ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC030671
Case Name	JASKOWIAK, JOE v. HOMER TOWNSHIP FIRE PROTECTION
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b-1)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0041
Number of Pages of Decision	26
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Patrick Serowka
Respondent Attorney	Gina Panepinto

DATE FILED: 2/2/2022

/s/Maria Portela, 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

JOE JASKOWIAK,

Petitioner,

vs. NO: 20 WC 30671

HOMER TOWNSHIP FIRE PROTECTION,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(b-1)

Timely Petition for Review under §19(b-1) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, benefit rates, temporary total disability benefits, medical expenses, prospective medical treatment, causation and the 8(j) credit, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below.

The Commission corrects the scrivener's error in the fourth sentence from the end of the second paragraph on page 16 of the Arbitrator's Decision to change the word "irks" to "risk". The Commission additionally corrects the scrivener's error in the first full paragraph on page 10 of the Arbitrator's Decision to change the word "would" to "wound".

All else is affimed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed October 27, 2021 is hereby affirmed and adopted.

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

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

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.

February 2, 2022

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 11122
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ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC030671
Case Name	JASKOWIAK, JOE v. HOMER TOWNSHIP FIRE PROTECTION
Consolidated Cases	No Consolidated Cases
Proceeding Type	19(b-1) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	23
Decision Issued By	Paul Cellini, Arbitrator

Petitioner Attorney	Patrick Serowka
Respondent Attorney	Gina Panepinto

DATE FILED: 10/27/2021

/s/ Paul Cellini, Arbitrator

Signature

INTEREST RATE WEEK OF OCTOBER 26, 2021 0.06%

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-1)

JOE JASKOWIAK
Employee/Petitioner
v.
HOMER TOWNSHIP FIRE PROTECTION
Employer/Respondent

Case # **20** WC **30671**
Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **July 9, 2021**. Respondent filed a *Response* on **July 23, 2021**. The Honorable **Paul Cellini**, Arbitrator of the Commission, held a pretrial conference on **July 27, 2021**, and a trial on **August 25, 2021**, in the city of **Chicago**. The matter is venued in Joliet, but the hearing was held in Chicago due to emergency Covid-19 rules. 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, **September 23, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

The causal relationship of Petitioner's current condition of ill-being is a moot issue.

In the year preceding the injury, Petitioner earned $**123,760.00**; the average weekly wage was $**Unknown (moot)**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of $**29,222.76** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**29,222.76**.

Respondent is entitled to a credit of $**44,613.15** under Section 8(j) of the Act.

ORDER

The Petitioner has failed to prove he sustained accidental injuries to his left foot or lumbar spine which arose out of his employment with Respondent on September 23, 2020

No benefits are awarded.

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter $**1,178.20** or the ***final*** cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) 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 27, 2021

STATEMENT OF FACTS

Petitioner, currently a lieutenant, has worked for Respondent as a firefighter/EMT (emergency medical technician) since 2005. In his current position, he is in charge of a company of 3 or 4 firefighters at his station (Station #3), and in addition to his supervisory duties, he runs emergency paramedic or fire calls and fights fires. As a firefighter, he uses tools a variety of tools, some of which are quite heavy. Fire hoses are different sizes and, especially when "charged" with water, can be heavy to pull. Multiple firefighters assist in pulling hoses, but this can include having to navigate around corners and stairways in fighting fires. Petitioner testified that his annual salary in 2020 was $103,000, per contract and he works limited overtime. He has six sick days, 12 vacation days and 9 "Kelly" days (i.e., a work reduction day to meet contractual hours, which are used every 9th or 10th shift).

Petitioner previously underwent multiple left foot surgeries in 2015 and 2016, and he testified his foot progressively improved and he was able to get to the very heavy duty level with work hardening before being discharged and released to full work duty by Dr. Kadakia, though he still had 3 out of 10 (3/10) level pain. He returned to work for Respondent in December 2016. At a 3/22/17 follow up with Dr. Kadakia, Petitioner testified he had some ongoing left foot discomfort, noting "good days and bad days", but nothing significant and nothing that ever stopped him from performing his full work duties. He testified he participated in various firefighter trainings and had no time off work due to his left foot between 2016 and 2020. Petitioner identified Px17 as a summary of documented training drills completed, with his training referenced on page 35. Training exercises included live burn tower drills, simulating a fire response in full gear. Hoses, typically 1-3/4" lines, would be pulled off the engine to the front door, charged and then pulled inside following a forceable entry scenario. This would also involve searching for victims, sometimes in a two story building. Again, he testified his left foot was fine during these drills.

Petitioner testified he participated in an in-house training involving a "consumption drill" on 12/3/19, involving performing a seven station circuit course while utilizing full gear and a SCBA (breathing apparatus) to see how long you can last on a bottle of air. This included stations where the firefighter would strike a tractor tire with a hammer 10 times, hoist a roll of hose up to the rafters and bring it back down, go up and down a large flight of stairs, crawl and pull a charged 1-2/4" hose line. On 3/11/20, he participated in firefighter rescue training, a drill in full gear where you package and drag a firefighter in full gear about 60 to 70 feet, as well as a two-man carry of a firefighter up and down a large set of stairs. He also had to practice ladder rescues. Petitioner testified that he had no left foot problems while performing any of these training activities. He testified he also regularly participated in physical fitness activities, including going to the gym five days per week prior to covid, and riding his bike 4 to 5 days per week (See Px17), noting he would keep logs of his rides via his phone or smart watch in 2019, including distance and time spent riding, though all of his rides were not included in the compilation and he was not able to track rides when he wasn't in range of his cellular service. At his gym, Premier Fitness, his workouts through September 2020 included his lower body, such as elliptical or stationary bike, but he did not use the treadmill, and he would wear cushioned/Hoka shoes.

Petitioner identified the Illinois Fire Service Institute (IFSI), based out of the University of Illinois, as a fire training organization. While he testified that most fire training occurs in-house, IFSI provides supplemental outside training as they have facilities that don't exist in house, such as a burn tower. Petitioner testified that IFSI training was mandatory per his chief for all Respondent officers, which total 6 lieutenants and 3 captains.

In September 2020, Petitioner participated in one week, 40 hour live fire officer training at an IFSI training station in Plainfield, Illinois. Petitioner testified that, outside of an actual live fire, this is the most labor intensive activity he performs in his job. Various live fire scenarios are presented, called "evolutions", and the fire officers attending would rotate the various firefighter positions. On 9/23/20, Petitioner testified his company, a group of 4 firefighters, was pulling a line to the third floor to check for fire. In full gear, one firefighter pulls the charged hose nozzle and the others are staggered in the stairwell to keep pulling the hose up. He testified the hose got caught

within the stairwell a few times and he had to use brute strength to pull it around the turns of a stairway. In the process of doing so, Petitioner testified he went to reach down to pull the hose, tried to muscle it up, and felt his back spasm/cramp and tighten up. He bent forward to try to stretch it out and then kept on going. He testified: "Pretty much the same time I felt my foot burning. When I got up to the third flight of stairs. Basically, I was the officer for that one I was running between the nozzle and up and down the stairs checking on my guys. Once we got a lull in the action. Basically, we got up there no fire. We were checking. We did a secondary search of the top floor and I had to check on my guys so kept coming up and down and drag dummies down as they found them. I felt my foot was burning and then when we got done with the evolution, I took my boot off and it was on fire." He testified his left foot pain was significantly worse than what he experienced in 2016.

They then took a break where the instructors would critique their performance. Petitioner testified he didn't say anything about being injured because he wanted to complete the training and not have to start over: "We're firefighters, we deal with injuries, deal with bumps and bruises." He testified he "thinks" he sat out the last evolution that day due to lightheadedness and dizziness, noting it was quite hot out that day, not due to injury. He returned to training at IFSI the next day and was tasked with a simulated basement fire. He testified he used a haligan and an axe to force the door open and helped to bring the hose up the stairwell to a landing area, and he then was positioned at the front door to keep the hose going into the building. As to his left foot and back, he testified he was "hurting" and began to get lightheaded. He completed the evolution, but the instructors noticed this, pulled him from the simulation, took his gear off and moved him to the side area. It again was a very hot day. His blood pressure was also high, so an ambulance was called to and he was ultimately sent to the ER at Edward Hospital. Petitioner testified he had back and foot pain at that time but again didn't report it because he wanted to continue the training, and he knew he would otherwise have to start over. At the ER, he underwent a workup, including cardiac, and was diagnosed with dehydration and heat exhaustion. Petitioner testified that Chief Bricker was at the ER with him. The following colloquy was elicited:

"Q: Did you tell him anything about the conditions of your foot?
A: Told him my foot was killing me.
Q: Okay. Did you tell your Chief about your left foot pain and low back pain?
A: Yes. I believe he called me and it was discussed and the decision was made to go Friday morning to the doctor, department doctor. there at the hospital."

The 9/24/20 report from Edward Hospital indicated Petitioner reported a history of doing fire drills in full equipment in warm weather and became very lightheaded but did not pass out. The ambulance was called based on elevated blood pressure and heart rate. He reported feeling dehydrated doing drills the past "three days plus." The initial assessment indicated he had been in a very intense class where he was in a burn tower. He reported that during an evolution he was pulling in hoses and when pulling in the third hose he briefly saw stars and became lightheaded. Once he had some fluids and cooled off on-site, he felt better, but was taken to the emergency department because he had a rapid heart rate and elevated blood pressure. He reported dizziness and received an EKG. He was diagnosed with dehydration with near syncope and heat exposure. He was discharged and advised to follow up with corporate health. (Px3). Petitioner testified that Chief Bricker then took him back to the training faculty. When he arrived back at the facility, while he wanted to keep going with the training, his diagnosis prevented this, so he got his things and went home. Petitioner testified he told Chief Bricker on 9/24/20 that his foot was killing him. The Chief then ordered that Petitioner go to the department doctor the next day.

At Premier Occupational Health on 9/25/20, Petitioner related a history of developing lightheadedness, dizziness, left foot and right sided low back pain while performing fire evolution training for the past few days. The report notes the problem began on 9/24/20. Petitioner had pain with range of motion and tenderness in the right SI joint area. Left foot exam was essentially normal. Lumbar x-ray showed minimal degeneration with minimal grade 1 listhesis at L5/S1 with loss of disc height but no fracture. Left foot films showed postoperative changes at the 3rd metatarsal head, mild loss of metatarsal joint space with minimal spurring and calcaneal spurring but no acute

fracture. A prior history of three left foot surgeries was indicated in an intake form. Lumbar and left foot sprains were diagnosed, with an indication that the process of recovery from an SI joint sprain was discussed with Petitioner. He was to follow up with his primary provider and light duty (no lifting or pushing/pulling greater than 10 pounds) was recommended through 9/28/20. (Px5). Petitioner testified that while being off work after this date, he continued to receive his regular pay for 5 months.

Petitioner's prior left foot problems initially appear to have begun sometime in December 2014. On 8/28/15, podiatrist Dr. Overpeck performed surgery involving 3rd metatarsal osteotomy with internal fixation, capsulotomy and 3rd interspace cyst excision. On 12/4/15, Dr. Overpeck performed surgery involving exostectomy of the left 3rd metatarsal, removal of the previously implanted fixation and manipulation under the toe under anesthesia. (Rx14). On 4/7/16, Dr. Kadakia performed a revision left 3rd metatarsal osteotomy with shortening and elevation with redirection and a metatarsophalangeal joint capsulotomy with extensor lengthening. Post-operative diagnosis was metatarsalgia, prior surgical intervention resulting in scarring and pain in the left 3rd joint, and extension deformity/early clawtoe formation. Dr. Kadakia noted that while a prior osteotomy supposedly had been done, he saw no indication of this since the toe was not shortened or elevated: "He has got a massive amount of scar" with pain and discomfort, and Petitioner was advised he really needed a true shortening. The extensor digitorum longus and extensor digitorum brevis were completely encased in scarring, and the joint was obliterated by scarring, which was "freed up" during the 4/7/16 surgery. (Px11).

On 5/25/16, Petitioner was significantly improved with really no pain, excellent range of motion and excellent alignment per x-ray. On 7/6/16, Petitioner "continued to endorse burning pain dorsally with stretching" and therapy was prescribed. A digital block was performed on 8/17/16 noting continued third toe elevation. On 9/14/16, Dr. Kadakia prescribed Hoka shoes to reduce forefoot pressure and work hardening. On 10/28/16, Petitioner felt he was ready to go back to work. Petitioner's left foot was definitely not 100%, it was significantly better than it was: "It is still not normal motion, and after a long day of work and more carting, it gives him a lot of pain and discomfort but he is able to do it, he just fights through the pain. The next day, if he has done a lot of work it gives him a lot of pain the next day." Dr. Kadakia went on: "I explained to (Petitioner) at this point that it is going to be hard to know with this thing. I think I have got him as good as we can. I do not know what else to do. I can cut the metatarsal head, but that is a terrible idea to a young active gentleman." He noted he could keep shortening the toe, but he didn't want to keep making more and more scarring. He was advised to get prescription shoes for his work boots. Four more weeks of work conditioning was prescribed, noting Petitioner felt he needed more to get used to pounding on his foot." On 11/29/16, Dr. Kadakia indicated Petitioner was doing relatively well and was being discharged as he was able to do very physical demand level but at a 3/10 pain level: "He is a tough guy" and wanted to return to firefighting. He was released to return to full duty: "He is not normal. I want to be very clear on that. It may deteriorate over time. He may have problems in the future. He may need further surgery and it is all related to the work injury. So even though he is getting discharged to full duty, it is not because he is normal. He has reached maximum medical improvement (MMI) at this point from my standpoint. He may get a little better, but it's hard to know." (Px11). An 11/28/16 report from ATI work hardening indicated Petitioner had progressed to a heavy work demand level and he was discharged. (Px9).

Dr. Toolan performed a Section 16 exam at the request of Respondent on 2/5/16. Dr. Toolan reviewed the pre-operative treatment by Dr. Overpeck, noting that after the initial surgery Petitioner continued to complain of the same symptoms he had prior to surgery, noting "his hip, knee and back pain is getting worse." Petitioner then reported he was again unimproved following the second surgery of December 2015 and felt he was getting worse, again reporting right knee, hip and back pain that was unrelenting. Petitioner had mild tenderness to palpation under the 2nd and 4th metatarsal heads as well, and there was significant fat pad atrophy underlying the third metatarsal head. A mild equinus contracture of the ankle ("I am unable to dorsiflex his ankle as usual with his knee extended, this resolves when I flex his knee"). Dr. Toolan opined that the surgeries to that point had not resolved his symptoms "due to limitations and omissions in the treatment plan", and that the nine or more injections into the left forefoot had contributed to significant fat pad atrophy and attenuation of the plantar plate of

the 3rd metatarsal phalangeal joint. He criticized the podiatrist's failure to restrict weightbearing and his recommendation for use of an improper orthotic. Dr. Toolan recommended a very specific course of treatment, to include new orthotics, therapy and home exercise, noting if this failed an additional surgery would be recommended, namely extensor digitorum lungus tendon lengthening to the 3rd toe, a flexor to extensor tendon transfer of the long flexor to the base of the third metatarsal, and an MTP joint dorsal capsulotomy. (Rx13).

Petitioner testified he returned to full duty at Homer Fire in December of 2016. On 3/22/17, Dr. Kadakia noted Petitioner was "doing pretty good. He is getting by. I would tell you it's not perfect; he would say it's not perfect. With the Hoka shoes he can function, he can do his job. He is back to full duty as a firefighter and by no means is it perfect. When he does jump down hard once in a while, it causes him a lot of pain and discomfort, but he can function at a high level at least despite the fact that it's not perfect." Dr. Kadakia found him to be at MMI, opined he does not have arthritis yet and that the condition could stay the same or deteriorate, hard to know. He noted that if Petitioner did develop arthritis over time "we can still do crazy things to minimize his pain." (Px11).

Returning to the post-9/23/20 treatment, on 9/28/20, Petitioner returned to Premier and told Dr. Pitsilos his back and left foot pain was worse with activity. Light duty restrictions (10 pounds) were continued through 10/9/20, again indicating the cause of the problem was related to work activities. Petitioner was again advised to follow up with his primary provider and was referred to Dr. Kadakia for left foot evaluation. (Px5).

On 10/9/20 the Petitioner saw Dr. Kuo (Illinois Orthopedic Institute) with complaints of a two week history of low back pain that began when performing firefighting drills with a lot of lifting with constant burning in his right low back since, which radiates to the right buttock with activity. He had no leg pain or numbness. Dr. Kuo noted when he injured himself "He reported immediately." X-rays noted age appropriate lumbar changes. He was 5'11" and 300 pounds. Noting Petitioner's symptoms were greater than what she expected, Dr. Kuo prescribed physical therapy, medications and lumbar MRI, holding him off work pending review of the films. (Px4). The 10/19/20 MRI showed an L5/S1 central disc extrusion confined to the ventral epidural space with mild bilateral facet arthropathy but no significant spinal canal or foraminal stenosis. (Px6).

Following the alleged 9/23/20 work injury, Petitioner initially saw Dr. Kadakia on 10/20/20 for his left foot. He noted that since he last saw him "he has been doing okay since, not great but okay. It is tolerable." His pain and discomfort were more in the 2nd and 3rd webspace than in the bone. X-ray showed no fracture or dislocation. Dr. Kadakia stated that "it is likely traumatic neuritis from the aggressive activity he was doing. It was a mandatory work activity he was doing and I think that really with the prominence of that 3rd metatarsal head and the pain and discomfort that he as, that what happens is that he overloads that area and causes traumatic neuritis and inflamed and it becomes a problem." The 2nd and 3rd webspaces were injected, which helped a lot, and he already had a metatarsal pad and Hoka shoes. He was taken off work. (Px11).

On 10/23/20, Petitioner reported ongoing 4 (4/10) to 6 (6/10) out of 10 level low back pain. Dr. Kuo opined that the MRI revealed a left annular tear at L5/S1, particularly on the left, with a slight disc bulge. Dr. Kuo prescribed "ramped up" physical therapy and an epidural steroid injection, diagnosed back pain with annular tear, work-related injury and Petitioner was to remain off work. The October 2020 ATI records reflect that Petitioner continued therapy until he was diagnosed with Covid and had continued with a slight antalgic gait and pain in the right sciatic distribution. Therapy was restarted on 11/24/20. A 12/2/20 therapy update noted Petitioner had 10 visits, with a three week gap due to Covid issues. He complained of right low back pain that can burn or radiate into the buttocks and intermittently on the right leg. Noting Petitioner had presented multiple times with a one inch short right leg while supine that equalized with long sitting, indicating a possible right SI joint problem. The therapist stated: "After mobilization of right SIJ in prone with muscle energy techniques, leg length is resolved and the patient is relatively pain free" for two or three hours. It was noted that authorization for injection was on hold pending an IME. On 12/3/20, Dr. Kuo, pending the IME regarding the injection, prescribed continued

physical therapy and off work status. Therapy continued through 12/9/20 but was no longer authorized pending the IME. (Px4).

On 12/4/20, Petitioner reported ongoing considerable pain, mainly in the 2nd to 4th toes, and pain with any weightbearing. He reported he felt he was worse after the injection. The report states that "overall his symptoms have not really improved since surgery." He had participated in a training program to try to get back to work that substantially worsened his symptoms. Findings included significant tenderness to palpation about the third metatarsal head, significant shooting pain between the second and third metatarsal heads and shooting pain between third and fourth metatarsal heads, which was concerning for neuroma. Dr. Kadakia prescribed an ultrasound to evaluate for neuroma, kept him off work and opined that he would be a good candidate for neuroma resection "if we are able to confirm a neuroma" and likely extensor tenotomy to bring down the third toe. (Px11).

Petitioner testified that on 12/10/20, he saw orthopedic surgeon Dr. Singh on behalf of Respondent for an evaluation of his low back pain. Petitioner reported 5/10 back pain with no radiation and denied pain prior to 9/23/20. The doctor's review of MRI reflected L5/S1 decreased signal intensity without height loss and minimal stenosis. Following a normal exam, Dr. Singh diagnosed a lumbar strain, causally related to the date of injury, and preexisting L5/S1 degenerative disc disease which was not contributory to his symptoms. He opined the strain had resolved and he needed no further treatment. He opined the treatment Petitioner received to date was excessive and prolonged in nature, as 4 weeks of conservative treatment should have been sufficient to address a soft tissue strain. Dr. Singh opined that Petitioner was able to return to full work duties. (Rx8).

On 12/15/20, Petitioner requested referral for low back pain from Northwestern Medical, and he was referred to Dr. Templin. (Px11). The 1/12/21 left foot ultrasound of Petitioner's left forefoot revealed small third toe MTP joint effusion with no evidence of Morton's neuroma. (Px11).

Petitioner was examined by orthopedic surgeon and foot/ankle specialist Dr. Holmes at the Respondent's request on 1/27/21. He indicated Petitioner reported being good until performing some work activities and felt dizzy and had left foot pain: "There is no specific injury." He reported burning, pulsing pain, primarily in the forefoot. He also reported swelling, stiffness, decreased function and pain that was tingling, aching and throbbing, but primarily burning. Dr. Holmes noted Petitioner had undergone three prior surgeries to the left forefoot, the last one being an extensive reconstruction. Dr. Holmes did not have the Petitioner's 2015/2016 records or surgical reports available for review, so he didn't know when the surgeries had been performed, and he did not have current MRI films. He indicated it would be helpful to his opinion to review these records. Exam noted complaints of pain and burning in the dorsal and plantar MTP joint in the area of the 2nd, 3rd and 4th toes, but otherwise was benign. X-ray indicated prior 3rd metatarsal shortening with pin fixation with surgical changes noted primarily forefoot and primarily between the 2nd and 4th metatarsals. Dr. Homes diagnosed Petitioner with metatarsalgia and some probable forefoot neuritis. Dr. Holmes stated: "It is my opinion that this patient did not sustain a work related incident. Yes, he did have increasing pain with the training class; however, he does have extensive foot surgery and has had 3 previous operations. It is my belief that his ongoing complaints are just the natural progression of this type of alignment of his foot secondary to the previous operations." He noted that Dr. Kadakia on 10/25/20 noted Petitioner had been doing okay but not great previously. Dr. Holmes further stated: "I think given his previous surgeries his foot is set up for having problems in the future regardless of his level of activity. Some lifestyle factors include his elevated BMI with his weight of 324 pounds is certainly a contributing factor in addition to the previous x-rays and surgeries." He noted there could be some argument that at least there was an aggravation of a preexisting condition "but clearly we all have to understand that the patient has an at-risk foot for any sort of ambulation causing pain from a natural history standpoint." It was his opinion the condition was degenerative following the surgeries and malalignment of his foot with a short third toe. His pain is in exactly the same area where he had the surgeries. Given the severity of his condition, he opined the preexisting condition was not aggravated in any substantive way. Any temporary aggravation would be resolved by now. Petitioner's weight is a significant metatarsalgia risk factor. (Px1).

On 2/2/21, Petitioner saw Dr. Templin with complaints of low back pain with minimal radiation into the right buttock. He reported participating in fire training on 9/23/20 "having to pull dummies and hoses up 3 flights of stairs. With this, he developed immediate pain that has been progressively increased." He denied back pain prior to this incident. Dr. Templin indicated that Petitioner's 10/19/20 MRI was a poor quality study but demonstrated disc degeneration with an L5/S1 annular tear without disc herniation or any significant central canal or foraminal stenosis. Neurologic exam was normal but there was tenderness over the right SI joint. Dr. Templin diagnosed low back pain that began after a work injury with underlying L5/S1 disc degeneration and an annular tear and recommended additional physical therapy. It was noted that Petitioner was off work due to his foot condition. (Px10).

Petitioner followed up with Dr. Kadakia on 2/5/21 with continued complaints of considerable pain in the second, third, and fourth toe, mainly centered at the 3rd toe. Dr. Kadakia believed the main problem was nerve pain, noting the ultrasound did not necessarily rule out a neuroma, especially given an exam that was indicative of a neuroma. He diagnosed left foot neuritis, again injected the 2nd and 3rd webspaces, for diagnostic purposes, and continued him off work. If the pain resolved and then returned, the doctor planned to proceed with a neuroma resection. (Px11).

The February 2021 records of ATI Physical Therapy regarding low back treatment reflect complaints of shooting pain down his right side/leg with forward bending and his exercises were modified due to increased pain in the supine position. On 2/24/21, the therapy record reflected that the plan to progress with standing strength had to be modified due to Petitioner's foot injury. (Px9).

A letter from Chief Locacius on 2/22/21 was sent to Petitioner ordering him to undergo a fitness for duty evaluation. Petitioner completed an FCE on 2/25/21 which indicated he could perform only 43% of his regular job. On 2/25/21, Petitioner reported ongoing low back and left foot pain. Light duty was continued by Premier Occupational Health and Petitioner was released to return as needed and again advised to see his primary provider. (Px5). On 3/1/21, ATI indicated slow progress and that Petitioner reported that the FCE "jacked up" his back and now walking was hard. Ongoing records indicate Petitioner's low back complaints were refractory to conservative care and he was discharged on 3/18/21. He was noted on 3/15/21 to be functioning at the sedentary level after 16 therapy sessions (Px9).

Petitioner had continued symptoms of burning left foot pain and on 3/2/21 Dr. Kadakia noted Petitioner "definitely says it is worse after this training period that he did while he was on the job and that is what made it worse. We didn't see him for years before that, but after he did this on the job training it got much worse." Dr. Kadakia again indicated he believed Petitioner's condition was consistent with a neuroma and injected the 3rd and 4th interspaces, noting if symptoms continued, he may need a neuroma resection. (Px11). Petitioner testified that following this injection he had about a week of relief before the pain returned.

Petitioner returned to Premier Occupational Health on 3/5/21 with ongoing symptoms, and he was again advised to return as needed and continued on restricted duty. (Px5).

On 3/16/21, Petitioner reported transient relief with the left foot injections for a week but now had persistent burning sensitivity over the top of the foot and tenderness within the third webspace primarily and pain with weightbearing. Petitioner wanted to discuss surgery, and Dr. Kadakia felt this was very reasonable, to include neuroma resection at the 3rd webspace, intermetatarsal ligament release of the 2nd webspace, correction of the cockup deformity of the 3rd toe and a capsulotomy of the 3rd MTP joint, with possible extensor lengthening. (Px11).

On 3/18/21, Petitioner followed up with Dr. Templin's office, reporting no improvement with physical therapy and that he was scheduled for another foot surgery. He was referred to pain management and for a new MRI. (Px10).

On 3/19/21, Petitioner saw Dr. Patel at the Pain & Spine Institute for low back pain. This report reflects a history of pain occurring on 9/23/20 while doing a live fire training class: "pulling a hose upstairs during training as firefighter had acute onset of right sided low back pain, reported it to occ health 2 days later as pain did not subside." Facet loading, SIJ, Fabere's, and SIJ tests were positive and he was diagnosed with low back pain and lumbar facet joint syndrome. Dr. Patel wanted to follow up with Petitioner after the updated MRI. (Px7). The repeat 3/22/21 lumbar MRI reflected disc bulges at L3/4 and L4/5 with mild foraminal stenosis, with disc space narrowing and desiccation with a 3 mm left paracentral disc protrusion/annular tear at L5/S1 but no significant stenosis. (Px10). On 3/26/21, Dr. Kadakia recommended against an epidural injection prior to foot surgery as it could impact post-surgical healing. (Px11).

Petitioner followed up with Dr. Patel on 3/31/21. He noted the MRI findings, including right greater than left facet arthropathy at L3, and diagnosed lumbar facet syndrome and a lumbar disc herniation. Dr. Patel discussed possible pain generators, including the L5/S1 annular tear versus the L3 to S1 right facet joints, but diagnostic injections were deferred due to upcoming foot surgery. (Px7).

On 4/8/21, Dr. Kadakia performed a left lower extremity neuroma resection of the left 3rd webspace and an extensor lengthening with capsulotomy of the left 3rd MTP joint. Indications for surgery reflected Petitioner had continued pain and discomfort after exercise that occurred at work in a training exercise. The operative notes state there was a heavy amount of scar tissue in the 3rd webspace that took a fair amount of time to get down. Dr. Kadakia observed the nerve adjacent to the intermetatarsal ligament was heavily scarred on the lateral aspect of the third metatarsal which explained his pain and symptoms. Dr. Kadakia released it off that third metatarsal. He also excised a thickened fat neuroma. He performed a release of the capsule of the toe and then did a Z-lengthening of the extensor tendon to put the toe into a neutral position and it fell into place. Dr. Kadakia concluded that the neuroma with scarring heavily on the lateral aspect of the third metatarsal were consistent with traumatic injury and scarring of this nerve consistent with the diagnosis in his history. (Px12). A 4/13/21 surgical pathology report noted fragments of peripheral nerve tissue with fibrosis and hypertrophy consistent with neuroma. (Px11).

On 4/9/21, Petitioner called Dr. Kadakia's office complaining of wound problems, and on 5/4/21 the doctor noted significant evidence of infection and performed an irrigation, debridement (I&D), and drainage with a secondary closure of the surgical wound. (Px11).

Petitioner returned to Dr. Patel on 4/29/21 (via telemedicine due to Covid) with low back pain that had increased in severity to 7/10. Dr. Patel felt Petitioner had axial back pain and that a diagnostic medial branch block/facet injection would diagnose the pain generator. (Px7).

A 5/19/21 report from infectious disease specialist Dr. Patwa noted a history of a postoperative left foot infection that was improved but not completely healed with antibiotics or I&D. Dr. Patwa diagnosed cellulitis that had improved and changed the antibiotic protocol. (Px13). On 5/21/21, Dr. Kadakia noted the wound was basically healed with one remaining small open area. Antibiotic medication and cream were continued. By 6/1/21, Petitioner continued to have a small unhealed area that the doctor identified as a likely sinus tract that could require an additional I&D procedure. (Px11).

Dr. Holmes was asked by Respondent to provide an addendum report after forwarding Dr. Kadakia's 2015/2016 records as well as his updated current medical. His opinions did not change versus his prior report, noting Petitioner did not suffer a temporary aggravation of his underlying condition, metatarsalgia, which is due to the

prior condition and treatment, as well as to plantar pad atrophy as noted by Dr. Toolan on 2/5/15: "This would also apply to the neuritis of the forefoot and potentially secondary to the multiple injections that in and of themselves would be contributing to underlying neuritic symptoms. (Rx2).

On 6/15/21, Petitioner called Dr. Kadakia's office indicating his would had again opened up and looked "angry" and the physician's assistant advised that he should come into the office for possible repeat I&D. (Px12).

On 6/16/21, Dr. Patel performed right L3, L4, L5 and sacral diagnostic medial branch block injections. (Px8). On 7/1/21, Petitioner reported (telemedicine) about 80% relief with the facet injections with his symptoms returning after 8 hours. Dr. Patel recommended a second right sided L3/S1 diagnostic injection and ordered physical therapy. (Px7).

On 7/12/21, Petitioner followed up with a nurse practitioner at Hinsdale Orthopedics. The report notes continued pain concentrated at the right lateral flank and thoracic spine that traveled to the upper portion of the right buttock. MRI findings included disc degeneration at L5/S1 with mild left sided foraminal stenosis and some facet arthropathy at L2/3, L3/4, L4/5, worse on the right. Petitioner had some right sided mid thoracic and flank numbness. Straight leg raise was positive bilaterally, worse on the right. He was to follow up with Dr. Patel for repeat injections and possible radiofrequency ablation (RFA) and to contact his primary provider for pain management medications. Diagnosis was low back pain following work injury with underlying disc degeneration at L5/S1, annular tear with left-sided foraminal stenosis. (Px10).

On 8/11/21, Petitioner underwent a second medial branch block for his low back pain. This provided a little bit more relief than the first one but again only lasted about 8 to 10 hours. (Px10).

Petitioner testified he continues to have the same back problems, including locking/cramping in the right low back with activity and slight pain radiation into the buttocks. He continues to seek treatment for the low back, noting Dr. Kadakia had continued to restrict him from work at a visit the day prior to the hearing.

On cross-examination, Petitioner reiterated he had participated in firefighter training programs from 2005 through September 2020, most of which had been done at Respondent's facilities with some satellite training, with no problems at all. According to Px17, this was upwards of 1,000 drills, some of which involved ladder rescues and rapid response training for school shooter situations (RFT) in full gear. He testified he took no time off between 2015 and September 2020 for foot or back pain and he denied any re-injuries to the left foot between these dates. As he normally has only 3 personnel in his fire company/station, he reiterated he is more hands-on than lieutenants at other fire stations and would have to pitch in at a live fire. Petitioner acknowledged his prior left foot injury and treatment in 2014 to 2016 involved workers' compensation. After initially treating and having surgeries with Dr. Overpeck, he started treating with Dr. Kadakia in 2016 "kind of at the request of workman's comp", noting that Section 12 examiner Dr. Toolan recommended he see Kadakia. As to the conversation with Petitioner noted by Dr. Kadakia on 10/28/16, Petitioner testified that he did not recall this conversation. As to stating to Kadakia on 10/20/20 that he had pain, the pain was tolerable, and that he had been doing okay but not great since the last surgery, Petitioner his recall was stating that he had good days and bad days. As to Dr. Kadakia's statement on 12/4/20 that Petitioner's overall symptoms had not improved since surgery, Petitioner didn't recall having such a conversation at all.

Petitioner testified the five day training course at issue ran from 9/21/20 to 9/25/20 (see Rx7), and that while he had never completed that specific training course before, none of the drills were foreign to him as he had performed them both in other trainings and on the job as a firefighter. Day 1 of training was classroom only. Day 2 (9/22/20) involved mainly instruction in the morning, with some physical activity such as forcing doors, but the first live fire evolution was in the afternoon on 9/22/20. There were three evolutions, but Petitioner could not recall his roles in them. It did involve first floor/basement entry. That afternoon, he was in full gear and he

completed all of his evolutions. Petitioner denied telling Lew Lake or anyone else prior to live fire training on 9/22/20 that he had a back or foot problem or that he may have a problem completing the training. Evolutions were scheduled in the morning and afternoon on Wednesday, 9/23/20, and Petitioner testified that he developed lightheadedness/dizziness and had to sit out after this occurred. He denied ever having similar cramping in his legs before. He acknowledged that Lew Lake advised him to sit out and watch the fire chiefs' performance, which he did while assisting in filling water bottles. He denied discussing physical fitness with Lew Lake on that date. Petitioner testified he hurt his back and foot on 9/23/20 but he did not tell Lake or anyone else about it because he would have had to re-do the evolution training again at a later time. He agreed having to repeat the training would not impact his employment status. He testified that other people sat out that day, though he could not say if they passed or failed since he didn't complete the training.

When he came into training in the morning on 9/24/20 (Thursday), Petitioner agreed he didn't tell Lew Lake, any other instructor or Chief Locacius that he had been injured on Wednesday, 9/23/20. He did perform some evolutions that Thursday but the only one he made it through was a basement fire – while the syllabus says this was in the afternoon, Petitioner testified it had actually been done in the morning. He testified he finished the first evolution but right afterwards was again seen looking lightheaded, so he was assisted, and his gear was pulled off. At that point, Lew Lake had Petitioner evaluated by Plainfield paramedics, and Petitioner believed the decision was ultimately made by Chief Bricker or Chief Locacius that he be evaluated at the hospital. Petitioner agreed he did not mention foot or back pain at the ER. Chief Bricker came to the ER after Petitioner had arrived and then brought Petitioner back to the training facility, and while Petitioner wanted to continue training, the doctor said he couldn't do it due to dehydration and heat exhaustion, so he grabbed his stuff and went home. He had no loss of consciousness during training. At some point on that Thursday (9/24/20), he couldn't recall exactly when, he spoke to Chief Locacius on the phone, and on his orders went to Premier Occupational Health the next day (9/25/20). Asked if this was the first time he reported back and foot injuries to Respondent, Petitioner testified he also told Chief Bricker about these injuries at the ER. Petitioner agreed he told medical personnel at Premier that he had hurt his foot and back in training running up and down stairs with full gear. He testified: "that's what I feel triggered it", and that's when he felt the burning in his foot. He couldn't say for sure how many times he had gone up and down the stairs that day, but that it could have been multiple times. Petitioner could not recall if he had performed training with Respondent between 2016 and 2020 that was similar to that of IFSI's but agreed if he had it would have been in full gear. As to his back condition, he testified he felt the back pain instantly when he was pulling the hose up the stairs and it wouldn't budge: "Felt my back strain. I felt spasm, moved my back forward (to stretch), it released a little bit and kept going. Its firefighting. We get bumps and bruises all the time." He didn't feel any pain shooting into his legs, just a back spasm. Petitioner denied having foot pain daily since 2016, again indicating he had good days and bad days but had never been unable to complete his work duties. He could not recall anything specific that would trigger his foot pain, and he never had to take anything stronger than Motrin. Petitioner did not recall ever discussing foot pain with any other member of the department between 2016 and the 2020 training. Petitioner believed he was the only one who provided the 2/25/21 FCE therapist with information on his condition, and he didn't recall mentioning sharp shooting pain down his R leg – "not in those exact words, no." When he indicated he was "knocked out", he meant knocked out of the training program, not that he lost consciousness.

On further cross exam, Petitioner agreed he did have conversations with Lew Lake towards the end of training and did recall talking with him while he was waiting for the ambulance, with Lake telling him he had broken his own back. Lake was trying to console him because he was upset about not being unable to complete the training. He did tell Lake he was embarrassed because he had never been unable to complete training as a firefighter or a Marine. He did discuss with Lake that he'd had foot injuries in the past, but did not discuss the current incident, indicating "at that point I still thought I could come back." He testified he told Dr. Kadakia that his use of the stairs is what injured his foot ("I told him the constant impact, yeah"), and he believed this is what Kadakia indicated in his report. He denied telling Dr. Holmes that he didn't recall a specific injury to his left foot. On redirect exam, he testified that he told Dr. Holmes he injured his foot "during live fire evolutions moving fire hose

upstairs." Petitioner agreed he had gained weight since his 2015/2016 surgeries, indicating that hie weight in 2015 at 240 to 250 pounds sounded right, while he weighs 320 pounds now. He indicated he had continued to work out since 2016 with no foot problems, but agreed it was harder to perform training and work tasks with more body weight.

Respondent Fire Chief Christopher Locacius testified that he initially began with Respondent in 2001 as a firefighter/EMT, moving up to Lieutenant (2006), Captain (2012), Battalion Chief (2015) and most recently Fire Chief (2017). Petitioner had originally been assigned to him in 2015 due to performance issues and to give him a new start with a performance plan under a new Battalion Chief (Locacius). He worked with the Petitioner and they were able to get him off of the performance plan in 2016. He continued to supervise the Petitioner, including working with him on fire calls, until he moved up to Fire Chief in 2017. Chief Locacius testified he has completed the IFSI fire training program in the past. He identified Rx4 and Rx5 as Respondent's training logs from 2006 to 2015 and 2015 to 2020, respectively. Chief Locacius was not on site for the 9/21/20 to 9/25/20 training at IFSI. Asked if he had a conversation with Petitioner on 9/24/20 or 9/25/20 regarding the training, he testified he spoke to him on the day he was sent to the hospital. He advised the Petitioner he was concerned about it being the second time he'd felt dizzy and lightheaded during the training and wanted to make sure he got checked out by a doctor. When Petitioner returned to the training site after the ER visit, they spoke by phone: "Then we sent him – he came back talked about the back and the foot and that's when we sent him to our department doctor on that Friday." Chief Locacius confirmed that this was the first time he learned Petitioner may have injured his back and foot. Based on the ER physician's recommendation, the Chief had determined Petitioner couldn't continue with training and referred him to Respondent's physician for evaluation. Once completed, the plan would be to determine the route needed for Petitioner to be able to complete training, and if a performance plan was needed. If such a plan required effort by the firefighter and he failed, discipline and/or termination could be considered. If training cannot be completed due to a physical injury that cannot otherwise be resolved, if necessary, the firefighter can apply for a pension. Chief Locacius testified that he was not aware of Petitioner having any issues with training between 2015 and September 2020, indicating he would have been notified if Petitioner had such difficulty. With regard to injuries or complaints during training, firefighters are instructed to complete a Form 45 document.

Chief Locacius testified that he and the Petitioner discussed his left foot pain three to five times between 2015 and September 2020, as he would ask his firefighters how they were doing. The Petitioner told him he had good days and bad days but had left foot pain every day. He told Petitioner if it got bad to let him know so the department doctor could check him out, as he would tell the firefighters they needed to be at 100%. The Chief testified he can tell when his firefighters are not performing well in a task, and he would ask them about it any issues he saw or if he was aware of them having a previous injury. He testified the Petitioner has gained weight over time, which has hampered his job performance, as weight gain impacts endurance and hydration, especially when wearing their gear (35 pounds), air pack (40 pounds) and other tools. Chief Locacius testified that Respondent's fire Stations 1 and 2 have lots of exercise equipment and firefighters can work out any time of day as long as they have no other work duties to perform. Station 3, where Petitioner was stationed, has a treadmill and free weights. The Chief is stationed at Station 1, so he isn't generally on site at Station 3, but he does go there for station checks, and he has never seen Petitioner working out. He testified he was aware the Petitioner had purchased a bicycle and encouraged him to ride, along with other activities, noting Petitioner felt biking was best for him because it didn't hurt his foot as much. The only modification to Petitioner's work gear for his left foot that the Chief was aware of was, he believed, insoles for his shoe. He testified Petitioner told him he used over-the-counter insoles that worked better, and the Chief advised him that they could modify his shoe/boot if needed.

Chief Locacius testified that he spoke to IFSIs Lew Lake during the September 2020 training on a Tuesday and discussed that Petitioner had been lightheaded and was sent out of evolution, but neither of them believed there was an issue with Petitioner participating in training the next day. His recall was he spoke to Chief Bricker while Petitioner was in the ambulance, as that is who he received information from, and he could not recall if he spoke to Lew Lake that day or not.

Chief Locacius testified that fire officers (Captain, Lieutenant) continued to perform firefighter/EMT duties, but include additional supervisory and paperwork responsibilities. A fully staffed fire station involves fewer physical requirements of a Lieutenant at that station, noting a station staffed at 2 or 3 firefighters is not fully staffed and a Lieutenant there has to be hands on when they have to be hands on. The goal is not to have this happen, but with a two or three man crew, you may have to. In general, he testified that Lieutenants between 2015 and 2020 were generally hands on firefighters, including at Petitioner's Station, which generally had 3 personnel. Petitioner is the only Respondent officer who failed to complete the September 2020 IFSI training.

IFSI's program director, Lew Lake, testified on behalf of Respondent. A staff member there for 20 years, Mr. Lake oversees IFSI's officer training program. He retired from his firefighting career as the assistant fire chief in Wheaton, Illinois in 2019. Mr. Lake identified Rx7 as the syllabus for the September 2020 training program. Day one involved lectures, including a discussion of injuries occurring during training having to be reported directly to him. In discussing officer fitness levels, IFSI personnel do an overview of the room to determine if they feel anyone will struggle with strenuous activity.

On the afternoon of 9/22/20, during the first or second evolution in the afternoon, Petitioner's company was participating. Mr. Lake testified that as Petitioner was going to force open the door, he overheard him telling his company: "I can't do this I have a fucked up back." Lake testified that he walked up to Petitioner at that moment and asked him if he was physically capable of performing, and that Petitioner indicated he was coming off a back injury and would do his best. Lake testified he knew how the Petitioner felt as he had undergone back surgery himself, and that is why he approached him. Petitioner was able to complete the evolution, they forced the door open and Lake then didn't give it a second thought. However, later that day the Petitioner then suffered from dehydration during an evolution. The instructor informed Lake that Petitioner did not appear well. They pulled him out of the evolution, pulled off his gear and sat him off to the side with fluids. Mr. Lake believed this was the second evolution of three that afternoon, and that he didn't want the Petitioner to do further evolutions, so he sat out the last evolution due to dehydration. Petitioner then indicated he felt better and planned to return the next day.

Mr. Lake was asked if Petitioner had a problem on Wednesday of the training week, involving three-flat fires, and Lake testified he didn't think Petitioner had a problem with these evolutions: "His issues took place when we did basement fires." At no time on 9/23/20 did the Petitioner report to Lake that he had a left foot or back injury during training, noting he absolutely would have documented it if he had. All students had been instructed to report any injury, no matter how trivial, to protect both themselves and their department. Mr. Lake testified that the Petitioner did not report any back or foot injuries during training, noting he absolutely would have documented if he had. During a basement evolution on 9/24/20, he believed sometime around 1:30 or 1:45 in the afternoon, he saw the Petitioner walking out of the building towards some steel cans and taking off his gear. Knowing he had a previous dehydration issue, he approached Petitioner to ask if he as okay, Petitioner indicated he was lightheaded and dehydrated again. Given this was the second incident, Lake called for an ambulance to check out if there were any problems beyond dehydration, such as a cardiac issue, and Petitioner was transported to Edward Hospital. He then called Chief Locacius to let him know. As to the specific dates and times, Mr. Lake testified this was to his best recollection, noting he has done many trainings since September 2020.

Before he went into the ambulance, Mr. Lake testified he sat at a picnic table with Petitioner on site that day and explained why he wanted Petitioner to see a physician. According to his testimony, during this discussion the Petitioner said he had a prior foot injury and a previous back injury, and had since gained a lot of weight, making his job harder and causing frustration. Lake indicated he was sympathetic, given his own prior back injury, and advised Petitioner and what he did in terms of fitness and working out to get himself back on track. Mr. Lake reiterated that the Petitioner did not say he had been injured during the training. The Petitioner indicated the problems were preexisting and that ever since his foot injury he had been struggling. When the Petitioner returned from the hospital indicating a diagnosis of dehydration, Mr. Lake determined, given this was a second incident,

Petitioner would not be able to complete the class. Petitioner then left the site. Mr. West testified that, in his experience, very few firefighters have failed this training, estimating less than 12 out of 2,000. On cross-examination, Mr. West testified he personally watches the training taking place at IFSI and was about 10 feet away when he heard Petitioner indicate his back was a problem. He testified that dehydration doesn't happen very often during training. IFSI does receive grants for each student, and he agreed that fire chiefs either send individuals to training, or if individuals want to volunteer they must have the signature of a chief.

On rebuttal, the Petitioner denied ever having conversations with Chief Locacius about his physical condition or his bicycle or exercise, and they never discussed him modifying his gear. He has to undergo yearly physicals, and he has never been found unfit for duty. He testified he completed every evolution during the Tuesday training, and he was first pulled out of training for dehydration on Wednesday afternoon during the last evolution of the day. As to Mr. Lake's testimony, Petitioner denied ever saying his back was messed up and he couldn't perform training, indicating Lake must have confused him with another student as he did not have a prior back injury, so this made no sense. While he acknowledged they discussed physical fitness at the picnic table after he was pulled out of the first evolution of the day on Thursday. Petitioner testified this was not on Wednesday, it was on Thursday. Petitioner agreed he had to leave the evolution after the first day and Mr. West did console him because he was upset. This was on the 23rd after the basement fire activity. They mostly discussed Mr. Lake's back injury. He did tell Mr. Lake that he had injured his foot "back in the day", but never discussed Petitioner having a back injury. He agreed they may have discussed Petitioner having a weight issue: "It may have come up. I was pretty emotional at that time." Petitioner agreed it is harder to work out as much since his foot injury and he has gained weight over the years. On cross, Petitioner could not recall if Mr. Lake had given him his cell phone number if he wanted to talk.

Dr. Kadakia was deposed on 7/27/21. An orthopedic surgeon specializing in the foot and ankle, the doctor testified he originally treated Petitioner's left foot in March 2016. On 4/7/16 he performed a revision osteotomy of the left third metatarsal. Petitioner had work hardening in November/December 2016 where he reached the very heavy duty work level and, though he still had some pain in the toe, he was released to return to work. By 3/22/17, Petitioner indicated he had been using Hoka shoes and working full duty but still had some pain, particularly any time he "jumped or kind of pounded on the foot", which was to be expected. Dr. Kadakia testified: "But he was able to function at a high level, therefore I said leave it alone, he's still at MMI, and I told him it'll probably be like this forever, I don't expect him to get any better after this." He indicated if Petitioner was able to continue working and "kind of pound through the pain" without hurting himself, he could continue to work regular duty. He did not see Petitioner again until 10/20/20. (Px16).

On 10/20/20, Petitioner reported he had been doing "relatively well" since 2016, but now had pain more on the bottom of the foot "aggravated from the activity." He reported he was doing fine until participating in a live fire training evolution "where he's pounding it really hard with heavy weights. So four full flights of stairs, 200 pound dummies, and in short summary, his foot hurt a lot. He was able to complete the training for that day because he, in general, pounds through his pain, that's kind of what I told him he had to do. And then the next day after the first day or training, he had gone back for training again, and he said he had a lot more pain in the foot." Dr. Kadakia then testified that Petitioner indicated he also hurt his back and had cardiac issues ("so everything kind of hurt"), and was primarily focused on his cardiac issues "so he didn't complain about his foot as much", but then had ongoing foot pain. Dr. Kadakia acknowledged he didn't really know what Petitioner did on a daily basis other than obviously being a firefighter and doing "heavy loads", but that the evolution involved some intense training with more than typical impact on his foot. There was no one specific incident that caused the foot pain. (Px16).

Petitioner presented with pain on 10/20/20 that was different than his typical 3rd toe joint pain, it was a nerve-type pain in the webspace between the third and fourth metatarsals that shot into his toes, aggravated by activity, which he had never complained of before. To Dr. Kadakia, this appeared to be more of a traumatic neuritis, i.e. nerve irritation, in the setting of the prior surgery where he had scars. Due to the prior surgery, Petitioner's left third

metatarsal is higher than the rest of his foot – "what that does is places the nerve under strain" along with the metatarsal head which is the bone on the bottom of the foot adjacent to where the nerve runs. He testified: "So people that have that condition are theoretically at risk for strain of the plantar nerve, the nerve on the bottom of the foot." Exam reflected tenderness over this nerve consistent with his symptoms. Ultrasound was obtained to identify if there was a neuroma, which is a thickened, damaged nerve. This was not seen, though ultrasound is not perfect in detecting neuroma, and did show fluid in the third toe joint consistent with his prior surgery and repetitive trauma. Ultimately, a neuroma is a clinical diagnosis. (Px16).

A diagnostic and therapeutic injection was performed between the third and fourth metatarsals, and Petitioner's response of brief relief supported the finding that this was not an inflammatory condition but rather a mechanical condition where the nerve may be "scarred, trapped, what have you." He further testified that in Petitioner's case, the neuroma was "likely secondary to scarring from his acute injury and his history of the fact that the nerve is probably not normal and its scarred down in position because of the prior surgery." At that point, Petitioner could either live with the problem or undergo surgical resection of the neuroma, as well as possibly a release of the second webspace. Dr. Kadakia held Petitioner off work based on Petitioner feeling he could not perform his job safely and because "I didn't think it was safe to do it, and it would obviously cause more trauma to the damaged nerve area and make it worse." When surgery was performed on 4/8/21, Dr. Kadakia used the old incision. Because the third toe had been cockeyed from the last surgery, he felt this should be fixed, so the third MTP joint was released to minimize the pain there and to make the foot more functional. The nerve was scarred down to the underside of the distal neck of the third metatarsal. Instead of going straight between the bones, the nerve "took like a 40 degree turn", which "makes sense because that's where we had all the prior surgery, and you are literally adjacent to the nerve with this prior surgery." He further testified: ". . . it does explain why with repetitive trauma since that nerve is stuck and scarred underneath the bottom of the bone, heavy loaded impacts are going to really aggravate that nerve." The nerve was released, and a pathology report confirmed a neuroma. Petitioner then unfortunately had difficulty healing, given he'd had so many surgeries, and ended up being infected, which delayed closure. At the time of his testimony, Dr. Kadakia testified that Petitioner's wound was nearly 100% healed, but he was not out of the woods yet, and he continued to report pain and swelling. He was to undergo therapy once the wound issue is resolved. (Px16).

Dr. Kadakia agreed that there was no mention of the left foot in the initial 9/24/20 ER report, again testifying Petitioner reported that while he had left foot and back pain at that time, it was overshadowed by cardiac issues/dehydration, noting it's common for people to not complain about less relevant problems at a medical visit. As to the initial report from Premier Occupational, Petitioner reported onset of left foot and low back pain on 9/24/20, which Dr. Kadakia tried to say this was a misstatement of a 9/23/20 onset. Based on the medical records reviewed and Petitioner's stated history, Dr. Kadakia opined that the work incident was the direct cause of the change in Petitioner's foot pain and nerve pathology that was found during surgery: "So he had obviously some preexisting foot pain, but that work injury accelerated or was the cause at least for it to have that nerve pain." The prior surgeries definitely put the Petitioner at greater risk of nerve issues. The finding of the nerve scarred down to the bone is not something Dr. Kadakia commonly sees or that occurs on its own, "and that would be where I would say there's evidence of trauma." Had the nerve been scarred to the bone prior to the work incident, he would have had prior nerve pain. It's a painful condition and it wouldn't make sense that he wouldn't have complained of the problem prior to the work incident. What happens, following the prior surgery, is that a heavy load causes some inflammation to that area, which by definition leads to scarring, and with no fat to protect it, it scars down to the bone. The need for surgery was due to the work injury: "again, he had no pain prior to this incident and hie pain was very consistent after that incident in September 2020." Any necessary treatment in the future was unclear at the time of his testimony, but potentially could involve further revision surgery. As to the opinions of Dr. Holmes, Dr. Kadakia testified that they more or less agreed on diagnosis, including some preexisting metatarsalgia, but he disagreed with Dr. Holmes' conclusion that just having an elevated toe would create a neuroma. Again, it puts one at risk of neuroma "but you have to have some sort of reason for that to make the nerve pathologic." The nerve irritation would have occurred gradually, but that didn't occur here given

Petitioner was fine the day before the training and then had nerve pain that was ongoing after the work injury. (Px16).

On cross examination, Dr. Kadakia agreed someone who has undergone the surgeries Petitioner had undergone previously is, in general, there is a predisposition for degeneration, arthritis and foot pain. He also agreed that a 300 pound person will have more impact on a foot with activity than someone who is 150 pounds. Early weightbearing following a foot surgery could potentially impact healing, but it depends on the surgery. All he knows about what Petitioner was doing during the evolution came from Petitioner. As to what could have caused Petitioner's left foot to become symptomatic, Dr. Kadakia testified: "sudden impact or repetitive, heavy impact, like beyond clinical physiologic impact. . . Some sort of excessive load." As to whether it could have occurred with activities of daily living, though unlikely, he testified it could theoretically if such activities are very heavy, but that it made no sense in this case given Petitioner had no symptoms and sought no treatment for 3-1/2 years prior to the work injury. It's fait to say its more likely for someone with prior surgeries and ongoing condition like Petitioner to have activities of daily living cause additional discomfort. He did tell Petitioner in 2016 that is foot would never be normal and "he always had some chronic pain in it." He would anticipate that the operated joint to develop arthritis over time, but just within that toe itself, nit the secondary structures on either side of it. Because the prior surgeries removed fat pad, there was no longer cushion between him and the nerve, making it more likely to develop neuroma. How Petitioner's body weight relates to development of neuroma on the bottom of the foot is complicated, as there is no data to support it one way or the other with a surgically created lack of fat pad. He agrees the heavier one is the more load that is put upon the foot. Dr. Kadakia agreed the Petitioner could not pinpoint a single event that triggered his left foot pain, but that to Kadakia's recall from his notes, it occurred "mostly the first day" of fire training. As to whether Petitioner's pain was so severe at the time of the 10/20/20 visit that he could not complete his firefighter duties, Dr. Kadakia testified he would not have traumatized the foot mechanically, but Petitioner said it hurt a lot and he couldn't do his work safely, and he had to go by what he said Its not unreasonable that severe nerve pain could prevent activities. He has known Petitioner a long time now and he has not been an exaggerator. (Px16).

Dr. Kadakia's understanding is that Petitioner hurt himself on 9/23/20, was able to complete his training that day, and returned the next day and was unable to complete some part of training before he had to get medical service for a possible cardiac condition. He agreed Petitioner did try to go back and complete training after being discharged from the hospital on 9/24/20. Ultrasound can depict fat thickened nerves, the most common neuroma, which Petitioner's ultrasound did not depict, but it is not good to view thin scarred nerves. Had there been such neuroma finding on ultrasound, it would definitely make the idea of acute trauma "more black and white." As to the findings of Drs. Toolan (2016) and Holmes (2021), Dr. Kadakia agreed with both of their diagnoses of metatarsalgia, which really is a broad diagnosis for forefoot pain. However, Dr. Toolan did not discuss nerve pain, only Dr. Holmes did. Petitioner's metatarsalgia is due to his third MTP joint. He had scarring and contractures from prior surgeries that were released during April 2021 surgery, but the joint remains abnormal. Dr. Kadakia acknowledged that the plantar nerve can become entrapped, as he found during surgery, outside of an accident, possibly even from the prior surgery. However, such scarring tends to occur close in time to the trigger, so "temporally speaking the only thing that correlates is this trauma (work injury) which makes sense." Again, the preexisting foot condition definitely predisposed him to his current issue, but the trigger is more likely during some sort of high level event, not just activities of daily living. As to the work injury, Dr. Kadakia, he didn't know if it was an exact event or just the cumulative effect of the day. He testified: "I don't think he had an underlying neuritis or nerve problem prior to that day" because he had no prior nerve pain. He had an acute change in symptoms. Acknowledging that the Petitioner had undergone other trainings between 2016 and 2020 that had heavy activity, and it was fair to ask if he would have expected Petitioner to have developed pain prior to the current incident with such activity, Dr. Kadakia testified: "So my response would be that he was at irks the whole time. He could have had it, he did not. Something must have happened differently during this episode of training that led to this type of injury to cause him to have the symptoms he had. That's the only logical conclusion I can come up with based on what I saw." He agreed that "it is unusual for sure" if he had done the same type of

training before between 2016 and 2020 and had no symptoms, but it must have been something different doing a heavy load in September 2020. (Px16).

On redirect, Dr. Kadakia agreed his narrative report indicated Petitioner returned to the training after the ER and the chief told him he couldn't return, and at that point he told the chief about left foot and back complaints. He acknowledged Petitioner's training records reflect he had numerous types of training between 2015 and 2020. (Px16).

Dr. Holmes was deposed on 8/10/21. His recollection of Petitioner was based on his review of his reports. He examined Petitioner on 1/27/21. Petitioner reported onset of pain at work on 9/23/20 with no specific injury. He acknowledged that his 1/27/21 opinion did not include a review of pre-2020 medical records and he stated at that time that such records would have been helpful. Dr. Holmes testified consistently with his report regarding Petitioner's complaints, exam findings and treatment history. He noted the complaint was burning pain on the top and bottom of the foot from the second to fourth metatarsals, i.e. the ball of the foot, and increased pain with weightbearing. X-rays showed some right 3rd hammertoe and that the 3rd toe was raised a bit, which Dr. Holmes indicated is not particularly unusual in the general population. He indicated it would be consistent with 10 to 12 prior injections (per Petitioner) and the prior surgeries. Dr. Holmes defined metatarsalgia as pain on the bottom of the foot under the ball particularly associated with weight bearing. Neuritis is the reported burning pain, an irritation or inflammation of the nerves. Dr. Holmes' opinion that Petitioner's left foot condition was not related to the work accident was based on no reported acute injury and "he wasn't doing any activity that would be out of the ordinary expectations of activities of daily living." He had the prior history of forefoot surgeries and injections. He opined it was the natural history of someone with his age, comorbidities and preexisting left foot condition. He noted Petitioner reported his pain got worse following injection with Dr. Kadakia, and an injection itself could further irritate the nerve if its struck. Dr. Holmes then agreed he was aware Petitioner was performing training exercises on 9/23/20 when he alleges he was injured. (Rx3).

Petitioner's third toe lift, a contracture, is a known cause of metatarsalgia and it takes fat away from the bottom of the foot and subjects the metatarsal head to increased forces on the bottom of the foot. While Petitioner's body weight also can impact foot pain, it's the overall configuration of the 3rd toe and location of pain that is the key. Petitioner had a fixed deformity, and over time it could stay the same or get worse, but it wouldn't get better. The prior surgeries would lead to increased scarring and potential metatarsalgia progression. Improperly sized shoes can contribute. Any weightbearing activity is a potential aggravation. He believed Petitioner was capable of full work duties. The only "treatment" he would recommend are metatarsal pads and steel shank rocker-bottom shoes like Hokas. There was no evidence Petitioner sustained a fracture, dislocation or trauma to the left foot on 9/23/20, or a jump/fall from a height. (Rx3).

After reviewing the records identified in his addendum report, Dr. Holmes noted Dr. Toolan, also a foot/ankle expert at University of Chicago, on 2/5/15 noted Petitioner had undergone nine or more left foot injections which contributed to plantar fat pad atrophy, which Holmes opined is a known complication of multiple cortisone injections: "It causes the cushion on the bottom of the foot to atrophy", which results in increased pain to the bottom of the foot. Toolan also noted attenuation of the plantar plate from the injections/procedures, which can cause the toe to elevate above the others. Petitioner had undergone an 8/28/15 left 3rd metatarsal capsulotomy, i.e. release of the joint, with excision of a cyst with podiatrist Dr. Overpeck. On 12/4/15, Dr. Overpeck performed a spur excision and manipulation of the 3rd toe under anesthesia. Petitioner then started his treatment with Dr. Kadakia, which included a diagnosis of metatarsalgia and the additional 4/7/16 surgery. As to the updated 2020/2021 records of Dr. Kadakia, while Dr. Holmes agreed with the diagnosis of neuritis but "I voiced my opinion that I do not believe he had a traumatic neuritis based upon the work injury but a traumatic neuritis based upon previous treatment and the recent cortisone injections as well." Dr. Holmes continued to opine that Petitioner had reached MMI and was capable of working full duty. He did not temporarily aggravate the condition via the work accident. His final diagnosis was metatarsalgia associated with plantar pad atrophy and neuritis. He had not

reviewed the Edward Hospital ER records but testified that he would have anticipated that if he sustained an acute injury to the left foot, Petitioner would have reported it at that time. Other than being on his feet at the time of his alleged work injury, Dr. Holmes was not aware of the specific activities he was performing. However, if Petitioner had performed these same activities in training in September 2020 as he had between 2015 and September 2020 without foot problems, Dr. Holmes testified this would further support his opinions. It was noted that statements of Dr. Kadakia in 2016 and 2017 indicated that Petitioner did not have a normal foot and had ongoing pain. Dr. Holmes then reviewed Dr. Kadakia's report referencing Petitioner's 9/23/20 training activities, he testified: "That information is consistent with the previous narrative of Dr. Kadakia in 2017 that he was able to perform his duties as a firefighter and that occasionally he would have some discomfort doing high impact activities, but he was able to perform those duties without restrictions or limitations." The report also notes that he completed training on 9/23/20 and the next day, after coming back from the hospital for dehydration, returned to the site and was advised he could not complete the training, after which he reported left foot and back complaints. Again, while he agreed with Kadakia's physical findings, Dr. Holmes opined that his explanation of the findings was inconsistent with his 2017 indication of Petitioner's condition: "I believe that his overview is essentially consistent with what his overview was on 3/22/17. I don't see that there's any specific traumatic event. To use a well-worn term, there was no specific tipping point that occurred on the reported day of the injury. This is just the continuation of the deformity that he noted earlier in 2017 and again now in October of 2020. (Rx3).

As to Dr. Kadakia diagnosing a neuroma in 2020, Dr. Holmes noted the 12/5/20 ultrasound was negative for this, and that Petitioner's symptoms "would still be consistent with a neuritis having rules out a neuroma as a potential cause of symptoms." The findings of Dr. Kadakia at the 4/8/21 surgery were consistent with the previous multiple surgeries, which he attributes to heavy activities, but these are activities he has been having going back to 2017. Nothing that occurred on 9/23/20 resulted in any of the anatomic features or scarring that was noted. That would be related to the multiple prior surgeries and injections, not to one specific activity on 9/23/20. Nothing Dr. Holmes had reviewed would suggest that anything could have happened to the left foot that would have caused any of the noted changes indicated at the April 2021 surgery – "it defies logic." (Rx3).

On cross examination, Dr. Holmes agreed the records of treatment after 9/23/20 note Petitioner had increased pain after the training event. Dr. Holmes stated that carrying tools and dummies up and down stairs, performing extrications of bodies, and pulling charged fire hoses up and down stairs all while wearing 80 pounds of firefighter gear were activities consistent with Petitioner's normal activities of daily living as a firefighter. Dr. Holmes acknowledged that the 9/25/20 report from Premier Occupational Health reflected complaints of left foot pain while doing fire evolution training. He agreed that Petitioner described left foot pain that occurred while doing the training as well as right-sided lower back pain following the training. He agreed the 10/20/20 report of Dr. Kadakia noted his opinion that traumatic neuritis of the left foot was from the aggressive, mandatory work activity. He agreed Petitioner's left foot complaints at that time involved pain and discomfort in the 2nd, 3rd and 4th web spaces of the left foot. He agreed that Petitioner reported immediate relief with Dr. Kadakia's injections but opined that this is not diagnostic in that "if I injected most things with xylocaine, it's going to feel better." He agreed Dr. Kadakia on 12/4/20 documented complaints of burning pain in the forefoot, pain with standing/weight-bearing and using stairs, and that these were the same complaints Petitioner made to him. Dr. Holmes agreed burning in the forefoot can be associated with nerve injury, which would be consistent with Dr. Kadakia's 12/4/20 diagnosis. (Rx3).

On further cross, Dr. Holmes testified that his indication of a "benign" physical exam of the left foot was in the context of his knowledge of a preexisting condition and Petitioner's subjective complaints: "I've acknowledged the previous surgeries. I've acknowledged his area of burning and metatarsalgia. But in the context of his functioning of the foot, lack of atrophy, lack of swelling, it's an essentially benign examination." Dr. Holmes agreed he diagnosed metatarsalgia and some neuritis of the forefoot, testifying his definition of neuritis is irritation or inflammation of the nerves, and his definition of metatarsalgia is pain in the ball of the foot that's generally associated with weight bearing activities. In the Petitioner's case, his definition of metatarsalgia is related to the

cocked up toe deformity, the displacement of the fat pad, the injection with the fat pad atrophy and the plantar plate attenuation. Asked if the conditions as described predisposed Petitioner to aggravation of the forefoot, he testified it predisposed Petitioner to pain as indicated by Dr. Kadakia with certain weight-bearing activities. Again, Petitioner's condition is not work-related but is the natural progression of his preexisting condition. Dr. Holmes acknowledged that "there could be an argument" that, at worst, there could have been an aggravation of a preexisting condition, but the Petitioner was at risk of any sort of ambulation causing pain, and he continued to opine that there was no temporary aggravation in this case. Dr. Holmes agreed he initially denied causation prior to reviewing any of Petitioner's prior 2016/2017 records or surgical reports, or the current MRI, despite indicating they would be helpful to his opinions. He did review x-rays but agreed they would not detect a nerve injury. His opinions did not change after reviewing these documents. Dr. Holmes agreed the operative report of April 2021 did indicate a neuroma was excised from Petitioner's 3rd toe web space, and that the nerve was heavily scarred on the lateral aspect of the third metatarsal, agreeing this would be a competent cause of the Petitioner's pain and symptoms. Dr. Holmes also agreed there was no indication Petitioner sought left foot treatment between April of 2017 until October of 2020, and agreed he had worked full duty throughout this time. He testified that Dr. Kadakia's October 2020 records did not reflect any change in condition of Petitioner's left foot. He agrees that scarring can be caused by inflammation, but also by surgery, which is a more common indication for scarring. He agreed there was no prior medical evidence of a neuroma or nerve pain in Petitioner's pre-September 2020 medical records. Dr. Holmes was asked to review Petitioner's firefighter training records. He agreed that a study presented by Petitioner's counsel, the "Naraghi Study", concluded that there is a relationship between foot posture index, ankle equinus, body mass index and intertarsal neuroma. Dr. Holmes testified that activities, per Petitioner's history, of lifting 200-pound dummies up and down stairs, dragging a hose, and performing all these activities in the evolution training, would not be a competent cause of aggravation of Petitioner's left foot condition. (Rx3). The Arbitrator notes that the conclusion of the Naraghi study was: "No relationships were found between foot posture index and body mass index with intermetatarsal neuroma, or between foot posture index and the interspaces affected. However, a strong association was demonstrated between the presence of intermetatarsal neuroma and a restriction of ankle dorsiflexion." (Rx3, Ex. 6).

The Arbitrator also notes a narrative report of Dr. Kadakia was part of the Rx2 deposition exhibit (Ex.4). Dated 6/7/21, which is consistent with his opinions stated within the deposition that the 9/23/20 work activities were at least a contributing cause to the Petitioner's neuritis/neuroma and need for surgery.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner has failed to prove he sustained accidental injuries arising out of his employment with Respondent on 9/23/20.

The facts make it clear that, in participating in the IFSI training on 9/23/20, the Petitioner was in the course of his employment with Respondent. The training was required by the Respondent, and multiple officer personnel, including Petitioner, participated. The issue is whether any injuries arose out of the employment. In the Arbitrator's view, the greater weight of the evidence supports the finding that it did not.

Initially, the Arbitrator notes that the Petitioner initially injured his left foot in December 2014, which the records indicate was the result of a work injury. He underwent three subsequent surgeries between that time and Dr. Kadakia's April 2016 surgery. The operative report from that procedure specifically noted a "massive" amount of scarring, and that the extensor digitorum longus, extensor digitorum brevis and the joint itself were completely encased in scarring, which had to be released. The Petitioner also underwent at least nine injections into the left

foot at that time. While it is true that he ultimately was released to full duties in late 2016, Dr. Kadakia at that time made it very clear that the Petitioner had ongoing problems with the left foot.

On 2/5/16, the Respondent's Section 12 examiner at that time, Dr. Toolan, noted Petitioner was complaining that the first two surgeries with podiatrist Dr. Overpeck did not change his symptoms, and that his "hip, knee and back pain" was worsening as a result. Already at that point, the doctor noted there was significant fat pad atrophy underlying the third metatarsal head. A mild equinus contracture of the ankle ("I am unable to dorsiflex his ankle as usual with his knee extended, this resolves when I flex his knee"). Dr. Toolan opined that the surgeries to that point had not resolved his symptoms "due to limitations and omissions in the treatment plan", and that the nine or more injections into the left forefoot had contributed to significant fat pad atrophy and attenuation of the plantar plate of the 3rd metatarsal phalangeal joint.

On 7/6/16, Dr. Kadakia documented that the Petitioner complained of dorsal burning foot pain. This is the same complaint the Petitioner had following his alleged current work accident. He also documented that Petitioner did not have normal motion, that he had a lot of pain and discomfort after a long day of work, and that he would just fight through the pain. He also noted complaints of significant pain the day after he had performed a lot of work. On 10/28/16, Dr. Kadakia stated: "I explained to (Petitioner) at this point that it is going to be hard to know with this thing. I think I have got him as good as we can. I do not know what else to do. I can cut the metatarsal head, but that is a terrible idea to a young active gentleman." On 11/29/16, Dr. Kadakia stated: "He is not normal. I want to be very clear on that. It may deteriorate over time. He may have problems in the future. He may need further surgery and it is all related to the work injury. So even though he is getting discharged to full duty, it is not because he is normal. He has reached maximum medical improvement (MMI) at this point from my standpoint. He may get a little better, but it's hard to know." On 3/22/17, Dr. Kadakia noted Petitioner was "doing pretty good", but that he was "getting by": "I would tell you it's not perfect; he would say it's not perfect. With the Hoka shoes he can function, he can do his job. He is back to full duty as a firefighter and by no means is it perfect. When he does jump down hard once in a while, it causes him a lot of pain and discomfort, but he can function at a high level at least despite the fact that it's not perfect." Dr. Kadakia went on to note it was hard to know if the Petitioner's condition would stay the same or deteriorate. When Dr. Kadakia saw Petitioner for the first time on 10/20/20 following the current alleged accident, he noted Petitioner had been "doing okay since, not great but okay. It is tolerable." On 12/4/20, Dr. Kadakia stated that "overall his symptoms have not really improved since surgery." The Arbitrator notes that Dr. Kadakia found during the 4/8/21 surgery that Petitioner had a neuroma with heavy scarring on the lateral aspect of the third metatarsal to the point that the nerve had adhered to the bone. As noted, the Petitioner already had very significant scarring at the time of his April 2016 surgery. While it was released, Dr. Kadakia has indicated that scarring would have continued for at least six months following the surgery.

Petitioner then testified that he did not recall discussing with Dr. Kadakia what was noted in his 10/28/16 report. He testified that the discussion with Kadakia on 10/20/20 was based on his statement that he had "good and bad days", not so much that he had been doing okay but not great since the last surgery, Petitioner his recall was stating that he had good days and bad days. Petitioner indicated he did not recall telling Dr. Kadakia on 12/4/20 that his overall symptoms had not improved since (2016) surgery.

The medical records in this case make it quite clear that the Petitioner has had significant ongoing left foot symptoms since his 2016 release by Dr. Kadakia. The evidence does support that the Petitioner had been able to perform his work duties since 2016, as well as all training he had undergone prior to September 2020, all of which at times was likely very physically heavy. However, the Arbitrator believed the greater weight of the evidence in this case also does not support the idea that Petitioner was unable to continue working after 9/23/20 because of his left foot. The discrepancies in his testimony versus the records of Dr. Kadakia are highly relevant in the Arbitrator's view given the discrepancies in his testimony versus that of Fire Chief Locacius and Lew Lake.

The reason that the Petitioner was pulled out of the September 2020 training was dehydration and heat exhaustion. The evidence doesn't support that the Petitioner was unable to continue at that point for any other reason, whether you consider his left foot or his back. He had become dehydrated twice during training and pulled out of fire training evolutions, the second time resulting in him being examined by paramedics and sent to the ER. The first time the Petitioner reported left foot or back injuries was on 9/24/20, after he had been released by the hospital and told that he could not continue with the IFSI training. While this was obviously a very short time after the alleged 9/23/20 injuries, the Petitioner had multiple opportunities to report an injury to Lew Lake prior to this time. Mr. Lake made it clear that the fire students all were advised of the importance of reporting injuries. The Arbitrator would also note that, given his status of a supervising Lieutenant, the Petitioner himself would understand the need to promptly report an injury. While he explained that he did not want to end his training and have to repeat it due to reporting an injury, this supports both that the Petitioner was basing a decision on whether to report an injury or not on an ulterior motive, and that he would have been able to continue training but for the dehydration issues he had.

Chief Locacius testified that he and the Petitioner discussed his left foot pain three to five times between 2015 and September 2020, and that the Petitioner told him he had good days and bad days but had left foot pain every day. The Petitioner denied this. The Chief testified that they had discussed the Petitioner riding a bike for fitness because it was easier on his foot, and that he encouraged him to do so. Petitioner denied this. The Chief testified that he was aware of Petitioner using shoe inserts and indicated he would assist with getting him any necessary footwear. Petitioner denied any discussion about modifying his work gear.

It is true that Mr. Lake's testimony was confusing in terms of whether certain incidents occurred on 9/22 or 9/23/20, the Arbitrator nevertheless found his testimony convincing. He testified to an incident, he believed on 9/22/20, where he specifically overheard the Petitioner state, while attempting to force open a door during an evolution, that "I can't do this I have a fucked up back." Lake testified that he immediately walked up to Petitioner and asked if he was physically capable of performing, and that Petitioner indicated he was coming off a back injury and would do his best. Petitioner denied that this ever occurred or that such a conversation was had. Before the ambulance came and took Petitioner to the ER on 9/24/20, Lake testified that he sat and talked with Petitioner at a picnic table. Petitioner agreed that a conversation took place at the picnic table at that time. Mr. Lake testified that Petitioner told him at that time that he had a prior foot injury and a previous back injury, had since gained a lot of weight, and this made his job harder. Lake indicated he discussed what he himself had done to get himself back into shape following his own back injury. Petitioner agreed that they did converse about Lake's prior back injury, but denied there was any discussion about physical fitness, or that he indicated he'd had a prior back injury. He did agree he mentioned a prior foot injury as being "back in the day." It seems to the Arbitrator that there would have been no reason to bring up the foot unless he had been ongoing problems with it. It also seems very odd to the Arbitrator that Petitioner would have indicated to the person who essentially was his supervisor for the day that he had a prior left foot injury but would not mention that he hurt himself during the training. Mr. Lake testified that at no time during the training did the Petitioner report to him that he injured himself during the IFSI training.

Overall, the Arbitrator found the testimony of Chief Locacius and Lew Lake to be more credible than that of the Petitioner. Otherwise, one would have to believe that the Chief and Mr. Lake were making up quite a few things, which doesn't make much sense to the Arbitrator in this scenario. While Petitioner's counsel sought to prove up bias on the part of Lake in that firefighters sent to him for training by fire departments allow him to receive grants for the training, there simply has been no evidence presented that would support that Locacius and Lake sought to conspire against Petitioner to create false testimony as to what occurred.

The Arbitrator empathizes with the Petitioner's circumstances, as he clearly has been willing to gut it out in continuing to work full duty in a job that can be very heavy in a profession that is laudable in society. Oftentimes, arbitrators utilize a "chain of events" analysis to show that someone was in good health, sustained an alleged work

injury, and found themselves in ill health thereafter. Here, however, the greater weight of the evidence indicates that the Petitioner had a preexisting left foot injury that was significant, and likely had a prior back injury, and that there is no indication that he would have been unable to continue training but for the dehydration incidents. Had the Petitioner been unable to continue training and had reported this was due to his injuries, this would be a much different case. While much testimony and evidence was entered in support and against a causal relationship in this case, and the training activities the Petitioner was participating in on 9/23/20 were significantly heavy, the Arbitrator finds that the evidence does not support that any accident occurred which arose out of the employment, so we do not reach the issue of causation.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that, based on the findings regarding accident (above), this issue is moot.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that, based on the findings regarding accident (above), this issue is 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:

The Arbitrator finds that, based on the findings regarding accident (above), this issue is moot.

WITH RESPECT TO ISSUE (K), WHETHER PETITIONER IS ENTITLED TO PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that, based on the findings regarding accident (above), this issue is 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:

The Arbitrator finds that, based on the findings regarding accident (above), this issue is moot.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC016041
Case Name	DECKER, GERALD v. BOB'S BARGAIN BARN & IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0042
Number of Pages of Decision	20
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Alexis Ferracuti
Respondent Attorney	Joseph Blewitt

DATE FILED: 2/2/2022

/s/ Thomas Tyrrell, Commissioner

Signature

22IWCC0042

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Gerald Decker,

Petitioner,

vs. NO: 15 WC 16041

Bob's Bargain Barn, Robert Rose individually and as Custodian/Owner, and the Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

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

In the interest of efficiency, the Commission primarily relies on the Arbitrator's detailed recitation of facts. On February 11, 2015, Petitioner sustained serious injuries to several digits on his left hand. Petitioner worked for Bob's Bargain Barn ("Respondent") as a maintenance worker. On the date of accident, Petitioner was repairing a hole in one of the store's walls, when he severely injured his left index, middle, and ring fingers while operating a table saw. Petitioner is right-handed.

Later that day, Petitioner underwent surgery to repair the damage to his fingers including the following procedures: 1) revision of amputation of the left middle finger, including removal of the base of the distal phalanx and excising the tendon to create enough skin flap to cover the wound; 2) exploration of the wound, with debridement, irrigation, and repair of the flexor profundus tendon and the collateral ligament of the DIP joint; and, 3) exploration of the wound, with debridement, irrigation, and loose primary closure of the laceration of the ring finger. The postoperative diagnoses were: 1) comminuted compound grade 3A fracture of the middle phalanx of the left index finger with bone loss from the ulnar aspect of the middle phalanx, and complete loss of the neurovascular bundle on the ulnar aspect and severe collateral ligament of the IP joint, and a severe fracture of the profundus tendon with only a small thread left; 2) complete amputation of the middle finger at the level of the DIP joint with only a small sliver of the base of the distal

phalanx left; and, 3) grade A compound fracture of the ring finger middle phalanx over the ulnar aspect with a complete loss of the neurovascular bundle, and a partial laceration of the flexor tendon. The surgeon wrote that Petitioner would have numbness over the ulnar aspect of the index and ring fingers because the neurovascular bundle of the ulnar aspect of both fingers is gone.

Petitioner continued to follow up with Dr. Sinha throughout the subsequent months and the doctor prescribed Norco to address Petitioner's pain. In March 2015, Dr. Sinha noted Petitioner suffered from joint swelling, range of motion limited by pain, and digit pain. More than once he advised Petitioner to consult a hand surgeon; however, Petitioner never did. Petitioner began physical therapy on March 24, 2015, to address the desensitization and hypersensitivity of his affected fingers as well as his range of motion. On April 17, 2015, Petitioner visited the ER and received treatment for a dog bite that is unrelated to the work injury.

The physical therapist discharged Petitioner from therapy due to noncompliance on May 1, 2015, after Petitioner only attended five sessions. The therapist wrote that Petitioner was a no-show for five appointments. Petitioner returned to Dr. Sinha a few days later and the doctor noted that Petitioner still complained of tenderness, range of motion limited by pain, stiffness, and digit pain. On June 18, 2015, Dr. Sinha discharged Petitioner from his care.

Petitioner returned to Dr. Sinha on September 22, 2015, with complaints of pain regarding a small area on the tip of the stump of his middle finger. Dr. Sinha believed the problem might be a suture and decided to perform a revision surgery on left middle finger stump. On October 14, 2015, Dr. Sinha performed a revision of the amputation of the left middle finger stump at the level just distal to the DIP joint. The postoperative diagnosis was status postop amputation of the tip of the left middle finger with a very painful tip of the stump. Dr. Sinha last examined Petitioner on October 27, 2015. He noted that Petitioner's wound from the recent revision surgery was healing. The doctor also noted that Petitioner was positive for joint swelling and digit pain.

Petitioner testified that Dr. Sinha restricted him from work from the date of accident until June 18, 2015. He testified that Dr. Sinha also restricted him from work from September 22, 2015, through October 27, 2015. Dr. Sinha never completed any work status documents and did not address Petitioner's work capabilities in any of his office visit notes. Petitioner testified that he has worked for the Daily Times delivering newspapers for three years. He testified that he continues to have trouble making a fist because his left ring, middle, and pointer fingers do not fully bend. Petitioner also complained of feeling a lot of sensitivity on his affected fingers. Petitioner testified that his left hand shakes due to nerve and tendon damage and that certain activities cause his symptoms to worsen. Petitioner testified that he experiences tingling in all three fingers, but the sensation is worse in the middle finger. Petitioner testified that he has less strength in his left hand compared to his right hand. He denied having difficulty performing activities of daily living; however, he testified that he now grabs items with his thumb and pointer finger due to his increased sensitivity. Petitioner testified that he has trouble working on lawnmowers due to his left-hand injury.

After weighing the credible evidence, the Commission affirms the majority of the Arbitrator's conclusions. However, the Commission modifies the Arbitrator's award of medical expenses. The Commission also modifies the temporary total disability ("TTD") benefits awarded

by the Arbitrator.

The Arbitrator determined that Respondent is liable for reasonable and necessary medical expenses contained in Petitioner's Exhibit 1, pursuant to Sections 8(a) and 8.2 of the Act. After reviewing the evidence, the Commission finds the expenses contained in Petitioner's Exhibit 1 include charges for medical treatment unrelated to the work accident. On April 17, 2015, Petitioner sought treatment at the ER after suffering a dog bite. This injury is clearly unrelated to the February 11, 2015, work injury. Respondent is liable only for medical expenses that are reasonable, necessary, and related to the work injury. Thus, the Commission modifies the Arbitrator's award of medical expenses and finds Respondent is not liable for any medical expenses related to the April 17, 2015, dog bite.

After carefully considering the credible evidence, the Commission also must modify the Arbitrator's award of TTD benefits. To establish an entitlement to TTD benefits, Petitioner must demonstrate not only that he did not work, but also that he was unable to work. *See Mech. Devices v. Indus. Comm'n (Johnson)*, 344 Ill. App. 3d 752 (2003). The dispositive test is whether the claimant's condition has stabilized, because a claimant is entitled to TTD benefits when a "disabling condition is temporary and has not reached a permanent condition." *Freeman United Coal v. Industrial Comm'n*, 318 Ill. App. 3d 170, 176 (2000) (internal citations omitted). "Once an injured claimant has reached maximum medical improvement, the condition is no longer temporary and entitlement to TTD benefits ceases…" *Id*. at 178.

Illinois courts consider several factors when determining whether a claimant has reached maximum medical improvement ("MMI"), including: 1) a release to return to work; 2) medical testimony concerning the claimant's injury; 3) the extent of the injury; and 4) whether the injury has stabilized. *Mech. Devices v. Indus. Comm'n (Johnson)*, 344 Ill. App. 3d 752, 760 (2003). The Arbitrator concluded Petitioner proved an entitlement to TTD benefits from February 12, 2015, through June 18, 2015, and from October 14, 2015, through October 27, 2015. The Commission views the evidence a little differently and finds Petitioner proved an entitlement to TTD benefits from February 12, 2015, through May 1, 2015, and from October 14, 2015, through October 27, 2015.

Unfortunately, Dr. Sinha never addressed Petitioner's ability to work. Thus, the Commission must determine when Petitioner reached MMI. There is no question that Petitioner sustained a significant and disabling injury while performing his work duties on the date of accident. Petitioner's injuries were so significant that Petitioner underwent surgery that same day. While it is clear that Petitioner initially continued to receive treatment from Dr. Sinha through June 18, 2015, the Commission finds there is no credible evidence that Petitioner's condition did not stabilize until that date. After weighing the totality of the evidence, the Commission finds Petitioner reached MMI on May 1, 2015. This is the date when the physical therapist discharged Petitioner due to his continued noncompliance. The physical therapist wrote that between March 24, 2015, and May 1, 2015, Petitioner only attended five therapy sessions. During that same period, Petitioner was a no-show five times. The Commission finds that Petitioner's condition stabilized by May 1, 2015. Furthermore, the Commission finds Dr. Sinha's office visit notes support a finding that Petitioner's condition did not appreciably change between May 1, 2015, and June 18, 2015. The Commission affirms the Arbitrator's determination that Petitioner proved an entitlement to

TTD benefits from October 14, 2015, through October 27, 2015. Thus, the Commission finds Petitioner proved by a preponderance of the evidence that he is entitled to TTD benefits only from February 12, 2015, through May 1, 2015, and from October 14, 2015, through October 27, 2015.

The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 12, 2020, is modified as stated herein.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner temporary total disability benefits of **$250.00**/week for **13-2/7** weeks commencing **February 12, 2015,** through **May 1, 2015**, and **October 14, 2015**, through **October 27, 2015** as provided in Section 8(b) of the Act.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical services as set forth in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act. However, Respondent is not liable for any expenses relating to Petitioner's April 17, 2015, dog bite injury.

IT IS FURTHER ORDERED that Respondent shall pay Petitioner permanent partial disability benefits of **$250.00**/week for **30.75** weeks, because Petitioner's injuries caused a **15%** loss of use of the left hand, as provided for in Section 8(e) of the Act. Respondent shall also pay Petitioner permanent partial disability benefits of **$250.00**/week for **13.3** weeks, because Petitioner's injuries caused a **35%** loss of use of the left middle finger, as provided for in Section 8(e) of the Act.

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

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

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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,000.00. 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.

February 2, 2022

d: 12/7/21
TJT/jds
51

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0042

DECKER, GERALD
Employee/Petitioner

Case# **15WC016041**

BOB'S BARGAIN BARN ROBERT ROSE INDIVIDUALLY AND AS CUSTODIAN/OWNER AND THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 11/12/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0190 LAW OFFICE OF PETER FERRACUTI
ALEXIS P FERRACUTI
110 E MAIN ST PO BOX 859
OTTAWA, IL 61350

0000 BOB'S BARGAIN BARN
416 E MAIN ST
STREATOR, IL 61364

5002 ASSISTANT ATTORNEY GENERAL
JOSEPH BLEWITT
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601-3227

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

☒ 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

GERALD DECKER
Employee/Petitioner

v.

BOB'S BARGAIN BARN, ROBERT ROSE Individually and as Custodian/Owner and the INJURED WORKER'S BENEFIT FUND
Employer/Respondent

Case # **15** WC **16041**

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 Cellini**, Arbitrator of the Commission, in the city of **Ottawa**, on **September 14, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

Decker v. Bob's Bargain Barn, et. al., and IWBF, 15 WC 16041

FINDINGS

On **February 11, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**250.00**; the average weekly wage was $**250.00**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **0** dependent children.

