitive motions such as pushing and pulling grinder pieces. He now had moderate aching/sharp pain that increased with certain range of motion. He also reported weakness and popping/clicking noises. He had pain in the front of the shoulder area. The chiropractic treatment at his place of employment made his condition worse. There was evidence of a SLAP tear on the MRI. He had pain and tenderness over the long head of the biceps tendon. He received an injection and physical therapy was recommended. He was to continue light duty work. If his condition did not improve, then a biceps tenodesis would be required. The impression was a glenoid labrum tear and biceps tendinitis. PX.6.

On cross-examination, Petitioner denied telling Dr. Suchy that his pain had been ongoing since June 2020. T.50. He did tell Dr. Suchy that it was from performing repetitive motions such as pushing and pulling grinder pieces. T.50-51. He told him that he had chiropractic treatment that made his pain worse. T.51.

Petitioner followed-up with Dr. Suchy on April 29, 2021. The workers' compensation insurance did not approve his therapy. His condition was worsening due to the inability to get therapy. Examination revealed pain and tenderness over the biceps tendon. He had a positive O'Brien's test, a positive Speeds test, and a positive Neer's test. The injection provided minimal relief only. Therapy was again recommended and his restrictions were continued. PX.6.

Respondent obtained a Section 12 examination from Dr. M. Bryan Neal on May 19, 2021. Dr. Neal was subsequently deposed on September 7, 2021. Dr. Neal is board-certified in orthopedic surgery. He stated that Petitioner indicated that the injury occurred in the Fall of 2020. He did not state a specific injury. RX.2. pg.12. Petitioner only attributed his pain to the set up utility job that he performed for 10 years. *Id*. Dr. Neal stated that Petitioner did not have a specific injury on March 15, 2021. It was purely the process of work over a long time that he put forth that caused his shoulder condition. RX.2. pg.15. Petitioner had some difficulty with abduction and he had marked diminished active range of motion and significant diminished passive range of motion. RX.2. pg.22. He also had a positive inferior glide test.

Dr. Neal diagnosed Petitioner with adhesive capsulitis that was not causally related to the work accident as there was no work accident on March 15, 2021. Petitioner had a symptomatic shoulder prior to that date. RX.2. pg.39. The most likely cause was from thyroid dysfunction. *Id*. He stated that it is universally recognized that adhesive capsulitis has association with diabetes and thyroid dysfunction. *Id*. Petitioner's work activities would not permanently worsen his shoulder condition. RX.2. pg.42.

On cross-examination, Dr. Neal agreed that Petitioner has a symptomatic right shoulder. RX.2. pg.48. He has no basis to disagree with the interpretation of the MRI as he did not review

the MRI. RX.2. pg.53. He stated that repetitive motions may or may not aggravate an asymptomatic partial labrum tear. RX.2. pg.55. He stated that flexion of the internally rotated arm, more of an overhead reaching motion, can cause the greater tuberosity of the humerus to impinge on the roof of the shoulder joint. RX.2. pg.58. Further, repetitive overhead reaching can cause an asymptomatic partial tear to become symptomatic. RX.2. pg.59. He believes Petitioner has a thyroid issue but does not know what medication he takes. RX.2. pg.63. Dr. Neal admitted that he does not have the "smoking gun evidence" that Petitioner has thyroid dysfunction but, to him, it looks like Petitioner has thyroid dysfunction. *Id.*

On re-direct examination, he does not think Petitioner has a clinically significant labral tear. RX.2. pg.66. He may have some fraying. *Id*. On re-cross examination, Dr. Neal testified that he did not review the job description. RX.2. pgs.68-69.

Petitioner testified that he did not tell Dr. Neal that he was uncertain when the pain began and he did not tell him that his pain began in the Fall of 2020. T.55. He told Dr. Neal that his pain was from the setup activity. T.56. This was moving the worm which he did for 10 years. *Id*.

Petitioner was seen by Dr. Suchy on May 24, 2021. Examination revealed a positive O'Brien's test, a positive Speeds test, and rotator cuff weakness on the right. Petitioner's therapy was denied by the insurance company. Petitioner probably needed a possible labrum repair and biceps tenodesis. He needed 6 weeks of physical therapy. Dr. Suchy opined that there was a direct causal relationship between his work injury and the development of a traumatic tear of the superior labrum and biceps anchor of the shoulder. Petitioner was given restrictions of no over the shoulder lifting and 20-pound max lifting. PX.6.

Presently, Petitioner cannot lift his right shoulder all the way up, which he was able to do prior to the injury. T.39-40. His employer is still accommodating the restrictions. *Id*. He would like medical treatment as recommended by Dr. Suchy. *Id*.

On cross-examination, he worked in the raw utility between June 2020 and March 2021. T.42. He first received work restrictions after March 15, 2021 and was working without restrictions between June 2020 and March 15, 2021. T.48. The Respondent accommodated the position by placing him in the blender operator position. T.49. He did not report any right shoulder issues between the date of hire in August 2010 and June 2020. T.57.

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 (4th Dist. 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 disagrees with the Arbitrator's finding that Petitioner failed to give a consistent or credible history of the alleged events. While there may be some inconsistencies

between the record and Petitioner's testimony, those inconsistencies do not outweigh the credible evidence and Petitioner's testimony as it relates to the accident and causal connection.

To recover benefits under the Act, 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. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799, 304 Ill. Dec. 722 (2006).

Here, the evidence strongly supports that Petitioner sustained an accident arising out of and in the course of his employment on March 15, 2021. Petitioner testified that he was working with the auger on March 15, 2021 when he experienced shoulder pain. He stated that his supervisor noticed that he was rubbing his shoulder and asked what happened. Petitioner was then sent to the company clinic. Mr. Duran confirmed Petitioner's testimony and stated that Petitioner reported right shoulder soreness to him and that he was sent to the safety manager. The in-house clinic record dated March 16, 2021 confirms that Petitioner was seen for shoulder pain that was presently a 9 out of 10 and the record further noted that it was work related. The Commission finds that the credible evidence supports that Petitioner sustained an accident arising out and in the course of his employment on March 15, 2021.

It is well established that 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. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003). In preexisting condition cases, recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally-connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition. *Id.* at 204-205. It is axiomatic that employers take their employees as they find them. *Id.* at 205. Thus, even though an employee has a preexisting condition which may make him more vulnerable to injury, recovery for an accidental injury will not be denied as long as it can be shown that the employment was also a causative factor. *Sisbro Inc.* at 205.

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 a causal nexus between the accident and the employee's injury." *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64, 442 N.E.2d 908, 66 Ill. Dec. 347 (1982). If a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration." *Schroeder*, 2017 IL App (4th) 160192WC, ¶ 26, 414 Ill. Dec. 198, 79 N.E.3d 833. "The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been." *Id.*

The evidence supports that Petitioner had some prior right shoulder soreness. Despite the soreness, however, the Petitioner was able to work full duty and without restriction between June 2020 and March 15, 2021. No medical records were offered supporting that Petitioner was receiving any medical treatment prior to the accident. It was only after the accident that Petitioner began to undergo medical treatment, received work restrictions related to his right shoulder,

underwent an MRI, was diagnosed with a glenoid labrum tear and bicep tendinitis, and surgery was recommended. The Commission finds that the work accident was a causative factor in Petitioner's resulting condition of ill-being. The Commission also notes that Petitioner established causation under the chain of events theory.

Furthermore, the Commission finds Dr. Suchy's opinion more persuasive than Dr. Neal's opinion. Dr. Neal testified that Petitioner has adhesive capsulitis that was not caused by the work accident and there was no worsening of his condition. Dr. Neal relates Petitioner's condition to either a thyroid dysfunction or an idiopathic cause. The Commission finds no support for Dr. Neal's opinion. Dr. Neal first stated that Petitioner had a symptomatic shoulder prior to the accident. However, no medical records were offered supporting that Petitioner was under any active medical treatment prior to the accident or that he needed any work restrictions. Dr. Neal also relates Petitioner's adhesive capsulitis to his alleged thyroid dysfunction. Dr. Neal's opinion ignores the fact that Petitioner's condition became symptomatic while working. Further, Dr. Neal acknowledged that he did not have the "smoking gun evidence" that Petitioner has thyroid dysfunction. There are also no records supporting that Petitioner was actively treating for a thyroid dysfunction prior to the injury. Dr. Neal's opinion is speculative at best.

The Commission finds Dr. Suchy's opinion more persuasive. Based upon his examination of the Petitioner, he opined that Petitioner's condition was related to the accident. He examined the MRI and found a direct relationship between his work injury and the development of a traumatic tear of the superior labrum and biceps anchor of the shoulder. His opinion is supported by the fact that Petitioner sustained an accident on March 15, 2021, was under no active medical treatment prior to the injury, was able to work full duty and without restrictions prior to the accident, and only received restrictions after the accident.

Based upon the above, the Commission finds that Petitioner established that his right shoulder condition is causally related to the March 15, 2021 accident. As Petitioner established that his right shoulder condition is causally related to the work accident, the Commission finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Suchy.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on December 27, 2021, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for prospective medical treatment as recommended by Dr. Suchy.

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

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

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

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

Bond for 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.

July 26, 2022

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

CAH/tdm
O: 7/21/22
052

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC015425
Case Name	GARCIA, ALFREDO v. SMITHFIELD FOODS, INC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Frank Soto, Arbitrator

Petitioner Attorney	Andrew Kriegel
Respondent Attorney	Heather Boyer

DATE FILED: 12/27/2021

/s/Frank Soto, Arbitrator

Signature

INTEREST RATE WEEK OF DECEMBER 21, 2021 0.16%

STATE OF ILLINOIS)
)SS.
COUNTY OF DUPAGE)

22IWCC0276

☐ 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)

ALFREDO GARCIA,
Employee/Petitioner

Case # **21 WC 15425**

v.

Consolidated cases:

SMITHFIELD FOODS, INC.,
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **FRANK SOTO**, Arbitrator of the Commission, in the city of **GENEVA**, on **November 23, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

K. ☒ Is Petitioner entitled to any prospective medical care?
L. ☐ What temporary benefits are in dispute?

☐ TPD ☐ Maintenance ☐ TTD

M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☐ Other

FINDINGS

On the date of accident, **December 16, 2021**, 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 $**44,364.84**; the average weekly wage was $**853.17**.

On the date of accident, Petitioner was 45 years of age, ***single*** with **2** dependent children.

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

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

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

ORDER

No benefits are awarded, as set forth in the Conclusions of Law attached hereto and incorporated 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.

By: /o/ Frank J. Soto

Arbitrator **December 27, 2021**

ICArbDec19(b)

Procedural History

This case was tried on November 23, 2021 pursuant to Sections 19(b) and 8(a) of the Act. The issues in dispute are whether Petitioner sustained an accidental injury that arose out of and in the course of his employment, whether Petitioner's current condition of ill-being is causally connected to this injury and whether Petitioner is entitled to prospective medical care. (Arb. Ex.# 1).