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

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

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

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

ORDER

The Arbitrator finds that the Respondent Bob's Bargain Barn was subject to the Illinois Workers' Compensation Act on February 11, 2015 pursuant to Section 3 of the Act.

The Arbitrator finds that the Petitioner was an employee of the Respondent Bob's Bargain Barn on February 11, 2015.

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent Bob's Bargain Barn on February 11, 2015. The Arbitrator further finds that the Petitioner's left hand injury is causally related to the February 11, 2015 accident.

The Arbitrator finds that the Petitioner provided timely notice of the February 11, 2015 accident to the Respondents.

The Arbitrator finds that the Petitioner was 42 years of age, married and without children aged 18 or younger.

The Arbitrator finds that the Petitioner's average weekly wage was **$250.00**.

Respondent shall pay Petitioner temporary total disability benefits of **$250.00 per week**, the minimum allowable statutory rate, for **20-1/7 weeks**, commencing **February 12, 2015 through June 18, 2015**, and from **October 14, 2015 through October 27, 2015**, as provided in Section 8(b) of the Act.

Respondent shall pay the reasonable and necessary **medical expenses contained in Petitioner's Exhibit 1**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$250.00 per week**, the minimum allowable statutory rate, for **30.75 weeks**, because the injuries sustained caused the loss of use of **15% of the left hand**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$250.00 per week**, the minimum allowable statutory rate, for **13.3 weeks**, because the injuries sustained caused the loss of use of **35% of the left middle finger**, as provided in Section 8(e) of the Act.

Respondent shall pay Petitioner compensation that has accrued from **February 11, 2015** through **September 14, 2020**, and shall pay the remainder of the award, if any, in weekly payments.

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 Petitioner pursuant to Sections 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 Worker's benefit Fund.

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

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

Signature of Arbitrator

November 6, 2020
Date

NOV 12 2020

STATEMENT OF FACTS

Petitioner's counsel initially, prior to Petitioner's testimony, made a statement for the record that the Respondent business Bob's Bargain Barn was closed down at the time when service of notice of the requested hearing date had been attempted. Counsel indicated that attempts to serve notice to Respondent occurred on 6/22, 6/24, 6/25 and 6/26/20n. After adding the owner of Bob's Bargain Barn, Robert Rose, as a party defendant, Petitioner's counsel unsuccessfully attempted to serve Respondent Rose in December 2019, after which it was learned that he had moved to the Dominican Republic. She hired a special process server, Ancillary, which she indicated was able to serve Respondent Rose in the Dominican.

Px7 includes an Affidavit of Non-service for Bob's Bargain Barn, with service attempted on 6/22/20, 6/24/20, 6/25/20 and 6/26/20. The process service stated: "The above address (416 E. Main Street, Streator, IL 61364) seemed to be a business, but doesn't appear to be anyone in there. Door are locked with a doorbell." (Px5; Px6; Px7).

Petitioner's Exhibit 5 includes an Affidavit of Non-Service on Robert Rose in the Dominican Republic following attempts on 11/5/19 and 11/7/19 at Calle Cristo Rey, #20, 4200000 Los Transormadores, Bonao, DR. These same documents were contained in Px6, along with photographs.

On 7/16/20, a process server indicated that he returned to the same address in the Dominican Republic. He stated: "The PS called out the recipient's name several times, when a woman between 65-75 years old came out in a very rude manner to meet the PS. The PS identified himself and the purpose of the visit to the woman who identified as Ms. Rosa. She kept asking questions to the PS about why they were looking for Robert Rose. The PS once again, explained to the woman the purpose of the visit, with no further information given by Ms. Rosa received the documents in-hand and left abruptly. The PS filled out the report and left the area afterwards." (Px8).

The parties stipulated after the closing of proofs that National Council on Compensation Insurance (NCCI) documentation was supposed to be part of Px8 but was inadvertently omitted, and they further stipulated that the document could be considered as part of Px8. This documentation certifies that that, based upon their database, there was no workers' compensation insurance policy evidence for Bob's Bargain Barn being covered on 2/11/15. (Px8).

Px9 is the Application for Adjustment of Claim, filed on 5/15/15 by Petitioner's counsel. It alleges Petitioner sustained an injury while working for Bob's Bargain Barn on 2/11/15, and names the State Treasurer/IWBF as a party Respondent. An Amended Application was filed on 12/23/19 naming Robert Rose individually. (Px9; Px10).

Petitioner testified that he was 49 years old (born on 4/3/72) at the time of the hearing and has been married since February 2012 with no children. Petitioner testified that on 2/11/15 he was employed by Bobs Bargain Barn and was supervised by owner Respondent Robert (Bob) Rose. Petitioner testified he learned that Respondent Rose was looking for someone to perform general maintenance and went to see him. Petitioner told Rose he was a handyman and woodworker. He was interviewed and hired by Rose to perform general maintenance around the building about a week prior to 2/11/15. He testified that Robert Rose was in a wheelchair and handicapped. Petitioner testified that part of his job with Respondent involved moving various items around the store. He testified that Rose told he him that he would work on a part time basis, and that he would pay Petitioner in cash and take care of the taxes himself. Petitioner testified he was not working for anyone else while he was working for Respondent and did not own his own business. He was Rose's sole employee. Petitioner testified he was hired on an ongoing basis and not "by the job." He estimated that he would start work at 8 a.m. at Rose's direction until he finished his work for the day and that he worked approximately 25 hours in the week he worked for Respondent. Rose would instruct him to perform various activities around the store and Petitioner testified Rose could have fired him at any time.

On 2/11/15, Petitioner testified that Rose asked him to repair a hole in the wall, which involved the use of a table saw, hammer and drill which all of which belonged to Rose. While running the table saw, a board kicked out, hit his right arm, spun him around, and caused his left hand to hit the saw blade, amputating part of his middle finger and causing severe damage to his index and ring fingers. He testified that Rose was on the premises with his wife at the time and called 911. An ambulance took Petitioner to the hospital, where he underwent surgery with Dr Sinha.

The evidence presented includes a 2/11/15 ambulance report from Advanced Medical Transport. The report indicates that Petitioner sustained a complete left middle finger amputation at the first knuckle due to a table saw, and that he was picked up at 416 East Main Street in Streator, Illinois. The Arbitrator notes that the intake report states that Petitioner was unemployed, but that this address matches the location where Petitioner attempted to serve Respondent. (Px2). Petitioner was transported to St. Mary's Hospital. Left hand x-rays reflected amputation of the 3rd digit extending to the proximal aspect of the distal phalanx with possible intraarticular extension into the distal interphalangeal joint. Additionally, there was a comminuted fracture of the 2nd digit middle phalanx with possible extension to the distal interphalangeal joint and possible nondisplaced fracture of the 2nd distal phalanx. Emergency surgery was performed, noting diagnoses of: 1) comminuted compound Grade 3A fracture, middle phalanx, left index finger with bone loss from the ulnar aspect of the middle phalanx and complete loss of neurovascular bundle on the ulnar aspect and severe collateral ligament, IP joint with severe fracture and only a small thread of the profundus tendon remaining; 2) amputation of the middle finger at the level of the DIP joint with only a small sliver of base of the distal phalanx; and, 3) Grade 3A compound fracture of the middle phalanx, ring finger, over the ulnar aspect with complete loss of neurovascular bundle and complete laceration of the flexor tendon. Surgery involved revision of the complete amputation of the middle finger distal phalanx, repair of the flexor profundus tendon and collateral ligament of the DIP joint, with exploration and debridement of the other two fingers. Dr. Sinha noted that, at the Petitioner's age, reconnection of the amputated finger had very little chance of surviving. He noted there was very significant injury to all three fingers, particularly the amputation of the 3rd finger and instability to the 2nd finger with bone loss from the middle phalanx. He opined that the Petitioner was going to have ulnar numbness on the ulnar 2nd and 4th fingers. The discharge diagnosis was multiple compound fractures in the 2nd, 3rd, and 4th fingers with amputation of the 3rd finger. (Px3).

On 3/31/15, Dr. Sinha recommended that Petitioner see a hand surgeon. Treatment from Dr. Sinha appeared to essentially involve physical therapy and Norco. It appears Petitioner's last visit was 5/5/15, however the Arbitrator had a difficult time deciphering the handwritten report other than a note that he was prescribed Norco. (Px4).

Post-surgical physical therapy began on 3/24/15, and documentation indicates Petitioner had complaints of constant pain and tightness to his left fingers since the surgery. He also reported numbness, tingling and hypersensitivity in the tips of the 2nd through 4th fingers. He had been discharged as of 5/1/15 due to no show/no call. The physical therapy discharge report of 5/8/15 notes the Petitioner was there to decrease hypersensitivity in the 2nd through 4th fingers of the left hand and to increase his range of motion. He reported significant ongoing pain in these fingers, particularly with hitting his finger unexpectedly, and he continued to lack grip strength and was unable to make a fist. He was advised on a home exercise program. (Px3).

Petitioner testified he was off work after 2/11/15 until 6/18/15. He testified that on 6/18/15 he was continuing to have pain but was released by Dr. Sinha to go back to work but was found to have had continued tenderness and distress on examination. He testified that he returned to Dr. Sinha in September 2015 due to a painful middle fingertip. The history contained in a 10/14/15 report of Dr. Sinha notes the index and ring fingers healed in good position and Petitioner had been discharged on 6/18/15, but he returned on 9/29/15 complaining of a painful stump at the tip, with significant pain any time he would hit it on something. Dr. Sinha's performed a revision procedure for the amputated finger on 10/14/15, involving removal of some bone until it was surrounded by healthy tissue and reclosure. The only subsequent medical report located by the Arbitrator was a handwritten 10/27/15 note which indicate the wound was healing and appears to discharge Petitioner from care. (Px4). Petitioner testified he continued to have digit pain and tenderness and difficulty making a fist, but that Dr. Sinha did not think further therapy would help and released him without restrictions. Petitioner testified that Dr. Sinha kept him off work from 9/22/15 until 10/27/15.

Petitioner testified that he has ongoing problems with range of motion and grip strength in the left hand, with an inability to fully flex his three middle fingers. He has continued problems with sensitivity in the fingers, particularly the middle finger and his hand often shakes, especially after using it to perform activities. He testified he also has some ongoing pain, again particularly with increased activities. He does not take any medication. At the time of the hearing, Petitioner was working for the Daily Times delivering newspapers five days a week. He can perform his daily activities, though he testified he has modified how he does things to avoid pain. He works on lawnmowers as a hobby but works slowly due to the sensitivity in the left hand. He has difficulty with fine manipulation and is still not used to not having a middle finger, noting the finger is amputated down to just below nail bed. He testified he had no left hand problems prior to 2/11/15.

Petitioner testified he was prescribed Norco by Dr. Sinha, which is supported by the medical records, and that he would obtain the prescription from Streator Drugs. Petitioner testified that Respondents never paid his medical expenses, and that Petitioner instead submitted the bills through his insurance, Molina Health Care. He testified he was never paid lost time benefits during the time he was off work due to his injury.

On cross examination, Petitioner testified that the last time he saw or spoke to Robert Rose was 2/11/15. Petitioner agreed he did not personally try to forward his medical bills to Rose, but it was his understanding his attorney had been in communication with Rose and/or his attorney and trying to get his bills paid. The Petitioner testified that to his knowledge Bob's Bargain Barn did not have insurance, that Respondent Rose never offered to pay any of his medical expenses and never paid him for his time off work. Petitioner testified he is right-handed.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (A), WAS THE RESPONDENT OPERATING UNDER AND SUBJECT TO THE ILLINOIS WORKERS' COMPENSATION OR OCCUPATIONAL DISEASES ACT, THE ARBITRATOR FINDS AS FOLLOWS:

Section 3 of the Illinois Workers' Compensation Act, specifically subsections 1 (stating that any business where there is the erection, maintaining, removing, remodeling, altering or demolishing any structure is subject to the Act), 8 (stating that any enterprise involving the use of sharp cutting tools is subject to the Act) and 17(a) (stating that any business or enterprise in which goods, wears, or merchandise are sold or in which services are rendered to the public at large is subject to the Act), support the finding that the Petitioner's use of the table saw while working for Respondent automatically subjected Respondent to the Act. The only exception to Section 17(a) would be that the paragraph does not apply to such business or enterprise unless the annual payroll during the year preceding the date of injury would be in excess of $1,000.00. Given Petitioner's unrebutted testimony that he was hired as an employee by Respondent, it is reasonable to assume that over only approximately 4 weeks of employment he would have hit this mark.

The Arbitrator finds that Respondent Bob's Bargain Barn, owned and operated by Robert Rose, was subject to the Act on 2/11/15 pursuant to Section 3 of the Act, as noted above.

WITH RESPECT TO ISSUE (B), WAS THERE AN EMPLOYEE-EMPLOYER RELATIONSHIP, THE ARBITRATOR FINDS AS FOLLOWS:

The fact that Petitioner was injured performing a specific task, wall repair, and had only been hired a week prior to his injury are facts which could understandably lead to a question of whether the Petitioner was hired as an

employee or as an independent contractor specifically to repair the wall at Respondent's building. However, the Petitioner's testimony is unrebutted that he was hired by Respondent as an employee. The Arbitrator also notes that the Petitioner indicates Mr. Rose was in a wheelchair and that he was the only employee, and the fact that Rose would therefore be limited in his ability to perform tasks for the Bargain Barn supports the Petitioner's argument that he was an employee.

In this case, the Petitioner testified that he was hired by Respondent's owner/operator, Robert Rose on a part-time basis, not on a "per job" basis. He testified he was hired to perform various jobs and maintenance around Respondent's store and did so. He testified that Rose would advise him on what jobs he was to perform and would supervise him. He testified that Rose indicated he would be paid in cash, and that Rose indicated he would take care of income taxes. He testified that he did not have his own business. With regard to the issue of Respondent's control over the Petitioner's work, the Petitioner credibly testified that Respondent Rose, as owner and supervisor of Bob's Bargain Barn, directed and controlled the work tasks performed by the Petitioner, the hours Petitioner was allowed to work including his daily start time and his end time. Rose provided the tools Petitioner used to perform the wall repair. The testimony indicates that Petitioner was not providing a certain specific skill to the store in question, but rather was hired as a general maintenance and laborer for the store due to Mr. Rose's ongoing disability and inability to perform the necessary tasks of moving merchandise around the store as he was confined to a wheelchair. Petitioner had no business of his own and did was not working for any other businesses or individuals while in the employment of Respondent Bob's Bargain Barn.

Taking all of the presented evidence into consideration, the greater weight of this evidence supports the finding that the Petitioner was an employee of Respondent Bob's Bargain Barn and Respondent Robert Rose.

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:

In order to obtain an award of benefits under the Workers' Compensation act, a claimant bears the burden of showing, by a preponderance of the evidence, that she has suffered a disabling injury which arose out of and in the course of his employment. Id. Both "arising out of" and "in the course of" employment must both be present at the time of claimant's injury in order to justify compensation under the Act. Id. An injury occurs "in the course of employment," within the meaning of the Act, when it occurs within the time and space boundaries of employment, and it "arises out of employment" when the injury had its origin in some risk connected with or incidental to, the employment so as to create a causal connection between the employment and the accidental injury.

The Arbitrator finds that an accident did occur that arose out of and in the course of Petitioner's employment with Respondent. Petitioner's undisputed testimony was that Robert Rose, in a supervisory capacity for Bob's Bargain Barn, instructed him to patch a hole in the drywall on the main sales floor of the business. While using a table saw belonging to Rose, the Petitioner struck his hand on the saw blade, resulting in injury to his left hand. The Petitioner was performing work at Respondent's direction, for the benefit of Respondent's business, when he was injured. The Arbitrator finds this evidence is sufficient to find that the Petitioner's injury occurred in the course of his employment with Respondent.

With regard to the arising out of aspect of this issue, the Petitioner was using a saw, again at the direction of the Respondent, and thus was performing a job that was specific to the job he was hired to do, building maintenance. The job also involved an increased risk of injury versus the general public given that the tool he was using, a table saw, was, quite obviously, very dangerous. The Petitioner was performing a task, repairing a

wall, that he was specifically asked to do by Robert Rose. Rose even supplied the saw that was involved in the Petitioner's injury. Taking all of the evidence together, the greater weight of the evidence supports the finding that Petitioner sustained accidental injury to his left hand which arose out of and in the course of the Petitioner's employment with Respondent Bob's Bargain Barn on 2/11/15.

WITH RESPECT TO ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner testified at hearing that the accident occurred on 2/11/15, and this is substantiated by the medical records submitted into evidence by Petitioner. The Arbitrator finds the date of the accident was 2/11/15.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner testified that when he injured his hand on the saw, Respondent Robert Rose was present, and the incident occurred on the premises of Respondent Bob's Bargain Barn. Petitioner immediately went to Rose, and Rose then called an ambulance. No conflicting evidence was presented by Respondent. The Arbitrator finds the evidence is clear that the Petitioner provided timely notice of the 2/11/15 accident to the Respondent.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Without fully restating the findings of fact above, the Arbitrator noted that it has already determined that the Petitioner sustained accidental injury to his left hand on 2/11/15 what he struck it on a saw blade while working for Respondent, severely lacerating three fingers, one of which was severed. It is patently obvious that the injury to the left hand is related to the 2/11/15 injury involving the table saw. The Arbitrator finds that the evidence makes it obvious on its face that the Petitioner left hand injury is causally related to the 2/11/15 accident.

WITH RESPECT TO ISSUE (G), WHAT WERE THE PETITIONER'S EARNINGS, THE ARBITRATOR FINDS AS FOLLOWS:

The Petitioner testified at hearing that he was paid $10.00 per hour and was expected to work approximately 25 hours per week. This testimony is consistent with the average weekly wage alleged in the Application for Adjustment of Claim. The Petitioner further testified that he was paid $250.00 in cash the week that he worked for the Respondent prior to the injury in question. No evidence to the contrary was presented by the Respondent. Therefore, the Arbitrator hereby finds that the Petitioner had an average weekly wage at the time of the accident of $250.00 per week.

WITH RESPECT TO ISSUE (H), WHAT WAS THE PETITIONER'S AGE AT THE TIME OF THE ACCIDENT, and WITH RESPECT TO ISSUE (I), WHAT WAS THE PETITIONER'S MARITAL STATUS AT THE TIME OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner testified that he is currently 49 years old (born on 4/3/72) and has been married since February 2012 with no children. This is consistent with his Application for Adjustment, filed on 5/15/15. No evidence was presented to dispute the Petitioner's testimony. The Arbitrator finds that the Petitioner was 42 years old, married and had no children under the age of 18 at the time of the accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings (above) with regard to accident and causation, the Arbitrator further finds that the medical services provided to the Petitioner were reasonable and necessary with respect to the injuries sustained during the work accident of 2/11/15. The medical expenses related to this treatment were presented by Petitioner into evidence as Petitioner's Exhibit 1. This documentation includes information regarding the specific providers, the dates of service for each, the total amount of medical services, the paid amount of medical services, the adjustment for payment on those services, and the balance remaining as a result of the medical services incurred by the Petitioner as a result of the 2/11/15 injury. The Petitioner testified that his attorney attempted to get the Respondent to pay these medical expenses, but this did not occur. Petitioner also testified that he submitted his medical expenses to his insurance, Molina Healthcare, which paid some of the expenses and obtained various discounts. The Arbitrator finds that the Respondent is liable for the medical expenses contained in Px1 pursuant to Sections 8(a) and 8.2 of the Act.

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:

The Petitioner testified that he remained off work as a result of his work injuries per Dr. Sinha from 2/12/15 through 6/18/15, and then again from 9/22/15 until 10/27/15. These off-work periods included surgeries to the left three middle fingers, amputation of a portion of the middle finger, and a revision of the amputation stump due to ongoing pain. The records of Dr. Sinha support the initial claimed off work period as related to the 2/11/15 accident, following the emergency surgery performed on 2/11/15. However, as to the latter claimed period, the evidence does not support the Petitioner being held off work starting on 9/22/15. The 10/14/15 report of Dr. Sinha notes Petitioner had returned to him on 9/29/15, but there is no note from that date contained in the records submitted into evidence. The Arbitrator finds that the evidence supports the finding that the Petitioner was off work as of the 10/14/15 revision procedure until his 10/27/15 release. Based on the greater weight of this evidence, the Arbitrator finds that the Petitioner is entitled to TTD benefits from 2/12/15 through 6/18/15 and from 10/14/15 to 10/27/15.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

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

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

(i) the reported level of impairment pursuant to subsection (a);

(ii) the occupation of the injured employee;

(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that neither party has presented an AMA permanent partial impairment rating or report into evidence. Therefore, this factor carries no weight in the permanency determination.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a general maintenance person at the time of the accident. He did not return to this position, however the Arbitrator notes that the evidence in the record did not disclose much information with regard to the physical requirements of the job with Respondent outside of moving things around the store and the use of the saw and other tools. It is therefore unclear to the Arbitrator if the Petitioner would have been able to return to his full duties with Respondent or not following his recovery from the left hand surgeries. However, the Petitioner did credibly testify that he sustained a loss of strength and motion in the left hand. The Petitioner is currently working delivering newspapers five days a week. The Arbitrator finds that this factor carries medium weight in the permanency determination.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 42 years old at the time of the accident. Neither party has provided evidence of how the Petitioner's age may impact any permanent disability he has suffered. The Arbitrator notes that the Petitioner sustained a severe injury to the left hand and still has a significant work life ahead of him. The Arbitrator finds that this factor carries minor weight in the permanency determination.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that the Petitioner was working part-time for Respondent earning $250.00 per week. The evidence does not reflect what he currently earns delivering newspapers. There are no specific work restrictions noted, and the evidence presented does not allow for a determination regarding hos the injury may have impacted the Petitioner's future earning capacity. As such, this factor carries no significant weight in the permanency determination.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner's medical records are consistent with his testimony that he suffered a left hand partial middle finger amputation, severe lacerations to the three middle left fingers, fracture and bone loss to the index finger of the left hand, and damage to the nerves in the ring finger on the left hand. The Petitioner credibly testified at hearing, again substantiated by the medical evidence, that he sustained nerve damage as a result of the accident in question resulting in hypersensation and numbness tingling, loss of grip strength, loss of range of motion in the hand and ongoing pain and difficulty with activities of daily living, particularly with left hand activity and striking the fingers directly. The Arbitrator observed the Petitioner opening and closing his hand at the hearing, evidencing an inability to make a complete fist. On the other hand, the Arbitrator notes the Petitioner testified he has modified how he does things and is able to work and perform his daily activities. There is no evidence of any medical work restrictions from Dr. Sinha. The Arbitrator does note that Petitioner was able to close his hand relatively well given the degree of injury he sustained, but also that he has ongoing symptoms and problems five years post- accident.

Based on the above noted factors, the record taken as a whole and a review of prior Commission awards with similar injuries similar outcomes, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of the loss of use of 35% of the left middle finger, and to the extent of the loss of use of 15% of the left hand, pursuant to §8(e) of the Act.

WITH RESPECT TO ISSUE (O), WHETHER THE RESPONDENT WAS COVERED BY WORKERS' COMPENSATION INSURANCE COVERAGE ON THE ACCIDENT DATE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator hereby finds that the Petitioner submitted as part of their exhibits a certificate of no insurance by NCCI, which supports the finding that Respondent Bob's Bargain Barn did not have a workers compensation insurance policy in effect at the time of the 2/11/15 accident in question. Therefore, the Arbitrator finds that the Respondent Bob's Bargain Barn was not covered by workers' compensation insurance at the time of Petitioner's 2/11/15 accident. The Arbitrator further finds that Respondent Robert Rose was provided with sufficient notice of the hearing, did not appear, and therefore did not provide evidence on his behalf or on the behalf of Respondent Bob's Bargain Barn.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC018635
Case Name	BRYANT, JARVIA v. WATERLOO SCHOOL DISTRICT 5
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0043
Number of Pages of Decision	30
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen Klyczek

DATE FILED: 2/4/2022

/s/ Deborah Simpson, Commissioner

Signature

22IWCC0043

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: causal connection prospective care	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JARVIA BRYANT,

Petitioner,

vs. NO: 16 WC 18635

WATERLOO SCHOOL DIST. 5,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner and Respondent herein and notice given to all parties, the Commission, after considering all issues, and being advised of the facts and law, modifies the Decision of the Arbitrator and finds that Petitioner's thoracic spine condition is not causally related to the work accident sustained on September 2, 2014. The Commission further reverses the Arbitrator's award of prospective medical care related to Petitioner's thoracic spine, as consistent with its finding of no causation, as well as Petitioner's lumbar spine for the reasons detailed herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator on all other issues, including Petitioner's benefit rates and the findings related to causation and the award of medical expenses for Petitioner's lumbar spine condition. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

I. Findings of Fact

On July 10, 2017, a §19(b) Decision was issued by Arbitrator Christina Hemenway finding that Petitioner sustained an accident on September 2, 2014 arising out of and in the course of her employment and that the condition of her lumbar spine was causally related to said accident. Arbitrator Hemenway awarded reasonable and necessary medical services for Petitioner's lumbar spine in the amount of $9,301.00 as well as prospective medical care related to the lumbar spine, including surgery as recommended by Dr. David Kennedy. The parties thereafter proceeded to a

second §19(b) hearing before Arbitrator Linda Cantrell on January 21, 2021 along with the consolidated case of 20 WC 5036. The Commission has issued a separate Decision addressing Arbitrator Cantrell's rulings in 20 WC 5036.

Petitioner, a teacher and union member, was working recess duty on September 2, 2014 when she glanced down to look at the time and did not see a special needs student approach and try to jump on her, such as how a baby would jump into one's arms. Another teacher standing next to Petitioner helped stop her from falling under the force. At the time of this incident, Petitioner was already preparing to undergo cervical surgery due to a prior neck injury. Following the incident, she felt low back pain and bilateral lower extremity symptoms. Petitioner testified that she did not initially notice any mid-back pain, because her low back pain was so debilitating that she did not pay attention to her mid-back until after her low back started to improve. Prior to this accident, Petitioner never had any mid-back symptoms that required ongoing treatment.

Following the issuance of the prior §19(b) Decision, Petitioner underwent the awarded lumbar surgery on October 5, 2017. The procedure included an L3-L4 and L4-L5 laminectomy, facetectomy, and foraminotomy with pedicle screw fixation at L3 to L5, posterolateral fusion at L3 to L5, and iliac crest bone marrow aspiration. On November 22, 2017, Petitioner presented for a postoperative appointment at Dr. Kennedy's office with complaints of bilateral hip pain shooting along her anterior legs with numbness and tingling in her feet. Nurse Practitioner Sejal Patel recommended continued use of Petitioner's LSO brace, bone growth stimulator, and muscle creams. She also kept Petitioner off work and increased her muscle relaxant doses. Petitioner subsequently started postoperative physical therapy for her lumbar spine on January 10, 2018.

Starting on January 22, 2018, Dr. Kennedy put Petitioner on restrictions of working only 3.5 hours per day Monday through Friday. On February 13, 2018, Petitioner told NP Patel that she felt miserable with constant pain, mostly in her low back and bilateral hips with some intermittent sciatic-type pain. Petitioner also continued to note anterior thigh pain and toe numbness. Lumbar X-rays were obtained and showed persistent right pedicle screw lucency at L5. NP Patel indicated that Dr. Kennedy wanted to follow this conservatively and placed Petitioner's physical therapy on hold.

On March 21, 2018, Petitioner continued to complain to NP Patel of her pre-surgical problems, including SI joint and bilateral hip pain as well as lower extremity numbness. On April 9, 2018, a post-myelogram lumbar CT showed an incomplete fusion at L3-L5 with no evidence of hardware failure, degenerative anterolisthesis of L4 on L5, mild leftward curvature of the spine, and diffuse annular bulges at L2 through L5 with mild bilateral foraminal stenosis. After reviewing the CT on May 3, 2018, Dr. Kennedy found that Petitioner did not need revisions of her prior instrumentation but could be a candidate for an SI fusion. He referred Petitioner to Dr. David Raskas of the Orthopedic Sports Medicine & Spine Care Institute for further consultation.

Petitioner presented to Dr. Raskas on May 15, 2018 with 50% back and 50% anterolateral thigh pain with burning in her right ankle and chronic numbness in both big toes. Dr. Raskas' assessment included lumbar pain, stenosis, facet arthropathy, facet degeneration, and pseudoarthrosis, as well as kyphosis of the thoracolumbar region and facet enlargement at L2-L3 and L5-S1. Dr. Raskas recommended first removing Petitioner's posterior hardware and

performing an anterior fusion at L2-S1, and then in a second stage, performing a laminectomy at L2-L3 and posterior instrumentation from L2 to S1. Dr. Raskas opined that the need for treatment was directly attributable to the nonunion of Petitioner's fusion, her lumbar kyphosis and stenosis, and the fact that the fusion put pressure on the already hypertrophic L5-S1 facets.

On June 11, 2018, Petitioner received bilateral SI joint injections in response to her continued left hip and low back symptoms. Shortly thereafter, on June 14, 2018, Dr. Kennedy opined that due to Petitioner's ongoing lumbar pain, a revision surgery was reasonable. Dr. Kennedy found that Petitioner's CT showed slight lucency around some of her screws and an incomplete bony fusion. He believed that Petitioner likely needed an anterior fusion with revision posterior fusion. However, in response to Dr. Raskas' recommendation that L2-L3 and L5-S1 be incorporated, Dr. Kennedy did not see enough pathology at those levels to warrant surgery. Dr. Kennedy opined that Petitioner's symptoms were emanating from her non-fusion and referred her to Dr. Matthew Gornet.

Petitioner presented to Dr. Gornet on July 12, 2018 with complaints of low back pain to both sides, buttocks, and hips with burning into her thighs and tingling in her feet. Dr. Gornet obtained lumbar X-rays, which showed lucency around the L5 screw, no fusion mass in the interbody space, and little fusion mass posteriorly. Dr. Gornet opined that Petitioner's symptoms were causally related to her work injury and subsequent surgery. On the same day, a lumbar MRI showed residual L3 to L5 foraminal stenosis due to bulging annular material and posterior element hypertrophy as well as an L2-L3 protrusion resulting in dural displacement, central canal stenosis, and foraminal stenoses. Dr. Gornet believed that Petitioner's L2-L3 disc had progressed to where she was developing adjacent level failure and her L5-S1 disc was starting to fail with an increasing annular tear. On July 17, 2018, a lumbar CT further revealed loosening screws at L5, anterolisthesis at L4-L5, bilateral foraminal stenosis at L3-L4 and L4-L5 due to disc and foraminal height loss at L3-L4 and posterior hypertrophy at both levels involving annular material at L4-L5, and disc bulges at L2-L3 with posterior hypertrophy resulting in foraminal and central canal stenosis. Dr. Gornet found that the CT showed a failed fusion at L3 to L5 with loose hardware and L5-S1 facet arthropathy. He recommended lumbar surgery and off-work restrictions.

On January 23, 2019, Petitioner underwent an anterior decompression at L2 to S1, disc replacement at L2-L3, and anterior interbody fusions at L3 to S1 with cages. Two days later, on January 25, 2019, Petitioner underwent a second lumbar procedure that involved a redo laminotomy at L4-L5 and L5-S1, hardware removal at L3 to L5, and a posterior fusion at L3 to S1. Dr. Gornet thereafter put Petitioner on oxycodone to manage her postoperative pain. When Petitioner returned to Dr. Gornet on February 7, 2019, her diagnosis was a failed fusion at L3-L4 and L4-L5 with transitional syndrome at L2-L3 and L5-S1. On February 14, 2019, Petitioner told Dr. Gornet that she had increasing back, buttock, and leg pain. Dr. Gornet recommended steroids, prednisone, oxycodone, and continued off-work restrictions. Then, on May 6, 2019, Dr. Gornet reported that Petitioner was turning a corner, as her leg pain and back discomfort were starting to resolve. Lumbar X-rays were obtained and revealed excellent positions of all devices with no fractures, lucency, or problems. A lumbar CT further demonstrated good early bone consolidation at L3 to S1 with L5-S1 lagging slightly behind the two other levels.

Petitioner testified that after her surgery with Dr. Gornet, her pain was ungodly for several

months, but once she began feeling better, she went on a road trip to Alabama and noticed mid-back pain shooting around to her chest. Petitioner indicated that her mid-back complaints started around the time of this road trip in July 2019. The treatment records show that on July 6, 2019, Petitioner presented to Red Bud Regional Hospital and complained of thoracic/mid-back pain with no known mechanism of injury. Her symptoms at that time were located in the left subscapular area with the pain radiating to her left posterior chest. Petitioner told the emergency room doctors that these symptoms began gradually three weeks prior after she went on a long car ride to Alabama. For her back pain, Petitioner was prescribed Percocet and prednisone.

On July 8, 2019, Petitioner received chiropractic treatment at Nobbe Chiropractic. Her assessments at that time included thoracic radiculopathy, a thoracic ligament sprain, and thoracic segmental and somatic dysfunction. On July 23, 2019, Petitioner called Dr. Gornet's office and told PA Nathan Collins that she had upper and mid-back pain radiating to her left chest. PA Collins stated that they were unable to identify any precipitating factors leading to the increased upper and mid-back pain but it could be the development of adjacent level issues or underlying thoracic pathology.

On August 12, 2019, a thoracic MRI revealed probable left foraminal disc protrusions at T4-T5, T5-T6, and T6-T7 resulting in left foraminal stenosis at each level. On that same day, Dr. Gornet reviewed the MRI and opined that Petitioner's symptoms were related to the T6-T7 herniation. Dr. Gornet indicated that an injection was an option, but Petitioner wanted to try living with it for now. However, on September 4, 2019, Petitioner called PA Collins and reported that her symptoms had increased with significant mid-back pain and low back pain radiating into her bilateral hips, buttocks, and right leg. In addition to the light duty restrictions already in place, PA Collins again restricted Petitioner to no more than 3.5 hours of work per day. He also recommended a T6-T7 epidural steroid injection, which Petitioner then underwent on October 1, 2019. On October 17, 2019, Dr. Gornet reported that the injection had helped but Petitioner still had significant low back pain. Dr. Gornet believed some of the pain was residual from Petitioner's original surgery and prior narcotic dependence. He further noted that Petitioner's examination was non-focal, although she still had burning in her feet. Dr. Gornet maintained Petitioner's light duty restrictions and expressed the possibility of nerve conduction studies at a future date.

Thereafter, on December 10, 2019, Petitioner sustained a second accident when she tripped and fell while teaching a computer class. This accident, in which Petitioner claims cervical injuries, is the subject of the separate Commission Decision in 20 WC 5036. Petitioner testified that after this fall, she felt as though the cages in her body had been shoved up into her throat. She also noted pain in her low back, mid-back, upper back, legs, and bilateral arms. Petitioner promptly presented to Barnes Jewish West County Hospital on the accident date and complained of low back pain radiating to her upper back and down her left leg. She denied neck pain at that time. Thoracic X-rays revealed no acute fractures, and lumbar X-rays revealed an instrumented posterior spinal fusion with L3-S1 interbody fusion and L2-L3 disc arthroplasty. Petitioner was diagnosed with a back strain and prescribed Norco and Zanaflex. Petitioner also called Dr. Gornet's office on the accident date to report that she had fallen at work and felt as though her cage was sticking into her spine with numbness and pain down her left leg.

Petitioner called PA Collins again the next day on December 11, 2019 and reported falling

backwards onto her back and buttocks the day prior. Petitioner stated that she immediately noticed increased low back pain that radiated into her hips and buttocks bilaterally with increasing left leg numbness. PA Collins recommended oral steroid therapy, prednisone, off-work restrictions, and nerve conduction studies. When Petitioner next presented on January 27, 2020, Dr. Gornet opined that Petitioner's recent work fall had aggravated her underlying condition and potentially caused a new accident, particularly to her neck. Dr. Gornet continued Petitioner's off work-restrictions and medications.

On January 28, 2020, a lumbar CT was obtained and showed decompression and instrumentation from L2 through S1 with the hardware in stable position. There was also progressing fusion across L3-L4, L4-L5, and L5-S1 with no residual central canal stenosis. Petitioner remained on off-work restrictions through a subsequent appointment with Dr. Gornet on July 20, 2020, at which time she complained of pain in her low back, hips, and legs. Petitioner also reported pain between her shoulder blades, scapular pain, and weakness and tingling in her arms. Dr. Gornet recommended thoracic, lumbar, and cervical MRIs and CTs. He also referred Petitioner to Dr. Daniel Phillips of the Neurological & Electrodiagnostic Institute for nerve function studies.

The MRI and CT scans were obtained on August 1, 2020. The thoracic MRI revealed T1-T2 and T4-T5 protrusions resulting in dural displacement but no central canal or foraminal stenosis. However, the thoracic CT found no disc bulges or protrusions and central canal or foraminal stenosis. Additionally, the lumbar CT showed decompression and instrumentation at L2 through S1 with solid fusion at L3 through S1 and disc replacement at L2-L3 that was stable and without residual central canal or foraminal stenosis. Shortly thereafter, on August 19, 2020, an EMG/NCS of the bilateral lower extremities was performed by Dr. Phillips and demonstrated values within the normal range with no lumbar radiculopathy, lumbosacral plexopathy, or peripheral neuropathy. On the next day, August 20, 2020, EDX studies of the bilateral upper extremities were performed and found subtle medial neuropathies across the wrists, which Dr. Phillips believed likely represented electrical residual from a previously more severe involvement. This study was not impressive for an acute cervical radiculopathy.

Also on August 20, 2020, Dr. Gornet reviewed Petitioner's diagnostic studies. As for the lumbar spine, Dr. Gornet indicated that the nerve conduction studies found no radiculopathy and the CT showed a solid fusion with no adjacent level issues. As for the thoracic spine, Dr. Gornet saw no problems of significance, although he noted a small disc protrusion at T6-T7. Dr. Gornet stated that the only problem he saw moving forward was a cervical disc problem at C3-C4 and C4-C5. He opined that Petitioner did not need any further treatment for her lumbar or thoracic spine. Dr. Gornet also believed that the pain between Petitioner's shoulder blades, scapular pain, weakness, and tingling likely emanated from her cervical herniations. He stated that he otherwise did not have an explanation for Petitioner's newer onset back, buttocks, and hip pain, although she might still be healing at L5-S1. At that time, Dr. Gornet recommended a C4-C5 injection and suggested consideration of a cervical disc replacement surgery if Petitioner did not improve. However, Dr. Gornet indicated that he did not believe the surgery would make a difference as to Petitioner's back and Petitioner would always have some permanent restrictions.

On September 3, 2020, the parties deposed Dr. Christopher O'Boynick, the board certified

orthopedic surgeon who performed a §12 examination on Petitioner on October 22, 20219. Dr. O'Boynick's diagnosis was thoracic pain with a T6-T7 left-sided disc herniation and no lateral recess or foraminal stenosis. He opined that Petitioner's thoracic condition was not causally related to the September 2, 2014 accident. Instead, Dr. O'Boynick believed that the car ride to Alabama or the natural aging course could be a cause of Petitioner's thoracic condition. Dr. O'Boynick further testified that Petitioner's thoracic pain was not in a dermatomal pattern during his examination. As for the lumbar spine, Dr. O'Boynick opined that Petitioner did not require further treatment and had reached MMI eight months after her lumbar surgery. He based this opinion largely on Petitioner's imaging studies, which he found to show a successful union across the fusion sites.

On cross examination, Dr. O'Boynick agreed that the mechanism of injury of a student jumping on Petitioner and grabbing her shoulders from behind could cause a thoracic or lumbar injury or aggravate a preexisting thoracic or lumbar condition. He also agreed that the symptoms Petitioner stated in a September 15, 2014 treatment note with Dr. Kennedy's office, specifically that she had neck, shoulder, and low back pain, could indicate an injury to the thoracic spine. Nevertheless, Dr. O'Boynick testified that it would be atypical and less likely to have neck pain from a thoracic disc herniation at T6-T7, which was what Petitioner had.

Dr. O'Boynick further conceded that as Petitioner's low back pain improved following her lumbar surgery in 2019, it was possible that her mid-back pain could have become more pronounced. He also agreed that Petitioner's MRI showed an objective disc herniation at T6-T7, which correlated with Petitioner's symptoms. However, Dr. O'Boynick explained that in his clinical experience, he had not seen symptoms of a thoracic disc herniation present so much later after the alleged inciting injury.

Dr. O'Boynick further agreed that ATI Physical Therapy notes from 2015 documented complaints of thoracic pain. However, he testified that although these records identified some nonspecific thoracic pain, Petitioner's presentation of pain around her anterior chest wall, which correlated with radicular irritation of her thoracic spine, did not present until after the car ride. He testified that the symptoms of Petitioner's thoracic disc herniation did not show up until numerous months after the accident date, which was an atypical presentation. Dr. O'Boynick clarified that although it was possible that the thoracic disc herniation was caused by the September 2014 injury, the symptoms that related to the disc herniation, specifically the complaint of thoracic radicular pain that went along with nerve root irritation, did not present until many months later.

Dr. O'Boynick explained that the reason he did not relate Petitioner's thoracic condition to the work accident was because the presentation of symptoms that more classically fit a thoracic disc herniation were not mentioned in Petitioner's records or in her complaints until June 2019. Dr. O'Boynick testified that it was possible that the trauma to the spine could have resulted in a thoracic herniation; however, it was also equally possible to have a thoracic disc herniation that presented without a history of trauma. He further testified that it was possible to have upper thoracic pain as a result of a cervical spine surgery like the one Petitioner underwent in January 2015. In his §12 report, Dr. O'Boynick stated that patients who had a previous cervical condition or injury often have referred pain to the thoracic spine. As such, he stated that it was possible that Petitioner had referred pain from her prior cervical condition.

The parties next deposed Dr. Gornet on September 14, 2020. Dr. Gornet opined that both Petitioner's lumbar and thoracic injuries were causally related to the September 2, 2014 accident. He testified that after Petitioner's lumbar surgery, at her May 6, 2019 visit, she had finally started to feel better and have improved function. Dr. Gornet agreed that when a patient begins to have improved pain in one area of their spine, they can become more aware of pain in another area. He explained that an area of severe pain tends to drown out all other aspects, but once it improves, the patient may realize other areas were affected. As such, Dr. Gornet testified that Petitioner's upper and mid-back symptoms began to come more to the forefront after her lumbar surgery.

Dr. Gornet testified that Petitioner's thoracic MRI showed a T6-T7 herniation that correlated with her pain marker. He testified that his basis for opining that Petitioner's thoracic condition was causally related to the accident was treating similar patients. He further testified that Petitioner had pain in her upper lumbar spine from the beginning, but she was on high dose narcotics that masked a lot of symptoms. Additionally, Dr. Gornet testified that without any other slip, fall, or trauma, there was no other explanation than to associate Petitioner's disc pathology with her work injury. Nevertheless, Dr. Gornet did not completely disagree with Dr. O'Boynick's opinion that Petitioner's thoracic pain was possibly associated with her pre-accident neck condition, although he believed that it was a combination of issues.

After Dr. Gornet's deposition, on October 6, 2020, Petitioner underwent a C4-C5 epidural steroid injection. The procedure note for this injection is the last treatment record submitted into evidence before this matter proceeded to hearing. Thereafter, on November 6, 2020, the parties deposed Dr. Robert Bernardi, the board certified neurosurgeon who performed a §12 examination on March 23, 2020 and subsequently provided an addendum on October 16, 2020. Dr. Bernardi's reports predominantly focus on Petitioner's cervical injury at issue in 20 WC 5036; however, he also addresses Petitioner's lumbar and thoracic conditions.

Dr. Bernardi listed his diagnoses as: status-post C5-C7 decompression and fusion; status-post L3-L5 decompression and fusion; postoperative pseudo-arthritis at L3 to L5; status-post L3 to sacral fusion with an L2-L3 disc replacement; bilateral arm pain, tingling, and weakness of an uncertain etiology; and mid-back, low back, and bilateral leg pain of an uncertain etiology. At the time of his March 2020 examination, Dr. Bernardi found no concrete physical or neurological findings and nothing objective to suggest that Petitioner needed any restrictions. Nevertheless, Dr. Bernardi testified that he needed to see additional imaging before opining as to causation. After reviewing additional medical records and imaging studies, Dr. Bernardi opined that Petitioner's conditions were not causally related to the December 10, 2019 accident. He explained that Petitioner had significant thoracic and lumbar complaints before December 2019 and told him that those complaints had not changed in any way. Dr. Bernardi testified that although the complaints were more intense, it was a subjective perception that was not substantiated by any new changes on imaging studies. He found no evidence that Petitioner had an acute disc herniation, fracture, or anything else that would explain the worsening symptoms she described.

II. Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of

the Arbitrator as to Petitioner's thoracic spine and finds that Petitioner's thoracic condition is not causally related to the September 2, 2014 work accident.

Petitioner's treatment records made no mention of thoracic pain until July 6, 2019, which is almost five years after the September 2014 accident and close in proximity to Petitioner's road trip to Alabama. After the work accident, Petitioner's complaints and treatment focused on her lumbar, SI, and bilateral lower extremity symptoms. Then, following her lumbar surgeries in January 2019, Dr. Gornet noted on May 6, 2019 that Petitioner was turning a corner as her leg pain and back discomfort started to resolve. The first complaint of thoracic and mid-back pain subsequently came when Petitioner presented to the emergency room on July 6, 2019 and complained of symptoms located in her left subscapular area and pain radiating to her left posterior chest. Petitioner reported that these symptoms began gradually three weeks prior after the long car ride to Alabama.

To try to explain Petitioner's delay in thoracic complaints, Dr. Gornet testified that when a patient begins to have improved pain in one area of the spine, they may become more aware of pain in another area. Dr. O'Boynick also conceded that as Petitioner's low back pain improved following her lumbar surgery in 2019, it was possible that her mid-back pain could have become more pronounced. Although the Commission recognizes that Petitioner was dealing with extensive lumbar problems after her accident, it finds that failing to raise any thoracic issues until almost five years after the accident represents a significant and, in this case, unsurmountable delay.

Petitioner attempts to argue that thoracic issues were raised before the July 2019 emergency room visit by pointing to Dr. O'Boynick's testimony. Dr. O'Boynick agreed that the symptoms of neck, shoulder, and low back pain that Petitioner raised in a September 15, 2014 visit with Dr. Kennedy's office could indicate a thoracic injury. However, he also testified that it would be atypical and less likely to have neck pain from the T6-T7 disc herniation that Petitioner had. Dr. O'Boynick also agreed that earlier 2015 records from ATI Physical Therapy identified some nonspecific thoracic pain, but he nevertheless contended that Petitioner's presentation of pain around her anterior chest wall, which correlated with radicular irritation of her thoracic spine, did not present until after her road trip. He testified that the symptoms of Petitioner's thoracic disc herniation did not show up until many, many months after the accident date, which he called an atypical presentation. Dr. O'Boynick reviewed all the records and did not see any thoracic complaints that specifically corresponded to Petitioner's T6-T7 herniation until after the car ride to Alabama.

At his deposition, Dr. O'Boynick conceded that the mechanism of injury could cause or aggravate a thoracic condition. He also agreed that Petitioner's MRI showed an objective disc herniation at T6-T7, which correlated with her symptoms. Nevertheless, Dr. O'Boynick opined that Petitioner's thoracic condition was not causally related to the September 2014 accident, because the presentation of symptoms that more classically fit a thoracic disc herniation were not documented in Petitioner's treatment records until June 2019. In his clinical experience, Dr. O'Boynick had not seen symptoms of a thoracic disc herniation present so much later after an alleged injury. He testified that although it was possible that the trauma to Petitioner's spine could have resulted in a thoracic herniation, it was equally possible to have a thoracic herniation present without a history of trauma. Dr. O'Boynick also testified that Petitioner's thoracic condition could

be a part of the natural aging process or caused by the car ride to Alabama, which was closer in proximity to her symptoms. He also indicated that it was possible that Petitioner's thoracic pain could have been referred pain stemming from her pre-accident cervical condition.

In considering Dr. O'Boynick's opinion as a whole, the Commission finds that despite any concessions, Dr. O'Boynick qualified his opinions by explaining that causation was less likely and emphasizing that Petitioner did not have any relevant thoracic symptoms until 2019. As such, the Commission does not believe that Dr. O'Boynick's concessions are strong enough to rely upon to overcome the fact that Petitioner did not present with any thoracic complaints until close to five years after her work accident. Thoracic complaints relative to her thoracic disc herniation were not documented in Petitioner's treatment records until 2019. For these reasons, the Commission determines that Dr. O'Boynick's opinions are more reliable than those of Dr. Gornet and finds that Petitioner failed to prove that her thoracic condition is causally related to the September 2, 2014 accident. Given that the Commission has made a finding of no causation, it so follows that all medical expenses related to the treatment for Petitioner's thoracic spine is denied.

As for Petitioner's lumbar condition, the Commission affirms and adopts the Arbitrator's findings concerning Petitioner's lumbar spine with the exception of the award of prospective medical care. On August 20, 2020, Dr. Gornet stated that the only problem he saw moving forward was Petitioner's cervical problem. Dr. Gornet then opined that Petitioner did not need any further treatment for her lumbar or thoracic spine. At the time of the hearing, there was no medical recommendation for prospective lumbar treatment pending. For these reasons, the Commission finds that Petitioner failed to establish her entitlement to any prospective lumbar care and reverses the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated April 22, 2021, is hereby modified as stated herein. In all other aspects not specifically detailed herein, the Commission affirms and adopts the Decision of the Arbitrator. Specifically, the Commission affirms and adopts the Arbitrator's findings as to Petitioner's benefit rates and the causation and award of medication expenses related to Petitioner's lumbar spine condition.

IT IS FURTHER FOUND that Petitioner failed to prove that the current condition of her thoracic spine is causally related to her work accident on September 2, 2014. The Commission therefore denies all medical expenses related to the treatment of Petitioner's thoracic spine.

IT IS FURTHER ORDERED that prospective medical care related to Petitioner's lumbar spine is hereby denied.

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 Illinois Workers' Compensation Act, if any.

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

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.

February 4, 2022

DLS/met
O- 12/8/21
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/s/*Deborah L. Simpson*
Deborah L. Simpson

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC018635
Case Name	BRYANT, JARVIA v. WATERLOO SCHOOL DISTRICT 5
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen Klyczek, Juan Arias

DATE FILED: 4/22/2021

/s/ Linda Cantrell, Arbitrator
Signature

INTEREST RATE WEEK OF APRIL 20, 2021 0.04%

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)

JARVIA BRYANT
Employee/Petitioner

v.

WATERLOO COMMUNITY UNIT SCHOOL DISTRICT NO. 5
Employer/Respondent

Case # **16**-WC-**18635**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville,** on **January 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. ☐ Other

FINDINGS

On the date of accident, **September 2, 2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**47,669.04** the average weekly wage was $**1,324.14**.

On the date of accident, Petitioner was **46** 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 **$1,214.98** under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services related to Petitioner's lumbar and thoracic spine 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 is responsible for reasonable and necessary prospective medical care to Petitioner's lumbar and thoracic spine as recommended by Dr. Gornet until Petitioner reaches maximum medical improvement.

The Arbitrator does not award temporary total disability benefits claimed by the Petitioner from 10/27/20 through the present, January 21, 2021, and awards said benefits in Case No. 20-WC-05036.

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

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

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

Linda J. Cantrell
Signature of Arbitrator

ICArbDec19(b)

APRIL 22, 2021

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JARVIA BRYANT,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 16-WC-18635
	)	
WATERLOO COMMUNITY UNIT SCHOOL DISTRICT NO. 5,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 21, 2021 pursuant to Section 19(b) of the Act. On June 15, 2016, Petitioner filed an Application for Adjustment of Claim against Respondent alleging injuries to her low back, legs, and body as a whole as a result of being injured by a student on September 2, 2014. (Case No. 16-WC-18635). Petitioner made an oral motion at arbitration to amend the Application for Adjustment of Claim in Case No. 16-WC-18635 to include Petitioner's mid-back as a body part affected by the accident. No objection was made by Respondent and the Arbitrator grants Petitioner's oral motion to amend.

On September 17, 2020, Petitioner filed an Amended Application for Adjustment of Claim against Respondent alleging injuries to her low back, mid-back, legs, and body as a whole as a result of tripping and falling while in the computer lab on December 10, 2019. (Case No. 20-WC-05036). A second Application for Adjustment of Claim was erroneously filed for the same date of accident of 12/10/19 and was assigned Case No. 20-WC-05818. That case was subsequently dismissed and the parties proceed to hearing on Case No. 20-WC-05036. The cases were consolidated for the purpose of trial.

On July 10, 2017, Arbitrator Christina Hemenway entered a Decision in Case No. 16-WC-18635 pursuant to Section 19(b) of the Act. Arbitrator Hemenway found Petitioner's condition of ill-being with regard to her lumbar spine causally related to the work accident of September 2, 2014. Arbitrator Hemenway awarded medical expenses through the date of arbitration, February 24, 2017, and prospective medical treatment, specifically a lumbar spine surgery recommended by Dr. Kennedy. The Arbitrator takes judicial notice of Arbitrator Hemenway's Decision. (PX25).

The parties stipulate that Petitioner sustained an accident which arose out of and in the course of her employment with Respondent on September 2, 2014 when a special needs student jumped on her causing injury to her low back. The issues in dispute in Case No. 16-WC-18635 are causal connection, medical expenses, temporary total disability benefits, and prospective medical treatment. The Arbitrator has simultaneously issued a separate Decision pursuant to Section 19(b) of the Act in Case No. 20-WC-05036.

TESTIMONY

Petitioner was 46 years old, single, with no dependent children at the time of accident. Petitioner testified she has worked for Respondent for over 20 years as a teacher and currently teaches sixth and seventh grade students. Petitioner is contracted to work a total of 180 days per year (36 weeks). Her salary is governed by the Waterloo Classroom Teacher's Association that divides her annual salary by 180 days and is paid over 24 pay periods.

Petitioner testified that on 9/2/14 she was on the playground supervising 8th grade recess when a special needs student jumped into her arms. She was looking down and did not anticipate the contact. A male teacher standing next to her prevented her from falling to the ground. Petitioner testified she worked 36 weeks per year prior to this incident. She stated that her low back, legs, and hips were bothering her following the accident. When this accident occurred, Petitioner was already scheduled for cervical spine surgery related to a work accident that occurred in 2013. She testified that her low back pain became debilitating but she did not immediately notice pain in her mid-back until her low back pain improved. She stated she has never experienced any significant mid-back pain prior to 9/2/14.

Petitioner testified she underwent lumbar surgery as recommended by Dr. Kennedy and awarded by Arbitrator Hemenway. She subsequently underwent a second lumbar surgery performed by Dr. Gornet involving L2 through L5-S1 in January 2019. She stated she noticed mid-back pain a couple of months following her second lumbar surgery and the pain wrapped around to her chest.

Dr. Gornet ordered an MRI of Petitioner's mid-back and an injection that provided temporary relief. Petitioner testified she requested Dr. Gornet release her to return to work in August 2019 at the start of the 2019-2020 school year. Petitioner testified she returned to full duty work until 9/5/19 when Dr. Gornet placed her on work restrictions. The Arbitrator notes that Dr. Gornet allowed Petitioner to return to work with restrictions on 8/13/19, and further restricted her work duties on 9/5/19, and Petitioner testified she was able to perform within those restrictions. On 12/10/19, Petitioner sustained another work accident while assisting a student in computer lab when she tripped and fell over a chair. Petitioner landed on her back and buttocks. Petitioner testified that her leg was numb and her low back was extremely painful and she was not able to stand up. Petitioner began to develop bilateral arm pain starting at her neck radiating to her shoulders and trapezius, aching in her hands, pressure in her low back like her lumbar cage had been pushed up to her chest, and mid to upper back pain. Petitioner testified she underwent cervical spine surgery in 2015 and had a good recovery which resolved her neck, shoulder, and arm pain.

Petitioner testified that following her 12/10/19 accident, Dr. Gornet ordered tests and another cervical steroid injection that provided relief for a couple of weeks. Dr. Gornet recommends a two-level cervical disc replacement which Petitioner wants to undergo. Petitioner testified she continues to have pain in her mid to upper back, arms, and hands. Petitioner reviewed surveillance videos of herself taken in September and October 2020. She stated she did not perform any strenuous activities in the videos. She testified that her pain is activity driven and she rests in a recliner when she is home. When she performs activities she wears a pain patch and engages in home exercises to manage her pain.

On cross-examination, Petitioner testified that she returned to full duty work on 8/13/19. On 9/5/19, Dr. Gornet placed her on light duty restrictions of no lifting over 10 pounds, no repetitive bending or twisting, alternate sitting and standing, and reduced work hours of half-time. Petitioner stated she was able to work within the light duty restrictions until her accident on 12/10/19.

Petitioner has to alternate sitting and standing to alleviate the pain in her low back and legs. She testified she noticed mid-back pain during a car trip to Alabama in which she was a reclined passenger. She stated the mid-back pain shot around to her chest. She described her mid-back pain as higher up since her accident on 12/10/19 that radiated to her shoulders and arms, which was not present prior to 12/10/19.

Petitioner called Brian Charron as a witness. Mr. Charron has been the Superintendent for Respondent for over six years. Mr. Charron agreed that Petitioner is contracted to work 180 days per school calendar year and is paid twice per month throughout the calendar year. He agreed that Petitioner's salary for the 2019-2020 school year was $55,134.00 if Petitioner worked the entire school year. (PX24). Mr. Charron explained that an employee's salary is divided by 24 pay periods and is paid September through August. Due to Petitioner's injury on 12/10/19, Petitioner exhausted her accumulated paid leave and was required to submit weekly time sheets while working restricted duty and was paid per day worked. Mr. Charron testified that Petitioner worked 14 days from 8/13/19 through 8/31/19 at a daily pay rate of $306.30. (RX3). Petitioner continued to receive full pay for the period 9/1/19 through 9/15/19 due to the use of accumulated leave, despite working half-days beginning 9/5/19 per Dr. Gornet's orders. Petitioner exhausted her accumulated leave during the 10/16/19 through 10/31/19 pay period and was paid for the half days she worked. Mr. Charron testified that Petitioner was incorrectly paid full pay for the period 11/1/19 through 11/15/19, resulting in a double payment for nine days as she only worked half days during that period. To correct the overpayment Petitioner was not paid for the next pay period.

MEDICAL HISTORY

Following Arbitrator Hemenway's decision entered on July 10, 2017, Petitioner continued her care and treatment with Dr. Kennedy. Dr. Kennedy obtained updated imaging studies and a CT myelogram that revealed nerve root compression bilaterally at L3-4 and L4-5. Dr. Kennedy recommended bilateral facetectomies at both levels with pedicle screw fixation and fusion. On 10/5/17, Petitioner underwent an L3-4 and L4-5 laminectomy, facetectomy, and bilateral foraminotomy with pedicle screw fixation and posterolateral fusion and iliac crest bone

marrow aspiration. Petitioner unfortunately experienced a turbulent recovery, fraught with persistent complaints of pain and radiculopathy in her lower extremities similar to her pre-surgical status. Petitioner testified she remained on prescription narcotics over the next couple of years.

On 11/22/17, Petitioner reported bilateral hip pain, worse with walking and at night. Petitioner further reported shooting pain along the anterior aspect of her legs and numbness and tingling in her feet despite use of Gabapentin, Percocet, Flexeril, and Lidocaine patches. Petitioner was instructed to continue using her brace and medications. On 1/2/18, Petitioner reported ongoing symptoms of nerve pain and muscle tightness. She was unable to sleep and constantly changed positions. Petitioner attempted to participate in physical therapy as prescribed; however, she reported "feeling miserable" on 2/13/18 and complained of constant pain in her lower back and bilateral hip area with intermittent sciatic type pain. The attending clinician noted a postural swag, which corroborated Petitioner's reports of off-balance posture with prolonged walking. Increased Gabapentin dosage brought no relief to Petitioner's radicular symptoms resorting in the use of more Percocet to relieve her pain. Films showed intact instrumentation, but there was persistent lucency about the right pedicle screw at L5, and no posterolateral fusion was appreciable along the right side of the L5 instrumentation. As a result, Petitioner's working hours were reduced, she was removed from physical therapy, and she was restricted to no lifting greater than 10-20 pounds.

On 3/21/18, Petitioner reported SI joint pain, bilateral hip pain, and difficulty with prolonged walking and sitting. Lumbar spine films continued to show lucency surrounding the L5 pedicle screws and a CT myelogram was ordered. Nevertheless, on 4/11/18, Dr. Kennedy expressed his belief that Petitioner's lumbar spine was fused and she required no further care and treatment. He recommended a second opinion to evaluate possible care and treatment to the sacroiliac area. The CT myelogram revealed incomplete fusion in the posterior elements of L3-5 with persistent diffuse annular disc bulges from L2 through L5. Though Dr. Kennedy reviewed the studies and acknowledged the absence of posterior bone formation, he did not recommend revision of her posterior instrumentation. Dr. Kennedy recommended an SI joint fusion and referred Petitioner to Dr. David Raskas.

On 5/15/18, Dr. Raskas noted that despite surgery Petitioner's pain returned to 50% back pain and 50% bilateral anterolateral thigh pain that was poorly controlled with medications, along with chronic numbness in her large toes bilaterally. Petitioner indicated that the anterior thigh pain was not present prior to the October 2017 surgery. Dr. Raskas noted Petitioner had been taking Percocet since the October surgery and was referred for evaluation for possible involvement of the SI joint. Dr. Raskas noted Petitioner had received SI joint injections from Dr. Feinberg, with the last being six (6) months prior to her posterolateral fusion, which provided limited relief. He further noted that Petitioner visibly appeared uncomfortable, as she fidgeted and struggled to find a comfortable position and ambulated with a slightly shuffled gait. His examination was positive for tenderness and pain to palpation of the lumbar spine and diminished deep tendon reflexes. His review of the CT myelogram taken in April 2018 showed clear lucency of the L5 screws, especially on the right, with haloing about the tips of the L4 screws which was consistent with early signs of hardware failure. Petitioner exhibited progressing stenosis of the L2-3 segment as compared with the findings on the September 2017

myelogram with enlarged facet joints contributing to midline and bilateral foraminal stenosis. Dr. Raskas noted a large osteophyte formation on the left side of the L5-S1 facet joint creating a claw-type appearance with abnormal bone growth and facet degeneration. Dr. Raskas assessed lumbar pain, kyphosis of the thoracolumbar region, L2-3 stenosis, facet arthropathy, pseudoarthrosis and facet degeneration of the lumbar spine, status post lumbar fusion, and hardware failure. Dr. Raskas recommended an anterior/posterior fusion from L2 to S1, with hardware removal, and a laminectomy at L2-3 and posterior instrumentation from L2 to S1. He opined that the surgery was directly attributable to the nonunion of the fusion, the lumbar kyphosis, and the stenosis of that area and the fact that the fusion is putting pressure on the already hypertrophic facets at L5-S1. He opined that Petitioner would be able to return to her job as a teacher with successful arthrodesis, but that she was temporarily and totally disabled in her current state.

Petitioner returned to Dr. Kennedy on 6/14/18 at which time he agreed, given Petitioner's current pain level and objective findings, that revision surgery was reasonable. He opined that an anterior fusion in conjunction with revision posterior fusion was reasonable. He disagreed with Dr. Raskas' recommendation for inclusion of L5-S1 and L2-3, as he believed Petitioner's symptoms were primarily emanating from non-fusion. Consequently, he referred Petitioner to Dr. Matthew Gornet for a third opinion.

Petitioner was evaluated by Dr. Gornet on 7/12/18 who noted Petitioner's complaints of pain to the bilateral low back, buttocks, hips, and anterior thighs with tingling in her feet despite fusion and prescription narcotic medication, the most recent of which was Oxycodone. He reviewed the results of the recent CT myelogram and previous MRI scan, and his physical examination showed tingling into the L3 distribution and the SI joint bilaterally. He ordered new scans that revealed a failed fusion at L3-4 and L4-5 with loose hardware, with developing adjacent level failure at both L2-3 and L5-S1. He also believed facet arthropathy at L5-S1 played a role in Petitioner's pain. Dr. Gornet recommended disc replacement at L2-3, revision fusion at L3-4 and L4-5, and disc replacement vs. fusion at L5-S1. Petitioner was kept off work.

Respondent had Petitioner evaluated by Dr. Benjamin Crane on 9/24/18 pursuant to Section 12 of the Act. Dr. Crane agreed that Petitioner was a surgical candidate from L2 to L5. However, Dr. Gornet noted that Dr. Crane's plan did not address the significant facet arthropathy at Petitioner's L5-S1 level. Dr. Gornet believed Petitioner's only option was to fuse L5-S1, revise the fusion from L3-4 and L4-5, and replace the disc at L2-3.

On 1/23/19, Dr. Gornet performed the first segment of a staged procedure which consisted of an anterior decompression at L2-3, L3-4, L4-5, and L5-S1; disc replacement at L2-3; and anterior lumbar interbody fusion at L3-4, L4-5, and L5-S1. On 1/25/19, Dr. Gornet performed a revision laminotomy at L4-5 and L5-S1, removal of hardware from L3 to L5, and a posterior fusion from L3 to S1. He noted increased difficulty due to scar tissue that was significant, making tissue dissection difficult and the operation time was increased by 50%.

Follow-up visits show that Petitioner again had a turbulent post-operative recovery with slow progression of improvement. Petitioner reported nausea on 1/29/19 and Dr. Gornet decreased her narcotic medication. On 2/6/19, Petitioner reported increased bilateral leg pain and

difficulty sleeping. Dr. Gornet suggested a course of oral steroids, but ultimately prescribed Tylenol. On 2/14/19, Petitioner reported increased back, buttock, and leg pain and Dr. Gornet expressed concern over spinal subsidence. Dr. Gornet prescribed steroids and refilled her pain medication. On 3/7/19, Petitioner reported the steroids helped her pain substantially, but her pain returned when the steroids wore off. Dr. Gornet noted Petitioner's films showed substantial reclamation of L5-S1 disc height and kept her off work.

On 5/6/19, Dr. Gornet noted that although Petitioner exhibited post-operative discomfort, her leg pain was beginning to resolve. CT scans showed good early reasonable bone consolidation at all levels; however, Dr. Gornet stated that due to the revision Petitioner remained temporarily and totally disabled and planned to consider therapy three months later if imaging studies continued to show acceptable status. On 7/6/19, Petitioner presented to Red Bud Regional Hospital Emergency Room with complaints of left scapular pain radiating into her left lateral posterior chest and breast. Petitioner reported that she noticed the pain after a long car ride to Alabama. Petitioner denied any precipitating acute injury. A CT angiography of the chest was performed and was negative for any abnormality. Petitioner was administered Toradol and other medications for pain and instructed to follow up with her physician.

On 7/23/19, Petitioner advised Dr. Gornet she had been experiencing upper and middle back pain located approximately in her bra line area which radiated to the left side of her chest for which she sought evaluation in the emergency department. Petitioner reported that she was on her second round of Prednisone without any significant relief in her symptoms. Dr. Gornet attempted to identify precipitating factors leading to Petitioner's increasing upper and mid back pain and suspected the development of adjacent level issues. He noted Petitioner could have an underlying pathology in her thoracic spine. He advised Petitioner to continue steroids as currently prescribed and recommended imaging studies if her lumbar spine continued to show acceptable progress.

On 8/12/19, Dr. Gornet obtained imaging studies and noted that Petitioner's lumbar spine films continued to show good position of all hardware without evidence of lucency or fracture. Although he felt that L5-S1 was lagging, he noted no lucency around the screws and the scans showed excellent bone consolidation at L3-4 and L4-5. Dr. Gornet attributed Petitioner's thoracic complaints to a herniation at T6-7 on the left. He recommended an injection but Petitioner decided to live with her symptoms. Dr. Gornet opined that Petitioner was not yet fully healed but allowed her to return to work beginning 8/13/19 with restrictions of no lifting greater than 10 pounds, no repetitive bending or lifting, and to alternate between sitting and standing. He also restricted Petitioner to teaching on the first floor only and to avoid stairs.

On 9/5/19, Petitioner called Dr. Gornet's office and advised him that her symptoms had significantly increased since returning to light duty work. She denied any intervening accidents. Dr. Gornet recommended placing Petitioner on further restrictions to include no working greater than 3 ½ hours per day effective immediately. He recommended moving forward with epidural steroid injection of the thoracic spine at T6-7 as Petitioner continued to report significant mid-back pain in addition to low back pain.

On 10/17/19, Dr. Gornet noted that the injection performed on 10/1/19 helped a portion of Petitioner's mid-back pain, but she still struggled with low back pain. He attributed Petitioner's low back symptoms to residual of her original surgery and narcotic dependence prior to seeing him. He recommended a nerve function study if follow-up radiological studies were normal to determine Petitioner's non-focal radiculopathy expressed in her feet. He recommended only occasional use of narcotics, once or twice a week, with at least 30 minutes of cardiovascular exercises a day. He noted that Petitioner was due to see Dr. O'Boynick for an IME.

On 12/10/19, Petitioner sustained another injury at work when she attempted to walk between rows of computer stations to assist a student and tripped over a chair leg. Petitioner fell to the floor on her back and buttocks. Petitioner called Dr. Gornet's office the day of the accident and stated she felt like her cage was sticking into her spine with numbness and pain down her left leg. Petitioner thereafter presented to the emergency room where she reported the history of accident and that she had pain in her lower back radiating to her upper back and down her left leg. The assessment noted a high probability for sprain-strain contusion of the back with less likely facture or hardware displacement. X-rays showed no signs of acute fracture and Petitioner was taken off work and given pain medication.

Petitioner called Dr. Gornet's office the following day and gave a detailed history of the accident, stating she tripped and fell backwards on to her back and buttocks after she tripped over a chair that a child pushed out when she was trying to step over it. Dr. Gornet placed Petitioner off work and ordered the nerve conduction study previously recommended. He also recommended oral steroid therapy and Famotidine. Dr. Gornet examined Petitioner on 1/27/20 and noted she was doing reasonably well with restrictions until the new accident occurred that aggravated her mid-back, low back, and leg symptoms. Dr. Gornet noted pain in Petitioner's neck and arms. He believed the fall aggravated Petitioner's underlying condition and possibly caused new injury, particularly in her neck, which he noted was a new complaint for Petitioner. He recommended a functional capacity evaluation in addition to the nerve function studies and opined Petitioner remained temporarily and totally disabled. He instructed Petitioner to remain off narcotics.

On 3/30/20, Dr. Gornet's assistant noted that Dr. Bernardi recommended a total myelogram to cover all of Petitioner's spine. Dr. Gornet agreed the new imaging studies were warranted. However, after further consideration, Dr. Gornet believed that MRIs with plain CTs of all three areas for comparison would suffice and Petitioner did not require myelograms. Dr. Gornet again noted the possibility that Petitioner's fall injured an adjacent disc level in her cervical spine, although Petitioner's neck pain was not significant at that point, given the likelihood of referred pain. He referred Petitioner to Dr. Phillips for nerve function studies.

The nerve conduction studies performed by Dr. Phillips on 8/19/20 fell within the range of normal and was not impressive for active lumbar radiculopathy. However, Dr. Phillips noted Petitioner suffered from severe left greater than right foraminal stenosis at L2-3 as shown on MRI and stated he did not have good distal NCV study for L2 sensory evaluation. The nerve studies performed on 8/20/20 to evaluate for cervical radiculopathy was also unimpressive for active cervical radiculopathy but showed subtle medial neuropathies across the bilateral wrists.

Dr. Gornet opined that Petitioner may have residual from her original problem, particularly in the L2 sensory nerve root. With respect to the thoracic spine, Dr. Gornet noted no problems of significance outside of the small protrusion at T6-7 on the left. On the cervical spine scans, Dr. Gornet noted the possibility of a lytic line through the graft at C5-6 which he believed would fuse. At C3-4 and C4-5, however, Dr. Gornet noted a cervical disc problem that would require treatment moving forward. He stated that Petitioner's pain between the shoulder blades with weakness and tingling likely emanates from the cervical disc herniations. He did not have an explanation for Petitioner's more recent onset of back, bilateral buttock and hip pain, left worse than right. He recommended an injection at C4-5. If Petitioner did not improve, he recommended cervical disc replacement at C3-4 and C4-5. As for Petitioner's low back, Dr. Gornet opined Petitioner will always have some level of permanent restrictions.

Dr. Christopher O'Boynick testified by way of evidence deposition on 9/3/20. Dr. O'Boynick treats and performs surgery on spinal conditions. He testified that he examined Petitioner on 10/22/19 and reviewed records and reports related to Petitioner's accident in September 2014. Based upon his examination and review of the records, he believed that Petitioner's diagnoses included thoracic pain with a T6-7 left-sided disc herniation without lateral recess or foraminal stenosis, lumbar spine pain secondary to multilevel decompression and failure of fusion followed by revision lumbar fusion and left greater than right radiculopathy.

Dr. O'Boynick testified he did not believe Petitioner's thoracic spine condition was related to the injury in September 2014 or her previous cervical spine surgery. He opined that the car ride to Alabama could have caused or manifested Petitioner's thoracic and left-sided chest wall pain, or that it was simply the result of aging that could have been made symptomatic by any activity of daily living. He further testified that he did not believe Petitioner's complaints matched up with a dermatomal distribution outside of her left-sided chest wall pain. Dr. O'Boynick opined that Petitioner did not require any additional care or treatment for her lumbar spine, largely based on the imaging studies showing successful union across L3-4, L4-5, and L5-S1. He opined that Petitioner was at maximum medical improvement with regard to her lumbar spine and could return to work as a teacher with the reasonable accommodation of only first floor teaching.

On cross-examination, Dr. O'Boynick testified he has been in practice since 2015 and obtained his board certification in 2017. He performs an average of one to two IMEs per week and charges $1,300 per IME and $650 for each additional body part evaluated. He testified he does not perform lumbar disc replacement surgeries, but he does perform cervical disc replacements. Dr. O'Boynick testified he did not have an independent recollection of examining Petitioner but would deny that the only examination he performed was making her bend over and reach for the ground. He testified that it was the insurance carrier that advised him Petitioner did not express complaints about her thoracic spine until after her 7/9/19 emergency room visit, and he agreed with its supposition that her complaints could be related to her road trip. Dr. O'Boynick testified that Petitioner's thoracic spine injury could also have been caused or aggravated by the September 2014 injury. He was not provided with Arbitrator Hemenway's 2017 Section 19(b) Decision.

Dr. O'Boynick admitted that complaints Petitioner voiced on 9/15/14, namely pain in her neck, shoulder, and low back, could also indicate injury to the thoracic spine. He also acknowledged that the unspecified diagnosis of "back strain" on that date could have encompassed the thoracic spine. He admitted that the complaints noted in the A.T.I. Physical Therapy records from May through August 2015 that included burning in the neck and upper back were consistent with a thoracic spine injury. Dr. O'Boynick acknowledged that Petitioner required extensive care for her lumbar spine, which began to improve following the surgery performed by Dr. Gornet in January 2019. He admitted it was possible for Petitioner's mid back pain to become more pronounced as her low back pain began to improve. He acknowledged that Petitioner suffered from an objective disc herniation at T6-7. He was not aware of an MRI performed prior to the September 2014 work injury. He also acknowledged that MRI findings are not the driving force behind treatment recommendations; rather, treatment recommendations are made based on patient symptoms with correlating findings. Though he had not seen Petitioner since October 2019, he agreed that the treatment she received for her lumbar and thoracic spine was reasonable and necessary.

Dr. O'Boynick acknowledged that his opinion that Petitioner was at maximum medical improvement was in contravention to the recommendations of Dr. Gornet. Though he agreed Petitioner's lumbar spine symptoms were causally related to the September 2014 work injury, he continued to disagree with respect to the thoracic spine. He testified that in his clinical practice and experience, he had not seen symptoms of a thoracic disc herniation present so much later after an inciting injury. While he acknowledged that the records identified some nonspecific thoracic pain as early as a few weeks after the accident and in early 2015, he reiterated that the anterior chest wall pain that correlated with radicular irritation at the thoracic spine did not present until after the car ride. He stated it is possible to develop disc herniations and subsequent radiculopathy with no history of injury. He stated he could not say whether the disc herniation was there before or after the student jumped on her, but her description of these symptoms that correlate with her thoracic disc herniation did not present until much later. He testified it is possible the thoracic disc herniation was caused by that injury but the symptoms she suffered from as it relates to that disc herniation did not present until many months later. He again specified that the absent or latent correlating complaint about which he spoke was the thoracic radicular pain that would accompany nerve root irritation from that disc herniation. He acknowledged that it was possible to suffer a disc herniation without nerve root pain or irritation.

Dr. Robert Bernardi testified by way of evidence deposition on 11/6/20. Dr. Bernardi is a neurosurgeon who performs cervical, thoracic, and lumbar decompressions and fusions. He examined Petitioner on 3/3/20 and noted Petitioner's status post anterior C5-6 and C6-7 decompressions and fusions, L3-4 and L4-5 decompressions and fusions, and L2-3 disc replacement with postoperative pseudoarthritis. Dr. Bernardi characterized Petitioner's complaints on her patient intake form as "global" with elevated pain scores. He noted rather extensive scarring from the multiple operation. Dr. Bernardi opined that Petitioner had bilateral arm pain, tingling, and weakness, mid-back pain, and bilateral leg pain, whose etiology was uncertain. He opined that Petitioner's first four diagnoses were clearly not related to her work incident of 12/10/19 as she underwent all of those procedures prior to that date. He was not sure as to causal connection of the last three diagnoses. She clearly had preexisting problems in each of these areas, but without additional imaging, it was impossible to determine whether Petitioner

might have some new or acute problems superimposed upon those more chronic ones. Dr. Bernardi believed a total myelogram of all three portions of the spine would be the best way to assess Petitioner's spine. He opined that Petitioner could return to work with the restrictions Dr. Gornet placed on 10/17/19.

Dr. Bernardi was subsequently provided with additional imaging studies and records and asked to prepare an addendum report, which he authored on 10/16/20. He testified that after reviewing same, his diagnoses with respect to Petitioner's condition remained unchanged. He further testified he did not believe these conditions were causally related to the 12/10/19 work accident based on his observation that Petitioner's conditions and complaints predated the December 2019 accident and remained the same, albeit more intense, following said injury. He further characterized Petitioner's increased complaints as subjective and not substantiated by any new changes on her imaging studies. Though he stated his opinion with respect to Petitioner's lumbar spine was fairly straightforward, Dr. Bernardi stated his opinion with respect to her cervical spine was "a little bit more complicated." He testified he observed no immediate reference to Petitioner's neck complaints in the first post-accident treatment record, but he observed a reference the following month in the records of Dr. Gornet. He further noted that the pandemic interfered with Petitioner's care and treatment, after which he noted no complaints until the EMG performed in August 2020. As to Dr. Gornet's opinion that Petitioner's neck complaints were expressed as referred pain, he also believed this unlikely, even though some of her symptoms were consistent, given the lack of specific mention of neck pain to accompany those symptoms. Dr. Bernardi did not believe Petitioner needed additional testing or treatment related to the December 2019 incident and placed her at maximum medical improvement.

On cross-examination, Dr. Bernardi testified he does not perform disc replacement surgery in his practice. He performs two independent medical evaluations per week and charges $3,500 for an examination. His charges for his examination, reports, and testimony in Petitioner's case amounted to $7,666.66. He admitted he detected no Waddell signs during his physical examination of Petitioner. When questioned about Petitioner's status in her low back prior to her December 2019 accident, Dr. Bernardi admitted the records showed that Petitioner had improved considerably prior thereto and was happy with her progress. He also agreed that Petitioner's symptoms of nerve pain increased following the December 2019 accident. He admitted that when he examined Petitioner in March 2020, he did not perform a physical examination of her cervical spine, reportedly because Petitioner did not complain of neck pain, even though he testified that he knew she had previous cervical spine issues and saw fit to examine her upper extremities and reflexes for a neurological examination. He acknowledged that Petitioner circled the cervicothoracic junction on her pain questionnaire and she also indicated she had pain in both of her arms. He agreed that Petitioner consistently reported intrascapular pain and upper extremity complaints, which Dr. Gornet believed emanated from her neck.

Dr. Bernardi admitted Petitioner's intrascapular and upper extremity complaints could be a sign of cervical pathology. He acknowledged that although Petitioner voiced similar complaints prior to the December 2014 accident, Dr. Gornet used different terminology to describe her condition when discussing same. He acknowledged that, as Petitioner's treating physician, he would have a good understanding of the evolution of her symptoms. He agreed that

Petitioner ultimately did well following her prior cervical spine surgery in 2015 from her 2013 work injury. Dr. Bernardi admitted that Petitioner's 8/28/13 MRI demonstrated no specific pathology at C3-4 or C4-5 while Dr. Gornet and the radiologist identified pathology at those levels following the December 2019 accident. He admitted that the annular tear and protrusion at C4-5 and bilateral foraminal protrusions extending into the midline at C3-4 could cause pain in Petitioner's neck and arms. He disagreed, however, with both Dr. Gornet and the radiologist that Petitioner suffered significant spinal cord compression, though he acknowledged that a pinched nerve could cause pain around the shoulder blade, and spinal cord compression could cause upper extremity paresthesias. He testified that axial pain or disc injury could cause both symptoms, though he again did not believe such would present without neck pain. Dr. Bernardi agreed that even trivial trauma could aggravate underlying stenosis. When asked whether the mechanism of injury from the accident in December 2019 could cause a cervical disc injury or aggravate underlying pathology, he stated that most who rupture a disc do not know they have done so. Theoretically anything can aggravate disc disease or cause a disc herniation, but you would not necessarily expect a fall onto your buttocks to produce a ruptured disc in the neck, but it is possible. He similarly acknowledged that the December 2019 accident would more likely aggravate a lower back condition. He admitted the records did not indicate Petitioner injured her neck in any manner other than the December 2019 accident. He acknowledged that Petitioner's arm complaints were a new phenomenon following the December 2019 accident.

Dr. Bernardi agreed it was reasonable for the primary clinical concern following the December injury to be her low back given the extensive lumbar surgery recently performed. He did not possess the phone conversation note between Petitioner and Dr. Gornet dated 12/10/19 but agreed that at times there can be delayed onset of symptoms following an injury, particularly when multiple body parts are injured. Though he testified he found no objective support for Petitioner's increased symptoms following her second injury, he acknowledged that a patient could have a change in symptoms without necessarily having appreciable change in pathology on MRI scans. He also admitted that Petitioner had not returned to her pre-December injury baseline with respect to her complaints following said accident.

Dr. Matthew Gornet testified by way of evidence deposition on 9/14/20. Dr. Gornet is a board-certified physician whose practice is devoted to spine surgery. Dr. Gornet testified that the history of injury Petitioner gave him was a mechanism consistent with both lumbar and thoracic spine injury. He explained that anytime you apply a mechanical load you can sustain an injury. He noted objective findings during his physical examination such as decreased EHL ankle dorsiflexion, decreased L5 sensation bilaterally, and positive straight leg raising on the left, all of which he testified was indicative of nerve irritation in the L5 distribution of Petitioner's spine. Dr. Gornet reviewed Petitioner's numerous medical records from various providers, including the imaging studies, and believed Petitioner sustained work-related injuries to her spine on 9/2/14. The basis for his opinion is Petitioner's symptomatology, the mechanism of injury, and MRI and objective findings that correlate with the objective findings on her physical examination. All those would be indicative of someone who sustained a disc injury chronologically at or near the time of what she described.

Dr. Gornet testified that he recommended a fusion at L5-S1 following Dr. Kennedy's surgery because Petitioner suffered fact arthropathy, which made her a poor candidate for disc

replacement, and a fusion would provide structural stability. He noted Petitioner suffered no intervening accidents and thus the need for the revision surgery was also causally related to the 9/2/14 accident. Dr. Gornet stated Petitioner's revision was a large undertaking as it was performed in a staged fashion. Dr. Gornet believed Petitioner's recovery was typical, with gradual, steady improvement over time. He explained, however, that as a patient improves in one area of his or her spine, they can become more aware of pain in a different area.

Dr. Gornet explained that as Petitioner's lumbar pain began to improve, she became more conscious of her upper and middle back. He also attributed this to an increase in her activity level along with a change in her loading patterns as a result of her treatment. He thus attributed Petitioner's mid-back pain to the September 2014 work injury. He based his opinion on the fact that Petitioner had pain into the upper lumbar spine from the very beginning and she was taking very high-dose narcotics that masked her symptoms. That absent any other slips, falls, or trauma, there is no other explanation than to associate this disc pathology with her injury. Dr. Gornet testified that Petitioner's mid-back pain and residual complaints were entirely normal for someone who had undergone such an extensive procedure.

With regard to Petitioner's accident on 12/10/19, Dr. Gornet testified that Petitioner thereafter presented with increasing pain in her buttocks and hips along with left leg numbness, increasing mid-back pain, and neck symptoms. After recommending diagnostic testing, placing Petitioner off work, and prescribing anti-inflammatory medication, Dr. Gornet felt Petitioner would benefit from neurofunction studies and a functional capacity evaluation. When asked about the novelty of Petitioner's cervical spine complaints following the December accident, Dr. Gornet testified that to his recollection, Petitioner's cervical complaints voiced after her second work accident were new. He did not see any real description of neck symptoms while treating her prior to December 2019 and he was focused on her thoracolumbar spine. He did not recall Petitioner having a significant amount of neck issues until after 12/10/19. He opined that the accident on 12/10/19 aggravated her low back and mid-back and based on seeing Petitioner before and after December 2019, Petitioner's symptoms worsened in those areas, with a new injury or symptoms in her neck.

Dr. Gornet testified that he recommended pan-spinal screening, specifically MRI studies, that are more sensitive than myelograms. When the MRI showed objective evidence of central disc and cord compression at C4-5 and C3-4 above the solid fusion at C5-6 and C6-7, he first attempted relief through conservative care and injection. When this failed he recommended additional surgery, which Dr. Gornet again related to the 12/10/19 accident. Dr. Gornet expressed concern for Petitioner returning to her employment given that her high level of pain would require severe restrictions that would limit her to sedentary activity, and that she also demonstrated inability to sit or stand for prolonged periods of time. For the time being, Petitioner remained temporarily and totally disabled for her spinal problem, and Dr. Gornet would reevaluate her permanent status once her neck is treated. When asked to which accident he would relate Petitioner's need for permanent restrictions he stated it was a combination. She clearly needed permanent restrictions from her original injury [9/2/14], but the second injury [12/10/19] has made her worse. The basis of his opinion is his treatment of Petitioner over a period of time. While Petitioner continued to have pain her function had improved, she returned to work, but she has not been able to bounce back from the December 2019 accident. Petitioner remained under

restrictions for her cervical, thoracic, and lumbar spine. The time off work Petitioner required prior to the second injury, however, Dr. Gornet related to the accidental injury of 9/2/14.

On cross-examination, Dr. Gornet testified that the lack of any specific mention of the neck in the initial records following the December 2019 injury was not unusual or inconsistent with the injury given the severity of her back complaints. Dr. Gornet testified that though he did not have records from 2013, he was aware Petitioner presented to the emergency room for mid-back pain following a long drive in July 2019. Dr. Gornet noted that Petitioner's complaints in July 2019 were secondary to her disc herniation. Dr. Gornet testified Petitioner's mid-back pain was chronologically consistent and pathology was present on the MRI subsequent to the MRI performed for the 2013 accident.

CONCLUSIONS OF LAW

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

It is well-settled law that in Workers' Compensation, each §19(b) hearing is a separate proceeding and constitutes a separate and appealable order. *Weyer v. Illinois Workers' Comp. Comm'n*, 900 N.E.2d 360 (1st Dist. 2008) citing *R.D. Masonry, Inc.*, 830 N.E.2d 584 (Ill. 2005); *Elmhurst-Chicago Stone Co. v. Indus. Comm'n*, 646 N.E.2d 961 (2nd Dist. 1995). However, once a specific issue or question of law or fact has been decided in the course of litigation, it cannot be rehashed at a subsequent time. The law-of-the-case doctrine is a fundamental legal principle which provides stability and an equitable means by which parties can proceed through litigation with reasonable expectations as to their burdens of proof. Specifically, the Appellate Court has held that:

> The rule of the law of the case is a rule of practice, based on sound policy that, where an issue is once litigated and decided, that should be the end of the matter and the unreversed decision of a question of law or fact made during the course of litigation settles that question for all subsequent stages of the suit. *Irizarry v. Indus. Comm'n*, 786 N.E.2d 218 (2nd Dist. 2003) citing *McDonald's Corp. v. Vittorio Ricci Chicago, Inc.*, 466 N.E.2d 1116 (Ill. 1984).

The Appellate Court has held that the law-of-the-case doctrine applies to the unreversed decision of an Arbitrator or the Commission in Workers' Compensation proceedings. *Weyer* citing *Irizarry v. Indus. Comm'n*, 786 N.E.2d 218 (2nd Dist. 2003).

The law also holds that for an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain between the original work-related injury and the ensuing condition. *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2005). "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Id.* The law holds that accidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it is a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205, 797

N.E.2d 665, 672-673 (2003). [Emphasis added]. "Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Indus. Comm'n*, 309 Ill. App. 3d 1037, 723 N.E.2d 846 (2000). Employers are to take their employees as they find them. *A.C. & S. v. Indus. Comm'n*, 304 Ill. App. 3d 875, 710 N.E.2d 837 (1999) citing *General Electric Co. v. Indus. Comm'n*, 89 Ill. 2d 432, 434, 433 N.E.2d 671, 672 (1982). If a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Rock Road Constr. v. Indus. Comm'n*, 227 N.E.2d 65, 67-68 (Ill. 1967), 37 Ill. 2d 123; see also *Illinois Valley Irrigation, Inc. v. Indus. Comm'n*, 66 Ill. 2d 234, 362 N.E.2d 339 (1977).

On July 10, 2017, Arbitrator Christina Hemenway entered a Decision pursuant to Section 19(b) of the Act. Arbitrator Hemenway found Petitioner's condition of ill-being with regard to her lumbar spine causally related to the work accident of September 2, 2014. Arbitrator Hemenway awarded medical expenses through the date of arbitration, February 24, 2017, and prospective medical treatment, specifically a lumbar spine surgery recommended by Dr. Kennedy. On 10/5/17, Petitioner underwent an L3-4 and L4-5 laminectomy, facetectomy, and bilateral foraminotomy with pedicle screw fixation and posterolateral fusion and iliac crest bone marrow aspiration. Petitioner unfortunately experienced a turbulent recovery and required a second surgery. On 1/23/19, Dr. Gornet performed an anterior decompression at L2-3, L3-4, L4-5, and L5-S1, disc replacement at L2-3, and anterior lumbar interbody fusion at L3-4, L4-5, and L5-S1. On 1/25/19, Dr. Gornet performed a revision laminotomy at L4-5 and L5-S1, removal of hardware from L3 to L5, and a posterior fusion from L3 to S1.

Petitioner's post-operative recovery was again eventful. On 8/12/19, Dr. Gornet opined Petitioner was not yet fully healed seven months post-surgery but allowed her to return to work on 8/13/19 with restrictions to start the 2019-2020 school year. Dr. Gornet further restricted Petitioner's work duties on 9/5/19 due to a significant increase in symptoms. On 10/17/19, Petitioner continued to complain of low back pain and Dr. Gornet ordered a nerve function study approximately two months prior to her work accident on 12/10/19.

Though Petitioner sustained a subsequent work injury on 12/10/19, there was no substantial change in Petitioner's course of care and treatment. Petitioner's original and revision surgeries were performed prior to the 12/10/19 accident and Dr. Gornet credibly testified that the revision surgery was casually related to the 9/2/14 accident. Dr. O'Boynick agreed Petitioner's lumbar spine symptoms were causally related to the September 2014 work injury. The record is clear that Petitioner's condition was weakened as a result of the extensive surgical treatment required as a result of her first accidental injury. 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).

Further, on 8/20/20, Dr. Gornet opined that Petitioner may have residual from her original problem, particularly in the L2 sensory nerve root. He did not believe any other treatment was necessary or needed for her lumbar spine at that time. The nerve conduction studies performed by Dr. Phillips on 8/19/20 fell within the range of normal and was not impressive for active lumbar radiculopathy. However, Dr. Phillips noted Petitioner suffered from

severe left greater than right foraminal stenosis at L2-3 as shown on MRI and stated he did not have good distal NCV study for L2 sensory evaluation. As a result, the Arbitrator finds that Petitioner's current condition of ill-being in her lumbar spine remains causally related to her accidental work injury of September 2, 2014.

With respect to Petitioner's thoracic spine, the Arbitrator finds that a totality of evidence supports that this injury is also causally related to the 9/2/14 accident. Dr. Gornet likewise credibly testified that Petitioner's mid-back condition was causally related to the 9/2/14 accident. The Arbitrator further finds Dr. O'Boynick's concessions support the chain of events analysis and Dr. Gornet's opinion linking Petitioner's condition of ill-being in her mid-back to the 9/2/14 accident. Dr. O'Boynick admitted that Petitioner's thoracic spine injury could have been caused or aggravated by the September 2014 injury. Dr. O'Boynick admitted that complaints Petitioner voiced on 9/15/14, namely pain in her neck, shoulder, and low back, could indicate injury to the thoracic spine. He admitted it was possible for Petitioner's mid back pain to become more pronounced as her low back pain began to improve. He acknowledged that Petitioner suffered from an objective disc herniation at T6-7 on her MRI. He knew of no MRI prior to the September 2014 accidental work injury. As a result, the Arbitrator finds that Petitioner's current condition of ill-being in her thoracic spine is causally related to her accidental work injury of September 2, 2014.

Based upon the foregoing, the Arbitrator finds that the evidence supports a finding that Petitioner's condition of ill-being in her lumbar and thoracic spine is causally related to the accident of September 2, 2014.

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).

Based upon the manifest weight of the evidence establishing that Petitioner's current condition of ill-being in her lumbar and thoracic spine is causally related to the accidental work injury on September 2, 2014, and the final Arbitration Decision entered on July 10, 2017, the Arbitrator concludes that the medical treatment rendered to Petitioner's lumbar and thoracic spine has been reasonable and necessary to relieve the effects of her injury. Notwithstanding, Dr. O'Boynick agreed that that the treatment Petitioner received for her lumbar and thoracic spine provided by Dr. Gornet was reasonable and necessary.

Respondent shall therefore pay the medical expenses outlined in Petitioner's Group Exhibit 1 as they relate to Petitioner's lumbar and thoracic 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.

With respect to prospective medical treatment, again the nerve function studies performed by Dr. Phillips revealed no evidence of active lumbar radiculopathy. A CT of the lumbar spine revealed a solid facet fusion at L5-S1 on the left, a solid interbody fusion at L5-S1, with some subtle lucency through the center of the graft, and no evidence of adjacent level issues. With respect to the thoracic spine, Dr. Gornet noted no problems of significance outside of the small protrusion at T6-7 on the left. Although Dr. Gornet opined on 8/20/20 that no further treatment on Petitioner's lumbar or thoracic spine was necessary or needed at that time, he did not release her at maximum medical improvement with regard to her lumbar or thoracic spine. To the contrary, Dr. Gornet opined Petitioner would require permanent restrictions with regard to her lumbar spine that would be determined after her cervical spine injury was addressed.

Therefore, Respondent is responsible for reasonable and necessary prospective medical care to Petitioner's lumbar and thoracic spine as recommended by Dr. Gornet until Petitioner reaches maximum medical improvement.

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

On 8/12/19, Dr. Gornet allowed Petitioner to return to work with restrictions of no lifting greater than 10 pounds, no repetitive bending or lifting, and to alternate between sitting and standing. He also restricted Petitioner to teaching on the first floor only and to avoid stairs. On 9/5/19, Dr. Gornet further restricted Petitioner's work duties due to an increase in symptoms. Petitioner continued to work in a sedentary capacity and testified she was able to do so until her work accident on 12/10/19. On 1/27/20, Dr. Gornet examined Petitioner and noted she was doing reasonably well with restrictions until the new accident occurred that aggravated her mid-back, low back, and leg symptoms. He recommended a functional capacity evaluation and opined Petitioner remained temporarily and totally disabled.

Based upon the above findings, the Arbitrator does not award temporary total disability benefits claimed by the Petitioner from 10/27/20 through the present, January 21, 2021, and awards said benefits in Case No. 20-WC-05036.

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.

Linda J. Cantrell
Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008364
Case Name	MYERS, MARIAN v. DYNO NOBEL
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0044
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner, Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen McManus

DATE FILED: 2/4/2022

/s/ Deborah Simpson, Commissioner

Signature

DISSENT

/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 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

MARIAN MYERS,
Petitioner,

vs. NO: 20 WC 8364

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

The Arbitrator found that Petitioner sustained her burden of proving repetitive traumatic accidents which caused conditions of ill-being of her shoulders bilaterally. He awarded her all medical expenses submitted into evidence and ordered Respondent to authorize and pay for prospective treatment recommended by Dr. Bradley, including but not limited to right-shoulder surgery. We agree with the Arbitrator's analysis and conclusions, including the specific conclusion that Petitioner's current right shoulder and left shoulder conditions are causally related to the repetitive trauma injuries that manifested on April 24, 2018 and August 1, 2019, and accordingly affirm the Arbitrator's award. However, the Commission clarifies the award for prospective medical treatment and finds that Petitioner is entitled to prospective medical treatment for the right shoulder in the form of surgery recommended by Dr. Bradley and post-operative treatment, including but not limited to physical therapy.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator issued on April 21, 2021, is hereby affirmed and adopted as clarified above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses specified in Petitioner's Exhibit 1 under §8(a), subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment for the right shoulder in the form of surgery recommended by Dr. Bradley and post-operative treatment, including but not limited to physical therapy.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 4, 2022

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

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

DLS/dw
O-12/8/21
46

Dissent

I respectfully dissent from the Decision of the Majority. The Majority affirmed and adopted, with explanation, the Decision of the Arbitrator in which he found Petitioner sustained her burden of proving a repetitive traumatic accident resulting in conditions of ill-being of her shoulders bilaterally. I would have reversed the Decision of the Arbitrator, found that Petitioner did not sustain her burden of proving a repetitive traumatic accident or causation to the condition of ill-being of her shoulders bilaterally, and denied compensation.

Petitioner worked for Respondent which made explosives and detonators. She worked on an assembly line. In her direct testimony, Petitioner described job activities which included reaching, manipulating, and overhead activities. Respondent presented three videos of other employees performing Petitioner's job activities. Those videos showed a lot of fine manipulation of the hands and other repetitive activities with the hands including reaching, grabbing, and tying. Petitioner acknowledged that she did perform the activities identified in the videos, but it did not show a particular activity in which she had to lift a bucket of parts and load them into a hopper. However, she also indicated that she only had to perform that task infrequently, and not at all on some days. Also, in cross examination Petitioner acknowledged that in her current job, she did not have to lift much or perform much overhead activities. Finally, Petitioner's medical records showed that Petitioner treated for her right shoulder as early as 2005, at which time she attributed her condition to her repetitive work activities. She also agreed that in 2006 she told a treating doctor that her shoulder hurt as much when she was not working and that any overhead activity caused her pain. At that time, her treating doctor, Dr. Straubinger, advised her that her condition was probably not work related.

On July 3, 2020, Petitioner began treating for her current condition with Dr. Bradley. Petitioner was referred to him by her lawyer, who had also referred other clients to him. That was the only time Petitioner saw Dr. Bradley. At deposition, Dr. Bradley testified that chronic repetitive, and particularly overhead, use/lifting can clearly cause or aggravate rotator cuff tendinopathy, tendinitis, and tear. He opined "that if this lady would not have been doing repetitive overhead activity, would have been doing more of a sit-down, desk-type job," he did not believe she would have developed a full-thickness tear or the pain she was experiencing. Dr. Bradley also opined that her long history of repetitive overhead activity caused her inflammation/impingement of the rotator cuff tendon and over time the continued irritation caused the ruptures/tears.

At Respondent's request, Petitioner presented for a Section 12 examination with Dr. Hobbs. He examined Petitioner, reviewed her medical records, and reviewed both the official description of Petitioner's job activities as well as the videos of her work activities. Dr. Hobbs testified by deposition. He concluded that Petitioner had a nontraumatic rotator cuff tear due to progressive degeneration of the cuff caused by aging.

Dr. Hobbs did not believe the activities Petitioner described or those he saw on the videos caused or aggravated her right shoulder condition. She did not need treatment for any work-related condition. He also noted that Petitioner had three knee replacement surgeries, one in 1999, one in 2006, the right revision arthroplasty in 2019; the severe arthritis in her knees likely placed greater stress on her shoulders as they would be needed to support her weight while ambulating.

The Arbitrator found the causation opinions of Dr. Bradley more persuasive than those of Dr. Hobbs. I disagree. In my opinion, Dr. Bradley did not have a good conception of Petitioner's actual job activities and relied exclusively on Petitioner subjective reports to him. He was under the impression that Petitioner did extensive overhead activities as well as significant lifting. That assumption appears to be contrary to the manifest weight of the evidence and even contrary to much of Petitioner's testimony. On the other hand, Dr. Hobbs had a better understanding of Petitioner's job activities. Not only did he document Petitioner's report of her activities, he also viewed the videos of people actually performing her job, and the official job description of Petitioner's job activities. It appears that Dr. Bradley did not have the benefit of such information. Therefore, I find the causation opinions of Dr. Hobbs more persuasive than those of D. Bradley.

For the reasons stated above, I would have reversed the Decision of the Arbitrator, found that Petitioner did not sustain her burden of proving a repetitive traumatic accident or causation to the condition of ill-being of her shoulders bilaterally, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

DLS/dw

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008364
Case Name	MYERS, MARIAN v. DYNO NOBEL
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	William R. Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen McManus

DATE FILED: 4/21/2021

INTEREST RATE THE WEEK OF APRIL 20, 2021 0.04%

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)

Marian Myers
Employee/Petitioner

Case # 20 WC 08364

v.

Consolidated cases: _____

Dyno Nobel
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 Collinsville, on March 9, 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, April 24, 2018, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $43,185.79; the average weekly wage was $830.50.

On the date of accident, Petitioner was 63 years of age, single with 0 dependent child(ren).

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

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

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the right shoulder surgery recommended by Dr. Matthew Bradley.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)f

APRIL 21, 2021

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged she sustained repetitive trauma injuries arising out of and in the course of her employment by Respondent. In case 20 WC 08364, the Application alleged Petitioner sustained an injury to her "Right Shoulder" as a result of "Repetitive motion of lifting, reaching, folding & packing." The date of accident (manifestation) alleged in the Application was April 24, 2018. In case 20 WC 08365, the Application alleged Petitioner sustained an injury to "Bi-lateral Shoulders" as a result of "Repetitive motion of lifting, reaching, folding & packing." The date of accident (manifestation) alleged in the Application was August 1, 2019 (Arbitrator's Exhibit 2). The cases were previously consolidated. The cases were tried in a 19(b) proceeding and Petitioner sought orders for payment of medical bills and prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner has worked for Respondent (or its corporate predecessors) for approximately 32 years. Respondent manufactures detonators and canister explosives. Petitioner testified her job duties require her to sit at an automated machine and that she has to constantly reach out and pick up figure 8 shaped units from a conveyor belt, bundle and package them. Petitioner estimated she performs this task approximately 3,000 times per day. Petitioner also has to place product in a plastic tote and, when it is full, she has to lift it at or above shoulder height and dump the product into a hopper. Petitioner estimated the weight of the filled tote to be approximately 30 pounds. Petitioner said she also uses a scoop to pick up small parts which she dumps into a bowl. This also requires the overhead use of her arms, but she said the weight of the filled scoop was minimal.

Petitioner prepared a document entitled Work History Timeline in which she identified her job titles and summarized her job duties. From 1999 to the present, Petitioner has worked as a Producer. In this Exhibit, Petitioner noted she operated various machines. The operation of all of the machines required the overhead use of her arms. Petitioner has had to lift totes which weighed 30 pounds, lifted boxes weighing 15 to 30 pounds, picked up and carried a tote full of hooks which weighed 30 pounds, picked up bushing material and lifted/carried boxes to pallets (Petitioner's Exhibit 10).

Petitioner testified her various work activities caused her to have shoulder pain, right more so than left. However, Petitioner said lifting did not cause shoulder issues as much as shoving, pushing and reaching. Petitioner stated that reaching out up to 3,000 times a day caused her to experience right shoulder pain.

Respondent tendered into evidence three videos of other employees performing some of Petitioner's job duties. The first video showed a seated employee picking up tubing material off of a table. On cross-examination, Petitioner said the tubing material weighed less than a pound and she would stack five of them into bundles. Even five of them would still weigh less than a pound. When Petitioner performed this job duty, she usually did so for an entire workday (Respondent's Exhibit 1).

The second video showed a tote filled with tubes. The tote is picked up and its contents are dumped into a hopper. On cross-examination, Petitioner agreed she would bend over, lift the tote off of the cart which was approximately one foot above the floor and dump the contents into a hopper. Petitioner said she could perform this task two or three times a day; however, there were some days Petitioner would not perform this task at all (Respondent's Exhibit 2).

The third video showed an individual at a machine with several spools on it. The individual removed a spool, carried it to a table where she obtained another spool and then she rolled them into a machine. The individual then pushed a button on the machine to put the spools in proper place. On cross-examination, Petitioner agreed the individual in the video worked at chest level. Petitioner confirmed she does not perform this task often and will go for weeks or months without having performed this specific task (Respondent's Exhibit 3).

Petitioner testified the videos did not depict all of her work activities. She stated the activities in the videos in which the employees reached out to pick up product on the conveyor belt and dumping them caused her to experience shoulder pain.

Johnny Miller, Respondent's site manager, testified at trial. Miller stated he was familiar with Petitioner and she is a good employee and her testimony regarding her job duties was accurate. However, he said the weight of the tote Petitioner would dump into a hopper was closer to 20 pounds, but otherwise, Petitioner's testimony was accurate.

Petitioner has had bilateral shoulder symptoms for a number of years. Petitioner underwent MRIs of the right and left shoulder on December 16, 2005. At that time, Petitioner gave a history of shoulder pain since August, 2005. According to the radiologist, the MRI of the right shoulder revealed subacromial bursitis and arthrosis at the acromioclavicular joint. According to the radiologist, the MRI of the left shoulder was negative, but revealed arthrosis at the left acromioclavicular joint (Respondent's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Dennis Straubinger, an occupational medicine specialist, on January 24, 2006. At that time, Petitioner complained of pain in the right and left shoulders since August, 2005. Petitioner advised him her shoulders hurt while at work and that any motion caused distress. He reviewed the reports of the MRI scans and noted they did not reveal any specific pathology other than bursitis and AC joint degeneration. Dr. Straubinger opined Petitioner had bilateral shoulder pain with bursitis which was probably not work-related (Respondent's Exhibit 8).

Petitioner was evaluated by Dr. Ira Taylor, an osteopathic physician, February 6, 2006, for bilateral shoulder pain. Petitioner informed Dr. Taylor the shoulder symptoms began the preceding August, MRIs were performed and her employer had her examined by Dr. Straubinger. Dr. Taylor diagnosed Petitioner with bilateral shoulder strains with bursitis. He did not opine whether the strains were work-related (Respondent's Exhibit 9).

Dr. Taylor saw Petitioner on March 1, 2006. He noted the findings of the MRI scans, but could not explain why Petitioner continued to have severe shoulder symptoms. He diagnosed Petitioner with bilateral shoulder and neck pain and prescribed medication (Respondent's Exhibit 9).

Dr. Taylor again saw Petitioner on November 19, 2010. At that time, Petitioner complained of muscle aches/pains mostly in the shoulders and hands. Dr. Taylor diagnosed Petitioner with a number of conditions including multiple arthralgias. He prescribed medication (Respondent's Exhibit 9).

Petitioner underwent MRI arthrograms on both shoulders on May 27, 2011. The radiologist's reports of the studies were not received into evidence at trial; however, as noted herein, they were subsequently reviewed/referenced by other physicians who examined/treated Petitioner.

Petitioner continued to work for Respondent and on April 24, 2018 (the date of manifestation alleged in case number 20 WC 08364), Petitioner informed Respondent she sustained a work-related injury to her upper extremities. The First Report of Injury was tendered into evidence at trial. It contained no information as to what Petitioner was claiming occurred to cause her to have sustained a work-related injury (Petitioner's Exhibit 8). At trial, Petitioner testified she was directed by the company nurse to apply ice to the affected body parts.

Petitioner testified her shoulder complaints worsened and she reported having sustained a repetitive trauma injury to her right arm on August 1, 2019 (the date of manifestation alleged in case number 20 WC 08365) an Employee's Injury Report was received into evidence at trial. According the Report, Petitioner experienced pain from the top of her right shoulder going down into the right arm/forearm. Petitioner described the accident as being constant repetition of folding/bundling units, lifting, dumping and hand cramping (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was evaluated by Dr. Mark Austin, an occupational medicine specialist, on August 13, 2019. At that time, Petitioner informed Dr. Austin she worked for Respondent for over 30 years and developed right shoulder symptoms gradually and started experiencing symptoms in 2016. Petitioner advised she performed repetitive movements of her right arm including reaching forward, laterally or upward and this caused her right shoulder symptoms. She also told Dr. Austin she had to lift/dump totes of material, each tote weighing 20 to 25 pounds (Petitioner's Exhibit 3).

Dr. Austin's examination of Petitioner's right shoulder revealed tenderness, a reduced range of motion and positive impingement tests. Dr. Austin's examination of Petitioner's left shoulder revealed a reduced range of motion and positive impingement tests. Dr. Austin ordered x-rays of the right shoulder and they were positive for glenohumeral joint and AC joint arthropathy. Dr. Austin searched Petitioner's electronic medical records and determined Petitioner had undergone MRI arthrograms of both shoulders in 2011. He noted that most of Petitioner's current examination findings were also present eight years prior at the time the MRI arthrograms were performed. Dr. Austin opined Petitioner had chronic right shoulder pain, weakness and a restricted range of motion and had sustained a "re-exacerbation of a chronic pre-existing condition." However, Dr. Austin also opined Petitioner had findings consistent with long and short head biceps tendinopathy which appeared to be a new finding. He recommended referral to an orthopedic surgeon to determine what was new and to determine what is causally related to a work injury (Petitioner's Exhibit 3).

An MRI arthrogram was performed on October 3, 2019. According to the radiologist, there was marked diffuse rotator cuff tendinosis, a full thickness tear of the supraspinatus and infraspinatus, a partial thickness tear of the subscapularis, mild glenohumeral osteoarthrosis, hypertrophic degenerative changes of the acromioclavicular joint and tendinosis/partial thickness tear of the long head of the biceps tendon (Petitioner's Exhibit 4).

Dr. Austin again saw Petitioner on October 15, 2019. Petitioner's complaints as well as the findings on examination were essentially the same as they were at the time of Dr. Austin's prior examination. Dr. Austin compared the MRI arthrogram of Petitioner's right shoulder of October 3, 2019, to the prior MRI arthrogram of Petitioner's right shoulder of 2011. He opined the MRI arthrograms were consistent with shoulder impingement and rotator cuff tendinosis and tears and confirmed Petitioner had sustained an "…exacerbation of chronic pre-existing conditions." He also opined the tendinosis/partial thickness tear of the long had biceps tendon was not present in the prior MRI arthrogram of 2011. Dr. Austin renewed his recommendation Petitioner be evaluated by an orthopedic specialist (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Lyndon Gross, an orthopedic surgeon, on November 22, 2019. In connection with his examination of Petitioner, Dr. Gross reviewed medical records and diagnostic studies provided to him by Respondent. At that time, Petitioner informed Dr. Gross she worked at a job which required repetitive movements of her right arm with frequent reaching forward laterally and upward as well as lifting totes of materials and dumping the material into a hopper. Petitioner advised she develops symptoms in both shoulders over time. Dr. Gross examined both shoulders; however, most of the positive findings were in regard to the right shoulder. Dr. Gross opined the activities at work may have caused a temporary exacerbation of the underlying condition, but did not cause an aggravation or acceleration of the underlying process. He also opined Petitioner's job duty was not the "prevailing factor" for her right shoulder condition (Respondent's Exhibit 10).

Petitioner was evaluated by Dr. Matthew Bradley, an orthopedic surgeon, on July 3, 2020. At that time, Petitioner informed Dr. Bradley she had worked for Respondent for over 30 years and she performed repetitive duties involving both arms and reported she was having shoulder pain in 2011 and previously underwent MRI scans in 2011 and 2019. Dr. Bradley examined both shoulders and noted Petitioner had pain, positive impingement signs and a diminished range of motion in both, but more so in the right than left. Dr. Bradley reviewed the MRI scans of both shoulders of May 27, 2011, and the MRI arthrogram of the right shoulder of October 3, 2019. In regard to the right shoulder, Dr. Bradley opined that MRI of the May 27, 2011, revealed acromioclavicular degenerative disease and tendinopathy of the supraspinatus tendon, but no tear. Dr. Bradley also opined the MRI of October 3, 2019, of the right shoulder revealed a full thickness tear of the supraspinatus (Petitioner's Exhibit 5).

Dr. Bradley opined Petitioner had chronic impingement syndrome in her right shoulder which led to the development of tendinosis of the supraspinatus tendon and spontaneous rupture of the tendon. Dr. Bradley opined Petitioner's repetitive activities of 30 years were a "precipitating factor" in the development of chronic rotator cuff tendinitis with spontaneous rupture of the supraspinatus tendon (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Micah Hobbs, an orthopedic surgeon, on December 10, 2020. In connection with his examination of Petitioner, Dr. Hobbs reviewed medical records, diagnostic tests and the videos of other individuals performing some of Petitioner's job duties, all of which were provided to him by Respondent. At the time of his examination, Petitioner informed him she worked on an assembly line and was required to reach out and manipulate items approximately 3,000 times per day with both arms and she also had to lift boxes up to approximately her shoulder height on the right side (Respondent's Exhibit 5; Deposition Exhibit 2).

Petitioner complained of bilateral shoulder pain, more on the right than left. Examination the right shoulder revealed weakness and a diminished range of motion. Examination of the left shoulder revealed a slightly diminished range of motion. Dr. Hobbs reviewed the MRIs of the right and left shoulders of May 27, 2011, and the MRI of the right shoulder of October 3, 2019. He opined the MRI of the right shoulder of May 27, 2011, revealed a bursal sided tear of the supraspinatus. He opined the MRI of the right shoulder of October 3, 2019, revealed a full thickness tear of the supraspinatus, a rupture of the long head biceps tendon and a tear of the subscapularis tendon. Dr. Hobbs opined Petitioner had a degenerative condition in her right shoulder related to her age and bony morphology and Petitioner's work activities did not cause or aggravate Petitioner's right shoulder rotator cuff disease. However, he also opined Petitioner's overhead use of her right arm could cause a "temporary exacerbation" of the underlying degenerative condition (Respondent's Exhibit 5; Deposition Exhibit 2).

Dr. Bradley was deposed on February 3, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bradley's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Bradley testified he diagnosed Petitioner with a right shoulder rotator cuff tear and surgery was indicated (Petitioner's Exhibit 6; pp 12-13).

In regard to causality, Dr. Bradley testified he discussed Petitioner's job duties with her at length and he had also reviewed medical records and the reports of Dr. Gross and Dr. Hobbs in which her work activities were also described. Dr. Bradley testified Petitioner having performed activity which required the repetitive use of her upper extremities contributed to and aggravated her bilateral shoulder condition (Petitioner's Exhibit 6; pp 15-17).

Dr. Bradley stated he disagreed with the opinion of Dr. Gross that the rotator cuff tear was age-related because it is uncommon for individuals Petitioner's age to have such a condition. Dr. Bradley also disagreed that Petitioner's work activities were a temporary exacerbation of her underlying condition because her symptoms had persisted for years without resolution (Petitioner's Exhibit 6; pp 20-22).

Dr. Hobbs was deposed on February 9, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Hobbs' testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Hobbs testified Petitioner had a non-traumatic complete tear of the right rotator cuff and osteoarthritis of the glenohumeral joint of the left shoulder. He attributed Petitioner's right shoulder condition to progressive degeneration of the cuff which occurred as a result of aging. Dr. Hobbs' opinion was based, in part, on the

review of the videos of other employees and a job demands analysis which had been provided to him by Respondent (Respondent's Exhibit 5; pp 25-31).

At trial, Petitioner testified she continues to have complaints in regard to both shoulders, but more so in respect to the right than left. Petitioner wants to proceed with the surgery on the right shoulder as recommended by Dr. Bradley.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained a repetitive trauma injury to her right and left shoulders which manifested itself on April 24, 2018, and August 1, 2019, and Petitioner's current condition of ill-being is causally related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner is a long-term employee of Respondent (or its corporate predecessors) and has performed work activities requiring the repetitive use of her arms for over 32 years.

Petitioner's testimony regarding her job activities and the repetitive use of her arms was unrebutted. The primary repetitive activity was Petitioner having to reach out, pick up and manipulate items approximately 3,000 times per day.

Johnny Miller, Respondent's site manager, testified at trial and agreed Petitioner's testimony regarding her job duties was accurate with the only partial exception being the estimated weight of the totes Petitioner would pick up and empty their contents into a hopper.

The videos Respondent tendered into evidence were not of Petitioner, but other employees performing some of Petitioner's job duties. Petitioner credibly testified that the videos did not depict all of her work activities.

Petitioner has had bilateral shoulder symptoms since 2005 and has been evaluated by several physicians and undergone MRIs of both shoulders.

Petitioner's right shoulder condition has been getting progressively worse over time. This was clearly indicated by the fact that when the MRI of May 27, 2011, was compared to the MRI arthrogram of October 3, 2019, the more recent study revealed pathology in the right shoulder which was not present earlier.

The opinions of Dr. Gross and Dr. Hobbs that Petitioner's work activities may have only caused a temporary exacerbation of Petitioner's right shoulder condition are inconsistent with the fact that Petitioner's right shoulder condition has continued to worsen.

Further, the opinion of Dr. Gross as to causality is of minimal probative value because he used the standard of "prevailing factor" and not "a causative factor."

Dr. Bradley obtained information from Petitioner regarding the specifics of her job duties and also reviewed the reports of Dr. Gross and Dr. Hobbs which likewise contained information regarding same. Dr. Bradley opined Petitioner's work activities contributed to or aggravated her bilateral shoulder condition. He also opined Petitioner's shoulder condition was not related to age and her work activities were not just a temporary exacerbation.

Based on the preceding, the Arbitrator finds the opinion of Dr. Bradley as to causality to be more persuasive than those of Dr. Gross and Dr. Hobbs.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issues (C) and (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 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issues (C) and (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the right shoulder surgery recommended by Dr. Matthew Bradley.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005036
Case Name	BRYANT, JARVIA v. WATERLOO COMMUNITY UNIT
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0045
Number of Pages of Decision	25
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Juan Arias

DATE FILED: 2/4/2022

/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

Jarvia Bryant,

Petitioner,

vs. NO: 20 WC 5036

Waterloo Community Unit School District No.5,

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

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

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

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

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

No bond is required for the removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 4, 2022

o12/8/21
DLS/rm
046

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005036
Case Name	BRYANT, JARVIA v. WATERLOO COMMUNITY UNIT
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	22
Decision Issued By	Linda Cantrell, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen Klyczek, Juan Arias

DATE FILED: 4/22/2021

/s/ Linda Cantrell, Arbitrator
Signature

INTEREST RATE WEEK OF APRIL 20, 2021 0.04%

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)

JARVIA BRYANT
Employee/Petitioner

v.

WATERLOO COMMUNITY UNIT SCHOOL DISTRICT NO. 5
Employer/Respondent

Case # **20**-WC-**05036**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville,** on **January 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. ☒ Other **(TTD underpayment)**

FINDINGS

On the date of accident, **December 10, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**18,706.18** the average weekly wage was $**1,281.25**.

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Respondent ***has agreed to pay*** all reasonable and necessary charges for all reasonable and necessary medical services ***itemized in Petitioner's Group Exhibit 1 related to Petitioner's cervical spine***.

Respondent shall be given a credit of $**40,676.54** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**40,676.54**.

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

ORDER

Respondent shall have credit for any medical expenses previously paid and shall indemnify and hold Petitioner harmless from claims made by any health providers arising from the expenses for which it claims credit.

Respondent is responsible for reasonable and necessary prospective medical care to Petitioner's cervical spine as recommended by Dr. Gornet, including but not limited to surgery, until Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of $**854.17**/week for the period **December 11, 2019 through the date of hearing, January 21, 2021**, representing **58-2/7** weeks, as provided in Section 8(b) of the Act. Respondent shall have credit for temporary total disability benefits paid.

The parties stipulate that Respondent paid temporary total disability benefits in the amount of $40,676.54. Respondent's Exhibit 4 reflects TTD payments for the period 12/11/19 through 10/26/20, for a total of 45.857 weeks, rendering a TTD rate of $887.03. Based on the Arbitrator's calculation of average weekly wage, Petitioner's TTD rate is $854.17. Therefore, Petitioner is not entitled to an underpayment of TTD benefits for the period 12/11/19 through 10/26/20.

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

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

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

Linda J. Cantrell
Signature of Arbitrator

ICArbDec19(b)

APRIL 22, 2021

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

JARVIA BRYANT,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-05036
	)	
WATERLOO COMMUNITY UNIT SCHOOL DISTRICT NO. 5,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

These claims came before Arbitrator Linda J. Cantrell for trial in Collinsville on January 21, 2021 pursuant to Section 19(b) of the Act. On June 15, 2016, Petitioner filed an Application for Adjustment of Claim against Respondent alleging injuries to her low back, legs, and body as a whole as a result of being injured by a student on September 2, 2014. (Case No. 16-WC-18635). Petitioner made an oral motion at arbitration to amend the Application for Adjustment of Claim in Case No. 16-WC-18635 to include Petitioner's mid-back as a body part affected by the accident. No objection was made by Respondent and the Arbitrator grants Petitioner's oral motion to amend.

On September 17, 2020, Petitioner filed an Amended Application for Adjustment of Claim against Respondent alleging injuries to her low back, mid-back, legs, and body as a whole as a result of tripping and falling while in the computer lab on December 10, 2019. (Case No. 20-WC-05036). A second Application for Adjustment of Claim was erroneously filed for the same date of accident of 12/10/19 and was assigned Case No. 20-WC-05818. That case was subsequently dismissed and the parties proceed to hearing on Case No. 20-WC-05036. The cases were consolidated for the purpose of trial.

On July 10, 2017, Arbitrator Christina Hemenway entered a Decision in Case No. 16-WC-18635 pursuant to Section 19(b) of the Act. Arbitrator Hemenway found Petitioner's condition of ill-being with regard to her lumbar spine was causally related to the work accident of September 2, 2014. Arbitrator Hemenway awarded medical expenses through the date of arbitration, February 24, 2017, and prospective medical treatment, specifically a lumbar spine surgery recommended by Dr. Kennedy. The Arbitrator takes judicial notice of Arbitrator Hemenway's Decision. (PX25).

The parties stipulate that Petitioner sustained an accident which arose out of and in the course of her employment with Respondent on December 10, 2019 when she tripped and fell over a chair in the computer room. The issues in dispute in Case No. 20-WC-05036 are causal connection, average weekly wage, temporary total disability benefits, TTD underpayment, and prospective medical care. The Arbitrator has simultaneously issued a separate Decision pursuant to Section 19(b) of the Act in Case No. 16-WC-18635.

TESTIMONY

Petitioner was 52 years old, married, with no dependent children at the time of accident. Petitioner testified she has worked for Respondent for over 20 years as a teacher and currently teaches sixth and seventh grade students. Petitioner is contracted to work a total of 180 days per year (36 weeks). Her salary is governed by the Waterloo Classroom Teacher's Association that divides her annual salary by 180 days and is paid over 24 pay periods.

Petitioner testified that on 9/2/14 she was on the playground supervising 8th grade recess when a special needs student jumped into her arms. She was looking down and did not anticipate the contact. A male teacher standing next to her prevented her from falling to the ground. Petitioner testified she worked 36 weeks per year prior to the incident. She stated that her low back, legs, and hips were bothering her following the accident. She was already scheduled for cervical spine surgery related to a work accident that occurred in 2013 when this accident occurred [16-WC-18635]. She testified that her low back pain became debilitating but she did not immediately notice pain in her mid-back until her low back pain improved. She stated she has never experienced any significant mid-back pain prior to 9/2/14.

Petitioner testified she underwent lumbar surgery as recommended by Dr. Kennedy and awarded by Arbitrator Hemenway. She subsequently underwent a second lumbar surgery performed by Dr. Gornet involving L2 through L5-S1 in January 2019. She stated she noticed mid-back pain a couple of months following her second lumbar surgery and the pain wrapped around to her chest.

Dr. Gornet ordered an MRI of Petitioner's mid-back and an injection that provided temporary relief. Petitioner testified she requested Dr. Gornet release her to return to work in August 2019. Petitioner returned to full duty work until 9/5/19 when Dr. Gornet placed her on work restrictions. The Arbitrator notes that Dr. Gornet allowed Petitioner to return to work with restrictions on 8/13/19, and further restricted her work duties on 9/5/19, and Petitioner testified she was able to perform within those restrictions. On 12/10/19, Petitioner sustained another work accident while assisting a student in computer lab when she tripped and fell over a chair [20-WC-05036]. Petitioner testified that her leg was numb and her low back was extremely painful and she was not able to stand up. Petitioner began to develop bilateral arm pain starting at her neck radiating to her shoulders and trapezius, aching in her hands, pressure in her low back like her lumbar cage had been pushed up to her chest, and mid to upper back pain. Petitioner testified she underwent cervical spine surgery in 2015 and had a good recovery which resolved her neck, shoulder, and arm pain.

Petitioner testified that following her 12/10/19 accident, Dr. Gornet ordered tests and another cervical steroid injection that provided relief for a couple of weeks. Dr. Gornet

recommends a two-level cervical disc replacement which Petitioner wants to undergo. Petitioner testified she continues to have pain in her mid to upper back, arms, and hands. Petitioner reviewed surveillance videos of herself taken in September and October 2020. She stated she did not perform any strenuous activities in the videos. She testified that her pain is activity driven and she rests in a recliner when she is home. When she performs activities she wears a pain patch and engages in home exercises to manage her pain.

On cross-examination, Petitioner testified that she returned to full duty work on 8/13/19. On 9/5/19, Dr. Gornet placed her on light duty restrictions of no lifting over 10 pounds, no repetitive bending or twisting, alternate sitting and standing, and reduced work hours of half-time. Petitioner stated she was able to work within the light duty restrictions until her accident on 12/10/19.

Petitioner has to alternate sitting and standing to alleviate the pain in her low back and legs. She testified she noticed mid-back pain during a car trip to Alabama in which she was a reclined passenger. She stated the mid-back pain shot around to her chest. She described her mid-back pain as higher up since her accident on 12/10/19 that radiated to her shoulders and arms, which was not present prior to 12/10/19.

Petitioner called Brian Charron as a witness. Mr. Charron has been the Superintendent for Respondent for over six years. Mr. Charron agreed that Petitioner is contracted to work 180 days per school calendar year and is paid twice per month throughout the calendar year. He agreed that Petitioner's salary for the 2019-2020 school year was $55,134.00 if Petitioner worked the entire school year. (PX24). Mr. Charron explained that an employee's salary is divided by 24 pay periods and is paid September through August. Due to Petitioner's injury on 12/10/19, Petitioner exhausted her accumulated paid leave and was required to submit weekly time sheets while working restricted duty and was paid per day. Mr. Charron testified that Petitioner worked 14 days from 8/13/19 through 8/31/19 at a daily pay rate of $306.30. (RX3). Petitioner continued to receive full pay for the period 9/1/19 through 9/15/19 due to the use of accumulated leave, despite working half-days beginning 9/5/19 per Dr. Gornet's orders. Petitioner exhausted her accumulated leave during the 10/16/19 through 10/31/19 pay period and was paid for the half days she worked. Mr. Charron testified that Petitioner was incorrectly paid full pay for the period 11/1/19 through 11/15/19, resulting in a double payment for nine days as she only worked half days during that period. To correct the overpayment Petitioner was not paid for the next pay period.

MEDICAL HISTORY

Following Arbitrator Hemenway's decision entered on July 10, 2017, Petitioner continued her care and treatment with Dr. Kennedy. Dr. Kennedy obtained updated imaging studies and a CT myelogram that revealed nerve root compression bilaterally at L3-4 and L4-5. Dr. Kennedy recommended bilateral facetectomies at both levels with pedicle screw fixation and fusion. On 10/5/17, Petitioner underwent an L3-4 and L4-5 laminectomy, facetectomy, and bilateral foraminotomy with pedicle screw fixation and posterolateral fusion and iliac crest bone marrow aspiration. Petitioner unfortunately experienced a turbulent recovery, fraught with persistent complaints of pain and radiculopathy in her lower extremities similar to her pre-

surgical status. Petitioner testified she remained on prescription narcotics over the next couple of years.

On 11/22/17, Petitioner reported bilateral hip pain, worse with walking and at night. Petitioner further reported shooting pain along the anterior aspect of her legs and numbness and tingling in her feet despite use of Gabapentin, Percocet, Flexeril, and Lidocaine patches. Petitioner was instructed to continue using her brace and medications. On 1/2/18, Petitioner reported ongoing symptoms of nerve pain and muscle tightness. She was unable to sleep and constantly changed positions. Petitioner attempted to participate in physical therapy as prescribed; however, she reported "feeling miserable" on 2/13/18 and complained of constant pain in her lower back and bilateral hip area with intermittent sciatic type pain. The attending clinician noted a postural swag, which corroborated Petitioner's reports of off-balance posture with prolonged walking. Increased Gabapentin dosage brought no relief to Petitioner's radicular symptoms resorting in the use of more Percocet to relieve her pain. Films showed intact instrumentation, but there was persistent lucency about the right pedicle screw at L5, and no posterolateral fusion was appreciable along the right side of the L5 instrumentation. As a result, Petitioner's working hours were reduced, she was removed from physical therapy, and she was restricted to no lifting greater than 10-20 pounds.

On 3/21/18, Petitioner reported SI joint pain, bilateral hip pain, and difficulty with prolonged walking and sitting. Lumbar spine films continued to show lucency surrounding the L5 pedicle screws and a CT myelogram was ordered. Nevertheless, on 4/11/18, Dr. Kennedy expressed his belief that Petitioner's lumbar spine was fused and she required no further care and treatment. He recommended a second opinion to evaluate possible care and treatment to the sacroiliac area. The CT myelogram revealed incomplete fusion in the posterior elements of L3-5 with persistent diffuse annular disc bulges from L2 through L5. Though Dr. Kennedy reviewed the studies and acknowledged the absence of posterior bone formation, he did not recommend revision of her posterior instrumentation. Dr. Kennedy recommended an SI joint fusion and referred Petitioner to Dr. David Raskas.

On 5/15/18, Dr. Raskas noted that despite surgery Petitioner's pain returned to 50% back pain and 50% bilateral anterolateral thigh pain that was poorly controlled with medications, along with chronic numbness in her large toes bilaterally. Petitioner indicated that the anterior thigh pain was not present prior to the October 2017 surgery. Dr. Raskas noted Petitioner had been taking Percocet since the October surgery and was referred for evaluation for possible involvement of the SI joint. Dr. Raskas noted Petitioner had received SI joint injections from Dr. Feinberg, with the last being six (6) months prior to her posterolateral fusion, which provided limited relief. He further noted that Petitioner visibly appeared uncomfortable, as she fidgeted and struggled to find a comfortable position and ambulated with a slightly shuffled gait. His examination was positive for tenderness and pain to palpation of the lumbar spine and diminished deep tendon reflexes. His review of the CT myelogram taken in April 2018 showed clear lucency of the L5 screws, especially on the right, with haloing about the tips of the L4 screws which was consistent with early signs of hardware failure. Petitioner exhibited progressing stenosis of the L2-3 segment as compared with the findings on the September 2017 myelogram with enlarged facet joints contributing to midline and bilateral foraminal stenosis. Dr. Raskas noted a large osteophyte formation on the left side of the L5-S1 facet joint creating a

claw-type appearance with abnormal bone growth and facet degeneration. Dr. Raskas assessed lumbar pain, kyphosis of the thoracolumbar region, L2-3 stenosis, facet arthropathy, pseudoarthrosis and facet degeneration of the lumbar spine, status post lumbar fusion, and hardware failure. Dr. Raskas recommended an anterior/posterior fusion from L2 to S1, with hardware removal, and a laminectomy at L2-3 and posterior instrumentation from L2 to S1. He opined that the surgery was directly attributable to the nonunion of the fusion, the lumbar kyphosis, and the stenosis of that area and the fact that the fusion is putting pressure on the already hypertrophic facets at L5-S1. He opined that Petitioner would be able to return to her job as a teacher with successful arthrodesis, but that she was temporarily and totally disabled in her current state.

Petitioner returned to Dr. Kennedy on 6/14/18 at which time he agreed, given Petitioner's current pain level and objective findings, that revision surgery was reasonable. He opined that an anterior fusion in conjunction with revision posterior fusion was reasonable. He disagreed with Dr. Raskas' recommendation for inclusion of L5-S1 and L2-3, as he believed Petitioner's symptoms were primarily emanating from non-fusion. Consequently, he referred Petitioner to Dr. Matthew Gornet for a third opinion.

Petitioner was evaluated by Dr. Gornet on 7/12/18 who noted Petitioner's complaints of pain to the bilateral low back, buttocks, hips, and anterior thighs with tingling in her feet despite fusion and prescription narcotic medication, the most recent of which was Oxycodone. He reviewed the results of the recent CT myelogram and previous MRI scan, and his physical examination showed tingling into the L3 distribution and the SI joint bilaterally. He ordered new scans that revealed a failed fusion at L3-4 and L4-5 with loose hardware, with developing adjacent level failure at both L2-3 and L5-S1. He also believed facet arthropathy at L5-S1 played a role in Petitioner's pain. Dr. Gornet recommended disc replacement at L2-3, revision fusion at L3-4 and L4-5, and disc replacement vs. fusion at L5-S1. Petitioner was kept off work.

Respondent had Petitioner evaluated by Dr. Benjamin Crane on 9/24/18 pursuant to Section 12 of the Act. Dr. Crane agreed that Petitioner was a surgical candidate from L2 to L5. However, Dr. Gornet noted that Dr. Crane's plan did not address the significant facet arthropathy at Petitioner's L5-S1 level. Dr. Gornet believed Petitioner's only option was to fuse L5-S1, revise the fusion from L3-4 and L4-5, and replace the disc at L2-3.

On 1/23/19, Dr. Gornet performed the first segment of a staged procedure which consisted of an anterior decompression at L2-3, L3-4, L4-5, and L5-S1; disc replacement at L2-3; and anterior lumbar interbody fusion at L3-4, L4-5, and L5-S1. On 1/25/19, Dr. Gornet performed a revision laminotomy at L4-5 and L5-S1, removal of hardware from L3 to L5, and a posterior fusion from L3 to S1. He noted increased difficulty due to scar tissue that was significant, making tissue dissection difficult and the operation time was increased by 50%.

Follow-up visits show that Petitioner again had a turbulent post-operative recovery with slow progression of improvement. Petitioner reported nausea on 1/29/19 and Dr. Gornet decreased her narcotic medication. On 2/6/19, Petitioner reported increased bilateral leg pain and difficulty sleeping. Dr. Gornet suggested a course of oral steroids, but ultimately prescribed Tylenol. On 2/14/19, Petitioner reported increased back, buttock, and leg pain and Dr. Gornet

expressed concern over spinal subsidence. Dr. Gornet prescribed steroids and refilled her pain medication. On 3/7/19, Petitioner reported the steroids helped her pain substantially, but her pain returned when the steroids wore off. Dr. Gornet noted Petitioner's films showed substantial reclamation of L5-S1 disc height and kept her off work.

On 5/6/19, Dr. Gornet noted that although Petitioner exhibited post-operative discomfort, her leg pain was beginning to resolve. CT scans showed good early reasonable bone consolidation at all levels; however, Dr. Gornet stated that due to the revision Petitioner remained temporarily and totally disabled and planned to consider therapy three months later if imaging studies continued to show acceptable status. On 7/6/19, Petitioner presented to Red Bud Regional Hospital Emergency Room with complaints of left scapular pain radiating into her left lateral posterior chest and breast. Petitioner reported that she noticed the pain after a long car ride to Alabama. Petitioner denied any precipitating acute injury. A CT angiography of the chest was performed and was negative for any abnormality. Petitioner was administered Toradol and other medications for pain and instructed to follow up with her physician.

On 7/23/19, Petitioner advised Dr. Gornet she had been experiencing upper and middle back pain located approximately in her bra line area which radiated to the left side of her chest for which she sought evaluation in the emergency department. Petitioner reported that she was on her second round of Prednisone without any significant relief in her symptoms. Dr. Gornet attempted to identify precipitating factors leading to Petitioner's increasing upper and mid back pain and suspected the development of adjacent level issues. He noted Petitioner could have an underlying pathology in her thoracic spine. He advised Petitioner to continue steroids as currently prescribed and recommended imaging studies if her lumbar spine continued to show acceptable progress.

On 8/12/19, Dr. Gornet obtained imaging studies and noted that Petitioner's lumbar spine films continued to show good position of all hardware without evidence of lucency or fracture. Although he felt that L5-S1 was lagging, he noted no lucency around the screws and the scans showed excellent bone consolidation at L3-4 and L4-5. Dr. Gornet attributed Petitioner's thoracic complaints to a herniation at T6-7 on the left. He recommended an injection but Petitioner decided to live with her symptoms. Dr. Gornet opined that Petitioner was not yet fully healed but allowed her to return to work beginning 8/13/19 with restrictions of no lifting greater than 10 pounds, no repetitive bending or lifting, and to alternate between sitting and standing. He also restricted Petitioner to teaching on the first floor only and to avoid stairs.

On 9/5/19, Petitioner called Dr. Gornet's office and advised him that her symptoms had significantly increased since returning to light duty work. She denied any intervening accidents. Dr. Gornet recommended placing Petitioner on further restrictions including no working greater than 3 ½ hours per day effective immediately. He recommended moving forward with epidural steroid injection of the thoracic spine at T6-7 as Petitioner continued to report significant mid-back pain in addition to low back pain.

On 10/17/19, Dr. Gornet noted that the injection performed on 10/1/19 helped a portion of Petitioner's mid-back pain, but she still struggled with low back pain. He attributed Petitioner's low back symptoms to residual of her original surgery and narcotic dependence prior

to seeing him. He recommended a nerve function study if follow-up radiological studies were normal to determine Petitioner's non-focal radiculopathy expressed in her feet. He recommended only occasional use of narcotics, once or twice a week, with at least 30 minutes of cardiovascular exercises a day. He noted that Petitioner was due to see Dr. O'Boynick for an IME.

On 12/10/19, Petitioner sustained another injury at work when she attempted to walk between rows of computer stations to assist a student and tripped over a chair leg. Petitioner fell to the floor on her back and buttocks. Petitioner called Dr. Gornet's office the day of the accident and stated she felt like her cage was sticking into her spine with numbness and pain down her left leg. Petitioner thereafter presented to the emergency room where she reported the history of accident and that she had pain in her lower back radiating to her upper back and down her left leg. The assessment noted a high probability for sprain-strain contusion of the back with less likely facture or hardware displacement. X-rays showed no signs of acute fracture and Petitioner was taken off work and given pain medication.

Petitioner called Dr. Gornet's office the following day and gave a detailed history of the accident, stating she tripped and fell backwards on to her back and buttocks after she tripped over a chair that a child pushed out when she was trying to step over it. Dr. Gornet placed Petitioner off work and ordered the nerve conduction study previously recommended. He also recommended oral steroid therapy and Famotidine. Dr. Gornet examined Petitioner on 1/27/20 and noted she was doing reasonably well with restrictions until the new accident occurred that aggravated her mid-back, low back, and leg symptoms. Dr. Gornet noted pain in Petitioner's neck and arms. He believed the fall aggravated Petitioner's underlying condition and possibly caused new injury, particularly in her neck, which he noted was a new complaint for Petitioner. He recommended a functional capacity evaluation in addition to the nerve function studies and opined Petitioner remained temporarily and totally disabled. He instructed Petitioner to remain off narcotics.

On 3/30/20, Dr. Gornet's assistant noted that Dr. Bernardi recommended a total myelogram to cover all of Petitioner's spine. Dr. Gornet agreed the new imaging studies were warranted. However, after further consideration, Dr. Gornet believed that MRIs with plain CTs of all three areas for comparison would suffice and Petitioner did not require myelograms. Dr. Gornet again noted the possibility that Petitioner's fall injured an adjacent disc level in her cervical spine, although Petitioner's neck pain was not significant at that point, given the likelihood of referred pain. He referred Petitioner to Dr. Phillips for nerve function studies.

The nerve conduction studies performed by Dr. Phillips on 8/19/20 fell within the range of normal and was not impressive for active lumbar radiculopathy. However, Dr. Phillips noted Petitioner suffered from severe left greater than right foraminal stenosis at L2-3 as shown on MRI and stated he did not have good distal NCV study for L2 sensory evaluation. The nerve studies performed on 8/20/20 to evaluate for cervical radiculopathy was also unimpressive for active cervical radiculopathy but showed subtle medial neuropathies across the bilateral wrists.

Dr. Gornet opined that Petitioner may have residual from her original problem, particularly in the L2 sensory nerve root. With respect to the thoracic spine, Dr. Gornet noted no problems of significance outside of the small protrusion at T6-7 on the left. On the cervical spine

scans, Dr. Gornet noted the possibility of a lytic line through the graft at C5-6 which he believed would fuse. At C3-4 and C4-5, however, Dr. Gornet noted a cervical disc problem that would require treatment moving forward. He stated that Petitioner's pain between the shoulder blades with weakness and tingling likely emanates from the cervical disc herniations. He did not have an explanation for Petitioner's more recent onset of back, bilateral buttock and hip pain, left worse than right. He recommended an injection at C4-5. If Petitioner did not improve, he recommended cervical disc replacement at C3-4 and C4-5. As for Petitioner's low back, Dr. Gornet opined Petitioner will always have some level of permanent restrictions.

Dr. Christopher O'Boynick testified by way of evidence deposition on 9/3/20. Dr. O'Boynick treats and performs surgery on spinal conditions. He testified that he examined Petitioner on 10/22/19 and reviewed records and reports related to Petitioner's accident in September 2014. Based upon his examination and review of the records, he believed that Petitioner's diagnoses included thoracic pain with a T6-7 left-sided disc herniation without lateral recess or foraminal stenosis, lumbar spine pain secondary to multilevel decompression and failure of fusion followed by revision lumbar fusion and left greater than right radiculopathy.

Dr. O'Boynick testified he did not believe Petitioner's thoracic spine condition was related to the injury in September 2014 or her previous cervical spine surgery. He opined that the car ride to Alabama could have caused or manifested Petitioner's thoracic and left-sided chest wall pain, or that it was simply the result of aging that could have been made symptomatic by any activity of daily living. He further testified that he did not believe Petitioner's complaints matched up with a dermatomal distribution outside of her left-sided chest wall pain. Dr. O'Boynick opined that Petitioner did not require any additional care or treatment for her lumbar spine, largely based on the imaging studies showing successful union across L3-4, L4-5, and L5-S1. He opined that Petitioner was at maximum medical improvement with regard to her lumbar spine and could return to work as a teacher with the reasonable accommodation of only first floor teaching.

On cross-examination, Dr. O'Boynick testified he has been in practice since 2015 and obtained his board certification in 2017. He performs an average of one to two IMEs per week and charges $1,300 per IME and $650 for each additional body part evaluated. He testified he does not perform lumbar disc replacement surgeries, but he does perform cervical disc replacements. Dr. O'Boynick testified he did not have an independent recollection of examining Petitioner but would deny that the only examination he performed was making her bend over and reach for the ground. He testified that it was the insurance carrier that advised him Petitioner did not express complaints about her thoracic spine until after her 7/9/19 emergency room visit, and he agreed with its supposition that her complaints could be related to her road trip. Dr. O'Boynick testified that Petitioner's thoracic spine injury could also have been caused or aggravated by the September 2014 injury. He was not provided with Arbitrator Hemenway's 2017 Section 19(b) Decision.

Dr. O'Boynick admitted that complaints Petitioner voiced on 9/15/14, namely pain in her neck, shoulder, and low back, could also indicate injury to the thoracic spine. He also acknowledged that the unspecified diagnosis of "back strain" on that date could have encompassed the thoracic spine. He admitted that the complaints noted in the A.T.I. Physical

Therapy records from May through August 2015 that included burning in the neck and upper back were consistent with a thoracic spine injury. Dr. O'Boynick acknowledged that Petitioner required extensive care for her lumbar spine, which began to improve following the surgery performed by Dr. Gornet in January 2019. He admitted it was possible for Petitioner's mid back pain to become more pronounced as her low back pain began to improve. He acknowledged that Petitioner suffered from an objective disc herniation at T6-7. He was not aware of an MRI performed prior to the September 2014 work injury. He also acknowledged that MRI findings are not the driving force behind treatment recommendations; rather, treatment recommendations are made based on patient symptoms with correlating findings. Though he had not seen Petitioner since October 2019, he agreed that the treatment she received for her lumbar and thoracic spine was reasonable and necessary.

Dr. O'Boynick acknowledged that his opinion that Petitioner was at maximum medical improvement was in contravention to the recommendations of Dr. Gornet. Though he agreed Petitioner's lumbar spine symptoms were causally related to the September 2014 work injury, he continued to disagree with respect to the thoracic spine. He testified that in his clinical practice and experience, he had not seen symptoms of a thoracic disc herniation present so much later after an inciting injury. While he acknowledged that the records identified some nonspecific thoracic pain as early as a few weeks after the accident and in early 2015, he reiterated that the anterior chest wall pain that correlated with radicular irritation at the thoracic spine did not present until after the car ride. He stated it is possible to develop disc herniations and subsequent radiculopathy with no history of injury. He stated he could not say whether the disc herniation was there before or after the student jumped on her, but her description of these symptoms that correlate with her thoracic disc herniation did not present until much later. He testified it is possible the thoracic disc herniation was caused by that injury but the symptoms she suffered from as it relates to that disc herniation did not present until many months later. He again specified that the absent or latent correlating complaint about which he spoke was the thoracic radicular pain that would accompany nerve root irritation from that disc herniation. He acknowledged that it was possible to suffer a disc herniation without nerve root pain or irritation.

Dr. Robert Bernardi testified by way of evidence deposition on 11/6/20. Dr. Bernardi is a neurosurgeon who performs cervical, thoracic, and lumbar decompressions and fusions. He examined Petitioner on 3/3/20 and noted Petitioner's status post anterior C5-6 and C6-7 decompressions and fusions, L3-4 and L4-5 decompressions and fusions, and L2-3 disc replacement with postoperative pseudoarthritis. Dr. Bernardi characterized Petitioner's complaints on her patient intake form as "global" with elevated pain scores. He noted rather extensive scarring from the multiple operation. Dr. Bernardi opined that Petitioner had bilateral arm pain, tingling, and weakness, mid-back pain, and bilateral leg pain, whose etiology was uncertain. He opined that Petitioner's first four diagnoses were clearly not related to her work incident of 12/10/19 as she underwent all of those procedures prior to that date. He was not sure as to causal connection of the last three diagnoses. She clearly had preexisting problems in each of these areas, but without additional imaging, it was impossible to determine whether Petitioner might have some new or acute problems superimposed upon those more chronic ones. Dr. Bernardi believed a total myelogram of all three portions of the spine would be the best way to assess Petitioner's spine. He opined that Petitioner could return to work with the restrictions Dr. Gornet placed on 10/17/19.

Dr. Bernardi was subsequently provided with additional imaging studies and records and asked to prepare an addendum report, which he authored on 10/16/20. He testified that after reviewing same, his diagnoses with respect to Petitioner's condition remained unchanged. He further testified he did not believe these conditions were causally related to the 12/10/19 work accident based on his observation that Petitioner's conditions and complaints predated the December 2019 accident and remained the same, albeit more intense, following said injury. He further characterized Petitioner's increased complaints as subjective and not substantiated by any new changes on her imaging studies. Though he stated his opinion with respect to Petitioner's lumbar spine was fairly straightforward, Dr. Bernardi stated his opinion with respect to her cervical spine was "a little bit more complicated." He testified he observed no immediate reference to Petitioner's neck complaints in the first post-accident treatment record, but he observed a reference the following month in the records of Dr. Gornet. He further noted that the pandemic interfered with Petitioner's care and treatment, after which he noted no complaints until the EMG performed in August 2020. As to Dr. Gornet's opinion that Petitioner's neck complaints were expressed as referred pain, he also believed this unlikely, even though some of her symptoms were consistent, given the lack of specific mention of neck pain to accompany those symptoms. Dr. Bernardi did not believe Petitioner needed additional testing or treatment related to the December 2019 incident and placed her at maximum medical improvement.

On cross-examination, Dr. Bernardi testified he does not perform disc replacement surgery in his practice. He performs two independent medical evaluations per week and charges $3,500 for an examination. His charges for his examination, reports, and testimony in Petitioner's case amounted to $7,666.66. He admitted he detected no Waddell signs during his physical examination of Petitioner. When questioned about Petitioner's status in her low back prior to her December 2019 accident, Dr. Bernardi admitted the records showed that Petitioner had improved considerably prior thereto and was happy with her progress. He also agreed that Petitioner's symptoms of nerve pain increased following the December 2019 accident. He admitted that when he examined Petitioner in March 2020, he did not perform a physical examination of her cervical spine, reportedly because Petitioner did not complain of neck pain, even though he testified that he knew she had previous cervical spine issues and saw fit to examine her upper extremities and reflexes for a neurological examination. He acknowledged that Petitioner circled the cervicothoracic junction on her pain questionnaire and she also indicated she had pain in both of her arms. He agreed that Petitioner consistently reported intrascapular pain and upper extremity complaints, which Dr. Gornet believed emanated from her neck.

Dr. Bernardi admitted Petitioner's intrascapular and upper extremity complaints could be a sign of cervical pathology. He acknowledged that although Petitioner voiced similar complaints prior to the December 2014 accident, Dr. Gornet used different terminology to describe her condition when discussing same. He acknowledged that, as Petitioner's treating physician, he would have a good understanding of the evolution of her symptoms. He agreed that Petitioner ultimately did well following her prior cervical spine surgery in 2015 from her 2013 work injury. Dr. Bernardi admitted that Petitioner's 8/28/13 MRI demonstrated no specific pathology at C3-4 or C4-5 while Dr. Gornet and the radiologist identified pathology at those levels following the December 2019 accident. He admitted that the annular tear and protrusion at

C4-5 and bilateral foraminal protrusions extending into the midline at C3-4 could cause pain in Petitioner's neck and arms. He disagreed, however, with both Dr. Gornet and the radiologist that Petitioner suffered significant spinal cord compression, though he acknowledged that a pinched nerve could cause pain around the shoulder blade, and spinal cord compression could cause upper extremity paresthesias. He testified that axial pain or disc injury could cause both symptoms, though he again did not believe such would present without neck pain. Dr. Bernardi agreed that even trivial trauma could aggravate underlying stenosis. When asked whether the mechanism of injury from the accident in December 2019 could cause a cervical disc injury or aggravate underlying pathology, he stated that most who rupture a disc do not know they have done so. Theoretically anything can aggravate disc disease or cause a disc herniation, but you would not necessarily expect a fall onto your buttocks to produce a ruptured disc in the neck, but it is possible. He similarly acknowledged that the December 2019 accident would more likely aggravate a lower back condition. He admitted the records did not indicate Petitioner injured her neck in any manner other than the December 2019 accident. He acknowledged that Petitioner's arm complaints were a new phenomenon following the December 2019 accident.

Dr. Bernardi agreed it was reasonable for the primary clinical concern following the December injury to be her low back given the extensive lumbar surgery recently performed. He did not possess the phone conversation note between Petitioner and Dr. Gornet dated 12/10/19 but agreed that at times there can be delayed onset of symptoms following an injury, particularly when multiple body parts are injured. Though he testified he found no objective support for Petitioner's increased symptoms following her second injury, he acknowledged that a patient could have a change in symptoms without necessarily having appreciable change in pathology on MRI scans. He also admitted that Petitioner had not returned to her pre-December injury baseline with respect to her complaints following said accident.

Dr. Matthew Gornet testified by way of evidence deposition on 9/14/20. Dr. Gornet is a board-certified physician whose practice is devoted to spine surgery. Dr. Gornet testified that the history of injury Petitioner gave him was a mechanism consistent with both lumbar and thoracic spine injury. He explained that anytime you apply a mechanical load you can sustain an injury. He noted objective findings during his physical examination such as decreased EHL ankle dorsiflexion, decreased L5 sensation bilaterally, and positive straight leg raising on the left, all of which he testified was indicative of nerve irritation in the L5 distribution of Petitioner's spine. Dr. Gornet reviewed Petitioner's numerous medical records from various providers, including the imaging studies, and believed Petitioner sustained work-related injuries to her spine on 9/2/14. The basis for his opinion is Petitioner's symptomatology, the mechanism of injury, and MRI and objective findings that correlate with the objective findings on her physical examination. All those would be indicative of someone who sustained a disc injury chronologically at or near the time of what she described.

Dr. Gornet testified that he recommended a fusion at L5-S1 following Dr. Kennedy's surgery because Petitioner suffered fact arthropathy, which made her a poor candidate for disc replacement, and a fusion would provide structural stability. He noted Petitioner suffered no intervening accidents and thus the need for the revision surgery was also causally related to the 9/2/14 accident. Dr. Gornet stated Petitioner's revision was a large undertaking as it was performed in a staged fashion. Dr. Gornet believed Petitioner's recovery was typical, with

gradual, steady improvement over time. He explained, however, that as a patient improves in one area of his or her spine, they can become more aware of pain in a different area.

Dr. Gornet explained that as Petitioner's lumbar pain began to improve, she became more conscious of her upper and middle back. He also attributed this to an increase in her activity level along with a change in her loading patterns as a result of her treatment. He thus attributed Petitioner's mid-back pain to the September 2014 work injury. He based his opinion on the fact that Petitioner had pain into the upper lumbar spine from the very beginning and she was taking very high-dose narcotics that masked her symptoms. That absent any other slips, falls, or trauma, there is no other explanation than to associate this disc pathology with her injury. Dr. Gornet testified that Petitioner's mid-back pain and residual complaints were entirely normal for someone who had undergone such an extensive procedure.

With regard to Petitioner's accident on 12/10/19, Dr. Gornet testified that Petitioner thereafter presented with increasing pain in her buttocks and hips along with left leg numbness, increasing mid-back pain, and neck symptoms. After recommending diagnostic testing, placing Petitioner off work, and prescribing anti-inflammatory medication, Dr. Gornet felt Petitioner would benefit from neurofunction studies and a functional capacity evaluation. When asked about the novelty of Petitioner's cervical spine complaints following the December accident, Dr. Gornet testified that to his recollection, Petitioner's cervical complaints voiced after her second work accident were new. He did not see any real description of neck symptoms while treating her prior to December 2019 and he was focused on her thoracolumbar spine. He did not recall Petitioner having a significant amount of neck issues until after 12/10/19. He opined that the accident on 12/10/19 aggravated her low back and mid-back and based on seeing Petitioner before and after December 2019, Petitioner's symptoms worsened in those areas, with a new injury or symptoms in her neck.

Dr. Gornet testified that he recommended pan-spinal screening, specifically MRI studies, that are more sensitive than myelograms. When the MRI showed objective evidence of central disc and cord compression at C4-5 and C3-4 above the solid fusion at C5-6 and C6-7, he first attempted relief through conservative care and injection. When this failed he recommended additional surgery, which Dr. Gornet again related to the 12/10/19 accident. Dr. Gornet expressed concern for Petitioner returning to her employment given that her high level of pain would require severe restrictions that would limit her to sedentary activity, and that she also demonstrated inability to sit or stand for prolonged periods of time. For the time being, Petitioner remained temporarily and totally disabled for her spinal problem, and Dr. Gornet would reevaluate her permanent status once her neck is treated. When asked to which accident he would relate Petitioner's need for permanent restrictions he stated it was a combination. She clearly needed permanent restrictions from her original injury [9/2/14], but the second injury [12/10/19] has made her worse. The basis of his opinion is his treatment of Petitioner over a period of time. While Petitioner continued to have pain her function had improved, she returned to work, but she has not been able to bounce back from the December 2019 accident. Petitioner remained under restrictions for her cervical, thoracic, and lumbar spine. The time off work Petitioner required prior to the second injury, however, Dr. Gornet related to the accidental injury of 9/2/14.

On cross-examination, Dr. Gornet testified that the lack of any specific mention of the neck in the initial records following the December 2019 injury was not unusual or inconsistent with the injury given the severity of her back complaints. Dr. Gornet testified that though he did not have records from 2013, he was aware Petitioner presented to the emergency room for mid-back pain following a long drive in July 2019. Dr. Gornet noted that Petitioner's complaints in July 2019 were secondary to her disc herniation. Dr. Gornet testified Petitioner's mid-back pain was chronologically consistent and pathology was present on the MRI subsequent to the MRI performed for the 2013 accident.

CONCLUSIONS OF LAW

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

Generally, under Illinois law, a claimant need prove only that some act or phase of his employment was a causative factor in the ensuing injury. *Vogel v. Ill. Workers' Comp. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812, 2005 Ill. App. LEXIS 8, 11, 290 Ill. Dec. 495, 500, citing *Twice Over Clean, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 638, 643, 809 N.E.2d 778, 284 Ill. Dec. 212 (2004), *appeal allowed* 211 Ill. 2d 617, 823 N.E.2d 979, 2004 Ill. LEXIS 1473, No. 98748. Further, 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. *Id.,* 354 Ill.App.3d at 786, citing *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).

However, where the issue involves whether an intervening accident broke the chain of causation between a work-related injury and an ensuing disability or injury, Illinois law states, work-related or not, it is irrelevant whether a subsequent incident may have aggravated the claimant's condition. *Id.* 354 Ill.App.3d at 786. Further, under an independent intervening cause analysis, compensability for an ultimate injury or disability is based on a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. *PAR Elec. v. Ill. Workers' Comp. Comm'n*, 2018 IL App (3d) 170656WC, P56, 118 N.E.3d 681, 694, 2018 Ill. App. LEXIS 775, 427 Ill. Dec. 480, 493 citing *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245, 263 N.E.2d 49 (1970) The "but for" rationale has been extended to cases where the event immediately causing the second injury was not itself caused by the first injury, yet but for the first injury, the second event would not have been injurious. *Id.* 118 N.E.3d at 698 citing *International Harvester Co.*, 46 Ill. 2d at 245. Further, an employer is relieved of liability only if the intervening cause completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being. *Id.*, 118 N.E.3d at 694, citing, *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411, 911 N.E.2d 1042, 331 Ill. Dec. 812 (2009).

With regard to Petitioner's mid and low back condition, Petitioner has failed to prove that the December 10, 2019 accident caused anything more than an aggravation of her pre-existing injury from 2014 to her mid and low back. The records and testimony of Dr. Gornet confirm that the December 10, 2019 accident caused only an aggravation to her previously symptomatic mid and low back. Petitioner was still under the care of Dr. Gornet for the 2014 injury at the time of the December 10, 2019 accident. She had not yet been released at maximum medical

improvement by Dr. Gornet and the treatment note of October 2019 confirmed that Petitioner continued to have significant mid and low back pain. Dr. Gornet continued Petitioner at that time on fairly restrictive work restrictions of no lifting over 10 pounds, no repetitive bending or lifting, alternating between sitting and standing as needed and only teaching on the first floor, and only working half days. It is clear that at the time of the December 10, 2019 accident, Petitioner had not fully healed from the 2014 accident. As such, Petitioner did not sustain her burden of proof that her current lumbar and thoracic spine conditions are causally related to the December 10, 2019 accident.

With regard to Petitioner's cervical spine, circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

When a preexisting condition is present, a claimant must show that "a work-related accidental injury aggravated or accelerated the preexisting [condition] such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *St. Elizabeth's Hospital v. Workers' Comp. Comm'n*, 371 Ill. App. 3d 882, 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 evidence supports a finding that Petitioner's current condition of ill-being in her cervical spine is causally related to her accidental injury on December 10, 2019. Dr. Gornet testified that Petitioner's neck symptoms were new and related to the accident of 12/10/19. He did not see any real description of neck symptoms while treating her prior to December 2019. Dr. Gornet testified that the lack of any specific mention of the neck in the initial records following the December 2019 injury was not unusual or inconsistent with the injury given the severity of her back complaints. The Arbitrator also relies on the credible opinions of Dr. Gornet, as they are supported by the evidence.

The Arbitrator appreciates that Petitioner sustained a work injury in 2013 for which she underwent cervical spine surgery in January 2015. Petitioner remained off work from the date of surgery through August 2015. The medical records introduced into evidence do not reveal any history of treatment for neck complaints following Petitioner's release from cervical spine surgery or any complaints involving Petitioner's upper extremities prior to her accident on 12/10/19. Further, Petitioner testified that the January 2015 cervical spine surgery resolved her neck, shoulder, and arm pain.

While Dr. Bernardi disagreed with Dr. Gornet's opinion based on the lack of immediate complaints specifically narrowed to the neck following the accident of 12/10/19, on further cross-examination, Dr. Bernardi agreed that it was reasonable for the primary clinical concern following the December injury to be her low back given the extensive lumbar surgery recently performed. Dr. Bernardi also agreed that at times there can be delayed onset of symptoms following an injury, particularly when multiple body parts are injured. He further acknowledged that a patient could have a change in symptoms without necessarily having appreciable change in pathology on MRI scans. Dr. Bernardi acknowledged that Petitioner's symptoms of shoulder and upper extremity pain could be emanating from her cervical spine, and that he did not appreciate any other history of injury to these areas of her body anywhere in the medical records. Lastly, Dr. Bernardi admitted that Petitioner had not returned to her pre-December injury baseline with respect to her complaints following said accident.

Based upon the foregoing, the Arbitrator finds that Petitioner's current condition of ill-being in her cervical spine is causally related to her work injury on December 10, 2019.

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

Both parties agree that Petitioner's pay is governed by the terms of the Waterloo Classroom Teachers' Association contract entered into evidence. (PX23). The parties disagree, however, as to how Petitioner's average weekly wage is to be calculated based on the earnings therein. Respondent alleges and paid benefits based on annual earnings of $18,706.18 with an average weekly wage of $1,281.25. Petitioner alleges an underpayment of benefits based on annual earnings of $55,134.00 with an average weekly wage of $1,531.50.

The wage records submitted into evidence document that in the fifty-two weeks preceding the December 10, 2019 work injury, Petitioner worked a total of seventy-three days and Petitioner received total wages, including wages for sick time and personal time, of $18,706.18. (RX3). Wages earned from December 1, 2019 through December 15, 2019 of $918.90 are not included in the average weekly wage calculation as they include post-accident wages.

Seventy-three days of work corresponds to 14.6 weeks of work as Petitioner and Respondent's superintendent testified that as a teacher, Petitioner was only required to work Monday through Friday. (73 days worked/5 days per work week = 14.6 weeks). As such, Petitioner's average weekly wage would equal $1,281.25 ($18,706.18/14.6 weeks).

Petitioner claims that her projected salary of $55,134.00 for the 2019-2020 school year should be divided by thirty-six weeks, as the union contract as well as the testimony of Petitioner and Respondent's superintendent confirmed that Petitioner would have earned $55,134 for the 2019-2020 school year *had she worked the full school year*. Both Petitioner and Respondent's superintendent confirmed that the teacher union contract required teachers to only work 180 days in order to receive their full pay. Thus, Petitioner argues that Petitioner was only required to work 36 weeks (180 days/5 days per week) in order to receive her full salary of $55,134, so that her average weekly wage would equal $1,531.50 ($55,134.00/36 weeks).

Pursuant to Section 10 of the Illinois Workers' Compensation Act, "The compensation shall be computed on the basis of the 'Average weekly wage' which shall mean *the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52*; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted." (emphasis added) 820 ILCS 305/10.

Accordingly, Petitioner's argument for calculation of her average weekly wage based on her projected earnings for the 2019-2020 school year fails as Section 10 specifically requires that average weekly wage be calculated based on Petitioner's earnings in the fifty-two weeks preceding the date of injury.

The Illinois Appellate Courts similarly held in *Wash.Dist.50 Schs v. Ill. Workers' Comp. Comm'n*, 394 Ill.App.3d 1087, 917 N.E.2d 586, 2009 Ill.App. LEXIS 1042, 334 Ill.Dec. 760 (App.Ct, 3rd Dist., 2009), that the Commission properly calculated a teacher's average weekly wage by dividing her earnings by the number of weeks the teacher *actually worked. Id.* 394 Ill.App.3d at 1088. More recently, in *Jonathan Jordan v. Calumet SD* #132, 15 IWCC 195 (IWCC, 2015), the Commission rejected the argument that a teacher's average weekly wage should be calculated based on the projected yearly salary of a teacher, rather than on the teacher's *actual* earnings.

Based on the foregoing, the Arbitrator finds Petitioner's average weekly wage amounts to $1,281.25 calculated by dividing her actual earnings of $18,706.18 by 14.6 weeks worked.

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).

Based on the finding as to causal connection, the Arbitrator finds Petitioner entitled to the reasonable and necessary medical care rendered to her cervical spine. The evidence demonstrates that Petitioner has not reached maximum medical improvement, as Petitioner remains under active care and treatment with Dr. Gornet, who has recommended injection and/or additional surgery based on Petitioner's persistent complaints.

Respondent stipulates it is liable for the medical bills itemized in Petitioner's Group Exhibit 1 related 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.

Respondent is responsible for reasonable and necessary prospective medical care to Petitioner's cervical spine as recommended by Dr. Gornet, including but not limited to surgery, until Petitioner reaches maximum medical improvement.

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

Dr. Gornet placed Petitioner off work beginning 12/11/19 until her next appointment on 1/27/20. Dr. Gornet examined Petitioner on 1/27/20 for complaints of neck, shoulder blade, and arm pain, as well as low back pain. Dr. Gornet ordered nerve function studies and a functional capacity evaluation with the impression of a new injury to her cervical spine. He continued her off work. On 8/20/20, Dr. Gornet noted the possibility of a lytic line through the graft at C5-6 which he believed would fuse. At C3-4 and C4-5, however, Dr. Gornet noted a cervical disc problem that would require treatment moving forward. He stated that Petitioner's pain between the shoulder blades with weakness and tingling likely emanates from the cervical disc herniations. Dr. Gornet recommended an injection at C4-5. If Petitioner did not improve, he recommended cervical disc replacement at C3-4 and C4-5. Dr. Gornet continued Petitioner off work through 10/5/20.

On 9/14/20, Dr. Gornet testified that Petitioner remained temporarily and totally disabled for her spinal problem, however, he did not indicate which spinal problem. Nevertheless, Dr. Gornet opined he would reevaluate Petitioner's permanent status once her neck was treated and he had not released Petitioner to return to work at the time of hearing.

Based upon the above findings, the Arbitrator awards temporary total disability benefits from **December 11, 2019 through the date of hearing, January 21, 2021**, representing **58-2/7 weeks**, based on Petitioner's average weekly wage of $1,281.25. Respondent shall have credit for temporary total disability benefits paid.

The parties stipulate that Respondent paid temporary total disability benefits in the amount of $40,676.54. Respondent's Exhibit 4 reflects TTD payments for the period 12/11/19 through 10/26/20, for a total of 45.857 weeks, rendering a TTD rate of $887.03. Based on the Arbitrator's calculation of average weekly wage above, Petitioner's TTD rate is $854.17.

Therefore, Petitioner is not entitled to an underpayment of TTD benefits for the period 12/11/19 through 10/26/20.

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

Linda J. Cantrell

Arbitrator Linda J. Cantrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC035612
Case Name	BRINSON, SAMUEL v. PARALLEL EMPLOYMENT GROUP INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0046
Number of Pages of Decision	23
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	Brien DiNella
Respondent Attorney	Daniel Swanson

DATE FILED: 2/4/2022

/s/Stephen Mathis, Commissioner

Signature

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Samuel Brinson,

Petitioner,

vs. No. 15 WC 35612

Parallel Employment Group, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Petitioner, who was 71 years old at the time of the arbitration hearing on August 19, 2020, testified on direct examination that he held a Master's degree in Public Administration. On October 27, 2015, Petitioner was working at the LEARN School, a charter school. Petitioner explained that Respondent, a staffing agency, "sent us to different charter schools run by the Chicago Board of Education." Petitioner described the accident on October 27, 2015, as follows: "[W]hile en route to lunch, I was leading the kids down to the basement from the first floor. * * * [W]hen we got down to the bottom, I wasn't quite all way on the bottom; I was like in the middle between the class to watch them. ¶ So I heard some boys. Behind me was a wall, and the wall with the banister, you couldn't see through the banister because there was a wall, so I couldn't see around the corner. * * * They were acting silly. * * * And as I was turning back and proceeded, I went down [fell down] the steps. I guess they took my attention away." Petitioner continued: "I ended up falling on the concrete floor in the basement. ¶ I hit my right knee first as

I went down. My leg was—one of the legs, I think, was on the steps at the bottom. ¶ As I hit the knee, I hit it real hard, and it caused a reaction, caused a pain in the hip and in my back. Then I flipped over to my left knee, and then I flipped back on my right again after I laid down. So it was a reaction going back and forth because I was caught off guard." The hip and back pain "got more intense later."

Petitioner further testified that some students helped him up. Petitioner rested during lunch and then walked the children back to class. When he made it back to the classroom, he asked them to get an ice pack from the nurse's office. A "social worker" or "administrator" stopped by and asked what happened. "She had an incident report in her hand." Petitioner completed the report, but never received a copy. The following day, Petitioner called and reported the accident to Respondent staffing agency. Respondent did not send him any paperwork to complete.

On October 30, 2015, Petitioner retained an attorney and completed an application for adjustment of claim. On November 11, 2015, Petitioner began treating for his injuries with Dr. Ronald Silver. Petitioner testified his initial treatment was conservative and included physical therapy. Ultimately, Dr. Silver recommended surgery on each knee. At Respondent's request, Petitioner was examined by Dr. Brian Cole. After the examination, Petitioner underwent injections into the knees, which helped in part. Dr. Silver continued to recommend surgery on each knee. "[E]ventually," Dr. Silver referred Petitioner for treatment of the back and the hip. Petitioner began treating for his hip with Dr. Kiran Chekka before September of 2016. Petitioner also saw Dr. Amit Mehta for his back. Dr. Chekka performed an injection into the hip, and Dr. Mehta performed an injection into the back. The injections provided only temporary relief. Respondent never authorized treatment for the back or the hip. At some point, Petitioner switched his care to "Dr. Khalid" (Dr. Khalid Malik) to treat under Medicare.[1] Dr. Malik performed two more injections into the back. On April 11, 2017, Petitioner underwent surgery on the right knee. After Petitioner recovered from the right knee surgery, Dr. Silver again recommended surgery on the left knee. As of the time of the arbitration hearing, Petitioner had not undergone the surgery on the left knee. He would like to proceed with the surgery.

Regarding attempting to return to work, Petitioner testified he attempted to return to work on restricted duty in 2016. Respondent did not take him back. Petitioner "never got a pink slip. They never told me the real reason." After Petitioner repeatedly called Respondent, he learned there was a problem because he did not attend an orientation in 2015 or 2016. Petitioner testified he did not have a computer. After more phone calls to Respondent's office, Petitioner "just gave up." Petitioner came to believe Respondent retaliated against him for filing a workers' compensation claim.

Regarding his condition at the time of the arbitration hearing, Petitioner mainly complained of pain in the hip and the back, and "[a] little" in the left knee. Petitioner was not working. He collected "Social Security and SSI" totaling approximately $780 per month.

[1] Petitioner's Exhibit 5 shows Petitioner treated under Medicaid.

On cross-examination, Petitioner agreed his last assignment from Respondent was on or about June 29, 2016. Then the school year ended. Petitioner was next questioned about Respondent's Exhibit 4, an email from Respondent about mandatory orientation in early August of 2016. Petitioner maintained he did not receive the email until he got a copy from Respondent's attorney. On March 17, 2017, Petitioner filed a complaint with the Illinois Department of Human Rights (IDHR) alleging age and injury discrimination. Respondent's counsel asked Petitioner whether in his employment discrimination lawsuit he admitted receiving the email. Petitioner responded: "No. I got it then, I told them, when I saw it." Petitioner explained that he leaned about the email during phone calls to Respondent in September. Petitioner maintained that he did not timely learn of the mandatory orientation. Petitioner understood that Respondent "took [him] out of the system" after he failed to attend the orientation. Petitioner believed Respondent discriminated against him because Respondent did not take him back, even though he received a Substitute of the Month award for February of 2016. On March 8, 2018, the discrimination lawsuit was dismissed for lack of substantial evidence. In October, Petitioner appealed the decision.

Petitioner clarified that he continued to work for Respondent after the accident through June 29, 2016. His job did not require squatting, kneeling or climbing. Petitioner subsequently clarified: "[Y]ou have to climb the stairs, like I told you, taking the kids to lunch." Petitioner agreed that on or about June 22, 2016, Dr. Silver took him off work.

Meghan Duffey, a safety specialist, testified on direct examination that she worked for Respondent for two years. Petitioner's counsel pointed out that Ms. Duffey did not work for Respondent during the relevant time. Ms. Duffey initially testified an injury report was never generated in this case, correcting herself that a Form 45 "was done after the fact of the injury, or I believe December 9th," after notice from the insurance carrier. Ms. Duffey further testified Respondent "accommodate[s] all restrictions, seated work." Ms. Duffey believed Respondent would have accommodated Petitioner's restrictions. Ms. Duffey further testified that Petitioner was "deactivated" on August 3, 2016, because he did not schedule an orientation. "The record on 8/3 of 2016 stated that, did not call in to schedule himself for orientation; called him several times, but with no answer to call back." Regarding Respondent's message log exhibit, Ms. Duffey testified that "[i]f [Petitioner] would have called in, it would have documented that he had called in."

On cross-examination, Ms. Duffey testified she began working for Respondent on July 9, 2018. Ms. Duffey agreed that Respondent was not currently accommodating the restriction of no climbing stairs. Regarding any receipt of an application for adjustment of claim by Respondent's local office in Illinois, Ms. Duffey expected the local office to forward it to the corporate office in Wisconsin, where she worked. Ms. Duffey did not believe Respondent required the mandatory training of employees who were on medical leave.

On redirect examination, Ms. Duffey was shown Petitioner's 8(a)/19(b) petition filed November 24, 2015. Ms. Duffey indicated the insurance carrier at some point sent that document to the corporate office. Regarding notice of accident from Petitioner, Ms. Duffey stated: "There is zero documentation in the message log," and there was no accident report from the school on file. Ms. Duffey stated: "We were not able to investigate this injury." On re-cross examination, Ms. Duffey expected a safety director at the local office to report a workers' compensation claim to the insurance carrier. An injured worker or his attorney may also report the claim.

Petitioner introduced into evidence, among other things, an initial letter from his counsel to Respondent's Illinois office, dated November 4, 2015, demanding workers' compensation benefits and enclosing the original application for adjustment of claim. Respondent introduced into evidence Petitioner's 19(b)/8(a) petition dated November 24, 2015. The petition indicates notice was sent to Respondent's Illinois office and Respondent's workers' compensation insurer.

Also, Respondent introduced into evidence an email dated July 7, 2016, from Respondent regarding the orientation. The email, which came from Ms. Duffey's mailbox, is not addressed to any particular individual. The email is ccd to "ILSubDispatch." Additionally, Respondent introduced into evidence IDHR's decision dated March 8, 2018, dismissing Petitioner's claim for lack of substantial evidence. IDHR found, in pertinent part: "Complainant concedes that he did receive Respondent's July 7, 2016, email."

The medical records from Dr. Silver show that on November 11, 2015, Petitioner began treating with Dr. Silver, who addressed his note to Respondent's workers' compensation carrier. Dr. Silver noted the following history and complaints: "While working as a substitute teacher for a Chicago Charter School he was walking down stairs in the school with children going to the lunchroom, he turned around to speak with a student and fell crashing down the stairs landing upon the anterior aspects of his knees and then flipped to the side injuring his right shoulder, head, neck and right ankle. I am concentrating on his shoulder and knees today." Both knees were equally painful, with crepitation, swelling and effusion. Dr. Silver was concerned about bilateral cartilage damage. He prescribed medication, braces, physical therapy and MRIs. On January 15, 2016, Dr. Silver noted both knees continued to do poorly, and again ordered MRI studies.

On March 2, 2016, Dr. Silver noted: "[The patient's] MRI of his left knee demonstrates a complex tear of his lateral meniscus as well as damage to the articular cartilage of the patellofemoral articulation as we suspected clinically." Dr. Silver recommended surgery on the left knee and physical therapy in the interim.