Findings of Fact

Testimony of Alfredo Garcia

Alfredo Garcia (hereafter referred to as "Petitioner") testified he had been employed by Smithfield Foods (hereafter referred to as "Respondent") since August 10, 2010, working in Raw Utility. (Trial Transcript, pages 1-11, 42). Petitioner alleged he sustained an accident at work on March 15, 2021, while performing his job as Raw Utility. He testified the Raw Utility position consisted of performing every single position at the manufacturing level, which included spices, blender operator, and set-up. (Tx. Pg. 11-12). He testified set up of the grinder included putting a plastic ring around the end of the worm/auger and pushing it inside the grinder. (Tx. Pg. 13). To perform the function, he had to place both hands on a handle, push the handle up and then slide the worm all the way into the grinder. (Tx. Pg. 14, 16, 20-21).

To explain the set-up process more thoroughly, Petitioner testified to various pictures provided by Respondent, identified as Respondent Exhibits 4 A-D. (Rx. 4A-D). Petitioner testified picture 4A was a picture of the worm/auger used in the set-up process. (Tx. Pg. 68-69). He testified the auger/worm was suspended in the air by a crane with all the weight held by the crane. (Tx. Pg. 69). He testified pictures 4C and 4D show the end of the auger and beginning of the grinder and explained how they matched up with male and female parts, like that of a plug in a wall. (Tx. Pg. 70).

If the male and female parts did not line up, Petitioner testified he had to pull the auger back out, and then smack it back in, bring it out, smack it back in, sometimes performing the maneuver five to six times. (Tx. Pg. 19). He testified, that once the female and male parts matched up, the auger slides right into the grinder. (Tx. Pg. 78).

In addition to the set-up position, Petitioner testified he performed the Frozen Grinder position, which entailed pulling 60-pound boxes from a pallet (which was lifted up or down automatically with the push of a button), onto a conveyor, removed the box by flipping it over onto the conveyor where the meat gets put into the grinder to be ground up. (Tx. Pg. 22-23). He would have to pull approximately 16 boxes onto the conveyor. (Tx. Pg. 24).

Petitioner testified he first developed right shoulder problems in late November 2020. (Tx. Pg. 25). On direct examination, he testified he told his Supervisor, Rick Duran about his right shoulder pain in November of 2020 and was moved from the set-up position for a month but return to that position in March of 2021. (Tx. 26-27). Petitioner testified on March 15, 2021 he developed new and different pain in his right shoulder. When asked how he injured his right shoulder on March 15, 2021, Petitioner testified he put in the grinder and noticed a sharp pain in his shoulder right away. He noticed the pain when he brought his hand, and arm down and he told his Supervisor,

Rick Duran he had pain in his shoulder. (Tx. Pgs. 26- 27). He also testified he felt pain when performing the frozen grinder position later that same that date. (Tx. Pg. 27-28). As questioning proceeded, he testified he injured his shoulder was from repetitive work performing both the set up and frozen grinder positions. (Tx. Pg. 30).

When asked about notice to the Employer on March 15, 2021, Petitioner testified he grabbed his shoulder and noticed his Supervisor was behind him. He described the Supervisor as a man by indicating, "he saw me touching my shoulder". (Tx. Pg. 28). Later during direct examination, Petitioner testified he reported the March 15, 2021 injury to his other Supervisor, Laurie DuBose (Tx. Pg. 31-32). After reporting the incident to Ms. DuBose, Petitioner testified he sought medical treatment with the in-house therapist and thereafter Tyler Medical Services. (Tx. Pg. 33).

At Tyler Medical Services, Petitioner testified he told the doctor he felt a sharp pain on his shoulder from working the frozen grinder and performing set-ups in the morning. (Tx. Pg. 34). Petitioner testified he reported his shoulder pain due to repetitive work and he noticed it was hurting more and more. (Tx. Pg. 34). On cross examination, Petitioner denied telling Tyler Medical Services that emptying frozen bags of meat, or any part of that activity was the reason he was seeking medical treatment. (Tx. 48-49). He denied telling Tyler Medical Services that he had been experiencing right shoulder discomfort for nine months prior to his first visit on March 19, 2021. (Tx. Pg. 46).

Petitioner testified he underwent an MRI of the right shoulder and was referred to Dr. Theodore Suchy. (Tx. Pgs. 35-36). He testified Dr. Suchy gave him a shot into his right shoulder which did not help. (Tx. Pg. 36). He testified he told Dr. Suchy his right shoulder pain developed from working on the frozen grinder and setting up the grinder at work. (Tx. Pg. 37). On cross examination, Petitioner denied telling Dr. Suchy that his pain had been present since June 2020. (Tx. Pg. 50).

Petitioner testified he was sent to Dr. Bryan Neal for a Section 12 Examination on May 19, 2021, after which no additional treatment was authorized. (Tx. Pgs. 38, 54). Petitioner denied telling Dr. Neal that he was unsure when his right shoulder pain or symptoms began. (Tx. Pg. 54). When pressed on the issue, Petitioner denied telling Dr. Neal his pain began in the fall of 2020. (Tx. Pg. 56). He also denied telling Dr. Neal that he sought treatment at the Art Clinic around Thanksgiving of 2020. (Tx. Pg. 60). Thereafter Petitioner testified that he received treatment at the Art Clinic and Tyler Medical Services around Thanksgiving of 2020. (Tx. Pgs. 60-61). Petitioner also denied telling multiple medical providers his pain began in June 2020 and that he denied providing three different time periods which his right shoulder pain began. (Tx. Pgs. 56, 62).

Petitioner testified he told the Art Clinic, Tyler Medical Services and Dr. Suchy that his right shoulder pain occurred from performing the set-up activity. (Tx. Pgs. 58-59). In terms of pre-accident medical conditions and medications, Petitioner testified he told Tyler Medical Services about his thyroid medication and acute and chronic medical conditions. (Tx. Pgs. 63-64). Yet, also testified he failed to disclose his medication and past acute/chronic medical conditions when seen by Dr. Suchy. (Tx. Pg. 64). Petitioner then testified Dr. Neal was the only physician he saw for this alleged injury who was aware of his hypothyroid medication. (Tx. Pg. 65).

The Arbitrator does not find the testimony of Petitioner to be credible regarding the onset of his symptoms and accident.

Medical Records/Treatment

Petitioner was first seen for treatment at the In-House, ART Clinic on March 16, 2021. He reported right shoulder discomfort which had been present for approximately nine months. He believed it was related to stock prepping. Petitioner reported his pre-session discomfort level as 9/10 and that his post session discomfort rating was 6/10. (Petitioner's Exhibit 4, Px. 4).

Petitioner was then seen at Tyler Medical Services on March 19, 2021 for initial evaluation of right shoulder pain that had been bothering him for "about nine months". (Px. 5). Petitioner reported that recently he had been emptying bags of frozen meat which caused increased shoulder pain. (Px. 5).

On physician examination, Petitioner was a 45-year-old male, 5'5" tall, weighing 212 pounds. The examination noted no visual deformity, prominence of the acromioclavicular region or ecchymosis in the right shoulder. (Px. 5). Petitioner had tenderness directly overlying the right AC joint. Petitioner had pain with abduction past 90°. The Jobe and empty can tests caused pain and weakness. Petitioner had a positive acromioclavicular impingement sign but had a negative Speed's sign with no evidence of bicipital rupture and the X-rays of the right shoulder were negative. (Px. 5).

Petitioner was diagnosed with chronic right shoulder pain, possible acromioclavicular impingement versus rotator cuff tear. The records state since the condition had existed for nine months, a diagnostic MRI was recommended. Petitioner was issued work restriction of no lifting, pushing, or pulling over 25 pounds. He was precluded from above shoulder level reaching or lifting.

On April 2, 2021 Petitioner was seen at Preferred Open MRI for an MRI of the right shoulder without contrast. (Px. 5). The radiologist interpreted the report to reveal a superior labrum tear/maceration but an intact rotator cuff. (Px. 5).

Following the MRI, Petitioner was referred to Dr. Theodore Suchy, for an orthopedic consultation, which took place on April 8, 2021. At that visit, Petitioner reported pain in the right shoulder which had been ongoing since June of 2020. Petitioner also reported working with a company for 10 years performing repetitive motions such as pushing and pulling grinder pieces. (Px. 6).

Petitioner received a cortisone injection into the right shoulder and was referred to physical therapy for a glenoid labrum tear and biceps tendinitis. Petitioner was kept on light duty including no lifting more than 25 pounds and no overhead lifting. (Px. 6).

Petitioner returned to Dr. Suchy on April 29, 2021. On physical examination of the right shoulder, Petitioner reported pain and tenderness over the biceps tendon, the O'Brien's test, Speed's test were positive and Petitioner also had a Neer sign. Physical therapy was recommended. (Px. 6).

Petitioner's restrictions were altered to include no pushing or pulling or lifting or carrying greater than 20 pounds with the right arm. (Px. 6).

Petitioner underwent an IME with Dr. Bryan Neal on May 19, 2021. (Rx. 2). Dr. Neal testified he was a Board Certified, and licensed Orthopedic Surgeon with a fellowship in hand and upper extremity surgery. (Rx. 2 Pgs. 5-6). Dr. Neal testified Petitioner reported his right shoulder pain began "roughly about a year ago". (Rx. 2, Pg. 12). Dr. Neal testified Petitioner attributed the right shoulder pain to his work activities and duties in general and overall. (Rx. 2, Pg. 12). He testified Petitioner never put forth that he ever once specifically injured his shoulder at any moment in time or from any specific injury or event but rather in was the process of working and more specifically it was the set-up work that he had done, in his opinion, for 10 years. (Rx. 2. Pg. 12-13).

Dr. Neal testified the set-up activity was the only job activity Petitioner attributed to causing his shoulder condition. (Rx. 2, Pg. 15, 17). Dr. Neal testified the set-up activity would be performed when he first came to work and he would have to move a worm, which was a slang term for a metal bar or piece of steel associated with a crane. He would push on the worm to get the ends together. (Rx. 2. Pg. 17).

Dr. Neal testified it was his understanding Petitioner did not have a specific work injury on any date, March 15, 2021 or otherwise, but rather it was purely the process of work over a long time that caused his shoulder condition. (Rx. 2, Pg. 18). Dr. Neal testified Petitioner told him he first sought medical care for his right shoulder around Thanksgiving of 2020. (Rx. 2, Pg. 18). Dr. Neal confirmed that if the company medical records were absent of any treatment by Petitioner around Thanksgiving of 2020, it would be inconsistent with what Petitioner reported to him. (Rx. 2, Pg. 19).

When asked about prior medical treatment, Dr. Neal testified Petitioner initially indicted he had no medical issues, but Petitioner was taking "pills" for his neck or throat condition. (Rx. 2, Pg. 20). Dr. Neal reviewed Petitioner's examination and testified it was highly abnormal for Petitioner's external and internal rotation to both be limited by about 50 percent when the right shoulder was partially abducted, but it was an excellent telltale sign of adhesive capsulitis. (Rx. 2, Pg. 24). He testified you should never get a fixed range of motion in such a young person. (Rx. 2, Pg. 25). He testified internal rotation is one of the most sensitive range of motion movements to lose. (Rx. 2, Pg. 25). However, when asked to actively rotate behind his back, the right side was diminished by 15 centimeters, which Dr. Neal testified was consistent with the diagnoses he provided. (Rx. 2, Pgs. 25-26).

He further testified Petitioner's reduced range of motion on the right shoulder told us he had significant limitation in passive range of motion, which meant the soft tissues around the joint won't let it move which again was a telltale sign of adhesive capsulitis. (Rx. 2, Pgs. 27-28). He testified, so you can have a normal labrum. You can have an intact rotator cuff. You can have no arthritis. You can have normal nerves, but you can have very painful and stiff shoulder that has significant limited active and passive range of motion. And in the face of normal x-rays, that's the textbook classic appearance of adhesive capsulitis, significant global shoulder limitation of active

and passive range of motion in the face of normal x-rays and a normal MRI. (Rx. 2, Pgs. 28-29). He further testified Petitioner's positive anterior glide test was also a sign of adhesive capsulitis. (Rx. 2, Pg. 29).

Dr. Neal testified he reviewed medical records from Tyler Medical Services, yet the mechanism of injury as Petitioner reported to Tyler Medical Services was not consistent with what he reported to Dr. Neal in terms of when his pain developed or what activity caused his pain. (Rx. Pg. 31-32). Dr. Neal also testified the March 19, 2021 prescription for Petitioner's MRI mentioned Petitioner was bodybuilder, very wide in his shoulders and may need to have an open MRI despite Petitioner denying any hobbies or gym memberships. (Rx. 2, Pgs. 32-33). He testified he reviewed the April 8, 2021 report of Dr. Suchy which referenced a date of onset in June of 2020, which was also inconsistent with what Petitioner reported to Dr. Neal. (Rx. 2, Pg. 33-34). Notably, during Dr. Neal's cross examination testimony, Petitioner's Attorney asked Dr. Neal to confirm Petitioner's manifestation date began in 2020. (Rx. 2, Pgs. 56-57).

Dr. Neal testified when Petitioner was examined by Dr. Suchy on April 8, 2021, and April 29, 2021 Dr. Suchy did not assess his range of motion. (Rx. 2, Pg. 35). He testified Dr. Suchy did not document normality or abnormality of either passive of active range of motion, therefore, he would not be able to opine that adhesive capsulitis was present or not present. (Rx. 2. Pgs. 35-36).

Dr. Neal testified he diagnosed Petitioner with right shoulder adhesive capsulitis and opined it was due to one of two possible causes, the first being his thyroid dysfunction, totality of the medical records reviewed, history, physical and diagnostic testing or idiopathic in nature. (Rx. 2, Pgs. 37-40). Whether he had a thyroid condition was not part of the foundation for making the diagnosis, but it was an excellent explanation as there were two universally recognized conditions associated with adhesive capsulitis: diabetes, and thyroid dysfunction. (Rx. 2, Pgs. 38-40). Further, Dr. Neal testified his diagnosis was not causally related to an aggravation, of a pre-existing condition as there was no permanent worsening and Petitioner's work activities would actually be part of a shoulder mobility program that would be helpful as movement of the shoulder, and stretching, are encouraged as treatment for frozen shoulder. (Rx. 2, pg. 41-42). Dr. Neal testified adhesive capsulitis was associated with immobility not repetitive activities. (Rx. 2. Pg. 62).

When asked about the MRI findings, Dr. Neal testified a labrum tear can suffer degenerative tearing over time and get worse with age. As such, he did not consider some labral tearing to be an abnormal finding. He testified there were plenty of people who had a painless shoulder, but if they were to get an MRI, they could have some labral tearing with no symptoms. So, a labral tear could be an abnormality, but not always. (Rx, 2, pg. 52).

Dr. Neal testified he did not believe Petitioner had a clinically significant labral tear as you would not expect a labral tear to produce the symptom complexes and complaints he had. He testified, "Petitioner could have some labral fraying, which was an earlier type of tear, or labral maceration. Wear and tear were not abnormalities in life, but rather normalities in life. But the real question was not whether he had a perfectly normal labrum, but whether he had some labral abnormality which was producing a clinical situation and Dr. Neal testified he would not expect that to be the case. Said differently, if you did a procedure and you only operated on the labrum, I think he

would principally have the same condition and the same complaints he has now because the labrum is not causing his current shoulder symptom complex". (Rx. 2, pgs. 66-67)

Following the Section 12 IME, Petitioner testified he was last seen by Dr. Suchy on May 24, 2021 at which time he recommended physical therapy. (Tx. Pg. 65).

Ricardo Duran Testimony

Ricardo Duran testified as Respondent's witness. He testified he was employed by Smithfield Foods in St. Charles, Illinois as a Production Supervisor. He had been the Production Supervisor for three years, including March 15, 2021. (Tx. Pgs. 80-81). As the Production Supervisor, he had 53 people report to him and he ran the production floor during the day and the set-up process in the morning. (Tx. Pg. 81).

Mr. Duran testified that the set-up process was the first hour of the day between 3:00 am and 4:00 a.m. including pulling out clean vats, pulling out meat, spices and assembling the machines. (Tx. Pgs. 81-82).

Mr. Duran testified Petitioner was one of the 53 people who reported to him. He testified Petitioner was employed as Raw Utility between June of 2020 and March 15, 2021. Raw Utility was a catch-all position, meaning the employee needed to know all six positions on the production floor, including receiving dock, service person, frozen grinder, fresh grinder, blender, and wolf king. (Tx. Pg. 82-86). The positions usually switched week to week, but the set-up process was the same every morning. (Tx. Pg. 87).

Mr. Duran testified the set-up process involves assembly of the machines, specifically the grinders. (Tx. Pg. 87-88). Assembly included connecting the auger/worm to a grinder by guiding the end of the auger into the beginning of the grinder.

Mr. Duran testified to pictures he took the morning of trial regarding the auger and grinder. (Tx. Pg. 88). He testified picture 4A depicted the auger/worm held by a cross beam and support bracket. He testified the full weight of the auger was supported by the beam with no weight distributed to the employee. (Tx. Pg. 89). To get the auger into the grinder, he testified the grinder needed to be aligned with the cross beam and once aligned/lined up, the employee simply guided the auger into the grinder. (Tx. Pg. 90). He testified that if it is lined up correctly, it does not take a whole lot of force to simply push it in. (Tx. Pg. 90). He testified all augers, whether they are big or small are all held by a crane that distributes the full amount of weight, with both cranes on wheels that slide the auger in and out of the grinder. (Tx. Pg. 111-112). He testified he had seen augers pushed in with the use of two fingers. (Tx. Pg. 113).

He further testified to Picture 4C which was the grinder/male end and 4D which was the auger/female end. (Tx. Pg. 91). Picture 4B had a 5'4' women holding onto a bar that allowed the employee to guide the auger into the grinder. (Tx. Pg. 91). If the female and male parts did not line up, the employee would slide the auger back out slightly and realign it. He testified this could be done using one hand. (Tx. Pgs. 91-92). Mr. Duran testified there would be no time when an employee would be smacking the auger into the grinder to connect the two. (Tx. Pg. 92).

Mr. Duran testified Petitioner never reported any injury to his right shoulder in June of 2020 or the fall of 2020. (Tx. Pg. 92). Rather he testified he was performing rounds in the fall of 2020, and he was asking everyone how they were doing. Petitioner mentioned in passing he had soreness in his arm but went on and chatted about other things. At no point during the conversation did Petitioner indicate his soreness was due to his job duties or position at work. (Tx. Pgs. 93-94). Mr. Duran testified Petitioner never reported right shoulder pain due to work duties prior to March 15, 2021. (Tx. Pg. 94).

Mr. Duran testified at no point between June 2020 and March 14, 2021 did Petitioner ever request a less demanding job, request to be moved to a different job, work a different job or request help from co-workers to perform the essential functions of his job. (Tx. Pgs. 94-95). Mr. Duran testified Petitioner was able to perform the full function of every job he was assigned between June 2020 and March 14, 2021. (Tx. Pg. 96). Petitioner also never requested to be seen at the In-House ART Clinic between June 2020 and March 14, 2021. (Tx. Pg. 96).

Mr. Duran testified he first became aware of Petitioner's alleged injury on March 15, 2021, when Petitioner approached him on the production floor and stated he had right shoulder soreness which he "thought" was from assembling the auger. Mr. Duran asked Petitioner whether he knew it was from assembly or whether he thought it was from assembly and Petitioner stated he "thought" it was from assembly. (Tx. Pgs. 97-98). Mr. Duran then directed Petitioner to the Safety Manager.

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 his claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill.App.3d 706, 714 (Ill. App. 5th Dist. 1992).

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 & 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). Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Id.* A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating or accelerating his preexisting condition. *Id.* at 204-05. An employee who alleges injury based on repetitive trauma must "show[ ] that the injury is work related and not the result of a normal degenerative aging process." *Belwood*, 115 Ill. 2d at 530. In repetitive-trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

Whether an accident aggravated or accelerated a preexisting condition is a factual question to be decided by the Commission. *Sisbro*, 207 Ill. 2d at 205. Where the claimant alleges accidental injuries caused by a repetitive trauma, it is for the Commission to determine whether a claimant's disability is attributable solely to a degenerative condition or to an aggravation of a preexisting condition due to a repetitive trauma. *Cassens Transport Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 331 (1994).

To establish causation in a repetitive-trauma case, a claimant must present medical testimony establishing a causal connection between the work performed and claimant's disability (*Nunn*, 157 Ill. App. 3d at 477), and must show that the injury is work related and "not the result of a normal degenerative aging process." *Belwood*, 115 Ill. 2d at 530.

With respect to issue (C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent; (F), whether Petitioner's current condition of ill-being is causally related to the Injury and (K) whether Petitioner entitled to prospective medical care, the Arbitrator finds the following:

The Arbitrator adopts the above findings of fact in support of the conclusions of law set forth below. The Arbitrator finds Petitioner failed to prove by the preponderance of the evidence, that he sustained an accident that arose out of and in the course of his employment with Respondent. The Arbitrator further finds, assuming Petitioner proved that he sustained an accident that arose out of and in the course of his employment, Petitioner failed to prove by the preponderance of the evidence that his current condition is causally related to an alleged work accident occurring on March 15, 2021.

The Arbitrator finds that Petitioner's condition has no connection to the alleged manifestation date. Petitioner testified he never sought treatment in November 2020, he continued to work without any lost time and the pain he felt in November 2020 was completely different than the pain he felt on and after March 15, 2021. (Tx. Pgs. 26-27).