The notes from March 4 and April 22, 2016, are the same in substance. On April 22, 2016, Dr. Silver summarized: "[The patient's] MRI of his right knee demonstrates damage to the articular cartilage in the patellofemoral compartment as well as some degenerative changes in that area. ¶ My impression is that of damage to the articular cartilage in the patellofemoral

compartment as well as an exacerbation and acceleration of pre-existing asymptomatic degenerative changes. ¶ He will require arthroscopic surgery of the right knee as well after his left knee has recovered from arthroscopic surgery for his complex tear of his lateral meniscus of his left knee."

At Respondent's request, Petitioner was examined by Dr. Cole on April 25, 2016. Dr. Cole examined Petitioner with respect to his knees, finding the following: "The claimant had a significant high magnitude fall on stairs. The reported mechanism of injury does correlate with the objective findings and subjective complaints." Dr. Cole diagnosed "[b]ilateral knee pain, aggravation of preexisting patellofemoral osteoarthritis, work-related." Dr. Cole recommended a single injection into each knee.

On June 22, 2016, Dr. Silver continued to recommend surgery on both knees. On August 3, 2016, Dr. Silver noted only temporary improvement after an injection into the right knee. Dr. Silver recommended surgery on the right knee and an injection into the left knee. On August 17, 2016, Dr. Silver injected the left knee. On September 7, 2016, Dr. Silver noted good pain relief from the injection into the left knee. The right knee continued to do poorly. Dr. Silver also referred Petitioner to a "back & hip specialist." Petitioner continued to follow up with Dr. Silver while awaiting surgical authorization for the right knee. On January 11, 2017, Dr. Silver opined the accident caused "cartilage damage in both knees."

In the meantime, Dr. Cole issued an addendum report on January 3, 2017. Dr. Cole reviewed additional records, but did not examine Petitioner. Dr. Cole noted the left knee, but not the right knee, responded well to the cortisone injection. Dr. Cole recommended surgery on the right knee.

On April 11, 2017, Dr. Silver operated on the right knee. He performed arthroscopic debridement, abrasion arthroplasty, and tricompartmental synovectomy. Postoperatively, Dr. Silver noted slow improvement. The last note from Dr. Silver is dated June 28, 2017. Dr. Silver noted slow improvement, right quad atrophy, and continued restrictions. He did not declare Petitioner at maximum medical improvement or the restrictions permanent. Petitioner was to follow up on August 9, 2017. Physical therapy records show that on July 14, 2017, Petitioner was discharged from postoperative physical therapy for the right knee after demonstrating sufficient improvement.

The medical records from Elmwood Park Same Day Surgery Center show that on September 21, 2016, Petitioner consulted Dr. Chekka, who noted the following history and complaints: "[The patient] suffered a work-related injury while working as a substitute teacher in October of 2015. At the time, he was working with first graders and he was walking on an elevated platform of sorts, and he was focused on multiple children ***. When he turned to look around the corner, he missed a step and fell down several steps. He first struck his right knee, then his left knee, and then he also landed on his right hip and right back." Petitioner indicated intermittent pain in his right buttock and right lateral hip. Physical examination was consistent

with the complaints. Dr. Chekka diagnosed: right greater trochanteric bursitis, right SI joint dysfunction/sacroiliitis, and myofascial low back pain/quadratus lumborum spasm. Dr. Chekka recommended physical therapy and a hip injection. Regarding causation, Dr. Chekka opined Petitioner's "condition and associated symptoms are consistent with the reported mechanism of injury. I believe the patient's injuries are causally connected to the incident outlined above."

On October 25, 2016, Dr. Mehta injected the right hip. On November 15, 2016, Petitioner reported an 80 to 90 percent relief. Dr. Mehta recommended continuing physical therapy. Thereafter, Petitioner followed up with Dr. Mehta.

On December 20, 2016, Petitioner complained the symptoms had returned, especially in the right low back with radiation to the right hip. Petitioner rated the pain a 7/10. Straight leg raise test was positive bilaterally, worse on the right. Dr. Mehta ordered MRI studies of the low back and the right hip.

On January 10, 2017, Dr. Mehta noted: "He did have an MRI of the lumbar spine which did show an L4-L5 disc protrusion 3-4 mm in size indenting the thecal sac with some stenosis as well as disc protrusions at the L3-L4 and L5-S1 levels indenting the thecal sac as well. Patient did have an MRI of the right hip which did show some mild bursitis as well as inflammatory changes in the right ischial tuberosity post traumatic in nature, but no tears or fractures are noted." Petitioner rated the pain a 4-8/10. Straight leg raise test continued to be positive. Dr. Mehta recommended right-sided epidural steroid injections from L4 through S1 and continuing physical therapy.

On February 21, 2017, Petitioner rated the pain a 4-8/10. Dr. Mehta continued to recommend right-sided epidural steroid injections from L4 through S1, assessing: "He shows signs and symptoms of lumbar disc bulging with stenosis causing radicular complaints and low back pain complaints." Dr. Mehta also prescribed additional physical therapy. On March 14, 2017, Petitioner followed up with Dr. Mehta, rating the pain a 6/10 and reporting that physical therapy was helping. Dr. Mehta's recommendations remained unchanged. Physical therapy records show Petitioner's last physical therapy session for his right hip and low back conditions was on April 10, 2017, the day before his right knee surgery.

The medical records from Dr. Malik show that on July 20, 2017, Petitioner sought treatment for right-sided low back, buttock and thigh pain since the work accident. Dr. Malik performed a lumbar epidural steroid injection and prescribed physical therapy.

On November 29, 2017, Petitioner reported temporary relief from the injection. Dr. Malik recommended a second lumbar epidural steroid injection. On December 19, 2017, Dr. Malik performed the lumbar epidural steroid injection. There are no further treatment records from Dr. Malik in evidence. Physical therapy records show that Petitioner underwent physical therapy prescribed by Dr. Malik from August 8 through December 18, 2017. Physical therapy was cancelled "due to no benefit from continued PT."

On October 22, 2020, the Arbitrator filed a Decision finding accident, notice and causation, and awarding: temporary total disability benefits from June 22, 2016 through October 25, 2016, and from April 11, 2017 through December 19, 2017; enumerated medical bills and lien pursuant to sections 8(a) and 8.2 of the Act; prospective medical care in the form of "the left knee arthroscopic surgery recommended by Dr. Ronald Silver and continued treatment to Petitioner's right hip and low back as recommended by Dr. Mehta and Dr. Khalid, pursuant to Section 8(a) of the Act. Respondent shall pay for all follow up medical care associated with the left knee surgery for Petitioner to achieve Maximum Medical Improvement ("MMI") status pursuant to Section 8(a) of the Act;" and permanent partial disability benefits "for 200 weeks [*sic*]," representing a 38 percent disability to the person as a whole (loss of trade). We disagree with the Arbitrator's award of prospective medical care and modify the award of permanent partial disability benefits.

As a preliminary matter, the Arbitrator found Petitioner credible. We agree.

Turning to the issue of prospective medical care, there are no recent medical records in evidence to support the Arbitrator's award. The last note from Dr. Silver is dated June 28, 2017. The last note from Dr. Malik is dated December 19, 2017. It is unclear what medical care, if any, Petitioner currently requires due to his work-related injuries. Accordingly, we vacate the award of prospective medical care.

Turning to the issue of permanency, the Commission considers the five factors enumerated in section 8.1b(b) of the Workers' Compensation Act (the Act): "(i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability." 820 ILCS 305/8.1b(b).

Regarding factor (i), the Commission notes no impairment rating has been submitted into evidence. The Commission therefore gives no weight to this factor.

Regarding factors (ii), (iii) and (iv), at the time of the injury on October 27, 2015, Petitioner was a 66-year-old substitute teacher who earned $256.65 per week. Respondent terminated Petitioner's employment in August of 2016 while Petitioner was actively treating and awaiting authorization for knee surgery. Petitioner stopped following up with Dr. Silver in August of 2017, before reaching maximum medical improvement from his right knee surgery. Likewise, Petitioner did not follow up with Dr. Malik after his lumbar epidural steroid injection on December 19, 2017. There are no permanent restrictions in evidence. At the time of the arbitration hearing on August 19, 2020, Petitioner was 71 years old and collected "Social Security and SSI" benefits. The weight of the evidence shows Petitioner left the workforce at the end of his work life. The Commission gives significant weight to these factors and finds that an award for loss of trade is not appropriate.

Regarding factor (v), the medical records corroborate Petitioner's testimony that he sustained a violent fall which caused injuries to both knees, the low back and the right hip. Regarding the right knee, Dr. Silver found: "[The patient's] MRI of his right knee demonstrates damage to the articular cartilage in the patellofemoral compartment as well as some degenerative changes in that area. ¶ My impression is that of damage to the articular cartilage in the patellofemoral compartment as well as an exacerbation and acceleration of pre-existing asymptomatic degenerative changes." Dr. Silver performed a right knee arthroscopic debridement, abrasion arthroplasty, and tricompartmental synovectomy. Regarding the left knee, Dr. Silver found: "[The patient's] MRI of his left knee demonstrates a complex tear of his lateral meniscus as well as damage to the articular cartilage of the patellofemoral articulation as we suspected clinically." Dr. Silver performed an injection into the left knee. The medical records indicate Petitioner obtained satisfactory results from the right knee surgery and the left knee injection. Petitioner stopped following up with Dr. Silver before reaching maximum medical improvement from his right knee surgery. Regarding the low back and right hip, Dr. Mehta noted: "He did have an MRI of the lumbar spine which did show an L4-L5 disc protrusion 3-4 mm in size indenting the thecal sac with some stenosis as well as disc protrusions at the L3-L4 and L5-S1 levels indenting the thecal sac as well. Patient did have an MRI of the right hip which did show some mild bursitis as well as inflammatory changes in the right ischial tuberosity post traumatic in nature, but no tears or fractures are noted." After switching care to Dr. Malik, Petitioner stopped following up before being declared at maximum medical improvement. Petitioner testified the right hip and low back symptoms continued to be chronic despite the injections and physical therapy. At the time of the arbitration hearing, Petitioner mainly complained of pain in the hip and the back, and "[a] little" in the left knee. The Commission gives significant weight to this factor.

The Commission concludes that the injuries sustained caused a 35 percent loss of use of the right leg, a 10 percent loss of use of the left leg, and a 7.5 percent disability to 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 October 22, 2020, is hereby modified as stated herein and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $220.00 per week for a period of 54 1/7 weeks, from June 22, 2016 through October 25, 2016, and from April 11, 2017 through December 19, 2017, those being the periods of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay, pursuant to §§8(a) and 8.2 of the Act, the medical bills and lien itemized by the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that the award of prospective medical care is vacated.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $220.00 per week for a total of 134.25 weeks, itemized as follows: (1) a period of 75.25 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of the right leg to the extent of 35 percent thereof; (2) a further period of 21.5 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused the loss of use of the left leg to the extent of 10 percent thereof; and (3) a further period of 37.5 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the permanent partial disability to the extent of 7.5 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.

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.

February 4, 2022

SJM/sk
o-12/08/2021
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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

BRINSON, SAMUEL Case# **15WC035612**
Employee/Petitioner

PARALLEL EMPLOYMENT GROUP
Employer/Respondent

On 10/22/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

1067 ANKIN LAW OFFICE LLC
JONEL METAJ
10 N DEARBORN ST SUITE 500
CHICAGO, IL 60602

2097 KRAKER & OLSEN
DANIEL SWANSON
300 S RIVERSIDE PLZ SUITE 2050
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Samuel Brinson
Employee/Petitioner

v.

Parallel Employment Group
Employer/Respondent

Case # **15** WC **35612**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **August 19, 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: **Is Petitioner entitled to any prospective medical care?**

FINDINGS

On the date of accident, **October 27, 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 $**13,345.80**; the average weekly wage was $**256.65**.

On the date of accident, Petitioner was **66** 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 $**70,161.20** for other benefits, for a total credit of $**70,161.20**.

Respondent is entitled to a credit of $**70,161.20** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $220.00 per week for 54 & 1/7 weeks, commencing June 22, 2016 through October 25, 2016 and from April 11, 2017 through December 19, 2017, as provided in Section 8(b) of the Act.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $8,733.43 to Elmwood Park Same Day Surgery Center, $2,929.59 to Orthopaedics of the North Shore, $46,184.86 to Athletico Physical Therapy, $6,265.00 to University of Illinois at Chicago, $282.00 to UIC Physician Group, $3,429.00 to Confirmative Management Services, and $1,145.90 for reimbursement of the IDHFS State of Illinois Public Aid Lien, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall authorize and pay for the left knee arthroscopic surgery recommended by Dr. Ronald Silver and continued treatment to Petitioner's right hip and low back as recommended by Dr. Mehta and Dr. Khalid, pursuant to Section 8(a) of the Act. Respondent shall pay for all follow up medical care associated with the left knee surgery for Petitioner to achieve Maximum Medical Improvement ("MMI") status pursuant to Section 8(a) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $220.00 per week for 200 weeks, because the injuries sustained caused the 38% loss of use of the person as a whole, as provided in Section 8(d)2 of the Act.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

Signature of Arbitrator

10/21/2020
Date

OCT 22 2020

STATEMENT OF FACTS:

Petitioner is a 71-year-old man who worked for Respondent as a substitute teacher. (T.10) Petitioner testified that he would receive and accept assignments from Respondent telephonically because he does not own a computer and cannot access the electronic portal. (T.78) Petitioner testified that he received an award for Substitute of the Month for February 2016 for his exemplary performance. (T.53) (*see also* RX8)

Petitioner testified that one of his job requirements was walking kids to the lunchroom for lunch, which involved climbing stairs. (T.64) Petitioner testified that on October 27, 2015, he was escorting a first-grade class down to the lunchroom at the Learn School. (T.11) As he was walking with them down the stairs, he was distracted by a couple of students who were making noise. (T.11-12) As he turned back from the students making noise, Petitioner fell down the stairs onto the concrete floor. (T.12-13) Petitioner testified that he hit his right knee first as he went down, which caused him pain in the hip and in the back. (T.13) Petitioner then hit his left knee and flipped back on his right side and laid down. *Id.* Petitioner testified that he was helped up by some of the students. *Id.* He then proceeded to take the students to the lunchroom and walked back upstairs to the classroom to sit down. (T.14) Petitioner testified that he went back to the lunchroom after lunch and picked up his students and returned to the classroom. (T.15) Petitioner explained that this was when his pain worsened, and he asked two students to go down and report what happened and get him some ice. *Id.* Petitioner testified that a school social worker then came to him and asked what happened and had Petitioner complete an incident report. (T.16) Petitioner claimed he was not provided a copy of the incident report. *Id.* According to Petitioner, the school indicated it would report the accident to Respondent. (T.16-17) Petitioner testified that he left the school that day and called Respondent's Oak Park/Chicago Office the next day to report the accident. *Id.* He testified that he could not recall with whom he spoke with that day. (T.17) Petitioner testified that Respondent never sent him a report regarding the accident. *Id.*

On November 11, 2015, Petitioner sought treatment from Dr. Ronald Silver. (PX3) Petitioner gave a history of "walking down stairs in the school with children going to the lunchroom, he turned around to speak with a student and fell crashing down the stairs landing upon the anterior aspects of his knees and then flipped to the side injuring his right shoulder, head, neck and right ankle." *Id.* On examination, Dr. Silver noted that both Petitioner's knees were equally painful with swelling and clicking. *Id.* Dr. Silver recommended physical therapy, pain medication and ordered MRI scans of the knees. *Id.* Dr. Silver placed Petitioner on sedentary work duties of occasional walking and standing. *Id.*

On November 27, 2015, Petitioner attended Athletico for his physical therapy initial evaluation. (PX4) Petitioner gave a history of walking his school kids down the stairs when he turned and fell down about four stairs. *Id.* On December 21, 2015, Petitioner complained to his therapist of right hip and right leg pain. *Id.* Petitioner continued to complain to his therapist of hip pain regularly from December 21, 2015 throughout the end of his treatment with Athletico in July of 2017. *Id.*

On January 15, 2016, Petitioner returned to Dr. Silver for follow up. (PX3) Dr. Silver noted that Petitioner continued to do poorly with "palpable and audible crepitation in both knees." *Id.* Dr. Silver again ordered MRIs of the knees and continued Petitioner's sedentary restrictions. *Id.*

Petitioner underwent the MRI of his knees on February 29, 2016. (PX2) MRI of the right knee revealed degenerative changes of the knee most pronounced in the patellofemoral joint space where there was full-thickness cartilage loss and irregularity with associated subchondral degenerative type changes, small joint effusion and small Baker's cyst. *Id.* MRI of the left knee revealed small focal mildly complex lateral meniscal tear, severe chondromalacia involving the inferolateral aspect of the femoral trochlea, subchondral degenerative signal changes, nonspecific edema within the superolateral aspect of Hoffa's fat pad raising suspicion for lateral femoral condyle-patellar tendon friction syndrome, small to moderate joint effusion and trace Baker's cyst. *Id.*

Dr. Silver who reviewed the MRI of the left knee on March 2, 2016 and noted a complex tear of the lateral meniscus as well as damage to the articular cartilage of the patellofemoral articulation. (PX3) Dr. Silver recommended arthroscopic surgery to repair the damage. *Id.* On March 4, 2016, Dr. Silver reviewed the MRI of the right knee and noted damage to the articular cartilage in the patellofemoral compartment of the right knee as well as exacerbation and acceleration of pre-existing asymptomatic degenerative changes as well as possible tearing of the lateral meniscus. *Id.* Dr. Silver recommended arthroscopic surgery of the right knee to be completed after Petitioner healed from the previously recommended left knee arthroscopy. *Id.*

On April 25, 2016, Petitioner underwent an Independent Medical Evaluation ("IME") by Dr. Brian Cole at Midwest Orthopedics at Rush at Respondent's request. (RX1) Petitioner provided a history of falling on stairs while working as a substitute teacher. *Id.* Under the "Medical Record Review" portion of his report, Dr. Cole indicated in items 9 and 10 that he reviewed, "the claimant's first report of injury… The date of report December 9, 2015 alleging report on October 27, 2015. Employee alleges he fell down stairs." *Id.* Dr. Cole also noted that the reported mechanism of injury correlated with the objective findings and Petitioner's subjective complaints. *Id.* Dr. Cole related the need for further treatment to the work injury. *Id.* However, Dr. Cole believed Petitioner should try conservative treatment, including cortisone injections into both knees, prior to considering surgical intervention. *Id.*

On June 22, 2016, Dr. Silver performed a cortisone injection in Petitioner's right knee. (PX3) Dr. Silver took Petitioner off work following this procedure. *Id.* On August 3, 2016, Petitioner returned to Dr. Silver for follow up and Dr. Silver noted that the cortisone injection provided temporary relief to the right knee. *Id.* On exam, the right knee showed patellofemoral crepitation, mild effusion, medical joint line tenderness and positive McMurray test. *Id.* Furthermore, Dr. Silver noted limited range of motion with full flexion due to pain. *Id.* Dr. Silver kept Petitioner off work. *Id.*

On August 17, 2016, Dr. Silver performed a left knee cortisone injection and noted that the left knee exam demonstrated lateral joint line tenderness, positive McMurray test and mild effusion. *Id.* On September 7, 2016, Petitioner returned to Dr. Silver for follow up and reported good pain relief from the cortisone injection in the left knee, but the right knee continued to do poorly. *Id.* Dr. Silver noted that he was waiting for approval for the right knee arthroscopy. *Id.*

On September 21, 2016, Petitioner went to Elmwood Park Same Day Surgery Center for an initial evaluation of his right hip and back pain on a referral from Dr. Silver. (PX2) Petitioner was seen

by Dr. Kiran Chekka and provided a consistent history of a fall on stairs while working as a substitute teacher. *Id.* Dr. Chekka noted that since the injury in October of 2015, Petitioner had treated with physical therapy for the knees and some therapy was added for his hip pain. *Id.* Dr. Chekka evaluated Petitioner and diagnosed him as having right trochanteric bursitis in the right hip, right sacroiliac joint dysfunction and myofascial low back pain. *Id.* Dr. Chekka recommended that Petitioner continue with physical therapy, try a topical compounding agent for the soft tissue pain and recommended an MRI of the hip. *Id.*

While Petitioner first got a formal referral for his hip and back pain in September of 2016, Dr. Silver wrote in his June 2017 note that Petitioner was referred to Dr. Ahmit Mehta for his hip and back pain from the onset of the injury. (PX3) Petitioner's physical therapy records indicate consistent treatment for his hip. (PX4) On December 21, 2015, Petitioner complained of right hip and right leg pain. *Id.* On January 27, 2016 and January 28, 2016, Petitioner complained of soreness in his right lateral hip. *Id.* By way of reference, Petitioner had complaints of pain and received therapy for his right hip on the following dates at Athletico:

> 12/21/15, 1/27/16, 1/28/16, 2/1/2016, 2/8/2016, 2/10/2016, 2/15/2016, 2/17/2016, 3/01/2016, 3/16/2016, 3/17/2016, 3/23/2016, 3/24/2016, 3/28/2016, 3/30/2016, 4/7/2016, 4/11/2016, 4/13/2016, 4/14/2016, 4/20/2016, 5/20/2016, 5/27/2016, 5/31/2016, 6/1/2016, 6/2/2016, 6/6/2016, 6/16/2016, 6/20/2016, 6/21/2016, 6/22/2016, 6/27/2016, 7/5/2016, 7/12/2016, 7/15/2016, 7/20/2016, 7/22/2016, 7/25/2016, 8/18/2016, 8/29/2016, 8/31/2016, 9/1/2016, 9/15/2016, 9/16/2016 and 9/23/2016. *Id.*

On October 25, 2016, Petitioner saw Dr. Mehta from Elmwood Park Same Day Surgery Center who performed a right trochanteric bursa hip injection. (PX2) On October 26, 2016, Petitioner returned to Dr. Silver for his bilateral knee pain. (PX3) Dr. Silver noted that all conservative treatment, including therapy, injections and medications, had failed. *Id.* He again requested authorization for arthroscopic surgery of the right knee. *Id.* Dr. Silver placed Petitioner on full duty work pending authorization of the right knee surgery. *Id.*

On November 15, 2016, Petitioner returned to Dr. Mehta who noted 80-90% relief of pain from the hip injection. (PX2) Dr. Mehta recommended continued therapy and a repeat injection of the hip, if necessary. *Id.* On December 20, 2016, Petitioner returned to Dr. Mehta complaining of back and hip pain. *Id.* Dr. Mehta noted increased pain with flexion of the lumbar spine, positive straight leg raise test on the right with radiating pain into his right hip. *Id.* He also noted tenderness in the right trochanteric bursa with tenderness in the right SI joint with a positive FABER test. *Id.* Dr. Mehta recommended an MRI of the lumbar spine and to follow up for the results. *Id.*

On January 3, 2017, Respondent obtained an addendum IME report from Dr. Cole. (RX2) For this addendum, Dr. Cole did not perform an exam of the Petitioner; instead reviewing updated medical records. *Id.* Dr. Cole stated that Petitioner's right knee continued to generate complaints through September, October and November and appeared to have arrived at a need for arthroscopic surgery with Dr. Silver. *Id.* Dr. Cole believed that the right knee warranted arthroscopic debridement and meniscectomy, but not the left knee. *Id.* Dr. Cole related the need for the right knee surgery to Petitioner's work injury. *Id.*

On January 4, 2017, Petitioner underwent an MRI of the lumbar spine and an MRI of the right hip. (PX2) The MRI of the lumbar spine revealed a 3-4 mm broad-based posterior disc herniation which indented the thecal sac at L4-L5 with some stenosis and bilateral significant neuroforaminal narrowing,

exacerbated by some ligamentum flavum hypertrophy and mild facet arthrosis and 2-3 mm posterior disc bulges/protrusions at L3-L4 and L5-S1 which also indented on the thecal sac with mild bilateral neuroforaminal narrowing, exacerbated by facet arthrosis and ligamentum flava hypertrophy. *Id.* The MRI of the right hip revealed evidence of mild trochanteric bursitis and inflammatory changes at the origin of the semitendinosus and biceps femoris tendon groups at the right ischial tuberosity, probably posttraumatic in nature with subsequent tendonitis/bursitis. *Id.*

On January 10, 2017, Petitioner followed up with Dr. Mehta to review the findings of the MRIs. *Id.* Dr. Mehta noted that the lumbar MRI revealed disc protrusions at L3-L4, L4-5 and L5-S1. *Id.* Dr. Mehta recommended lumbar injections for Petitioner's pain. *Id.* On February 21, 2017, Petitioner returned to Dr. Mehta, who noted that the lumbar injection had not been approved and therefore was not performed. *Id.* Dr. Mehta continued to recommend the injections based on the results of the MRI. *Id.*

On April 11, 2017, Dr. Silver performed arthroscopic debridement, abrasion arthroplasty and tricompartmental synovectomy of Petitioner's right knee. (PX3) The surgery was authorized and paid for by the Respondent. (PX1) Dr. Silver kept Petitioner off work post-operatively as he continued therapy at Athletico.(PX3 & PX4) On June 28, 2017, Dr. Silver noted slow improvement with the right knee following the surgery. (PX3) Dr. Silver discharged Petitioner with permanent restrictions of no squatting, kneeling, crawling or stair climbing. *Id.* Dr. Silver noted in the postscript that he referred Petitioner "to Dr. Mehta for his spine and hip injuries at the same time of his work injury of 10/27/2015." *Id.*

Petitioner testified that treatment for his back and hip was never authorized by the workers' compensation insurance company. (T.25) He testified that he had no choice but to seek treatment with his Medicaid/Medicare insurance at UIC with Dr. Malik Khalid. (T.25-26) On June 1, 2017, Petitioner saw Dr. Khalid and complained of right sided lower back pain and lateral thigh and buttock pain that stemmed from a work-related fall in 2015. (PX5) Dr. Khalid scheduled the Petitioner for a lumbar epidural steroid injection which was done on July 7, 2017. *Id.* Dr. Khalid recommended physical therapy and a repeat injection. *Id.* Petitioner underwent physical therapy for his back and hip at UIC from August 10, 2017 through December 21, 2017. (PX6) Petitioner returned to Dr. Khalid on December 19, 2017 and underwent a second lumbar epidural injection. (PX5)

Petitioner testified that he never underwent the left knee surgery recommended by Dr. Silver but would get it immediately if authorized. (T.26) Petitioner explained that he continues to have pain and loses his balance when walking on his left knee. (T.26-27) He testified that his hip and back are still symptomatic, and he pays $350 for pain cream. (T.27) When questioned about his time off, Petitioner testified that he never received any checks from the workers' compensation carrier. (T.27-28) Additionally, Petitioner testified that there are still outstanding medical bills related to treatment for injuries sustained during the accident that have not been paid by the workers' comp insurance carrier. (T.28) Petitioner testified that he is currently not working and is receiving Social Security Disability and supplemental income. (T.28)

Petitioner testified that after Labor Day in 2016, he reached out to Respondent, specifically Cynthia and Hannah, about returning to work. (T.36-37) Petitioner testified that he notified them that his doctor was going to release him to light duty. (T.37) The medical records indicate that Petitioner was kept off work by Dr. Silver from June 22, 2016 through October 25, 2016. (PX3) Petitioner testified that he did not receive any assignment to return to work and his last assignment for Respondent was June 29, 2016. (T.38)

Respondent introduced into evidence an email dated July 7, 2016 regarding summer orientation. (RX4) Petitioner testified that he never received this email. (T.41) Furthermore, at the time Petitioner was sent the email, Petitioner had been kept off work by Dr. Silver. (PX3) Petitioner testified that he reached out to Respondent on numerous occasions in 2016 as he was willing and able to work but he was stalled and never given an assignment. (T.31-32)

Meghan Duffey, Respondent's Safety Specialist for the last two years, testified for Respondent. (T.81-82) Ms. Duffey explained that when an injury occurs, employees are to report the injury to Respondent and the school administration immediately. (T.87-88) Ms. Duffey testified that an injury report regarding the October 27, 2015 accident was completed by Valerie Christian on December 9, 2015. (T.83-84) Ms. Duffey explained that the report was made following notice received by Respondent's workers' compensation insurance carrier of the accident. (T.84) Ms. Duffey testified that Respondent sent Petitioner an email regarding mandatory training. (T.85-86) The email indicates that Petitioner must schedule his training by Friday, July 29, 2016. (RX4) Ms. Duffy further testified that she does not have any information as to whether employees on medical leave have to attend mandatory training and admitted that Respondent does not have a policy that requires employees on medical leave to complete the mandatory training. (T.103-104) Ms. Duffy testified that Petitioner was terminated on August 3, 2016 for failing to attend the mandatory training. (T.94-95)

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:

In order to obtain compensation under the Act, a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. Both elements must be present at the time of the claimant's injury in order to justify compensation. *IL Bell Telephone Co. v. Indust. Comm'n.*, 131 Ill.2d 478, 483 (1989). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his duties, and while a claimant is at work, are generally deemed to have been received "in the course" of the employment. *Caterpillar Tractor Co. v. Indust. Comm'n.,* 129 Ill.2d 52, 57 (1989). The "arising out of" component refers to the origin of case of the claimant's injury and requires that the risk be connected with, or incidental to, the employment so as to create connection between the employment and the accidental injury. *Id.* at 58.

Here, the Arbitrator finds that both elements have been met. Petitioner testified that on October 27, 2015, he was working as a substitute teacher for the Respondent. Petitioner credibly testified that on that date, he was taking a first-grade class down the stairs of the school to the lunchroom when he became distracted by a few of the students and fell down the stairs. Petitioner testified that he reported the injury to the school social worker that same day and called Respondent within 24 hours to report the accident. The Arbitrator notes that the medical records show that Petitioner consistently reported the October 27, 2015 accident and sought treatment following the accident. Also, the record shows that Petitioner had been working without restrictions prior to the October 27, 2015 accident and following the October 27, 2015 accident, he was placed on sedentary restrictions.

Accordingly, since the injury occurred while the Petitioner as working his scheduled shift on the Respondent's premises, and since the injuries were sustained from a risk incidental to his employment, the Arbitrator finds Petitioner's injuries arose out of and in the course of his employment with the Respondent on October 27, 2015.

WITH RESPECT TO ISSUE (D), WHAT WAS THE DATE OF THE ACCIDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner's credible testimony and the medical records all indicate that Petitioner was injured in a work accident on October 27, 2015. Accordingly, the Arbitrator finds that the accident occurred on October 27, 2015.

WITH RESPECT TO ISSUE (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds Petitioner's testimony that he reported the accident to a social worker at the school on October 27, 2015 and the following day, by telephone, to Respondent credible and persuasive. The Arbitrator is not persuaded by Ms. Duffy's testimony that Respondent first became aware of the accident on December 9, 2015. The Arbitrator notes that Respondent provided its employment message logs as RX10. However, in reviewing those logs, the Arbitrator notes that while Petitioner's call to Respondent on October 28, 2015 is not in the log, neither is the fact that Respondent was notified of the accident on December 9, 2015, despite the fact that the logs are supposed to list all information regarding Petitioner and anything that happened regarding Petitioner. *Id.* In fact, the Arbitrator notes that Ms. Duffey testified that the employee message log documents all communications via email, phone call, internal communications, etc., regarding Petitioner. (T.91-92) Therefore, the Arbitrator is not persuaded by Respondent's employment message logs as alleged proof of Petitioner's failure to report the accident in a timely manner.

Accordingly, the Arbitrator finds that timely notice of the October 27, 2015 work accident was provided to Respondent. However, assuming *arguendo* that the first report of the injury to the Respondent was on December 9, 2015, this is 44 days after the accident. Per the Act, "notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c). Therefore, either way, Petitioner has established that he provided timely notice of the accident to Respondent.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

A causal connection between work duties and a condition of ill-being may be established by a chain of events including Petitioner's ability to perform the duties before the date of the accident, and inability to perform the same duties following that date. *Pulliam Masonry v. Industrial Comm'n.*, 77 Ill.2d 469, 471 (1979). Proof of prior good health and change immediately following and continuing after an injury may establish that an impaired condition was due to an injury. *Land and Lakes Co. v. Indust. Comm'n.*, 359 Ill.App.3d, 593 (2d Dist. 2005).

Petitioner testified that on October 27, 2015 he injured his knees, right hip and low back in a fall down the stairs. Petitioner was working without any physical restrictions prior to October 27, 2015 and was placed on sedentary work restrictions by Dr. Silver immediately after the injury. Following the accident, Petitioner had consistent complaints of pain in his knees, right hip and low back. While he continued to work for Respondent, he was doing so with sedentary work restrictions.

Dr. Silver and Dr. Cole agreed that the work accident caused Petitioner's symptoms in his knees. Dr. Silver recommended arthroscopic surgery of the right knee, and Dr. Cole agreed with this recommendation. Petitioner underwent the surgery on April 11, 2017 and was discharged from care on June 28, 2017 with permanent restrictions. Dr. Silver also recommended arthroscopic surgery for the left knee, but Dr. Cole did not agree with the recommendation. The Arbitrator is not persuaded by the opinions of Dr. Cole as it relates to the left knee and finds the opinions of Dr. Silver to be more persuasive. The Arbitrator notes that Dr. Cole did not

re-examine Petitioner following the April 2016 IME, instead reviewing updated medical records. Further, while an injection to the left knee helped, Petitioner has remained symptomatic in the left knee. Furthermore, the MRI of the left knee revealed a complex tear of the lateral meniscus. As such, the Arbitrator gives more weight to the findings and opinions of Dr. Silver and finds that Petitioner's bilateral knee conditions are causally related to the October 27, 2015 work accident.

Regarding Petitioner's right hip and low back, the Arbitrator notes that the medical records show that Petitioner was actively treating at Athletico from December 21, 2015 through July of 2017. Dr. Silver wrote in his June 28, 2017, note that Petitioner was referred to Dr. Mehta for his hip and back pain from the onset of the injury. Further, on September 21, 2016, Petitioner was seen by Dr. Chekka and provided a consistent history of injuring his back and hip in a fall at work on October 27, 2015. Dr. Chekka noted that since the injury, Petitioner had treated with physical therapy for his hip pain. Dr. Chekka diagnosed Petitioner with right trochanteric bursitis in the right hip, right sacroiliac joint dysfunction and myofascial low back pain. On October 25, 2016, Dr. Mehta performed a right trochanteric bursa hip injection due to Petitioner's ongoing pain complaints. On January 4, 2017, Petitioner underwent an MRI of the lumbar spine which revealed a 3-4 mm protrusion at the L4-5, and smaller protrusions at L3-4 and L5-S1. Dr. Mehta recommended lumbar injections for Petitioner's pain.

On June 1, 2017, Petitioner saw Dr. Khalid and complained of right sided lower back pain and lateral thigh and buttock pain that stemmed from a work-related fall in 2015. Dr. Khalid immediately scheduled the Petitioner for a lumbar epidural steroid injection, which Petitioner underwent on July 7, 2017. Dr. Khalid recommended physical therapy and a repeat injection. Petitioner underwent physical therapy for his back and hip at UIC from August 10, 2017 through December 21, 2017. Petitioner returned to Dr. Khalid on December 19, 2017 and underwent a second lumbar epidural injection.

The Arbitrator notes that Respondent did not introduce any evidence to dispute that Petitioner's right hip and low back injuries are related to his work incident. As it stands, all the doctors in this case relate Petitioner's injuries to his work accident. Accordingly, the Arbitrator finds that the Petitioner's current conditions of ill-being regarding the right hip and low back are causally related to the October 27, 2015 work accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

Due to his work-related injuries, Petitioner has required treatment in the form of doctor's visits, injections, diagnostic testing, medication and physical therapy. The Arbitrator notes that Dr. Cole agreed with the need for additional conservative treatment for the knees and, ultimately, right knee arthroscopic surgery, but not left knee surgery. As stated above, the Arbitrator finds the findings and opinions of Dr. Silver more persuasive regarding Petitioner's bilateral knee issues and treatment. Accordingly, the Arbitrator finds that all the treatment Petitioner has undergone for his bilateral knee injuries has been reasonable and necessary and Respondent is liable for payment per the medical fee schedule.

Regarding the right hip and low back, the Arbitrator notes that Dr. Silver indicated in a postscript to his note from June 28, 2017 that he referred Petitioner to Dr. Mehta for his spine and hip injuries at the time of his work injury. In addition, Petitioner had consistent complaints of pain in the right hip noted in his physical therapy records from December 21, 2015 through September 23, 2016. He was first seen by Dr. Chekka on September 21, 2016 and continued to treat with pain management through December 19,

2017. As such, the Arbitrator finds that there is a temporal connection between the accident and the onset of right hip and back pain. The Arbitrator notes that Respondent did not offer any medical opinions into evidence to dispute causation for the right hip and back injuries. Accordingly, the Arbitrator finds that Petitioner's treatment regarding his right hip and low back has been reasonable and necessary and Respondent is liable for payment per the medical fee schedule.

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:

As stated above, the Arbitrator finds that Petitioner's conditions of ill-being are causally related to the October 27, 2015 accident. Petitioner was initially placed on restricted work by Dr. Silver on November 11, 2015 and he continued to work within these restrictions. On June 22, 2016, Petitioner began a course of injections to his knees with Dr. Silver and was taken off work. Petitioner remained off work through October 25, 2016 while he completed the injections. Dr. Silver returned Petitioner to full duty work on October 25, 2016 and he remained at full duty until his right knee surgery on April 11, 2017, when Dr. Silver again took Petitioner off work. Dr. Silver returned Petitioner to sedentary work on April 19, 2017. On June 28, 2017, Dr. Silver placed Petitioner on permanent restrictions of no squatting, kneeling, crawling, or stair climbing. Ms. Duffey testified that Petitioner was terminated on August 3, 2016.

The Supreme Court of Illinois ruled in *Interstate Scaffolding v. Illinois Workers' Compensation Commission*, 236 Ill. 2d 132, 923 N.E.2d 266 (2010), that claimants should be paid temporary total disability ("TTD") benefits if they have yet to reach MMI. The court stated:

> "Looking to the Act, we find that no reasonable construction of its provisions supports a finding that TTD benefits may be denied to an employee who remains injured, yet has been discharged by his employer for 'volitional conduct' unrelated to his injury. A thorough examination of the Act reveals that it contains no provision for the denial, suspension or termination of TTD benefits as a result of an employee's discharge by his employer. Nor does the Act condition TTD benefits on whether there has been "cause" for the employee's dismissal. Such an inquiry is foreign to the Illinois Workers' Compensation system."

Interstate Scaffolding, 236 Ill. 2d 132, at 146.

Respondent never paid Petitioner TTD benefits and terminated Petitioner on August 3, 2016. The Arbitrator finds that the medical evidence shows that Petitioner's condition had not stabilized at the time of his termination in August of 2016. The Arbitrator further notes that Petitioner had been taken off work during that time period. Accordingly, the Arbitrator finds that Petitioner is entitled to TTD benefits for 54 and 1/7 weeks from June 22, 2016 through October 25, 2016 and again from April 11, 2017 through December 19, 2017.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

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

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but

are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.

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

(i) the reported level of impairment pursuant to subsection (a);
(ii) the occupation of the injured employee;
(iii) the age of the employee at the time of the injury;
(iv) the employee's future earning capacity; and
(v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order.

With regard to subsection (i) of Section 8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator gives this factor no weight.

With regard to subsection (ii) of Section 8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a substitute teacher at the time of the accident and that he was not able to return to work in his prior capacity as a result of said injury and the permanent restrictions imposed as a result, as well as the termination of Petitioner's employment by Respondent. The Arbitrator gives this factor some weight.

With regard to subsection (iii) of Section 8.1b(b), the Arbitrator notes that Petitioner was 66 years old at the time of the accident. The Arbitrator gives this factor some weight.

With regard to subsection (iv) of Section 8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that following his termination, Petitioner began receiving Social Security Disability benefits. Petitioner testified that he received $570 and $195 monthly. This amount is comparable to what he was earning for Respondent, however, Petitioner would have chosen to continue working for Respondent were he not fired while in treatment. The Arbitrator gives this factor substantial weight.

With regard to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner's medical records document a consistent course of medical care and consistent complaints from Petitioner regarding his conditions of ill-being. Petitioner complained of pain in his knees, right hip and low back. MRI of Petitioner's left knee revealed a complex tear of the lateral meniscus. MRI of Petitioner's right knee revealed full thickness cartilage loss and probable tearing of the lateral meniscus. Petitioner underwent physical therapy and cortisone injections to both knees and arthroscopic surgery in the right knee. Petitioner's treater recommended surgery for both knees. Petitioner was discharged with permanent restrictions regarding his right knee of no squatting, kneeling crawling or climbing stairs. MRI of Petitioner's right hip revealed evidence of mild trochanteric bursitis. He had one injection in the right hip and continues to be symptomatic. MRI of Petitioner's lumbar spine revealed multilevel bulges with radiating pain. Petitioner completed two cortisone injections to the lumbar spine and remains symptomatic. Petitioner's credible testimony and medical records establish Petitioner's permanent disability due to the October 27, 2015 work accident. The Arbitrator therefore gives this factor great 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 38% loss of use of the person as a whole, pursuant to Section 8(d)2 of the Act.

WITH RESPECT TO ISSUE (O), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Petitioner sustained work related injuries on October 27, 2015 to his right knee, left knee, right hip and low back. Dr. Silver and Dr. Cole both agree that Petitioner sustained injuries to his knees in the October 27, 2015 accident. Respondent authorized the arthroscopic surgery for the right knee, but not the left knee.

The Arbitrator notes that the left knee MRI revealed a complex tear of the lateral meniscus. Dr. Silver placed Petitioner in physical therapy for conservative care. Dr. Cole also recommend physical therapy, as well as a cortisone injection to the left knee which was performed on August 17, 2016. At the time of his IME addendum, Dr. Cole had not seen the Petitioner since April 25, 2016. Dr. Cole did not examine Petitioner on January 3, 2017. Dr. Cole reviewed updated medical records and noted that Petitioner responded well to the injection. The subsequent medical records show, however, that Petitioner continued to complain of pain in the left knee. On January 11, 2017, Dr. Silver continued to recommend arthroscopic surgery of both knees. As of the date of trial, Petitioner testified that the left knee continues to give him problems and he loses his balance when walking. Dr. Cole stated in his addendum report that "it appears the left knee responded well to the injection" but did not place Petitioner at MMI regarding the left knee. The Arbitrator notes that Dr. Cole is not aware of Petitioner's current complaints and the fact remains that Petitioner still has a torn meniscus in the left knee. As such, the Arbitrator finds the findings and opinions of Petitioner's treating physician Dr. Silver more reliable and persuasive than those of Dr. Cole regarding Petitioner's need for left knee surgery.

As to Petitioner's right hip and low back conditions, the Arbitrator notes that Dr. Chekka, Dr. Mehta and Dr. Khalid all relate these conditions to the work accident. Petitioner made consistent complaints of pain in the hip during physical therapy beginning in December of 2015. Petitioner last saw Dr. Mehta on March 14, 2017, and at that visit, Dr. Mehta recommended epidural steroid injections in the low back. Petitioner underwent the injections with Dr. Khalid. At trial, Petitioner complained of continued pain in his hip and low back and testified that he is using pain creams to manage the pain. The Arbitrator notes that there is no medical opinion to dispute that these injuries and ongoing conditions are related to the work accident.

Accordingly, the Arbitrator finds that Petitioner is entitled to prospective medical care in the form of a left knee arthroscopy as recommended by Dr. Silver, and any post-operative care required until Dr. Silver finds that Petitioner has reached MMI regarding his left knee. The Arbitrator further finds that Petitioner is entitled to prospective medical care in the form of continued medical care for the right hip and low back as recommended by Dr. Mehta and Dr. Khalid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC026718
Case Name	SWINFORD, JASON v. ILLINOIS DEPT OF CORRECTIONS
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0047
Number of Pages of Decision	10
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Nick Schiro
Respondent Attorney	Christina Smith

DATE FILED: 2/4/2022

/s/ Kathryn Doerries, Commissioner

Signature

22IWCC0047

STATE OF ILLINOIS)	☐ Affirm and adopt (no changes)
) SS.	☐ Affirm with changes
COUNTY OF)	☐ Reverse Choose reason
SANGAMON	☒ Modify down

☐ 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

JASON SWINFORD,

Petitioner,

vs. NO: 17 WC 026718

ILLINOIS DEPARTMENT OF CORRECTIONS,

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 permanent disability and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Permanent Disability

The Commission affirms and adopts the Arbitrator's Decision except views the evidence differently with respect to Section 8.1b(b) factors (ii), (iii), and (v). According to Section 8.1b(b) of the Act, for injuries that occur after September 1, 2011, in determining the level of permanent partial disability, the Commission shall base its determination on the following factors:

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

The Commission agrees that no single enumerated factor shall be the sole determinant of

disability and the relevance and the weightof any factors used in addition to the level of impairment as reported by the physician must be explained.

In considering the degree to which Petitioner is permanently partially disabled as a result of the work-related accident, the Commission weighs the five factors in Section 8.1b(b) of the Act as follows:

(i) The reported level of impairment pursuant to AMA guidelines

No AMA impairment rating was submitted by either party, so this factor is given no weight.

(ii) The occupation of the injured employee

Petitioner was employed as correctional officer and he returned to work in his prior capacity and then reassigned to a sedentary position. Petitioner did not have any difficulty performing his job duties. Thus, this factor is assigned some weight.

(iii) The age of the employee at the time of the injury

Petitioner was 45 years old at the time of the accident and although he has approximately 20 years of work life remaining until retirement, the Petitioner recovered within one month of his injury with limited objective residual effects and no medical treatment after four weeks. This factor is assigned little weight.

(iv) The employee's future earning capacity

There is no evidence of reduced future earning capacity in the record; thus, this factor is assigned no weight.

(v) Evidence of disability corroborated by the treating medical records

The Arbitrator documents that the medical records of Dr. DeSalvio confirm a diagnosis of what he thought appeared to be a left leg, partial gastrocnemius muscle tear; however, as of the last doctor visit, four weeks after the injury, the left calf injury had clinically resolved. The Commission notes that there were no diagnostics to confirm Dr. DeSalvio's partial tear diagnosis, Petitioner's symptoms had, in fact, improved significantly within seven days according to DeSalvio's August 30, 2021, office note, Petitioner underwent no physical therapy and had no lost time. The Petitioner testified he continues to experience pain and tenderness in the left calf which increases with activity, however, this is not corroborated in the medical records. This factor is assigned little weight.

Based on the foregoing factors, the Commission reduces the permanency award to 2% loss of use of the left leg.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision

filed on April 30, 2021, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $790.64 per week for a period of 4.3 weeks, as provided in §8(e) of the Act, for the reason that the injuries sustained caused 2% loss of use of the left leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall hold Petitioner harmless from any claims by group insurance for reimbursement for reasonable and related medical expenses.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner compensation that has accrued from September 27, 2017, through March 16, 2021, and shall pay the remainder of the award, if any, in weekly payments.

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

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

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1)*.

February 4, 2022
KAD/bsd
O120721
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC026718
Case Name	SWINFORD,JASON v. ILLINOIS DEPT OF CORRECTIONS
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Edward Lee, Arbitrator

Petitioner Attorney	Nick Schiro
Respondent Attorney	Christina Smith, State of Illinois Attorney General, Office of the attorney general

DATE FILED: 4/30/2021

INTEREST RATE FOR THE WEEK OF APRIL 27, 2021 0.03%

/s/ *Edward Lee, Arbitrator*
Signature

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

April 30, 2021

/s/ *Brendon O'Rourke*
Brendan O'Rourke, Assistant Secretary
Illinois Workers' Compensation Commission

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
NATURE AND EXTENT ONLY

Jason Swinford
Employee/Petitioner

v.

Illinois Department of Corrections
Employer/Respondent

Case # **17** WC **26718**

Consolidated cases: _____

The only disputed issue is the nature and extent of the injury. An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Lee**, Arbitrator of the Commission, in the city of **Springfield, Illinois**, on **3/16/2021**. By stipulation, the parties agree:

On the date of accident, **8/23/17**, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $**64,000.04**, and the average weekly wage was $**1,340.00**.

At the time of injury, Petitioner was **45** years of age, ***single*** with **1** dependent children.

Necessary medical services and temporary compensation benefits have not been provided by Respondent.

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**.

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

ORDER

Respondent shall hold petitioner harmless from any claims by group insurance for reimbursement for reasonable and related medical expenses.

Respondent shall pay Petitioner the sum of $**790.64**/week for a further period of **8.6** weeks, as provided in Section **8(e)** of the Act, because the injuries sustained caused **4% loss of use of left leg**.

Respondent shall pay Petitioner compensation that has accrued from **9/27/17** through **3/16/21**, and shall pay the remainder of the award, if any, in weekly payments.

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

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

_Edward Lee
Signature of Arbitrator

APRIL 30, 2021

FINDINGS OF FACT

Testimony of Petitioner, Jason Swinford

Petitioner was hired in November of 2000 as a correctional officer. On August 23, 2017, Petitioner was entering a transfer bus and as he was stepping up onto the bus he felt excruciating pain in his left lower calf area and lower leg (T. 10-11).

Petitioner was thereafter treated at the Carle Clinic. He treated from the date of the accident to September 27, 2017. He missed 3 days of work and returned to light duty for a short period and eventually resumed full duty. No surgery was necessary (T. 11-12).

Petitioner's medical bills, admitted into evidence as Petitioner's Exhibits 2 and 3, were paid by his group insurance. He is requesting a hold harmless from Respondent for these related charges (T. 12).

Petitioner has not injured his left lower extremity or calf prior or subsequent to his accident herein (T. 12-13).

Since his injury Petitioner has continued to experience discomfort usually on busy days. This is especially true while on stairs. The discomfort is located specifically at the top portion of his calf. He is off all prescription medication for his injury. He will take an occasional Tylenol when pain increases or about once a month. He doesn't ride a bike as often because after a short period of time he starts noticing irritation or discomfort. He never had these symptoms before his accident (T. 13-14 and 16).

Since his accident Petitioner has been able to return to work but not at the same job. He believed the Respondent did not want to "put me out there anymore" which he believed was due to his injury. Instead, he was put in the school building where he sat in a desk where he was off his feet. He performed that job for about 9 months and was promoted to his current position, lead worker for Illinois Correction Industries. He earns more money. The injury has not affected Petitioner's pay (T. 14-15).

On cross-examination, Petitioner admitted he had no physical therapy for his injury other than propping it up and applying ice. He has not had to ask for accommodations for his job duties after returning to work. Petitioner does not feel the injury has prevented him from advancing in his job (T. 17-18).

Documentary Evidence

Petitioner first sought treatment at the occupational medicine department of Carle. Records show that on August 23, 2017 Petitioner was complaining of lower left leg pain after stepping onto a bus. He complained of exquisite pain in the mid portion of the tibial area without any direct trauma. He had exquisite tenderness with ankle plantar flexion and extension. He rated his pain at 10 with certain movements. A physical exam revealed areas of significant tenderness at about the midshaft of the tibia. The diagnosis was lower left leg strain. He was instructed to ice and elevate, take Ibuprofen and return to work light duty (PX 1, pgs. 6-7).

In follow-up on August 30, 2017 Dr. Desalvio believed Petitioner suffered a partial tear of the left gastroc muscle at the myotendinous junction. Petitioner's symptoms had improved significantly but not completely. He still had tenderness with palpation and stretching of the left calf muscle at the area where the muscular bodies turn into the tendon. Exquisite tenderness had resolved but he continued to have some palpatory tenderness at the application. While standing there was no significant swelling on either side. There was tenderness at the musculotendinous junction of the gastroc muscle on the left side. Petitioner was able to stand on his toes however he had discomfort on the left side with that maneuver. The diagnosis was partial tear of the left gastroc muscle at the myotendinous junction. Petitioner was instructed to begin gentle stretching of

the muscle over the next few weeks hoping to help resolve the residual pain. He was released back to restricted work from August 30, 2017 to September 3, 2017 and was to avoid kneeling or squatting and stepping up onto trucks. He could resume full duty on September 4, 2017 (PX 1, pgs. 13-14).

In follow-up on September 13, 2017 Petitioner was doing well. He had been working regular duty although he was not climbing in and out of trucks. He continued to have some discomfort at the musculotendinous junction at the bottom of the left gastrocnemius muscle. He also had some associated discomfort towards the lateral border of the mid shaft of the tibia almost consistent with a shin splints. Gait was normal. He was able to stand on his toes without significant pain. A physical exam revealed good symmetry of the calves and essentially a normal gait. There was palpable tenderness at the area of the myotendinous junction of the gastrocnemius on the left side. He was diagnosed with a healing left calf injury. Petitioner was released back to regular duty (PX 31 pgs. 20-21).

Petitioner was last seen by Dr. Desalvio on September 27, 2017. Overall Petitioner was doing well. He was no longer having any significant pain symptoms. He had continuing minor discomfort if he stepped quickly or lunged with the left foot and calf. A physical exam showed good symmetry although there was perhaps a slight increase in diameter of the left side compared to the right. He was essentially back to a baseline status. He was back to normal activities. Petitioner's left calf injury had clinically resolved and he was released from care (PX 1, pgs. 27-28).

Petitioner was examined by Dr. DSouza for an independent medical examination on July 12, 2019. Dr. DSouza's report was admitted into evidence as Respondent's Exhibit 1. Dr. DSouza found no evidence of a continuing disability. He diagnosed a shin splint. He believed Petitioner's work activities such as repetitive jumping and ascending stairs and steps into vehicles can contribute to his symptomatology. He believed Petitioner was at maximum medical improvement and capably of fully executing his duties without any specific restrictions. He did not feel there was any permanent disability rating since Petitioner was at maximum medical improvement (RX 1).

The sole disputed issue in this matter is the nature and extent of the Petitioner's injury.

CONCLUSIONS OF LAW

With respect to issue (L), what is the Nature and Extent of the Injury, the Arbitrator finds and concludes as follows:

For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the Section 8.1b of the Illinois Workers' Compensation Act. Here, the accident occurred on August 23, 2017 making Section 8.1b applicable.

No single enumerated factor shall be the sole determinant of disability and the relevance and the weight of any factors used in addition to the level of impairment as reported by the physician must be explained.

In the instant case the Petitioner suffered a partial tear of the left gastroc muscle at the myotendinous junction injury of the left lower extremity. The Arbitrator accepts Dr. DeSalvio's diagnosis of a calf muscle tear versus a shin splint diagnosis made by Dr. DSouza because Petitioner's complaints and symptoms were more consistent with a muscle injury as opposed to a bone injury. Petitioner reached MMI on September 27, 2017 with no permanent restrictions. Petitioner returned to regular duty work on September 13, 2017 however he was placed in a sedentary position .

With regard to subsection (i) of §8.1b(b), the Arbitrator notes 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 the Petitioner was employed as a correctional officer. He was assigned to the sallyport as the officer and his duties consisted of checking all vehicles that came into the sallyport. He would check for contraband. He would climb up into the cab of the semis and check underneath the bedding, the seats and anywhere he could look. He would climb into the back of the semis and look for contraband and make sure there was nothing harmful. He would check semis and buses and he would back and do the same thing checking for contraband. The Arbitrator further notes that although Petitioner was returned to regular duty he was reassigned to a sedentary position. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes Petitioner was age 45 at the time of his injury and may reasonably be expected to live and work with the permanent effects of his injury for a longer time than an older individual and, therefore, his permanent partial disability may be greater than that of an older individual. 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 there is no evidence the accident has impaired Petitioner's future earning capacity. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner credibly testified that he continues to experience pain and tenderness in the left calf which increases with activity. The medical records of Dr. DeSalvio confirm a left calf muscle tear. As of the last doctor visit Petitioner's left calf injury had clinically resolved. Petitioner's complaints are consistent with the injury he sustained. The Arbitrator therefore gives lesser weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 4% loss of use of the left leg pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008365
Case Name	MYERS, MARIAN v. DYNO NOBEL
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0048
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner, Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen McManus

DATE FILED: 2/4/2022

/s/ Deborah Simpson, Commissioner

Signature

DISSENT

/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 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

MARIAN MYERS,
Petitioner,

vs. NO: 20 WC 8365

DYNO NOBEL,
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, and medical expenses both current and prospective, and being advised of the facts and law, affirms the Decision of the Arbitrator, as clarified below including the specific conclusion that Petitioner's current right shoulder and left shoulder conditions are causally related to the repetitive trauma injuries that manifested on April 24, 2018 and August 1, 2019,, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Arbitrator found that Petitioner sustained her burden of proving repetitive traumatic accidents which caused conditions of ill-being of her shoulders bilaterally. He awarded her all medical expenses submitted into evidence and ordered Respondent to authorize and pay for prospective treatment recommended by Dr. Bradley, including but not limited to right-shoulder surgery. We agree with the Arbitrator's analysis and conclusions including the specific conclusion that Petitioner's current right shoulder and left shoulder conditions are causally related to the repetitive trauma injuries that manifested on April 24, 2018 and August 1, 2019, and accordingly affirm the Arbitrator's award. However, the Commission clarifies the award for prospective medical treatment and finds that Petitioner is entitled to prospective medical

treatment for the right shoulder in the form of surgery recommended by Dr. Bradley and post-operative treatment, including but not limited to physical therapy.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator issued on April 21, 2021, is hereby affirmed and adopted as clarified above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay reasonable and necessary medical expenses specified in Petitioner's Exhibit 1 under §8(a), subject to the applicable medical fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent authorize and pay for prospective medical treatment for the right shoulder in the form of surgery recommended by Dr. Bradley and post-operative treatment, including but not limited to physical therapy.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $50,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 4, 2022

DLS/dw
O-12/8/21
46

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

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

Dissent

I respectfully dissent from the Decision of the Majority. The Majority affirmed and adopted the Decision of the Arbitrator in which he found Petitioner sustained her burden of proving a repetitive traumatic accident resulting in conditions of ill-being of her shoulders bilaterally. I would have reversed the Decision of the Arbitrator, found that Petitioner did not sustain her burden of proving a repetitive traumatic accident or causation to the condition of ill-being of her shoulders bilaterally, and denied compensation.

Petitioner worked for Respondent which made explosives and detonators. She worked on an assembly line. In her direct testimony, Petitioner described job activities which included reaching, manipulating, and overhead activities. Respondent presented three videos of other employees performing Petitioner's job activities. Those videos showed a lot of fine manipulation of the hands and other repetitive activities with the hands including reaching, grabbing, and tying. Petitioner acknowledged that she did perform the activities identified in the videos, but it did not show a particular activity in which she had to lift a bucket of parts and load them into a hopper. However, she also indicated that she only had to perform that task infrequently, and not at all on some days. Also, in cross examination Petitioner acknowledged that in her current job, she did not have to lift much or perform much overhead activities. Finally, Petitioner's medical records showed that Petitioner treated for her right shoulder as early as 2005, at which time she attributed her condition to her repetitive work activities. She also agreed that in 2006 she told a treating doctor that her shoulder hurt as much when she was not working and that any overhead activity caused her pain. At that time, her treating doctor, Dr. Straubinger, advised her that her condition was probably not work related.

On July 3, 2020, Petitioner began treating for her current condition with Dr. Bradley. Petitioner was referred to him by her lawyer, who had also referred other clients to him. That was the only time Petitioner saw Dr. Bradley. At deposition, Dr. Bradley testified that chronic repetitive, and particularly overhead, use/lifting can clearly cause or aggravate rotator cuff tendinopathy, tendinitis, and tear. He opined "that if this lady would not have been doing repetitive overhead activity, would have been doing more of a sit-down, desk-type job," he did not believe she would have developed a full-thickness tear or the pain she was experiencing. Dr. Bradley also opined that her long history of repetitive overhead activity caused her inflammation/impingement of the rotator cuff tendon and over time the continued irritation caused the ruptures/tears.

At Respondent's request, Petitioner presented for a Section 12 examination with Dr. Hobbs. He examined Petitioner, reviewed her medical records, and reviewed both the official description of Petitioner's job activities as well as the videos of her work activities. Dr. Hobbs testified by deposition. He concluded that Petitioner had a nontraumatic rotator cuff tear due to progressive degeneration of the cuff caused by aging. Dr. Hobbs did not believe the activities Petitioner described or those he saw on the videos caused or aggravated her right shoulder condition. She did not need treatment for any work-related condition. He also noted that

Petitioner had three knee replacement surgeries, one in 1999, one in 2006, the right revision arthroplasty in 2019; the severe arthritis in her knees likely placed greater stress on her shoulders as they would be needed to support her weight while ambulating.

The Arbitrator found the causation opinions of Dr. Bradley more persuasive than those of Dr. Hobbs. I disagree. In my opinion, Dr. Bradley did not have a good conception of Petitioner's actual job activities and relied exclusively on Petitioner subjective reports to him. He was under the impression that Petitioner did extensive overhead activities as well as significant lifting. That assumption appears to be contrary to the manifest weight of the evidence and even contrary to much of Petitioner's testimony. On the other hand, Dr. Hobbs had a better understanding of Petitioner's job activities. Not only did he document Petitioner's report of her activities, he also viewed the videos of people actually performing her job, and the official job description of Petitioner's job activities. It appears that Dr. Bradley did not have the benefit of such information. Therefore, I find the causation opinions of Dr. Hobbs more persuasive than those of D. Bradley.

For the reasons stated above, I would have reversed the Decision of the Arbitrator, found that Petitioner did not sustain her burden of proving a repetitive traumatic accident or causation to the condition of ill-being of her shoulders bilaterally, and denied compensation. Therefore, I respectfully dissent from the Decision of the Majority.

DLS/dw

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC008365
Case Name	MYERS,MARIAN v. DYNO NOBEL
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	10
Decision Issued By	William R. Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	Stephen McManus

DATE FILED: 4/21/2021

INTEREST RATE THE WEEK OF APRIL 20, 2021 0.04%

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)

Marian Myers
Employee/Petitioner

Case # 20 WC 08365

v.

Consolidated cases: _____

Dyno Nobel
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 Collinsville, on March 9, 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 1, 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 $43,185.79; the average weekly wage was $830.50.

On the date of accident, Petitioner was 64 years of age, single with 0 dependent child(ren).

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

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

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, the right shoulder surgery recommended by Dr. Matthew Bradley.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)f

APRIL 21, 2021

Findings of Fact

Petitioner filed two Applications for Adjustment of Claim which alleged she sustained repetitive trauma injuries arising out of and in the course of her employment by Respondent. In case 20 WC 08364, the Application alleged Petitioner sustained an injury to her "Right Shoulder" as a result of "Repetitive motion of lifting, reaching, folding & packing." The date of accident (manifestation) alleged in the Application was April 24, 2018. In case 20 WC 08365, the Application alleged Petitioner sustained an injury to "Bi-lateral Shoulders" as a result of "Repetitive motion of lifting, reaching, folding & packing." The date of accident (manifestation) alleged in the Application was August 1, 2019 (Arbitrator's Exhibit 2). The cases were previously consolidated. The cases were tried in a 19(b) proceeding and Petitioner sought orders for payment of medical bills and prospective medical treatment. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

Petitioner has worked for Respondent (or its corporate predecessors) for approximately 32 years. Respondent manufactures detonators and canister explosives. Petitioner testified her job duties require her to sit at an automated machine and that she has to constantly reach out and pick up figure 8 shaped units from a conveyor belt, bundle and package them. Petitioner estimated she performs this task approximately 3,000 times per day. Petitioner also has to place product in a plastic tote and, when it is full, she has to lift it at or above shoulder height and dump the product into a hopper. Petitioner estimated the weight of the filled tote to be approximately 30 pounds. Petitioner said she also uses a scoop to pick up small parts which she dumps into a bowl. This also requires the overhead use of her arms, but she said the weight of the filled scoop was minimal.

Petitioner prepared a document entitled Work History Timeline in which she identified her job titles and summarized her job duties. From 1999 to the present, Petitioner has worked as a Producer. In this Exhibit, Petitioner noted she operated various machines. The operation of all of the machines required the overhead use of her arms. Petitioner has had to lift totes which weighed 30 pounds, lifted boxes weighing 15 to 30 pounds, picked up and carried a tote full of hooks which weighed 30 pounds, picked up bushing material and lifted/carried boxes to pallets (Petitioner's Exhibit 10).

Petitioner testified her various work activities caused her to have shoulder pain, right more so than left. However, Petitioner said lifting did not cause shoulder issues as much as shoving, pushing and reaching. Petitioner stated that reaching out up to 3,000 times a day caused her to experience right shoulder pain.

Respondent tendered into evidence three videos of other employees performing some of Petitioner's job duties. The first video showed a seated employee picking up tubing material off of a table. On cross-examination, Petitioner said the tubing material weighed less than a pound and she would stack five of them into bundles. Even five of them would still weigh less than a pound. When Petitioner performed this job duty, she usually did so for an entire workday (Respondent's Exhibit 1).

The second video showed a tote filled with tubes. The tote is picked up and its contents are dumped into a hopper. On cross-examination, Petitioner agreed she would bend over, lift the tote off of the cart which was approximately one foot above the floor and dump the contents into a hopper. Petitioner said she could perform this task two or three times a day; however, there were some days Petitioner would not perform this task at all (Respondent's Exhibit 2).

The third video showed an individual at a machine with several spools on it. The individual removed a spool, carried it to a table where she obtained another spool and then she rolled them into a machine. The individual then pushed a button on the machine to put the spools in proper place. On cross-examination, Petitioner agreed the individual in the video worked at chest level. Petitioner confirmed she does not perform this task often and will go for weeks or months without having performed this specific task (Respondent's Exhibit 3).

Petitioner testified the videos did not depict all of her work activities. She stated the activities in the videos in which the employees reached out to pick up product on the conveyor belt and dumping them caused her to experience shoulder pain.

Johnny Miller, Respondent's site manager, testified at trial. Miller stated he was familiar with Petitioner and she is a good employee and her testimony regarding her job duties was accurate. However, he said the weight of the tote Petitioner would dump into a hopper was closer to 20 pounds, but otherwise, Petitioner's testimony was accurate.

Petitioner has had bilateral shoulder symptoms for a number of years. Petitioner underwent MRIs of the right and left shoulder on December 16, 2005. At that time, Petitioner gave a history of shoulder pain since August, 2005. According to the radiologist, the MRI of the right shoulder revealed subacromial bursitis and arthrosis at the acromioclavicular joint. According to the radiologist, the MRI of the left shoulder was negative, but revealed arthrosis at the left acromioclavicular joint (Respondent's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Dennis Straubinger, an occupational medicine specialist, on January 24, 2006. At that time, Petitioner complained of pain in the right and left shoulders since August, 2005. Petitioner advised him her shoulders hurt while at work and that any motion caused distress. He reviewed the reports of the MRI scans and noted they did not reveal any specific pathology other than bursitis and AC joint degeneration. Dr. Straubinger opined Petitioner had bilateral shoulder pain with bursitis which was probably not work-related (Respondent's Exhibit 8).

Petitioner was evaluated by Dr. Ira Taylor, an osteopathic physician, February 6, 2006, for bilateral shoulder pain. Petitioner informed Dr. Taylor the shoulder symptoms began the preceding August, MRIs were performed and her employer had her examined by Dr. Straubinger. Dr. Taylor diagnosed Petitioner with bilateral shoulder strains with bursitis. He did not opine whether the strains were work-related (Respondent's Exhibit 9).

Dr. Taylor saw Petitioner on March 1, 2006. He noted the findings of the MRI scans, but could not explain why Petitioner continued to have severe shoulder symptoms. He diagnosed Petitioner with bilateral shoulder and neck pain and prescribed medication (Respondent's Exhibit 9).

Dr. Taylor again saw Petitioner on November 19, 2010. At that time, Petitioner complained of muscle aches/pains mostly in the shoulders and hands. Dr. Taylor diagnosed Petitioner with a number of conditions including multiple arthralgias. He prescribed medication (Respondent's Exhibit 9).

Petitioner underwent MRI arthrograms on both shoulders on May 27, 2011. The radiologist's reports of the studies were not received into evidence at trial; however, as noted herein, they were subsequently reviewed/referenced by other physicians who examined/treated Petitioner.

Petitioner continued to work for Respondent and on April 24, 2018 (the date of manifestation alleged in case number 20 WC 08364), Petitioner informed Respondent she sustained a work-related injury to her upper extremities. The First Report of Injury was tendered into evidence at trial. It contained no information as to what Petitioner was claiming occurred to cause her to have sustained a work-related injury (Petitioner's Exhibit 8). At trial, Petitioner testified she was directed by the company nurse to apply ice to the affected body parts.

Petitioner testified her shoulder complaints worsened and she reported having sustained a repetitive trauma injury to her right arm on August 1, 2019 (the date of manifestation alleged in case number 20 WC 08365) an Employee's Injury Report was received into evidence at trial. According the Report, Petitioner experienced pain from the top of her right shoulder going down into the right arm/forearm. Petitioner described the accident as being constant repetition of folding/bundling units, lifting, dumping and hand cramping (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was evaluated by Dr. Mark Austin, an occupational medicine specialist, on August 13, 2019. At that time, Petitioner informed Dr. Austin she worked for Respondent for over 30 years and developed right shoulder symptoms gradually and started experiencing symptoms in 2016. Petitioner advised she performed repetitive movements of her right arm including reaching forward, laterally or upward and this caused her right shoulder symptoms. She also told Dr. Austin she had to lift/dump totes of material, each tote weighing 20 to 25 pounds (Petitioner's Exhibit 3).

Dr. Austin's examination of Petitioner's right shoulder revealed tenderness, a reduced range of motion and positive impingement tests. Dr. Austin's examination of Petitioner's left shoulder revealed a reduced range of motion and positive impingement tests. Dr. Austin ordered x-rays of the right shoulder and they were positive for glenohumeral joint and AC joint arthropathy. Dr. Austin searched Petitioner's electronic medical records and determined Petitioner had undergone MRI arthrograms of both shoulders in 2011. He noted that most of Petitioner's current examination findings were also present eight years prior at the time the MRI arthrograms were performed. Dr. Austin opined Petitioner had chronic right shoulder pain, weakness and a restricted range of motion and had sustained a "re-exacerbation of a chronic pre-existing condition." However, Dr. Austin also opined Petitioner had findings consistent with long and short head biceps tendinopathy which appeared to be a new finding. He recommended referral to an orthopedic surgeon to determine what was new and to determine what is causally related to a work injury (Petitioner's Exhibit 3).

An MRI arthrogram was performed on October 3, 2019. According to the radiologist, there was marked diffuse rotator cuff tendinosis, a full thickness tear of the supraspinatus and infraspinatus, a partial thickness tear of the subscapularis, mild glenohumeral osteoarthrosis, hypertrophic degenerative changes of the acromioclavicular joint and tendinosis/partial thickness tear of the long head of the biceps tendon (Petitioner's Exhibit 4).

Dr. Austin again saw Petitioner on October 15, 2019. Petitioner's complaints as well as the findings on examination were essentially the same as they were at the time of Dr. Austin's prior examination. Dr. Austin compared the MRI arthrogram of Petitioner's right shoulder of October 3, 2019, to the prior MRI arthrogram of Petitioner's right shoulder of 2011. He opined the MRI arthrograms were consistent with shoulder impingement and rotator cuff tendinosis and tears and confirmed Petitioner had sustained an "…exacerbation of chronic pre-existing conditions." He also opined the tendinosis/partial thickness tear of the long had biceps tendon was not present in the prior MRI arthrogram of 2011. Dr. Austin renewed his recommendation Petitioner be evaluated by an orthopedic specialist (Petitioner's Exhibit 3).

At the direction of Respondent, Petitioner was examined by Dr. Lyndon Gross, an orthopedic surgeon, on November 22, 2019. In connection with his examination of Petitioner, Dr. Gross reviewed medical records and diagnostic studies provided to him by Respondent. At that time, Petitioner informed Dr. Gross she worked at a job which required repetitive movements of her right arm with frequent reaching forward laterally and upward as well as lifting totes of materials and dumping the material into a hopper. Petitioner advised she develops symptoms in both shoulders over time. Dr. Gross examined both shoulders; however, most of the positive findings were in regard to the right shoulder. Dr. Gross opined the activities at work may have caused a temporary exacerbation of the underlying condition, but did not cause an aggravation or acceleration of the underlying process. He also opined Petitioner's job duty was not the "prevailing factor" for her right shoulder condition (Respondent's Exhibit 10).

Petitioner was evaluated by Dr. Matthew Bradley, an orthopedic surgeon, on July 3, 2020. At that time, Petitioner informed Dr. Bradley she had worked for Respondent for over 30 years and she performed repetitive duties involving both arms and reported she was having shoulder pain in 2011 and previously underwent MRI scans in 2011 and 2019. Dr. Bradley examined both shoulders and noted Petitioner had pain, positive impingement signs and a diminished range of motion in both, but more so in the right than left. Dr. Bradley reviewed the MRI scans of both shoulders of May 27, 2011, and the MRI arthrogram of the right shoulder of October 3, 2019. In regard to the right shoulder, Dr. Bradley opined that MRI of the May 27, 2011, revealed acromioclavicular degenerative disease and tendinopathy of the supraspinatus tendon, but no tear. Dr. Bradley also opined the MRI of October 3, 2019, of the right shoulder revealed a full thickness tear of the supraspinatus (Petitioner's Exhibit 5).

Dr. Bradley opined Petitioner had chronic impingement syndrome in her right shoulder which led to the development of tendinosis of the supraspinatus tendon and spontaneous rupture of the tendon. Dr. Bradley opined Petitioner's repetitive activities of 30 years were a "precipitating factor" in the development of chronic rotator cuff tendinitis with spontaneous rupture of the supraspinatus tendon (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Micah Hobbs, an orthopedic surgeon, on December 10, 2020. In connection with his examination of Petitioner, Dr. Hobbs reviewed medical records, diagnostic tests and the videos of other individuals performing some of Petitioner's job duties, all of which were provided to him by Respondent. At the time of his examination, Petitioner informed him she worked on an assembly line and was required to reach out and manipulate items approximately 3,000 times per day with both arms and she also had to lift boxes up to approximately her shoulder height on the right side (Respondent's Exhibit 5; Deposition Exhibit 2).

Petitioner complained of bilateral shoulder pain, more on the right than left. Examination the right shoulder revealed weakness and a diminished range of motion. Examination of the left shoulder revealed a slightly diminished range of motion. Dr. Hobbs reviewed the MRIs of the right and left shoulders of May 27, 2011, and the MRI of the right shoulder of October 3, 2019. He opined the MRI of the right shoulder of May 27, 2011, revealed a bursal sided tear of the supraspinatus. He opined the MRI of the right shoulder of October 3, 2019, revealed a full thickness tear of the supraspinatus, a rupture of the long head biceps tendon and a tear of the subscapularis tendon. Dr. Hobbs opined Petitioner had a degenerative condition in her right shoulder related to her age and bony morphology and Petitioner's work activities did not cause or aggravate Petitioner's right shoulder rotator cuff disease. However, he also opined Petitioner's overhead use of her right arm could cause a "temporary exacerbation" of the underlying degenerative condition (Respondent's Exhibit 5; Deposition Exhibit 2).

Dr. Bradley was deposed on February 3, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Bradley's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Bradley testified he diagnosed Petitioner with a right shoulder rotator cuff tear and surgery was indicated (Petitioner's Exhibit 6; pp 12-13).

In regard to causality, Dr. Bradley testified he discussed Petitioner's job duties with her at length and he had also reviewed medical records and the reports of Dr. Gross and Dr. Hobbs in which her work activities were also described. Dr. Bradley testified Petitioner having performed activity which required the repetitive use of her upper extremities contributed to and aggravated her bilateral shoulder condition (Petitioner's Exhibit 6; pp 15-17).

Dr. Bradley stated he disagreed with the opinion of Dr. Gross that the rotator cuff tear was age-related because it is uncommon for individuals Petitioner's age to have such a condition. Dr. Bradley also disagreed that Petitioner's work activities were a temporary exacerbation of her underlying condition because her symptoms had persisted for years without resolution (Petitioner's Exhibit 6; pp 20-22).

Dr. Hobbs was deposed on February 9, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Hobbs' testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Dr. Hobbs testified Petitioner had a non-traumatic complete tear of the right rotator cuff and osteoarthritis of the glenohumeral joint of the left shoulder. He attributed Petitioner's right shoulder condition to progressive degeneration of the cuff which occurred as a result of aging. Dr. Hobbs' opinion was based, in part, on the

review of the videos of other employees and a job demands analysis which had been provided to him by Respondent (Respondent's Exhibit 5; pp 25-31).

At trial, Petitioner testified she continues to have complaints in regard to both shoulders, but more so in respect to the right than left. Petitioner wants to proceed with the surgery on the right shoulder as recommended by Dr. Bradley.

Conclusions of Law

In regard to disputed issues (C) and (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained a repetitive trauma injury to her right and left shoulders which manifested itself on April 24, 2018, and August 1, 2019, and Petitioner's current condition of ill-being is causally related to her work activities.

In support of this conclusion the Arbitrator notes the following:

Petitioner is a long-term employee of Respondent (or its corporate predecessors) and has performed work activities requiring the repetitive use of her arms for over 32 years.

Petitioner's testimony regarding her job activities and the repetitive use of her arms was unrebutted. The primary repetitive activity was Petitioner having to reach out, pick up and manipulate items approximately 3,000 times per day.

Johnny Miller, Respondent's site manager, testified at trial and agreed Petitioner's testimony regarding her job duties was accurate with the only partial exception being the estimated weight of the totes Petitioner would pick up and empty their contents into a hopper.

The videos Respondent tendered into evidence were not of Petitioner, but other employees performing some of Petitioner's job duties. Petitioner credibly testified that the videos did not depict all of her work activities.

Petitioner has had bilateral shoulder symptoms since 2005 and has been evaluated by several physicians and undergone MRIs of both shoulders.

Petitioner's right shoulder condition has been getting progressively worse over time. This was clearly indicated by the fact that when the MRI of May 27, 2011, was compared to the MRI arthrogram of October 3, 2019, the more recent study revealed pathology in the right shoulder which was not present earlier.

The opinions of Dr. Gross and Dr. Hobbs that Petitioner's work activities may have only caused a temporary exacerbation of Petitioner's right shoulder condition are inconsistent with the fact that Petitioner's right shoulder condition has continued to worsen.

Further, the opinion of Dr. Gross as to causality is of minimal probative value because he used the standard of "prevailing factor" and not "a causative factor."

Dr. Bradley obtained information from Petitioner regarding the specifics of her job duties and also reviewed the reports of Dr. Gross and Dr. Hobbs which likewise contained information regarding same. Dr. Bradley opined Petitioner's work activities contributed to or aggravated her bilateral shoulder condition. He also opined Petitioner's shoulder condition was not related to age and her work activities were not just a temporary exacerbation.

Based on the preceding, the Arbitrator finds the opinion of Dr. Bradley as to causality to be more persuasive than those of Dr. Gross and Dr. Hobbs.

In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issues (C) and (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 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issues (C) and (F), the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the right shoulder surgery recommended by Dr. Matthew Bradley.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005962
Case Name	GULLEY, MIKE v. GENERAL DYNAMICS
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0049
Number of Pages of Decision	14
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Kelly Phelps
Respondent Attorney	James Keefe, Jr.

DATE FILED: 2/7/2022

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MIKE GULLEY,

Petitioner,

vs. NO: 20 WC 05962

GENERAL DYNAMICS,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 25, 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 $20,500.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 7, 2022

o- 1/25/22
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC005962
Case Name	MIKE GULLEY v. GENERAL DYNAMICS
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	William Gallagher, Arbitrator

Petitioner Attorney	Kelly Phelps
Respondent Attorney	James Keefe, Jr.

DATE FILED: 6/25/2021

INTEREST RATE FOR THE WEEK OF JUNE 22, 2021 0.05%

/s/William Gallagher, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Mike Gulley
Employee/Petitioner

Case # 20 WC 05962

v.

Consolidated cases: n/a

General Dynamics
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 Collinsville, on May 26, 2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☒ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 18, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $65,000.00; the average weekly wage was $1,250.00.

On the date of accident, Petitioner was 37 years of age, married with 3 dependent child(ren).

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $9,003.60 for other benefits, for a total credit of $9,003.60.

Respondent is entitled to a credit of amounts paid under Section 8(j) of the Act.

ORDER

Respondent shall pay reasonable and necessary medical services for treatment provided to Petitioner for his right shoulder condition as identified in Petitioner's Exhibit 3, Exhibit 4, Exhibit 5 and Exhibit 6 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's claim for prospective medical treatment is denied.

Respondent shall pay Petitioner temporary total disability benefits of $833.33 per week for 13 5/7 weeks, commencing June 25, 2020, through September 28, 2020, as provided in Section 8(b) of the Act.

Based upon the Arbitrator's Conclusions of Law attached hereto, Petitioner's claim for Section 19(k) penalties, Section 19(l) penalties and Section 16 Attorneys' Fees is denied.

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

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

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

William R. Gallagher

JUNE 25, 2021

William R. Gallagher, Arbitrator
ICArbDec19(b)

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained an accidental injury arising out of and in the course of his employment by Respondent on December 18, 2019. According to the Application, Petitioner was "Unhitching trailer from fifth wheel on truck" and sustained an injury to the "Person-as-a-whole and right shoulder" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and temporary total disability benefits as well as prospective medical treatment. Petitioner also claimed he was entitled to Section 19(k) and Section 19(l) penalties and Section 16 Attorneys' Fees. Respondent disputed liability on the basis of accident and causal relationship (Arbitrator's Exhibit 1).

The temporary total disability benefits sought by Petitioner were for two periods of time, June 25, 2020, through September 23, 2020, and March 18, 2021, through May 26, 2021 (date of trial), 23 3/7 weeks. The prospective medical treatment sought by Petitioner was cervical disc replacement surgery recommended by Dr. Matthew Gornet, an orthopedic surgeon (Arbitrator's Exhibit 1).

Petitioner worked for Respondent as a vehicle operator. Petitioner's job duties included loading/unloading goods using a semi-trailer. At trial, Petitioner testified that on December 18, 2019, he was in the process of removing a pin from the fifth wheel of a trailer. The pin was stuck and Petitioner was required to forcefully pull on the pin with his right hand. When the pin came loose, Petitioner fell backwards and sustained an injury to his right arm and neck.

Petitioner did not report the accident to Respondent, completed his shift and continued to work through the end of the week, December 20, 2019. Petitioner did not seek any medical treatment and explained he thought he had just pulled a muscle.

Effective December 23, 2019, Respondent's plant was shut down for the holidays and Petitioner did not return to work until January 2, 2020. Petitioner testified that over the holiday break, the pain in his right shoulder and neck worsened. However, Petitioner did not seek any medical treatment during this period of time.

When Petitioner returned to work on January 2, 2020, he informed Respondent he had sustained a work-related injury on December 18, 2019. The following day, January 3, 2020, Petitioner completed a First Aid/Injury Report. According to this report, Petitioner was pulling with his right arm to disconnect a trailer and sustained an injury to his right shoulder and trapezius. There was no reference to Petitioner having injured his neck in this report (Respondent's Exhibit 1).

The First Report of Injury was subsequently prepared on February 13, 2020. According to this report, Petitioner was disconnecting a trailer and pulled his right shoulder. There was no reference to Petitioner having sustained an injury to his neck (Respondent's Exhibit 1).

Petitioner initially sought treatment on January 7, 2020, at Heartland Regional Occupational Health (Heartland Regional). At that time, Petitioner advised he had sustained the injury on December 22 while pulling on a wheel had symptoms in his right shoulder and hand. The

assessment was right shoulder pain and Petitioner was directed to apply ice and do exercises at home. There was no reference to Petitioner having neck symptoms (Petitioner's Exhibit 2).

Petitioner was seen at Heartland Regional on January 9, 2020. At that time, Petitioner complained of right shoulder pain and "popping" in his neck. Again, the assessment was right shoulder pain (Petitioner's Exhibit 2).

Petitioner was subsequently seen at Heartland Regional on January 16, January 23, January 30, February 6, February 13, and February 27, 2020. Petitioner continued to complain of right shoulder symptoms and the assessment remained right shoulder pain. The records of February 13 and February 27, 2020, noted that Petitioner had pain/tightness in his neck (Petitioner's Exhibit 2).

On February 21, 2020, Petitioner was evaluated by Dr. Roger Watters, his family physician. Petitioner advised Dr. Watters he injured his right shoulder on December 18, 2019, while pulling on a pin to release a fifth wheel mechanism. Petitioner denied having neck pain. Dr. Watters ordered an MRI scan of Petitioner's right shoulder (Petitioner's Exhibit 3).

Petitioner was again seen by Dr. Watters on March 18, and March 23, 2020, complaining of right shoulder pain. There were no complaints/findings in regard to the neck (Petitioner's Exhibit 3).

The MRI was performed on April 3, 2020. According to the radiologist, the MRI revealed an intact rotator cuff and was normal. Dr. Watters saw Petitioner on April 8, 2020. At that time, Petitioner continued to complain of right shoulder pain but had no complaints in respect to the neck. Dr. Watters referred Petitioner to Dr. J. T. Davis, an orthopedic surgeon (Petitioner's Exhibit 3).

On April 13, 2020, Petitioner was evaluated by Jeremy Palmer, a Physician Assistant, associated with Dr. Davis. At that time, Petitioner informed PA Palmer of the accident of December 18, 2019, which caused him to experience immediate and sharp pain in the right shoulder. PA Palmer opined Petitioner had a possible labral tear and mild rotator cuff strain. He also noted Petitioner had some mild underlying neck pain, but Petitioner had a full range of motion of the neck. PA Palmer ordered an MR arthrogram of Petitioner's right shoulder (Petitioner's Exhibit 4).

The MR arthrogram was performed on May 19, 2020. According to the radiologist, the study revealed supraspinatus tendinosis with fraying, infraspinatus tendinosis but no full thickness rotator cuff tear (Petitioner's Exhibit 4).

Dr. Davis saw Petitioner on June 1, 2020. At that time, Petitioner complained of right scapular, shoulder and paracervical pain with radiation nonfocally down the arm. Dr. Davis opined Petitioner had a traumatic partial rotator cuff tear and possible C5 radiculopathy on the right side. He ordered an MRI scan of Petitioner's cervical spine and referred Petitioner to Dr. Swastik Sinha, an orthopedic surgeon associated with him (Petitioner's Exhibit 4).

The MRI was performed on June 11, 2020. According to the radiologist, the MRI revealed borderline stenosis at C4-C5 and C5-C6 as well as a disc bulge at C6-C7 (Petitioner's Exhibit 4).

Dr. Sinha evaluated Petitioner on June 12, 2020. Petitioner complained of cervical pain which he attributed to the injury at work describing it as involving a "twisting movement." Dr. Sinha reviewed the MRI and prescribed medication (Petitioner's Exhibit 4).

Dr. Davis saw Petitioner on June 22, 2020. Petitioner continued to complain of right shoulder pain and Dr. Davis recommended Petitioner proceed with arthroscopic surgery. Dr. Davis authorized Petitioner to be off work and quarantined him prior to surgery (Petitioner's Exhibit 4).

Dr. Davis performed arthroscopic surgery on July 9, 2020. The procedure consisted of debridement of partial rotator cuff tear of the supraspinatus, debridement of subacromial and subdeltoid adhesions and bursitis, distal clavicle resection, and injection into the right shoulder (Petitioner's Exhibit 4).

Following surgery, Petitioner continued to be treated by Dr. Davis and PA Palmer. Dr. Davis ordered physical therapy and, when he saw Petitioner on September 22, 2020, he authorized Petitioner to return to work without restrictions on September 28, 2020 (Petitioner's Exhibit 4).

In regard to his neck, Petitioner was seen by Dr. Sinha on August 28, 2020. At that time, Petitioner complained of mild pain symptoms in the neck. Dr. Sinha referred Petitioner to Dr. Tennyson Lee, an orthopedic surgeon associated with him, for further treatment (Petitioner's Exhibit 4).

Petitioner was evaluated by Dr. Lee on September 21, 2020. At that time, Petitioner advised Dr. Lee he had neck pain since the accident of December, 2019. Dr. Lee administered an injection into the right trapezius/scapular area. He recommended Petitioner continue home exercises (Petitioner's Exhibit 4).