Petitioner failed to give a consistent or credible history of the alleged events. It is the province of the Commission to judge the credibility of witnesses, draw reasonable inferences from testimony, and determine the weight to be given testimony. *S & H Floor Covering, Inc. v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 259, 266 (2007). Petitioner alleged he reported right shoulder pain in November 2020 during a conversation he had with his Supervisor Rick Duran. He testified he told Mr. Duran, about his right shoulder pain in November 2020, and as a result Mr. Duran moved him away from the set-up position for one month. (Tx. pgs. 25-27). Petitioner further testified he returned to the set-up job in March of 2021, at which time he developed new and different pain in his shoulder. (Tx. Pgs. 26-27).

The Arbitrator notes Petitioner testified he was moved off the set-up position for one month, after a conversation with MR. Duran in November of 2020, only to returned to the set-up position in March of 2021. If Petitioner had been moved away from the set-up position for one month, as he testified, Petitioner would have returned to the set-up position by late December or early January 2021, and not in March of 2021, as he testified.

The Arbitrator also notes that Mr. Duran testified Petitioner only mentioned right shoulder soreness in the fall of 2020 during a passing conversation, with no formal allegation or documented report that his soreness was in any way related to his job, or more specifically the set-up position. Contrary to Petitioner's testimony that he was moved off the set-up position for a month, Mr. Duran testified Petitioner worked in the full performance of his job in Raw Utility, performing all positions, between June 2020 and March 14, 2021. Mr. Duran further testified that, during the same period, Petitioner never requested a less demanding job, never requested to be moved to a different position and never requested help from co-workers to perform the essential functions of his job. (Tx. pg. 93-96).

Additionally, despite Petitioner's testimony his right shoulder pain began in November 2020 but changed on March 15, 2021, the medical records from the In-House ART Clinic, authored on March 16, 2021, show that Petitioner reported right shoulder symptoms for nine months, which the Arbitrator notes would have been June of 2020. (Px. 4). The medical records from Tyler Medical Services, authored on March 19, 2021, state that Petitioner reported his right shoulder had been bothering him for about for nine months, which the Arbitrator notes would be June of 2020. (Px. 5). When Petitioner was seen by Dr. Suchy, on April 8, 2021, Petitioner reported ongoing right shoulder pain since June 2020. (Px. 6). Petitioner denied telling the three providers that his pain began in or around June 2020. (Tx. pgs. 46, 50, 56, 62). The courts presume that when a person seeks treatment for an injury, he will not falsify statements to a physician from whom he expects to receive medical aid. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill.2d. 590, 592, 119 N.E. 2d 224, 226 (1954). The Arbitrator finds Petitioner's trial testimony regarding the onset of his symptoms not to be credible. 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 IL.W.C. 004187 (Ill. Indus. Comm'n 2010).

Petitioner's inconsistent report of injury continued during his Independent Medical Examination with Dr. Neal on May 19, 2021. Dr. Neal testified Petitioner initially reported his right shoulder pain began "roughly about a year ago", which the Arbitrator notes would have been May or June of 2020. (Rx. 2, pg. 12). Petitioner then told Dr. Neal, he "thought" it might have been around the fall of 2020. [Emphasis Added]. (Rx. 2, Pg. 12). However, Petitioner repeatedly denied any issues with his right shoulder in June of 2020, he did not lose any time from work in June of 2020, did not seek any medical treatment for his right shoulder until March 16, 2021. (Tx. pg. 43).

Petitioner's third alleged date of accident or manifestation date was March 15, 2021. The Arbitrator finds Petitioner's testimony as to the March 15, 2021 date of accident to be the most concerning in terms of his credibility. Petitioner first testified his right shoulder pain changed from his initial pain he experienced in November 2020 to new and different pain while at work on March 15, 2021 as he was putting in a grinder. (Tx. pg. 26-27). Petitioner testified he noticed a sharp pain on his shoulder "right away", and then brought his hand and arm down. He stated he told his Supervisor he had pain in his shoulder. (Tx. pg. 27). Mr. Duran testified assembly of the grinder occurred first thing in morning between 3:00 a.m. and 4:00 am before any other activities, such as Frozen Grinder position, could be performed in the plant. After allegedly reporting the injury to his Supervisor, Petitioner then testified he was also working on the frozen grinder position

and when he put the boxes in for the grinder, he experienced shoulder pain and as he grabbed his shoulder, he noticed his male Supervisor standing right behind him who asked Petitioner what was wrong. (Tx. pg. 27-28).

However, a few questions later Petitioner alleged he reported the March 15, 2021 injury to his female Supervisor, Laurie Dubose. (Tx. pg. 32). Up until this point, all prior references regarding reporting the injury were to a male Supervisor.

In contrast to Petitioner's testimony, Mr. Duran testified he first became aware of Petitioner's alleged injury on March 15, 2021, when Petitioner approached him on the production floor and stated he had right shoulder soreness which he "thought" was from assembling the auger. Mr. Duran asked Petitioner whether he knew it was from assembly of the auger or whether he thought it was from assembly of the auger and Petitioner stated he "thought" it was from assembly of the auger. (Tx. Pgs. 97-98). At that point, he felt Petitioner had reported a work incident and Mr. Duran immediately sent Petitioner to Sara Neff, the Safety Manager. (Tx. pgs. 97-98).

Petitioner then testified his right shoulder pain was from repetitive trauma from performing both the set-up and frozen grinder positions. Petitioner's testimony regarding the accident is not credible. First, Petitioner is asking this Court to believe that he sustained an injury between 3:00 a.m. to 4:00 a.m., on March 15, 2021, reported the same to Mr. Duran but continued working, only to injure himself, again, later the same date performing the frozen grinder position. Petitioner's testimony is not consistent with the testimony of Mr. Duran who testified that Petitioner reported the injury and claimed he "thought" his shoulder pain may be due to the set-up activity. Petitioner's testimony that he also injured his right shoulder on the frozen grinder position later the same date, after reporting the first possible injury, appears to be self-serving statement intending to bolster his case and not credible.

Petitioner's testimony consistently referenced a male Supervisor, and Mr. Duran testified he was that male Supervisor. However, when Petitioner later alleges that he gave notice to a female Supervisor, when all prior questions and answers reference a male supervisor, shows a lack of credibility. Based on the above, the Arbitrator gives very little weight to Petitioner's testimony as to when his alleged complaints of pain began and whether he sustained an accident which arose out of his employment. It is the province of the Commission to judge the credibility of witnesses, draw reasonable inferences from testimony, and determine the weight to be given testimony. *S & H Floor Covering, Inc. v. Workers' Compensation Comm'n*, 373 Ill. App. 3d 259, 266 (2007).

In addition to Petitioner's failure to establish when his right shoulder complaints began, the Arbitrator finds he also failed to establish what allegedly caused his right shoulder pain. Petitioner worked in Raw Utility, which was described by Mr. Ricardo Duran, Respondent's witness, as a catch all position, encompassing six separate and distinct jobs. (Tx. Pg. 82). The Arbitrator notes the two distinct jobs at issue involved the set-up position and frozen grinder position. Mr. Duran testified the set-up position was the only part of the Raw Utility position that had to be performed daily. (Tx. Pg. 82). The other positions, including the frozen grinder position, varied week to week. (Tx. Pg. 87).

Mr. Duran testified in the set-up position; the employee assembles grinders. (Tx. Pg. 87-88). To assemble the grinder, the employee is tasked with guiding an auger/worm, which was depicted in Respondent Exhibit 4A as a large cylindrical metal bar, into the grinder machine. Petitioner testified the auger/worm is held by a cross beam and support bracket, with the full weight of the auger being supported by the beam and absolutely no weight distributed to the employee. (Tx. Pgs. 69-70). He further testified, that once the female and male parts match up, the auger *slides* right into the grinder. (Tx. Pg. 78). He acknowledged that matching the female and male parts of the auger to the grinder was like that of attaching a plug into a wall socket. (Tx. Pg. 70-71).

Despite this admission, and Petitioner's use of the word "slide" several times in his testimony, Petitioner spent a good portion of his direct testimony trying to convince the court he had to use a significant amount of physical force to push the auger into the grinder, essentially creating right shoulder pain. He went so far as to allege that if the two parts did not match up, he would have to repeat the function up to 5-6 times, "smacking" the two parts together. (Tx. Pgs. 19-20). Notably, the Arbitrator notes there was no testimony that any part of this position had to be performed at or above shoulder level.

In contrast to this testimony, Respondent witness, Mr. Duran testified consistently that the assembly of the grinder and its connection to the auger could be done with one hand. In fact, he testified he had seen the auger and grinder connected using as little as two fingers to slide it in and out. (Tx. Pgs. 113). The Arbitrator notes the mere fact that both witnesses used the term "slide" in and out to describe connecting the auger and the grinder implies lack of significant force. The Arbitrator does not find Petitioner's testimony credible that he was required to apply force to connect the auger to the grinder.

In the Frozen Grinder position, Petitioner would have to pull/slide 60-pound boxes from a pallet (which lifted up or down automatically with the push of a button), onto a conveyor, and then remove the box by flipping it over onto the conveyor. From there, the conveyor dumps the meat into the grinder to be ground up. (Tx. Pg. 22-23). He would have to pull/slide approximately 16 boxes off the pallet. (Tx. Pg. 24). This job description was corroborated by Ricardo Duran but Mr. Duran testified there was no lifting required in the position.

Petitioner testified he experienced right shoulder on March 15, 2021 working on the grinder and performing set-up. He testified he noticed a sharp pain on his shoulder "*right away"* when he brought his hand and arm down. Petitioner stated he told his Supervisor he had pain in his shoulder. (Tx. pg. 27). After allegedly reporting the injury to his Supervisor, Petitioner then testified he was putting boxes in for the grinder, he experienced shoulder pain. Petitioner then testified his right shoulder pain was due to repetitive work performing both the set-up and frozen grinder positions.

In comparing Petitioner's medical records to his testimony, the Arbitrator finds that although Petitioner reported to Dr. Neal, the IME, that he "thought" the main culprit of his pain was from the set-up position, medical records from the ART In-House Clinic on March 16, 2021, showed Petitioner reported his pain was from stock prepping. (Tx. pgs. 44-45). However, Petitioner denied the same during his testimony and claimed he had no knowledge of stock prepping. (Tx.

pg. 45).

When seen at Tyler Medical Services on March 19, 2021, medical records show Petitioner reported his right shoulder pain began from emptying frozen bags of meat. (Tx. pg. 48). Petitioner again denied reporting the same during his testimony. (Tx. pgs. 45-46).

When he was seen by Dr. Suchy on April 8, 2021, medical records show Petitioner reported his right shoulder pain began from performing repetitive work on the grinder machine. (Tx. pg. 50-51). Petitioner agreed with that portion of the medical record from Dr. Suchy but disagreed with other portions of that same record wherein it referenced that his pain began in June 2020. (Tx. pgs. 50).

For the same reasons outlined above when discussing Petitioner's lack of credibility in establishing when his alleged complaints of right shoulder pain began, the Arbitrator finds the same rationale can be applied as to what job activity allegedly caused the pain. Petitioner routinely admitted he "thought" the pain was from the set-up position, only to then allege it was also from the frozen grinder job, and finally to then claim it was due to repetitive trauma performing both jobs. In repetitive-trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987).

Based upon Petitioner's lack of credibility as to when his pain began and what activity caused his pain the Arbitrator finds Petitioner failed to establish that his accident arose out of and in the course of his employment with Respondent.

As Petitioner cannot prove that his accident arose out of and in the course of his employment, the Arbitrator also finds Petitioner's current condition of ill-being is not causally related to the injury. Dr. Neal, Respondent's IME, testified he diagnosed Petitioner with right shoulder adhesive capsulitis. (Rx. 2, Pgs. 37-40). To make a formal diagnosis of adhesive capsulitis Dr. Neal, testified first a proper examination must be performed and must include testing for active and passive range of motion as limited rotation was a telltale sign of adhesive capsulitis. (Rx. 2, pg. 24). Dr. Neal testified Suchy failed to document normality or abnormality of either passive of active range of motion, therefore, he would not be able to opine that adhesive capsulitis was present or not present. (Rx. 2. Pgs. 35-36).

Further, Dr. Neal testified adhesive capsulitis is typically related to one of two possible causes, the first being his thyroid dysfunction and the second being idiopathic. Dr. Neal testified whether he had a thyroid condition was not part of the foundation for making the diagnosis, but it was an excellent explanation as there were two universally recognized conditions associated with adhesive capsulitis: diabetes, and thyroid dysfunction. (Rx. 2, Pgs. 38-40). The Arbitrator notes none of Petitioner's treating physicians, including the In-House Art Clinic, Tyler Medical Services or Dr. Suchy were aware of any prior acute or chronic conditions, nor were they aware Petitioner was on thyroid medication for hypothyroidism. (Tx. pg. 64).

Further, Dr. Neal testified his diagnosis was not causally related to an aggravation, of a pre-existing condition as there was no permanent worsening and Petitioner's work activities would actually be part of a shoulder mobility program encouraged as treatment for frozen shoulder. (Rx. 2, pg. 41-42).

Lastly, when asked to address the discrepancy between his diagnosis of adhesive capsulitis and the partial labrum fraying noted in the MRI findings, Dr. Neal testified he did not believe Petitioner had a clinically significant labral tear as you would not expect a labral tear to produce the symptom complexes and complaints he had. He testified, "Petitioner could have some labral fraying, which was an earlier type of tear, or labral maceration. Wear and tear are not abnormalities in life, but rather a normality in life. But the real question was not whether he had a perfectly normal labrum, but whether he had some labral abnormality which was producing a clinical situation and Dr. Neal testified he would not expect that to be the case. Said differently, if you did a procedure and you only operated on the labrum, he would principally have the same condition and the same complaints he has now because the labrum is not causing his current shoulder symptom complex". (Rx. 2, pgs. 66-67)

Because Petitioner failed to prove by the preponderance of the evidence that he sustained an accidental injury that arose out of and in the course of his employment and failed to prove that his current condition of ill-being is causally related to a work accident, Petitioner's request for prospective medical care is hereby denied.

By: */o/ Frank J. Soto*
Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC008879
Case Name	Ryan Muench v. University of Illinois Medical Center Pathology Lab
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0277
Number of Pages of Decision	14
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Patrick Shifley
Respondent Attorney	John Fassola

DATE FILED: 7/27/2022

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ryan A. Muench,

Petitioner,

vs. NO: 15 WC 8879

University of Illinois,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, permanent partial disability, causal connection, prospective medical expenses, notice, 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 November 1, 2021, is hereby affirmed and adopted.

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

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

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

July 27, 2022
MP:yl
o 7/21/22
68

/s/ *Marc Parker*
Marc Parker

/s/ *Carolyn M. Doherty*
Carolyn M. Doherty

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC008879
Case Name	MUENCH, RYAN v. UNIVERSITY OF ILLINOIS MEDICAL CTR PATHOLOGY LAB
Consolidated Cases	No Consolidated Cases
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Raychel Wesley, Arbitrator

Petitioner Attorney	Patrick Shifley
Respondent Attorney	John Fassola

DATE FILED: 11/1/2021

/s/ Raychel Wesley, Arbitrator
Signature

INTEREST RATE WEEK OF OCTOBER 26, 2021 0.06%

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

Ryan A. Muench **Case #** **15 WC 08879**
Employee/Petitioner

v.

University of Illinois
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 **Raychel A. Wesley**, Arbitrator of the Commission, in the City of **Chicago**, on **August 30, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **05/17/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the Petitioner earned $**2,745.02**; the average weekly wage was $**171.56**.

On the date of accident, Petitioner was **20** years of age, ***single*** with **0** children under 18.

Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services. This issue is moot due to the Arbitrator's decision on issues of Accident and Notice.

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 would be entitled to a credit of $**3,527.63** under Section 8(j) of the Act, but this issue is moot due to the Arbitrator's decision on issues of Accident and Notice.

ORDER

The Arbitrator finds that Petitioner failed to meet his burden of proving a compensable accident or that his current condition of ill-being is causally related to a workplace accident. Please see Addendum.

The Arbitrator further finds that Petitioner failed to prove that Notice had been provided to the Respondent as required by Section 6(c) of the Act. Please see Addendum.

As a result of the foregoing, no benefits are awarded, and all remaining issues are moot.

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

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

/s/ Raychel A. Wesley

Signature of Arbitrator

November 1, 2021

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RYAN A. MUENCH,	)	
	)	Case Number: 15 WC 08879
Petitioner,	)	
	)	
v.	)	
	)	
UNIVERSITY OF ILLINOIS,	)	
	)	
	)	
Respondent.	)	

ADDENDUM TO MEMORANDUM OF ARBITRATION DECISION

FINDINGS OF FACT

Petitioner testified that in the Spring of 2013 he was employed as a student in the UIC Pathology Lab. (T.10) His duties included receiving lab samples and distributing them to departments in the Pathology Lab. (T.11) The employees would "spin" the tubes and if necessary, manually pipette serum into new tubes. (T.11)

On May 17, 2013, Petitioner was working in the lab. (T.14) He was pipetting specimens from tubes that were specifically designated as testing for HIV viral loads. (T.14) He testified that while he was pipetting the serum, his elbows slipped off the table, causing the blood sample to splatter onto the table. (T.14-15) Petitioner testified that some of the serum came into contact with his face and his gloves. (T.15)

Initially, the pipette in question was described as similar to a turkey baster. (T.12) However, he clarified on cross examination that it was much smaller than a turkey baster, and similar in size to a ball point pen. (T.28) He could not specify how much of the serum spilled. (T.28)

He testified that he took off his gloves and washed his hands. (T.16) He changed his gloves and continued working. (T.16) He testified that one of the gloves appeared to have a tear or rip in it. (T.16) On cross examination, he testified that his washed his face, but did not wash out his eyes. (T.29)

Petitioner admitted in his testimony that he did not notify a supervisor of the incident on the date in question. (T.21, 25) He denied that he had been trained to report accidents, or any incidents involving the spillage of blood products. (T.25) Respondent called Gilberto Salas to testify. Mr. Salas testified that he was employed in 2013 as the Compliance Safety Regulatory Manager for the Laboratory. (T.41) As part of his job responsibilities, he trained new employees, including student employees. (T.41) He testified that student employees, including the Petitioner, would have specifically been trained to reports accidents as soon as they occurred. (T.42)

As noted, Petitioner did not report the accident on the date it occurred. He testified that he first reported the accident to a supervisor shortly prior to being instructed to be seen at the University of Illinois Employee Health Services. (T.20-21) On cross examination, he admitted he was first seen at University Health Services on August 8, 2013, and that he would have first reported the incident to his supervisor shortly before that date. (T.26) He agreed that he would have provided the initial notice to Christine Dressel, and that if the records demonstrated that he first advised her on August 2, 2013, that would seem correct. (T.27) During the testimony of Mr. Salas, he confirmed that he learned of the incident from Ms. Dressel on the date it was reported to her. (T.50) Per an email communication that was admitted into evidence as Respondent's Exhibit 3, Ms. Dressel was notified by the Petitioner on August 2, 2013. (RX3)

On June 18, 2013, Petitioner saw his primary care physician. He advised them that he had been sick about three weeks. (T.30) The medical record from the primary care physician indicate that Petitioner specifically requested sexually transmitted disease testing. (RX2, p.9) Petitioner testified that he typically asked for STD testing as part of his medical visits. (T.31) However, the medical record suggests that he specifically told his doctor that he was concerned that he had an STD in light of his symptoms. (RX2, p.10) Petitioner also admitted that he did not tell his primary care physician about any incident that had occurred in the lab. (T.31)

Petitioner was diagnosed with HIV as a result of the testing. (RX2, p.12) He was referred to Dr. Ross Slotten, whom he saw for the first time on July 3, 2013. (T.33) He did describe to Dr. Slotten an incident in the UIC Pathology Lab on May 17, 2013. On cross examination, he denied that he told Dr. Slotten that blood had spilled on his hands but did not splash into his face or eyes. (T.33) However, the medical records admitted into evidence indicate a history given to

Dr. Slotten on July 3, 2013, stating that the fluid did not splash in his face or eyes. (PX1) Similarly, the email from Christine Dressel admitted into evidence as Respondent's Exhibit 3, described an incident in which the fluid spilled onto Petitioner's gloved hand, but not into his face. (RX3)

Petitioner testified regarding additional risk factors for development of HIV. He admitted that he was a sexually active gay male in the months prior to his alleged incident, and that he had multiple male sexual partners. (T.34) On direct examination, when questioned about safe sex practices, he responded by stating "define unprotected sex, I guess." (T.18) On cross examination, he distinguished between "insertive sex" using a condom, as opposed to oral sex without a condom. (T.35) He also admitted on cross examination to having undergone sexually transmitted disease testing in February 2013, despite the fact that he felt he was practicing safe sex. (T.32)

Petitioner is currently in good health and is being treating with anti-retroviral medications. (T.35) He continues to see Dr. Slotten. (T.35) He is still employed in the health care industry. (T.24) He has no current restrictions on either work or personal activities. (T.35)

Petitioner presented the evidence deposition of Petitioner's treating physician, Dr. Ross Slotten. Dr. Slotten testified that when he saw Petitioner on July 3, 2013, he was given a history that he had been sick for about six weeks. (PX3, p.24) He testified that the earliest an individual would typically start experiencing symptoms would be two weeks after exposure. (PX3, p.13, 29-30) He agreed that if Petitioner had been sick for six weeks as of July 3, 2013, an exposure in May would be on the short end of the possible range of symptoms developing. (PX3, p.42)

Dr. Slotten further testified that Petitioner gave a history of the blood getting on his hand, but not getting into any mucus membranes like his eyes or mouth. (PX3, p.10) Petitioner did describe having a cut on his hands. (PX3, p.10) However, Petitioner did not describe whether or not he was wearing gloves. (PX3, p.25) Overall, Dr. Slotten could not provide an opinion within a reasonable degree of medical certainty that Petitioner's HIV infection was causally related to his alleged workplace exposure. He testified "I conclude only two things. Either HIV was acquired sexually or through the blood exposure." (PX3, p.22) On cross examination, he agreed that he is unable to determine which of the two is more likely, and he could not give an opinion in that regard within a reasonable degree of medical certainty. (PX3, p.38)

Respondent presented the evidence deposition of Dr. Sudhir Penugonda. Dr. Penugonda is an infectious Diseases Specialist. (RX1, p.5) Dr. Penugonda testified that Petitioner's exposure to HIV was more likely in the time frame prior to the alleged workplace incident in May 2013. (RX1, p.18) Even if he tested negative for HIV in February 2013, that did not preclude him having been infected prior to that date. (RX1, pp.22-23) He testified it was not likely that Petitioner would have developed the virus as a result of the alleged exposure on May 17, 2013. (RX1, p.24) He also testified that the alleged mechanism of transmission, a mucosal exposure to the eye, would qualitatively have a very low risk exposure unless there was a large volume of liquid. (RX1, pp.20-21)

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATED TO (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT, AND (F) IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner alleges that he contracted HIV as a result of an accident in the laboratory in which he was exposed to an HIV-positive blood sample. The Petitioner bears the burden of proving that he sustained an accidental injury as described, and also that his current condition of ill-being is causally related to that workplace accident. In reviewing the totality of the evidence, the Arbitrator finds that Petitioner failed to meet his burden proof.