Petitioner did not seek any further medical treatment until December 17, 2020, when he was seen by Dr. Gornet. Petitioner informed Dr. Gornet that he was injured at work on December 22, 2019, while pulling on a pin to disconnect a trailer from a tractor. At that time, Petitioner complained of neck and right trapezius/shoulder pain. Dr. Gornet reviewed the MRI of Petitioner's cervical spine and opined it revealed protrusions at C5-C6 and C6-C7 and annular tears at C4-C5 and C5-C6. He also noted the MRI did not have foraminal views. Dr. Gornet opined there was an overlap of Petitioner's neck and right shoulder symptoms and opined they were related to the accident of December 22, 2019. He ordered an MRI scan with higher resolution and foraminal views (Petitioner's Exhibit 7).

The MRI was performed on December 17, 2020. According to the radiologist, the MRI revealed protrusions at C3-C4, C4-C5 and C5-C6 as well as an annular tear at C6-C7 (Petitioner's Exhibit 7).

Dr. Gornet reviewed the MRI and his interpretation of it was consistent with that of the radiologist. He referred Petitioner to Dr. Helen Blake for a single injection at C5-C6 on the right, but noted that if Petitioner did not improve, disc replacement surgery at C5-C6 might be indicated (Petitioner's Exhibit 7).

Dr. Blake saw Petitioner on January 26, 2021, and administered an epidural injection on the right at C5-C6. When Dr. Gornet saw Petitioner on March 18, 2021, Petitioner advised the injection did not provide any sustained relief. Dr. Gornet authorized Petitioner to be off work and recommended Petitioner proceed with disc replacement surgery at C5-C6 (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. George Paletta, an orthopedic surgeon, on January 5, 2021, in regard to his right shoulder condition. In connection with his examination of Petitioner, Dr. Paletta reviewed medical records and diagnostic studies provided to him by Respondent. Petitioner advised Dr. Paletta he sustained the injury to his right arm on December 18, 2019, while attempting to pull a pin on the fifth wheel of a truck. Dr. Paletta opined Petitioner had persistent right shoulder pain with radiculopathy in the right upper extremity. However, Dr. Paletta also opined the right shoulder surgery performed by Dr. Davis was not reasonable and necessary or causally related to the accident. Dr. Paletta based this opinion upon his review of the MRI scans which he opined did not reveal significant pathology and, at the time of the surgery, there was only minimal fraying of the rotator cuff. He opined this finding would not be a pathology caused by the work injury. Further, Dr. Paletta opined there was no evidence of an injury to the distal clavicle which would have necessitated a resection (Respondent's Exhibit 2; Deposition Exhibit 2).

At the direction of Respondent, Petitioner was examined by Dr. Peter Mirkin, an orthopedic surgeon, on February 8, 2021, in regard to Petitioner's cervical spine condition. In connection with his examination of Petitioner, Dr. Mirkin reviewed medical records and diagnostic studies provided to him by Respondent. Petitioner informed Dr. Mirkin he experienced pain in his right shoulder on December 22, 2019, while pulling on a pin on a semi-trailer. According to Dr. Mirkin's report, Petitioner also informed him he experienced pain in his neck and right arm when he was cutting a tree at his home with a chainsaw (Respondent's Exhibit 3; Deposition Exhibit 3).

Dr. Mirkin opined Petitioner did not have a cervical spine condition related to the accident of December, 2019. This was based on his review of the MRIs which he opined did not reveal any neural compressive lesions. He also opined there was no need for cervical surgery, Petitioner was at MMI and could work without restrictions (Respondent's Exhibit 3; Deposition Exhibit 3).

Dr. Gornet was deposed on March 29, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Gornet's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Specifically, Dr. Gornet testified that the mechanism of the injury described by Petitioner was consistent with the cervical spine condition he diagnosed. Dr. Gornet stated Petitioner should undergo disc replacement surgery at C5-C6 and Petitioner was disabled from work as of the time of his most recent visit of March 18, 2021 (Petitioner's Exhibit 8; pp 11-14).

On cross-examination, Dr. Gornet agreed that pulling/lifting tree limbs could cause pathology in Petitioner's cervical spine. He also agreed Petitioner's quality of life was a factor in his surgical recommendation (Petitioner's Exhibit 8; pp 16-18).

Dr. Mirkin was deposed on April 12, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Mirkin's testimony was consistent with his medical

report and he reaffirmed the opinions contained therein. Specifically, Dr. Mirkin stated the MRIs of June 11 and December 17, 2020, did not reveal any cervical disc pathology or any evidence of nerve compression. Dr. Mirkin testified Petitioner did not sustain a significant neck injury and there was no need for cervical disc surgery (Respondent's Exhibit 3; pp 7-10).

On cross-examination, Dr. Mirkin agreed there was no reference in any of the medical treatment records of a chain saw incident in November, 2020. Dr. Mirkin testified he did not ask Petitioner if he was cutting down a whole tree or just the limbs (Respondent's Exhibit 3; pp 12-13).

Dr. Paletta was deposed on April 21, 2021. On direct examination, Dr. Paletta's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. Paletta testified there was no explanation for Petitioner's right shoulder complaints and the diagnostic studies did not reveal any pathology related to the accident. He also stated the right shoulder surgery was not reasonable and necessary or related to the work accident. He explained the mechanism of the injury was not consistent with a rotator cuff tear and the diagnostic studies did not reveal a rotator cuff tear (Respondent's Exhibit 2; pp 11-17).

On cross-examination, Dr. Paletta conceded that the treating physician, Dr. Davis, may have assessed the situation differently. He agreed Dr. Davis did not commit malpractice by performing the surgery and that "…another orthopedic surgeon could have a different opinion with regard to the necessity and reasonableness of surgery." Dr. Paletta agreed Petitioner had sustained a right shoulder strain (Respondent's Exhibit 2; pp 23-25).

Dr. J. T. Davis was deposed on May 10, 2021, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Davis' testimony was consistent with his medical records and he reaffirmed the opinions contained therein. Dr. Davis noted that the MRI which was performed was negative, but opined Petitioner had sustained a possible labral tear and rotator cuff strain. Dr. Davis ordered the MR arthrogram which he opined revealed a partial thickness tear of the rotator cuff, but no labral tear. Dr. Davis described the surgery he performed and testified the right shoulder condition was related to the accident (Petitioner's Exhibit 9; pp 8-18).

On cross-examination, Dr. Davis agreed that when he saw Petitioner on July 23, August 21, and September 23, 2020, Petitioner did not have any complaints in regard to the neck. Dr. Davis also testified that Petitioner's description of the accident was consistent with the mechanism of a rotator cuff injury (Petitioner's Exhibit 9; pp 21, 24).

At trial, Petitioner testified he continues to experience pain in his neck and right shoulder and, prior to December 18, 2019, he had no neck/right shoulder injuries or symptoms. Petitioner stated Dr. Gornet had authorized him to be off work on March 18, 2021, and he wants to proceed with the disc replacement surgery recommended by Dr. Gornet. In regard to the use of the chain saw as described by Dr. Mirkin, Petitioner stated there was no incident, but he was simply cutting some limbs in his yard and experienced neck pain afterward.

Respondent tendered into evidence a report regarding surveillance of Petitioner conducted on May 1, May 2 and May 7, 2021, and surveillance video obtained on May 1 and May 2, 2021. In the

video, Petitioner was observed standing in an above ground pool, but he was not observed participating in its construction (Respondent's Exhibit 4).

Conclusions of Law

In regard to disputed issue (C) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner sustained an accidental injury arising out of and in the course of his employment by Respondent on December 18, 2019.

In support of this conclusion the Arbitrator notes the following:

When Petitioner sustained the accident, he thought he had nothing more than a pulled muscle which would resolve on its own.

The accident occurred just shortly before Respondent's plant was shut down for the holidays. Petitioner testified his symptoms worsened over the holidays and he reported the accident to Respondent when he returned to work at the time the plant reopened on January 2, 2020.

Petitioner consistently reported the accident as having occurred on December 18, 2019 (or December 22, 2019) to the physicians who treated and examined him and described it as having occurred he was attempting to pull a pin out of a wheel mechanism.

In regard to disputed issue (F) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner's current condition of ill-being in regard to his right shoulder is causally related to the accident of December 18, 2019, but his current condition of ill-being in regard to his neck/cervical spine is not causally related to the accident of December 18, 2019.

In support of this conclusion the Arbitrator notes the following:

When Petitioner reported the accident to Respondent on January 2, 2020, he reported having sustained an injury to his right shoulder, but did not report having sustained an injury to his neck. The Arbitrator notes there was no reference to Petitioner having sustained a neck injury in the First Aid/Injury Report of January 3, 2020, or the First Report of Injury of February 13, 2020.

In the records of Heartland Regional Occupational Health, there were numerous references to Petitioner having right shoulder pain, but there were only two references to Petitioner having neck symptoms.

When Petitioner was seen by family physician, Dr. Watters, he only complained of right shoulder pain.

As noted herein, when Petitioner was seen by Dr. Davis and PA Palmer, most of his complaints were in regard to the right shoulder and there were occasions in which he had no neck complaints whatsoever.

When Petitioner was seen by Dr. Sinha for his neck symptoms on June 12, 2020, Petitioner described the injury to his neck as having occurred as a result of a "twisting movement." While the Petitioner consistently reported the accident as having occurred as a result of his forcefully removing a pin from a wheel, this was the only instance in which Petitioner described having sustained any type of twisting injury.

Based upon the preceding, the Arbitrator finds Petitioner's neck/cervical spine condition is not causally related to the accident of December 18, 2019.

Dr. Davis opined Petitioner's right shoulder condition was causally related to the accident and he performed corrective surgery.

Respondent's Section 12 examiner, Dr. Paletta, opined Petitioner's right shoulder condition was not related to the accident and the right shoulder surgery was not medically reasonable and necessary. However, when he was deposed, Dr. Paletta conceded that the treating physician, Dr. Davis, may have assessed the situation differently, did not commit malpractice and another orthopedic surgeon could have a different opinion as to the reasonableness of the surgery.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Davis to be more persuasive than that of Dr. Paletta in regard to the cause of Petitioner's right shoulder condition.

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 the medical services provided to Petitioner in regard to his right shoulder surgery were reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Respondent is not liable for payment of the medical services provided to Petitioner for his neck/cervical spine condition.

Respondent shall pay reasonable and necessary medical services for treatment provided to Petitioner for his right shoulder condition as identified in Petitioner's Exhibit 3, Exhibit 4, Exhibit 5 and Exhibit 6 as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit of amounts paid for medical benefits that have been paid and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is not entitled to prospective medical treatment.

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

The Arbitrator concludes Petitioner is entitled to temporary total disability benefits of 13 5/7 weeks, commencing June 25, 2020, through September 28, 2020.

In support of this conclusion the Arbitrator notes the following:

Petitioner was being actively treated by Dr. Davis for his right shoulder condition and authorized to be off work for the aforestated period of time.

In regard to disputed issue (M) the Arbitrator makes the following conclusion of law:

The Arbitrator concludes Petitioner is not entitled to Section 19(k) penalties, Section 19(l) penalties and Section 16 Attorneys' Fees.

In support of this conclusion the Arbitrator notes the following:

While the Arbitrator concluded Petitioner sustained a work-related injury on December 18, 2019, Respondent's denial of the claim was not unreasonable or vexatious.

Petitioner delayed reporting the accident to Respondent until January 2, 2020. While he reported the accident within the time limit prescribed by the Act (Respondent did not dispute notice), Petitioner did not seek medical treatment during the holiday break and, when Petitioner reported the accident, he only reported having sustained an injury to his right shoulder.

Further, Respondent reasonably relied upon the medical opinions of Dr. Paletta in regard to the shoulder and Dr. Mirkin in regard to the neck/cervical spine, to continue to deny benefits.

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC038111
Case Name	LULLO, MICHAEL v. STATE OF ILLINOIS
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0050
Number of Pages of Decision	16
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Jean Swee
Respondent Attorney	Bradley Defreitas

DATE FILED: 2/7/2022

/s/ Thomas Tyrrell, Commissioner

Signature

22IWCC0050

STATE OF ILLINOIS)
) SS.
COUNTY OF McLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael Lullo,

Petitioner,

vs. NO: 15 WC 038111

State of Illinois / ISU,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by Respondent and Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causation, medical expenses, prospective medical treatment, temporary total disability ("TTD"), and permanent partial disability ("PPD"), and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part thereof.

As it pertains to the issue of accident, the Commission modifies the reasoning provided by the Arbitrator. The Arbitrator correctly found that, consistent with *McAllister v. Ill. Workers' Comp. Comm'n,* 2020 IL 124848, Petitioner's acts were incidental to and causally connected to his job duties as a building service worker for Respondent as they were acts that he was reasonably expected to perform incident to his assigned duties. Additionally, the Arbitrator correctly found that at the time of the occurrence, Petitioner was arguably performing acts that he was instructed to do by his employer as he was traversing the steps during course of removing trash. As this was not a neutral risk, there was no need to need to perform a further qualitative or quantitative analysis.

The Supreme Court in *McAllister* provided a framework to determine whether a claimant's injury arose out of his or her employment by categorizing the risks to which the claimant was exposed. Generally, risks fall into three categories: (1) risks distinctly associated with employment; (2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *McAllister*, P38.

A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that

the employee might reasonably be expected to perform incident to his or her assigned duties. *McAllister,* P46.

Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. *McAllister*, P40. Whereas, injuries resulting from neutral risks generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public, either quantitatively or qualitatively. *McAllister*, P44.

In this case, Petitioner was exposed to a risk distinctly associated with his employment because at the time of the occurrence he was in the process of retrieving more garbage bags, he was at work performing an act his employer might reasonably expect him to perform incident to his assigned job duties, and in fact was directed to perform. Thus, the analysis ends there.

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 November 24, 2020, is modified as stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED that Respondent shall pay to Petitioner temporary total disability benefits of $411.00/week for 6 days, commencing October 15, 2015 through October 23, 2015, as provided in Section 8(b) of the Act. Respondent shall receive a credit for temporary total disability benefits previously paid to Petitioner.

IT IS FURTHER ORDERED that Respondent shall pay reasonable and necessary medical expenses, as identified in Petitioner's Exhibit 3, subject to the fee schedule.

IT IS FURTHER ORDERED that Respondent shall receive a credit in the amount of $150.48 for related payments made by the group health insurer, pursuant to Section 8(j) of the Act. 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.

IT IS FURTHER ORDERED that Respondent pay to Petitioner the sum of $369.00 per week for a period of 4.3 weeks, as provided in § 8(e) of the Act, for the reason that the injury sustained caused the loss of use of 2% of the left leg.

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 Respondent pay to Petitioner interest pursuant to §19(n) of the Act, if any.

Pursuant to Section 19(f)(1) of the Act, this decision is not subject to judicial review. *820 ILCS 305/19(f)(1) (West 2013)*.

February 7, 2022

d: 12/7/21
TJT/ahs
51

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

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

SPECIAL CONCURRING OPINION

I concur Petitioner sustained his burden of proving accident. However, I differ from the majority's reasoning.

In *McAllister,* the Illinois Supreme Court recites the well-established principles for proving accident:

> ***in order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003) (collecting cases). *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, 2020 Ill. LEXIS 561.

Petitioner was in the course of his employment when his injury occurred. The issue to address is "arising out of".

> "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some *risk* (emphasis added) connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58); see also *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194, 775 N.E.2d 908, 266 Ill. Dec. 836 (2002) ("An injury 'arises out of' one's employment if it originates from a risk connected with, or incidental to, the employment, involving a causal connection between the employment and the accidental injury."). A risk is incidental to the employment when it belongs to or is connected with what the employee *has to do* (emphasis added) in fulfilling his or her job duties. *Orsini*, 117 Ill. 2d at 45. To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, P36.

Risks fall into three categories: (1) risks distinctly associated with employment; (2) risks

personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics. *McAllister*, P38. As to neutral risks, they have no particular employment or personal characteristics and include stray bullets, dog bites, assaults, street risks, lightning, and hurricanes. In the context of falls, neutral risks include falls on level ground or while traversing stairs. Whether a neutral-risk injury arises out of employment depends on whether the employee was exposed to a risk greater than that to which the general public is exposed. 1 A. Larson & L. Larson, Larson's Workers' Compensation Law § 4.03, at 4-2 to 4-3, § 7.04(1)(a), at 7-15 (1999). Thus, because the general public and employees alike are equally exposed to the risks of walking and traversing stairs, injuries resulting from these acts generally do not arise out of employment. *Illinois Consol. Tel. Co. v. Industrial Comm'n, 314 Ill. App. 3d 347, 353, 732 N.E.2d 49, 54.* See also *Elliot v. Industrial Comm'n, 153 Ill. App. 3d 238, 244, 505 N.E.2d 1062, 106 Ill. Dec. 271 (1987).* (By itself, the act of walking up a staircase does not expose an employee to a risk greater than that faced by the general public.)

While the *McAllister* court overturned *Adcock* and its progeny, it did not include "walking" or "traversing stairs" in its description of the "everyday activities" that were the subject of its decision. To include walking or traversing stairs would move Illinois to the precipice of becoming a positional risk state, if not fully embracing the positional risk doctrine, which has been repeatedly rejected by Illinois courts including *McAllister*.[1] Indeed, the *McAllister* court reiterated the long-standing rejection of the positional risk doctrine. *McAllister*, 2020 IL 124848, P66.

Applying the standards recited in *McAllister*, Petitioner was injured carrying garbage bags while climbing stairs to complete an assigned task under time constraints. He could have used the elevator but elected to use the stairs. The act of climbing the stairs was not necessary to the fulfillment of his specific job duties and not incidental to the employment.

Under a neutral risk analysis, the factors described by Petitioner support a finding of increased risk, both quantitatively and qualitatively, that places Petitioner at a greater risk than the general public's use of the stairs. He was not only instructed to clean the library, but was also under time constraints so he acted with increased speed in climbing the stairs and with increased frequency in using the stairs.

To find the act of traversing steps in and of itself was incidental to his employment and an injury resulting therefrom compensable would usher in positional risk as the standard for compensability. Illinois has expressly and repeatedly rejected this doctrine.

/s/*Kathryn A. Doerries*

1 Under the positional risk doctrine, an injury may be said to arise out of the employment if the injury "would not have occurred but for the fact that the conditions or obligations of the employment placed claimant in the position where he was injured by a neutral force, meaning by 'neutral' neither personal to the claimant nor distinctly associated with the employment." (Larson, *The Positional-Risk Doctrine in Workmen's Compensation*, 1973 Duke L.J. 761, 761.) This court has previously declined to adopt the positional risk doctrine, believing that the doctrine would not be consistent with the requirements expressed by the legislature in the Act. (See *Campbell "66" Express, Inc. v. Industrial Comm'n* (1980), 83 Ill. 2d 353, 355-56; *Decatur-Macon County Fair Association v. Industrial Comm'n* (1977), 69 Ill. 2d 262, 268.) For the reasons stated in *Campbell "66" Express* and *Decatur-Macon County Fair Association*, we continue to adhere to that view. *Brady v. Louis Ruffolo & Sons Constr. Co*., 143 Ill. 2d 542, 552-553, 578 N.E.2d 921, 925-926, 1991 Ill. LEXIS 36, *14-15, 161 Ill. Dec. 275, 279-280.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0050

LULLO, MICHAEL
Employee/Petitioner

Case# **15WC038111**

ST OF IL/ILLINOIS STATE UNIVERSITY
Employer/Respondent

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

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0564 WILLIAMS & SWEE LTD
JEAN A SWEE
2011 FOX CREEK RD
BLOOMINGTON, IL 61701

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

0000 ASSISTANT ATTORNEY GENERAL
LOUIS LAUGGES
500 S SECOND ST
SPRINGFIELD, IL 62706

0903 ILLINOIS STATE UNIVERSITY
1320 ENVIRONMTL HEALTH SAFETY
NORMAL, IL 61790

0904 STATE UNIVERSITY RETIREMT SYS
PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

NOV 24 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Lullo
Employee/Petitioner

v.

Case # **15** WC **38111**

Consolidated cases: **N/A**

State of Illinois/Illinois State University
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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Bloomington**, on **October 15, 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 **October 14, 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.

Per the stipulation of the parties, in the year preceding the injury, Petitioner earned **$32,058.00**; the average weekly wage was **$616.50**.

On the date of accident, Petitioner was **32** 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, **$0** in non-occupational indemnity disability benefits and **$0** for other benefits, for a total credit of **$0.**

Respondent is entitled to a credit for medical bills paid in the amount of **$150.48** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

Respondent shall pay the reasonable and necessary medical services as contained in **Petitioner's Exhibit 3** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of **$411.00**/week for **1 2/7 weeks**, for the timeframe of **October 15, 2015 through October 23, 2015,** as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of **$369.90/week** for **4.3 weeks**, because the injuries sustained caused **2% loss of the left leg,** as provided in Section 8(e) of the Act.

Respondent is entitled to a credit for medical bills paid in the amount of **$150.48** through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

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

Melinda M. Bowe-Gillespie

Signature of Arbitrator

11/23/2020

Date

NOV 24 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Michael Lullo
Employee/Petitioner

Case # **15** WC **38111**

v.

Consolidated cases: N/A

State of Illinois/Illinois State University
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that he had been employed by Respondent as a building service worker for approximately four years prior to October 14, 2015. He testified that his daily job duties included cleaning the bathrooms, the hallways, the offices, the principal's office, the library, and the classrooms on the second floor of University High School. He testified that his shift began at 2:00 a.m., and that other workers would show up later in the morning. Petitioner testified that the cleaning supplies were located on the first floor, and that during his shift he would often either take the elevator or take the stairs to go up and down to get supplies and to take the trash out.

Petitioner testified that on October 14, 2015, he arrived at work at 2:00 a.m. and that shortly after he began working his shift his supervisor, Evelyn Whitfield, informed him that later that day there would be an event in the library and that the president of the university would be present. He testified that Ms. Whitfield asked him to do a deep cleaning in the library, to take all the trash out of the library, and to set up chairs and tables in the library for the event.

Petitioner testified that after Ms. Whitfield informed him of the additional job duties that evening, he prioritized deep cleaning in the library and began hurrying to complete the additional tasks, as well as his regular duties. He testified that the library had eight trash cans and that there was more trash than usual because it was homecoming week.

Petitioner testified that after Ms. Whitfield asked him to deep clean the library, he decided that he would be able to complete the additional job duties more quickly if he used the steps between the second and first floors. On cross examination, Petitioner testified that that on a normal day he would traverse the steps two times and that he would use the elevator most of the time. He testified that the elevator was very slow and that he did not want to rely on it, so he decided to use the stairs. Petitioner testified that he could pick up the pace if he used the stairs.

Petitioner testified that there were approximately 30 steps between the first and second floors. He testified that he placed three garbage bins at the bottom of the steps, and then went upstairs and bagged all of the trash and started bringing them downstairs to dump them in the bins. He testified that he also carried some chairs up to the second floor. Petitioner testified that he ran out of supplies and went downstairs to get more supplies, and that while he was downstairs he grabbed a roll of trash bags. He testified that he carried the roll of trash bags in his hands and proceeded upstairs. He testified that as he got to the first

landing, he turned and went to the second landing when he felt his left knee buckle underneath him. He testified that because he was carrying the roll of trash bags he could not reach out to grab the handrail, and that he fell onto his knees. He testified that he noticed immediate left knee pain.

Petitioner testified that at the time his left knee twisted and buckled, he was moving faster than his normal pace and that he was thinking about the additional job duties that he needed to complete during his shift. He testified that before his knee buckled on October 14, 2015, he had gone up and down the steps approximately 10 times. He testified that that after his left knee buckled, his knee hurt and he began to limp.

Petitioner testified that although he had experienced right knee pain prior to his October 14, 2015 accident, he had never experienced any ongoing left knee pain or any disability with his left knee. He testified that since his accident, he has had some ongoing left knee pain and that the pain is worse with bending or walking up and down stairs.

Petitioner testified that he is currently working as an apprentice union plumber/pipefitter and that his wages are higher than what he had been earning as a building service worker for Respondent.

On cross examination, Petitioner testified that the stairway was open to the public and that there was no debris or water on the stairway at the time of his injury. On further cross examination, Petitioner testified that before October 14, 2015, his left knee had never buckled on him.

The medical records of Occupational Health Clinic at St. Joseph Medical Center/Dr. Mary Yee Chow were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on October 23, 2015, at which time it was noted that he was seen for a re-check of his left knee. It was noted that Petitioner had a slight limp with pain increasing to level 5 while walking, that he was not using his Ace wrap due to it slipping down, that he was tender to the touch, and that there was slight swelling on the inner knee. It was noted that the chief complaint was left knee pain, that bending still hurt, and that walking still hurt but not as bad, that he had cancelled an appointment, and that the Ace wrap helped but fell off when walking. It was also noted that Tylenol and Ibuprofen helped and that Petitioner felt wobbly when walking, but had no falling sensation. It was noted that the diagnosis was that of a left knee injury. It was noted that Petitioner stated that he wished to see his family doctor of his own choice. It was further noted that Petitioner could return to work with restrictions, although no restrictions were indicated. (PX1).

The records of Occupational Health Clinic at St. Joseph Medical Center reflect that Petitioner was seen on October 15, 2015, at which time it was noted that he was seen for a left knee injury. It was noted that Petitioner was climbing stairs and his left knee gave out, that he had pain when bending, and that he stated that he had a decrease in strength and pushing on the knee. It was noted that Petitioner saw his primary care physician and that no x-rays were done. It was further noted that Petitioner was at work and going up stairs and that his left knee buckled a little and gave out the day before, that his knee hurt yesterday at work, and that he came to work that morning and had worked, but took the elevator. It was noted that Petitioner had pain when walking and that his knee was starting to buckle and hurt when trying to bend it, that he was carrying rolls of trash bags (empty) up stairs at University High School at ISU, that there was no substance on the stairs, and that the stairs appeared normal. It was also noted that Petitioner's knee locked every so often. The assessment was noted to be that of a left knee injury, probable meniscus injury. It was noted that Petitioner was to be on sedentary restrictions, and that he was to take Ibuprofen as needed and use an Ace wrap. Petitioner was recommended to return in 7-10 days. The FMLA Certification of Health Care Provider for Employee noted that the approximate date condition commenced was that of October 14, 2015, that the probable duration of the condition was unsure but probably 6-8 weeks, that Petitioner was unable to perform his to perform his job functions due to the condition and that he was to do

sedentary (sitting most of the time) work only, and that he was walking up stairs at work, that his knee gave out and he felt pain, and that he was carrying rolls of trash bags at the time of the incident. (PX1).

The records of Occupational Health Clinic at St. Joseph Medical Center reflect that Petitioner completed a form dated October 15, 2015 which noted that his left knee gave out on him while climbing stairs and that he now had knee pain with almost no bending strength. (PX1).

The Tristar Accident Report was entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The Arbitrator notes that the document was illegible. (PX2).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 3.

The medical records of Advocate Medical Group were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on October 15, 2015, at which time it was noted that he was complaining of left knee pain with flexion, that he was hurt at work, and that the injury occurred on October 15, 2015. It was noted that Petitioner complained of acute left knee pain with chronic right knee pain, that he stated that he was going up the stairs with a light load at work when he felt his left knee buckle under him and had had left knee pain since, that he also had chronic knee problems on the right and had had an MRI with orthopedic recommendation to hold off any significant arthroscopy and was to try to lose weight and alter his job mechanics, and that he had not lost any weight. It was noted that the exam of the knee was not very significantly abnormal and only abnormal with respect to mild tenderness just medial to the patella, that the patellar movement showed no crepitus nor was there crepitus elsewhere, that there were no noises with knee movement in both active and passive range of motion, and that he walked with a mild limp. It was noted that there was no sign of effusion or discoloration or difference in temperature between Petitioner's two knees, and that stress testing with abduction and adduction, anterior posterior drawer signs, and McMurray's testing showed no laxity nor significant increase in pain. The assessment was noted to be that of left anterior knee pain. It was noted that Petitioner was informed to follow-up with his primary care physician, Dr. Ranjan, at his earliest convenience in order to fill out his FMLA and work injury paperwork, and that they would defer further evaluation and management to Dr. Ranjan. It was noted that Petitioner was seen for his right knee by orthopedics, that he was encouraged ambulation with the use of the cane in order to decrease the instability and risk of falling, that his knee pain would likely improve with some weight loss secondary to decreased strain and weight on his knees bilaterally, and that no emergent imaging was needed at that time as he was able to ambulate as long as he did not put full weight on his left knee. Petitioner was recommended to take over-the-counter anti-inflammatories as needed for the pain and to follow-up as needed. (PX4).

The records of Advocate Medical Group reflect that Petitioner was seen on November 18, 2015, at which time he stated that he needed to get a note to go back to work which he said could be without restriction since he had no further pain in his left knee for which he had been seen over a month ago. It was noted that Petitioner stated that he went to a worker's compensation doctor but for some reason they did not fill out the form for him to return to work. It was further noted that the exam of the left lower extremity was symmetrical with the right, that there was no swelling, discoloration, or tenderness any place in the left knee, that stress testing with varus and valgus stress, drawer testing, and McMurray's testing were all normal with no pain nor laxity with these maneuvers, that Petitioner walked without a limp, and that he stated that he felt strong at the knee. The assessment was noted to be that of a knee strain. It was noted that the knee pain and strain seemed to be completely resolved so Petitioner was written for return to work immediately without any restrictions, and that he was advised to lose weight. At the time of the December 22, 2015 visit, it was noted that Petitioner was seen for what was a suspected sinus infection and that he had a tooth that was causing him pain. (PX4).

The CMS Work Comp Packet Documentation was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Workers' Compensation Employee's Notice of Injury noted that the date of injury was that of October 14, 2015 at 3:00 a.m., that the form was completed on October 15, 2015, that Petitioner was going up the stairs when his left knee buckled and that he felt pain and was able to recover before falling down the stairs, and that the body part affected was that of the left knee. The Supervisor's Report of Injury or Illness dated October 15, 2015 noted that Petitioner was walking up the stairs and that his knee buckled under him, and that he thought he must have stepped wrong or twisted wrong. The form was signed by Evelyn Whitfield, BSW Foreman. (RX1).

The Illinois Form 45 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. The document notes that Petitioner was climbing stairs when the accident occurred, that he stated that he was climbing up the stairs when his knee buckled and that his left knee was swollen, and that the injury or illness was that of a strain. (RX2).

The Wage Statement was entered into evidence at the time of arbitration as Respondent's Exhibit 3. The Payment Ledger was entered into evidence at the time of arbitration as Respondent's Exhibit 4.

The medical records of OSF were entered into evidence at the time of arbitration as Respondent's Exhibit 5. The documents were duplicative of those as contained in Petitioner's Exhibit 1. (RX5; PX1).

CONCLUSIONS OF LAW

With respect to disputed issue (C), the Arbitrator finds that Petitioner has proven that he sustained an accidental injury on October 14, 2015 that arose out of and in the course of his employment with Respondent.

In order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 203 (2003), as cited in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124848 (2020) at ¶ 32. The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill.2d 361, 366-67 (1977), as cited in *McAllister* at ¶ 34. "A compensable injury occurs 'in the course of' employment when it is sustained while a claimant is at work or while he performs reasonable activities in conjunction with his employment." *Wise v. Industrial Comm'n*, 54 Ill.2d 138, 142 (1973), as cited in *McAllister* at ¶ 34.

"The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203, as cited in *McAllister* at ¶ 36. A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini v. Industrial Comm'n*, 117 Ill.2d 38, 45 (1987), as cited in *McAllister* at ¶ 36. To determine whether a claimant's injury arose out of his or her employment, we must categorize the risks to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351 WC, ¶ 31; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC, ¶ 38; *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill.App.3d 472, 478 (2011); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105 (2006), as cited in *McAllister* at ¶ 36.

Generally, all risks to which a claimant may be exposed fall within one of three categories. The three categories of risks recognized by the case law are "(1) risks directly associated with the employment;

(2) risks personal to the employee; and (3) neutral risks which have no particular employment or personal characteristics." *Illinois Institute of Technology Research Institute*, 314 Ill.App.3d at 162; *Baldwin,* 409 Ill.App.3d at 478; *First Cash Financial Services,* 367 Ill.App.3d at 105, as cited in *McAllister* at ¶ 38.

The first category of risks involves risks that are distinctly associated with employment. Examples of employment-related risks include "tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work-related tasks which contributes to the risk of falling." *First Cash Financial Services,* 367 Ill.App.3d at 106, as cited in *McAllister* at ¶ 40. Injuries resulting from a risk distinctly associated with employment are deemed to arise out of the claimant's employment and are compensable under the Act. *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 Il App (3d) 150500WC, ¶ 35, as cited in *McAllister* at ¶ 40.

The second category of risks involves risks personal to the employee. "Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies and are generally noncompensable." *Illinois Institute of Technology Research Institute*, 314 Ill. App.3d at 162-63, as cited in *McAllister* at ¶ 42. "Injuries resulting from personal risks generally do not rise out of employment. An exception to this rule exists when the work place conditions significantly contribute to the injury or expose the employee to an added or increased risk of injury." *Rodin v. Industrial Comm'n*, 316 Ill.App.3d 1224, 1229 (2000), as cited in *McAllister* at ¶ 42.

The third category of risks involves neutral risks that have no particular employment or personal characteristics. *Illinois Consolidated Telephone Co.*, 314 Ill.App.3d at 353, as cited in *McAllister* at ¶ 44. "Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombings, and hurricanes." *Illinois Institute of Technology Research Institute*, 314 Ill.App.3d at 163, as cited in *McAllister* at ¶ 44. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 27, as cited in *McAllister* at ¶ 44. "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1014 (2011), as cited in *McAllister* at ¶ 44.

The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk - a risk distinctly associated with the claimant's employment. *Mytnik,* 2016 Ill App (1st) 152116WC, ¶ 39; *Steak 'n Shake*, 2016 Ill App (3d) 150500WC, ¶ 38, as cited in *McAllister* at ¶ 46. A risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill.2d 52, 58 (1989), as cited in *McAllister* at ¶ 46.

In the case at hand, the Arbitrator finds that, consistent with *McAllister*, Petitioner's acts were incidental to and causally connected to his job duties as a building service worker for Respondent as they were acts that he was reasonably expected to perform incident to his assigned duties. Additionally, the Arbitrator further that, at the time of the occurrence, Petitioner was arguably performing acts that he was instructed to do by his employer as he was traversing the steps during the course of removing trash.

Furthermore, the Arbitrator finds that Respondent's assignment of additional work duties to clean the library qualitatively and quantitatively placed Petitioner at greater risk than the general public in order to fulfill his duties, that Petitioner was subjected to an increased risk resulting from the additional workload

which caused an increased frequency and speed with which he used the stairs to perform his regular and additional janitorial duties, and that Petitioner's work placed him at greater risk because he was hurrying and preoccupied with completing the additional task of deep cleaning the library and setting up tables and chairs in addition to his regular daily job duties. The Arbitrator also finds that the additional job duties caused Petitioner to ascend and descend the steps at a much more frequent basis than he would have been with his regular job duties, and that because Petitioner was carrying the roll of garbage bags in his hands, he was prevented from grabbing the handrail and this placed him at an increased risk as well. As a result thereof, the Arbitrator finds that Petitioner has proven that he sustained an accidental injury on October 14, 2015 that arose out of and in the course of his employment with Respondent.

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of October 14, 2015.

Petitioner testified that he did not have pre-accident left knee issues and that he had never treated medically for his left knee prior to October 14, 2015. The Arbitrator notes that Dr. Chow's and Dr. Griffith's October 15, 2015 histories of accident are consistent with Petitioner's testimony of accident and subsequent left knee pain. (PX1; PX4). The record reveals that the physician at Advocate Medical Group diagnosed Petitioner with a knee strain as it relates to the accident. (PX4). As a result thereof, the Arbitrator finds that Petitioner has met his burden of proving that his current condition of ill-being is causally related to the accident of October 14, 2015.

With respect to disputed issue (J) pertaining to reasonable and necessary medical services, in light of the Arbitrator's aforementioned conclusions, the Arbitrator finds that Petitioner's care and treatment was reasonable, necessary and causally related to his work accident of October 14, 2015. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 3, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall be given a credit for all medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner claims that he is entitled to temporary total disability benefits for the timeframe of October 15, 2015 through October 23, 2015. (AX1). In light of the Arbitrator's findings as to both accident and causation, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits for the timeframe of October 15, 2015 through October 23, 2015, a period of 1 2/7th weeks.

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

With respect to Subsection (i) of Section 8.1b(b), the Arbitrator notes that neither party submitted an AMA impairment. As a result thereof, the Arbitrator gives no weight to this factor.

With respect to Subsection (ii) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he was a building service worker for Respondent at the time of the accident at issue. The Arbitrator places greater weight on this factor when making the permanency determination.

With respect to Subsection (iii) of Section 8.1b(b), Petitioner was 32 years old on the date of the accident at issue. In light of Petitioner's release to full duty by his treating physician, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (iv) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that he is currently working as an apprentice union plumber/pipefitter and that his wages are higher than what he had been earning as a building service worker for Respondent. As there was no evidence proffered at arbitration to demonstrate that Petitioner's work accident has impaired or otherwise affected his future earnings capacity, the Arbitrator places lesser weight on this factor when making the permanency determination.

With respect to Subsection (v) of Section 8.1b(b), the Arbitrator notes that Petitioner testified that since his accident, he has had some ongoing left knee pain and that the pain is worse with bending or walking up and down stairs. At the time of November 18, 2015 visit at Advocate Medical Group, it was noted that Petitioner stated that he needed to get a note to go back to work which he said could be without restriction since he had no further pain in his left knee for which he had been seen over a month ago. It was noted that Petitioner stated that he went to a worker's compensation doctor but for some reason they did not fill out the form for him to return to work. It was further noted that the exam of the left lower extremity was symmetrical with the right, that there was no swelling, discoloration, or tenderness any place in the left knee, that stress testing with varus and valgus stress, drawer testing, and McMurray's testing were all normal with no pain nor laxity with these maneuvers, that Petitioner walked without a limp, and that he stated that he felt strong at the knee. The assessment was noted to be that of a knee strain. It was noted that the knee pain and strain seemed to be completely resolved so Petitioner was written for return to work immediately without any restrictions, and that he was advised to lose weight. (PX4). The Arbitrator concludes that Petitioner's evidence of disability at the time of arbitration was somewhat corroborated by his treating records at the conclusion of his treatment. The Arbitrator accordingly places lesser weight on this factor in determining permanency.

The Arbitrator notes that the determination of permanent partial disability benefits is not simply a calculation, but an evaluation of all of the factors as stated in the Act in which consideration is not given to any single factor as the sole determinant. Based on the above factors and the record in its entirety, the Arbitrator concludes that Petitioner sustained permanent partial disability to the extent of **2% loss of use of the left leg** as provided in Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC011992
Case Name	PATRICK, THOMAS v. VSN SHIPPING, INC. AND IWBF
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0051
Number of Pages of Decision	12
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Giambattista Patti
Respondent Attorney	Joseph Blewitt

DATE FILED: 2/7/2022

/s/Maria Portela, Commissioner

Signature

22IWCC0051

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

THOMAS PATRICK,

Petitioner,

vs. NO: 13 WC 11992

VSN SHIPPING, INC. and the ILLINOIS TREASURER
as EX OFFICIO CUSTODIAN OF THE IWBF,

Respondents.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the decision of the Arbitrator but modifies Section (F) regarding causation. The Commission strikes the last two sentences of the paragraph beginning with "Additionally…". The Commission replaces the remainder of the paragraph with the following:

> At the time Petitioner was seen at Oakhurst Medical Center on June 14, 2013, he was given lifting restrictions expiring on July 14, 2013. Thereafter, Petitioner did not seek medical treatment until April 17, 2016, nearly three years later when he was seen at Ascension St. John with complaints of back pain "after lifting a heavy object approximately four days ago." Accordingly, the Commission finds Petitioner reached maximum medical improvement ("MMI") on July 14, 2013 and failed to prove his current condition of ill-being is causally related to the work accident subsequent to that date.

All else is affirmed.

The Illinois State Treasurer as *ex-officio* custodian of the Injured Workers' Benefit Fund was named as a co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. This award is hereby entered against the Fund to the extent permitted and allowed under §4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the Injured Workers' Benefit Fund for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the Injured Workers' Benefit Fund.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $253.00 per week for a period of 7 1/2 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 1 1/2 % loss of the person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $606.20 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.

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.

February 7, 2022

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 12522
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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

PATRICK, THOMAS
Employee/Petitioner

Case# **13WC011992**

VSN SHIPPING AND ILLINOIS TREASURER AS EX OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND - (IWBF)
Employer/Respondent

On 2/18/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.51% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4463 GALANTI LAW OFFICE
GIAMBATTISTA PATTI
PO BOX 99
E ALTON, IL 62024

0000 VSN SHIPPING INC
5353 N DELPHIA
CHICAGO, IL 60656

5002 ASSISTANT ATTORNEY GENL
JOSEPH BLEWITT
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

T. Patrick v. VSN Shipping, Inc., et al, 13 WC 011992

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

Thomas Patrick
Employee/Petitioner

Case # **13** WC **011992**

v.

VSN Shipping and the Illinois Treasurer as Ex officio Custodian of the Injured Workers' Benefit Fund - (IWBF)
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeffrey Huebsch**, Arbitrator of the Commission, in the city of **Chicago**, on **August 8, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

T. Patrick v. VSN Shipping, Inc., et al, 13 WC 011992

FINDINGS

On **March 9, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner's average weekly wage was **$253.00**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **1** dependent children.

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

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

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

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

ORDER

Respondent shall pay reasonable and necessary medical services of $606.20, as provided in §§8(a) and 8.2 of the Act, and as is set forth below.

Petitioner's claim for TTD benefits is denied.

Respondent shall pay Petitioner permanent partial disability benefits of $253.00/week for 7-1/2 weeks because the injuries sustained caused Petitioner to suffer the 1-1/2% loss of use of the person as a whole, in accordance with §8(d)2 of the Act.

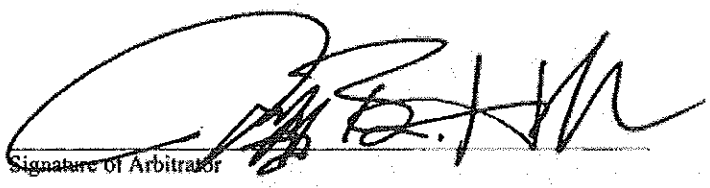
The Illinois State Treasurer as ex-officio of the Injured Workers' Benefit Fund was named as co-Respondent in this matter. The Treasurer was represented by the Illinois Attorney General. The award is hereby entered against the Fund to the extent permitted and allowed under Section 4(d) of the Act, in the event of the failure of Respondent-Employer to pay the benefits due and owing the Petitioner. Respondent-Employer shall reimburse the IWBF for any compensation obligations of Respondent-Employer that are paid to the Petitioner from the IWBF.

Respondent shall pay Petitioner the compensation benefits that have accrued from 3/9/2013 through 8/8/2019 in a lump sum, and shall pay the remainder of the award, if any, in weekly payments.

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest at the rate set forth on the *Notice of Decision of Arbitrator* shall accrue from the date listed below to the day before the date of payment;

however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.



Signature of Arbitrator

February 16, 2020
Date

FEB 18 2020

FINDINGS OF FACT

Petitioner, Thomas Patrick, testified that he worked for Respondent, VSN Shipping, Inc., as a truck driver. In this job, he would pick up and drop trailer loads. He was hired by Slavisa "Visa" Vukoicic, the owner of VSN. Petitioner was instructed by Vukoicic to fly to Chicago, where he took a drug test and signed a "Service Agreement". The agreement is undated and appears to be between Petitioner and Respondent has one page signed by both parties, and three pages signed by Respondent only. (PX 4) Thereafter, Petitioner drove Respondent's truck to Georgia, where Petitioner lived at that time. Vukoicic scheduled Petitioner's deliveries and paid Petitioner 40 cents per loaded mile, via a fuel card that was issued to him by Vukoicic. Petitioner worked for Respondent for about 3 months before the accident. The truck that Petitioner drove was owned by Respondent. It had a VSN logo on it. Respondent paid for fuel, repairs, service and maintenance for the truck. Respondent chose the repair shops.

On March 9, 2013, Petitioner was involved in a motor vehicle accident in North Carolina. Petitioner testified that he swerved off the road to avoid a stopped car. The truck went down the median, striking poles and landing on its side. Petitioner said that he had pain in his back and legs at that time. He needed help to get out of the truck. He was "dazed" and refused medical treatment at that time. He called Vukoicic from the scene to inform him of the accident and ask for further directions. Vukoicic arranged for the truck to be towed. Petitioner was cited for failure to maintain lane control by North Carolina Highway Patrol on the date of the accident. (PX 7) Petitioner did not return to work for VSN Shipping.

On May 31, 2013, Petitioner had medical treatment at DeKalb Medical Center in Georgia. The coding documents say he was diagnosed with "sprain/strain of back site" and "late effect of motor vehicle accident." He was given home care instructions for back injury prevention, taken off-work through June 3, 2013, and was discharged from care, with a referral to Oakhurst clinic for follow up. (PX 14) On June 14, 2013, Petitioner presented to Oakhurst Medical Center in Georgia also complaining of back pain. (PX 15) He was discharged with prescriptions for cyclobenzaprine and Vicodin and given a work restriction of no lifting greater than 15

pounds for 4 weeks., and discharged. (PX 15) According to Petitioner, his treatment was delayed he was depressed and had no insurance and no job.

Petitioner moved back to Detroit and, on April 17, 2016, presented to Ascension St. John Hospital.He had complaints of back pain "after lifting a heavy object approximately 4 days ago." (PX 16) The Lumbosacral x-ray was normal, he was diagnosed with a back strain, and discharged. Petitioner returned on July 23, 2017 with complaints of neck pain and left knee pain after a fall in the shower. Cervical and brain CTs were normal. Thoracic, lumbosacral, and left knee x-rays were normal. He was discharged the same day. Petitioner underwent a stress echocardiogram procedure on December 16, 2013. There is no mention of any back problems at that time. (PX 16)

Petitioner has received medical care at the VA hospital in Detroit, largely consisting of counseling and psychiatric treatment. Petitioner has been diagnosed with bipolar disorder and depression. A chart note of October 23, 2018 documents complaints of low back pain, status post MVA in 2013. Petitioner receives acupuncture and patches for back complaints. (PX 17)

Petitioner's bills exhibit showed a claimed bill from DeKalb Medical Center in the amount of $606.20 for the date of service of May 31, 2013. (PX 18)

Petitioner has not worked since the accident. He has never recovered. He receives SSDI. He has 7/8-10 back pain currently, which is worse when lying down. Petitioner has not kept his CDL license current.

At the time of the accident, VSN had auto liability insurance (PX 4), a registration for a 2005 Freightliner truck (PX 6), and an annual inspection report for the same (PX 8). NCCI reported that VSN did not have workers' compensation insurance on the day of the accident. (PX 11) Petitioner attempted to serve Mr. Vukovich and VSN at its business address by certified mail and by use of a process server, but the service was returned as undeliverable. (PX 12, PX 13) No representative of VSN was present at the time of the hearing. VSN never filed any appearance in this matter.

CONCLUSIONS OF LAW

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law that follow.

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 the injury. Caterpillar Tractor Co. v. Industrial Commission, 129 Ill. 2d 52, 63 (1989)

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

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

Petitioner has proven Act.

The Act applies to employees who are "in the service of another under any contract of hire, express or implied, oral or written, including persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois, persons whose employment results in fatal or non-fatal injuries within the State of Illinois where the contract of hire is made outside of the State of Illinois, and persons whose employment is principally localized within the State of Illinois, regardless of the place of the accident or the place where the contract of hire was made." 820 ILCS 305/1(b)2.

The contract of hire was made within the State of Illinois. Petitioner was flown by Respondent to Illinois, where he took a drug test and then drove off in Respondent's truck. The last act necessary for the formation of the employment contract was Petitioner taking the drug test and leaving in Respondent's truck. These events occurred in Illinois.

(B) Was there an employee-employer relationship?

Based on Petitioner's testimony regarding who owned and insured the truck, as well as who determined where and when the truck and its driver were supposed to go, it is clear that Petitioner was an employee of VSN Shipping, Inc.

(C) Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? And (D) What was the date of the accident?

Based on Petitioner's testimony, the Arbitrator finds that he suffered accidental injuries which arose out of and in the course of his employment by Respondent resulting from his motor vehicle accident on March 9, 2013.

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

Based on Petitioner's testimony, the Arbitrator finds that Petitioner gave notice of the accident to Respondent on the date of the accident.

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

The evidence adduced convinces the Arbitrator that Petitioner suffered a low back strain with mild residuals as a result of the accident. He did not present for any kind of treatment until eleven weeks after the date of accident and his treatment has not been consistent at all. Additionally, he sought treatment for low back

pain after lifting a heavy object in April of 2016. The submitted medical records and the significant gaps in treatment do not support a finding of causation beyond that stated above.

(G) What were Petitioner's earnings?

Petitioner alleged that he made $14,000 in the year before the accident, with an Average Weekly Wage of $253.00. No one from VSN presented to offer any rebuttal, the Arbitrator finds that the AWW was $253.00.

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

Petitioner testified that he was 55 years old at the time of the accident and the Arbitrator so finds.

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

Petitioner testified that he was single with one dependent at the time of the accident and it is so found. **(D)**

(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?

Respondent is found to be liable for the DeKalb MC bill for the date of service of May 31, 2013, in the amount of $606.20 in accordance with §8(a) of the Act and subject to §8.2 of the Act.

(K) What temporary benefits are in dispute? TTD

Petitioner claims entitlement to TTD from March 9, 2013 through July 14, 2013. He was not medically excused off work until May 31, 2013 (from DeKalb MC). No TTD will be awarded without appropriate authorization. Therefore, the claimed TTD from March 9, 2013 to May 31, 2013 is denied. Petitioner was authorized off work from May 31, 2013 through June 3, 2013. (PX 14) He did not provide any evidence as to whether any of these days were "working days", pursuant to §8(b) of the Act. Therefore, no TTD is awarded through June 3, 2013. Thereafter, Petitioner was given lifting restrictions on June 14, 2013, expiring on or about July 14, 2013. Petitioner did not provide testimony supporting an award of TTD for this time period. Petitioner's claim for TTD is denied.

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

An AMA impairment rating was not done in this matter; however, Section 8.1(b) of the Act requires the Commission's consideration of five factors in determining permanent partial disability:

1. The reported level of impairment;
2. Petitioner's occupation;

3. Petitioner's age at the time of the injury;
4. Petitioner's future earning capacity; and
5. Petitioner's evidence of disability corroborated by treating medical records.

Section 8.1(b) also states, "No single 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 a physician must be explained in a written order." The term "impairment" in relation to the AMA Guides to the Evaluation of Permanent Impairment 6th Edition is not synonymous with the term "disability" as it relates to the ultimate permanent partial disability award.

1. The reported level of impairment

An AMA impairment rating was not done in this case. This does not preclude an award for partial permanent disability. This factor is given no weight in determining PPD.

2. Petitioner's Occupation

On the date of the accident, Petitioner was a truck driver. He did not return to any work after the accident, but the Arbitrator is not persuaded that the failure to return to work is due to any injury as a result of the accident. This factor is given great weight in determining PPD.

3. Petitioner's age at the time of injury

Petitioner was 55 years old at the time of injury, and he is 62 years old at the time of the hearing. Accordingly, Petitioner is nearing the end of his work life. This is relevant and should receive some weight in determining PPD.

4. Petitioner's future earning capacity

Petitioner has not proved any loss of earnings as a result of the accident. Petitioner is not presently working, but the Arbitrator is not persuaded that this is due to his injuries. Great weight is given to this factor in determining PPD.

5. Petitioner's evidence of disability corroborated by medical records

Considering the submitted medical records, the Arbitrator concludes that Petitioner suffered a mild back strain as a result of the injury, with resulting mild residuals. This factor is given great weight in determining PPD.

After considering the above, and the Record as a whole, the Arbitrator finds that the injuries sustained caused Petitioner to suffer the 1-1/2% loss of use of a person as a whole, in accordance with §8(d)2 of the Act.

(O) Insurance Compliance/Liability of the IWBF

Based on the certification provided by NCCI, the Arbitrator finds that VSN Shipping, Inc. did not have workers' compensation insurance on the date of the accident. Therefore, liability of the IWBF is established, pursuant to §4(d) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	08WC036905
Case Name	CASAS, AMADOR v. CHEVY'S FRESH MEX
Consolidated Cases	
Proceeding Type	Remand
Decision Type	Commission Decision
Commission Decision Number	22IWCC0052
Number of Pages of Decision	5
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	CHRISTOPHER MOSE
Respondent Attorney	Frank Barber

DATE FILED: 2/8/2022

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

AMADOR CASAS,

Petitioner,

vs.

NO: 08 WC 36905
19 IWCC 0491

CHEVY'S FRESH MEX,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission on remand from the Circuit Court. The Circuit court reversed the Commission's award of wage differential benefits pursuant to Section 8(d)(1) of the Act and remanded the matter to the Commission "for entry of findings regarding wage differential benefits to award [*sic*] Plaintiff, including the calculation of the amount of wage differential benefits, and any other benefits the Commission finds due in accordance with this decision;". The Commission hereby complies with the order of the Circuit Court.

The following evidence is pertinent on remand. Petitioner, a waiter, and bartender for Respondent sustained a work-related accident in January 2008 that resulted in injuries to both knees and left him with restrictions that prevented him from returning to his prior employment. Following his injury Petitioner was employed at Wal-Mart part-time as a cashier.

At arbitration Petitioner elected to receive compensation pursuant to Section 8(d)(1) of the Act. Petitioner's injury occurred prior to the 2011 Amendments to the Act. As Petitioner was injured in 2008, he is entitled to receive wage differential benefits for the full duration of his disability. *United Airlines v. Illinois Workers' Compensation Comm'n.,*407 Ill.App.3d 467, 942 N.E. 2d 711,713, 347 Ill.Dec.508 (2011).

The Commission, in its earlier Decision filed September 10, 2019, found that Petitioner would be able to earn a weekly wage of $777.86 in the full performance of his usual and customary duties. This finding was not challenged by either party and it was not disturbed by the Circuit Court. The Commission further found in its earlier Decision that Petitioner's bilateral knee injuries rendered him unable to pursue his usual and customary employment and an impairment of his earnings occurred as a result.

Petitioner entered into evidence post-injury wage statements from his employment at Wal-Mart. The evidence showed that Petitioner's hourly wages and number of hours worked at Wal-Mart varied over time. The Commission, in its earlier Decision, performed a calculation of wage differential benefits pursuant to Section 8(d)(1) benefits that Petitioner timely appealed to the Circuit Court.

The Circuit Court of Cook County held oral arguments on April 8, 2021. On May 18, 2021 Judge Curry issued an Opinion and Order which reversed in part the Commission's Decision of September 10, 2019, finding that the wage differential calculations contained therein were against the manifest weight of the evidence. The Opinion and Order provided modified calculations of the wage differential benefits and remanded the case to the Commission. The Circuit Court made the following factual findings:

1) Pay stubs for fourteen of the fifteen pay periods from September 6, 2014 through April 3, 2015 show that Petitioner earned $5,201.94 during those 28 weeks. Because Petitioner began work on September 2, 2014, (the pay period began on August 23, 2014) he only worked part of one week during the initial pay period. His pay stubs therefore show earnings for 29 weeks at his initial hourly rate of $8.65. Further, they show that he earned a total of $5,317.94 over 29 weeks, or average earnings of $183.38 per week. Two-thirds of the difference between $777.86 and $183.38 is $396.32 for this period.
2) Pay stubs from April 4, 2015 through the pay period ending August 21, 2015 are in evidence. This is ten pay periods, or twenty weeks. Petitioner earned a total of $2,349.45 during these twenty weeks for an average of $117.47 per week. Two-thirds of the difference between $777.86 and $117.47 is $440.26 for this period.
3) Pay stubs from August 22, 2015 through the pay period ending February 19, 20016, show that Petitioner earned a total of $3,035.81 over eleven pay periods (22 weeks), for an average of $137.99 per week. Two-thirds of the difference between $777.86 and $137.99 is $426.58 for this period.
4) From February 20, 2016 through February 17, 2017 is a period of 52 weeks. The 26 pay stubs for this period show that Petitioner earned a total of $6,066.90, or an average of $116.67 per week. Two-thirds of the difference between $777.86 and $116.67 is $440.79 for this period.

5) From February 18, 2017 through August 18, 2017 (the duration of Petitioner's disability at the time of the submission of the evidence), he earned a total of $2,664.62 over these 13 pay periods, or 26 weeks. This is an average of $102.48 per week. Two-thirds of the difference between $777.86 and $102.48 is $450.25 for this period.

The Commission notes the pay period ending August 18, 2017 was the most recent pay stub submitted into evidence at the time of the arbitration hearing on September 5, 2017. Therefore, in addition to the wage differential specified by the Circuit Court, the Commission finds that Petitioner is entitled to the sum of $450.25 per week for the duration of his disability, as set forth in Section 8(d)(1) of the Act which was in effect at the time of Petitioner's injury.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the following pursuant to Section 8(d)(1) of the Act, for the reason that the injuries sustained caused Petitioner to be incapacitated from pursuing his usual and customary line of employment and sustained a loss of earnings that would have derived from the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount he is able to earn after the accident:

1) The sum of $396.32 per week for the 28 -week period commencing September 6, 2014 through April 3, 2015;
2) The sum of $440.26 per week for the 20- week period commencing April 4, 2015 through August 21, 2015;
3) The sum of $426.58 per week for the 11- week period from August 22, 2015 through February 19, 2016; and
4) The sum of $440.79 per week for the 52-week period from February 20, 2016 through February 17, 2017; and
5) The sum of $450.25 per week commencing February 18, 2017 and continuing for the duration of Petitioner's disability.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $425.00 for medical expenses under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $20,000.00. 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.

February 8, 2022
SJM/msb
D-1/26/22
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	18WC031320
Case Name	BURTON, CORA v. WEXFORD HEALTH SERVICES
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0053
Number of Pages of Decision	21
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Terry Schroeder

DATE FILED: 2/14/2022

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
ROCK ISLAND

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CORA BURTON,

Petitioner,

vs. NO: 18 WC 031320

WEXFORD HEALTH SERVICES,

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 21, 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 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 $2,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 14, 2022

KAD/bsd
O011122
42

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC031320
Case Name	BURTON,CORA v. WEXFORD HEALTH SERVICES
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	

Petitioner Attorney	Kevin Morrisson
Respondent Attorney	Terry Schroeder

DATE FILED: 4/21/2021

INTEREST RATE FOR THE
WEEK OF APRIL 20, 2021 0.04%

STATE OF ILLINOIS)
)SS.
COUNTY OF Rock Island)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Cora Burton
Employee/Petitioner

v.

Case # **18** WC **31320**

Consolidated cases: **N/A**

Wexford Health Sources
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 **Melinda Rowe-Sullivan**, Arbitrator of the Commission, in the city of **Peoria**, on **March 8, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 11, 2018,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

On the date of accident, Petitioner was **52** years of age, ***married*** with **0** dependent children.

Respondent shall be given a credit of $**ALL AMOUNTS PAID** for TTD, $**0** for TPD, $**0** for maintenance, $**0** in non-occupational disability benefits, and **$0** in other benefits, for a total credit of **$ALL AMOUNTS PAID.**

Respondent shall be given a credit of **$ALL AMOUNTS PAID** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

ORDER

As Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of February 11, 2018, Petitioner's request for prospective medical treatment as recommended by Dr. Tan is denied.

Respondent shall pay for medical services **rendered up to February 4, 2020,** as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with regard to said medical expenses **for treatment rendered up to February 4, 2020** directly to Petitioner. Respondent shall pay any unpaid, related medical expenses **for treatment rendered up to February 4, 2020,** according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner.

Respondent shall be given a credit of $**ALL AMOUNTS PAID** for TTD, $**0** for TPD, $**0** for maintenance, $**0** in non-occupational disability benefits, and **$0** in other benefits, for a total credit of **$ALL AMOUNTS PAID.**

Respondent shall be given a credit of **$ALL AMOUNTS PAID** in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act.

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

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

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

Melinda M. Rowe-Sullivan

Signature of Arbitrator

ICArbDec19(b)

APRIL 21, 2021

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Cora Burton
Employee/Petitioner

v.

Wexford Health Sources
Employer/Respondent

Case # **18** WC **31320**

Consolidated cases: **N/A**

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on the date of the accident, she was employed by Respondent and assigned to Pontiac Corrections. She testified that she currently works for the State of Illinois at the same location. She testified that her job title is that of a med tech, and that she performs the functions of a nurse. She further testified that her typical day involves passing medications to inmates and assessing them for illness or injury.

Petitioner testified that on February 11, 2018 while working for Respondent, she slipped on some icy stairs and injured her right ankle. She testified that when she slipped, she felt a pop in the ankle and excruciating pain. She testified that she never had problems with her right ankle prior to this incident. She further testified that she sought emergency care at OSF on the date of the accident, and treated with OSF Occupational Care for a brief period of time. She testified that she eventually saw Dr. Li for the first time on March 13, 2018. Petitioner testified that she began treatment by undergoing physical therapy and ultimately had an MRI of the right ankle performed on March 15, 2018.

Petitioner testified that Dr. Li performed a right ankle arthroscopic surgery on May 8, 2018. She testified that the surgery alleviated her pain "somewhat." Petitioner testified that the pain has never totally been gone, and that there are days where it does not hurt at one point and does later in the day, depending on her level of activity. She further testified that walking and using the stairs are still an issue.

Petitioner testified that after the May 18, 2018 surgery, she continued to do therapy with Dr. Li's office. She testified that she believes that she did make progress with the therapy and ended up returning to full duty. She testified that when she first returned to work she was given easier assignments to try to help, including working in areas of the facility without many stairs and without as much walking.

Petitioner testified that she treated with Dr. Li through November 29, 2018. She further testified that she was working full duty at that time. She testified she did not see Dr. Li again until March 21, 2019 and that at that time, Dr. Li told her if it did not get better in a couple of months to return, so that is what she had done. She testified that she told Dr. Li that she had pain in her ankle and into the outside on top of her foot. She testified that Dr. Li told her that she could take over-the-counter medications if needed and to wear her ankle brace as needed, and that there was nothing more he could do for her. She testified that she sought a second opinion with Dr. Giselle Tan, and that she was referred to Dr. Tan by her primary physician, Dr. Jennifer Stevens.

Petitioner testified that she saw Dr. Tan on August 12, 2019 and also in September 2019. When asked what Dr. Tan had recommended, Petitioner responded that Dr. Tan had suggested that she still needed surgery to repair tendons in her ankle. She testified that she has not pursued that surgery because she currently works for a different employer and cannot afford to take the time off. She testified that she is still working full duty and that she plans to pursue the surgery if given the opportunity.

Petitioner testified that she recalled seeing Dr. Holmes on behalf of the Respondent on January 7, 2020. Petitioner agreed that she recalled telling Dr. Holmes where the pain was in her ankle. When asked if she recalled Dr. Holmes marking her ankle, Petitioner responded that she was not sure if the doctor marked it or if the physician's assistant that came in prior to him was the one that marked it. She testified that she did, however, remember someone marking it. At the time of arbitration, Petitioner was asked by her attorney to mark on Petitioner's Exhibit 5 other areas on her foot where she also has pain. Petitioner testified that the areas she marked was where she also told Dr. Holmes her pain was from.

Petitioner testified that since seeing Dr. Holmes her symptoms have gotten worse and that she is in pain almost daily. She testified that she takes Ibuprofen as part of her daily routine. She testified that she has not had medical care for her pain because it requires time off to have anything done. She testified that she would like to pursue the surgery as recommended by Dr. Tan. She testified that she does not like to live in pain. She testified that she is still able to fully perform her job duties with over-the-counter medications, and that she takes Ibuprofen or Tylenol to make it through a shift at work.

On cross examination, Petitioner testified that she went to work in July 2019 for the State of Illinois. She agreed that she last saw Dr. Li on March 21, 2019, and that she did not see Dr. Tan until about six months later. She further agreed that she underwent no treatment from either Dr. Li or Dr. Tan between March and August of 2019.

The medical records of Dr. Lawrence Li were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that Petitioner was seen on March 13, 2018, at which time it was noted that she stated that she slipped and fell up wet stairs at a prison, that she was working, that as she was going up some wet stairs because of snow she twisted her ankle and felt a pop, and that she developed a lot of swelling on the lateral aspect of her ankle. It was noted that Petitioner had been treating with occupational medicine and had been on crutches and simply had not been getting better, that she had not had any imaging except for an x-ray, and that she could not bear full weight without having pain on the undersurface of her foot as well as the lateral aspect of her ankle. It was noted that Petitioner had to use crutches in order to take some weight over [*sic]* her foot and ankle otherwise her pain became severe, that her pain was aggravated by activities of daily living and limited her desired lifestyle, and that her pain also interfered with sleep and woke her up. It was further noted that Petitioner denied numbness and tingling, and that the date of injury was that of February 11, 2018. The diagnosis was noted to be that of a right ankle peroneous tendon tear. Petitioner was given Mobic and was recommended to undergo an MRI. (PX1).

The records of Dr. Li reflect that Petitioner underwent an MRI on March 15, 2018 at the Open MRI Center, which was interpreted as revealing (1) sequelae of a high-grade partial thickness tear of the anterior talofibular ligament; (2) intermediate to low signal in the anterolateral gutter, a finding which can be seen in the setting of anterolateral impingement; (3) tendinosis, mild tenosynovitis, and partial-thickness tears of the peroneal tendons, as described; (4) sequelae of an osteochondral injury along the medial talar dome, as described; (5) multi-focal degenerative joint disease, as described. At the time of the March 16, 2018 visit, it was noted that Petitioner had a right ankle high-grade tear of the ATFL, lateral gutte [*sic*] syndrome, partial-thickness tear of the peroneal tendon, and osteochondral injury of the medial talar dome. Petitioner was given an injection, was recommended to undergo physical therapy, and was recommended to follow-up in four weeks. At the time of the physical therapy visit on March 23, 2018, it was noted that Petitioner's pain was rated 3-4/10 and that she tried walking with one crutch, but could not do it very long due to pain.

It was noted that Petitioner entered and exited the clinic with a right lower leg walker and bilateral axillary crutches. It was noted that ultrasound and vasopneumatic cryotherapy were implemented for pain/inflammation management. (PX1).

The records of Dr. Li reflect that Petitioner underwent a Physical Therapy Initial Evaluation on March 20, 2018. At the time of the March 26, 2018 physical therapy visit, it was noted that Petitioner reported increased pain with the use of a single crutch but did use only one around the house, that she rated 2-3/10 currently, and that she was unsure if the ultrasound was helpful but the Game Ready with compression seemed to help. At the time of the March 28, 2018 physical therapy visit, it was noted that Petitioner stated that she tolerated the last session without any increase in soreness and that her pain was not too bad on that date, but that she was not on her feet a lot the day before. At the time of the April 2, 2018 physical therapy visit, it was noted that Petitioner reported that she did fine after the last therapy session, but that her pain had been worse since Saturday for an unknown reason. It was noted that Petitioner's pain was 4/10 upon entering the clinic on the back of the ankle and bottom of her foot, and that she had been trying to increase her weightbearing in the boot. The Progress Note dated April 11, 2018 noted that Petitioner reported that she continued to have significant right ankle pain that worsened with weightbearing, that she wore a right lower leg walker and used one crutch at home and two crutches in the community, and that she had not gotten significant relief with therapy thus far. It was noted that Petitioner had not shown improvement in objective measurements or subjective reports since starting therapy. (PX1).

The records of Dr. Li reflect that Petitioner was seen on April 9, 2018 for physical therapy, at which time it was noted that her pain was rated 2/10 upon entering the clinic, that no significant changes or improvements in symptoms were noted since last seen, and that she did not notice any improvement with the laser. It was noted that Petitioner did not seem to get relief from modalities except temporary relief with vasopneumatic cryotherapy, which was continued on that date for pain/inflammation management. At the time of the April 16, 2018 visit with Dr. Li, it was noted that Petitioner had been in therapy for four weeks and still had significant pain and could not bear full weight even in a lower leg walker, that she was still using crutches, that most of the pain was lateral and that she had some medial pain as well, and that her pain was aggravated by activities of daily living and limited her desired lifestyle. It was also noted that Petitioner's pain also interfered with sleep and woke her up, and that she denied numbness and tingling. The diagnosis was noted to be that of right ankle high grade tear of the ATFL, lateral gutte [*sic*] syndrome, partial-thickness tear of the peroneal tendon, and osteochondral injury medial talar dome. It was noted that Petitioner was not progressing and improving with therapy. Petitioner was dispensed Mobic and was recommended to undergo right arthroscopic ankle surgery, modified Brostrom repair of ATFL, repair of peroneus brevis tendon, and address medial talar dome OCD lesion as indicated. (PX1).

The records of Dr. Li reflect that Petitioner was seen on April 16, 2018 for physical therapy, at which time it was noted that she had just seen Dr. Li, that she reported some pain, and that Dr. Li recommended surgery since she was not making progress. It was noted that Petitioner stated that she had been feeling a little better recently, that she reported that she got temporary relief from Game Ready pneumatic compression, and that she had a good experience with new parameters with ultrasound the last session. At the time of the April 18, 2018 physical therapy visit, it was noted that Petitioner reported feeling a little more sore lately which she thought may be from the Graston Technique for soft tissue mobilization, and that she stated she had had trouble sleeping the last couple of nights as she could not get comfortable. At the time of the April 23, 2018 physical therapy visit, it was noted that there were no changes, that moderate right calf atrophy was noted, that the home exercise program was updated with ankle band strengthening including calf strengthening, and that ultrasound and vasopneumatic cryotherapy was continued for pain/inflammation management. At the time of the April 25, 2018 physical therapy visit, it was noted that Petitioner's pain was rated 3/10 and that she did not get any significant relief from therapy. It was noted that Petitioner was approved for surgery which was scheduled for May 8th, and that physical therapy would be discontinued and resumed after surgery. (PX1).

The records of Dr. Li reflect that Petitioner was seen on May 16, 2018, at which time it was noted that she was seen post-operatively following right ankle arthroscopy with microfracture of osteochondral injury medial talar dome, extensive debridement of tenosynovitis and scar tissue right ankle, removal of loose body, repair of peroneus brevis tendon, and modified Brostrom ligament reconstruction. It was noted that Petitioner stated that she had typical post-operative pain, that Game Ready pneumatic compression was reducing swelling, and that she was having moderate pain. Petitioner was prescribed Norco and Voltaren Gel, was to continue Game Ready vasopneumatic compression therapy, and was to start physical therapy. It was noted that Petitioner was using crutches and got fatigued, and that she was to be fit for an IWalk to help her with ambulation around the house. Petitioner was recommended to return for follow-up in four weeks. (PX1).

The records of Dr. Li reflect that Petitioner underwent surgery by Dr. Li on May 8, 2018 at Ireland Grove Center for Surgery, which was that of right ankle arthroscopy with microfracture of osteochondral injury medial talar dome, extensive debridement of tenosynovitis and scar tissue right ankle, removal of loose body, repair of peroneus brevis tendon, modified Brostrom ligament reconstruction. At the time of the May 22, 2018 physical therapy visit, it was noted that Petitioner reported that she used the IWalk when she was walking more but that if she was going to be up and down she just used the crutches, that her pain was "not bad" on that date and was rated 2/10 upon entering the clinic, and that she was able to get the reparel sleeve on. At the time of the May 24, 2018 physical therapy visit, it was noted that Petitioner reported that she did fine after the last session, that the tenderness had decreased quite a bit, and that the antibiotic was helping with the redness at the incision site. At the time of the June 8, 2018 visit, it was noted that Petitioner stated that she reported no pain since was not putting weight on it, and that she was doing well with physical therapy. It was also noted that Petitioner was to continue physical therapy, was to transition to a lower leg walker with a slow advance to weight bear as tolerated, and was to return for follow-up in four weeks for ultrasound. (PX1).

The records of Dr. Li reflect that Petitioner was seen on June 4, 2018 for physical therapy, at which time it was noted that she reported that her ankle was tight and achy that day so she did her exercises, that it felt a little better but was still stiff because she had been in class all day with her orthosis on, and that she reported overall her ankle was improving but that she had a lot of tightness. At the time of the June 8, 2018 physical therapy visit, it was noted that Petitioner reported that her ankle was feeling a little loose that day, that she stated that she regularly was not having any pain at rest and that it went up to about 3-4/10 on average with activity, and that she just saw the nurse practitioner who would follow-up with the doctor regarding weight bear status in the next couple of days, but for now was still non-weightbearing. At the time of the May 18, 2018 Physical Therapy Initial Evaluation, it was noted that Petitioner reported that she injured her right ankle when she slipped and fell on wet stairs at work, that she was a nurse at a prison, and that she tried conservative care but did not improve significantly, therefore surgery was ordered. It was noted that Petitioner presented post-surgically and stated that she had been recovering okay since surgery but had a lot of swelling, that she also reported significant pain around the lateral incision site, that she was using Game Ready pneumatic compression 30 minutes on/30 minutes off, and that she was elevating about heart-level when she iced. (PX1).

The records of Dr. Li reflect that Petitioner was seen on June 13, 2018 for physical therapy, at which time it was noted that she stated that she was gradually putting a little weight on the foot but that it was painful, and that she was being cautious. At the time of the June 18, 2018 physical therapy visit, it was noted that Petitioner had pain and swelling increases with increased weightbearing activities. At the time of the June 25, 2018 physical therapy visit, it was noted that Petitioner reported that she had not been using the crutch the last 1-2 days, that she had more pain with weightbearing, and that she continued to wear the boot as instructed. At the time of the July 2, 2018 visit, it was noted that Petitioner stated that she still had one area near the incision that bothered her, that a forcep was used to see if there were any retained sutures, and that her therapy was progressing but that because of that wound her progress had been slow. Petitioner

was dispensed for Mobic and Ultram, was recommended to continue physical therapy, was to transition to a lace-up ankle brace from the lower leg walker, and was to follow-up in four weeks. At the time of the June 27, 2018 physical therapy visit, it was noted that Petitioner stated that she had more pain on that date than usual, that she rated the pain at 4/10 and that it was annoying, that it was located on the outside of the ankle, and that she took pain medications an hour ago and that it was still present. (PX1).

The records of Dr. Li reflect that Petitioner was seen on July 2, 2018 for physical therapy, at which time it was noted that she stated that she just got out of the doctor's appointment and that her incision site was really sore because he was debriding it to make sure there was not a stitch. At the time of the July 16, 2018 physical therapy visit, it was noted that Petitioner stated that she was just experiencing a dull ache in the ankle and that the lace-up brace caused some soreness in her heel the day before. It was noted that Petitioner continued to ambulate with altered gait mechanics. At the time of the July 18, 2018 physical therapy visit, it was noted that Petitioner stated that she had some more swelling the last two days in her foot which she had not had for a couple of weeks, that she continued to have a dull ache when she first started walking, and that she had discomfort in the front of the ankle and top of foot when she was walking. At the time of the July 31, 2018 visit, it was noted that Petitioner stated that she continued to make good progress in therapy and that the pain was decreasing significantly. Petitioner was dispensed Mobic, was to advance her work restrictions, was to continue physical therapy, and was to follow-up in four weeks at which time it was anticipated she would be placed at full duty. (PX1).

The records of Dr. Li reflect that Petitioner was seen on July 27, 2018 for physical therapy, at which time it was noted that she reported that her ankle was much better overall, that she reported minimal pain with functional activity and walking but that it did limit her distance/time due to increased swelling, and that she continued to wear the lace-up ankle brace for all weightbearing activity as instructed. At the time of the July 23, 2018 physical therapy visit, it was noted that Petitioner stated that she was doing okay that day, that she still had some swelling present, that she stated that it came and went, and that she stated that she was very sore after the last session. At the time of the August 3, 2018 physical therapy visit, it was noted that Petitioner got occasional sharp pain on the outside of her ankle and that it was bad the day before. At the time of the July 6, 2018 physical therapy visit, it was noted that Petitioner reported that her incision was now starting to heal, that the area that was debrided was looking better to her, and that she used the ankle brace at home but that it bothered her left knee some. At the time of the July 9, 2018 visit, it was noted that Petitioner reported that her incision had been better since the doctor debrided it and that her pain had also been much better overall, that she started using the lace-up ankle brace around the house and then tried walking a little bit outside with it on as well, and that overall she was doing well with the new brace but that it was stiff the first few steps and she had had a little more swelling. (PX1).

The records of Dr. Li reflect that Petitioner was seen on July 11, 2018 for physical therapy, at which time it was noted that her tolerance with the lace-up brace was improving, and that her pain was a 0/10 at rest and a dull ache with activity. At the time of the July 31, 2018 physical therapy visit, it was noted that Petitioner stated that she just saw the doctor and was able to go back to work for four hours a day, that she was allowed to stand only for 30 minutes per hour, and that the pain in the ankle was under control on that date. At the time of the August 6, 2018 physical therapy visit, it was noted that Petitioner stated that she only had pain when she initially stood up for the first few steps or after being on it for too long. At the time of the August 28, 2018 visit, it was noted that Petitioner stated that she could not return to work with the restrictions given, and that she had been getting stronger but still had some pain over the anterior aspect of her ankle and some pain over the base of the 5th metatarsal but that it was getting better. Petitioner was dispensed Naproxen, was recommended to advance restrictions to allow her to return to work for eight hours a day sit down as needed, was to continue physical therapy for strengthening, and was to follow-up in four weeks. (PX1).

The records of Dr. Li reflect that Petitioner was seen on August 30, 2018 for physical therapy, at which time it was noted that she had no new complaints and that she still had discomfort on the side and

top of her foot, mostly at start-up. At the time of the August 28, 2018 physical therapy visit, it was noted that Petitioner had more soreness on the top of her foot the last two days with an unknown cause. At the time of the August 24, 2018 visit, it was noted that Petitioner's worst pain was 3-4/10 with prolonged walking or walking on uneven ground, that the best pain was 0/10 with rest, and that she had stiffness with start-up from sitting. At the time of the August 21, 2018 physical therapy visit, it was noted that Petitioner reported that her ankle felt stiff but that it usually did after her drive in to physical therapy, and that her ankle still felt tight and sore around its circumference but that most of her pain was still down the outside of the ankle and foot. At the time of the September 6, 2018 physical therapy visit, it was noted that Petitioner reported continued improvement in her right ankle and that she continued to report her most significant issues were prolonged activity and weightbearing tolerances. It was noted that Petitioner was advancing toward goals, but had progress remaining to reach full return to functional mobility. (PX1).

The records of Dr. Li reflect that Petitioner was seen on August 14, 2018 for physical therapy, at which time it was noted that she was not noticing an improvement in her activity tolerance yet and that her ankle was stiff at start-up. At the time of the August 10, 2018 physical therapy visit, it was noted that Petitioner's walking was limited to about 15 minutes at a time by lateral ankle pain. At the time of the September 10, 2018 physical therapy visit, it was noted that Petitioner stated that her foot was doing okay and that she had a deep ache in the ankle, especially after prolonged standing or walking (30 minutes). At the time of the September 6, 2018 physical therapy visit, it was noted that Petitioner reported continued improvement in her right ankle and that she continued to report her most significant issues were prolonged activity and weightbearing tolerances. It was also noted that Petitioner had mild gait deviations noted on the right lower extremity. At the time of the September 17, 2018 physical therapy visit, it was noted that Petitioner reported that she continued to have discomfort at the anterior ankle, sometimes the whole thing hurt. At the time of the September 13, 2018 physical therapy visit, it was noted that Petitioner stated that she had soreness in the ankle Monday night and Tuesday, and that she even had to ice the ankle. It was further noted that Petitioner was not sure of the reason for the increase in soreness. (PX1).

The records of Dr. Li reflect that Petitioner was seen on September 20, 2018 for physical therapy, at which time it was noted that she reported that she had discovered that the orange band had caused the increase in soreness in the ankle, and that she went back to the yellow band and was not having pain at the current time. At the time of the September 24, 2018 physical therapy visit, it was noted that Petitioner's walking tolerance was limited to one or two hours. At the time of the September 27, 2018 visit, it was noted that Petitioner stated that she had done well with therapy and at that point had reached her goals, and that she had some occasional pain and swelling but overall was much better than before. Petitioner was dispensed Naproxen, was recommended to return to work full duty the next week, and was to follow-up in four weeks. It was noted that if all was well, Petitioner would be at maximum medical improvement. At the time of the September 27, 2018 physical therapy visit, it was noted that Petitioner reported that her ankle still got a little sore when she was on her feet for a long time but overall it felt much better, and that she thought she was ready to go back to work. It was noted that Petitioner demonstrated no significant objective or functional limitation at that time and had returned to full functional mobility, and that she was advised in final home exercise program and discharge instructions. It was also noted that Petitioner had met all goals of physical therapy and was discharged. (PX1).

The records of Dr. Li reflect that Petitioner was seen on November 1, 2018, at which time it was noted that she stated that she was having trouble because of the length of time she had to be on her feet, and that she stated that she walked about 6-8 miles per day at her job and at the end of the day, even though she was wearing compression stockings, her ankle really swelled up. Petitioner was dispensed Naproxen and was prescribed Voltaren Gel and Ultram. It was noted that an injection was performed in the peroneal tendon sheath. Petitioner was recommended to follow-up in four weeks. At the time of the November 29, 2018 visit, it was noted that Petitioner stated that the cortisone injection and the Voltaren Gel helped significantly, that her pain was less and she was working full duty, and that she felt that Ultram and Voltaren

Gel helped her with her ability to work and felt without she would not be able to work. Petitioner was prescribed Ultram and Voltaren Gel. Petitioner was recommended to continue her home exercise program and to advance to full activities. At the time of the March 21, 2019 visit, it was noted that Petitioner stated that she continued to have dysfunction in her right ankle, that she had discomfort over the anterior and lateral aspect of the ankle, that there was swelling after she had been on it for her work shift, and that surgery was done close to a year ago and she wanted to know if there was going to be any additional improvement or if this would be a permanent condition. It was noted that Dr. Li believed at that time that Petitioner's condition and residual dysfunction were permanent, and that he believed that the extent of her injury had caused her permanency. (PX1).

The medical records of OSF Orthopedics/Dr. Tan were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that Petitioner was seen on September 9, 2019, at which time it was noted that she returned on that date to go over the results of her MRI. It was noted that Petitioner stated that she had pain even after surgery, and that she was there for further evaluation. It was noted that it was explained to Petitioner that while some of her symptomatology was secondary to arthritis she still had a tear of the peroneus longus and peroneus brevis, that there was also a sprain of the ATFL and CFL, that her pain was not medially whatsoever even though she had injured the deltoid in the past, and that they discussed that Dr. Tan offered her a right peroneus brevis and peroneus longus repair with possible peroneus brevis to peroneus longus transfer with likely a modified Brostrom. It was noted that Dr. Tan believed that it would alleviate some of Petitioner's pain but that it would not get rid of any of her arthritic pain, which was in the subtalar as well as tibiotalar joint. It was noted that it was odd since Petitioner's notes suggested there was a repair, although the radiologist mentioned no evidence of repair of this. The assessment was noted to be that of (1) right ankle pain, unspecified chronicity; (2) peroneal tendonitis of right lower extremity. The impression of the August 25, 2019 MRI of the right ankle was noted to be that of (1) longitudinal split tears, tendinosis, and tenosynovitis of the peroneal tendons with distal reconstitution and intact insertions; (2) chronic sprains of the anterior talofibular ligament, deep deltoid, and calcaneofibular ligaments; (3) at least moderate degenerative changes with regions of high-grade chondral loss in the ankle, hindfoot, and midfoot as detailed; (4) susceptibility artifact from metallic foreign body at the plantar heel soft tissues. (PX2).

The records of OSF Orthopedics reflect that Petitioner underwent x-rays of the right ankle on August 12, 2019, which were interpreted as revealing decreased joint space medial tibiotalar joint bilaterally with subtle cavovarus heel alignment; calcification of the insertion Achilles and a plantar calcaneal enthesophyte; well corticated avulsion fracture off the medial malleolus left side. At the time of the August 12, 2019 visit, it was noted that Petitioner tumbled down the stairs in February 2018 and had microfracture and tendon surgery with Dr. Li in Bloomington, that she denied any numbness but did get tingling of the whole foot, that she got pain on the bottom of her foot under the arch and then on the lateral aspect, and that she had tried a cortisone injection as well and multiple different shoes. It was noted that Petitioner tried Voltaren gel and that helped a little bit, and that she still had swelling in the ankle and leg as well. It was further noted that Petitioner had been released to work by Dr. Li and that she worked eight hours a day and sometimes 12 hours a day, that she worked as a nurse in the prison, that she had been referred by Dr. Stevens, and that she had tried a cortisone injection and different shoes. It was noted that Petitioner still had swelling in the ankle as well as her leg, that she had tingling over her foot laterally, and that she had pain on the bottom of her foot under the arch and on the lateral aspect of her foot and ankle. It was noted that on physical examination, Petitioner had tenderness over the lateral border of her foot and a little bit over the insertion of the peroneus brevis at the base of the 5th metatarsal, that most of her pain was over the dorsal lateral aspect of her foot between the 4th and 5th ray, and that there was soft tissue swelling more over the lateral aspect of the ankle on the right side versus the left. It was noted that Dr. Tan explained to Petitioner that she felt that she walked over the lateral border of her foot as she had subtle cavovarus heel alignment, that Dr. Tan wanted to treat this conservatively, that she could get a pair of Arch Rivals as she was a "savvy" online shopper, and that this reduced the pressure over the lateral border of her foot and

would make her balance better on both sides. It was noted that Dr. Tan also wanted a repeat MRI of the right ankle as she wanted to evaluate for the peroneal tendon as well as the lateral collateral ligament pathology. It was noted that the MRI would have to be approved by work comp, that Petitioner did not need a work note as she had been released to full duty, and that she was comfortable with the plan. The impression was noted to be that of (1) right ankle pain, unspecified chronicity; (2) right foot pain. (PX2).

The transcript of the deposition of Dr. Giselle Tan dated July 10, 2020 was entered into evidence at the time of arbitration as Petitioner's Exhibit 3. Dr. Tan testified that she is a licensed orthopedic surgeon and that in her office practice she sees foot and ankle pathology. (PX3).

Dr. Tan testified that she first saw Petitioner on September 9, 2019 and that she stated that she had surgery that was a work comp injury. She testified that Petitioner had an incision where it would be more consistent with repairing the ligaments on the outside of the ankle, that she had some portals which would indicate that she had some sort of arthroscopy procedure, and that she had some tenderness over the tissues of the ankle both on the inside and on the outside. She testified that Petitioner did not come in with any assistive devices when she walked into her office, but that she stated that she still had pain even after her surgery. She testified that Petitioner had continued to still have swelling in her ankle compared to her contralateral ankle, and that her plan was to get another MRI. She testified that based on her review of the MRI, there were still tears of the peroneal tendons which were the balance muscles on the outside and then sprain of the ligaments on the outside portion of Petitioner's ankle. She testified that there was also a sprain on the inside part which was the deltoid ligament, and also some arthritic changes of the ankle at the back of the joint below the ankle and in front of the ankle as well. She testified that at the time of the second visit with Petitioner when they discussed the MRI results, and that she still continued to state that she had pain and swelling. When asked whether the presentation of Petitioner's symptoms at both visits was consistent with the MRI study that she reviewed, Dr. Tan responded that she could not think of anything else that would cause her persistent swelling. (PX3).

When asked whether she thought that Petitioner's pain complaints were out of proportion to the diagnostic study that she reviewed, Dr. Tan responded in the negative and further testified that at the same time she had arthritis. She testified that she did not know if that was different from Petitioner's presentation with the other surgeon. When asked whether Petitioner's current pain complaints were a result of what Dr. Li had originally repaired or was the result of a new condition that had developed since, Dr. Tan responded that it appeared that it would be the same because her symptomatology was at the level of her prior incision. (PX3).

Dr. Tan testified that she proposed re-repairing the ligaments on the outside part of Petitioner's ankle which was the anterior talofibular ligament and the calcaneofibular ligament, and possibly repair of the peroneus brevis muscle. She testified that she discussed that soft tissue procedures would not alleviate any of Petitioner's arthritic symptoms. She testified that she told Petitioner that the pain of the arthritis would be the same but that to some extent, it would help her pain mainly from the area where her incisions were. She testified that in her September 9th note she indicated that it was odd since Petitioner's surgical report noted there was a repair, although the radiologist mentioned no evidence of repair in the MRI. She further testified that usually there was some sort of evidence of something there, and that she did not know the reason for that. When asked whether that could be why Petitioner was still having persistent pain, Dr. Tan responded that it was possible. (PX3).

When asked why she was recommending surgery, Dr. Tan responded that it seemed that Petitioner had most of her symptoms on the outside of her ankle and less so in the inside of her ankle, that she still had pain over her prior surgical intervention, and that they had a new MRI showing the ligament tears on the lateral aspect of the ankle, as well as the tear of the peroneus brevis muscle which was on the outside part of the ankle as well. Having reviewed the report dated March 21, 2019 from Dr. Li and having been asked whether the complaints noted in the report by Petitioner were different than when she presented to

her in September 2019, Dr. Tan responded that the language was a little bit different but that it was the same. She testified that Petitioner was noted to have dysfunction in the right ankle, that she mentioned that her ankle was still not correct, and that she still said there was swelling as well. (PX3).

When asked whether the repair that she was proposing would at least in some part alleviate the swelling that had been noted to be persistent in Petitioner's examinations, Dr. Tan responded that she believed so. She testified that she believed that Petitioner gave her a history of a work injury as being the cause of her ankle pain. When asked whether the condition that she diagnosed was some that could be caused or rendered symptomatic by a trauma such as a twisting injury, Dr. Tan responded in the affirmative. (PX3).

Having been posed a hypothetical and having been asked whether a slip on an icy staircase suffering a twisting injury to the ankle was something that could cause or aggravate the conditions that she noted in the original Open MRI Center report to the point where Petitioner would need surgical intervention as referenced in the operative report, Dr. Tan responded in the affirmative. When asked whether the current surgical recommendation was caused by either the original twisting injury or was a natural progression from the tripping injury on February 11, 2018, Dr. Tan responded that it was probably from the original injury but that Petitioner did have surgery as well. (PX3).

When asked whether the sprain and tear of the tendon on the outside of ankle present on the current MRI were present on the original MRI, Dr. Tan responded that they were. When asked whether they had changed significantly at least from the report, Dr. Tan responded that she believed that the one thing that was different was that the original MRI indicated there was some mild edema of the calcaneofibular ligament without high-grade tear/rupture, while the MRI more recently done indicated a chronic sprain of the anterior talofibular ligament as well as the calcaneofibular ligament. When asked if there was anything that would cause that difference or whether they were at all related, Dr. Tan responded that the only thing that she could say was that the ligament that was not torn before was torn in the most recent MRI, and that the surgery which Dr. Li documented (*i.e*., a modified Brostrom) typically treated the tears of both of those ligaments. When asked if it was a possible result of the surgery or an indication of a new injury, Dr. Tan responded that it was a possible result of the surgery. (PX3).

When asked of her prognosis for Petitioner post-surgically, Dr. Tan responded that she believed that her subjective symptoms would hopefully be alleviated on the outside part of her ankle and that she discussed with her that the arthritic changes would not be alleviated. She testified that the arthritis was noted on the open MRI as mild tibiotalar degenerative joint disease, and that it was something that could be aggravated by a twisting injury. When asked whether the arthritis could be aggravated permanently, Dr. Tan responded that she supposed it could. When asked if Petitioner were to return to her office with similar symptoms and whether her surgical recommendation would change, Dr. Tan responded that she would probably want to get another MRI to see what the condition of the ligaments were and whether there had been a progression of the symptoms of her arthritis. When asked whether that would change her surgical recommendation, Dr. Tan responded that it was quite possible it may. She testified that if Petitioner indicated that her pain was not at her prior surgical incision, then it would probably change what she would offer her in the future. (PX3).

On cross examination, Dr. Tan agreed that until she examined Petitioner and ran more diagnostic tests, she could not say with any certainty what her recommendation might be. When asked whether it was possible that the tears that were showing up on the more recent MRI that did not show up on the first MRI were caused by something other than the surgery, Dr. Tan responded that it was highly unlikely because the first MRI showed no tear in the calcaneofibular ligament and that she guessed that Dr. Li probably tightened both the anterior talofibular ligament and the calcaneofibular ligament as part of the modified Brostrom. (PX3).

On cross examination when asked whether she reviewed the actual MRI studies or just relied on the radiologist, Dr. Tan responded that she reviewed the actual studies. She testified that she did not see any surgical changes and that oftentimes they would mention sutures or you could them, and that she did not see anything. She testified that it was unusual because usually there was always some sort of telltale sign of some sort of repair, and that in this case there was not. She testified that she did not know Dr. Li. When asked whether it was possible that Dr. Li did not do what he put in the operative report, Dr. Tan responded that she did not know and that Petitioner had an incision that was consistent with a repair in that area. (PX3).

On cross examination, Dr. Tan agreed that the first date that she saw Petitioner was on September 9, 2019 and that the last date Dr. Li saw her was on March 21, 2019. She agreed that there was a six-month window that they had no idea what Petitioner was doing. She testified that it was possible that Petitioner could have suffered another injury. She testified that it was possible for someone who had had an injury to suffer another intervening injury and just feel that it was related back to the original injury. She agreed that it was possible that in activities of daily living someone could sprain or roll their ankle. (PX3).

On cross examination, Dr. Tan testified that degenerative arthritis was degenerative in nature and the symptoms either changed or stayed the same. She testified that arthritis was wear and tear of the cartilage. When asked whether that progressed as the joints were continued to be used, Dr. Tan responded that sometimes it did and that sometimes it did not, and that it depended on the individual patient. She testified that it was not unusual to see this type of arthritis in someone that was 54 years of age. She testified that she did not think that body habitus had anything to do with someone having arthritis. She testified that diabetes slowed down wound and fracture healing. (PX3).

On cross examination, Dr. Tan testified that prior to seeing Petitioner on September 9th she had not reviewed any other medical records. She testified that she had not seen the emergency room report. She testified that she had not reviewed all of Dr. Li's records other than what counsel gave her before the deposition. She testified that her opinion was based on two visits and an MRI. (PX3).

On redirect, Dr. Tan testified that there was nothing in her reports that would be indicative of an injury between the time of Dr. Li's visit on March 21, 2019 and when she saw Petitioner in September. She testified that on presentation, Petitioner had swelling compared to her contralateral unoperated ankle with symptoms more consistent around her incision. She testified that a microfracture could be asymptomatic, and that a trauma such as a twisting injury could render it symptomatic. (PX3).

On further cross examination when asked whether one would have a microfracture present prior to undergoing surgery, Dr. Tan responded that one could have an osteochondral defect that became symptomatic with a twisting injury. She agreed that it could also be made symptomatic by virtually any activity, and further testified that some people had it and did not know unless they had a study. (PX3).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The IME Picture was entered into evidence at the time of arbitration as Petitioner's Exhibit 5.

The IME Report of Dr. George Holmes dated January 7, 2020 was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The report reflects that Petitioner was a 54-year-old LPN who worked in the Illinois prison system, that an injury occurred on February 11, 2018 when she slipped on icy stairs, and that she presented with anterolateral pain and posterolateral pain. It was noted that sometimes the pain awoke Petitioner at night, that she used modified shoes but they did not make much of a difference, and that she had more pain toward the end of the day after she had been on her feet standing and walking in the prison area. It was noted that Petitioner currently took no medications for inflammation or pain, that she used no braces or orthotics at that time, and that she did return to work in October 2018. (RX1).

The report reflects that Petitioner had good passive eversion and inversion of the hindfoot, that she had some pain with resisted eversion and the posterolateral aspect of the ankle, and that most of her pain was posterior to the lateral malleolus. It was noted that Dr. Holmes was unable to answer the question regarding reasonableness and necessity of the procedure recommended by Dr. Tan due to the lack of medical records. It was further noted that, however, to the extent Dr. Tan wanted to do a Brostrom procedure, Petitioner had no evidence of any instability and that the area of pain posterior to the fibula appeared to be isolated in one spot and, given Petitioner's co-morbidities and given the localization of pain and the lack of swelling at that point, he could not indicate that he would state that surgery was reasonable and necessary. It was noted that Dr. Holmes could not provide any treatment recommendations as it related to the accident, that Petitioner was functioning and working full-time, full duty, and that at that point he saw no orthopaedic reason that she would not continue her current work status in spite of her symptomatology. It was further noted that Dr. Holmes was unable to state whether Petitioner was at maximum medical improvement from the injury of February 11, 2018, that she did not have any orthopedic issues that would preclude her from continuing to work at her current level without restrictions as an LPN, and that as to a firm date for maximum medical improvement it would be predicated on his review of the medical records. (RX1).

The IME Addendum Report of Dr. George Holmes dated February 4, 2020 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. It was noted that Dr. Holmes had been provided with additional medical records. It was noted that Dr. Holmes did not agree that Petitioner required a Brostrom procedure or peroneal tendon repair as recommended by Dr. Tan, that at the time of the examination she had a small discrete area of discomfort in the posterolateral aspect of the ankle, that the area did not comport with pain that would be anticipated to occur along the tract of the peroneal tendons, and that there was no tracking at all in the area of the pain that they marked and photographed. It was noted that Dr. Holmes was unable to determine that Petitioner had any ligamentous instability of the ankle on the drawer test done in the office, and that there was no evidence of any atrophy or swelling noted as well. It was further noted that, based the MRI findings, Petitioner's physical examination, and the previous surgery that was performed in May 8, 2018, it was Dr. Holmes's opinion that he would not agree with the recommendations of Dr. Tan. (RX2).

The report reflects that, as to the issue of current treatment recommendations, Dr. Holmes recommended observation and possibly a work conditioning or work hardening program. It was noted that it was Dr. Holmes's opinion that Petitioner was at maximum medical improvement as to the February 11, 2018 accident, that he did not find that there was any impairment other than a very small area of discomfort, that there was no instability, that there was no swelling, that there was no atrophy, and that there was no objective dysfunction other than Petitioner's well-localized pain in the posterolateral aspect of the ankle. It was further noted that Dr. Holmes did not perform a detailed AMA Guidelines Impairment Rating. (RX2).

The transcript of the deposition of Dr. George Holmes dated November 30, 2020 was entered into evidence at the time of arbitration as Respondent's Exhibit 3. Dr. Holmes testified that he is an orthopedic surgeon, that is board-certified in orthopedic surgery, and that there was no subspecialty certification for the subspecialty that he does in foot and ankle. (RX3).

Dr. Holmes testified that he performed an IME of Petitioner on January 7, 2020. He testified that the medical records that he was provided as to the January 7, 2020 report included radiographs dated February 11, 2018 and August 12, 2019, as well as an MRI scan dated August 25, 2019. He testified that Petitioner gave a history that on February 11, 2018 she apparently slipped on some icy stairs and this resulted in her twisting her right ankle, that she saw Dr. Li on her own for her ankle injury, that she stated that the initial treatment consisted of an MRI scan and then underwent an arthroscopic procedure on the ankle as well as a ligament repair, and that this occurred on May 8, 2018. He testified that Petitioner was treated post-operatively in sort of the standard fashion, that this included several cortisone injections after the surgery, and that she was then released from care in October but still had complaints of pain. He testified

that Petitioner indicated that Dr. Li felt there was nothing more that could be done and that he could not offer any further treatment, and that she then sought the care of Dr. Tan who recommended an MRI scan and was subsequently recommending surgery as well. (RX3).

Dr. Holmes testified that Petitioner's complaints as of the January 7, 2020 exam were that of subjective complaints of anterior lateral ankle pain and posterior lateral pain of the right ankle, that she stated that sometimes the pain would awaken her at night, that she had tried some shoe modifications but felt they really did not help her, that she also indicated that she had more pain towards the end of the day when she was on her feet working, and that apparently she was still working in the prison area. He testified that Petitioner's co-morbidities included hypertension, that she also had diabetes, and that she also had some obesity issues as well as elevated cholesterol. When asked of the significance of Petitioner's co-morbidities to her current condition, Dr. Holmes responded that generally these were metabolic issues and could impact healing, and that the literature showed that patients with these co-morbidities tended to have more persistent pain after procedures as well. (RX3).

Dr. Holmes testified that on physical examination there was no swelling in the areas of the foot or the ankle, that the calf circumference was 43 cm on the right and 44 cm on the left which was within the standard of error, that Petitioner had no instability, that she had some pain with resisted eversion in the posterior part of the ankle, and that this was where most of her pain was on examination at that time. He testified that he outlined Petitioner's area of her pain, that he localized her pain and took a photograph to document the exact location of the pain in relationship to the fibula, and that the remainder of the exam was intact. (RX3).

Dr. Holmes testified that the injury Petitioner suffered and the procedure that was performed by Dr. Li appeared to be for instability of the ankle. He testified that Dr. Li also operated on an OCD lesion which she had medial dome of the talus, and that the area of Petitioner's pain would not have been in the surgical procedure area and it would not have been in the area that was initially addressed in the surgery in May of 2018. He testified that, at the time of the January 7, 2020 examination, he was unable to provide a treatment recommendation but was able to form an opinion as to Petitioner's current status as of the January visit. He testified that regardless of the lack of medical records Petitioner had no instability of the ankle, and there was only one spot of pain posterior to the fibula as noted in the photograph. He testified that that area of pain would not have been addressed, in his opinion, by any additional ankle surgery, that Petitioner had no swelling in the ankle, that there was no atrophy in the ankle, and that she had essentially a normal examination except for the one spot as marked in the photograph. (RX3).

When asked whether he was able to form an opinion at that time as to what the potential source of pain located at the spot marked in the photograph to be caused by or responsible for, Dr. Holmes responded that he noted in the report that he was unable to make a definitive diagnosis yet but that he did entertain the possibility of a peroneal tendon injury. He testified that at that point it was only one spot and not the entire area of the tendon and that at that point he had the opportunity to review the MRI scan, which did not demonstrate any tear in the tendon but did demonstrate tendinopathy. He testified that tendinopathy was premature aging of the tendon and was more common in patients with diabetes and other co-morbidities. He testified that Petitioner's exposure to steroids, her weight, her diabetes, her hypertension, and her elevated cholesterol were all etiological factors that could cause tendinopathy in a tendon. (RX3).

Dr. Holmes testified that in his January 7th report, he indicated that he needed additional medical records to review before he made opinions as to Petitioner's maximum medical improvement status and the propriety of the recommended treatment. He testified that he was provided those records and that he indicated his final opinions in a report dated February 4, 2020. He testified that he did not agree that Petitioner required a Brostrom procedure and/or peroneal repair. He testified that he did not feel that on examination Petitioner demonstrated ankle instability, that this procedure was also performed earlier by Dr. Li on May 8, 2018, and that he did not believe that she required a peroneal tendon repair given that when

patients had peroneal symptoms they had symptoms along the track of the peroneal tendons, and that she did not have symptoms along the tract of the peroneal tendons. (RX3).

Dr. Holmes testified that his review of the MRI of August 25, 2019 did not demonstrate any signal changes around the tendon, that this would indicate that there was not an acute process going on around the tendons, that if the tendons were to cause a symptomatology Petitioner would have demonstrated some swelling around the ankle which was not demonstrated objectively, and that she would have had some disuse atrophy, which was also not demonstrated. He testified that he felt that, based on the medical records reviewed, the photographs they had taken, and the lack of instability on examination, he felt that Petitioner did not require the Brostrom procedure, nor did she require the peroneal tendon repair. (RX3).

Dr. Holmes testified that arthritic issues were common for someone of Petitioner's age. He testified that Dr. Tan noted in her notes that when she looked at the subtalar joint, she felt that Petitioner had some subtalar arthritis and tibial talar arthritis as well. He testified that those were two potential causes of pain. He testified that the spot tendinis [*sic*] that Petitioner demonstrated was more likely to be caused by the subtalar joint arthritis than the peroneal tendon. When asked from a normal healing perspective from an injury like Petitioner had whether it would have been possible for her to display some instability when she was seen on the two occasions by Dr. Tan and then have those issues resolve in the four months between those appointments and his examination of her in January 2020, Dr. Holmes responded that it was a possibility. (RX3).

Dr. Holmes testified that he was of the opinion that the surgery recommended by Dr. Tan was not necessary, and that he recommended observation and the possibility of work conditioning or work hardening as of the time of his February report. He testified that he was of the opinion that Petitioner was at maximum medical improvement as of February 4, 2020. When asked whether, as of the date of his February 4, 2020 report, he had an opinion whether Petitioner had any evidence of impairment, Dr. Holmes responded that at the completion of his examination he found there was no objective dysfunction which meant that he could not provide any objective criteria that would show that she could not do anything. He agreed that he did not perform an AMA guideline impairment rating. (RX3).

On cross examination, Dr. Holmes agreed that he thought that Petitioner had some tendinopathy and further testified that it was based on the MRI scan. He agreed that one of Petitioner's co-morbidities was that the injections of her ankle could cause tendinopathy. He testified that it was his understanding that Petitioner was getting those injections as a result of her post-operative treatment from the original surgery. (RX3).

On redirect, Dr. Holmes agreed that he was not saying that Petitioner had demonstrated tendinopathy as of the January 7th office exam but that the diagnostic study of August 25, 2019 (which was four months previous) demonstrated it. He testified that Petitioner had no clinical exam that was consistent with any clinically significant tendinopathy, and that her exam was inconsistent with clinical tendinopathy. He testified that Petitioner had OCD lesion on the medial side of her ankle, but that she had no pain in that area and that it was of no significance. He further testified that Petitioner did not have a clinical diagnosis of tendinopathy, that she had no swelling, that she had no instability, that she had no atrophy, and that she did not have subjective complaints along the peroneal tendons consistent with tendinopathy. (RX3). Furthermore, Dr. Holmes testified that he outlined Petitioner's area of her pain, and that he localized her pain and took a photograph to document the exact location of the pain in relationship to the fibula. (RX3).

CONCLUSIONS OF LAW

With respect to disputed issue (F) pertaining to causation, the Arbitrator finds that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of February 11, 2018.

At the outset, the Arbitrator notes that Dr. Tan has only seen Petitioner on two occasions – *i.e.*, August 12, 2019 and September 9, 2019 -- as compared to the one occasion on which Petitioner was seen by Dr. Holmes, which was that of January 7, 2020. (PX2; PX3; RX1; RX3). Furthermore, the Arbitrator finds to be significant in this case that, on cross examination, Dr. Tan testified that prior to seeing Petitioner on September 9th she had not reviewed any other medical records; that she had not seen the emergency room report; that she had not reviewed all of Dr. Li's records other than what counsel gave her before the deposition; and that her opinion was based on two visits and an MRI. (PX3). On the other hand, Dr. Holmes testified that in his January 7th report he indicated that he needed additional medical records to review before he made opinions as to Petitioner's maximum medical improvement status and the propriety of the recommended treatment, that he was provided those records, and that he indicated his final opinions in a report dated February 4, 2020. (RX3).

Placing greater weight upon the opinions of Dr. Holmes in this case, the Arbitrator notes that Dr. Holmes testified that he did not agree that Petitioner required a Brostrom procedure and/or peroneal repair. He testified that he did not feel that on examination Petitioner demonstrated ankle instability, that this procedure was also performed earlier by Dr. Li on May 8, 2018, and that he did not believe that she required a peroneal tendon repair given that when patients had peroneal symptoms they had symptoms along the track of the peroneal tendons, and that she did not have symptoms along the tract of the peroneal tendons. (RX3). Dr. Holmes further testified that his review of the MRI of August 25, 2019 did not demonstrate any signal changes around the tendon, that this would indicate that there was not an acute process going on around the tendons, that if the tendons were to cause a symptomatology Petitioner would have demonstrated some swelling around the ankle which was not demonstrated objectively, and that she would have had some disuse atrophy, which was also not demonstrated. (*Id.*). Related thereto, of significance to the Arbitrator is the fact that Petitioner's most recent physical examination was performed by Dr. Holmes on January 7, 2020 at which time no swelling was noted in the ankle nor were there signs of atrophy, whereas at the time of the August 12, 2019 visit with Dr. Tan it was noted that Petitioner still had swelling in the ankle as well as her leg, and that there was soft tissue swelling more over the lateral aspect of the ankle on the right side versus the left. (PX2). When asked from a normal healing perspective from an injury like Petitioner had whether it would have been possible for her to display some instability when she was seen on the two occasions by Dr. Tan and then have those issues resolve in the four months between those appointments and his examination of her in January 2020, Dr. Holmes responded that it was a possibility. (RX3).

Having reviewed and considered the entirety of the evidence in this matter, the Arbitrator finds the opinions of Dr. Holmes to be more credible than those proffered by Dr. Tan and, as such, adopts the opinions of Dr. Holmes and concludes that as a result of the February 11, 2018 accident, Petitioner had attained maximum medical improvement as of February 4, 2020. As a result thereof, the Arbitrator finds that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident February 11, 2018.

With respect to disputed issue (J) pertaining to reasonable and necessary medical services, in light of the Arbitrator's aforementioned conclusions and in reliance upon the opinions of Dr. Holmes, the Arbitrator finds that Petitioner's care and treatment rendered up through the date of February 4, 2020 was reasonable, necessary, and causally related to the work accident of February 11, 2018. As a result thereof, Respondent shall pay the reasonable and necessary medical services rendered up to February 4, 2020, as included in Petitioner's Exhibit 4, as provided in Sections 8(a) and 8.2 of the Act. Respondent is to hold Petitioner harmless for any claims for reimbursement from any health insurance provider and shall provide payment information to Petitioner relative to any credit due. Respondent is to pay unpaid balances with

regard to said medical expenses directly to Petitioner. Respondent shall pay any unpaid, related medical expenses according to the fee schedule and shall provide documentation with regard to said fee schedule payment calculations to Petitioner. Respondent is entitled to a credit for all benefits paid under its group health plan under Section 8(j) of the Act.

With respect to disputed issue (K) pertaining to prospective medical treatment, in light of the Arbitrator's finding that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of February 11, 2018, Petitioner's request for prospective medical treatment as recommended by Dr. Tan is 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.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC022715
Case Name	PETERS, GEORGE v. LANGER TRANSPORT INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0054
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Miles Cahill

DATE FILED: 2/14/2022

/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

George Peters,

Petitioner,

vs. NO: 17 WC 22715

Langer Transport, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§19(h) and 8(a) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, employment, 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 May 7, 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 $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.

February 14, 2022

o1/2/22
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	17WC022715
Case Name	PETERS, GEORGE v. LANGER TRANSPORT INC
Consolidated Cases	
Proceeding Type	19(b)/8A Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	9
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Zbigniew Bednarz
Respondent Attorney	Miles Cahill

DATE FILED: 5/7/2021

THE INTEREST RATE FOR THE WEEK OF MAY 4, 2021 0.03%

/s/ Carolyn Doherty, 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)/8A

George Peter
Employee/Petitioner

v.

Langer Transport, Inc.
Employer/Respondent

Case # **17** WC **22715**

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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago, Illinois**, on **4/12/2021**. 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. ☒ 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, **6/19/2017**, 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. ARB EX 1

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

Petitioner's current condition of ill-being **in his left shoulder *is*** causally related to the accident of 6/19/17 as a natural sequelae of the 6/19/17 right shoulder injury.

In the year preceding the injury, Petitioner earned $**84,563.35**; the average weekly wage was $**1,658.10**.

On the date of accident, Petitioner was **58** 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 $**0.00** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**0.00**.

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

ORDER

As to the **left shoulder**, Respondent shall pay Petitioner temporary total disability benefits of $**1,105.40**/week for **39-3/7** weeks, commencing **7/11/2020** through **4/12/2021**, as provided in Section 8(b) of the Act.

As to the **left shoulder**, Respondent shall pay reasonable and necessary medical services incurred in connection with the care and treatment of the **left shoulder** only pursuant to Sections 8 and 8.2 of the Act.

As to the **left shoulder**, Respondent shall authorize and pay for the medical treatment plan of Dr. Steven Chudik, including the recommended left shoulder surgery and its attendant care, pursuant to Sections 8 and 8.2 of the Act.

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

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

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

Carolyn M. Doherty

Signature of Arbitrator

MAY 6, 2021

FINDINGS OF FACT

The Arbitrator initially notes that, pursuant to stipulation of the parties, this matter was tried on the sole issues of accident/causal connection for Petitioner's condition of ill-being with regard to his left shoulder, his request for prospective medical/surgical treatment in relation to the left shoulder and any attendant TTD and medical expenses connected to the left shoulder injury. T. 4-9. Respondent stipulated that Petitioner sustained a work injury on 6/19/17 to the right shoulder and that the right shoulder injury was causally related to the work accident of 6/19/17. T. 4-9, ARB EX 1. At this trial, Petitioner alleges that his left shoulder condition is a natural sequelae of the undisputed right shoulder injury and thus causally related to the accident of 6/19/17. Respondent disputes that the left shoulder condition is a natural sequelae of the right shoulder condition as alleged by Petitioner. Further pursuant to the parties' stipulation, Petitioner is in no way prohibited from pursuing any benefits or compensation at a future trial with regard to his right shoulder, right wrist and right elbow conditions including the payment of TTD and medical expenses incurred in connection with these stipulated work related injuries. The parties took great care to memorialize this agreement as shown in ARB EX 1 T. 4-9 and to indicate that the sole purpose of this trial was to determine causal connection for Petitioner's left shoulder condition and the need for the recommended left shoulder repair surgery. ARB EX 1. The parties' stipulations were considered by the Arbitrator when making the following findings of fact and conclusions of law.

It is undisputed that Petitioner worked for Respondent Langer as a chemical transport driver out of the Joliet facility. He began working in this capacity in August 2015. Petitioner testified that he has worked as a truck driver in general since 1981. Petitioner worked 12-14 hours days 5 to 6 days per week for Respondent driving local and regional routes. Petitioner testified that on 6/19/17 was at work at a loading dock separating the tractor from the trailer. Petitioner testified that while pulling the 5th wheel pin he slipped and felt a pop and heard a noise in his right shoulder. Petitioner testified that he had immediate pain in his right shoulder and reported the injury to the evening dispatcher. Accident and notice are not at issue with regard to the right shoulder injury. ARB EX 1. Prior to this accident, Petitioner did not miss any time from work due to his right shoulder nor did he have a prior injury or medical treatment to his right shoulder.

The next day, Petitioner left on his dispatched trip to Texas. Petitioner testified that he was in Texas for 2 days. While in Texas, he received an envelope with papers that he was to complete with regard to the right shoulder accident and injury. The papers included an accident report that was sent to Chicago after completion. Petitioner testified that he delivered the truck back to Illinois and then sought treatment for his right shoulder.

Petitioner first treated for the right shoulder on Saturday June 24, 2017. Again, the Arbitrator notes here that there is no issue with regard to Petitioner's right shoulder injury or as to the right carpal tunnel condition that arose during this right shoulder treatment. Petitioner treated with Dr. Chudik for his right shoulder as of 8/23/17 and was diagnosed with a rotator cuff tear. Petitioner was seen for a Section 12 exam by Dr. Nicholson at Respondent's request and Dr. Nicholson agreed that Petitioner's right shoulder condition was causally related to the accident and that he needed the recommended surgery.

After ultimately receiving approval from Respondent, Petitioner underwent a right shoulder rotator cuff repair surgery on 10/2/18 performed by Dr. Chudik followed by physical therapy.

Petitioner's right shoulder physical therapy was put on hold for awhile in early 2019 when he was hospitalized for a pulmonary embolism. Physical therapy for the right shoulder was continued thereafter. In February 2019,

Petitioner reported right wrist and hand complaints and pursuant to an MRI he was diagnosed with right carpal tunnel by Dr. Fajardo. In May 2019, Respondent's section 12 examining physician Dr. Sagerman agreed that Petitioner's right carpal tunnel syndrome and need for the release surgery was the result of the sling that he wore on his right arm after his right shoulder surgery and thus related to Petitioner's work related right shoulder injury in 2017.

Petitioner underwent right carpal tunnel surgery on July 24, 2019. Thereafter, Drs. Fajardo and Chudik recommended physical therapy for the hand, wrist and right shoulder. In October 2019, Petitioner returned to Dr. Chudik and he again recommended continued therapy, but also suggested an eventual transition to work conditioning. PX 4 at 470-72. The Petitioner returned to Dr. Chudik on 11/21/19; at this stage Dr. Chudik recommended work conditioning. PX 4 at 510-12. Petitioner did not make any complaints of left shoulder pain to Dr. Chudik at the visit of 11/21/19. PX 4 at 510. He was to follow up with Dr. Chudik in 6 weeks. PX 4, p.512. The Petitioner started work conditioning at ATI Physical Therapy on 11/26/19. PX 5 at 356.

The Petitioner also returned to Dr. Fajardo on 11/26/19 for the right wrist. PX 4 at 514. Dr. Fajardo had noted improvement in the wrist but still recommended continued therapy. PX 4 at 514-16. Petitioner returned to Dr. Fajardo again for a final visit on 1/6/20; at this stage Dr. Fajardo released the Petitioner back to full duty work as to the right wrist, and deemed him at maximum medical improvement. PX 4 at 518-20.

Petitioner also returned to Dr. Chudik that same day, 1/6/20. PX 4 at 521. At this visit, the Petitioner noted ongoing complaints of right shoulder pain, but also noted new complaints of left shoulder pain. (PX 4 at 521). Dr. Chudik documented that the Petitioner reported he "has experienced some gradual onset of left shoulder pain over the recent weeks. He states that he has been using his left arm much more than normal while his right arm has been recovering from the injury and surgery." (TA at 30-31, PX 4 at 521). At that time, Dr. Chudik indicated that he would keep the left shoulder under observation, but recommended continued work conditioning for the right shoulder. (TA at 31, PX 4 at 521-23). Petitioner demonstrated a positive Hawkins and Neer's impingement testing to the left shoulder at the visit of 1/6/20. PX 4, p. 522. Dr. Chudik noted that the left shoulder pain was "concerning" and that a full work up for the left shoulder would be in order if the pain did not improve. PX 4, p. 523.

The Petitioner returned to Dr. Chudik again on 2/17/20; he was still making complaints of left shoulder pain. (PX 4 at 527). These left shoulder pain complaints are also reflected in the January 2020 ATI physical therapy notes. PX 5. Dr. Chudik ordered an MRI of the left shoulder. PX 4 at 529. The MRI was completed on 2/25/20, and Petitioner returned to Dr. Chudik on 2/26/20. (TA at 32-33, PX 4 at 531-32). Dr. Chudik reviewed the MRI and diagnosed the Petitioner with left shoulder "small leading edge and partial supra tear from aggravation of PT and overuse." PX 4, p. 524. He also noted that Petitioner "… has been doing physical therapy and work conditioning for is right shoulder and it has aggravated his left shoulder rather than helping it. He is already failing conservative treatment that we would initially recommend, so we recommend a left shoulder rotator cuff tear." Until, approval, he will continued work conditioning for his right shoulder but only do what is tolerated for the left shoulder." PX 4, p. 534, Dr. Chudik further noted that Petitioner complained of worsening left shoulder pain during work conditioning; "[o]nce he started lifting more than 30lbs and increasing demands in work conditioning his left shoulder pain got worse." (PX 4 at 532).

That same day, 2/26/20, Dr. Sagerman authored another Section 12 report subsequent to an examination that took place on 2/20/20. (TA at 33-34). Dr. Sagerman opined that no further treatment was necessary for the right shoulder. (TA at 34). He recommended that the Petitioner attempt to return to full duty work. (TA at 34).

The Petitioner returned to Dr. Chudik on 4/8/20 with ongoing complaints of bilateral shoulder pain. (PX 4 at 537). Dr. Chudik was still recommending left shoulder surgery. (TA at 37, PX 4 at 539). The Petitioner continued to follow-up with Dr. Chudik throughout the rest of 2020 and into early 2021. (TA at 38, PX 4 at 543-74). The Petitioner returned to Dr. Chudik on 5/20/20, 8/18/20, 12/7/20, 1/18/21 and most recently on

3/1/21. PX 4. At each visit, the Petitioner continued to complain of left shoulder pain, and Dr. Chudik continued to recommend left shoulder surgery. PX 4. The Petitioner testified that, if the left shoulder surgery were approved, he would undergo the same. (TA at 39).

Dr. Sagerman authored an addendum report dated 6/9/20 where he opined that the left shoulder was not related to the Petitioner's claim. (RX 6 at Ex. 5).

Petitioner testified that he is not able to explain why the left shoulder pain is first referenced in the January 6 2020 medical records. He testified that he mentioned the development of the left shoulder pain during lifting and carrying exercises at physical therapy in late 2019. He further testified that he lost 160 pounds since January 2020 but that the weight was lost by dieting and not through exercise requiring the use of his left shoulder. Petitioner testified that his left shoulder is still painful and that he can hear a pop when he moves the left arm. He would like to have the recommended surgery.

On cross exam, Petitioner agreed that the physical therapy notes from December 2019 indicate that he complained of groin pain during a squatting exercise and that it was documented. He again testified that he reported the left shoulder pain at the same time but is not able to explain why the complaints were not documented. Petitioner agreed that in November 2019 he simply reported the circumstances of left shoulder pain but not a specific incident occurring during physical therapy.

Petitioner agreed that he posted a picture of himself in June 2020 to advertise his weight loss on Facebook. The picture shows Petitioner sitting down with ice bags on his lap. He is not lifting the bags of ice.

On 3/11/2020, Petitioner emailed his manager and stated that he could try to do his old job per his attorney's direction as per the direction of the Section 12 examining physician. In his mind at that time he was not able to go back to work but was simply following the direction of the Section 12 physician. Petitioner was paid TTD through July 11, 2020.

The evidence deposition of treating physician Dr. Chudik was taken on 12/21/20. PX 7. With regard to Petitioner's left shoulder, the body part solely in dispute in the instant trial, Dr. Chudik testified that he saw Petitioner on 1/6/20 for a scheduled follow up on the right shoulder. At that visit, Petitioner made complaints about the left shoulder reporting a gradual onset of left shoulder pain "over the recent weeks while participating in work conditioning, he also feels like he's using his left arm much more than normal than his right arm while he'd been recovering from his injury and surgery." P. 24. Dr. Chudik noted that on 1/6/20, Petitioner had been treating 2.5 years for the right shoulder. P. 24. Dr. Chudik explained that disability in the right shoulder "obviously it leads to overuse typically of the opposite extremity just trying to take care of your everyday needs just in terms of repetitive reaching and activities. He's also working on both shoulder pretty hard in therapy and work conditioning as well." P. 24-25. He hoped Petitioner's left shoulder complaints would resolve with further therapy but when they did not resolve, he recommended an MRI. The MRI revealed a small leading-edge tear of the supraspinatus tendon. P. 27. Dr. Chudik recommended a left shoulder arthroscopy and repair. P. 28, 30.

Dr. Chudik opined that Petitioner's symptomatic left shoulder rotator cuff tear was aggravated while he performed work conditioning for his right shoulder. Conservative treatment has failed so the surgical recommendation has been made. P. 30, 35,44. He further testified that work conditioning can be very demanding physically and that the weights lifted in work conditioning are heavy and in combination with the required exercises cause further injury. P. 36,37,58, 84-85. On cross exam, Dr. Chudik was asked if Petitioner's left shoulder condition was due to a single incident or to gradual development and he responded, "I think it's hard to tell whether there was an injury that set it off. Sometimes when injury the rotator cuff, particularly smaller tears as in this case, sometimes they don't hurt immediately and it's only subsequent

swelling that causes the aggravation—or causes pain and symptoms that are notable. It's very clear that he injured or at the very least aggravated his shoulder according to the documentation in this case." P. 63-64,70.

Dr. Sagerman testified via evidence deposition dated March 15, 2021. RX 6. As of 9/19/19, Dr. Sagerman noted no findings associated with Petitioner's left shoulder by either history or examination. P. 26. At that time he indicated that Petitioner should continued work conditioning for the right shoulder injury. P. 26. At his third examination of Petitioner on 2/20/20, Dr. Sagerman noted that Petitioner reported pain "… in his left shoulder when he was performing overhead lifting and curling free weights during physical therapy four weeks ago." P. 27. Petitioner reported no prior injury to the left shoulder. P. 27. Petitioner reported pain and difficulty sleeping with the left shoulder. Petitioner's left shoulder exam showed a reduction in the abduction range of motion from 150 degrees in May of 2019 to 110 degrees in February 2020. P. 30, 32. All other noted range of motion was the same as in May 2019. P. 32-33. Dr. Sagerman testified that the significance of the change in abduction range of motion was "unclear without additional information" given the negative impingement sign and supraspinatus tests for rotator cuff tear. P. 33-35.

Dr. Sagerman diagnosed Petitioner was left shoulder pain with possible bursitis and opined that the condition was not causally related to the accident of June 19, 2017 because the work conditioning records did not mention indication of left shoulder symptoms "and no description of any specific injury affecting the left shoulder." P. 46. He opined, "The injury which occurred at work on June 19, 2017 was confined to the right shoulder and not the left shoulder. I could not find anything in the records which indicate any mechanism of injury or a causal event for his left shoulder symptoms. He said that he noticed it after performing lifting activities during physical therapy. That was his statement, but I could not see any documentation to corroborate that in the records I reviewed." P. 48-52. Dr. Sagerman also denied seeing any evidence or report to support that Petitioner's left shoulder symptoms resulted from repetitive activity. P. 52-53.

On cross-exam, Dr. Sagerman testified that following an upper extremity surgery on one side, a person may have to use the other extremity more than usual. P. 77. He did not review the left shoulder MRI taken in February 2020 but testified that the results of the MRI could add to his diagnosis of possible bursitis and could confirm the presence of pathology in the left shoulder. P. 82.

Dr. Chudik addressed Dr. Sagerman's opinion that the left shoulder was not a subsequence of the right shoulder occupational therapy. Dr. Chudik indicated that Dr. Sagerman agreed that an MRI would be appropriate. The MRI was performed and indicated articular surface and interstitial tearing of the central posterior supraspinatus tendons. P. 43-44. Dr. Chudik disagrees with Dr. Sagerman's dispute of the relationship between the left shoulder condition and the work accident and subsequent treatment testifying "Medical records document that Mr. Peters suffered injury and aggravation to his left shoulder while in work conditioning for his right shoulder on 6-19-2017 for that work-related injury on 6-19-2017. The February 25, 2020 MRI revealed objective evidence of a rotator cuff tear consistent with his symptoms. And it is my opinion that the left shoulder condition is a subsequent consequence of the original June 19, 2017, injury." P. 44.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

C. Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent? F. Is Petitioner's current condition of ill-being in his left shoulder causally related to the injury? K. Is Petitioner entitled to any prospective medical care?

Pursuant to the stipulation of the parties, the Arbitrator notes that Petitioner injured his right shoulder in a work accident on 6/19/17. Based on the record in its entirety, the Arbitrator finds that Petitioner also sustained accidental injuries to his left shoulder as a natural sequelae of the undisputed right shoulder injury on 6/19/17 and that Petitioner's left shoulder condition is thus causally related to the accident of 6/19/17.

In so finding, the Arbitrator notes that Petitioner underwent right shoulder surgery with Dr. Chudik on 10/2/18 followed by post-operative therapy. Petitioner was eventually engaged in active work conditioning for his right upper extremity when he complained to Dr. Chudik about developing left shoulder pain and popping while in work conditioning. Dr. Chudik's records clearing indicate reports of a gradual onset of pain in his left shoulder as of January 2020 after 2.5 years of right arm treatment. Petitioner credibly testified that during that extended period, he had to primarily rely on his left upper extremity for his activities of daily living. (TA at 39). Specifically, he explained that everything he would have previously done with his right hand, he had to do with his left. The Arbitrator further notes Dr. Chudik's opinion that the left shoulder condition was causally related to the 6/19/17 work accident. (PX 7 at 34-35). He explained that the Petitioner likely aggravated the left shoulder condition due to a combination of activities in work conditioning for the right shoulder, as well as favoring the left shoulder while he was recovering from the right shoulder condition. (PX 7 at 34-35). Dr. Chudik reviewed the physical therapy records from late January of 2020 and opined that those were consistent with an aggravation of the left shoulder. (PX 7 at 36-38). Dr. Chudik also relied on the MRI findings from February 2020 indicating left rotator cuff tear as objective evidence of Petitioner's left shoulder complaints.

The Arbitrator is not dissuaded in these findings by the lack of left shoulder complaints contained in the late 2019 work conditioning records or by Petitioner's recollection at trial to symptom development in November 2019. The Arbitrator finds any such discrepancies to be insignificant and without weight given the totality of the evidence in the record. As such, the Arbitrator was not persuaded by the opinions of the Respondent's Section 12 examiner Dr. Scott Sagerman, who opined that Petitioner's left shoulder complaints were in no way related to his right shoulder treatment essentially because the work conditioning records provided no documentation of left shoulder pain prior to 1/6/20.

As a result, based on the testimony of Petitioner on the fact of overuse of the left arm during the 2.5 years of right arm treatment, the opinions of Dr. Chudik, and on the documented left shoulder complaints as of 1/6/20 corroborated by the MRI results of February 2020, the Arbitrator finds that Petitioner's left shoulder condition is a logical sequelae of the right shoulder injury and thus causally related to the accident of 6/19/17.

Further, based on the Arbitrator's findings on the issues of accident and causal connection regarding Petitioner's left shoulder, the Arbitrator further finds that Petitioner is entitled to receive the requested prospective medical care as prescribed by Dr. Chudik. The Arbitrator finds that Respondent shall authorize and pay for the prospective medical care as prescribed by Dr. Chudik including the left arm surgery and its attendant care pursuant to Sections 8 and 8.2 of the Act.

J. Were the medical services that were provided to the Petitioner reasonable and necessary?

Based on the Arbitrator's findings on the issues of accident and causal connection regarding Petitioner's left shoulder, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in connection with the care and treatment of his causally related left shoulder injury pursuant to Sections 8 and 8.2 of the Act. The Arbitrator makes no findings with regard to right shoulder medical expenses as those expenses are preserved for later hearing. ARB EX 1, T. 4-9.

L. What temporary benefits are in dispute? TTD

The Arbitrator, having found that the Petitioner's left shoulder condition and restrictions are causally connected to his accident, awards TTD for the period of 7/11/20 through 4/12/21 for a total of 39-3/7 weeks. This was the only period in dispute among the parties. ARB EX 1. The Arbitrator finds that the Petitioner was removed from work by Dr. Steven Chudik for the entirety of this period. (PX 4).

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC028919
Case Name	JONES, BARBARA v. WALMART INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0055
Number of Pages of Decision	23
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Michael Rothmann
Respondent Attorney	Julie Schum

DATE FILED: 2/14/2022

/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

BARBARA JONES,

Petitioner,

vs. NO: 18 WC 28919

WALMART, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Decision of the Arbitrator found that the ongoing pain management recommendations set forth by Dr. Thomas Pontinen on February 21, 2021 were reasonable, necessary, and related to Petitioner's work injury. In awarding the prospective pain management care, the Arbitrator cited to page 125 of Petitioner's Exhibit 9 and identified it as Dr. Pontinen's treatment note from February 21, 2021. However, when consulting the transcript, the treatment note found on page 125 of Petitioner's Exhibit 9 is instead dated February 25, 2021. This February 25, 2021 note documents Petitioner's last treatment visit with Dr. Pontinen's practice before the hearing date. As such, the Commission finds that the Arbitrator made a typographical error when referring to the treatment note's date as February 21, 2021 instead of February 25, 2021.

On February 25, 2021, Petitioner was seen by Dr. Pontinen's physician assistant, David Gilbert, at Midwest Anesthesia and Pain Specialists. At that time, PA Gilbert continued to recommend pain management medication and treatment. The Commission finds that Petitioner is entitled to the ongoing pain management treatment for her causally related lumbar conditions as recommended by Dr. Pontinen's practice in the February 25, 2021 treatment note.

The Commission corrects the date that Dr. Pontinen's office awarded prospective care to February 25, 2021 and incorporates that correction into the Decision of the Arbitrator. In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner is entitled to prospective care as recommended by Dr. Pontinen's practice in the treatment note dated February 25, 2021. With the incorporation of this correction, the Commission otherwise affirms and adopts the Decision of the Arbitrator filed on May 18, 2021.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner interest under §19(n) of the Illinois Workers' Compensation 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.

February 14, 2022

DLS/met
O- 1/26/22
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	18WC028919
Case Name	JONES, BARBARA v. WALMART INC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Michael Glaub, Arbitrator

Petitioner Attorney	Michael Rothmann
Respondent Attorney	Julie Schum

DATE FILED: 5/18/2021

INTEREST RATE FOR THE WEEK OF MAY 18, 2021 0.03%

/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)
X None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Barbara Jones
Employee/Petitioner

v.

Walmart, Inc
Employer/Respondent

Case # 2018 WC 28919

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 **Glaub**, Arbitrator of the Commission, in the city of **Rockford**, on **3/17/2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, prior to and **8/4/2018**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$23,260.64**; the average weekly wage was $**447.32**.

On the date of accident, Petitioner was **52** 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 **$10,024.10** for TTD, $ for TPD, $ for maintenance, and $___ for other benefits, for a total credit of $**10,024.10**.

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

ORDER

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to the following medical providers, as set forth in Sections 8(a) and 8.2 of the Act: ATI: $21,723.95; Centegra (Carobene) $1,421.20; Illinois Pain Assoc. $6,657; Dr. Mohan $430.50; Dr. Neckrysh $2,250; Midwest Anesthesia $9,863; UIC Hospital $221,174.27; UIC Physician: $78,138; Vista $775.75; Waveform: $3,639

Respondent shall pay Petitioner temporary total disability benefits of $298.21 week for 134 2/7 weeks, commencing on August 20, 2018 through March 17, 2021, for a total of $40,045.34 as provided in Section 8(b) of the Act. Respondent shall be given a credit of $10,024.10 for temporary total disability benefits that have been paid.

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

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

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

Michael A. Glaub **MAY 18, 2021**

Signature of Arbitrator

ICArbDec19(b)

IN THE ILLINOIS WORKERS COMPENSATION COMMISSION

Barbara Jones,	)	
	)	
Petitioner	)	
	)	
vs.	)	**18 WC 28919**
	)	
Walmart Inc.,	)	
	)	
Respondent.	)	

FINDINGS OF FACTS

On August 4, 2018, Petitioner, Barbara Jones (Jones), an employee of Respondent Walmart, was working as an inventory/sales associate, when she felt low back pain while lifting a skid. Tx. at 13-14. She had been working there for 5 years and was working in the shoe department where she was required to lift between 25-50 lbs. Tx. at 9-12. Because of the low back pain, she worked light duty for the next nine days while taking over the counter pain medication. Tx. at 15-16.

As a result of the August 4, 2018 work injury, all treating, and IME physicians opined that Jones suffered a L4 compression fracture which had healed within three to four months. Px4 at 52-53; Px13 at 9, 14, 16, 43; Rx2 at 29-30; Rx4 at 20, 29, 70, 72, 74. However, Respondent disputes that Jones suffered a L5-S1 annular tear, sacroiliitis, SI joint pain, or aggravation of degenerative disc disease at L4-5 and L5-S1 which required a fusion, and disputes that treatment after December 26, 2018 was related to the injury.

Medical Records:

On August 13, 2018, Jones treated at Vista Occupational Health, exhibiting positive bilateral straight leg raise test and complained of radiating low back pain shooting up her back. Px11 at 11. She received work restrictions of no lifting, pushing, pulling, squatting, kneeling, or climbing, no repetitive lifting, limited bending, stooping, and twisting, groundwork only, and to alternate between standing and sitting as needed. *Id.* at 8. She was prescribed Naproxen and a Medrol dose pack. *Id.* An August 16, 2018 lumbar MRI showed an acute endplate L4 compression fracture, with a trace disc bulge at L4-5; and at L5-S1 a mild disc bulge with a small annular fissure with moderate bilateral neural foraminal narrowing. *Id.* at 13-14. On August 20, 2018, she continued to have positive straight leg raise test and Vista took her off work until she was seen by a neurosurgeon. *Id.* at 7.

Workers compensation referred her to Dr. Zelby (Tx. at 18) whom she saw on August 24, 2018 and complained of low back pain with occasional numbness into her left toes. PEx7 at 6. Dr. Zelby

reviewed the August 16, 2018 MRI and noted the L4 compression fracture and right L5-S1 annular tear. *Id.* at 8. He prescribed a hard brace, pain medication and kept her off work. *Id.* at 9.
She began treating with Dr. Dabah at Pain Therapy Associates on September 11, 2018 and complained of low back pain with numbness into her legs and feet. Px.4 at 51. He prescribed a soft LSO brace for the L4 fracture. *Id.* at 52. On October 1, 2018, she reported low back pain radiating into the buttock, down her legs, with numbness into the left big toe. *Id.* at 50. On October 15, 2018, she continued to have back pain and reported relief at therapy using a TENS machine. *Id.* at 47. Therefore, Dr. Dabah prescribed a H-Wave machine. He also prescribed LidoPro patch/ointment because the lidocaine 5% patches were not effective. *Id.* at 48. While seeing Dr. Dabah, she treated ATI therapy from September 11, 2018 until December 12, 2018. PEx1 at 192. On October 8, 2018, she reported low back pain radiating into her buttock. *Id.* at 150. Therapy records noted that the pain patch decreased her pain for a few hours and that electrical stimulation was helping. *Id.* at 127, 134, 136, 138. Dr. Dabah's October 29, 2018 note also indicated that the electric stimulator provided two hours of relief during therapy, yet she continued to have low back pain with occasional left foot numbness. Px4 at 44. He noted that Lidopro patch reduced her pain and that the LSO brace provided better relief than the hard brace that Dr. Zelby had prescribed. *Id.* at 44, 45. On November 27, 2018, she reported increased back pain during therapy. *Id.* at 41.

Jones testified she had difficulty with chores and self-care and required help from her mother. Tx. at 22-23. Jones returned to Dr. Dabah on March 7, 2019, with continued back pain and reported that she had been discharged from therapy due to pain. *Id.* at 37. Dr. Dabah prescribed another lumbar MRI. *Id.* at 40. The March 14, 2019 MRI showed a L4-5 disc bulge with left foraminal herniation contributing to mild left foraminal stenosis and a L5-S1 annular bulge with superimposed 5.6 mm migrated herniation causing mild bilateral neural foraminal stenosis. Px8 at 5. On March 25, 2019, Dr. Dabah noted that the L5-S1 disc protrusion was contributing to her pain and prescribed a lumbar epidural steroid injection (ESI). *Id.* at 37. On April 3, 2019, Dr. Dabah noted a positive straight leg raise test and performed a L5-S1 ESI, which provided 100% relief for two days. Px4 at 28, 31-32. In May 2019, Jones continued to have a positive straight leg raise test and Dr. Dabah performed another L5-S1 ESI, which provided 70% relief for 2-4 days. *Id.* at 21, 22, 24. Dr. Dabah kept her off work while he treated her. Px 4.

Dr. Dabah referred Jones to Dr. Mohan, an orthopedic surgeon, (Tx at 25) whom she saw on April 9, 2019. Px5 at 1. Dr. Mohan reviewed the MRIs and noted that the L4 compression fracture had healed and the L5-S1 annular tear had progressed into a protrusion and also diagnosed her with sacroiliitis. *Id.* at 4; Px13 at 9, 43. He referred her back to Dr. Dabah for pain management. Px5 at 4, Px13 at 7. On June 1, 2019, Dr. Mohan noted that the ESI provided temporary relief and opined that the L5-S1 disc was causing pain for which he recommended a facet injection and ablation and a pain psychologist to reduce her pain and anxiety. Px5 at 8, 11; Px13 at 18-31. He did not recommend surgery but noted it may be necessary in six months if she did not improve. Px5 at 11.

On June 24, 2019, Jones saw Dr. Rakic, at Midwest Anesthesia & Pain, per Dr. Mohan's referral. Px9 at 16; Px13 at 22. She complained of low back and left leg pain and had positive straight leg raise test and positive SI joint pain. Px9 at 16-17. Dr. Rakic diagnosed lumbar radiculopathy and noted that the L5-S1 annular tear seen on the initial MRI failed to heal and progressed. *Id.* at 18, 23. He too recommended an LSO brace for the herniation and an H-wave machine. *Id.* He performed

L4-S1 medial branch blocks and opined that the conditions he was treating were related to the August 4, 2018 work injury and that the L4 fracture had healed. *Id.* at 19, 26

On August 5, 2019, Dr. Rakic noted that the H-wave provided several hours of pain relief per day. *Id.* at 23. He prescribed epidural steroid injections, not facet injections, for her radiculopathy. *Id.* at 25. Since the H-Wave provided relief, he prescribed a home unit purchase. *Id.* at 29-30. Jones purchased the H-Wave on October 3, 2019. PEx12.

Dr. Mohan referred her to Dr. Carobene, a pain specialist in Jones' health plan. Px13 at 23, Tx. at 27-28. On September 10, 2019, Jones complained of back pain radiating into her buttock, left leg and foot, with numbness. Dr. Carobene diagnosed her with lumbar radiculopathy. Px2 at 3, 6. A September 19, 2019 EMG confirmed L5 radiculopathy, for which Dr. Carobene performed a L4-5 and L5-S1 epidural injections on September 24, 2019. Px3 at 3, Px2 at 11.

On October 9, 2018, because she had not improved and workers compensation approval had stalled, Dr. Mohan referred her to pain management and a neurosurgeon in her health plan to discuss surgery for the herniation and radiculopathy. Px5 at 15-16; Px13at 26.

Compared to the March 2019 MRI, a November 15, 2019 MRI showed stable L5-S1 findings and a stable left foraminal L4-5 protrusion with some worsening of left L4-5 foraminal stenosis. Px8 at 4.

On December 12, 2019, Jones saw Dr. Pontinen, at Midwest Anesthesia and Pain, who also noted that the initial L5-S1 tear had not healed and progressed into a 5-6 mm extrusion. PEx9 at 32-34. Dr. Pontinen recommended continued use of the LSO brace, home exercise, pain medication and referred her to Dr. Neckrysh, a neurosurgeon, for surgery since conservative treatment had failed. *Id.* at 35; Px14 at 14. He opined that the conditions he was treating her for were related to the August 4, 2018 work injury. *Id.* at 35.

On December 26, 2019, Jones saw Dr. Neckrysh complaining of low back and left leg pain. Px6 at 2. Dr. Neckrysh opined that she had L5-S1 radiculopathy from foraminal stenosis and degeneration at L4-5 and L5-S1 and recommended a L4-5 and L5-S1 decompression and fusion. *Id.* at 5-6. He opined that the work injury caused the L4 fracture and aggravated her degenerative disc disease at L4-5 and L5-S1, causing discogenic pain and lumbar radiculopathy. *Id.* He further opined that the fusion was related to the work injury. *Id.*

Jones continued to see Dr. Pontinen for medication refills while awaiting approval for surgery. Px9 at 45, 52. Surgery was also postponed given Covid. *Id.* at 53, 57. On March 10, 2020, she was seen at UIC because of increased low back pain. PEx10 at 147.

On July 14, 2020, Dr. Neckrysh performed a L4-S1 fusion. Px.10 at 167. The post-operative diagnosis was lumbar radiculopathy and low back and mechanical back pain. *Id.* at 166. In an October 20, 2020 post op visit, Dr. Neckrysh noted Jones was doing very well, that her mechanical back pain had improved, and that her numbness would take 6 months to one year to heal. *Id.* at 45.

On July 23, 2020, Jones advised Dr. Pontinen that her presurgical pain had improved, but that she continued to have pain at the surgical site. Px9 at 64. He prescribed Oxycodone and a quad cane. *Id.* at 67, 70. On August 20, 2020, Dr. Pontinen noted she had postoperative pain but was feeling

better and was able to get out of the house and run errands. *Id.* at 72. Dr. Pontinen reviewed the IL Prescription Monitoring Program and Rx12 which listed the medications Jones was taking and the prescribers. Rx12. He noted she was compliant and refilled her medication. *Id.* at 75. On September 17, 2020, her pain was 5-6 out of 10 and she was weaning off the oxycodone. *Id.* at 78, 96. On October 28, 2020, she slipped, but did not fall and had left buttock pain for a few days. Px9 at 97. As of December 4, 2020, she complained of increased pain after physical therapy and stopped formal therapy. *Id.* at 101, 122. On February 21, 2021, Dr. Pontinen recommended continued pain management for her low back status post her L4-S1 fusion, and SI joint pain, which had been positive on exam since April 2019. Px9 at 17, 25, 34, 41, 48, 59, 80, 89, 110, 125.

Jones testified that currently on average her pain is rated 2-3/10. Tx at 31. She can now take care of herself and helps with dishes, cooking, and shopping, and has increase in pain when standing or sitting for 10-20 minutes. *Id.* at 32.

Dr. Mohan

Dr. Mohan, an orthopedic surgeon who performs 10-20 spinal surgeries per week, testified that on April 9, 2019, when he first saw her, she had lumbar spasms, objective findings he could feel. Px13 at 8, 32-33, 50. She did not need kyphoplasty for the L4 fracture. *Id.* at 35, 39. The August 2018 and March 2019 MRI showed a L5-S1 annular tear which had progressed into a protrusion. PEx13 at 9, 43. He stated that the clinical reason for the August 16, 2018 lumbar MRI was back pain and left foot numbness and explained that an annular fissure is a tear in the disc which can cause back pain. *Id.* at 11-12. As of March 14, 2019, L5-S1 disc material had moved out of the disc, was impinging on a nerve and causing bilateral neuro-foraminal stenosis which was a cause of pain. *Id.* at 12-14.

She did not have Waddell signs and was not a malingerer. *Id.* at 30-31. Her complaints of paresthesia into the buttock and foot were consistent with L5 nerve impingement, which was confirmed by a September 2019 EMG showing L5 radiculopathy and nerve damage. *Id.* at 24-25. Her complaints were consistent with the MRI, EMGs and exams. *Id.* at 30, 52. The L5-S1 epidural injections were prescribed for the herniation and radicular pain. *Id.* at 23. Dr. Mohan opined that the L5 radiculopathy was related to the accident and the L4-5 and L5-S1 injections were reasonable and necessary. *Id*. at 25-26.

Dr. Mohan opined that the work injury caused or aggravated the L5-S1 annular tear making it symptomatic, progressing into a significant L5-S1 herniation that was seen on the March 2019 MRI. *Id.* at 14-16, 40. The accident aggravated her lumbar degenerative disc disease and made it symptomatic. *Id.* at 16. While the L4-5 and L5-S1 findings could be degenerative, they were asymptomatic prior to the injury, and trauma can make asymptomatic degenerative disc disease symptomatic. *Id.* at 43-44, 51. Regardless, he believed that the injury accelerated the degenerative disc disease, which led to the protrusion and radiculopathy. *Id.* at 51-52. Her complaint of back pain in December 2017 did not change his opinions because she had an acute L4 fracture, and the August 2018 and March 2019 MRIs proved that her degenerative disease progressed. *Id.* at 44. The work injury also caused a stiff low back resulting in sacroiliitis and SI joint pain. *Id.* at 16.

As of October 9, 2019, Dr. Mohan did not believe surgery was ideal because she might have improved with other modalities, including a microdiscectomy, which could reduce her leg pain, but not most her back pain. *Id.* at 27-29. He did not believe a fusion was ideal as of November 22,

2019, the date of his deposition, and he wanted her to exhaust conservative treatment before surgery, which is why he referred her to a pain specialist and neurosurgeon for a second opinion. *Id.* at 29, 35, 54, 57. He believed that her stress and anxiety was elevated by the pain from the work injury and that a pain psychologist could help. *Id.* at 47, 52, 54-55. He kept her off work while treating her. *Id.* at 17. His bills were reasonable, customary, and related to the August 4, 2018 work injury. *Id.* at 31.

Dr. Neckrysh

Dr. Neckrysh, a neurosurgeon who has performed thousands of fusions, testified that Dr. Pontinen referred Jones to him. Px14 at 5, 8-9, 14. He explained that the positive straight leg raise test showed radicular compression and given her complaints, he was concerned she had discogenic pain coming from an annular tear. *Id.* at 15, 24-25. Annular tears could predispose or increase the chance of disc material protruding resulting in a herniation. *Id.* at 26. She had degeneration at L4-5 and L5-S1 and radiculopathy, as confirmed by EMG, for which he recommended and performed a L4-5 and L5-S1 decompression and fusion on July 14, 2020. *Id.* at 15, 18. As a result of the surgery, her pain and functioning improved, therefore he opined the surgery was necessary and confirmed that the L4-5 and L5-S1 discs were causing her pain. *Id.* at 19, 31. The last time he saw her was January 19, 2021 for increased lumbar muscular pain after physical therapy. *Id.* at 20.

He opined that the August 4, 2018 work injury aggravated her asymptomatic degenerative conditions at L4-5 and L5-S1, resulting in an L5-S1 annular tear which caused discogenic pain and radiculopathy and which ultimately required surgery. *Id.* at 30-31, 41. He has not returned her to work, since he began treating her. *Id.* at 22. The December 26, 2020 bill was reasonable, necessary, and related to the August 4, 2018 work injury. *Id.* at 33.

While Respondent objected, pursuant to *Ghere,* to Dr. Neckrysh's testimony about what surgery he performed, the deposition notice, which Respondent received on February 3, 2021, set forth his opinions that the work injury caused back pain, radiculopathy, and aggravated her stenosis, L4-5 and L5-S1 and require a L4-S1 fusion, which was also stated in his December 26, 2019 report that Respondent had. Px14 at 5; Px15. The deposition took place on February 12, 2021. Px6.

Respondent IME Dr. Sani

Dr. Sani, a neurosurgeon, testified that most of his medicolegal work is done for Respondents. Rx2 at 6, 45. He performed an IME for Respondent and issued a report on August 19, 2019. She was truthful as it related to her complaints and history of accident. *Id.* at 9, 26, 58. He issued a second report on March 10, 2020. For both reports he reviewed records, but Respondent did not send him the EMG report or ATI records, which he did not review. *Id.* at 19-26, 34-35, 75, 100.

Petitioner did not have preexisting low back complaints other than the December 16, 2017 when she had low back pain from muscle contractures for two days. *Id.* at 12-13. She did not have preexisting radiculopathy, numbness into her left foot, annular tears or herniations nor any restrictions for her low back. *Id.* at 55-57. No one had recommended back surgery prior to August 4, 2018. *Id.* at 104.

Dr. Sani opined she had a L4-5 and L5-S1 herniation, as shown in the March 2019 MRI and not the August 2018 MRI, which were chronic and not a cause of her symptoms. *Id.* at 29-31. As of August 19, 2019, Dr. Sani believed there was no plausible cause for her continued low back pain (*Id.* at 33, 96-97), yet he admitted that L5 radiculopathy affects the left big toe and that her L5 radiculopathy was indeed, a possible cause of pain. *Id.* at 66, 96. He also admitted that positive straight leg raise tests suggest nerve root irritation, yet, left out of his reports that on August 13, 2018 she had positive straight leg raise bilaterally, that on August 16 and 24, 2018, she had left foot numbness, and that on September 11, 2018 she had numbness shooting down her legs and feet. *Id.* at 65, 72, 73, 74. Despite testifying that her radiculopathy only became consistent after November 2019, he admitted that Drs. Dabah, Mohan and Rakic all diagnosed her with radiculopathy, which had been confirmed by the EMG that he did not review, prior to November 2019. *Id.*at 87, 89-90, 95.

Dr. Sani opined that the August 16, 2018 MRI showed minimal and clinically insignificant degeneration at L4-5 and L5-S1. *Id.* at 103. While Dr. Sani testified nothing on the August 2018 and March 14, 2019 MRIs could cause pain (*Id.* at 108) he did not dispute the radiologist's assessment of an L5-S1 annular fissure and admitted that trauma could cause a disc to tear, which could be painful. *Id.* at 63-64. He also admitted that annular tears can worsen, weaken disc walls, and contribute to degeneration. *Id.* at 64.

As to the March 14, 2019 MRI, Dr. Sani indicated the L5-S1 disc material moved, causing a L5-S1 herniation and neural foraminal stenosis. *Id.* at 79-80. The L5-S1 herniation narrowed the passage where nerves come out bilaterally, which can be symptomatic and cause back pain and difficulty walking. *Id.* at 71, 80-81. He cannot say when the L5-S1 herniation occurred, but it was within a few weeks to three months prior to March 14, 2019. *Id.* at 84. The herniation could have possibly occurred during physical therapy; however, he does not know what caused the herniation. *Id.* at 84-85.

He opined that all the treatment through August 5, 2019 was reasonable and necessary, but that no treatment six weeks and on after the accident was necessary to heal the L4 fracture. *Id.* at 31-32. A L4 fracture could take three months to heal and be painful for a long time. *Id.* at 37, 60.

Dr. Sani opined that the H-Wave machine was unnecessary to heal the L4 fracture. *Id.* at 31. He disagreed with the recommendation for a TENS unit because the L4 fracture had healed, and the H-Wave was not indicated for herniations. *Id.* at 39-40. However, he conceded that H-Wave is FDA approved to provide electrical stimulation to speed recovery and manage pain. *Id.* at 93-94.

With respect to the L4 fracture only, Dr. Sani believed she could return to work without restrictions and reached MMI six weeks after injury. *Id.* at 33-34, 107. Despite his return-to-work opinion, he did not know what her job duties were, how much she had to carry, nor what activities she had to perform. *Id.* at 54-55. He has no opinion as to what her restrictions would be after August 19, 2019 and cannot dispute the restrictions her doctors placed thereafter. *Id.* at 107.

Dr. Sani did not believe the fusion was related to the work injury. *Id.* at 38. Dr. Sani believed that Dr. Neckrysh's recommendation for surgery was based only on a November 2019 MRI, which Dr. Sani never reviewed. *Id.* at 37-38. Despite not seeing the November 15, 2019 MRI scan or report,

Dr. Sani believed it showed a L5 extrusion, which he could not say had gotten worse compared to the March 2019 MRI. *Id.* at 101-102. To the contrary, the November 15, 2019 MRI report noted that the L5-S1 herniation was stable as compared to the March 2019 MRI. Px8 at 4.

Dr. Sani did not recommend a L4 kyphoplasty. *Id.* at 38. He did not recommend L5-S1 facet injections or medial branch blocks because she had a L5-S1 herniation but explained that the blocks help determine which discs are causing pain prior to ablations. *Id.* at 38-39, 106. He does not perform ablations which can reduce radicular pain for six months to one year. *Id.* at 106.

He did not agree with the need for additional epidural steroid injections based on his belief that the first two did not provide relief (*Id.* at 39); however, he admitted that the 1st injection provided 100% relief, the second one provided short lived benefit (*Id.* at 85), and that epidural injections are indicated for L5 radiculopathy. *Id.* at 67.

While Dr. Sani acknowledged that LSO braces can be used for low back pain (*Id.* at 99), he disagreed with the recommendation for an LSO back brace because the L4 fracture had healed, and it was not indicated for a herniation. *Id.* at 39-40.

Dr. Sani did not believe a referral to a pain psychologist was related to the August 4, 2018 work injury, but he did not believe she was malingering or magnifying her symptoms and instead thought her complaints were related to anxiety. *Id.* at 40, 90. He acknowledged that medical conditions could increase a person's anxiety. *Id.* at 91. While she continued to take pain medication six weeks after the injury, he did not believe it was related to the work injury but agreed that the medication was indicated and that she should continue to take it at the direction of her doctors. *Id.* at 41-42.

Respondent IME Dr. Noren

Dr. Noren, a pain management and anesthesia physician, who devotes 25% of his practice to IMEs, of which 90-95% is done for Respondents, conducted an IME on December 26, 2018 for Respondent. REx4 at 5, 63-64. On exam she had back pain, needed to change position often, and had decreased pinprick in the dermatome affecting the left foot, great toe. *Id.* at 8, 11, 71. Her lumbar flexion range of motion was 40 (normal is 90) and her extension was negative five (normal 30), meaning it was painful for her to stand straight. *Id.* at 71-72. Her reported functional ability at the IME was sedentary (*Id.* at 70-71) whereas her job required her to lift 25-50 lbs. *Id.* at 19. He only examined her once on December 26, 2018. *Id.* at 81.

Dr. Noren believed her to be truthful. *Id.* at 28, 69. He had her fill out a pain disability questionnaire which indicated severe pain and disability. *Id.* at 15. The Oswestry score showed she was bedbound or exaggerating her symptoms. *Id.* at 17. Regardless, he admitted that treatment through December 26, 2018 was reasonable, necessary, and related to the work injury. *Id.* at 29. Dr. Noren did not believe her complaints at the IME were related to the L4 fracture, but instead, were related to symptom magnification. *Id.* at 30; *Infra.*

Dr. Noren conceded that her only preexisting complaints of low back pain was on December 26, 2017 which lasted only two days, and that she did not have preexisting symptomatic facet

hypertrophy, arthropathy, radiating pain into her leg or foot, numbness into her left toe or lifting restrictions prior to August 4, 2018. *Id.* at 23, 67-68. 70.

Despite testifying that he reviewed numerous records for his December 26, 2018 and February 12, 2020 reports, he did not know what her complaints to Vista were on August 13, 2018 and does not know if Respondent sent him that report. *Id.* at 79. Respondent did not send him Dr. Dabah's October 1, 2018 record which noted radiating pain into her buttock and legs, with numbness in her left big toe. *Id.* at 81. Dr. Noren admitted that numbness in the big toe is consistent with L5 radiculopathy. *Id.* at 77. While he agreed that an EMG could help confirm the cause of the numbness, there is no evidence that he reviewed the September 2019 EMG. *Id.* at 78.

Dr. Noren conceded that the records starting in August 2018 and onward showed positive straight leg raise which could suggest spinal nerve impingement. *Id.* at 23, 79, 90. Contrary to Dr. Sani's opinion that the injections were not necessary, Dr. Noren agreed that the lumbar epidural injections were indicated for herniated discs with nerve root irritation and may have been indicated for her for four months after the work injury. *Id.* at 54-55, 84.

The only objective tests he reviewed were the August 16, 2018 and March 14, 2019 MRI reports and bone scans, for which he relied on the radiologists' interpretations. *Id.* at 72, 97. Dr. Noren admitted that the August 16, 2018 MRI showed an L5-S1 annular fissure, which occurs when the outer part of the disc tears. *Id.* at 73-74. Annular tears can be degenerative, and he does not believe the annular tear occurred because of trauma. *Id.* at 125.

For a patient with continued back pain and numbness in the big toe after a L4 fracture, he would prescribe a bone scan and MRI to determine the cause of the numbness. *Id.* at 76-77. Thus, he believed the bone scan was necessary. *Id.* at 54. The repeat March 14, 2019 MRI showed degeneration at L5-S1 and a disc protrusion, which he opined was unrelated to her work injury because the findings were typical in patients her age. *Id.* at 49-50.

Dr. Noren agreed that L4-5 and L5-S1 degenerative disc disease, stenosis, facet hypertrophy and arthropathy could be either asymptomatic or symptomatic. *Id.* at 74-75, 86, 88, 125. Trauma can cause asymptomatic degenerative disc disease, stenosis, and facet arthropathy to become symptomatic and cause radiating pain. *Id.* at 87-89, 91. He conceded that the L5-S1 disc bulge superimposed on a 5.6 mm migrated herniation causing bilateral neural foraminal stenosis, could cause bilateral leg pain. *Id.* at 85, 87. While admitting that trauma can aggravate degenerative disc disease, he does not believe it happened in this case. *Id.* at 127. Yet, he agreed that the L4 fracture, even at 10%, could contribute to degenerative disk disease. *Id.* at 82.

Respondent provided Dr. Noren's December 26, 2108 AMA rating report to Petitioner's counsel on February 19, 2020, the day before Dr. Noren's February 20, 2020 deposition. *Id.* at 35. Over Petitioner's objection, Dr. Noren opined she had a 7% impairment rating. *Id.* at 38. However, he admitted that to properly do the rating, she needed to be at MMI for all diagnosis and that he only considered the L4 fracture. *Id.* at 92. He acknowledged that functionally she was limited to sedentary activity. *Id.* at 94. As of December 26, 2018, she had diminished light touch in a clinically appropriate distribution. *Id.* at 94. Assuming she had a herniation and more than one diagnosis he should have used a different table and used a higher impairment rating. *Id.* at 94, 95.

Despite stating she was limited to sedentary activity, he believed she could return to work and had reached MMI as it related solely to the L4 fracture by December 26, 2018. *Id.* at 32, 56.

He did not believe any further therapy, medication, injections, or diagnostics were necessary relative to the L4 fracture. *Id.* at 30-31, 56. Dr. Noren had no opinion related to Dr. Neckrysh's surgery and could not say whether she would improve with surgery. *Id.* at 51-52, 92. As to specific treatment, Dr. Noren did not believe was necessary, he did not believe that the H-Wave machine was indicated because they are not used for compression fractures and because the TENS unit did not provide pain relief. *Id.* at 30, 55. He also opined that the kyphoplasty was not indicated. *Id.* at 28, 52, 81. Despite Jones having back pain with extension during Dr. Noren's exam, he stated the L5-S1 facet joint injections were not indicated because she did not have back pain with extension. *Id.* at 52, 90. He also opined that Jones did not need medial branch blocks to determine which discs were the source of pain prior to ablation. *Id.* at 53. Lastly, despite Jones advising Dr. Noren that the LSO brace reduced her pain and helped her walk, he opined that she did not need the LSO brace since she had no spinal instability. *Id.* at 9, 55.

Dr. Noren opined that Jones' self-reported impairments were related to symptom magnification and an underlying anxiety disorder, depression and history of post-traumatic stress and child abuse. *Id.* at 32, 46-47. He believed that her perception of pain, which she consistently rated as high, was inconsistent with the objective findings; however, he did not believe she was malingering, making up or consciously over-exaggerating her symptoms. *Id.* at 33, 45-46, 101-02. He explained that anxiety or depression can accentuate a person's perception of pain and believed that her underlying anxiety disorder contributed to her reported pain and decreased functioning. *Id.* at 99, 101-02. While he refers patients with psychological and medical issues to psychologists, he did not refer her to one to confirm his beliefs and determine how much her anxiety was contributing to her pain levels nor did he perform any psychological tests. *Id.* at 100, 102. He could not provide an opinion of symptom magnification based on reasonable degree of psychological certainty. *Id.* at 101. Moreover, during his exam, the Waddell test, the primary test to check for symptom magnification, was negative. *Id.* at 100.

Over Petitioner's objection per the Mental Health and Developmental Disability Confidentiality Act, based on a review of Antioch Family Health records, Dr. Noren testified that Jones' had generalized anxiety disorder dating back to October 2015, for which she was prescribed medication through 2017. *Id.* at 21-23. He did not review any psychological or psychiatric records diagnosing her with generalized anxiety disorder; instead, he relied on physician assistants' notes and conceded that he did not know what the assistant's qualifications were to render such diagnosis. *Id.* at 102-04.

Based on the Antioch records, he also opined she had depression, starting in 2015, which contributed to her symptom magnification. *Id.* at 105. Notably, the Antioch records drafted by a nurse practitioner, stated that Jones did not have depression. *Id.* at 104, 116. Despite offering his own opinion, Dr. Noren does not know whether any physician or psychologist diagnosed her with depression. *Id.* at 106-08. He is unfamiliar with Antioch's depression screening but has no reason to dispute that between September 2016 and May 10, 2018, the screenings were negative for depressive symptoms, depression, anxiety, sleep disturbance and mood swings. *Id.* at 109-111. Dr. Noren could only point to Dr. Hsu's December 6, 2010 record, which noted depression and a

prescription for Cymbalta. *Id.* at 39, 41, 113. Dr. Noren does not know whether Dr. Hsu was a psychiatrist/psychologist, whether Jones took Cymbalta after 2010, or whether her depression continued after December 2010. *Id.* at 113, 115. While she was taking clonazepam through 2017, he does not know if she took it after December 26, 2017. *Id.* at 115-16.
As to his reliance on her history of PTSD and child abuse as contributing to her symptom magnification, Dr. Noren testified he simply noted that she had reported child abuse to another doctor and did not question Jones about it. *Id.* at 119-20. He does not know what sort of abuse, does not know if PTSD was clinically diagnosed and that he was unqualified to diagnose her with PTSD. *Id.* at 121-22. Dr. Noren also cited an August 19, 2014 ER report for chest pain, to support his symptom magnification theory, claiming that there was no reason for her to go the ER. *Id.* at 41-42. However, the ER discharge diagnosis was leukocytosis and chest pain, not anxiety; it specifically stated she did not have psychiatric symptoms. *Id.* at 118-19

Despite his claim of symptom magnification, Dr. Noren does not dispute that Jones' pain was real to her and that only the patient knows how much pain they are in. *Id.* at 98-99. He did not dispute Dr. Mohan's recommendation for a pain psychologist, but believed it was unrelated to the work injury. *Id.* at 56. Despite his focus on her preexisting mental conditions as the cause of her complaints, he admitted that no records showed that any mental conditions caused any significant impairments working or performing social activities prior to August 4, 2018. *Id.* at 123.

UR Reports

The October 29, 2018 UR report (REx7) found that Dr. Dabah's prescription for Lidopro 4% topical ointment and Lidopro 4% topical patch was not certified. The UR physician reviewed a Form 45, Dr. Zelby's report, charts of unknown providers dated September 24 and 28, 2018 and a September 14, 2018 diagnostic report. REx7 at 8. It indicated the medication is of questionable utility and stated that Jones did not benefit from prior use of 5% Lidocaine patches. *Id.* at 2. It noted that Lidocaine can help if there is localized pain consistent with neuropathic etiology or suggested neuropathic pain. *Id.* at 4. For non-neuropathic back pain, it noted limited results in pain reduction with better results in acute patients. *Id.* at 4.

The November 12, 2018 UR did not certify the prescription for H-Wave treatment because the TENS unit Jones was using at physical therapy provided relief, therefore she did not need to switch to a H-Wave because she could wear the TENS unit. REx.8 at 2-3.

CONCLUSIONS OF LAW:

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (F) WHETHER PETITIONER'S PRESENT CONDITION OF ILL-BEING IS CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS:

The Arbitrator incorporates the Finding of Fact and above conclusions as if stated herein. This Arbitrator finds that Petitioner's present conditions of a L4 fracture, L4-5 and L5-S1 fusion, sacroiliitis, SI joint pain and increased anxiety are related to the work injury on August 4, 2018.

All treating and IME physicians opined that the August 4, 2018 work injury caused the L4 fracture which healed within three to four months. At issue is the cause of her continued back pain and whether the L4-5 and L5-S1 conditions are related to the August 4, 2018 injury.

It is undisputed that Petitioner did not have preexisting annular tears, radiculopathy, herniations, symptomatic degenerative disc disease, facet hypertrophy, arthropathy, lumbar pain or radiating pain down her left leg or into her left foot and big toe. The December 2017 incident was a pulled muscle which lasted for two days. Petitioner was working full duty for Respondent, lifting 25-50 lbs., constantly walking, standing, stooping, and bending, and had been working for Respondent for five years prior to the injury, with no work restrictions.

The radiating low back pain began on August 4, 2018 and worsened between August 4, 2018 and March 14, 2019. Between August and October 2018, Jones exhibited positive straight leg raise tests and complained of occasional numbness into her left leg and toe. In October 2018, the back pain was radiating into her buttock and big toe with occasional left foot numbness. On November 27, 2018, she reported increased back pain while at therapy. Petitioner testified that her low back pain gradually worsened and that she did not suffer any other injuries between the August 16, 2018 and March 14, 2019 MRI.

The August 16, 2018 lumbar MRI showed an acute L4 compression fracture and a mild disc bulge at L5-S1 with a small annular fissure. Drs. Mohan, Neckrysh and Sani testified that annular tears can be painful. Drs. Mohan and Neckrysh testified the tear was a cause of Jones' pain, which progressively worsened.

The March 14, 2019 MRI showed a L4-5 bulge with left foraminal herniation contributing to mild left foraminal stenosis and a L5-S1 annular bulge with superimposed 5.6 mm migrated herniation causing mild bilateral neural foraminal stenosis. Dr. Dabah opined that the L5-S1 disc protrusion contributed to her pain. Drs. Mohan, Pontinen, and Rakic opined that the L5-S1 tear progressed to an L5-S1 protrusion/herniation.

Jones continued to exhibit positive straight leg raise tests and suffer from radiating low back pain in April and May 2019. On June 24, 2019, Dr. Rakic diagnosed her with lumbar radiculopathy. In September 2019, Dr. Carobene diagnosed her with lumbar radiculopathy which was confirmed by a September 19, 2019 EMG. Drs. Mohan and Pontinen then referred her to a neurosurgeon, Dr. Neckrysh, who on December 26, 2019 also diagnosed her with L5-S1 radiculopathy and recommended a L4-S1 fusion.

The records alone demonstrated that Jones complained of low back pain radiating into her left foot days after the August 4, 2018 work injury, which progressively got worse without an intervening accident. The doctors' testimony also supports finding that the L4-5 and L5-S1 herniations shown on the March 14, 2019 MRI were related to the August 4, 2018 injury. Dr. Mohan testified that the L5-S1 tear was related to the accident and had progressed to a herniation. He opined her complaints were consistent with the EMG, MRIs, and exams and that the radiculopathy was related to the August 4, 2018 accident. PEx13 24-25, 30, 52.

Dr. Mohan opined that the injury also aggravated her lumbar degenerative disc disease. *Id at* 16. While he conceded the findings on the August 16, 2018 MRI could be degenerative, they were asymptomatic. *Id.* at 51. Dr. Mohan opined that the accident aggravated the degenerative disc disease and made it symptomatic, leading to the protrusion and radiculopathy. *Id.* at 51-52.

Dr. Neckrysh also opined that the accident aggravated her asymptomatic degenerative disc disease at L4-5 and L5-S1, resulting in or aggravating an annular tear causing discogenic pain and radiculopathy for which she required a fusion. PEx14 at 15, 30-31, 39, 41. He believed that her positive straight leg raise tests suggested radicular compression. *Id.* at 15. He explained that the annular tear could have caused her back pain with left foot numbness and that annular tears increase the chance of disc material protruding resulting in herniations. *Id.* at 24-26.

Respondent's IME, Dr. Sani, did not believe the L5-S1 herniation and a L4-5 disc bulge seen on the March 14, 2019 MRI were causing any symptoms. REx2 at 22, 29-30, 33. While Dr. Sani testified that the herniations were chronic, this was contradicted by his admission that the August 16, 2018 MRI did not show the herniation, but instead demonstrated minimally insignificant degeneration, and only occurred a few weeks to three months prior to March 14, 2019. *Id.* at 30-31, 84, 103. Dr. Sani also confirmed that the L5-S1 disc material had moved between the August 16, 2018 and March 14, 2019 MRI, resulting in a herniation and neural foraminal stenosis. *Id* at 80, 85. He admitted that annular tears can be painful, and that tears can worsen, weaken the disc walls and lead to degeneration. *Id.* at 64, 108. He also admitted that stenosis can be painful. *Id.* at 71, 80-81. Significantly, he did not know the cause of the L5-S1 herniation. *Id.* at 84-85.

Despite Dr. Sani's opinion that there was no biological cause for her complaints six weeks after the injury, he admitted that the L5 radiculopathy could be a cause of her pain. *Id.* at 96. He admitted that a positive straight leg raise suggests nerve root irritation and that L5 radiculopathy affects the left big toe. *Id.* at 66. The records show she had positive radiculopathy starting on August 13, 2018, confirmed by EMG. Significantly, Dr. Sani did not review the EMG report. *Id.* at 89-90. His opinion that her radicular complaints only started after the November 2019 MRI (*Id.* at 95) is contradicted by the records. Dr. Sani's opinion there was no cause for her pain is also impeached as he conceded that she needed to take medication after the six-week period. For these reasons and because Dr. Sani did not know the cause of the herniation, this Arbitrator finds Petitioner's treating physicians more credible.

Respondent IME, Dr. Noren, opined that Jones' continued complaints as of the December 26, 2018 exam were unrelated to the August 4, 2018 work injury, were not consistent to any objective tests, and instead were caused by symptoms magnification and anxiety. REx4 at 30. Yet, Dr. Noren admitted that numbness into the left toe was consistent with L5 radiculopathy and that positive straight leg findings could indicate nerve impingement. *Id.* at 77, 79. He confirmed in his AMA rating that she had diminished light tough in a clinically appropriate nerve distribution during his December 2018 exam. *Id.* at 94. Dr. Noren ignored the objective evidence, and did not review the EMG, all of which were consistent with radiculopathy.

While Dr. Noren testified there is no indication the L5-S1 annular tear shown in the August 16, 2018 MRI occurred because of the trauma and that tears and facet hypertrophy could be degenerative, he admitted these were asymptomatic prior to August 4, 2018. *Id.* at 74, 123, 125.

While Dr. Noren admitted that trauma can cause lumbar degenerative disc disease, L4-5 and L5-S1 stenosis and facet arthropathy to become symptomatic and cause radiating pain (*Id.* at 86-88, 91), he testified that the accident did not cause or aggravate the age appropriate L5-S1 degeneration and disc protrusions shown on the March 14, 2019 MRI. *Id.* at 48-50, 127. Yet, he failed to explain why the March 14, 2019 finding were not present just a few months before in the August 16, 2018 MRI, especially if they were age appropriate, nor did he explain the quick progression between the two MRIs. Significantly, he admitted that the L4 fracture, even at 10%, could contribute to degenerative disc disease and that the March 14, 2019 MRI findings could be competent causes of bilateral pain. *Id.* at 82 85, 87.

Dr. Noren disregarded the objective evidence, and instead opined that her symptoms after December 26, 2018 were related to symptom magnification due to anxiety or other psychological conditions. *Id.* at 32-33, 102. This is not credible, especially since Dr. Sani did not believe she had symptom magnification, and no one thought she was malingering. Moreover, the Waddell test Drs. Noren and Mohan performed to check for symptom magnification were negative. While Dr. Noren relies on his pain disability questionnaires as a basis, he admitted it was filled out incorrectly resulting in a higher score, for which he did not correct. *Id.* at 15, 17, 83. His opinions that there was no cause for her symptoms, are impeached by his admissions that the findings on the MRIs could cause pain as well as the EMG.

Dr. Noren's opinion that her complaints did not correlate to any objective tests and instead was related to symptom magnification is also unsupported by the records he relied on. The records show that before the accident, despite having an alleged anxiety disorder, she worked full duty without work or daily restrictions without difficulty. Dr. Noren relied on nurse practitioner and physician assistant's records to claim she had anxiety, depression, and PTSD, yet the depression and psychological screenings through 2018 were negative. He was not qualified to diagnose her with PTSD and does know if any such diagnosis was made by a mental health professional. He did not know if she took anxiety or depression medication after 2017 nor if she had depression after October 2010. Moreover, contrary to his opinion that she always rated her pain high, after the fusion, she reported improvement in pain and functioning, with pain down to a 3-5/10. Dr. Noren also could not provide an opinion of symptom magnification based on a reasonable degree of psychological certainty. Regardless, Dr. Noren does not dispute that the pain she felts was real. *Id.* at 98-99. Dr. Noren's opinions about increased pain perception does not refute that the work injury caused her low back pain and radiculopathy.

For the foregoing reasons, this Arbitrator does not find that she had symptom magnification. This Arbitrator finds Jones' treating physicians more credible than Dr. Noren, and that her anxiety or other alleged psychological conditions, whether clinically diagnosed or not, are not the sole cause of her low back pain radiating into her left leg. Instead, the Arbitrator finds that the work-related injuries, stated herein, increased her anxiety, for which a pain psychologist would be beneficial.

The evidence proves that the work-related injury caused and/or aggravated her prior minimal and asymptomatic degenerative disease at L4-5 and L5-S1 such that her current L4-5 and L5-S1 condition of ill-being which ultimately required surgery is causally connected to the work-related

injury. Dr. Sani's acknowledgement that an annular tear and Dr. Noren's opinion that a L4 fracture, even at 10%, can contribute to degeneration, supports this finding.

As for the sacroiliitis and SI joint pain, Dr. Mohan's and Rakic's opinion that the back pain contributed to the sacroiliitis and SI joint pain which he treated her for (PEx13 at 16; PEx9 at 16-17, 19, 26) is unrebutted, therefore this Arbitrator finds that the work injury contributed to the sacroiliitis and SI joint pain.

For the above reasons, this Arbitrator finds that the August 4, 2018 work injury caused or aggravated Petitioner's L4 compression fracture, the L5-S1 annular tear which progressed to a L5-S1 herniation, the aggravation of degenerative disc disease at L4-5 and L5-S1 and L5 radiculopathy which necessitate the L4-S1 decompression and fusion, and the sacroiliitis and SI joint pain. The Arbitrator further finds that these conditions increased her anxiety.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J) REASONABLENESS OR NECESSITY OF MEDICAL, SURGICAL OR HOSPITAL BILLS OR SERVICES, THE ARBITRATOR FINDS:

The Arbitrator incorporates the Finding of Fact and above conclusions, as if stated herein. Respondent has not paid for all reasonable and necessary medical services.