Petitioner testified that he was working with HIV-positive blood samples on May 17, 2013. He testified that while pipetting specimens, his elbow slipped off the bench causing the serum in the sample to splatter on to his face and his gloved hands. Petitioner admitted that he did not give notice of the accident to any of his supervisors. While he testified that he was not trained to report accidents and incidents, he also testified that he recognized the exposure to HIV-positive blood products to be "a big deal". (T.25) Also, Respondent's witness, Gilberto Sallas, testified that Petitioner was trained to report any such incidents. Overall, the Arbitrator finds that the lack of notice of the incident is a relevant consideration in determining whether the accident occurred as described.

Petitioner's failure to report the accident applies to his initial medical treatment as well. Petitioner was seen by his primary care physician on June 18, 2013, for a "cold" that was persisting. (T.38) The Arbitrator notes that Petitioner was concerned enough about the nature of his illness that he requested STD testing on that date. However, Petitioner did not advise his doctor that he had been exposed to an HIV-positive blood sample a few weeks prior.

Moreover, Petitioner's description of the accident has changed over time. He saw Dr. Ross Slotten on July 3, 2013. He testified that he told Dr. Slotten that blood had splashed in his face. However, Dr. Slotten's note, admitted into evidence as part of Petitioner's Exhibit 1, specifically indicates that Petitioner gave a history of blood spilling on his hands, but not splashing into his face or eyes. Although Petitioner testified to having a rip in one of his gloves, that reference does not appear any of Petitioner's medical records.

Additionally, Petitioner reported this incident to his supervisor, Christine Dressel, on August 2, 2013. An e-mail from Ms. Dressel, admitted into evidence as Respondent's Exhibit 3, indicates that Petitioner reported that the blood products spilled onto his gloved hands, but there was no exposure to his face. Therefore, Petitioner's contemporaneous history to medical providers and other individuals is not consistent with his testimony regarding an exposure to his eyes or other mucus membranes.

Moreover, the totality of the evidence does not support a contention that Petitioner's development of HIV is causally related to a workplace exposure on May 17, 2013. As noted, Petitioner was seen by his primary care physician on June 18, 2013 and advised them that he had been sick for about three weeks. That would indicate that his symptoms began on or about May 28, 2013, which would be only 11 days after the date of the alleged exposure. Notably, Petitioner had also been seen by his primary care physician on May 7, 2013, 10 days prior to the incident, with complaints of hives. (RX2, p.16) Dr. Sudhir Penugonda testified that Petitioner's complaints of hives on that date could very well have been an early indicator of an existing HIV exposure. (RX1, p.14)

Dr. Penugonda testified that it was unlikely that, if Petitioner had been exposed to HIV on May 17, 2013, he would have been symptomatic in less than two weeks. When asked whether he could have developed the virus as a result of the exposure on May 17th, Dr. Penugonda testified "it is not likely". (RX1, p.24) He also testified that even 20 days after

exposure, an antibody test may still be negative. (RX1, p.23) A positive test within 10 or 11 days would be "on the fringe" of possibility. (RX1, p.28)

With regard to the method of alleged contraction of HIV, Dr. Penugonda likewise testified that it would be unlikely the Petitioner would have developed HIV as a result of the exposure as described. Dr. Penugonda noted that the medical records suggest that Petitioner had exposure on a gloved hand, with a cut on one of his hands under the gloves. Even if he presumed that there was a potential exposure to the eye, a mucosal exposure does not carry a moderate or high risk unless there was a large volume exposure. (RX1, p.21) He opined it was more likely that Petitioner's development of HIV was related to sexual activity.

Petitioner presented the testimony of his treating physician, Dr. Ross Slotten. Dr. Slotten had prepared a narrative note in which he erroneously indicated that Petitioner was allegedly exposed at work in March or April. He testified that the latency period for developing symptoms would be between two to four weeks. Two weeks after exposure would be the earliest one would anticipate symptoms. Therefore, after clarification of the alleged date of exposure, he testified that the development of symptoms in eleven days would be, at best, on the "short end" of the range in which he might have developed symptoms.

More significantly, Dr. Slotten clearly indicated that he could not provide an opinion within a reasonable degree of medical certainty that Petitioner's development of HIV was related to an alleged exposure in the laboratory. When asked his opinion, he testified that "either HIV was acquired sexually or through the blood exposure." (PX3, p.22) On cross-examination, he reiterated that of the two possibilities, he was not able to determine which of the two was more likely.

Petitioner, in his testimony, indicated that he was a sexually active gay male in the months prior to May 17, 2013. He testified that he was not aware that any of his sexual partners had been determined to be HIV-positive. When asked whether he engaged in safe sex practices, he equivocated on what the definition of safe sex would entail, and later explained a distinction, in his mind, between oral sex, for example, and other types of sexual activity. In addition, the Arbitrator notes that Petitioner requested STD testing in June 2013, as well as in February 2013, which is indicative of a concern in his own mind that he could have potentially been exposed to a disease as a result of his sexual activity.

In light of the foregoing, the Arbitrator concludes that the Petitioner has not met his burden of proving that he sustained an exposure to HIV as a result of a laboratory accident on May 17, 2013. Furthermore, the Arbitrator finds that Petitioner has failed to meet his burden of proving that his condition of ill-being is causally related to the alleged workplace exposure. At best, one of the testifying medical experts opined that exposure to blood product was one possible mechanism of transmission. According to Dr. Penugonda, it was an unlikely mechanism of transmission. According to Dr. Slotten, it was only as likely as Petitioner's sexual activity. The medical opinions are insufficient to support Petitioner's burden of proof on the issue of causation.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATED TO (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS THE FOLLOWING:

Petitioner alleges a specific incident occurring on May 17, 2013 in which HIV-positive serum splashed onto him. Petitioner testified that he knew this was "a big deal." Nonetheless, Petitioner also admitted in his testimony that he did not notify a supervisor of the accident on the date it occurred.

Under the Illinois Workers' Compensation Act, notice of an accident is to be provided to an employer "as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c). It is well established that the notice provision of the Act is jurisdictional, and failure of an employee to give notice will bar the claim. *Ristow v. Industrial Commission,* 39 Ill.2d 410 (1968).

In this case, it is clear that notice was not provided to the employer within 45 days of the date of the accident. Petitioner testified that he first advised his supervisor, Christine Dressel, shortly before his initial visit with University Health Services. The date of the visit with University Health Services was established as August 8, 2013. Further evidence was presented that Petitioner first advised Ms. Dressel of the incident on August 2, 2013. Therefore, notice was not provided to the Respondent for 77 days, well beyond the period of time prescribed under the Illinois Workers' Compensation Act.

In addition, the employer was unquestionably prejudiced by the lack of notice. While Petitioner's counsel questioned Respondent's witness, Gilberto Salas, on what investigation was performed once the incident was reported, Mr. Salas also clearly testified that had the employer been timely notified, the accident would have been investigated "immediately". (T.52) The 77-day delay in providing notice eliminated any meaningful opportunity for the employer to investigate whether the incident occurred as described. Had the incident been promptly reported, the employer could have spoken with co-employees, could have verified whether the Petitioner was in fact working with HIV-positive blood samples, and could have assessed whether a sample had been lost or otherwise compromised.

Accordingly, the Arbitrator finds that Petitioner failed to provide statutory notice as required in Section 6(c) of the Act. As a result, Petitioner's claim for compensation is barred.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATED TO (J), WERE THE MEDICAL SERVICES PROVIDED TO PETITIONER REASONABLE AND NECESSARY, AND (L) WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS THE FOLLOWING:

Pursuant to the preceding paragraphs, the Arbitrator finds that Petitioner failed to meet his burden of proving that he sustained compensable injuries arising out of and in the course of his employment, and that the Petitioner did not provide statutory Notice of a work-related accident. As a result of these findings, no compensation is awarded, and all remaining issues are moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023063
Case Name	Ronald Gianakopoulos v. Town of Cicero
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0278
Number of Pages of Decision	12
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Robert Luedke

DATE FILED: 7/29/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONALD GIANAKOPOULOS,

Petitioner,

vs. NO: 19 WC 23063

TOWN OF CICERO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current conditions of ill-being are causally related to his accident and whether continuing treatment with Dr. Hennessy is reasonable, necessary, and causally related to the work accident, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2021 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $3,476.08 per week for a period of 5 & 3/7ths weeks, representing December 13, 2019 through January 19, 2020, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall have a credit of $3,476.08 for TTD benefits already paid.

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

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 29, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 6/29/22

/s/ *Stephen J. Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023063
Case Name	GIANAKOPOULOS, RONALD v. TOWN OF CICERO
Consolidated Cases	No Consolidated Cases
Proceeding Type	8(A)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Robert Luedke

DATE FILED: 9/16/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 14, 2021 0.05%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(A)

Ronald Gianakopoulos Case # **19** WC **23063**
Employee/Petitioner
v.
Town of Cicero
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **7/15/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. X Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☐ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☐ Is Petitioner entitled to any prospective medical care?
L. ☐ 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, **6/26/2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,945.74**; the average weekly wage was $**960.50**.

On the date of accident, Petitioner was **49** years of age, ***married,*** with **0** dependent children.

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

Respondent shall be given a credit of $**3,476.08** for TTD, $ for TPD, $ for maintenance, and $ for other benefits, for a total credit of $.

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

ORDER

Respondent shall pay $**3,476.08** in temporary total disability benefits, pursuant to the parties' stipulation, for the **5-3/7ths** weeks from **12/13/2019 – 1/19/2020**. Respondent is also given the $3,476.08 in credit for TTD benefits.