Dr. Noren opined that the treatment through December 26, 2018 was reasonable and related to the August 4, 2018 accident. Dr. Sani testified that treatment through September 19, 2019 was reasonable and necessary but believed that treatment for six months after the injury was related to the work injury, specifically for the L4 fracture.

Respondent disputes paying for any medical treatment after December 26, 2018, the date it claims that the L4 fracture had healed. Respondent denies treatment for the L5-S1 annular tear, the aggravation of degenerative disc disease at L4-5 and L5-S1 and the lumbar radiculopathy which ultimately led to a fusion by Dr. Neckrysh.

The surgery was necessary and related to the injury. While Dr. Mohan testified on November 22, 2019, that he did not believe a fusion was ideal, on June 1, 2019 he was contemplating surgery in six months if she did not improve. Px5 at 11. While Dr. Mohan preferred a microdiscectomy, he admitted it would only reduce her leg pain, not her back pain. Px13 at 27-29. Dr. Mohan wanted to exhaust conservative treatment before surgery (*Id.* at 29, 35, 54) and therefore referred her to a pain specialists and neurosurgeon for a second opinion. *Id.* at 57, Px5 at 15-16; Px13at 26. Dr. Pontinen, the pain specialist, in December 2019, determined she had failed conservative treatment, would not perform anymore injections, and referred her to Dr. Neckrysh. Px9 at 32-35. Dr. Neckrysh explained that surgery was necessary because Jones failed conservative treatment and continued to have low back pain with L5 radiculopathy, and degeneration at both L4-5 and L5-S1. Dr. Mohan's preference for a microdiscectomy does not mean that the fusion was unnecessary or unreasonable, especially since Dr. Sani did not opine it was unnecessary and Dr. Noren had no opinion on the matter. Further, Jones testified that the surgery relieved the leg pain, reduced her back pain and restored functioning, thereby indicating that the surgery was beneficial. This Arbitrator find that the L4-S1 fusion was reasonable and necessary and related to the accident. Since the Arbitrator finds causal connection between the work injury and the L4-5 and L5-S1

conditions, Respondent is liable to pay for the reasonable and necessary medical services to treat these conditions.

As to specific treatments Respondent disputed through its IME and UR, the Arbitrator finds as follows: The L4 kyphoplasty is unnecessary since the L4 fracture healed and no doctor is prescribing it. The June 1, 2019 recommendation for L5-S1 facet injection by Dr. Mohan are not reasonable or necessary per Dr. Rakic's opinion that it was not indicated for active radiculopathy. This does not preclude such treatment in the future, if related and necessary.

Dr. Dabah prescribed the H-Wave machine because it reduced her pain. Dr. Sani opined the TENS unit helped and admitted it is FDA approved to speed recovery and manage pain. While Drs. Sani and Noren testified the H-Wave machine was not necessary for the L4 fracture, they did not address whether it was necessary for her discogenic and radicular pain. Dr. Pontinen also prescribed the H-Wave machine in September 2019. The November 12, 2018 UR report found that the H-Wave treatment was not certified because the TENS treatment she received at physical therapy provided relief, therefore she should wear the TENS machine, and not get a H-Wave machine. REx.8 at 2-3. The UR inexplicably does not explain how she could wear a TENS unit when not in therapy. Jones purchased an H-Wave machine for use at home. Since this treatment was beneficial, the H-Wave was reasonable, necessary, and related to the injury.

Dr. Sani opined that the lumbar Medial Brach blocks were unnecessary because she had an L5-S1 herniation. Drs. Noren and Sani testified these were diagnostic to determine which disc were the pain generators and whether an ablation would be beneficial. Dr. Rakic performed the blocks on June 24, 2019 at the request of Dr. Mohan who had recommended an ablation for her radiculopathy. Given her continued discogenic pain and Dr. Mohan's attempt to exhaust conservative treatment before surgery, the L4-S1 blocks were reasonable and necessary and related to the injury.

Dr. Sani opined she did not need additional lumbar epidural injections after May 1, 2019, because the prior injections did not provide relief. However, the April 3, 2019 injection provided 100% relief and the May 25, 2019 provided relief, all though short lived. While Dr. Noren opined the epidural injections were indicated for her back pain for four months after the injury, he agreed they were indicated for herniated discs with nerve root irritation. Since Jones had herniated discs with nerve root irritation confirmed by the exams, MRIs and EMG, the epidural injections performed were reasonable and necessary and related to the injury.

Dr. Dabah prescribed the LSO brace on September 11, 2018 for the L4 fracture. Px4 at 53. Dr. Sani opined it was unnecessary because the L4 fracture had healed, and the brace was not indicated for herniations. Dr. Noren opined it was unnecessary because she had no spinal instability. However, Dr. Dabah prescribed the LSO brace prior to the fracture healing, which according to Drs. Mohan, Sani and Noren could take three-four months to heal. Dr. Sani admitted an LSO brace can help low back pain. Neither opined it was unnecessary while the fracture was healing, and Jones indicated that LSO brace decreased her pain and helped her walk. Thus, the LSO was reasonable, necessary, and related to the injury.

Dr. Mohan recommended a pain psychologist. While Drs. Sani and Noren did not believe it was related to the work injury, they did not opine it was unreasonable or unnecessary. Dr. Sani indicated that pain could aggravate anxiety. For the reasons stated above, a referral to pain psychologist is reasonable and necessary and related to the injury.

Dr. Sani opined that pain medication prescribed six weeks after the injury was unrelated, yet Dr. Noren found the prescription through December 26, 2018 related. Regardless of the cause, Dr. Sani opined that the pain medication prescribed was necessary and that Jones should continue to take it at the direction of her doctors. There is no indication or opinion she was or is abusing opioids. Since her pain was related to the L4-5 and L5-S1 conditions after December 26, 2018, the prescriptions for pain medications through the date of trial are reasonable, necessary, and related to the work injury.

The retrospective UR Report (Rx7) found that Lidopro ointment/lidopro patch was not certified. However, it used information, the Form 45, Dr. Zelby's report, and two unknown documents, not accessible to Dr. Dabah when he prescribed the medication. A proper retrospective UR report must be based on information that the doctor had available at the time of the recommendation. 820 ILCS 305/8.7(e). Therefore, the review was not valid. Dr. Dabah prescribed the Lidopro patch/ointment after Lidoderm 5% patch alone was not effective. Records indicate the patch/cream combo helped. The UR report indicates that the medication is of questionable utility, not of no utility. Moreover, it indicates it could be used for neuropathic pain, which Petitioner had, as evidence by discogenic pain and radiculopathy. The UR also indicated it was helpful to patients in acute phases of injury, which correlate to the October 15, 2018 prescription.

Thus, Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, to the following medical providers, as set forth in Sections 8(a) and 8.2 of the Act: ATI: $21,723.95; Centegra (Carbone) $1,421.20; Illinois Pain Assoc. $6,657; Dr. Mohan $430.50; Dr. Neckrysh $2,250; Midwest Anesthesia $9,863; UIC Hospital $221,174.27; UIC Physician: $78,138; Vista $775.75; Waveform: $3,639.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K) IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS:

The Arbitrator incorporates the Finding of Fact and above conclusions as if stated herein.

On February 21, 2021, Dr. Pontinen continued to see Jones for her low back pain status post L4-S1 fusion and prescribed continued pain management. Px9 at 125. Since this Arbitrator finds that the work injury contributed to her SI joint pain and low back condition which required a L4-S1 fusion, and there is no opinion that the recommendations are unreasonable, this Arbitrator finds that the pain management recommendations set forth in Dr. Pontinen's February 21, 2021 note are reasonable, necessary, and related to the work injury.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L) THE AMOUNT OF COMPENSATION DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS:

The Arbitrator incorporates the Finding of Fact and above conclusions as if stated herein.

All of Petitioner's physicians kept Petitioner off work from August 20, 2018 through March 17, 2021. Respondent's IMEs focused solely on the L4 fracture and did not opine as to what her restrictions would be after the L4 fracture healed. Dr. Noren found her MMI on December 26, 2018 as it related to her fracture only, but also testified she was functionally sedentary. Dr. Sani indicated she reached MMI six weeks after the injury, despite stating that the fracture could take up to 3-4 months to heal. The IMEs did not provide opinions as to any work restrictions given her L4-5 and L5-S1 injuries, regardless of cause, whereas her treaters did. This Arbitrator places more weight in Petitioner's treating physicians compared to Respondent's IMEs' opinions. Given her condition before and after surgery, there is no indication that she could return to work and perform duties, including lifting 25-50 lbs. as set forth in the job descriptions. PEx16. She also testified that she could only stand for 20 minutes at a time, which was also inconsistent with her job requirement of standing and walking all day. Based on finding causation, complaints and functional deficits, this Arbitrator finds that she was totally and temporarily restricted from working as a result of the work-related injury through the date of trial.

Respondent shall pay Petitioner temporary total disability benefits of $298.21 week for 134 2/7 weeks, commencing on August 20, 2018 through March 17, 2021, for a total of $40,045.34 as provided in Section 8(b) of the Act. Respondent shall be given a credit of $10,024.10 for temporary total disability benefits that have been paid.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC024149
Case Name	JONGSMA, BRADLEY J v. PEPPER CONSTRUCTION
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0056
Number of Pages of Decision	12
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Karin Connelly
Respondent Attorney	Shawn Biery

DATE FILED: 2/15/2022

/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

BRADLEY JONGSMA,

Petitioner,

vs. NO: 18 WC 24149

PEPPER CONSTRUCTION,

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 left shoulder condition of ill-being is causally related to his work injury and whether Petitioner is entitled to incurred medical expenses as well as prospective treatment, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission 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 2, 2020 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,196.98 per week for a period of 30 1/7 weeks, representing January 16, 2018 through August 15, 2018, 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 $36,082.40 for TTD benefits already paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses of $862.00, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for left shoulder treatment as recommended by Dr. Durkin pursuant to §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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,000.00. 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.

February 15, 2022

/s/ *Deborah J. Baker*

DJB/lyc

O: 12/22/21

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/s/ *Stephen J. Mathis*

/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

8(a)

JONGSMA, BRADLEY J Case# **18WC024149**

Employee/Petitioner

PEPPER CONSTRUCTION

Employer/Respondent

On 9/2/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0412 RIDGE & DOWNES
KARIN K CONNELLY
230 W MONROE ST SUITE 2330
CHICAGO, IL 60606

2965 KEEFE CAMPBELL BIERY & ASSOC
SHAWN R BIERY
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
8(a)

Bradley J. Jongsma
Employee/Petitioner

v.

Pepper Construction
Employer/Respondent

Case # **18** WC **24149**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Elaine Llerena**, Arbitrator of the Commission, in the city of **Chicago**, on **June 18, 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 _____

Bradley J. Jongsma v. Pepper Construction, 18WC24149

FINDINGS

On **November 29, 2016**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**93,364.44**; the average weekly wage was $**1,795.47**.

On the date of accident, Petitioner was **49** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**36,082.40** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**36,082.40**.

Respondent is entitled to a credit of $**36.082.40** under Section 8(j) of the Act.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $1,196.98 per week for 30-1/7 weeks, commencing January 16, 2018 through August 15, 2018, as provided in Section 8(b) of the Act. The Arbitrator notes that appropriate benefits have been paid.

Respondent shall pay reasonable and necessary medical services of $862.00, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall provide Petitioner prospective medical care pursuant to Section 8(a) of the Act as recommended by Dr. Durkin in the form of treatment as recommended by Dr. Durkin for treatment of Petitioner's left shoulder.

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

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

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

Signature of Arbitrator

August 25, 2020
Date

SEP 2 - 2020

STATEMENT OF FACTS

Petitioner was working for Respondent Pepper Construction as a Deck Foreman when he sustained a work accident on November 29, 2016. (AX1, T.7-8))

Petitioner testified that he had ten to twelve people working beneath him. (T.8) Petitioner explained that he was in charge on constructing the decks on the building and responsible for the safety of the people working with him. (T.8-9) Petitioner explained that each job site runs a little differently, but according to everybody who knew him at the job site, he was a foreman, so he was not just a foreman on paper. (T.7-8)

Petitioner explained that what they were constructing was not a steel building but slab on slab, concrete after concrete, concrete columns, concrete piers and concrete decks. (T.8) Petitioner further explained there was a core, with a Core Foreman, columns, with a Column Foreman, and then the floor that you walk on is the deck, which he was in charge of constructing. *Id.*

Petitioner described his job as very physical, repetitious and demanding. (T.9) Petitioner explained that an average piece of plywood coming off a truck weighs about 47 ½ lbs and, after the plywood is poured on, it could weigh up to 60 lbs. *Id.* Petitioner testified that he spent the day "throwing down" sheets of plywood. *Id.* Petitioner testified that the sheets of plywood are put down from column to column, building small walls which are the beams. *Id.* Petitioner further testified that he would make frames for the concrete to be poured from 2x4s and 4x4s which ranged from 6 inches wide to 4 feet wide by 4 feet tall. (T.10) Petitioner explained he would put the frames together like a "deck of cards." *Id.* Petitioner testified that he also constructed gang forms that could weigh up to tens of thousands of pounds which were lifted by a crane. *Id.* Petitioner testified he would use all sorts of tools, including power tools, but not jackhammers. (T.10-11)

Petitioner testified that at around 11:00 a.m., workers were preparing to pour concrete. (T.11) Petitioner testified he was walking on stirrups on the deck and explained that stirrups are small fabricated pieces, shaped like Ws, which are approximately 2 inches above the deck. (T11-13) Petitioner explained that there was rebar on the ground which he walked on to get around, as well. *Id.* Petitioner testified that you walked on these things in order to avoid stepping on electrical cords and pieces of conduit and falling. (T.13) Furthermore, Petitioner explained since concrete was to be poured, there were inverted light poles with big steel plates on the deck in preparation for the concrete to be poured. (T.17-19)

Petitioner testified he was within 30 feet from the base of the tower crane, which was probably about 50 feet above his head. (T.14) Petitioner testified they were moving "yellow boys," 4x4 pieces of lumber which were 22 feet long and had webbing. *Id.* The yellow boys are used as structural support for the plywood when concrete gets poured. (T.15) The yellow boys were helicoptered to the job site, then lifted to the floor being worked on by a crane where Petitioner and the superintendent were responsible for bringing them down to the floor. (T.15-16) The yellow boys that were being moved to the floor by the crane were packaged and weighed around 5,000 lbs and were about 4x4 feet wide, 3 feet tall and 22 feet long. (T.15-16) Petitioner testified that it was a bit windy that day, like it normally is on high-rises. (T.15) Petitioner explained that there was supposed to be a rope on one side of the load to grab on to and help steady the load as it came down. (T.16) However, Petitioner testified, the load did not have any rope and was spinning as it came down. (T.16-17) Petitioner and the superintendent signaled to the crane operator where they wanted the load to be placed and when it reached about face/chest high, the superintendent grabbed the load. (T.17) At that point, Petitioner grabbed the right side of the load with his left arm. (T.17)

Petitioner testified that as he grabbed the load with his left arm to walk the load down, the load was still spinning and swinging. (T.19-20) Petitioner explained that as he walked the package down, his left foot slipped

and got stuck underneath an inverted light pole with a big steel plate on it. (T.20) Petitioner testified he was unable to move his left foot. *Id.* Petitioner did not let go of the load due to fear it would strike other people and hurt them, even kill them. (T.20-21) Petitioner held on as long as he could but eventually the load got ripped out of his left arm and he fell to the deck. (T.21, 23) Petitioner felt immediate pain in his left shoulder. (T.21) Petitioner testified that he immediately pulled his left arm into himself with his right arm and put his left arm between his legs because the pain was so horrific. (T.22) Petitioner remembered laying in the fetal position his left arm between his knees and the superintendent looking at him like that had to hurt. (T.23) Petitioner testified he then got up, walked it off and continued working. *Id.*

Petitioner testified that he continued to have pain in his left shoulder and, once he got home, he took some aspirin and went to bed. (T.25-26) Petitioner testified that he awoke the following morning with excruciating pain in his left shoulder. (T.26) Petitioner went to work, but after about 3-4 hours of working, Petitioner went to the superintendent and reported his pain and indicated there was a problem with his left shoulder. (T.26-27) Petitioner indicated that he could barely move his left arm, had no strength in it and felt pins, needles and burning in his left arm. (T.27)

Petitioner sought treatment at Rush Hospital's Emergency Room, which was four blocks away. (T.27-28) Petitioner testified that he was referred to Dr. Gregory Nicholson by personnel at Rush Hospital's Emergency Room.(T.28) Following his release from Rush Hospital, Petitioner went to Respondent's clinic to undergo drug testing as requested by Respondent. (T.27-28)

Petitioner saw Dr. Nicholson on December 14, 2016. (PX1) Petitioner described the November 29, 2016 accident and complained of continued left shoulder pain. *Id.* Dr. Nicholson ordered a left shoulder MRI, which Petitioner underwent that same day and revealed a supraspinatus rim rent tear, subscapularis tendinosis, probable degenerative type labral tears and mild teres minor atrophy. (PX1 & PX8) Dr. Nicholson reviewed the MRI and found that Petitioner had a small full-thickness rotator cuff tear which he felt was a new injury and matched up with Petitioner's mechanism of injury and clinical examination. (PX1) Dr. Nicholson recommended surgery. *Id.*

On January 16, 2017, Dr. Nicholson performed a left shoulder arthroscopy with arthroscopic subacromial decompression including acromioplasty. (PX1 & PX9) The operative report specifically notes that there was no evidence of synovitis or undersurface rotator cuff tears and the biceps tendon was pristine. *Id.* Petitioner testified that he continued to experience the same pain he had before the surgery after the surgery. (T.31)

Petitioner followed up post-operatively with Dr. Nicholson, who ordered physical therapy. (PX1) Petitioner reported his ongoing left shoulder pain to Dr. Nicholson and at physical therapy. (PX1 & PX2) Petitioner continued to follow up with Dr. Nicholson, undergo physical therapy and underwent several cortisone injections which only provided temporary relief. *Id.* Petitioner complained of ongoing left shoulder pain and problems throughout his treatment. *Id.* Dr. Nicholson prescribed pain medications which, according to Petitioner, somewhat helped with inflammation, but not with the pain. (PX1, T.34)

Petitioner testified that he returned to work following the surgery in August or September of 2017. (T.41, 43) Petitioner testified that he returned to work, full duty, because of the supervisory nature of his position. (T.39-40) Petitioner explained that if he could not do something, or even thought he could not do something, he would have someone else do it so as not to put anyone in harm's way. (T.39) Petitioner further explained that he was performing construction and concrete work just as before the accident. (T.40-41) Petitioner testified that he continued to have pain in his left arm, but he did not use it as much at work and did not do gang forms. *Id.* Petitioner explained he could pick up a sheet of plywood with one arm and maybe

support a sheet of plywood with about 5 lbs. of pressure. (T.41) Petitioner testified his left arm was not working as well and would get hung up and would crack and snap, like walking on walnuts. (T.41-42) Additionally, Petitioner testified that his left arm would go numb and he was losing strength in his left arm daily. (T.42) Petitioner testified it was difficult for him to reach around to his back to reach a back hook. *Id.*

On November 8, 2017, Respondent had Dr. Ajay K. Balaram perform a medical records review of Petitioner's medical records. (RX1-Dep.Ex.2) Dr. Balaram diagnosed Petitioner as having a torqueing injury to his left shoulder, acromioclavicular joint injury and possible arthropathy. *Id.* Dr. Balaram recommended a left shoulder arthroscopy and distal clavicle arthroscopic excision. *Id.* Dr. Balaram opined that if Petitioner and his surgeon determined that Petitioner would proceed with conservative treatment, then Petitioner had reached maximum medical improvement (MMI). *Id.* However, if Petitioner and his surgeon decided surgery was appropriate, then Petitioner would be at MMI 6 to 7 months after surgery, based on Petitioner's ability to perform daily and work activities in the setting of his acromioclavicular joint dysfunction. *Id.* Dr. Balaram released Petitioner to return to full duty work since he felt Petitioner was coping appropriately despite his injury. *Id.*

On February 28, 2018, Dr. Nicholson noted that Petitioner was working full duty but continued to have left shoulder issues. (PX1) Dr. Nicholson noted that Petitioner reported that his job description had changed, and he was required to do heavier lifting, about 50 lbs to 120 lbs, to chest height occasionally and over chest height. *Id.* Petitioner reported developing some distal left elbow pain. *Id.* Dr. Nicholson noted that Petitioner was neurologically intact and that the physical exam was essentially normal. *Id.* Dr. Nicholson felt that Petitioner had chronic left shoulder issues and released Petitioner to continue working full duty. *Id.* Dr. Nicholson felt Petitioner had not reached MMI and noted that Petitioner had a relatively new onset of distal biceps tendinitis. *Id.* Dr. Nicholson explained that it was a somewhat rare condition but felt that it was directly and indirectly due to some substitution patterns by Petitioner and coincided with Petitioner's increased workload. *Id.*

Petitioner testified he continued to work for Respondent until April 2018, when he was laid off. (T.43)

On April 17, 2018, Petitioner underwent an independent medical examination (IME) with Dr. Balaram at Respondent's request. (RX1-Dep.Ex.3) Dr. Balaram noted that Petitioner complained of left elbow pain which, according to Petitioner, has been present since the November 29, 2016 accident. *Id.* Dr. Balaram noted that there was no prior description of an elbow injury in the medical records. *Id.* As such, Dr. Balaram found that Petitioner's left elbow condition was unrelated to the November 29, 2016 accident. *Id.* Regarding Petitioner's left shoulder, Dr. Balaram found that Petitioner had persistent pain associated with the acromioclavicular joint injury sustained on November 29, 2016. *Id.* However, noting that Petitioner continued to work and finding that Petitioner had functional use of his left shoulder, Dr. Balaram did not recommend surgery. *Id.* Dr. Balaram doubted that additional surgery would eliminate Petitioner's left shoulder pain. *Id.* Dr. Balaram also felt Petitioner did not need an MR arthrogram as the prior surgery was a better determinate of intraarticular pathology than an arthrogram. *Id.* Dr. Balaram found that Petitioner was at MMI regarding his left shoulder, noting that Petitioner was at full activities from a functional standpoint and despite Petitioner's residual pain complaints. *Id.* Dr. Balaram released Petitioner to return to work full duty. *Id.*

On April 25, 2018, Dr. Nicholson noted that Petitioner complained of tightness in and around his left shoulder and of lateral elbow pain, which was different than before when he reported pain more over the distal biceps. *Id.* Dr. Nicholson explained to Petitioner that he had been at a steady state for about 6-9 months and no other treatment was required. *Id.* Dr. Nicholson found Petitioner to be at MMI regarding his shoulder. *Id.* Dr. Nicholson noted that Petitioner asked why he was not undergoing an MRI arthrogram of the shoulder and Dr. Nicholson explained there was no clinical indication for one and released Petitioner from care. *Id.* Petitioner

testified he felt that he required additional medical treatment and an MR arthrogram because of his continued pain in his left shoulder and because the arthrogram would provide proof that there was something wrong with his shoulder. (T.35-36)

Petitioner testified that after he was laid off in April 2018, he decided he was not going back to concrete work because his arm was killing him and he knew another general contractor who did a lot of school work who he had worked for in the past when things were slow. (T.44) Petitioner explained that school work consisted of building or remodeling schools, which meant a lot of mechanical system work. *Id.* However, Petitioner explained, that he does not deal with the mechanical systems, instead his job focuses more on working on doors, locks and hardware. (T.44-45) According to Petitioner, the locks are electronic, and his job consists of removing old locks and replacing them with new locks. (T.45) Petitioner testified that school work differed greatly from his previous concrete work because he went from picking up tens of thousands of pounds a day to lifting less than 200 lbs a day. *Id.* Petitioner testified that school work was nice, simple, easy work that did not require overhead work which helped him maintain his left shoulder. (T.45-46) Petitioner explained that overhead work is problematic for him because he not only feels pain in his shoulder when he reaches overhead, but because he lacks the range of motion in his left shoulder that allows him to raise his left shoulder. (T.46) Petitioner testified that he has to use his right hand to move his left shoulder in order to get a shirt over his head or to wipe sweat off his brow. *Id.*

Petitioner sought additional treatment from Dr. Michael Durkin on September 17, 2018. (PX4) Dr. Durkin noted Petitioner had significant left shoulder complaints and had reported the November 29, 2016 accident. *Id.* Dr. Durkin took x-rays, examined Petitioner and diagnosed him as having left shoulder instability related to the November 29, 2016 accident. *Id.* Dr. Durkin ordered an MR arthrogram. *Id.*

The MR arthrogram, performed on January 15, 2019, revealed moderate grade bursal surface partial tearing involving the posterior tendon, low-grade interstitial partial tearing of distal subscapularis tendon and diffuse mild fraying and degeneration of the labrum. (PX3 & PX7) Petitioner followed up with Dr. Durkin on January 22, 2019, to review the results of the MR arthrogram. (PX4) Dr. Durkin noted that Petitioner complained of severe left shoulder pain that was prohibiting him from working. *Id.* Dr. Durkin noted a decrease in Petitioner's range of motion and more signs of impingement during the physical examination. *Id.* Dr. Durkin agreed with the radiologist's report that Petitioner had a significant abnormality in the subscapularis tendon of his left shoulder. *Id.* Additionally, Dr. Durkin was concerned with the increase in Petitioner's pain and was concerned that Petitioner had a dislocated bicep tendon. *Id.* Dr. Durkin recommended a left shoulder arthroscopy, repair of the subscapularis tendon and open sub pectoral bicep tendinosis. *Id.* Dr. Durkin released Petitioner to modified duty of no use of the left upper extremity. (PX3) Petitioner testified he would proceed with the recommended surgery if it were authorized by Respondent because he continues to have pain and still has limited use of his left arm. (T.38)

On March 27, 2019, Petitioner underwent another IME with Dr. Balaram at Respondent's request. (RX1-Dep.Ex.4) Dr. Balaram diagnosed Petitioner as having left shoulder rotator cuff insertional tendinopathy of the supraspinatus and subscapularis. *Id.* However, Dr. Balaram determined that any current left shoulder issues Petitioner had were unrelated to the November 29, 2016 accident, noting that during the arthroscopy Petitioner's subscapularis and biceps tendon were normal. *Id.* Dr. Balaram found that all the treatment Petitioner had received was reasonable and not excessive. *Id.* Dr. Balaram released Petitioner to return to full duty work, noting that Petitioner was already working full duty. *Id.*

On August 15, 2019, Dr. Durkin issued a narrative report outlining his treatment of Petitioner. (PX4) Dr. Durkin opined that Petitioner's ongoing left shoulder condition and need for additional surgery was causally related to the November 29, 2016 accident. *Id.* Dr. Durkin explained that his opinion was based on the

mechanism of injury, the fact that the tear was also seen on the first MRI and that it is a well known fact that tears in the suprascapularis tendon are not as common as those as the supraspinatus tendon and are frequently missed on MRIs and arthroscopy. *Id.* Dr. Durkin disagreed with Dr. Balaram's finding that Petitioner's left shoulder was fully functional and that Petitioner had reached MMI. *Id.* Dr. Durkin opined that Petitioner's left shoulder condition had not resolved and the pathology seen on the MRI was still present on the MR arthrogram and that pathology correlated with Petitioner's current symptoms. *Id.*

On January 14, 2020, Dr. Balaram's evidence deposition was taken. (RX1) Dr. Balaram's testimony was consistent with his prior reports from November 8, 2017, April 17, 2018 and March 27, 2019.

At trial, Petitioner testified he has had no other accident with respect to his left shoulder after November 29, 2016. (T.48) Petitioner testified that the strength in his left arm is probably 25% of what it used to be. (T.47) Petitioner testified that he continued to work because he had bills to pay and did not trust the workers' compensation system. (T.48-49) Petitioner further testified he enjoyed his work and would get up every day at 4:00 o'clock in the morning, happy to "go back with all the boys in the sandbox and play." (T.49) Petitioner explained he continued to do carpentry work because he had put too much blood, sweat and tears into the carpenters' union to give up his pension. (T.50) Petitioner testified that his pension is not a civilian pension and that, for him, it is all about his pension, his points and his benefits. *Id.*

Regarding his current left shoulder condition, Petitioner testified that it gets worse every day. (T.53) Petitioner described daily popping and weakness in his left shoulder. (T.53-54) Petitioner testified of difficulty driving due to the minimal vibration of his car, as well of difficulty shaving his head because he cannot lift his arm. (T.54) Petitioner reiterated that if surgery was approved, he would have it. *Id.*

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that the parties stipulated that Petitioner suffered accidental injuries from a work-related accident on November 29, 2016. (AX1) Petitioner described, in great detail, how the accident occurred and the injury to his left shoulder as a result. The Arbitrator finds that Petitioner testified credibly regarding the accident and the aftereffects of the accident.

The Arbitrator notes that the records establish that Petitioner's left shoulder condition has been ongoing since the November 29, 2016 accident. The records indicate that surgery, physical therapy and injections failed to relieve Petitioner's left shoulder pain. Additionally, as noted by Dr. Durkin, the MR arthrogram revealed moderate grade bursal surface partial tearing involving the posterior tendon, low-grade interstitial partial tearing of distal subscapularis tendon and diffuse mild fraying and degeneration of the labrum. As noted by Dr. Durkin in his narrative report, the findings of the MR arthrogram support the diagnosis of Dr. Balaram. Additionally, Dr. Durkin opined that Petitioner's ongoing left shoulder condition and need for additional surgery was causally related to the November 29, 2016 accident. Dr. Durkin explained that his opinion was based on Petitioner's mechanism of injury, the fact that the tear was also seen on the first MRI and that it is a well-known fact that tears in the suprascapularis tendon are not as common as those as the supraspinatus tendon and are frequently missed on MRIs and arthroscopy. As such, Dr. Durkin disagreed with Dr. Balaram's finding that Petitioner's left shoulder was fully functional, that Petitioner had reached MMI and that his current left shoulder condition was not causally related to the November 29, 2016 accident.

It is the Commission's function to choose between conflicting medical opinions. Not only may the Commission decide which medical view is to be accepted, it may attach greater weight to the opinion of a

treating physician. *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill. 2d 1, 4, 394 N.E.2d 1166, 1168 (1979); *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232, 590 N.E.2d 78, 82 (1992).

In light of Petitioner's ongoing left shoulder pain and problems following the accident, his continued pain and problems with the left shoulder after returning to work and the results of the MR arthrogram, the Arbitrator finds the opinions of Dr. Durkin more persuasive than those of Dr. Nicholson and Dr. Balaram.

Based on the above, the Arbitrator finds that Petitioner's current left shoulder condition is causally related to the November 29, 2016 accident.

Regarding Petitioner's complaint of left elbow problems, the Arbitrator notes that there was no mention of any elbow problems until February 28, 2018. On that date, Dr. Nicholson noted that Petitioner complained of developing left elbow pain. As such, the Arbitrator finds that Petitioner's left elbow condition is not causally related to the November 29, 2016 accident.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that the treatment provided through April 25, 2018 was found to be reasonable and non-excessive by Dr. Balaram. Additionally, the Arbitrator notes that Petitioner's need for ongoing treatment with Dr. Durkin was required based on his ongoing, documented pain complaints and problems and confirmed by the findings of the MR arthrogram.

Therefore, based on the above, the Arbitrator finds that the medical services provided to Petitioner have been reasonable and necessary. Accordingly, the Arbitrator awards the outstanding medical bill from Hinsdale Orthopedics, totaling $862.00, pursuant to Sections 8(a) and 8.2 of the Act.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that Petitioner testified, credibly, regarding his ongoing pain and problems with his left shoulder since the November 29, 2016 accident. The Arbitrator further notes that the medical records detail Petitioner's ongoing left shoulder pain and problems since the November 29, 2016 accident. The records also detail the failure of surgery, physical therapy and injections to relieve Petitioner's pain. The Arbitrator further notes that the MR arthrogram revealed moderate grade bursal surface partial tearing involving the posterior tendon, low-grade interstitial partial tearing of distal subscapularis tendon and diffuse mild fraying and degeneration of the labrum, all of which Dr. Durkin found to be causally related to Petitioner's November 29, 2016 work accident.

Therefore, based on the above, the Arbitrator finds that Petitioner is entitled to prospective medical care pursuant to Section 8(a) of the Act in the form of treatment as recommended by Dr. Durkin for treatment of Petitioner's left shoulder.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC027003
Case Name	CORDOBA, ELVIA v. IKEA U.S. HOLDINGS, INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0057
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	Julio Costa
Respondent Attorney	Richard Lenkov

DATE FILED: 2/17/2022

/s/Kathryn Doerries, Commissioner

Signature

DISSENT

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELVIA CORDOBA,

Petitioner,

vs. NO: 20 WC 027003

IKEA U.S. HOLDINGS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary disability, causal connection, medical expenses and prospective medical, penalties under Sections 19(k) and 19(l) and attorney's fees under Section 16, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 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 except as to correct a scrivener's error on page nine, in the second paragraph under the section entitled "CONCLUSIONS OF LAW," "WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPOECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY". In the second to the last sentence in the referenced paragraph, the Commission strikes the date "11/29/19" and replaces it with "11/27/19" so that sentence now reads as follows: "Setting aside the

discrepancy between a specific trauma and a repetitive trauma on 11/27/19, there is no history of how often the Petitioner either operated the forklift steering wheel or had to replace pallet feet either on 2/29/20 or on a regular basis."

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on February 2, 2021, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner has failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on February 29, 2020.

IT IS FURTHER ORDERED BY THE COMMISSION that based on this finding, the Petitioner is not entitled to temporary total disability benefits, medical expenses or prospective medical treatment.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner has failed to prove entitlement to penalties and attorney fees as provided in Sections 16, 19(k) and 19(1) 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 bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(1) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission.

February 17, 2022
KAD/bsd
O122121
42

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

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

DISSENT

I respectfully dissent from the opinion of the majority and would reverse the Decision of the Arbitrator. After carefully considering the totality of the evidence, I believe Petitioner met her burden of proving that he sustained an accident that arose out of and in the course of her employment on February 29, 2020.

In this case, the Petitioner put forward both specific and repetitive trauma theories of injury. Petitioner sustained a specific traumatic injury arising out of and in the course of her employment, which was superimposed by previous repetitive trauma injuries. Following her release from her November 27, 2019 injury, Petitioner experienced a recurrence of left shoulder pain in the course of her job duties. As a forklift operator, Petitioner was removing legs from damaged pallets, which could get jammed and cause her difficulty in removing them. This was done up at her head level. She was also required to turn a forklift wheel at chest height with her left arm all day. After performing these duties on February 29, 2020, her "shoulder began to hurt a lot," so she reported an injury to her team lead, Brian.

Petitioner testified she was directed to go to Physicians Immediate Care, which she did on March 2, 2020. PIC would not see her without authorization. Human Resources then provided Petitioner with an authorization slip for treatment dated March 4, 2020. When Petitioner presented to PIC on March 6, 2020, she indicated she sustained an injury on February 29, 2020. She complained of left shoulder pain and mid-thoracic pain from constant turning of the forklift wheel. When she presented for initial therapy evaluation on March 16, 2020, the date of injury is March 6, 2020, the first day she was seen at PIC for the new injury, and the mechanism of injury is listed as "constant turning of forklift wheel." Similarly, when she presented to Dr. Park on April 2, 2020, she reported her pain worsened as she was doing heaving work and more strenuous pulling on February 26, 2020.

The testimony and medical evidence show that Petitioner sustained a recurrent active left shoulder condition on February 29, 2020, for which she requires ongoing medical care, including the reasonable and necessary left shoulder surgery.

For the forgoing reasons, I would reverse the Decision of the Arbitrator.

o: 12/21/2021
TJT/ahs
51

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION
CORRECTED

22IWCC0057

CORDOBA, ELVIA
Employee/Petitioner

Case# **20WC027003**

20WC007556

IKEA
Employer/Respondent

On 2/2/2021, 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 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5755 COSTA IVONE LLC
JULIO COSTA
311 N ABERDEEN ST SUITE 100 B
CHICAGO, IL 60607

2542 BRYCE DOWNEY & LENKOV LLC
RICH LENKOV
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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
CORRECTED ARBITRATION DECISION
19(b)/8(a)

ELVIA CORDOBA
Employee/Petitioner

v.

IKEA
Employer/Respondent

Case # **20** WC **27003**

Consolidated cases: **20 WC 07556**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **New Lenox**, on **November 12, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **February 29, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 $**35,778.606**; the average weekly wage was $**688.05**.

On the date of accident, Petitioner was **48** 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 $**3,730.79** for TTD, $**0** for TPD, $**0** for maintenance, and $**1,832.68** for other benefits (advance), for a total credit of $**5,563.47**.

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

ORDER

The Arbitrator finds that the Petitioner has failed to prove that she sustained accidental injuries arising out of and in the course of her employment with Respondent on February 29, 2020.

Based on this finding, the Arbitrator finds the Petitioner is not entitled to temporary total disability benefits, medical expenses or prospective medical treatment.

The Arbitrator finds that the Petitioner has failed to prove entitlement to penalties and attorney fees as provided in Sections 16, 19(k) and 19(l) 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

January 26, 2021
Date

ICArbDec19(b)

FEB 2 - 2021

STATEMENT OF FACTS

The Arbitrator initially notes that the Petitioner testified via interpreter Ruben Rodriguez.

Petitioner has been employed as a general worker in the conventional picking department for IKEA in Joliet, Illinois since approximately 5/14/18. Her job duties included collecting orders, i.e., "picking", and placing them on pallets for shipment to other stores, which involved operating a forklift. She worked full-time and her work schedule was Wednesday to Saturday, 5:00 a.m. to 3:30 p.m. While working under Team Lead "Brian", Petitioner testified that she would rotate job positions daily, but when "Bill" became her Team Lead, she hardly moved from her position and basically did not rotate. She testified that she would have to lift items weighing up to 50 kilograms (approximately 110 pounds), and that completed order pallets could weigh up to 800 to 1000 kilograms (approximately 1,760 to 2204 pounds). She testified she would have to move these pallets alone, which was "very difficult" and would only have help if the product fell off the pallet.

On 11/27/19, Petitioner testified she was picking a large order, which at the end required picking four kitchen countertops which she believed weighed about 30 kilograms (which is approximately 65 pounds) each. While pulling the last one by herself towards the pallet, she testified she felt significant pain on her left shoulder and part of her scapula. Petitioner testified she reported the accident to her supervisor that same day.

Petitioner also testified, however, that she'd had left shoulder discomfort for approximately 1 to 2 months prior to 11/27/19, but she denied any "heavy or strong" accidents before 11/27/19. She indicated that when she would begin her work week on Wednesdays her shoulder would be fine, but that it would bother her by the end of her Saturday shift. She also testified: "So about a month prior I've had situation where I placed my hand, my left hand on a box that was heavy, it's like push the box, the box moved. As I leaned the box against something, the box moved and I felt a type of pinch on my (mid) back." She denied any prior left shoulder injuries.

Petitioner testified she was brought to Physician's Immediate Care (PIC) by Team Lead "Francisco." At PIC on 11/27/19, Petitioner saw Dr. Talamayan, reporting constant shooting posterior left shoulder, posterior left elbow, and mid forearm pain since the morning of 11/27/19. She reported the pain to be 10 out of 10, meaning the worst pain imaginable. The report then, however, goes on to note the problem was the result of a 7/27/19 work injury with sudden onset. She reported a 5-month history of intermittent left shoulder pain and left upper extremity tingling and numbness: "Pt reports pain started when she accidentally try to push a pallet and ended up being yanked forward. Pain also reproduced with heavy lifting. Pain worsened on 11/27/19 when she lifted a heavy pallet." Petitioner denied neck pain. Exam abnormalities included positive Spurling's and shoulder relief testing on the left, and tenderness to the anterior left shoulder. Neer, Hawkins and empty can signs were negative regarding the left shoulder. Left shoulder x-ray showed a non-displaced fracture of the acromion process with adjacent soft tissue swelling. Cervical x-rays showed degenerative spondylosis. Dr. Talamayan diagnosed a left shoulder strain and cervical radiculopathy and assigned restrictions of no lifting over the shoulder greater than 15 pounds, no lifting from waist to shoulder greater than 15 pounds, and no lifting below the waist greater than 20 pounds with the left arm. Naprosyn was prescribed. (Px1)

Asked if she then reported the specifics of what occurred on 11/27/19 to PIC, Petitioner testified: "Not that day. They made comments about five months before what happened with regard to the box", indicating this referred to an incident where she hurt her back. Asked why she told the doctor about her back injury if it was unrelated to the 11/27/19 incident, Petitioner testified that she thought it was related to the pain in the shoulder but was then advised it was not related. Petitioner testified that the doctor indicated her problem was cervical, but she also testified that an interpreter was not present and that she communicated with the doctor "as best I could with

hand gestures and the little English I could speak." Petitioner advised that she told the doctor what work activities were causing her pain, and that when she would lift something heavy and push it, she would feel the pain. Despite the report indicating she was left-handed, Petitioner testified she is right hand dominant. Petitioner testified that the Respondent accommodated her work restrictions, but after a week she had increased pain and returned to PIC, where she was advised to avoid left hand use.

On 12/3/19, Petitioner reported worsening left shoulder and scapula pain after wrapping pallets at work, and Dr. Talamayan restricted Petitioner to right-handed work only and referred her for physical therapy. Prednisone was prescribed. On 12/10/19, Petitioner reported improvement, and Dr. Talamayan restricted Petitioner to 5 pounds with the left arm, with no lifting above shoulder level, and continued physical therapy. On 12/17/19, Petitioner reported improved left shoulder and neck pain, indicating she only was feeling pain with arm movement. There was normal range of motion and no numbness or tingling. Dr. Talamayan again continued physical therapy and work restrictions (no overhead lifting or other lifting over 15 pounds with the left arm). Medications were reduced to only ibuprofen. (Px1).

On 12/24/19, Petitioner reported continued improvement with less pain along the scapular border and no numbness or tingling. She was able to do overhead reaching without difficulty. Petitioner was advised to continue therapy, as well as a home exercise program, and the work restrictions indicated were no overhead lifting and no lifting greater than 20 pounds with the left arm. On 12/31/19, Dr. Talamayan indicated Petitioner's back and shoulder pain had resolved, and she denied any numbness, tingling, weakness, or limited range of motion. The doctor opined that Petitioner had reached maximum medical improvement (MMI) and could return to full duty work with no residual disability and no impairment. (Px1).

Petitioner testified she "more or less" felt good at that point and returned to full duty work as of 1/1/20, but after returning to work her injury was continuing to bother her "just a little." She testified that Brian was again her Team Lead, and so she again would rotate positions as she had before as opposed to always working in conventional picking.

On 2/29/20, Petitioner testified that she again developed left shoulder pain while using her left hand at work, including to drive the forklift and to replace damaged cardboard "feet" that were on the bottom of the pallets. Replacing the feet would involve lifting the pallet with the forklift to where the feet were at eye level. Petitioner indicated that sometimes the feet would get stuck and become difficult to remove, at which time she would ask for help from the Team Lead, but there would not always be someone available to help. She testified that the forklift steering wheel was at about chest level, and she would have difficulty operating the forklift after the accident due to pain. She couldn't really switch hands because the right hand would operate the other forklift controls.

When she reported the 2/29/20 pain to Team Lead Brian, Petitioner testified that he advised her to go to the clinic and to provide the claim number from the 11/27/19 incident. She testified she was not seen until 3/6/20 at Physicians Immediate Care (PIC) because 2/29/20 was a Saturday, and when she went on the following Monday (3/2/20) she was advised that she could not be seen without authorization from Respondent. When she reported this to Brian, he advised her to discuss it with Human Resources (HR). Petitioner identified a 3/4/20 document in Px1 as the medical authorization she then received from HR to go to the PIC clinic, noting the claim number referenced at the bottom related to her 11/27/19 claim and that a new claim number was never opened relative to 2/29/20.

On 3/6/20, Petitioner returned to PIC with primary complaint of back pain in the left scapular region and left upper back since a 2/29/20 injury: "Pt here c/o L shoulder pain and mid thoracic pain sustained from constant turning of the forklift wheel." She denied numbness or tingling. Thoracic x-ray was normal. Left shoulder/upper

arm and thoracic strains were diagnosed, and Dr. Talamayan prescribed Naprosyn and Cyclobenzaprine along with restrictions of no lifting over 10 pounds with the left arm and no forklift driving. (Px1).

Petitioner testified that light duty work restrictions were not accommodated by Respondent at this point, and that she felt her pain at this point was worse than it had been before.

Petitioner followed up at PIC on 3/13/20 with continued complaints of the left shoulder, scapula, and mid back. She denied neck pain. Medication was not helping, and a new medication, Nabumetone, was prescribed, along with physical therapy. Work restrictions were continued. On 3/20/20, Petitioner noted worsening shoulder pain with therapy, and pain radiating to the left scapula and upper arm. She had developed a rash after taking the new medication. Work restrictions and therapy were continued, and Petitioner was referred for a left shoulder MRI. (Px1).

One portion of the 3/27/20 report of Dr. Talamayan states "she [sic] feeling better", while another section notes the Petitioner's left shoulder pain radiating to the scapula was unchanged since the last visit. The doctor noted they were still awaiting MRI authorization, and Petitioner was referred to Parkview Orthopedic Surgery. (Px1).

The left shoulder MRI was completed on 3/31/20, and the report indicates the exam was limited due to patient motion. The impression was of supraspinatus and infraspinatus insertional tendinosis with partial thickness tear along the anterior supraspinatus, and a partial tear at the supraspinatus myotendinous junction, with no evidence of a full thickness tear or a displaced labral (SLAP) tear. Also indicated was mild subacromial/subdeltoid bursal fluid. (Px1).

Following the MRI, Petitioner testified she was referred to an orthopedic surgeon, and she sought treatment with Dr. Park at the recommendation of a friend. She testified that she provided the doctor with a history of the accident.

Orthopedic surgeon Dr. Park's 4/2/20 report indicates that on 11/27/19, Petitioner was pulling a countertop when she felt pain in the posterior shoulder and scapula. The Arbitrator notes that in a second section of the report, Dr. Park indicates Petitioner was "vigorously and repetitively" pulling countertops at work on 11/27/19. The pain resolved with conservative treatment and she returned to regular duty on 1/1/20, but she reported the pain began to recur on 2/19/20 with work duties, and on 2/26/20 the pain worsened as she was doing heavier work and more strenuous pulling. She reported that therapy had not helped. Following examination and review of various diagnostic imaging, Dr. Park diagnosed a left scapular muscle strain and a partial left rotator cuff tear. The left shoulder was injected. (Px2).

On 4/30/20, Petitioner reported that her superior/anterior shoulder pain resolved with the injection. Noting a diagnosis of a left scapular muscle strain, Dr. Park performed a trigger point injection to the shoulder region and prescribed therapy and medication, including a Diclofenac cream. On 5/21/20, Petitioner reported the trigger point injection didn't help, and noted the cream produced a burning sensation. Therapy had been denied by workers' compensation. Dr. Park prescribed chiropractic and massage treatment, home exercise, Flexeril and light work duty. (Px2).

On 6/15/20, Dr. Park noted Petitioner had begun therapy at ATI, but it increased her pain. He injected the shoulder joint for a second time and continued to recommend chiropractic, massage and physical therapy" along with light duty. On 7/20/20, Petitioner reported her shoulder pain again resolved with the injection but had gradually returned. While Petitioner had no neck pain or numbness/tingling complaints, Dr. Park ordered a cervical MRI given persistent medial scapular pain. He noted that her positive responses to the injections told him that there was a subacromial source to her pain. (Px2).

The 8/4/20 cervical MRI reflected disc bulges at C3/4 and C4/5, a central to right paracentral disc herniation at C5/6 with severe right and mild left foraminal stenosis, and a C6/7 central to right paracentral disc herniation with mild to moderate canal stenosis and mild bilateral foraminal stenosis. (Px2).

On 8/17/20, Petitioner noted no change in her condition. Dr. Park opined that Petitioner had two sources of shoulder pain, and that her left trapezial/scapular pain could be cervical-related. He referred Petitioner to pain management to consider a cervical epidural injection. On 9/21/20, Dr. Park noted he was waiting for the epidural to be authorized before considering any further shoulder treatment, but continued work restrictions (no overhead or repetitive work and a 2-pound limit) and chiropractic/massage/therapy treatment. (Px2).

The records of ATI Physical Therapy indicate the Petitioner was treated there from 5/27/20 to 10/8/20 with a total of 56 visits. (Px3).

Petitioner also treated with Dr. Farag at Midwest Anesthesia & Pain Specialists (MAPS) on 9/1/20, at which time he prescribed an H-Wave machine and an EMG/NCV. She underwent a cervical epidural at this facility on 10/1/20 at C6/7. (Px4).

On 10/12/20, Dr. Park prescribed arthroscopic left shoulder surgery for decompression and rotator cuff debridement versus repair, and possible biceps tenotomy or tenodesis. (Px2). At follow up at MAPS on 10/15/20, Petitioner reported 50% improvement in her neck pain since the epidural, which is consistent with Petitioner's testimony. (Px4). On 10/21/20, Petitioner reported her scapular pain had improved with the cervical epidural. (Px2).

On 11/9/20, Dr. Park stated: "Given that the patient had no shoulder pain or weakness prior to her work injury on 11/27/20, I think her left partial rotator cuff tear was directly caused by the work injury of repetitive pulling of countertops leading up to 11/27/20." He opined that her medial periscapular muscle strain had resolved with cervical epidural, and that her trapezial/posterior scapular pain was due to cervical disc disease, and treatment for this was left up to pain management. (Px2).

On 10/26/20, Respondent requested a Utilization Review regarding the prescribed surgery, and Dr. Milos indicated the procedure would be medically reasonable. (Px5).

Petitioner was examined by Dr. Verma at the Respondent's request on 10/23/20. Petitioner reported pulling a 30-to-40-kilogram countertop at work on 11/27/19 from a pallet and felt sharp left shoulder pain, noting "This was an acute injury with no prior history of shoulder injury or trauma." Nothing was noted by Petitioner regarding the subsequent claimed 2/29/20 incident. Dr. Verma reviewed the prior medical records, but the doctor references the 3/6/20 medical note where injury was noted on that date due to constant turning of a forklift wheel. He noted that he did not review any records from the treatment Petitioner indicated she had at La Clinica and with a pain management facility. Dr. Verma examined the Petitioner and reviewed the left shoulder MRI and opined that she suffered from left shoulder impingement with partial rotator cuff tear. He noted this correlated with the subjective complaints and he did not see an active neck or scapular condition. He opined that she sustained a shoulder strain on 11/27/19 but prior to returning to work on 1/1/20 had a normal exam and full function. Opining that her current condition was not related to the 11/27/19 incident and that she had reached MMI for same as of 1/1/20, Dr. Verma also noted that despite Petitioner stating she had no prior left shoulder complaints, the medical records he reviewed indicated she had intermittent left shoulder symptoms prior to 11/27/19. (Rx3).

Petitioner testified that her 10/23/20 examination with Dr. Verma lasted approximately 5 minutes.

Petitioner testified that both Respondent's HR department in Baltimore, as well as the workers' compensation insurance adjuster, contacted her after the 11/27/19 injury, noting there was an interpreter with the adjuster, but not with IKEA's HR representative. Further testimony appeared to indicate that Petitioner may have called the HR department and not vice versa.

When Petitioner was taken off work again on 3/6/20, she testified she received TTD benefits until approximately 4/14/20, and that she didn't know why her benefits were terminated. Petitioner testified she has been managing financially with her savings and child support for her 12-year-old son, and that she utilizes food banks. Her son is performing the household chores. Petitioner testified that she wants to have the recommended surgery because she her pain to resolve and to return to work and live a normal life.

On cross examination, Petitioner agreed that she had testified to two separate incidents on direct, 11/27/19 and 2/29/20, testifying that the latter date is "the day I claim that my shoulder had continued to hurt." She agreed that she is alleging that a specific traumatic incident occurred on 11/27/19 that resulted in shoulder pain, and that she reported it that same day as a specific incident.

Shown documentation from Rx7, the Petitioner agreed that she signed off on the documentation at the time of her 5/4/18 hire date indicating she was aware of company safety and security topics that were discussed, including the need to immediately report work injuries to the employer.

Petitioner also identified her 11/27/19 accident report "Statement Sheet" as Rx8. She agreed that it states what happened in her own words in Spanish, and that she read it before she signed off on it. She also agreed that her statement was then translated into English by Francisco Antunez. She understood it was important to accurately indicate what happened.

The translation of Petitioner's statement by Francisco Antunez is as follows: "5 months ago I was cutting the plastic wrap off of a pallet. I was leaning on a box, supporting my balance. The box shifted forward causing my arm to extend outward. I felt a sharp pain in my back. Over time the pain has worsened over time. It hurts when I lift heavy items. Today it hurts bad after lifting a heavy item." (Rx8). The Arbitrator notes that the translation of this same statement by the interpreter at hearing was as follows: "5 months before as I was cutting the plastic of a pallet, I placed my hand on a box at the side of the pallet thinking that the box was heavy, but it was light. And as I placed my arm, it pulled away and I felt a pinch on my back. I did not give it much importance. But as time went by and the time I lifted anything heavy, my shoulder was hurting a lot when I touched or handled a product the pain would be very strong." (Tr. 48-49). The Arbitrator notes that this document was again addressed on redirect, where it was made clear that the interpreter at the hearing misread one word in Spanish that was very close in spelling (hoy versus hay), and that the last sentence is consistent with Mr. Antunez' translation, i.e. "Today it hurts after lifting a heavy item." (Tr. 61-62).

The Arbitrator further notes that the first page of the document in Rx8, a Team Lead report dated 11/27/19, indicates Petitioner reported on 11/27/19 an incident that occurred 5 months prior involving a left shoulder sprain/strain, in the "300's area" of the facility due to lifting product 803.972.09. This document further notes that Petitioner's Team Lead was Brian Behnke, and that the incident was reported to Francisco Antunez at 6:30 a.m. on 11/27/19. However, it is unclear who signed off on this document where it indicates: "Co-workers Signature." (Rx8).

As to the reference in her statement to "5 months before", Petitioner testified that this referred to the incident where she placed her left hand over the box, it moved, and she felt the pinch in her back. She indicated she did not injure her shoulder at that time and that "nothing hurt", she just felt the pinch. She denied ever hurting her left shoulder at any time prior to 11/27/19. As to why she even mentioned anything about what occurred five

months prior to her claimed 11/27/19 accident, Petitioner testified it was because she wanted to be honest and "the pain of (11/27/19) was the occurrence of" using the left hand. Petitioner testified that she believed her statement in Rx8 is consistent with what she told her supervisor happened and is consistent with what she testified to at hearing regarding what happened on 11/27/19.

Following the review of Rx8 and questions regarding the incident 5 months prior, Petitioner was then asked what happened 2 months prior given her testimony on direct. She testified: "When I lifted something heavy, it was bothering, the shoulder was bothering me when as I was pulling off products. . . It was a bother that whenever I rested it would go away." Petitioner agreed she did not report a September 2019 injury to Respondent, testifying: "Can you imagine. I could not be reporting every time I felt pain. I would have a report on a daily basis." She testified she verbally told Team Lead "Bill" not to put her in conventional picking due to her shoulder pain, though she did not explain exactly when this occurred. She agreed she also didn't report any injury to Respondent 5 months prior to 11/27/19. She agreed she did not report or complete any accident reports for the alleged June 2019, September 2019 or 2/29/20 incidents. Despite her prior testimony, the Petitioner reiterated that she had no shoulder complaints prior to 11/27/19. As to her prior testimony that she wasn't told why her TTD benefits were being terminated, Petitioner acknowledged that Respondent's insurer sent a letter to her attorney indicating benefits were terminated "because the dates did not match."

Attempting to clarify the testimony on redirect exam, Petitioner testified that she had 10 out of 10 shoulder pain following the incident on 11/27/19, while prior to that it had ranged from 1/10 to 6/10, the least pain being prior to starting her work week and the worst pain being at the end of her work week. She testified that her condition would worsen when she was picking and wasn't being rotated to other positions. At this point she testified that her problem / discomfort began in October 2019. She indicated the pain was due to lifting and pulling, especially heavy products. Petitioner testified she did not see a doctor for her shoulder prior to 11/27/19 because her discomfort would go away with rest and "it only happened when I take heavy things." The difference on 11/27/19, she explained, was that she was unable to use her arm due to severe pain. Petitioner again acknowledged that company policy was to report any work injury, regardless of the degree of pain.

Respondent called Anthony Fitzpatrick, Respondent's Safety and Security manager since September 2017, to testify. His job involves safety and security guidance, orientation training for employees in this regard, accident follow up and preventative actions. Mr. Fitzpatrick testified that he would receive any work accident reports from Team Leaders or Safety/Security personnel. He had no record of Petitioner reporting an accident in June or September 2019. Had she reported such incidents, accident report would have been completed, she would have been offered medical treatment and there would have been follow-up – the same as what was done when she reported the November 2019 injury. He testified that if a supervisor failed to report an employee reported work accident, that supervisor would be subject to corrective action and possibly termination. Supervisors are trained to a higher degree than regular employees regarding the importance of accident reporting. Managers are trained to analyze the accidents as well to reduce the danger in the future. When Team leaders have an accident reported, they would obtain a "red folder", which contains an accident report. He testified that as to Respondent employees, "our goal is to have them report any accident or incident no matter how slight to the Team Leader and Supervisor." Petitioner signed off on 2019 training documentation (see Rx7), which acknowledges that she received and understood a variety of Safety and Security topics, including accident/incident reporting. Retraining is performed annually.

On cross-examination, Mr. Fitzpatrick testified that had the Petitioner reported an injury prior to 11/27/19, an incident report would have been created and medical treatment would have been offered, if desired. As to the 3/4/20 medical authorization (see Px1) Petitioner testified to, Fitzpatrick agreed it references the 11/27/19 claim on the bottom. As to why, given the Petitioner's 3/6/20 medical record from PIC states that Petitioner reported a 2/29/20 injury, there was no new incident report created, Mr. Fitzpatrick testified: "From my record, I have no

information about a new report having been filed. From my understanding it was attributed to initial workers compensation claim." He testified that when Respondent's HR reached out to the workers' compensation carrier, "it referenced the same injury area and it was determined to proceed to send her through that workers' compensation claim that was already done." He further testified: "From my understanding from the records that we have, there was no report ever provided to me regarding a new incident. It was attributed to the already existing pain. So the coworker said I still have pain in my left shoulder, and they were doing authorizations to return back with indication of a workers' compensation claim." Fitzpatrick agreed the PIC report referenced a new mechanism of injury, but he had no record indicating Petitioner reported a new accident to the Respondent.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, and WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

With regard to whether the Petitioner has provided sufficient proof of an accidental injury on 2/29/20, the Arbitrator can only note that it is unclear exactly what the Petitioner is claiming constituted an "accident" on this date within the meaning of the Workers' Compensation Act.

Initially, the Arbitrator notes that the evidence makes it unclear if the Petitioner was claiming a repetitive trauma injury or a specific trauma in this case. Her testimony was that she developed pain in her left shoulder while using her left upper extremity at work to drive a forklift and to replace damaged "feet" on the bottom of the cardboard pallets used at Respondent's facility. However, she did not testify as to how often she performed these activities. She did not testify that she sustained any specific trauma on 2/29/20 to the left shoulder/upper back. The Team Lead, Brian, who Petitioner approached with the problem, advised her to claim the injury as part of the 11/27/19 accident that is the subject of 20 WC 07556. It is unclear as to why he would have done this, given the company policy described by Mr. Fitzpatrick, and not prepared a new incident report if the Petitioner had reported a specific accident on 2/29/20. The initial report of PIC on 3/6/20 noted that Petitioner claimed constant turning of the forklift steering wheel. However, there is no definition of what was considered "constant" by either Petitioner or Dr. Talamayan. No testimony was provided as to exactly how often the Petitioner was operating the forklift steering wheel or how much force or grip was required to operate it. No testimony was provided as to how often the Petitioner may have had to replace pallet feet on 2/29/20. There is no evidence in any of the medical records that Petitioner provided a history of repetitive trauma. Interestingly, the initial report of Dr. Park noted both that Petitioner was injured on 11/27/19 pulling a countertop, as well as that she was pulling countertops "vigorously and repetitively." Setting aside the discrepancy between a specific trauma and a repetitive trauma on 11/29/19, there is no history of how often the Petitioner either operated the forklift steering wheel or had to replace pallet feet either on 2/29/20 or on a regular basis. It is difficult to make any finding regarding repetitive trauma without an understanding of how often the allegedly contributory activities were actually performed, both for a physician and an arbitrator.

The only causal connection opinion the Arbitrator could locate in the medical records after 2/29/20 was that of Dr. Park, and it was his opinion that her condition at that time was related to the 11/27/19 accident. However, his report notes both that she sustained injury when she pulled a countertop on that date, as well as that she had been "vigorously and repetitively" pulling countertops at work on 11/27/19. This is not consistent with the Petitioner's testimony that she had to pull 4 such countertops as the last part of a large order she was picking. Additionally, the Arbitrator notes that Dr. Park based his opinion, in part, of the Petitioner's statement that she had no left shoulder problems prior to 11/27/19. The evidence in the record, both Petitioner's testimony and the contemporaneous medical, indicate that not only had the Petitioner had left shoulder problems prior to 11/27/19

going back at least five months, but also that she had injures herself on two separate occasions approximately five and two months before 11/27/19.

After a thorough review of the entire evidentiary record for both 20 WC 07556 and 20 WC 27003, the picture that is painted is that the Petitioner initially injured herself sometime around June 2019 and has had numerous flare ups of pain since that time in the left shoulder/left upper back area. Unfortunately, the Petitioner either did not report the noted June and/or September 2019 incidents or did not file any workers' compensation claims for them. The Arbitrator cannot now find that what appears to be a condition going back to June 2019 as compensable when no claims were filed regarding these alleged incidents. There are no medical opinions which relate the Petitioner's condition to the alleged 2/29/20 accident.

As noted in 20 WC 07556, it is possible that these factual discrepancies regarding Petitioner's pre-2/29/20 condition could be related in some way to language issues given the Petitioner is a Spanish speaker. However, the Arbitrator notes that some of this evidence was obtained via Petitioner directly at hearing, and there is nothing in the records of Dr. Talamayan which reference any need for translation.

Petitioner's counsel's citation of *Cont'l Tire the Ams., L.L.C. v. Ill. Workers' Comp. Comm'n* makes a reasonable argument. The problem in this case, from the Arbitrator's view, is significant confusion regarding exactly what the Petitioner's symptoms have been over time, when, whether there were potentially compensable specific trauma accidents involved before 11/29/19 where no notice was provided to the Respondent, and no solid causation opinion from Petitioner's treating physicians. The facts in this regard are not nearly as clear in this case as in *Cont'l Tire.*, particularly in terms of what facts the physicians in this case were or were not aware of, as well as what the Petitioner's daily work activities were.

While it is certainly possible that the Petitioner sustained a compensable accident and injury on 2/29/20, taking the evidence as a whole, the preponderance of the evidence supports the finding that the Petitioner has failed to prove that she sustained compensable accidental injury on 2/29/20.

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 findings above, this issue is moot

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the Arbitrator's findings above, this issue is 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 findings above, this issue is moot

According to Arbx1, the Petitioner alleges entitlement to TTD benefits from 11/4/19 through 12/31/19, and again from 3/7/20 through the 11/12/20 hearing date. While Respondent paid TTD from 12/10/19 through 12/31/19, and again from 3/7/20 through 4/10/20, the indication is that TTD after 4/10/20 is disputed

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the findings noted above, the Arbitrator finds that the Petitioner has failed to prove she is entitled to penalties and/or attorney fees pursuant to Sections 16, 19(k) or 19(l) of the Act.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that the Request for Hearing form (Arbx1) submitted by the parties covers both the case at bar as well as consolidated case 20 WC 07556. A credit to Respondent totaling $5,563.47 was stipulated to by the parties based on both prior TTD payments as well as a prior advance paid by Respondent prior to hearing. As the Arbitrator is required to issue separate decisions for each of the consolidated matters, the Arbitrator wishes to make it clear that this credit of $5,563.47 is a credit that applies as a single credit to both the 20 WC 07556 and 20 WC 27003 cases. Therefore, while this same credit amount is indicated in both decisions, the credit is a total credit and is to be applied to both cases. The Respondent is not entitled to credit of $5,563.47 against the 20 WC 07556 case and another $5,563.47 credit against the 20 WC 27003 case.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC007556
Case Name	CORDOBA, ELVIA v. IKEA U.S. HOLDINGS, INC
Consolidated Cases	20WC027003
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0058
Number of Pages of Decision	16
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Julio Costa
Respondent Attorney	Richard Lenkov

DATE FILED: 2/17/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ELVIA CORDOBA,

Petitioner,

vs. NO: 20 WC 007556

IKEA U.S. HOLDINGS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary disability, causal connection, medical expenses and prospective medical, penalties under Sections 19(k) and 19(l) and attorney fees under Section 16, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Comm'n*, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 8, 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.

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)*. As there are no monies due and owing, there is no bond set by the Commission for the removal of this cause to the Circuit Court by Respondent. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 17, 2022

KAD/bsd
O122121
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/s/*Kathryn A. Doerries*
Kathryn A. Doerries

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF 19(b)/8(a) ARBITRATOR DECISION

22IWCC0058

CORDOBA, ELVIA
Employee/Petitioner

Case# **20WC007556**

20WC027003

IKEA
Employer/Respondent

On 1/8/2021, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5755 COSTA IVONE LLC
JULIO COSTA
311 N ABERDEEN ST SUITE 100 B
CHICAGO, IL 60607

2542 BRYCE DOWNEY & LENKOV LLC
RICH LENKOV
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

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)/8(a)

ELVIA CORDOBA
Employee/Petitioner

v.

IKEA
Employer/Respondent

Case # **20** WC **07556**

Consolidated cases: **20 WC 27003**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Paul Cellini**, Arbitrator of the Commission, in the city of **New Lenox**, on **November 12, 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 _____

Cordoba v. IKEA, 20 WC 07556

FINDINGS

On the date of accident, **November 27, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**35,778.606**; the average weekly wage was $**688.05**.

On the date of accident, Petitioner was **48** 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 $**3,730.79** for TTD, $**0** for TPD, $**0** for maintenance, and $**1,832.68** for other benefits (advance), for a total credit of $**5,563.47**.

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

ORDER

The Arbitrator finds that the Petitioner sustained accidental injuries arising out of and in the course of her employment on November 27, 2019. The Arbitrator further finds that the Petitioner's left shoulder/upper back condition was causally related to the November 27, 2019 accident until December 31, 2019, when she was found to be at maximum medical improvement and released to full work duties. Her condition after December 31, 2019 is not causally related to the November 27, 2019 accident.

Respondent shall pay Petitioner temporary total disability benefits of **$458.70 per week** for **4-1/7 weeks**, commencing **December 3, 2019 through December 31, 2019**, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of **$3,730.79** for temporary total disability benefits that have been paid.

Respondent shall pay reasonable and necessary medical services incurred by Petitioner between 11/27/19 and 12/31/19 relating to treatment of the left shoulder/upper back, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall be given a credit for any of the awarded medical expenses that have been paid prior to the hearing, and Respondent shall hold petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Petitioner has failed to prove entitlement to prospective medical treatment related to the November 27, 2019 accident.

The Arbitrator finds that the Petitioner has failed to prove entitlement to penalties and attorney fees as provided in Sections 16, 19(k) and 19(l) 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

January 6, 2021
Date

ICArbDec19(b)

JAN - 8 2021

STATEMENT OF FACTS

The Arbitrator initially notes that the Petitioner testified via interpreter Ruben Rodriguez.

Petitioner has been employed as a general worker in the conventional picking department for IKEA in Joliet, Illinois since approximately 5/14/18. Her job duties included collecting orders, i.e., "picking", and placing them on pallets for shipment to other stores, which involved operating a forklift. She worked full-time and her work schedule was Wednesday to Saturday, 5:00 a.m. to 3:30 p.m. While working under Team Lead "Brian", Petitioner testified that she would rotate job positions daily, but when "Bill" became her Team Lead, she hardly moved from her position and basically did not rotate. She testified that she would have to lift items weighing up to 50 kilograms (approximately 110 pounds), and that completed order pallets could weigh up to 800 to 1000 kilograms (approximately 1,760 to 2204 pounds). She testified she would have to move these pallets alone, which was "very difficult" and would only have help if the product fell off the pallet.

On 11/27/19, Petitioner testified she was picking a large order, which at the end required picking four kitchen countertops which she believed weighed about 30 kilograms (which is approximately 65 pounds) each. While pulling the last one by herself towards the pallet, she testified she felt significant pain on her left shoulder and part of her scapula. Petitioner testified she reported the accident to her supervisor that same day.

Petitioner also testified, however, that she'd had left shoulder discomfort for approximately 1 to 2 months prior to 11/27/19, but she denied any "heavy or strong" accidents before 11/27/19. She indicated that when she would begin her work week on Wednesdays her shoulder would be fine, but that it would bother her by the end of her Saturday shift. She also testified: "So about a month prior I've had situation where I placed my hand, my left hand on a box that was heavy, it's like push the box, the box moved. As I leaned the box against something, the box moved and I felt a type of pinch on my (mid) back." She denied any prior left shoulder injuries.

Petitioner testified she was brought to Physician's Immediate Care (PIC) by Team Lead "Francisco." At PIC on 11/27/19, Petitioner saw Dr. Talamayan, reporting constant shooting posterior left shoulder, posterior left

elbow, and mid forearm pain since the morning of 11/27/19. She reported the pain to be 10 out of 10, meaning the worst pain imaginable. The report then, however, goes on to note the problem was the result of a 7/27/19 work injury with sudden onset. She reported a 5-month history of intermittent left shoulder pain and left upper extremity tingling and numbness: "Pt reports pain started when she accidentally try to push a pallet and ended up being yanked forward. Pain also reproduced with heavy lifting. Pain worsened on 11/27/19 when she lifted a heavy pallet." Petitioner denied neck pain. Exam abnormalities included positive Spurling's and shoulder relief testing on the left, and tenderness to the anterior left shoulder. Neer, Hawkins and empty can signs were negative regarding the left shoulder. Left shoulder x-ray showed a non-displaced fracture of the acromion process with adjacent soft tissue swelling. Cervical x-rays showed degenerative spondylosis. Dr. Talamayan diagnosed a left shoulder strain and cervical radiculopathy and assigned restrictions of no lifting over the shoulder greater than 15 pounds, no lifting from waist to shoulder greater than 15 pounds, and no lifting below the waist greater than 20 pounds with the left arm. Naprosyn was prescribed. (Px1)

Asked if she then reported the specifics of what occurred on 11/27/19 to PIC, Petitioner testified: "Not that day. They made comments about five months before what happened with regard to the box", indicating this referred to an incident where she hurt her back. Asked why she told the doctor about her back injury if it was unrelated to the 11/27/19 incident, Petitioner testified that she thought it was related to the pain in the shoulder but was then advised it was not related. Petitioner testified that the doctor indicated her problem was cervical, but she also testified that an interpreter was not present and that she communicated with the doctor "as best I could with hand gestures and the little English I could speak." Petitioner advised that she told the doctor what work activities were causing her pain, and that when she would lift something heavy and push it, she would feel the pain. Despite the report indicating she was left-handed, Petitioner testified she is right hand dominant. Petitioner testified that the Respondent accommodated her work restrictions, but after a week she had increased pain and returned to PIC, where she was advised to avoid left hand use.

On 12/3/19, Petitioner reported worsening left shoulder and scapula pain after wrapping pallets at work, and Dr. Talamayan restricted Petitioner to right-handed work only and referred her for physical therapy. Prednisone was prescribed. On 12/10/19, Petitioner reported improvement, and Dr. Talamayan restricted Petitioner to 5 pounds with the left arm, with no lifting above shoulder level, and continued physical therapy. On 12/17/19, Petitioner reported improved left shoulder and neck pain, indicating she only was feeling pain with arm movement. There was normal range of motion and no numbness or tingling. Dr. Talamayan again continued physical therapy and work restrictions (no overhead lifting or other lifting over 15 pounds with the left arm). Medications were reduced to only ibuprofen. (Px1).

On 12/24/19, Petitioner reported continued improvement with less pain along the scapular border and no numbness or tingling. She was able to do overhead reaching without difficulty. Petitioner was advised to continue therapy, as well as a home exercise program, and the work restrictions indicated were no overhead lifting and no lifting greater than 20 pounds with the left arm. On 12/31/19, Dr. Talamayan indicated Petitioner's back and shoulder pain had resolved, and she denied any numbness, tingling, weakness, or limited range of motion. The doctor opined that Petitioner had reached maximum medical improvement (MMI) and could return to full duty work with no residual disability and no impairment. (Px1).

Petitioner testified she "more or less" felt good at that point and returned to full duty work as of 1/1/20, but after returning to work her injury was continuing to bother her "just a little." She testified that Brian was again her Team Lead, and so she again would rotate positions as she had before as opposed to always working in conventional picking.

On 2/29/20, Petitioner testified that she again developed left shoulder pain while using her left hand at work, including to drive the forklift and to replace damaged cardboard "feet" that were on the bottom of the pallets.

Replacing the feet would involve lifting the pallet with the forklift to where the feet were at eye level. Petitioner indicated that sometimes the feet would get stuck and become difficult to remove, at which time she would ask for help from the Team Lead, but there would not always be someone available to help. She testified that the forklift steering wheel was at about chest level, and she would have difficulty operating the forklift after the accident due to pain. She couldn't really switch hands because the right hand would operate the other forklift controls.

When she reported the 2/29/20 pain to Team Lead Brian, Petitioner testified that he advised her to go to the clinic and to provide the claim number from the 11/27/19 incident. She testified she was not seen until 3/6/20 at Physicians Immediate Care (PIC) because 2/29/20 was a Saturday, and when she went on the following Monday (3/2/20) she was advised that she could not be seen without authorization from Respondent. When she reported this to Brian, he advised her to discuss it with Human Resources (HR). Petitioner identified a 3/4/20 document in Px1 as the medical authorization she then received from HR to go to the PIC clinic, noting the claim number referenced at the bottom related to her 11/27/19 claim and that a new claim number was never opened relative to 2/29/20.

On 3/6/20, Petitioner returned to PIC with primary complaint of back pain in the left scapular region and left upper back since a 2/29/20 injury: "Pt here c/o L shoulder pain and mid thoracic pain sustained from constant turning of the forklift wheel." She denied numbness or tingling. Thoracic x-ray was normal. Left shoulder/upper arm and thoracic strains were diagnosed, and Dr. Talamayan prescribed Naprosyn and Cyclobenzaprine along with restrictions of no lifting over 10 pounds with the left arm and no forklift driving. (Px1).

Petitioner testified that light duty work restrictions were not accommodated by Respondent at this point, and that she felt her pain at this point was worse than it had been before.

Petitioner followed up at PIC on 3/13/20 with continued complaints of the left shoulder, scapula, and mid back. She denied neck pain. Medication was not helping, and a new medication, Nabumetone, was prescribed, along with physical therapy. Work restrictions were continued. On 3/20/20, Petitioner noted worsening shoulder pain with therapy, and pain radiating to the left scapula and upper arm. She had developed a rash after taking the new medication. Work restrictions and therapy were continued, and Petitioner was referred for a left shoulder MRI. (Px1).

One portion of the 3/27/20 report of Dr. Talamayan states "she [sic] feeling better", while another section notes the Petitioner's left shoulder pain radiating to the scapula was unchanged since the last visit. The doctor noted they were still awaiting MRI authorization, and Petitioner was referred to Parkview Orthopedic Surgery. (Px1).

The left shoulder MRI was completed on 3/31/20, and the report indicates the exam was limited due to patient motion. The impression was of supraspinatus and infraspinatus insertional tendinosis with partial thickness tear along the anterior supraspinatus, and a partial tear at the supraspinatus myotendinous junction, with no evidence of a full thickness tear or a displaced labral (SLAP) tear. Also indicated was mild subacromial/subdeltoid bursal fluid. (Px1).

Following the MRI, Petitioner testified she was referred to an orthopedic surgeon, and she sought treatment with Dr. Park at the recommendation of a friend. She testified that she provided the doctor with a history of the accident.

Orthopedic surgeon Dr. Park's 4/2/20 report indicates that on 11/27/19, Petitioner was pulling a countertop when she felt pain in the posterior shoulder and scapula. The Arbitrator notes that in a second section of the report, Dr. Park indicates Petitioner was "vigorously and repetitively" pulling countertops at work on 11/27/19.

The pain resolved with conservative treatment and she returned to regular duty on 1/1/20, but she reported the pain began to recur on 2/19/20 with work duties, and on 2/26/20 the pain worsened as she was doing heavier work and more strenuous pulling. She reported that therapy had not helped. Following examination and review of various diagnostic imaging, Dr. Park diagnosed a left scapular muscle strain and a partial left rotator cuff tear. The left shoulder was injected. (Px2).

On 4/30/20, Petitioner reported that her superior/anterior shoulder pain resolved with the injection. Noting a diagnosis of a left scapular muscle strain, Dr. Park performed a trigger point injection to the shoulder region and prescribed therapy and medication, including a Diclofenac cream. On 5/21/20, Petitioner reported the trigger point injection didn't help, and noted the cream produced a burning sensation. Therapy had been denied by workers' compensation. Dr. Park prescribed chiropractic and massage treatment, home exercise, Flexeril and light work duty. (Px2).

On 6/15/20, Dr. Park noted Petitioner had begun therapy at ATI, but it increased her pain. He injected the shoulder joint for a second time and continued to recommend chiropractic, massage and physical therapy" along with light duty. On 7/20/20, Petitioner reported her shoulder pain again resolved with the injection but had gradually returned. While Petitioner had no neck pain or numbness/tingling complaints, Dr. Park ordered a cervical MRI given persistent medial scapular pain. He noted that her positive responses to the injections told him that there was a subacromial source to her pain. (Px2).

The 8/4/20 cervical MRI reflected disc bulges at C3/4 and C4/5, a central to right paracentral disc herniation at C5/6 with severe right and mild left foraminal stenosis, and a C6/7 central to right paracentral disc herniation with mild to moderate canal stenosis and mild bilateral foraminal stenosis. (Px2).

On 8/17/20, Petitioner noted no change in her condition. Dr. Park opined that Petitioner had two sources of shoulder pain, and that her left trapezial/scapular pain could be cervical-related. He referred Petitioner to pain management to consider a cervical epidural injection. On 9/21/20, Dr. Park noted he was waiting for the epidural to be authorized before considering any further shoulder treatment, but continued work restrictions (no overhead or repetitive work and a 2-pound limit) and chiropractic/massage/therapy treatment. (Px2).

The records of ATI Physical Therapy indicate the Petitioner was treated there from 5/27/20 to 10/8/20 with a total of 56 visits. (Px3).

Petitioner also treated with Dr. Farag at Midwest Anesthesia & Pain Specialists (MAPS) on 9/1/20, at which time he prescribed an H-Wave machine and an EMG/NCV. She underwent a cervical epidural at this facility on 10/1/20 at C6/7. (Px4).

On 10/12/20, Dr. Park prescribed arthroscopic left shoulder surgery for decompression and rotator cuff debridement versus repair, and possible biceps tenotomy or tenodesis. (Px2). At follow up at MAPS on 10/15/20, Petitioner reported 50% improvement in her neck pain since the epidural, which is consistent with Petitioner's testimony. (Px4). On 10/21/20, Petitioner reported her scapular pain had improved with the cervical epidural. (Px2).

On 11/9/20, Dr. Park stated: "Given that the patient had no shoulder pain or weakness prior to her work injury on 11/27/20, I think her left partial rotator cuff tear was directly caused by the work injury of repetitive pulling of countertops leading up to 11/27/20." He opined that her medial periscapular muscle strain had resolved with cervical epidural, and that her trapezial/posterior scapular pain was due to cervical disc disease, and treatment for this was left up to pain management. (Px2).

On 10/26/20, Respondent requested a Utilization Review regarding the prescribed surgery, and Dr. Milos indicated the procedure would be medically reasonable. (Px5).

Petitioner was examined by Dr. Verma at the Respondent's request on 10/23/20. Petitioner reported pulling a 30-to-40-kilogram countertop at work on 11/27/19 from a pallet and felt sharp left shoulder pain, noting "This was an acute injury with no prior history of shoulder injury or trauma." Nothing was noted by Petitioner regarding the subsequent claimed 2/29/20 incident. Dr. Verma reviewed the prior medical records, but the doctor references the 3/6/20 medical note where injury was noted on that date due to constant turning of a forklift wheel. He noted that he did not review any records from the treatment Petitioner indicated she had at La Clinica and with a pain management facility. Dr. Verma examined the Petitioner and reviewed the left shoulder MRI and opined that she suffered from left shoulder impingement with partial rotator cuff tear. He noted this correlated with the subjective complaints and he did not see an active neck or scapular condition. He opined that she sustained a shoulder strain on 11/27/19 but prior to returning to work on 1/1/20 had a normal exam and full function. Opining that her current condition was not related to the 11/27/19 incident and that she had reached MMI for same as of 1/1/20, Dr. Verma also noted that despite Petitioner stating she had no prior left shoulder complaints, the medical records he reviewed indicated she had intermittent left shoulder symptoms prior to 11/27/19. (Rx3).

Petitioner testified that her 10/23/20 examination with Dr. Verma lasted approximately 5 minutes.
Petitioner testified that both Respondent's HR department in Baltimore, as well as the workers' compensation insurance adjuster, contacted her after the 11/27/19 injury, noting there was an interpreter with the adjuster, but not with IKEA's HR representative. Further testimony appeared to indicate that Petitioner may have called the HR department and not vice versa.

When Petitioner was taken off work again on 3/6/20, she testified she received TTD benefits until approximately 4/14/20, and that she didn't know why her benefits were terminated. Petitioner testified she has been managing financially with her savings and child support for her 12-year-old son, and that she utilizes food banks. Her son is performing the household chores. Petitioner testified that she wants to have the recommended surgery because she her pain to resolve and to return to work and live a normal life.

On cross examination, Petitioner agreed that she had testified to two separate incidents on direct, 11/27/19 and 2/29/20, testifying that the latter date is "the day I claim that my shoulder had continued to hurt." She agreed that she is alleging that a specific traumatic incident occurred on 11/27/19 that resulted in shoulder pain, and that she reported it that same day as a specific incident.

Shown documentation from Rx7, the Petitioner agreed that she signed off on the documentation at the time of her 5/4/18 hire date indicating she was aware of company safety and security topics that were discussed, including the need to immediately report work injuries to the employer.

Petitioner also identified her 11/27/19 accident report "Statement Sheet" as Rx8. She agreed that it states what happened in her own words in Spanish, and that she read it before she signed off on it. She also agreed that her statement was then translated into English by Francisco Antunez. She understood it was important to accurately indicate what happened.

The translation of Petitioner's statement by Francisco Antunez is as follows: "5 months ago I was cutting the plastic wrap off of a pallet. I was leaning on a box, supporting my balance. The box shifted forward causing my arm to extend outward. I felt a sharp pain in my back. Over time the pain has worsened over time. It hurts when I lift heavy items. Today it hurts bad after lifting a heavy item." (Rx8). The Arbitrator notes that the translation of this same statement by the interpreter at hearing was as follows: "5 months before as I was cutting the plastic

of a pallet, I placed my hand on a box at the side of the pallet thinking that the box was heavy, but it was light. And as I placed my arm, it pulled away and I felt a pinch on my back. I did not give it much importance. But as time went by and the time I lifted anything heavy, my shoulder was hurting a lot when I touched or handled a product the pain would be very strong." (Tr. 48-49). The Arbitrator notes that this document was again addressed on redirect, where it was made clear that the interpreter at the hearing misread one word in Spanish that was very close in spelling (hoy versus hay), and that the last sentence is consistent with Mr. Antunez' translation, i.e. "Today it hurts after lifting a heavy item." (Tr. 61-62).

The Arbitrator further notes that the first page of the document in Rx8, a Team Lead report dated 11/27/19, indicates Petitioner reported on 11/27/19 an incident that occurred 5 months prior involving a left shoulder sprain/strain, in the "300's area" of the facility due to lifting product 803.972.09. This document further notes that Petitioner's Team Lead was Brian Behnke, and that the incident was reported to Francisco Antunez at 6:30 a.m. on 11/27/19. However, it is unclear who signed off on this document where it indicates: "Co-workers Signature." (Rx8).

As to the reference in her statement to "5 months before", Petitioner testified that this referred to the incident where she placed her left hand over the box, it moved, and she felt the pinch in her back. She indicated she did not injure her shoulder at that time and that "nothing hurt", she just felt the pinch. She denied ever hurting her left shoulder at any time prior to 11/27/19. As to why she even mentioned anything about what occurred five months prior to her claimed 11/27/19 accident, Petitioner testified it was because she wanted to be honest and "the pain of (11/27/19) was the occurrence of" using the left hand. Petitioner testified that she believed her statement in Rx8 is consistent with what she told her supervisor happened and is consistent with what she testified to at hearing regarding what happened on 11/27/19.

Following the review of Rx8 and questions regarding the incident 5 months prior, Petitioner was then asked what happened 2 months prior given her testimony on direct. She testified: "When I lifted something heavy, it was bothering, the shoulder was bothering me when as I was pulling off products. . . It was a bother that whenever I rested it would go away." Petitioner agreed she did not report a September 2019 injury to Respondent, testifying: "Can you imagine. I could not be reporting every time I felt pain. I would have a report on a daily basis." She testified she verbally told Team Lead "Bill" not to put her in conventional picking due to her shoulder pain, though she did not explain exactly when this occurred. She agreed she also didn't report any injury to Respondent 5 months prior to 11/27/19. She agreed she did not report or complete any accident reports for the alleged June 2019, September 2019 or 2/29/20 incidents. Despite her prior testimony, the Petitioner reiterated that she had no shoulder complaints prior to 11/27/19. As to her prior testimony that she wasn't told why her TTD benefits were being terminated, Petitioner acknowledged that Respondent's insurer sent a letter to her attorney indicating benefits were terminated "because the dates did not match."

Attempting to clarify the testimony on redirect exam, Petitioner testified that she had 10 out of 10 shoulder pain following the incident on 11/27/19, while prior to that it had ranged from 1/10 to 6/10, the least pain being prior to starting her work week and the worst pain being at the end of her work week. She testified that her condition would worsen when she was picking and wasn't being rotated to other positions. At this point she testified that her problem / discomfort began in October 2019. She indicated the pain was due to lifting and pulling, especially heavy products. Petitioner testified she did not see a doctor for her shoulder prior to 11/27/19 because her discomfort would go away with rest and "it only happened when I take heavy things." The difference on 11/27/19, she explained, was that she was unable to use her arm due to severe pain. Petitioner again acknowledged that company policy was to report any work injury, regardless of the degree of pain.

Respondent called Anthony Fitzpatrick, Respondent's Safety and Security manager since September 2017, to testify. His job involves safety and security guidance, orientation training for employees in this regard, accident

follow up and preventative actions. Mr. Fitzpatrick testified that he would receive any work accident reports from Team Leaders or Safety/Security personnel. He had no record of Petitioner reporting an accident in June or September 2019. Had she reported such incidents, accident report would have been completed, she would have been offered medical treatment and there would have been follow-up – the same as what was done when she reported the November 2019 injury. He testified that if a supervisor failed to report an employee reported work accident, that supervisor would be subject to corrective action and possibly termination. Supervisors are trained to a higher degree than regular employees regarding the importance of accident reporting. Managers are trained to analyze the accidents as well to reduce the danger in the future. When Team leaders have an accident reported, they would obtain a "red folder", which contains an accident report. He testified that as to Respondent employees, "our goal is to have them report any accident or incident no matter how slight to the Team Leader and Supervisor." Petitioner signed off on 2019 training documentation (see Rx7), which acknowledges that she received and understood a variety of Safety and Security topics, including accident/incident reporting. Retraining is performed annually.