See order in 21WC 02195 regarding prospective medical care.

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.

SEPTEMBER 17, 2021

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Gianakopoulos,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 19 WC 23063
Town of Cicero,	)	
	)	
	)	
Respondent.	)	

FINDINGS OF FACT

This matter proceeded to hearing on July 15, 2021, in Chicago, Illinois before Arbitrator Charles Watts on Petitioner's 19(B) and 8(a) today on Case Number 21 WC 02195.

The parties stipulated to the occurrence of accidents on June 26, 2019 (19 WC 23063) (Arb. Ex. 1); February 6, 2020 (21WC 02196) (Arb. Ex. 3); and May 11, 2020 (21WC 02195) (Arb. Ex. 2). All three cases are consolidated as all three accidents affected Petitioner's right knee. Issues in dispute include causal connection, past medical bills, TTD benefits as well as prospective medical for the right knee. (Arb. Ex. 2).

Petitioner was hired in 2009 by the Town of Cicero and worked as a part of the garbage pickup crew. Petitioner testified that he drove garbage trucks picking up toters weighing approximately 60-70 pounds. (Tr., p.11). On June 26, 2019, Petitioner reached for a toter to pull to the back of the truck when his leg twisted, feeling a pop in his right knee. (Tr., p. 15). Petitioner filled out an accident report detailing the same. (RX 2).

On June 28, 2019, Petitioner presented to Occupational Health Center at Westlake and seen by Dr. Emily Miral. Petitioner was a 49-year-old male who was pulling a toter and felt a pop in his right knee. He was diagnosed with a right knee sprain and provided restricted duty of no climbing or lifting. Petitioner was provided with a knee immobilize and crutches and was to return. (PX. 5). Respondent offered Petitioner light duty while sitting in the lunchroom. (Tr., p. 16).

Petitioner followed up with Occupational Health Center on July 3, 2019, and was recommended a right knee MRI. (PX 5)

On July 10, 2019, petitioner underwent an MRI which revealed a complex medial meniscal tear with predominant horizontal cleavage component and chondromalacia.

Subsequently petitioner was referred to Dr. Hennessy. (PX 5, p. 12). Petitioner presented to Dr. Ryon Hennessy on July 17, 2019 with right knee complaints. The doctor reviewed the MRI which demonstrated a tear of the posterior horn of the medial meniscus. Petitioner was provided an injection and was recommended four weeks of therapy.

Petitioner returned on August 14, 2019, noting he failed nonoperative treatment. At this point Dr. Hennessy recommended an arthroscopy for a partial medial meniscectomy. Petitioner was provided sedentary duty.

On December 13, 2019, petitioner underwent a partial medial meniscectomy and medial synovectomy with a postoperative diagnosis of a medal meniscus tear and medial synovitis. (PX 3).

Petitioner followed up on January 13, 2020, noting no complaints of pain. Petitioner returned to work full duty without restrictions as a garbage man as of January 20, 2020. (PX. 4).

On February 6, 2020, petitioner testified that he was pulling a tote in the snow and slipped injuring his right knee again. (Tr., 20). Petitioner also filled out an accident report detailing the same. (RX 3). Petitioner presented to the Occupational Health Center at River Forest and was provided light duty restrictions. (PX 5, p. 18).

Petitioner underwent a course physical therapy beginning February 17, 2020 through April 10, 2020. (PX 6).

Petitioner presented on Dr. Hennessy on March 11, 2010. Petitioner was advised to continue with physical therapy and was returned to work with restrictions. (PX 5). Petitioner was eventually discharged from therapy on April 13, 2020. He returned to work full duty as of April 20, 2020. (PX 4).

Petitioner subsequently testified that on May 11, 2020 he was pulling a 60 lb. toter from one side of the alley to the other, walking backwards and noticed right knee pain. (Tr. 24). Petitioner filled out another accident report indicating that he was pulling garbage cans from one side of the alley to the other walking backwards and stepped wrong injuring his knee. (RX 4).

Petitioner presented to Dr. Hennessy on May 11, 2020. Petitioner noted he was pulling a garbage can and twisted his right knee again. He aspirated the right knee and provided a cortisone injection. Petitioner was to begin with home physical therapy program and return in four weeks. He was provided restrictions. In a June 17, 2020 follow up petitioner noted pain along the medial aspect of his knee. Petitioner was recommended to proceed with a repeat MRI and X-rays. (PX 4).

Petitioner underwent the repeat MRI on July 1, 2020 for the right knee. The impression was an abnormal appearance to the medial meniscus related to the partial medial meniscectomy, sprain to the medial collateral ligament, and degenerative changes most prominent medially with grade 4 chondromalacia. (PX 2). X-rays taken showed near bone on bone in the medial compartment. (PX 2).

On July 1, 2020 Dr. Hennessy advised that X-rays showed petitioner's knee was bone on bone. He noted he had a combination of an aggravation of the pre-existing chondromalacia and acute injury as well as evidenced by the new bone marrow edema on the medial femoral condyle. With the amount of joint space narrowing, Dr. Hennessy noted a simple chondroplasty would not suffice. Additionally based on his weight he would not recommend a partial knee replacement. Based on the same Dr. Hennessey recommended a full knee replacement. (PX 4).

Petitioner continued to follow up with Dr. Hennessy whose recommendations remained the same. (PX 4). In an August 24, 2020 follow up, Dr. Hennessy noted petitioner was still waiting for approval for the right knee total arthroplasty. Petitioner now needed the assistance of a cane to ambulate due to his pian in his knee. Petitioner was off work. (PX 4, p. 43).

Respondent obtained Dr. Kathleen Weber to review medical records and provide an opinion. Dr. Weber authored the report on August 10, 2020. (RX 1, Ex. 2). Dr. Weber reviewed petitioner's medical records and accident reports. She also had an opportunity to review the X-rays. Dr. Weber opined that petitioner's morbid obesity negatively affected his pre-existing degenerative knee arthritis to increase the mechanical load to his arthritic knee. (RX 1., Ex. 2). She further opined that the similar events in a nonwork related environment could have happened. Therefore, it was her opinion that the mechanism of injury did not cause or permanently aggravate petitioner's present condition of ill-being in his right knee but rather was a result of the natural history of his pre-existing arthritis. The sole contribution of his morbid obesity, a non-occupational conditional, was likely the more significant player in his arthritic conditions. It was her opinion that if a right knee total replacement is pursued, it is unrelated to the three dates of injury. (RX 1, Ex. 2).

On December 17, 2020 Dr. Hennessy authored a narrative noting that petitioner presented for his right knee osteoarthritis complaints after his work injury in May 2020. He reviewed the record review authored by Dr. Kathleen Weber. Dr. Hennessy disagreed with her opinion noting petitioner did not have any prior problems with his knee prior to May 2019. Subsequently he failed nonoperative treatment undergoing an arthroscopy. Petitioner subsequently sustained a second work injury on February 6, 2020 and a third injury on May 11, 2020. He noted petitioner was pulling a garbage container backward when his right knee shifted and popped. Dr. Weber did not have the actual films of the MRI. Dr. Hennessy further noted that the based on the arthroscopic pictures of December 2019 showing near normal cartilage in all three compartments including the medial side and the fact that petitioner was nearly bone on bone only seven months later showed that there was an abnormal acceleration of the development of arthritis from the second and third injuries in February and May 2020. Dr. Hennessy did concede that petitioner's weight contributed to the need of the knee replacement but noted that only seven months later would not be a natural progression of his arthritic changes. Based on the same, he noted that the work injury was clearly an accelerated event. Therefore, to a reasonable degree of medical certainty utilizing his experience as a board-certified orthopedic surgeon he disagreed with Dr. Weber noting that the new injury of May 11, 2020 caused permanent aggravation and acceleration of whatever minimal degenerative changes petitioner had. In addition, the injury in May 2019 played a role in that once his meniscus had been debrided, he was at increased risk of developing advanced arthritis at a rapid rate. (PX 1).

Petitioner continued to follow up with Dr. Hennessy through April 26, 2021. Petitioner was recommended to undergo surgery and provided restrictions. (PX 4). The records indicate that there is a medical bill for a date of service of June 2, 2021 with no corresponding medical record. (PX 4, p. 56).

On April 28, 2021 Dr. Kathleen Weber testified on behalf of Respondent. (RX.1). Dr. Weber is a partner at Midwest Orthopedics at Rush board certified in sports medicine but not a treating orthopedic surgeon. (RX 1, p. 9, p. 27). Dr. Weber testified that she reviewed medical records but did not examine petitioner. (RX 1, p. 10). She noted that the personally reviewed the radiographic films as well. (RX 1, p. 11). Dr. Weber testified that petitioner had not exhausted conservative treatment to include weight loss, additional corticosteroid injections, possibly other injections. (RX 1, p. 19). In addition, based on the fact that he still had joint space it was her opinion that he did not need a total knee replacement. (RX 1, p.20). She testified that the mechanism of injury could have happened anywhere. She noted petitioner did not experience any swelling or a traumatic fall. Based on the totality of the medical records, it seemed that the pre-existing arthritis was not irritated at any of those points in time. (RX 1., p. 21). This because the MRIs did not change. She further testified that petitioner had early arthritic changes based on his MRI findings. (RX 1., p. 23). Based on the changes in imaging and review of records Dr. Weber testified that his arthritic change was not a result of his accidents. On Cross-Examination, she noted she did not know the weight of any of the garbage cans to include the garbage can during the May 11, 2020 work accident. (RX 1 p., 30-31). Dr. Weber did testify that it was difficult to compare both of petitioner's X-rays as one was weight bearing and one was non weight bearing. She noted she would recommend weight loss prior to

consideration of a joint replacement because the higher risk of injection. (RX. 1, p. 42). She maintained her opinion that petitioner should not undergo a total knee replacement and if he did it was not work related.

CONCLUSIONS OF LAW

The Arbitrator adopts the Statement of Facts in support of the Conclusions of Law.

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

To obtain compensation under the act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill.2d 249, 253 (1980) including that the accidental injury both arose out of and occurred in the course of his employment (Horvath v. Industrial Commission, 96 Ill.2d. 349 (1983)) and that there is some causal relationship between the employment and her injury. Caterpillar Tractor Co. v. Industrial Commission, I29 Ill. 2d 52, 63 (1998). 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).

Credibility is the quality of a witness which renders her 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 her testimony. Where a claimant's testimony is inconsistent with her actual behavior and conduct, the Commission has held that an award cannot stand. McDonald v. Industrial Commission, 39 Ill. 2d 396 (1968); Swift v. Industrial Commission, 52 Ill. 2d 490 (1972). While it is true that an employee's uncorroborated testimony will not bar a recovery under the Act, it does not mean that the employee's testimony will always support an award of benefits when considering all the testimony and circumstances shown by the totality of the evidence. Caterpillar Tractor Co. v. Industrial Commission, 83 Ill. 2d 213 (1980). The mere existence of testimony does not require its acceptance. Smith v. Industrial Commission, 98 Ill.2d 20, 455 N.E.2d 86 (1983). To argue to the contrary would require that an award be entered or affirmed whenever a claimant testified to an injury no matter how much her testimony might be contradicted by the evidence, or how evidence it might be that her story is a fabricated afterthought. U.S. Steel v. Industrial Commission, 44 Ill2d 207, 214, 254 N.E.2d 522 (1969); see also Hansel & Gretel Day Care Center v. Industrial Commission, 215 Ill. App. 3d 284, 574 N.E.2d 1244 (1991).

The Petitioner 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). "Liability under the Workmen's Compensation Act may not be based on imagination, speculation, or conjecture, but must have a foundation of facts established by a preponderance of the evidence…" Shell Petroleum Corp. v. Industrial Commission, 10 N.E.2d 352 (1937). The burden of proof is on a claimant to establish the elements of her 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. Revere Paint & Varnish Corp. v. Industrial Commission, 41 Ill.2d. 59 (1968). Preponderance of the evidence means greater weight of the evidence in merit and worth that which has more evidence for it than against it. Spankroy v. Alesky, 45 Ill. App.3d 432 (1st Dist. 1977).

In the case at hand, the Arbitrator observed Petitioner during the hearing and finds him to be a credible witness. Petitioner testified in open hearing before the Arbitrator who viewed his demeanor under direct examination and under cross-examination. Petitioner's manner of speech, body language, and flow of answers to questions, when added together, showed sincerity. Petitioner was well-mannered, composed,

spoke clearly, and made normal eye contact with the Arbitrator. He testified that he wants the surgery recommended by Dr. Hennessy. (Tr. 29). He further noted that he continues to have pain on the inner part of his knee, by his kneecap. He utilized a cane for the last six months and rides on scooters in the grocery store. (Tr. 29-30). The Arbitrator compared Petitioner's testimony with the totality of the evidence submitted and did not find any material contradictions.

The credibility of Dr. Ryon Hennessy and Dr. Kathleen Weber is assessed below.

Issue F, whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. Even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. Thus, a claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). "A chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury." International Harvester v. Industrial Com., 93 Ill. 2d 59, 63 442 N.E.2d 908 (1982).

The Arbitrator finds that Petitioner established a causal relationship between the undisputed May 11, 2020 injury and his current right knee condition. In so finding, the Arbitrator relies on the following: 1) No medical documentation supporting pre-existing medical care to the right knee 2) Dr. Hennessy's opinion that petitioner's accident aggravated petitioner's right knee arthritis 3) the opinion that petitioner's original surgery accelerated petitioner's knee arthritis.

Petitioner testified that he sustained three work accidents to his right knee. He noted that he did not have any prior right knee complaints before the injury. In addition no medical records were submitted to document any preexisting medical treatment. The first accident occurred on June 26, 2019 prompting the need for surgery. Petitioner was released to return full duty in the same position as part of the garbage pick up crew. Petitioner sustained two additional undisputed injuries in the course of his job duties. The second accident was February 6, 2020 which prompted a course of physical therapy. Petitioner once again returned to work full duty. The last injury was on May 11, 2020. Based on the mechanism of injury, X-rays, petitioner's past surgical attempts, and MRIs, Dr. Hennessy recommended a total knee replacement. Even though Dr. Hennessy conceded that petitioner's weight did contribute to the need for a knee replacement, he noted that the May 11, 2020 work injury was clearly an accelerated event. In addition the May 2019 meniscus debridement also placed petitioner a higher risk of developing advanced arthritis at a rapid rate. Dr. Hennessy clearly indicated that seven months is not a natural progression of arthritic changes. (PX 1).

Dr. Weber also testified in this matter. Dr. Weber is a board-certified sports medicine physician. She agreed with petitioner's initial surgery but disputed the need for the current surgical request. She noted petitioner's right knee condition was due to a natural progression of the preexisting condition. She further noted the mechanism of injury could have happened anywhere and petitioner did not sustain any trauma, to include swelling. As such, based on the totality of the medical records, petitioner's pre-existing arthritis was not irritated at any of those points in time.

In this case the Arbitrator adopts the opinions of the board certified orthopedic treating physician Dr. Hennessy and finds petitioner's right knee symptoms causally related to May 11 2020 injury. The Arbitrator further notes that Dr. Hennessy was the physician who reviewed the all the actual MRI films while Dr. Weber did not. In addition Dr. Weber did not examine petitioner nor is she is a board certified orthopedic surgeon. On the other hand, Dr. Hennessy not only examined petitioner but saw his condition of petitioner's joints during surgery. As such, he was the physician in the best position to assess petitioner's condition and treatment options. The Arbitrator recognizes that petitioner's weight also played a factor into the need for a total replacement but acknowledges the standard that petitioner's injury was a causative factor.

As to issue "J", the reasonableness and necessity of medical care provided, the Arbitrator finds as follows:

Overall, the Arbitrator finds Petitioner's treatment to be reasonable and necessary and finds that Respondent has not paid for said treatment. As such, the Arbitrator orders Respondent to pay $1050.00 to Petitioner directly for the following outstanding medical services, pursuant to the medical fee schedule and Sections 8(a) and 8.2 of the Act. The Arbitrator does not award the last medical bill of $175.00 for a date of service of June 2, 2021 as there was no corresponding medical record. As such the Arbitrator finds that Petitioner did not meet his burden of proof.

As to issue K, whether Petitioner is entitled to any prospective medical care, the Arbitrator finds as follows:

In adopting the opinions of Dr. Hennessy, the Arbitrator awards the recommended right total knee replacement. Dr. Hennessy's opinion that petitioner's new injury of May 11, 2020 caused permanent aggravation and acceleration of whatever minimal degenerative changes he had and that the surgery from the May 2019 played a role in that once his meniscus had been debrided he was at increased risk of developing advanced arthritis at a rapid rate was well reasoned.

As to issue "L", regarding Petitioner's entitlement to Temporary Total Disability benefits, the Arbitrator finds as follows:

Petitioner was placed on work restrictions by Dr. Hennessy. Based on the same, the Arbitrator awarded awards Temporary Total Disability benefits May 12, 2020 through the date of trial, July 15, 2021, or a total of a total of 61-3/7ths weeks. Respondent is awarded credit for any of said TTD period for which it has already paid Petitioner, either in regular wages or in TTD benefits.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002195
Case Name	Ronald Gianakopoulos v. Town of Cicero
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0279
Number of Pages of Decision	7
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Robert Luedke

DATE FILED: 7/29/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONALD GIANAKOPOULOS,

Petitioner,

vs. NO: 21 WC 02195

TOWN OF CICERO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current conditions of ill-being are causally related to his accident and whether continuing treatment with Dr. Hennessy is reasonable, necessary, and causally related to the work accident, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2021 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $640.33 per week for a period of 61 & 3/7ths weeks, representing May 12, 2020 through July 15, 2021, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall receive credit for TTD benefits which it can demonstrate has been paid to Petitioner either in regular wages or TTD benefits.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $1,050.00 for medical expenses, as provided in §8(a) and subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the right total knee replacement surgery and reasonable post-operative care recommended by Dr. Hennessy as provided in §8(a) of the Act.

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

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 29, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 6/29/22

/s/ *Stephen J. Mathis*

43

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002195
Case Name	GIANAKOPOULOS, RONALD v. TOWN OF CICERO
Consolidated Cases	No Consolidated Cases
Proceeding Type	8(A)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	4
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Robert Luedke

DATE FILED: 9/16/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 14,2021 0.05%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(A)

Ronald Gianakopoulos Case # **21** WC **02195**
Employee/Petitioner
v.
Town of Cicero
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **7/15/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/11/2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,945.74**; the average weekly wage was $**960.50**.

On the date of accident, Petitioner was **50** years of age, ***married,*** with **0** dependent children.

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

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

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

ORDER

Respondent shall authorize and pay for the right total knee replacement surgery prescribed by Dr. Hennessy, along with reasonable post-operative care.

Respondent shall pay the further sum of **$1,050.00** for necessary medical services as provided in Section 8(a) of the Act and subject to the fee schedule provisions thereof.

Respondent shall pay TTD benefits at a rate of $640.33 for the 61-3/7ths weeks from 5/12/2020 – 7/15/2021. Respondent shall receive credit for any portion of said period for which it can demonstrate that Petitioner has been paid, either in regular wages or TTD benefits.

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.

SEPTEMBER 16, 2021

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Gianakopoulos,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 21 WC 02195
Town of Cicero,	)	
	)	
	)	
Respondent.	)	

The Statement of Facts and Conclusions of Law in the decision for 19 WC 23063 are adopted as the decision for 21 WC 02195.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002196
Case Name	Ronald Gianakopoulos v. Town of Cicero
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0280
Number of Pages of Decision	7
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Robert Luedke

DATE FILED: 7/29/2022

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

RONALD GIANAKOPOULOS,

Petitioner,

vs. NO: 21 WC 02196

TOWN OF CICERO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's current conditions of ill-being are causally related to his accident and whether continuing treatment with Dr. Hennessy is reasonable, necessary, and causally related to the work accident, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 16, 2021 is hereby affirmed and adopted.

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

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

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

Under Section 19(f)(2), no "county, city, town, township, incorporated village, school district, body politic, or municipal corporation" shall be required to file a bond. As such, Respondent is exempt from the bonding requirement. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

July 29, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 6/29/22

43

/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002196
Case Name	GIANAKOPOULOS, RONALD v. TOWN OF CICERO
Consolidated Cases	No Consolidated Cases
Proceeding Type	8(A)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	4
Decision Issued By	Charles Watts, Arbitrator

Petitioner Attorney	Ian Elfenbaum
Respondent Attorney	Robert Luedke

DATE FILED: 9/16/2021

THE INTEREST RATE FOR THE WEEK OF SEPTEMBER 14, 2021 0.05%

/s/Charles Watts, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(A)

Ronald Gianakopoulos Case # **21** WC **02196**
Employee/Petitioner
v.
Town of Cicero
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Charles Watts**, Arbitrator of the Commission, in the city of **Chicago**, on **7/15/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **2/6/2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**49,945.74**; the average weekly wage was $**960.50**.

On the date of accident, Petitioner was **50** years of age, ***married,*** with **0** dependent children.

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

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

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

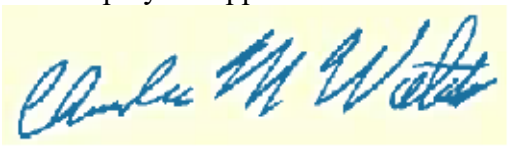
ORDER

See order in 21WC 02195.

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.



SEPTEMBER 16, 2021

Signature of Arbitrator

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Gianakopoulos,	)	
	)	
Petitioner,	)	
	)	
v.	)	
	)	Case No. 21WC 02196
Town of Cicero,	)	
	)	
	)	
Respondent.	)	

The Statement of Facts and Conclusions of Law in the decision for 19 WC 23063 are adopted as the decision for 21 WC 02196.