On cross-examination, Mr. Fitzpatrick testified that had the Petitioner reported an injury prior to 11/27/19, an incident report would have been created and medical treatment would have been offered, if desired. As to the 3/4/20 medical authorization (see Px1) Petitioner testified to, Fitzpatrick agreed it references the 11/27/19 claim on the bottom. As to why, given the Petitioner's 3/6/20 medical record from PIC states that Petitioner reported a 2/29/20 injury, there was no new incident report created, Mr. Fitzpatrick testified: "From my record, I have no information about a new report having been filed. From my understanding it was attributed to initial workers compensation claim." He testified that when Respondent's HR reached out to the workers' compensation carrier, "it referenced the same injury area and it was determined to proceed to send her through that workers' compensation claim that was already done." He further testified: "From my understanding from the records that we have, there was no report ever provided to me regarding a new incident. It was attributed to the already existing pain. So the coworker said I still have pain in my left shoulder, and they were doing authorizations to return back with indication of a workers' compensation claim." Fitzpatrick agreed the PIC report referenced a new mechanism of injury, but he had no record indicating Petitioner reported a new accident to the Respondent.

CONCLUSIONS OF LAW

WITH RESPECT TO ISSUE (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner sustained her burden of proving that she sustained accidental injury arising out of and in the course of her employment on 11/27/19.

The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *Scheffler Greenhouses, Inc. v Industrial Comm'n*, 66 Ill. 2d 361, 366-67 (1977). An injury occurs "in the course of" employment when it was sustained while a claimant is at work or while he performs reasonable activities in conjunction with the employment. *Wise v Industrial Comm'n*, 54 Ill. 2d 138, 142 (1973).

The Petitioner testified that, on that date, she was picking a large order for the Respondent, pulled a 65-pound kitchen countertop and felt left shoulder pain. As the Petitioner was employed by Respondent, as stipulated, on 11/27/19, and was performing this activity during her work hours, it is clear that the accident occurred in the course of Petitioner's employment with Respondent.

As to the "arising out of" aspect of the accident issue, it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the

employment and the accidental injury. *Baggett v Industrial Comm'n*, 201 Ill.2d 187, 194 (2002). A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his or her job duties. *Orsini v Industrial Comm'n*, 117 Ill.2d 38, 44 (1987). The risk to which a claimant is exposed must first be categorized in one of three ways: 1) risks directly associated with the employment, 2) risks personal to the employee and 3) neutral risks which have no particular employment or personal characteristics. Employment risks include the obvious kinds of industrial injuries and occupational disease and are universally compensated. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.App.3d 149, 162 (2000).

In this case, it is abundantly clear that the injury to the Petitioner was due to a risk, pulling a heavy countertop to fill a picked order, distinctly associated with the employment. As such, the Petitioner has shown by the preponderance of the evidence that this work activity resulted in an accident which arose out of her employment with Respondent on 11/27/19.

WITH RESPECT TO ISSUE (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that the Petitioner sustained a shoulder injury on 11/27/19 that constituted what appears to be an aggravation of a preexisting condition. She reached MMI as to this injury as of 12/31/19, and the Arbitrator finds that the causal connection of this injury to the 11/27/19 accident ended as of that date.

The Petitioner's testimony and the contemporaneous medical records in this case make it extraordinarily difficult to try to determine exactly when the Petitioner originally sustained a left shoulder injury. That said, the evidence clearly shows that the Petitioner had a left shoulder condition prior to 11/27/19.

On 11/27/19, Petitioner testified she reported a left shoulder injury to Respondent, as noted above. However, the accident report statement, which she read and acknowledged was accurate, identified an incident that occurred 5 months prior (June 2019) where she felt a pinch in her mid-back and shoulder pain from lifting heavy items. The translation made by her Team Lead Francisco was: "5 months ago I was cutting the plastic wrap off of a pallet. I was leaning on a box, supporting my balance. The box shifted forward causing my arm to extend outward. I felt a sharp pain in my back. Over time the pain has worsened over time. It hurts when I lift heavy items. Today it hurts bad after lifting a heavy item." The translation reported by the interpreter at hearing, Ruben Rodriguez, was as follows: "5 months before as I was cutting the plastic of a pallet, I placed my hand on a box at the side of the pallet thinking that the box was heavy, but it was light. And as I placed my arm, it pulled away and I felt a pinch on my back. I did not give it much importance. But as time went by and the time I lifted anything heavy, my shoulder was hurting a lot when I touched or handled a product the pain would be very strong." Either way, this clearly references a prior injury to the left shoulder, one with continuing, if not worsening, symptoms. While it also mentions "back", the Petitioner's testimony and the medical records make clear that part of her complaints were to the posterior scapula and shoulder, and there was no evidence of any other part of her back being injured.

At Petitioner's initial visit to Dr. Talamayan at PIC on 11/27/19, the history indicated both the 11/27/19 injury, as well as indicating the "problem" started five months prior, specifying 7/27/19, when she "tried to push a pallet and was yanked forward", with a five-month history of intermittent left shoulder pain and left upper extremity tingling and numbness.

The Petitioner also specifically testified to a one- or two-month history of left shoulder discomfort following an incident where she put her left hand on a heavy box and it moved: "As I leaned the box against something, the box moved and I felt a type of pinch on my (mid) back."

There are instances in this case, for example in her report to Section 12 examiner, Dr. Verma, and surgeon Dr. Park, where the Petitioner denies any left shoulder pain prior to 11/27/19. This is clearly not true. In providing his causal connection opinion of Petitioner's condition to the 11/27/19 accident, Dr. Park's 11/9/20 report makes it clear that he relied on the Petitioner's statement of no prior problems. It is also unclear as to whether Dr. Park ever reviewed any of Petitioner's prior records. Dr. Verma, on the other hand, specifically notes his review of the records and the discrepancy of Petitioner's statement to him versus the medical references to pre-11/27/19 left shoulder problems.

The Arbitrator finds the opinions of Dr. Verma to be more persuasive in this case. He opined that the Petitioner suffered a left shoulder strain on 11/27/19 which resolved as of 1/1/20, based on the normal exam and full function indicated by Dr. Talamayan on 12/31/19.

Overall, while the Petitioner is an empathetic figure here, the lack of any consistent history of left shoulder pain and/or injuries, and the Petitioner's clearly false statements that she had no left shoulder problems prior to 11/27/19, the Arbitrator finds that the Petitioner sustained an aggravation of the preexisting left shoulder condition on 11/27/19, which resolved after a month of treatment. The Arbitrator finds this aggravation was temporary, and the causal connection of the left shoulder and/or alleged cervical condition impacting the left upper back ended as of the MMI date of 1/1/20.

While it appears that the incidents both five and two months prior to 11/27/19 also occurred at work, there is no evidence that the Petitioner ever reported these to the Respondent. While the shoulder problems prior to 11/27/19 did not apparently prevent the Petitioner from working, she also testified that she asked Team Lead Brian to allow her to avoid the conventional picking duties and rotated her to different jobs, and the incident on 11/27/19 only led to one month of treatment before she returned to full duties.

The Arbitrator acknowledges that language difficulties, due to Spanish being the Petitioner's native language, may have contributed to the inconsistent facts noted above. However, the arbitrator finds it difficult to believe that Dr. Talamayan's records would have been as detailed as they are if the Petitioner were only communicating with hand gestures and minimal English, as she testified. There was no testimony as to whether Dr. Talamayan spoke Spanish or not. The Arbitrator simply cannot speculate that any inconsistencies were due to language difficulties, particularly where some of the discrepancies came up during her trial testimony with an interpreter.

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:

It does not appear that any of the outstanding medical expenses listed in Px8 predated 1/1/20. If any medical bills relating to left shoulder/upper back treatment prior to 1/1/20 remain outstanding, Respondent is liable for same.

WITH RESPECT TO ISSUE (K), IS PETITIONER ENTITLED TO ANY PROSPECTIVE MEDICAL CARE, THE ARBITRATOR FINDS AS FOLLOWS:

With regard to this issue, there is no evidence in the record that any ongoing treatment was recommended to the Petitioner as a result of the 11/27/19 injury, given the Arbitrator's findings above regarding causation. The surgical recommendation of Dr. Park is causally related to the 11/27/19 accident in his opinion, but as noted

above, this opinion was based on a lack of complete information, and the Arbitrator rejects same as described above. The Arbitrator denies prospective medical treatment relative to the 11/27/19 accident.

WITH RESPECT TO ISSUE (L), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, TEMPORARY PARTIAL DISABILITY AND/OR MAINTENANCE, THE ARBITRATOR FINDS AS FOLLOWS:

According to Arbx1, the Petitioner alleges entitlement to TTD benefits from 11/4/19 through 12/31/19, and again from 3/7/20 through the 11/12/20 hearing date. While Respondent paid TTD from 12/10/19 through 12/31/19, and again from 3/7/20 through 4/10/20, the indication is that TTD after 4/10/20 is disputed.

It is unclear as to the basis of the claim for TTD prior to 11/27/19. Based on the records in evidence and the Petitioner's testimony, it appears that Respondent stopped accommodating her restrictions following her 12/3/19 visit to Dr. Talamayan. The Arbitrator finds that the Petitioner is entitled to 12/3/19 through 12/31/19, when she was released to full duty at MMI by Dr. Talamayan.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

Based on the findings noted above, the Arbitrator finds that the Petitioner has failed to prove she is entitled to penalties and/or attorney fees pursuant to Sections 16, 19(k) or 19(l) of the Act.

WITH RESPECT TO ISSUE (N), IS THE RESPONDENT DUE ANY CREDIT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator notes that the Request for Hearing form (Arbx1) submitted by the parties covers both the case at bar as well as consolidated case 20 WC 27003. A credit to Respondent totaling $5,563.47 was stipulated to by the parties based on both prior TTD payments as well as a prior advance paid by Respondent prior to hearing. As the Arbitrator is required to issue separate decisions for each of the consolidated matters, the Arbitrator wishes to make it clear that this credit of $5,563.47 is a credit that applies to both the 20 WC 07556 and 20 WC 27003 cases. Therefore, while this same credit amount is indicated in both decisions, the credit is a total credit and is to be applied to both cases. The Respondent is not entitled to credit of $5,563.47 against the 20 WC 07556 case and another $5,563.47 credit against the 20 WC 27003 case.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC010153
Case Name	SERRATO PEREZ, MARIA DE JESUS v. SOURCE ONE STAFFING, INC.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0059
Number of Pages of Decision	16
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Alexandra Broderick
Respondent Attorney	MALLORY ZIMET

DATE FILED: 2/17/2022

/s/Maria Portela, Commissioner

Signature

22IWCC0059

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

MARIA DEJESUS SERRATO PEREZ,

Petitioner,

vs. NO: 14 WC 10153

SOURCE ONE STAFFING, INC. and SUNCAST CORP.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that Petitioner's lumbar strain and left hip pain are causally connected to the work accident of February 20, 2014, but that she has failed to prove that the right hip fracture and cervical condition are causally related to said accident. Moreover, the Commission affirms the decision of the Arbitrator, however, strikes the entirety of Section "F" on page 6 of 7 and replaces it with the following:

> Petitioner testified that she sustained a work injury on February 20, 2014, immediately sought medical care and promptly reported her injury. The medical records introduced into evidence corroborated her testimony.
>
> Following the work accident, Petitioner received consistent and continuous treatment with several providers, among them Tyler Medical, the occupational health clinic, Dr. Tebeau, her primary care physician, Dr. Bauer, a chiropractor, Dr. Novoseletsky, an orthopedist, and surgical consults with Drs. Mayer and Steinke. Petitioner does not speak English and cannot write in either English or Spanish, so during the course of her medical care, either interpreters or family

members served as translators. There are notes from several providers that Petitioner was a poor historian.

On February 21, 2014, the day following the accident, Petitioner was seen at Tyler Medical Center. She complained of striking her back, but made no complaints involving any other body area or system. Petitioner underwent x-rays to her lumbar spine which showed nothing of significance beyond degenerative findings. (Px2) She was diagnosed with a lumbar contusion and strain. (Px2, 2/21/14) She returned on February 25, 2014 noting left hip pain and at that time her x-rays were normal. (Px2) She returned again on March 3, 2014 with continued pains and at this time also reported neck pain. Her diagnoses of lumbar contusion and strain and left hip pain remained. Dr. Long, the occupational health physician, opined that her cervical, shoulder and overall body symptoms did not correlate with the work injury as they developed nearly a week after the accident and while she was not working. She was instructed to follow up with her private physician. (Px2)

On March 3, 2014, Petitioner initiated chiropractic treatment with Dr. Bauer at West Chicago Family Chiropractic. Petitioner complained of lower back, right and left buttock and bilateral lower extremity pain. No neck pain was noted. Dr. Bauer placed Petitioner off work and noted his clinical impression was lumbar sprain/strain, lumbo-sacral sprain/strain, sciatica and muscle spasm. (Px3)

On March 10, 2014, Petitioner sought an initial evaluation with an orthopedist, Dr. Novoseletsky. She complained of neck pain and low back pain with radiculopathy. Dr. Novoseletsky continued the off-work restrictions and ordered a lower extremity EMG, as well as cervical and lumbar spine MRIs. (Px4) Petitioner's May 7, 2014 EMG showed a right S-1 nondenervative radiculopathy evidenced by an attenuated right tibial H reflex. Also noted was left superior and left peroneal neuropathy of uncertain origin. (Px4, Px6) When she returned to Dr. Novoseletsky on May 14, 2014, he noted she was suffering from neck pain, low back pain with bilateral lower extremity pain and paresthesia. Dr. Novoseletsky prescribed medication, physical therapy, steroid injections and kept her off work. (Px4) Petitioner saw Dr. Novoseletsky again on June 6, 2014 and July 30, 2014 prior to her IME with Dr. Levin. (Px4) She also continued to receive extensive chiropractic care. (Px3)

When Petitioner saw Dr. Levin on September 4, 2014, she complained of numbness in the legs bilaterally, tingling in the legs and bilateral groin pain. She also complained of constant low-back pain. (Rx4, p. 12) Based on her history, his exam, and radiographic studies, Dr. Levin opined that Petitioner had marked subjective complaints of pain which were out of proportion to objective findings. He also noted that there were multiple inconsistencies in her clinical exam. (Rx4, p. 19) Dr. Levin felt no further physical therapy, chiropractic care or injections were warranted and opined she could return to work full duty. (Rx4, p. 20) Dr. Levin also prepared a supplemental report after reviewing the March 27, 2014

lumbar MRI and May 7, 2014 EMG and felt that these studies were not confirmatory of any acute pathology that would correspond to her work injury. (Rx4, p. 23) Dr. Levin had no opinions regarding Petitioner's condition after September 4, 2014. (Rx4, p. 28)

On November 12, 2014, Petitioner presented to Dr. Tebeau complaining of lumbar, bilateral hip and cervical spine pain. She complained it was related to her work accident of February 20, 2014 and had been getting worse. She underwent x-rays of her back, neck and hips and her hip x-rays showed an avulsion fracture of the right hip that Dr. Tebeau opined may have happened when Petitioner fell. He referred her for an orthopedic consult with Dr. Mayer. (Px1)

When Petitioner was seen by Dr. Mayer on January 9, 2015, he opined that some of Petitioner's symptoms are muscular and some are related to her degenerative changes and stenosis at L5-S1. He imposed lifting restrictions. (Px8) Petitioner underwent injections with Dr. Mayer, but reported on February 18, 2015 that the injections did not help. She requested a surgical consult. (Px8)

On March 17, 2015, Petitioner was seen by Dr. Steinke for a surgical consult. Dr. Steinke indicated he found nothing in her MRI that would correlate with all of her symptoms and that her pain appeared to be out of proportion based on the MRI findings.

On March 24, 2015, Petitioner was seen by Dr. Tebeau at which time he noted that she was a difficult historian and there was no clear etiology of the whole body component. He suggested a rheumatological evaluation and added that consideration could be given to fibromyalgia or a neuropathic process.

On March 25, 2015, Petitioner followed up with Dr. Mayer and he issued a permanent 15-pound lifting restriction. (Px8)

On June 10, 2015, Petitioner underwent another EMG which was an unremarkable study without any evidence of peripheral polyneuropathy or lumbosacral radiculopathy.

A claimant may be entitled to benefits under the Act even though he suffers from a preexisting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill.2d 193, 205 (2003). "[I]n 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 204-05. "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.

Although it is undisputed that Petitioner was asymptomatic prior to the work accident,

became symptomatic after the work accident, and has remained symptomatic since the work accident, the Commission finds that Petitioner suffered a lumbar strain, bulging discs at the L2-S1 level, and left hip pain as a result of the work accident of February 20, 2014. The Commission further finds Petitioner failed to prove that her bilateral shoulder, cervical spine and right hip conditions were the result of injuries sustained in the work accident.

As to permanency, the Commission affirms the Arbitrator's 8.1b(b) analysis for factors (i)-(iii), but modifies factors (iv) and (v).

As to factor (iv), Petitioner was released by Dr. Mayer on March 25, 2015 with permanent lifting restrictions of 15 pounds and a recommendation that she can perform non labor-intensive work. Petitioner can neither read nor write in English or Spanish, but did not introduce any evidence regarding any other skills she may possess. She had not worked for 3 years prior to taking the Source One Staffing job and only worked for 15 days before her injury. Petitioner did testify that her past jobs did not involve lifting and were mostly factory jobs. (T. 34-35) This factor is modified from "no weight" and is given significant weight.

As to factor (v), Petitioner's medical records clearly set forth that Petitioner sustained a work injury on February 20, 2014. Petitioner first reported to the occupational health clinic, and then to her chiropractor. She was referred to an orthopedist where she treated for consistent complaints of lumbar spine pain with radiculopathy and cervical pain. In November of 2014 she went to see her primary physician with the same complaints. She was then referred to another orthopedist as well as other specialists including an orthopedic surgeon and neurosurgeon. Petitioner was ultimately undergoing pain management, including physical therapy and epidural steroid injections, for her lumbar condition through her primary physician. The medical records support that Petitioner sustained a lumbar strain and bulging discs from L2-S1 and left hip pain as a result of the February 20, 2014 work accident. This factor is given some weight. The Commission strikes the portion of the Arbitrator's decision beginning with "the Arbitrator notes… through …to this factor" under the analysis in Section L, factor (v) on page 7 of 7.

Finally, the Commission corrects the following scrivener's errors. On page 3 of the Arbitrator's Decision in the second sentence of the first paragraph, the word "seed" is replaced with the word "seen". On page 5 of the Arbitrator's Decision, in the last paragraph under the section pertaining to Dr. Mark Levin February 21, 2018 Deposition (Rx4), the Commission corrects the year from "2104" to "2014".

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $286.00 per week for a period of 28 6/7 weeks, from February 21, 2014 through September 10, 2014, 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 $286.00 per week for a period of 50 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of 10% person as a whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner

the sum of $23,534.00 for medical expenses under §8(a) of the Act, subject to the fee schedule in §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that 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 $46,187.00. 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.

February 17, 2022

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 122121
49

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

SERRATO PEREZ,MARIA DeJESUS Case# **14WC010153**

Employee/Petitioner

SOURCE ONE STAFFING INC & SUNCAST CORP

Employer/Respondent

On 10/4/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.79% 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:

1922 STEVEN B SALK & ASSOC LTD
ALEXANDER BRODERICK
150 N WACKER DR SUITE 2570
CHICAGO, IL 60606

5001 GAIDO & FINTZEN
PETER HAVIGHORST
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Maria De Jesus Serrato Perez
Employee/Petitioner

v.

Source One Staffing, Inc. & Suncast Corp.
Employer/Respondent

Case # **14** WC **10153**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Christine M. Ory**, Arbitrator of the Commission, in the city of **Geneva**, on **March 19, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 20, 2014,** Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

Petitioner's current condition of ill-being as to the lower back and left hip ***is*** causally related to a work accident.

In the year preceding the injury, Petitioner earned **$17,160.00**; the average weekly wage was **$330.00**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **1** dependent children.

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

Respondent owes for all reasonable and necessary medical services through September 4, 2014.

To date, Respondent has paid $ **0** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

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

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

ORDER

Medical Benefits

Respondent shall pay the **$23,534.00** subject to the fee schedule, pursuant to §8 and §8.2 of the Act and subject to credit for any portion of the bill paid by respondent.

Temporary Total Disability

Respondent shall pay temporary total disability from **February 21, 2014 through September 10, 2014**, which is **28-6/7 weeks at $286.00 per week**.

Permanent Disability

Respondent shall pay **$286.00 per week for 50 weeks**, as provided in §8 (d) 2 of the Act, as petitioner's injuries sustained caused **10% loss of use of person as a whole.**

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

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

Christine M Ong

Signature of Arbitrator

ICArbDec p. 2

October 3, 2019

Date

OCT 4 - 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Maria De Jesus Serrato Perez	)	
Petitioner,	)	
vs.	)	**No. 14 WC 10153**
Source One Staffing & Suncast Corp.	)	
Respondent.	)	
	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Geneva on March 19, 2019. The parties agree that on February 20, 2014, petitioner and the respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer and that petitioner gave timely notice of the claimed accident. The parties agree petitioner earned $17,160.00 in the year predating the accident and that her average weekly wage, calculated pursuant to §10, was $330.00.

At issue in this hearing is as follows:

1. Whether the petitioner sustained accidental injuries that arose out of and in the course of her employment.
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Petitioner's marital status and number of dependents.
4. Whether respondent is liable for medical bills.
5. Whether petitioner is entitled to temporary total disability.
6. The nature and extent of petitioner's injury.

STATEMENT OF FACTS

The Petitioner does not speak English; her native language is Spanish. She testified with the assistance of Carol Cadiz, a certified interpreter, qualified to translate Spanish to English and English to Spanish. After being duly qualified and accepted by both parties, Ms. Cadiz served as an interpreter for the petitioner.

Petitioner testified she had one dependent child under the age of eighteen at the time of the accident.

Petitioner testified she worked for Source One, the staffing agency, for eight months. She was sent by Source One to work for Suncast, where she worked for about 15 days prior to February 20, 2014. She worked on a production line at Suncast, where she lifted 30-pound containers throughout the day.

Petitioner testified she has had no formal education and does not read or write in English or Spanish. She admitted she had problems with her back and neck, for which she received treatment, prior to February 20, 2014, but had not had any injections.

On February 20, 2014, petitioner slipped on plastic pieces and fell to the ground in a seated position. She landed with her right foot forward and the left foot behind her. The following day

she was sent by Source One to Tyler Medical. She followed up with Tyler Medical on February 25, 2014 and for the last time on March 3, 2014. She complained of neck pain and radiating pain in her lower back.

On the same day she last was seen at Tyler Medical, she went to Dr. Bauer, with West Chicago Family Chiropractic. She complained of pain in her back and down her legs. Dr. Bauer recommended physical therapy and for petitioner to remain off work. Dr. Bauer then referred her to Dr. Novoseletsky at Suburban Orthopaedics.

She was first seen by Dr. Novoseletsky on March 10, 2014. She was referred for MRIs and EMG. After petitioner obtained the tests, Dr. Novoseletsky performed back injections on May 20, 2014 and July 14, 2014. On July 30, 2014, Dr. Novoseletsky recommended another injection and kept petitioner off work.

She then sought treatment by her PCP, Dr. Tebeau, whom she first saw on November 12, 2014. Dr. Tebeau referred petitioner to Dr. Mayer, whom she first saw on January 9, 2015, as well as for physical therapy. She was not able to obtain physical therapy as her husband's insurance would not cover the therapy. Dr. Mayer performed injections on January 26, 2015 and February 9, 2015. She did not obtain any relief from the injections.

She saw Dr. Tebeau again on March 24, 2015, who recommended petitioner see Dr. Weckerle, a rheumatologist. She returned to Dr. Mayer on March 25, 2015, who gave her permanent 15-pound lifting restriction.

She first saw Dr. Weckerle on May 11, 2015.

Petitioner was prescribed Lidoderm patches by Dr. Magana, who practices with Dr. Tebeau, on May 20, 2015. She switched to Dr. Magana as he speaks Spanish. Dr. Magana kept petitioner off work and referred her for a bone scan. Dr. Magana referred her for a neuro-surgical consult with Dr. Peter Lee. Dr. Lee then referred petitioner for pain management.

During this time, she continued under the care of Dr. Weckerle, who performed lumbar injections in May and June, 2016. She also saw Dr. Norek, with Cadence Health, who recommended physical therapy. She did not undertake the therapy as she had already had eight months of therapy that didn't help. She also received injections by Dr. Weckerle in March, 2017 and August, 2018, which helped for a while.

Petitioner continues to see Dr. Magana monthly for pain medication management, which includes hydrocodone, that petitioner takes two to three times a day. Dr. Magana continues to keep petitioner off work.

She is not able to kneel at church. She no longer is active. She no longer participate in Zumba classes.

She was wearing tennis shoes when the accident occurred.

Petitioner has not worked or looked for work since the date of accident. She is supported by her husband.

Cadence Physician Group Records (PX.1)

These records begin with petitioner's visit on March 3, 2008 with Dr. Christopher Tebeau.

The first mention of any back complaints began November 12, 2014. Petitioner reported she had back pain since February, 2014. She had a MRI six months prior. She also reported she had problems after the fall on left side. She had left leg pain radiating. She received exercises, brace, medication and three injections which made the condition worse. Diagnosis was lumbar radiculopathy, hip pain which Dr. Tebeau believed was due to degenerative joint disease or bursitis. Dr. Tebeau believed petitioner may need updated MRI. (35-38)

Petitioner was seen again on December 10, 2014. She had seed Dr. Mayer who was awaiting petitioner's prior records. Dr. Mayer indicated petitioner had an avulsion fracture of the right hip (68-69). According to note Dr. Trebeau's records petitioner was kept off work from November 12, 2014 to December 14, 2014 (47-56).

She had several telephone encounters with Dr. Trebeau.

Petitioner was seen again on March 24, 2015 by Dr. Trebeau. She reported she had seen Dr. Mayer and obtained a lumbar MRI and two injections; which reportedly did not help. She was also seen by Dr. Steinke who determined she was not a surgical candidate. (58)

Tyler Medical Services Records (PX.2)

Petitioner was first seen on February 21, 2014 after slipping on plastic and falling on her back. The diagnosis was lumbar contusion and sprain. She was put on work restrictions and to return on February 25, 2014. Lumbar X-ray showed degenerative findings predominately at L5-S1

On February 25, 2014, the diagnosis remained as lumbar contusion and strain, as well as left hip pain. She was again given work restrictions. Physical therapy was provided. X-rays of left hip and pelvis were normal.

She returned on March 3, 2014. The diagnosis was lumbar contusion and strain, as well as left hip pain. Formal physical therapy was prescribed. Petitioner reported three days prior she noticed cervical, shoulder and overall body symptoms. As petitioner was not working, and it was eleven days since the accident, Dr. Long could not relate these complaints to the original accident.

West Chicago Family Chiropractor Records (PX.3)

Petitioner was seen by Michael Bauer, D.C. from March 3, 2014 to October 23, 2014 for lower back, buttocks and bilateral lower extremity pain.

Suburban Orthopaedics Records (PX.4; PX.5; PX.6)

Petitioner was first seen on March 10, 2014 by Dr. Dmitry Novoseletsky as a referral by Dr. Bauer with complaints of low back and cervical pain. Petitioner received Lumbar Epidural Steroid Injections on May 20, 2014 and July 15, 2014.

The March 27, 2014 lumbar MRI showed L2-3 mild diffuse bulge with shallow central disc protrusion with no narrowing of spinal canal narrowing or nerve impingement, L3-L4 disc bulge and L5-S1 disc desiccation without stenosis.

The March 27, 2014 cervical MRI showed cervical spondylosis with mild stenosis.

The May 7, 2014 EMG showed nondenervative S1 radiculopathy.

Dr. Novoseletsky kept petitioner off work from March 10, 2014 to October 24, 2014. She was last seen by Dr. Novoseletsky on October 24, 2014.

Northwestern Medicine Central DuPage Hospital Records (PX.7)

These records consist of X-ray, EMG and physical therapy reports.

Cadence Physicians Group Records (PX.8 & PX.9)

Petitioner was first seen by Dr. Steven Mayer for low back and neck pain on November 24, 2014 as a referral by Dr. Tebeau. Diagnosis was cervical and lumbar strain. She was seen in follow up on January 9, 2015. The diagnosis was lumbar radiculopathy. Dr. Mayer performed a left L5 transforaminal epidural steroid injection on January 26, 2015 and February 9, 2015. On

March 17, 2015 petitioner was seen by Dr. Steinke, who recommended physical therapy. She followed up with Dr. Mayer on March 25, 2015. Dr. Mayer provided a permanent fifteen-pound lifting restriction.

Advantage MRI March 5, 2015 Lumbar MRI Report (PX.10)

The MRI showed bulges at the L2-L3 level to L5-S1 levels, as well as a small left foraminal protrusion at the L3-L4 levels.

Dr. Corinna Weckerle/Northwestern Medicine Regional Medical Group Records (PX.11)

Petitioner was first seen by Dr. Weckerle on May 11, 2015 for a multitude of complaints, including low back and bilateral leg pain. The treatment included shoulder injections and pain medication. Specifically, Dr. Weckerle prescribed Lidoderm patches for back pain. The records end on August 16, 2018.

Northwestern Medicine/Dr. Jose Magana (PX.12A, 12B, 12C)

Petitioner was initially seen by Dr. Jose Magana on May 20, 2015 for back pain. The records continue through October 17, 2018. Dr. Magana stated petitioner was unable to work indefinitely.

West Chicago Family Chiropractic Bill (PX.13)

The bill for services rendered from March 3, 2014 to October 23, 2014 totals $18,515.00 with a balance due of $16,920.00.

Suburban Orthopaedics Bill (PX.14)

The bill for services rendered from March 10, 2014 to October 24, 2014 totals $11,270.10.

Northwester Medicine Central DuPage Hospital Bill (PX.15)

The bills for services rendered from November 20, 2014 to August 22, 2018 totals $$20,413.75.

Winfield Laboratory Consultants Bill (PX.16)

The bill for services rendered on November 12, 2014 totals $276.00.

Winfield Radiology Consultants Bill (PX.17)

The bill for services rendered from November 12,2014 to August 12, 2017 totals $3,732.03.

Northwestern Medicine Bills (PX.18)

The bill for services rendered from November 12, 2014 to August 31, 2018 totals $31,570.34.

Cadence Physician Group Orthopaedics Bill (PX.19)

The bill for services rendered by Dr. Steven Mayer and Dr. Brian Steinke from November 24, 2014 to March 25, 2015 totals $3,939.00

Cadence Ambulatory Surgical Center Bill (PX.20)

The bill for injections on January 26, 2015 and February 9, 2015 totals $17,200.00.

Advantage MRI Bill (PX.21)

The bill for the March 5, 2015 MRI totals $1,966.45.

Xerox/Cigna Group Payments (PX.22)

The group payments made totals $7,319.08.

Notices to Previous Attorneys (PX.23)

Petitioner provided notice of the trial to Lulay Law Offices and Goldstein Bender & Romanoff.

Application for Adjustment of Claim (RX.1)

The Application for Adjustment of Claim was filed on May 21, 2015.

Dr. Mark Levin February 21, 2018 Deposition (RX.4)

Dr. Mark Levin, board certified orthopedic surgeon, testified in behalf of respondent. Dr. Levin had no independent recollection of petitioner and needed to refer to his reports for any information. Dr. Levin examined petitioner on September 28, 2014.

The history provided by petitioner to Dr. Levin was that she slipped and did not fall to the ground on February 20, 2014. She said her left leg went out in front of her and the right went under her. She did the splits, but did not fall to the ground.

She reported two weeks after the accident she obtained a lawyer who referred her to Dr. Novoseletsky.

Petitioner's reaction to the exam by Dr. Levin was unusual. Specifically, Dr. Levin reported when he flexed petitioner's wrists, she claimed to have leg pain; and when the wrists were put in the neutral position, the leg pain would disappear.

Dr. Levin reported petitioner's subjective complaints were out of proportion to the objective findings.

Dr. Levin believed petitioner was capable of working full duty, without restrictions, and had reached maximum medical improvement as of the date of his exam on September 4, 2104.

West Chicago Family Chiropractic Records (RX.5)

The complete records for treatment of petitioner from March 3, 2014 to October 23, 2014.

CONCLUSIONS OF LAW

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

C. With respect to the issue of whether an accident occurred that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

Petitioner testified, without rebuttal, that she was hired by staffing agency, Source One. Source One sent her to work at Suncast; where she worked fifteen days before February 20, 2014. On that date, petitioner testified she was working at Suncast on a production line when she slipped and fell on pieces of plastic. The history contained in all of the medical records was consistent with petitioner's testimony.

The Arbitrator, therefore, finds petitioner proved she sustained injuries in an accident that arose out of and in the course of her employment with respondents on February 20, 2014.

F. With respect to the issue of whether the petitioner's condition of ill-being is related to the injury, the Arbitrator makes the following conclusions of law:

Petitioner's initial complaints to the doctors at Tyler Medical on February 21, 2014, the day after the accident, were centered on the lumbar spine and left hip. The diagnosis was lumbar contusion/sprain and left hip pain.

On March 3, 2014, she reported to Dr. Long of Tyler Medical that three days prior she noticed cervical, shoulder and overall body symptoms. Dr. Long reasoned that as petitioner was not working, and it had been 11 days since the accident, Dr. Long could not relate these complaints to the original accident.

On March 3, 2014, she also presented to Dr. Michael Bauer, D.C. with West Chicago Family Chiropractic with complaints of lower back pain, buttocks and bilateral lower extremity.

The February 21, 2014 Lumbar X-rays showed degenerative changes predominately at L5-S1. The March 27, 2014 lumbar MRI showed bulging discs from L2-L3 through L5-S1, as well as a shallow disc protrusion at L2-L3, without impingement.

On March 10, 2014, petitioner presented to Dr. Novoseletsky with complaints of low back and cervical pain. The May 7, 2014 EMG showed nondenervative S1 radiculopathy.

Based upon the foregoing, the Arbitrator finds petitioner suffered a lumbar strain, bulging discs at L2 through S1 level and left hip pain as a result of the work accident of February 20, 2014. Petitioner failed to prove that any problems relative to her shoulders or neck were the result of the work accident.

I.With respect to the issue of petitioner's marital status and dependents, the Arbitrator makes the following conclusions of law:

Petitioner testified she had one dependent child under the age of 18 at the time of her accident. She also testified her husband's insurance paid for some of her medical treatment. The Arbitrator, therefore, finds at the time of her accident, petitioner had two dependents pursuant to the Act; her husband and one child.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The Arbitrator finds the evidence supports an award for medical treatment to the lumbar spine and left hip only from February 20, 2014 to September 4, 2014 and awards the medical bills, pursuant to the fee schedule and pursuant to §8 and §8.2 of the Act, from West Chicago Family Chiropractic for services rendered from March 3, 2014 to September 2, 2014, which totals $15,140.00 and Suburban Orthopaedics for the period from March 10, 2014 to July 31, 2014, excluding the March 27, 2014 cervical spine MRI, for a total of $8,394.00.

Respondent to be given credit for any payments already made by respondent.

K. With respect to the Arbitrator's decision with regard to temporary total and temporary partial disability, the Arbitrator makes the following conclusions of law:

The evidence supports a finding that petitioner was temporarily totally disabled, per respondent's stipulation, for the period from February 21, 2014 to September 10, 2014, which is 28-6/7 weeks at the rate of $286.00 per week.

L. In support of the Arbitrator's decision with regard to the nature and extent of petitioner's injury, the Arbitrator makes the following conclusions of law:

Petitioner sustained a lumbar strain with bulging discs and a L2-L3 disc protrusion, as well as left hip pain.

Pursuant to §8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability for accidental injuries occurring on or after September 1, 2011:

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that there was no permanent partial disability impairment rating provided. The Arbitrator, therefore, cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner worked on a production line. The injury claimed purportedly affected petitioner's ability to perform her job. Therefore, the Arbitrator gives some weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 48 years of age. The Arbitrator gives some weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner, according to Dr. Levin, was capable of returning to her usual employment with respondent as of September 4, 2014 as there was not objective evidence of her ongoing disability. The Arbitrator, therefore, gives no weight to this factor.

With regard to (v) of §8.1b (b) evidence of disability corroborated by the treating medical records, the Arbitrator notes the lack of objective evidence in the treating records to support her ongoing claimed disability. The Arbitrator gives little to no weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds Petitioner sustained permanent partial disability to the extent of 10% loss of use of person as a whole to §8(d)2 and awards 50 weeks of permanent partial disability at the rate of $286.00 per week.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC034469
Case Name	OSMAN, SCOTT v. EAST AURORA SCHOOL DISTRICT 131
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0060
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Kurt Niermann
Respondent Attorney	Lindsay Vanderford

DATE FILED: 2/18/2022

/s/Marc Parker, 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

Scott Osman,

Petitioner,

vs. NO: 13 WC 34469

East Aurora School Dist. 131,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of temporary total disability, causal connection, permanent partial disability, medical expenses, prospective medical expenses, penalties and attorney fees, and evidentiary errors, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 9, 2020, is hereby affirmed and adopted.

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

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

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

February 18, 2022

MP:yl
o 2/17/22
68

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0060

OSMAN, SCOTT
Employee/Petitioner

Case# **13WC034469**

EAST AURORA SCHOOL DISTRICT 131
Employer/Respondent

On 4/9/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

5122 PORRO NIERMANN LAW GROUP
KURT A NIERMANN
821 W GALENA BLVD
AURORA, IL 60506

2965 KEEFE CAMPBELL BIERY & ASSOC
LINDSAY R VANDERFORD
118 N CLINTON ST SUITE 300
CHICAGO, IL 60661

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

Scott Osman
Employee/Petitioner

v.

East Aurora School District 131
Employer/Respondent

Case # **13** WC **34469**

Consolidated cases: **N/A**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Stephen J. Friedman**, Arbitrator of the Commission, in the city of **Geneva**, on **January 17, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 11, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**52,86528**; the average weekly wage was $**1,015.64**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of $**18,668.33** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**18,668.33**.

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

ORDER

Respondent shall pay Petitioner permanent partial disability benefits of $609.38/week for 41.75 weeks, because the injuries sustained caused the 25% loss of the Right Foot, as provided in Section 8(e) of the Act.

Petitioner's claims for medical and prospective medical 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

April 2, 2020
Date

ICArbDec p. 2

APR 9 - 2020

Statement of Facts

At trial in this matter, Petitioner moved to amend the Application for Adjustment of Claim to state that the part of the body affected is both legs. There being no objection, the motion was granted (Arb. Ex. 2). The parties stipulated that this matter was presented on alternative theories of either prospective medical under Section 8(a) of the Act or, if the Arbitrator found such award not supported by the evidence, the Arbitrator may enter an award of Permanent Partial Disability under Section 8(d)2 or 8(e).

Petitioner Scott Osman testified he worked for Respondent as a Shipping Receiving Clerk/Fireman. Petitioner's job description is in the Work Conditioning Systems records which states that lifting is up to 80 pounds (PX 7, p 9). He testified that he had to load and unload trucks, move equipment, furniture and tend to boilers, air conditioners and perform general maintenance on the school property. The job demanded very heavy activities and lifting up to 200 pounds and walking 6 to 15 miles each day which he measured on his electronic gear.

Petitioner had a herniated disc in his low back in 1997 with a diagnosis of sciatica and foot drop. He testified he recovered and returned to full duty work thereafter. He had no problems with his foot, knees or hips for the 15 year period before December 12, 2012.

On December 12, 2012, Petitioner fell from a ladder catching his foot between a skid and the wall, and twisting his right ankle. He was taken to Provena Urgent Care. X-rays noted no acute bony abnormality superimposed on spurring (PX 4, P 140). He was then seen at Castle Orthopedics. Petitioner underwent an MRI of the right ankle on February 12, 2013 (PX 4, p 138). Petitioner was then seen by Dr. Simon Lee at Midwest Orthopedics beginning April 24, 2013 (PX 4). Dr. Lee takes a consistent history of accident. He notes treatment at the clinic who referred him to Dr. Scott O'Connor at Castle Orthopaedics who placed him into a CAM boot. Dr. O'Connor had him remain in the CAM boot and go for therapy, neither of which provided significant relief. Medications did not significantly help. Given the lack of relief, the therapist recommended that he go for a second opinion (PX 4, p 28). Examination revealed limitations in motion of the ankle joint, tenderness through the medial aspect of the anterior tibiotalar joint line and into the plantar heel as well, pain with palpation to the medial gutter into the distribution of the deltoid ligament, some tenderness to the lateral ligament complex and some joint laxity through the deltoid. Imaging revealed some osteophyte formation through the anterior aspect of the tibiotalar joint line. The MRI revealed attenuation and edema through the medial deltoid tendon distribution and a loose body distal to the medial malleolus. Dr. Lee diagnosed the condition as a right ankle sprain with deltoid avulsion injury and subsequent loose body, status post fall. Dr. Lee recommended a cortisone injection and a reconstruction if the symptoms did not resolve (PX 4, p 29).

Petitioner was examined by Dr. Anand Vora at Respondent's request on July 18, 2013. Petitioner reported the accident falling from a ladder injuring in right ankle. He stated he was 1 to 2 feet off the ground. Dr. Vora examined Petitioner and reviewed the x-rays and MRI. He diagnosed anterior right ankle impingement with osteophyte, medial gutter osteophyte and early ankle arthritis. He opined that these were chronic, pre-existing conditions that were aggravated by the accident. He felt the cortisone injection recommended by Dr. Lee was appropriate (RX 2).

The cortisone injection was done on August 1, 2013 (PX 4, p 27). The injection provided no relief, with Petitioner reporting continuing popping, clicking and instability in the joint at the next visit. Dr. Lee's assessment was right ankle pain with lateral ligamentous instability. He recommended surgery (PX 4, p 24). Surgery was performed on September 27, 2013 consisting of an extensive debridement, distal tibial

exostectomy, anterior medial OCD, chondroplasty and lateral ligament reconstruction (PX 4, p 31). Petitioner saw Dr. Lee on September 30, 2013, reporting severe post-operative pain requiring an ER visit. A new short leg cast was applied, and he was to use crutches (PX 4, p 22). On October 9, 2013, his symptoms had significantly improved, and he was placed in a weigh bearing cast (PX 4, p 20). On October 30, 2013, he was placed in a CAM boot and advised to begin outpatient therapy (PX 4).

Petitioner began physical therapy at Advanced Physical Medicine of Yorkville on November 5, 2013 (PX 6). In the initial evaluation history, Petitioner states that after his back surgery, he lost some sensation in the outside of his leg that has not come back. Now he has loss of sensation along the outside of his foot. He states that turns his foot out since the injury. The gait analysis notes increased ER of the right foot with a lateral lean, decreased step length and cadence, decreased right hip flexion, decreased stance time on right foot. Sensation is noted to be intact. The assessment was that Petitioner needed specific exercises to focus on gait pattern (PX 6, p 97-98). On November 15, 2013, Petitioner reported back pain (PX 6, p 105).

On November 20, 2013, Petitioner was transitioned to an ASO brace and advised to continue therapy and rehab. He was cleared for light office work only (PX 4). On December 9, 2013, Petitioner reported improvement. He is concentrating on walking to do it right. Gait is improved with some loss of dorsiflexion, decreased push off, and lateral lean to the right (PX 6, p 126-128). On December 11, 2013, Petitioner complained of intermittent painful ankle popping. He was advised that was likely due to breaking up on scar tissue. He was instructed to wean out of the ASO brace and to continue therapy (PX 4). His therapy examination on December 18, 2013 noted that he has increased pronation of his foot. His weightbearing falls on the lateral aspect of his foot, and then into excessive pronation (PX 6, p 138). Therapist Jaquez recommended custom orthotics were medically necessary and would eliminate biomechanical faults, which effect the patient's ankles, knees and low back (PX 6, p 183).

On January 15, 2014, Dr. Lee noted continued improvement. Petitioner reported he is still having pain within the joint space and is also stiff with range of motion. Petitioner was to continue light work restrictions. Dr. Lee discussed beginning work conditioning or a trial of regular work. X-rays taken on February 5, 2014 revealed an intact mortise with a slight varus alignment. His hindfoot was also medial to his mechanical axis. Arch supports were prescribed to provide lateral posting and stability to the foot. Work hardening began (PX 4). Petitioner attended work conditioning at Work Conditioning Systems from February 10, 2014 through March 21, 2014. He reported receiving his orthotics. In additional to his symptoms in the right foot, he also advanced low back soreness and tightness (PX 7).

On April 2, 2014, he reported that work hardening was providing some improvement, but he still experienced pain through the anteromedial aspect that flared up with activity. He had not yet received his custom orthotics. Dr. Lee released him for a trial of full duty work (PX 4). Petitioner received his custom orthotics on April 11, 2014. He had adjustments done on April 22, 2014 and May 7, 2014. He reported knee pain at that time and was advised to see his doctor (PX 9). On May 21, 2014, Petitioner reported he was working full duty and had had the orthotics adjusted several times. The orthotics helped overall, but they made his knees achier and sorer. Petitioner reported that he was very fatigued and tired by the end of his workday. He wore high-top boots at work but still had general instability episodes. Physical examination noted full range of motion and excellent strength with no significant swelling or edema. Dr. Lee found Petitioner at MMI and released him from care to return to full duty work. Petitioner reported the right knee pain as he has had in the past (PX 4, RX 1).

Petitioner testified he returned to full duty work for Respondent in May 2014. Petitioner testified his knee pain began gradually. This started the first time he was seen at Urgent Care. He testified he noticed this because his foot was splayed outward before surgery. He testified his right knee started hurting first and then the left knee. He testified he saw Dr. Burgess at Hinsdale Orthopedics. Petitioner saw Dr. Burgess on January 15, 2015 for his right ankle (PX 2). He noted his complaints in the right ankle and stated that it is now causing heel pain, hip, knee and back pain. Examination notes Petitioner is wearing regular shoes. He has an antalgic gait. Examination is limited to the bilateral feet and ankles. The assessment is mechanical and functional instability of the right lateral ankle, probable OCD of the medial talar dome, right ankle arthritis. Dr. Burgess recommended an updated MRI of the ankle. He prescribed a topical medication. He released Petitioner to work without restriction (PX 2, p 11-15).

Dr. Vora reviewed updated records and provided an addendum report on April 2, 2015 (RX 3). He reviewed all of Dr. Lee's records, Dr. Burgess's January 15, 2015 record, therapy records and the MRI findings. He stated his diagnosis is unchanged. He opined that the symptoms advanced to Dr. Burgess are not related to the accident. He stated the temporary exacerbation had resolved and the treatment is unrelated to the work condition, but rather to the underlying degenerative condition. He found Petitioner had reached MMI (RX 3).

Petitioner had an MRI of the right ankle at Imaging Centers of America on May 15, 2015 with an impression of tenosynovitis, post-surgical hypertrophy of the medial joint capsule, osteoarthritis, and possible symptomatic os trigonum (PX 10). Petitioner saw Dr. Amy Schroeder DPM on May 27, 2015 for his right ankle (PX 8). She notes Workers Compensation is refusing to cover further treatment. Petitioner denied any painful joints or pain in his legs after exertion. He denied back pain. After examination and review of the MRI, Dr. Schroeder's assessment was pain in the limb, traumatic arthropathy of the ankle and foot, pain in the ankle and foot, and difficulty walking. She provided an injection (PX 8).

Petitioner returned to Dr. Burgess on May 16, 2016 for follow up on instability of the right ankle. Petitioner reported follow up with Fox Valley Ortho and the ordering of a custom AFO brace. Petitioner also complained of bilateral hip and knee pain. After examination, Dr. Burgess advised Petitioner to continue the brace. He referred Petitioner to Dr. Burra for his hips and knees (PX 2, p 16-17).

Petitioner saw Dr. Burra on March 22, 2017 for evaluation of his right knee (PX 2, p 19). Petitioner reported right knee pain right after the injury. Petitioner reported multiple episodes of giving out of his right knee. Examination gait within normal limits. All stability tests were within normal limits. After examination and x-rays, Dr. Burra's impression was right knee patellofemoral pain, mechanical symptoms, possible loos body, possible medial meniscus tear and bipartite patella. He requested an MRI of the knee. He also detected a deficit on ankle reflex which may be related to Petitioner's back surgery and referred him to Dr. Barfield for an EMG (PX 2, p 19-22). The March 28, 2017 right knee MRI impression was no displaced meniscal tears demonstrated, small Baker's cyst, no loose bodies, bipartite patella (PX 2, p 26). The NCV was normal. The EMG noted expected chronic S1 radiculopathy. Dr. Barfield stated that he does not think radiculopathy is playing a role in his symptom of the right knee giving out (PX 2, p 28). Dr. Burra saw Petitioner on May 3, 2017. He reviewed the diagnostic testing and performed an examination. He concluded that Petitioner had a completely benign exam and MRI. He required no surgical or conservative intervention for his knee. He returned Petitioner to full duty work and advised him to follow up with his spine surgeon (PX 2, p 29-32).

Petitioner testified to treatment for an unrelated injury to his right arm from a burn accident in 2017. He underwent physical therapy at ATI for that injury (PX 5). On August 15, 2017, on order of Dr. Baldea, he

underwent therapy for pain, lumbar impaired gait mechanics which were related to his 1997 back injury. Petitioner reported recurrent back pain for 20 years (PX 5, p 184). Petitioner had x-rays of the cervical and lumbar spine ordered by Dr. Carson on November 4, 2017 showing moderate to severe degenerative disc disease in the cervical and lumbar spines 9PX 3, p 268). Petitioner had a cervical and lumbar MRIs ordered by Eric Carson DC on December 20, 2017. The cervical MRI noted disc bulges, narrowing and desiccation most notably at C5-6 and C6-7 (PX 3, p 271-272). The lumbar MRI noted disc desiccation at L2-3 though L5-S1 with degenerative endplate changes at L4-5 and L5-S1(PX 3, p 269-270).

Petitioner saw Dr. Chudik at Hinsdale Orthopedics on October 22, 2018 for bilateral knee pain (PX 2, p 35). He reported immediate onset of right knee pain at the time of the accident. He stated that some time in 2015, he began to experience left knee pain that he felt was due to favoring his left leg. Dr. Chudik's impression was meniscus vs. cartilage pathology. He recommended updated MRIs (PX 2, p 38). The MRI's were performed October 25, 2018 (PX 2, p 40-41). On November 5, 2018, Dr. Chudik reviewed the MRI studies. He noted "bilateral pf" in both knees, and chondromalacia in the left knee. He recommended physical therapy and allowed continued unrestricted work activity (PX 2, p 39-46). Petitioner had therapy at ATI form November 14, 2018 through January 29, 2019 (PX 5).

Petitioner saw Dr. Kooen on November 7, 2018 for bilateral hip pain (PX 2, p 47). Petitioner reported hip pain for 6 years since his accident date. X-rays noted osteoarthritis. Bilateral MRA studies were ordered (PX 2, p 48). MRA studies performed November 21, 2018 noted labral detachments (PX 2, p 51-52). Petitioner saw Dr. Alden on November 28, 2018. He reviewed the studies and recommended amniofix prior to considering hip arthroscopy (PX 2, p 53-54). Petitioner saw Dr. Lorenz for back complaints on December 12, 2018 (PX 2, p 55). He reported the accident, and stated he had knee and back complaints at the time of the injury. He reports pain across the lumbar spine radiating down the right leg to his knee with intermittent buckling of the right knee. Physical examination is normal except for some slight decreased sensation along the lateral aspect of the right knee. X-rays note degenerative changes at L4-5 and L5-S1. Dr. Lorenz stated that his antalgic gait, hip and knee complaints likely aggravate his lumbar complaints. Once those are treated, he can proceed with a course of lumbar therapy focusing on gait, posture and strengthening (PX 2, p 55-56). Petitioner saw Dr. Chudik on December 17, 2018 for his knees. Dr. Chudik performed bilateral knee injections (PX 2, p 58-59).

Petitioner saw Dr. Malhotra for pain management with various medications from January 16, 2019 through March 12, 2019 (PX 13). Petitioner chose to see Dr. Chilelli at Northwestern Medical beginning March 19, 2019 for his bilateral hips (PX 3, p 262). Petitioner reported pain since 2012. Following examination and review of the MRI studies, Dr. Chilelli assessed bilateral hip pain with MRI evidence of labral tears. Suspect femoroacetabular impingement with possible component of lumbar radiculopathy. He recommended cortisone injections into the hips (PX 3, p 263). On March 21, 2019, Dr. Chilelli evaluated Petitioner's knees. He recommended injections. He also referred Petitioner to physiatry for evaluation of his lumbar spine (PX 3, p 253). Petitioner had Microvisc injections to both knees on April 9, 2019 and a cortisone injection to the right hip on April 18, 2019 (PX 3, p 224-250). Petitioner reported no relief to Dr. Chilelli on May 14, 2019. Dr. Chilelli noted complaints of radiating pain down both legs and the prior history of back pain and recommended a lumbar MRI (PX 3, p 212-213). The May 16, 2019 lumbar MRI noted multilevel spondylotic changes. Dr. Chilelli advised that Petitioner had arthritis and disc bulges resulting in likely nerve root impingement at L3-4, L4-5 and L5-S1. Petitioner should be seen by physiatry (PX 3, p 202-207).

Petitioner saw Dr. Mayer with respect to his low back on June 4, 2019. Dr. Mayer recommended lumbar injections (PX 3, p 189-191). Petitioner had a right L4 transforaminal epidural steroid injection on June 17,

2019 (PX 3, p 151). He reported only 10% to 15% relief on July 10, 2019. Dr. Mayer proposed the second injection to be done at L3 for a diagnosis of lumbar radiculitis (PX 3, p 136-137). The injection at L3 was performed on July 15, 2019. Dr. Mayer recorded that pain was reduced to 0/10 prior to discharge. Concordant pain was noted during the injection (PX 3, p 112). On July 30, 2019, Petitioner reported the relief only lasted 1 to 2 days. Dr. Mayer discussed a surgical consultation (PX 2, p 93-94). Petitioner saw Dr. Kolavo on August 21, 2019. Dr. Kolavo diagnosed degenerative lumbar disc. He did not feel Petitioner was a surgical candidate. He recommended physical therapy and further evaluation of the right hip (PX 3, p 72-75). Petitioner had therapy at Fyzical from September 10, 2019 through October 8, 2019 (PX 12).

Petitioner saw Dr. Chilelli on October 22, 2019. Petitioner continued with symptoms. Dr. Chilelli referred Petitioner to his partner Dr. Bhatia for consideration of arthroscopic hip surgery (PX 3, p 61-62). Petitioner saw Dr. Bhatia on October 31, 2019. He denied any radicular symptoms. Dr. Bhatia recommended another hip injection (PX 3, p 40-52). The injection was performed on November 8, 2019 (PX 3, p 26). On January 3, 2020, Petitioner reported symptoms returned shortly after the injection. Dr. Bhatia recommended targeted physical therapy for femoroacetabular impingement of the right hip (PX 3, p 8). Petitioner testified he want to have the therapy.

Petitioner testified he wears his brace at work. He was not wearing it at trial. It prevents up and down movement of the foot. He testified he does his work by torqueing his knees and hips more. He testified he is fatigued and in pain by the end of the workday. He hurts in his ankle, knees and hips. He no longer jogs.

Dr. Burgess testified by evidence deposition taken November 16, 2016 (PX 1). He is board certified in foot and ankle surgery. He testified to Petitioner's January 15, 2015 visit. He noted the antalgic or painful gait. His impression was ankle arthritis, some instability and possibly an osteochondral lesion. He opined that the condition was causally related to the accident. He testified that Petitioner returned in May 2016. He was wearing a brace. He was complaining of some hip and knee pain. He testified he provided an injection. He testified that his normal course of treatment if the injection was not effective would be to consider surgery. Since Petitioner said he was doing well with the brace in May 2016, Dr. Burgess just recommended continuation of immobilization with the brace. Dr. Burgess testified that there is a compensatory mechanism given the altered gait. He would causally relate the knee and hip to the accident (PX 1).

Dr. Vora testified by evidence deposition taken April 25, 2016 (RX 4). He is board certified in foot and ankle surgery. He testified to his independent examination performed on July 8, 2013. Petitioner had reported the fall from the ladder of one to two feet with immediate symptoms of ankle pain. At the time of the exam, Petitioner reported ankle instability and pain in the front of the ankle. He testified he reviewed records and actual MRI films. After examination, his diagnosis was anterior ankle impingement with osteophyte, medial gutter osteophyte and early arthritis. He opined that it is impossible for these to be caused by the work injury, but they could have been aggravated. They are chronic degenerative conditions. He testified a cortisone injection was appropriate. If he needed surgery, he would reach maximum medical improvement in 3 months. He opined that there is no acute injury, but the mechanism may have aggravated the underlying condition which would be related (RX 4).

Dr. Vora testified he prepared an addendum report on April 2, 2015. He reviewed additional records from Dr. Lee, an operative note, follow up physical therapy notes, and medical records from Dr. Burgess. He did not reexamine Petitioner. He testified his diagnosis was unchanged. He noted the ligament reconstruction was beyond his diagnosis. He did not find instability in his July 8, 2013 examination. He testified that Petitioner was

already going to surgery and if Dr. Lee felt like he had instability, the ligament resection is reasonable. He testified that Dr. Burgess findings of edema and mechanical instability were not present in his July 2013 examination. He testified that Petitioner's subjective complaints are supported by Dr. Burgess objective findings. He does not find them related to the accident. He notes Dr. Burgess advances no diagnosis. He notes the timing of the complaints. He notes that Dr. Lee suggests he is doing well, and Petitioner returned to work without restrictions for an extensive period of time. Dr. Vora opined that the temporary aggravation of the underlying degenerative condition had resolved as of Dr. Lee's release of Petitioner to unrestricted duty and finding of maximum medical improvement. He stated that he is confident of his opinions to a 95% degree of certainty. Dr. Vora testified the heel ulcer is not related to putting weight on a new area. Dr. Vora testified that the literature does not indicate that ankle instability would cause knee arthritis. He testified that the Petitioner did not have an os trigonum issue (RX 4).

Petitioner was examined by Dr. Shane Nho at Respondent's request on February 25, 2019 (RX 5). Dr. Nho reviewed and summarized treating records through December 2018 including x-rays and MRI studies. He notes Provena treatment for the right ankle. Petitioner treated with Dr. O'Conner at Castle Orthopedics with complaints of ongoing right ankle pain. X-rays revealed minimal chronic degenerative changes. Petitioner was diagnosed with a grade 2 sprain. Petitioner treated with Castle Orthopedics through March 20, 2013. Dr. Nho also summarized records from Dr. Lee, the MRI studies of the ankle, knees and hips, DPM records, and Hinsdale records of Dr. Burra and Dr. Chudik. Dr. Nho records Petitioner's history of symptoms in the right knee beginning after the work injury. He does not remember when the left knee or hip pain began. Physical exam of the hips noted pain on provocative testing. Knee examinations show normal range of motion, with pain of both patella with stable ligamentous exam. He has patellofemoral pain of both knees with underlying and pre-existing bipartite patella. Dr. Nho opined that Petitioner's complaints in the hips and knees are not causally related to the accident and he is at MMI for the hips and knees (RX 5).

Dr. Nho testified by evidence deposition taken June 17, 2019 (RX 6). He testified that he is board certified in orthopedic surgery and specialized in arthroscopic and reconstructive surgery to the shoulder, hip and knee. He testified to his review of medical records, history and examination of Petitioner consistent with his report. He notes Petitioner had a non-antalgic gait, a normal gait pattern. His diagnosis was patellofemoral pain of both knees with underlying and pre-existing bipartite patella for the knees and underlying and pre-existing femoroacetabular impingement of the hips. These are degenerative or congenital conditions. Dr. Nho opined that these conditions were not causally connected to the accident on December 11, 2012. He notes that the medical records do not support Petitioner's statement that he had right knee complaints at the time of the accident. He opined that Petitioner did not suffer a temporary aggravation of a pre-existing condition. Petitioner did not advance any complaints until well after the accident. Dr. Nho opined that the condition could not have been aggravated by using an air splint, CAM walker, post-surgical brace, ASO brace, or orthotic inserts. He opined that Petitioner was at MMI and in need of no treatment (RX 6).

Dr. Nho testified he does not know if he reviewed all the medical records. To be related, symptom should be noted in the records within weeks of the injury. It is unlikely that the way a person turns his foot would have an impact on the joints. Dr. Nho found a normal gait in his examination. Other physicians noting an altered gait would not change his opinion on causation. Dr. Nho is 99.5% certain his opinions are correct (RX 6).

Conclusions of Law

In support of the Arbitrator's decision with respect to (F) Causal Connection, the Arbitrator finds as follows:

A Workers' Compensation Claimant bears the burden of showing by a preponderance of credible evidence that his current condition of ill-being is causally related to the workplace injury. *Horath v. Industrial Commission*, 449 N.E.2d 1345, 1348 (Ill. 1983) citing *Rosenbaum v. Industrial Com.* (1982), 93 Ill.2d 381, 386, 67 Ill.Dec. 83, 444 N.E.2d 122). The Commission may find a causal relationship based on a medical expert's opinion that the injury "could have" or "might have" been caused by an accident. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 182, 457 N.E.2d 1222, 1226, 75 Ill. Dec. 663 (1983). However, expert medical evidence is not essential to support the Commission's conclusion that a causal relationship exists between a claimant's work duties and his condition of ill-being. *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63, 442 N.E.2d 908, 911, 66 Ill. Dec. 347 (1982). A chain of events suggesting a causal connection may suffice to prove causation. *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839, 639 N.E.2d 886, 892, 203 Ill. Dec. 327 (1994). Prior good health followed by a change immediately following an accident allows an inference that a subsequent condition of ill-being is the result of the accident. *Navistar International Transportation Co. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205 (2000).

Petitioner sustained an undisputed accident on December 11, 2012, when he fell from a ladder and twisted his right ankle. Petitioner testified that he had no prior injuries or treatment for his right ankle. He advanced immediate complaints in the right ankle and began a continuous course of treatment through his release by Dr. Lee in May 2014. This condition of ill-being is causally related both by the chain of events and the medical opinions of the treating doctors and Dr. Vora.

On May 21, 2014, Dr. Lee's physical examination noted full range of motion and excellent strength with no significant swelling or edema. Dr. Lee found Petitioner at MMI and released him from care to return to full duty work. Petitioner sought no further treatment until he saw Dr. Burgess on January 15, 2015, seven months later. Dr. Burgess impression was ankle arthritis, some instability and possibly an osteochondral lesion. He opined that the condition was causally related to the accident. Dr. Vora's diagnosis was anterior ankle impingement with osteophyte, medial gutter osteophyte and early arthritis. He opined that it is impossible for these to be caused by the work injury, but they could have been aggravated. They are chronic degenerative conditions. He opined that there is no acute injury, but the mechanism may have aggravated the underlying condition. Dr. Vora opined that the temporary aggravation of the underlying degenerative condition had resolved as of Dr. Lee's release of Petitioner to unrestricted duty and finding of maximum medical improvement.

It is the Commission's province to assess the credibility of witnesses, draw reasonable inferences from the evidence, determine what weight to give testimony, and resolve conflicts in the evidence, particularly medical opinion evidence. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 406-07, 459 N.E.2d 963, 76 Ill. Dec. 828 (1984); *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675, 928 N.E.2d 474, 340 Ill. Dec. 475 (2009); *Fickas v. Industrial Comm'n*, 308 Ill. App. 3d 1037, 1041, 721 N.E.2d 1165, 242 Ill. Dec. 634 (1999). Expert testimony shall be weighed like other evidence with its weight determined by the character, capacity, skill and opportunities for observation, as well as the state of mind of the expert and the nature of the case and its facts. *Madison Mining Company v. Industrial Commission*, 309 Ill. 91, 138 N.E. 211 (1923). The proponent of expert testimony must lay a foundation sufficient to establish the reliability of the bases for the expert's opinion. *Gross v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100615WC, 960 N.E.2d

587, 355 Ill. Dec. 705. If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. Expert opinions must be supported by facts and are only as valid as the facts underlying them. *In re Joseph S.*, 339 Ill. App. 3d 599, 607, 791 N.E.2d 80, 87, 274 Ill. Dec. 284 (2003). A finder of fact is not bound by an expert opinion on an ultimate issue, but may look 'behind' the opinion to examine the underlying facts. A treating doctor's findings and opinions can be undermined, or even disregarded, through reliance on inaccurate or incomplete information." See *Ravji v. United Airlines*, 2012 WL 440353 at 13 (Ill. Indus. Comm'n) interpreting *Horath v. Industrial Commission*, 96 Ill.2d 349 (Ill. 1983).

Having heard the evidence and reviewed the exhibits, the Arbitrator finds the opinion of Dr. Lee corroborated by the opinion of Dr. Vora persuasive. As more fully discussed below with respect to Petitioner's conditions in the knees and hips, the Arbitrator does not find Petitioner a credible witness. Petitioner was released to full duty work and did not seek any care for 7 months. Thereafter he did not see Dr. Schroeder for an additional 4 months and did not return to Dr. Burgess until May 2016, another year later and over 4 years since the accident. The Commission has considered such a gap in care in determining causal connection. See: *Centeno v. Illinois Workers' Comp. Comm'n*, 2020 IL App (2d) 180815WC, No. 2-18-0815WC (March 30, 2020); *Richard Olcikas v. Dominick's Finer Foods, Inc.*, 2009 Ill. Wrk. Comp. LEXIS 1098, affirmed *Olcikas v. IWCC*, 2012 Ill. App. Unpub. LEXIS 26; 2011 IL App (1st) 103274WC-U; 2012 WL 6951575; *Jacob Haltom v. Center for Sleep Medicine*, 2013 Ill. Wrk. Comp. LEXIS 509; 13 IWCC 563, affirmed *Haltom v. IWCC*, 2015 IL App (1st) 133954WC-U; 2015 Ill. App. Unpub. LEXIS 1568; *Jose Ruben Meraz vs. Minute Men Staffing*, 2015 Ill. Wrk. Comp. LEXIS 30; 15 IWCC 30. The Arbitrator finds Dr. Vora's diagnosis in accordance with the original x-rays and MRI study. The Arbitrator finds that the causally related condition in the right foot reached maximum medical improvement as of May 21, 2014.

Petitioner also alleges that his conditions of ill-being in the knees and hips are causally related to the accident. Petitioner testified that he had right knee pain immediately at the time of his accident. He testified that he developed pain in the opposite knee at some indeterminate time and also developed pain in his hips. He claims his altered gait resulted in these additional conditions. Petitioner presented the opinion of Dr. Burgess stating that due to the altered gait noted in his two examinations that there is a compensatory mechanism and he would causally relate the knee and hip to the accident. Dr. Vora testified that the literature does not indicate that ankle instability would cause knee arthritis. Dr. Nho's diagnosed degenerative or congenital conditions and opined that these conditions were not causally connected to the accident on December 11, 2012 or the various braces used by Petitioner.

The Arbitrator notes that Petitioner's testimony and later medical histories are inconsistent with the medical records. Petitioner claims to have had right knee pain initially after the accident, but the records do not support this claim. Petitioner did not offer the initial Provena and Castle Orthopedics, but they were reviewed and summarized by Dr. Nho and do not note any complaints, diagnostics or treatment other than for the right ankle. Dr. Lee's records are silent as to any complaints other that the right knee until the final discharge in May 2014, 18 months later. Yet Petitioner presents his complaints to the multiple body parts to his treating physicians as if they developed at the time of the accident. He seeks no care for 7 months when he sees Dr. Burgess, a foot and ankle specialist, with additional complaints in the knees and hips. He repeats this claim of immediate onset of knee pain to Dr. Burra and Dr. Chudik. He also tells Dr. Lorenz that he had immediate onset of back pain. He told Dr. Kooen in 2018 that he had hip pain for six years. He reports to Dr. Chilelli that his hip pain beganin 2012. The only condition documented in the medical records was the right ankle, the right hip developed over a year later, the hips and left hip were not documented until over 2 years later.

Petitioner's claim of causation based upon altered gait is also contradicted by the records and further document Petitioner's inconsistent presentation and significant degenerative conditions. Petitioner admitted a prior 1997 back injury and surgery, but claimed no problems since. Yet at Advanced Physical Medicine of Yorkville on November 5, 2013, Petitioner states that after his back surgery, he lost some sensation in the outside of his leg that has not come back. He reports back pain in therapy and work conditioning. The medical records document chiropractic care in 2017 including cervical and lumbar MRI studies documenting extensive degenerative changes. He reported to his therapist he had a 20 year history of back problems. Petitioner's symptoms, including the right leg pain and claim of giving out of the right knee are suspected to be related to his low back and he underwent extensive work up for that unrelated condition. The Arbitrator notes that he reported to Dr. Lorenz that he had pain radiating down his right leg, yet told Dr. Chudik he had no radicular complaints. Petitioner testified to his splaying of his right foot, but the Arbitrator notes that condition was specially noted during the initial therapy evaluation and Petitioner underwent treatment to address that which he admitted improved his gait. While Dr. Burgess noted an antalgic gait in January 2015, his May 2016 notes show gait within normal limits. Dr. Burra in May 2017 finds Petitioner has a completely benign knee examination and MRI.

These multiple inconsistencies are coupled with the multiple gaps in care. Petitioner sought no treatment following Dr. Lee's discharge at MMI on May 21, 2014 for seven months. After seeing Dr. Burgess in January 2015, he has a podiatrist visit in May 2015 and seeks no further care until returning to Dr. Burgess a year later in May 2016. He does not see Dr. Burra, the first treatment for his knees or hips until March 2017,over 5 years after the accident. He continues to change treaters after being discharged.

Based upon the inconsistent and inaccurate information provided, the pre-existing degenerative conditions, including degenerative findings in the prior low back and unrelated cervical findings as well as the undisputed findings of multiple degenerative conditions noted in the knees and hips, and the multiple gaps in care, the Arbitrator finds the opinions of Dr. Vora and Dr. Nho persuasive that Petitioner's claimed conditions of ill-being in the knees, hips and possible low back are not causally connected to the accident, altered gait or the bracing devices employed by Petitioner.

Based upon the record as a whole, the Arbitrator finds that Petitioner has proven by a preponderance of the evidence that initial his condition of ill-being in the right ankle is causally connected to the accidental injury sustained on December 11, 2012. The condition reached maximum medical improvement as of May 21, 2014 when Petitioner was released by Dr. Lee. Any condition of the right ankle thereafter, and any other condition of ill-being to the knees, hips or low back is not causally connected.

In support of the Arbitrator's decision with respect to (J) Medical and (O) Prospective Medical, the Arbitrator finds as follows:

Under §8(a) of the Act, a claimant is entitled to recover reasonable medical expenses that are causally related to the accident and that are determined to be required to diagnose, relieve, or cure the effects of a claimant's injury. The claimant has the burden of proving that the medical services were necessary, and the expenses incurred were reasonable. *City of Chicago v. Illinois Workers' Compensation Commission,* 409 Ill. App. 3d 258,267 (1st Dist., 2011). In determining the reasonableness and necessity of treatment, the Commission also has considered whether the records demonstrate subjective or objective improvement or whether the treatment failed to provide demonstrable benefit. *Hugo Alvarez v AMI Bearings, 16 IWCC 0408; Nelson Centeno v. Minute Men, 13*

IWCC 0914, affirmed Centeno v. Illinois Workers' Compensation Commission, 2016 IL App (2d) 150575WC-U; 2016 Ill. App. Unpub. LEXIS 1261. Based upon the Arbitrator's finding with respect to Causal Connection, reasonable and necessary medical treatment for Petitioner's right ankle through May 21, 2014 only would be causally connected to the accident.

The Arbitrator has reviewed the exhibits including the bills submitted and the payment logs and finds that Respondent has paid all reasonable, necessary and causally connected medical. Petitioner's claim for medical bills is denied.

Petitioner has also sought prospective medical treatment for the knees and hips based upon the recommendations of Dr. Burra and Dr. Chilelli. Based upon the Arbitrator's finding with respect to Causal Connection, the Arbitrator finds that Petitioner has failed to prove by a preponderance of the evidence, that he is entitled to any reasonable or necessary care for any condition of ill-being causally connected to the accidental injuries sustained on December 11, 2012.

Petitioner's claims for medical and prospective medical are denied.

In support of the Arbitrator's decision with respect to (L) Nature & Extent, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Causal Connection and Prospective Medical, the Arbitrator, pursuant to the stipulation of the Parties, will address partial permanent disability. The Arbitrator will only address disability of the body parts in accordance to his finding with respect to Casual Connection. Petitioner's date of accident is after September 1, 2011 and therefore the provisions of Section 8.1b of the Act are applicable to the assessment of partial permanent disability in this matter.

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a Shipping Receiving Clerk at the time of the accident and that he is able to return to work in his prior capacity as a result of said injury and has worked his regular duty for almost 6 years since May 2014. The Arbitrator notes that this job is Heavy per the job description requiring lifting of up to 80 pounds. Petitioner claimed the job is Very Heavy with lifting of up to 200 pounds. The job requires extensive walking and climbing ladders. Because of these facts, the Arbitrator therefore gives lesser weight to this factor.

With regard to subsection (iii) of §8.1b(b), the Arbitrator notes that Petitioner was 42 years old at the time of the accident. Petitioner would be expected to remain in the workforce performing a heavy job for many years. Because of this, the Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1b(b), Petitioner's future earnings capacity, the Arbitrator notes that Petitioner has returned to his regular job and remained for several years since the accident. No evidence of a loss of earning was presents. Because of this, the Arbitrator therefore gives no weight to this factor.

With regard to subsection (v) of §8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes Petitioner sustained an undisputed injury to his right ankle. Dr. Lee diagnosed the condition as a right ankle sprain with deltoid avulsion injury and subsequent loose body which required surgery. Dr. Lee's May 21, 2014 physical examination noted full range of motion and excellent strength with no significant swelling or edema. Petitioner continues to have complaints and wears a brace. Because of these facts, the Arbitrator therefore gives greater weight to this factor.

Based on the above factors, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% loss of use of the right foot pursuant to §8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002033
Case Name	ALLEN, KIMBERLY D v. DOLLAR GENERAL
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Aribtration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0061
Number of Pages of Decision	20
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Charles Edmiston
Respondent Attorney	PETER SINK

DATE FILED: 2/18/2022

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly D. Allen,

Petitioner,

vs. No. 21 WC 2033

Dollar General,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability and prospective medical care, and being advised of the facts and law, modifies and corrects clerical errors in 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 does note clerical errors in the Arbitration Decision, which it corrects herein. On page 2 of the Arbitrator's Decision, under the section, "Findings," the Arbitrator wrote that the date of Petitioner's accident was, "December 18, 2021." The Commission finds Petitioner's date of accident to be, "December 18, 2020," and corrects the Arbitration Decision to reflect that date.

Also on page 2 of the Arbitration Decision, under the section, "Order," the Arbitrator wrote, "Petitioner was temporarily totally disabled as a result of the accident from December 19,

2020 through March 31, 2020, the date of the arbitration hearing, a period of 14-5/7 weeks, at a rate of $506.00 per week." The Commission agrees that the correct period of temporary total disability is 14-5/7 weeks; however, the Commission finds that period runs from December 19, 2020 through the date of the arbitration hearing, which was actually March 31, 2021. The Commission corrects the Arbitration Decision to reflect those proper dates.

Finally, the Commission finds that the parties stipulated to an average weekly wage of $756.00. Two-thirds of that equals $504.00, not $506.00. The Commission finds Petitioner's temporary total disability rate in this case to be $504.00 per week, and corrects the Arbitrator's Decision to reflect that figure. All else in the Arbitrator's Decision is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 1, 2021, is hereby affirmed and adopted, with the corrections noted herein.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits at the rate of $504.00 per week for 14-5/7 weeks, for the period December 19, 2020 through March 31, 2021, as provided by §8(a) and §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's awards of medical expenses and prospective medical care are affirmed and adopted.

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

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

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 $8,100.00. 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.

February 18, 2022

/s/ *Marc Parker*
Marc Parker

MP/mcp
o-2/17/22
068

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	21WC002033
Case Name	ALLEN, KIMBERLY D v. DOLLAR GENERAL
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	Dennis OBrien, Arbitrator

Petitioner Attorney	Charles Edmiston
Respondent Attorney	Melissa McEndree

DATE FILED: 6/1/2021

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

/s/Dennis OBrien, Arbitrator

Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

KIMBERLY D. ALLEN
Employee/Petitioner

v.

DOLLAR GENERAL
Employer/Respondent

Case # **21** WC **2033**

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 **March 31, 2021**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. [ ] What was the date of the accident?
E. [x] Was timely notice of the accident given to Respondent?
F. [x] Is Petitioner's current condition of ill-being causally related to the injury?
G. [ ] What were Petitioner's earnings?
H. [ ] What was Petitioner's age at the time of the accident?
I. [ ] What was Petitioner's marital status at the time of the accident?
J. [x] Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [x] 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, **December 18, 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*** 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 $**39,312.00**; the average weekly wage was $**756.00**.

On the date of accident, Petitioner was **44** 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 $**0.00** 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 December 18, 2020 which arose out of and in the course of her employment by Respondent.

Petitioner's current condition of ill-being, right shoulder injury with possible avulsion fracture and possible rotator cuff tear, and swollen right hand, is causally related to the accident of December 18, 2020.

Petitioner provided Respondent with notice of the December 18, 2020 fall within the 45 days following the accident.

Petitioner was temporarily totally disabled as a result of the accident from December 19, 2020 through March 31, 2020, the date of the arbitration hearing, a period of 14 5/7 weeks, at a rate of $506.00 per week.

The bills introduced into evidence in Petitioner Exhibit 3 are related to Petitioner's right shoulder, arm and hand injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in the accident of December 18, 2020, and are to be paid by Respondent pursuant to the Medical Fee Schedule.

Petitioner is entitled to prospective medical treatment as recommended by Dr. Gunda and PA Whitman, to wit, an MRI of Petitioner's right shoulder.

Petitioner has not reached maximum medical improvement, continues to be disabled and is in need of additional medical testing and treatment.

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 1, 2021

ICArbDec19(b)

vs. WC

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner Kimberly D. Allen testified that on December 18, 2020 she was employed by Respondent Dollar General as a store manager candidate, having started working in that capacity on November 24 or 25, 2020. She said she was learning to open and close the store, learning how to handle freight and put it on floor in the correct ways. Those were her main duties at the time. She was working at that time at Respondent's location on Ash Street in Springfield, Illinois.

On the morning of December 18, 2020 she was told to come into work at 6 a.m. to learn how to do freight. She and the store manager in training, Tammy Rodriguez went to the back of the store to start taking merchandise to the front of the store so it could be put out on the floor. They were joined shortly thereafter by another young lady and they started doing the freight together. At about 8 o'clock they had a milk truck delivery. There was a problem as he delivered frozen milk, and they could not sell frozen milk at Dollar General. She said this made Ms. Rodriguez quite upset, saying Ms. Rodriguez was throwing milk in the cart, loading them in an angry fashion because he had brought frozen milk.

Petitioner said they had to work fast so the milk would not spoil and there were many crates of milk jugs stacked up to stock. The milk was put on a rolling cart they used to roll merchandise onto the floor, in this case to put the milk into the refrigerator. They had to look at the date on the milk that was already in the refrigerator to make sure it was not out of date. They would then transfer milk from the refrigerator into a shopping cart to make room to put the new milk in the refrigerator. They would move down the line of refrigerators to get the bad milk out and put it in the cart. As they were doing this she noticed that some milk they had taken out of the refrigerator was leaking.

Petitioner said she informed the other worker that was with them, who she believed was named Kayla, that the milk was leaking. Kayla went to get some equipment or substance to soak up the milk. While Kayla did this Petitioner said she walked around her to where the milk spilled, around the aisle which held Pepsi drinks. She said while she was coming up the aisle to meet where everybody was at, she slipped and fell, holding onto a yellow cart which was on the side of that aisle. She said she fell onto her right side. She said she slipped on either the milk or water that was on the floor, as it was raining that day. She said she fell onto her right shoulder, with her hand reflexively hitting the ground first, to brace her. She said she hit her funny bone and had some

tingling with that in her neck and shoulder. She said she had not experienced that tingling sensation before that fall.

Petitioner said she reported this to the manager, Tammy Rodriquez, who was present at the arbitration hearing, and who she said witnessed her fall. Ms. Rodriguez said at first that she was going to have to send Petitioner home, but Petitioner told her she was okay, that it was just a fall, nothing to be concerned about, that she did not need to go home, that she was okay. She said Ms. Rodriguez insisted on sending her home, however, so Petitioner called her father and her father came to the store. She said at that point Ms. Rodriquez said Petitioner could stay at the store, she was not going to let her go home. Petitioner said her father therefore left.

Shortly after her father left, Petitioner said Ms. Rodriguez got a call from the manager at Respondent's MacArthur store who needed someone to drop off a deposit. Ms. Kayla knew how to do that, so she was sent to make the deposit. A Pepsi truck arrived and a heated discussion apparently ensued between the driver and Ms. Rodriguez, although Petitioner did not name who was arguing, just noting she was called into the conversation so she could learn how to do the Pepsi. Petitioner said that at this point she was holding her shoulder because it was tingling. Ms. Rodriguez then said she was going to send Petitioner home as her arm was still hurting, and Petitioner again said no, she did not need to go home, and asked if she could just do some computer based learning on how to be a store manager. Ms. Rodriguez said no, she did not think the district manager would want her to do that.

Petitioner said she therefore needed another ride so she called her boyfriend to have him call Mr. Al, her neighbor, to have him pick her up as her dad had to go to work. Petitioner said Mr. Al came to pick her up and Ms. Rodriguez again said she was not going to let Petitioner go home, she could stay at the store. Petitioner said Mr. Al then left and Petitioner then went to the back and began working the frozen stuff with her left arm as the other was still tingling a bit. At this point Kayla came back to the store and came to where Petitioner was and wondered if Ms. Rodriguez was going to send Petitioner home, and Petitioner told her she was not, and while her hand was a little swollen, she would be okay.

Petitioner thought Ms. Rodriguez must have thought Kayla was having a conversation that she should not have as she called Petitioner back into the office and said she needed to know what Petitioner and Kayla were talking about. Petitioner told Ms. Rodriguez that it wasn't really her business, that Petitioner "was grown," and they were not talking about Ms. Rodriguez. Petitioner said that at this point she was very upset, told Ms. Rodriguez they were talking about her hand, but again noted it was none of Ms. Rodriguez's business. Petitioner said Ms. Rodriguez then left the office and spoke to Kayla, and brought Kayla towards Petitioner and then asked Kayla what they had been talking about. Petitioner said Kayla told Ms. Rodriguez that they had

been talking about Petitioner's hand, and Ms. Rodriguez contradicted her, saying they had been talking about something else. Petitioner repeated that they were only talking about her hand and Ms. Rodriguez said Petitioner was lying, and was to get out of the store immediately, out into the rain, since she did not have a car there. Petitioner said she then tried to call the district manager, but had to leave a voice message telling him that Ms. Rodriguez had kicked her out of the store, that it was raining and now she had to get a ride with a stranger. She left a message that she had fallen and had missed two rides to go home as Ms. Rodriguez would not let her go home.

Petitioner said she then went home. The next day, Saturday, she sent Ms. Rodriguez a message advising her that she would not be at work as her arm was still sore. She said the arm was sore that day, but she could move it, it was not to the point where it was frozen, as it was on Sunday. She said on Sunday it was horrible, it felt like it was frozen in place, and her hand was quite swollen. She therefore went to the clinic on MacArthur, where they took x-rays and gave her a sling. She was told she had to come back the next day to the clinic to see the workers comp people.

She went back to see the workers comp people and they reviewed her hand. They said her hand was so swollen they would have to cut the rings off of her hand.as they could not examine it like that. She said they cut the rings off of her fingers and they then immediately sent her to the Orthopedic Center. She said she told the doctor or nurse practitioner she saw that she had fallen at work, and they sent her for an MRI and they wanted to see her again after the MRI was done. She said the MRI has never been completed as it was not authorized by worker's comp, and she therefore has not been able to go back to the doctor. She said she tried to go back to HSHS, the clinic she had initially gone to, but was told they could not do anything and she should go back to Orthopedics.

Petitioner said that as of the date of arbitration she could not carry anything heavy due to sharp pain in her shoulder. She said if she carried anything with her right hand she had to carry it up against her body. She said she did not have full function of her hand, it was swollen, and while she is a furniture refurbisher, she cannot squeeze the staple gun as much as she could and has to take continuous breaks. She said she had a sharp pain in her neck, that it would start to hurt and then her entire right arm would start to swell. She said the majority of the swelling was in her hand and sometimes it was in her neck area. She said she had less strength in her right arm, she could not carry a gallon of milk on her side. She said she had not had any of these problems prior to her fall at work.

On cross-examination Petitioner said she did not want to answer Ms. Rodriguez's questions because of the way she came at her. She said it wasn't about her shoulder, it was about what they were talking about. She

said Ms. Rodriguez was present when she fell and asked if she was okay and Petitioner told Ms. Rodriguez that she should be okay. Petitioner said that she did not go home immediately that day as it wasn't so extreme that she had to go home at that time.

Petitioner said that when working by the freezers before her fall she knew that milk was leaking. She said she did not just walk into the milk on the floor, she walked around the milk to another aisle to in front of where the milk had spilled. She did not think the milk was there on the side of the cart where she fell as the milk was in the front of the aisle and she was coming up the side of the aisle when she fell.

Petitioner said she had a previous workers' compensation claim which involved her leg in Arizona, probably in 2015.

Petitioner said she had grabbed onto a cart that was in the aisle near the freezers, when she fell, but you could see the freezers from where the cart fell. The cart itself was not by the freezers. She said the freezers were in aisle one, and she had walked down aisle two to get away from the milk, and then she came to the area of the cart and you could see the freezers from there.

Petitioner said that when she first presented to HSHS they examined her hand, which was swollen, and x-rayed it as well as her shoulder.

On re-direct examination Petitioner said the cart she was next to when she fell was not the cart with the milk in it, nor was it near the cart with the milk in it. She was going towards the aisle, approaching the milk and refrigerators.

Tammy Rodriguez

Respondent called Tammy Rodriguez as a witness. She testified that she is employed at Dollar General, and was so employed on December 18, 2020, at the East Ash store. Both at that time and at the time of arbitration her job title was store training manager. She said she was familiar with Petitioner's incident as she had witnessed it. She said when half the milk was delivered frozen it had to be put in coolers as it could not be taken to the floor and stocked. The milk which was not frozen was placed in carts to be pushed out to the floor, by the freezers and coolers. The freezers are further down the aisle, past the coolers, and it was at the coolers that Petitioner fell. They were going to put the fresh milk in the coolers, and the other material had already been taken out of the coolers. The shopping carts with the fresh milk were then taken to the coolers. She could not tell if there was milk leaking as she was receiving the truck and pushing the carts out to Ms. Kayla and Petitioner so they could get the product onto the floor as there was a time limit on how long it could take.

Ms. Rodriguez said she was not advised of there being milk on the floor, she did not realize it until after Petitioner had fallen. She had not seen the milk before the fall, she did not see it until she ran the video footage from their CCTV, and she then found the milk, which she described as "little dribbles of milk in certain spots by where Kayla and Kim were working." She said she could see the milk on the video before the fall. She said she took a video of it on her phone and sent it to her boss so he could get it to risk management. She said she still had that video on her phone.

The witness then showed the video to counsel and the arbitrator and noted that she was the person in the elf hat towards the freezers, Kayla was the person with red hair standing next to the cart, and Petitioner was walking down the aisle, Petitioner being the person in braids who falls. Ms. Rodriguez said the white spots on the floor was the spilled milk, and that it was located exactly where Petitioner fell. She said there were five spots of milk on the floor, some of those spots were approximately three inches in diameter.

Counsel for Respondent agreed to have the video copied and a CD sent to the arbitrator and it would be admitted as Joint Exhibit 1.

Ms. Rodriguez said she asked Petitioner if she was okay and Petitioner said she was fine, though it hurt a little. She asked Petitioner if she needed to go home and said she needed to call the district manager, but Petitioner said she was fine. She said she watched Petitioner from the office and Petitioner was just using one arm. She said you cannot use just one arm to do freight due to time limits on getting the freight out, so she again asked Petitioner if she was okay and Petitioner again said it hurts but she was going to work her shift out. After returning to her office she observed Petitioner talking to Kayla. She said Kayla told her that when she got back from the bank Petitioner spoke with her and asked Kayla if Ms. Rodriguez was going to allow Petitioner to go home. Ms. Rodriguez testified that she did not know Petitioner wanted to go home as she had not brought that to her attention. She said Petitioner said she couldn't go home, she needed the money and she was going to try to work through it. She said if Petitioner had asked to go home she would have allowed her to do so. She said she had paperwork to do with the manager and risk management, a report needed to be made right away. She said it was company protocol to send an employee home if they were injured.

Ms. Rodriguez testified that Kayla was not present as she was currently on leave.

Ms. Rodriguez said she at no time prevented Petitioner from going home.

Over objection Ms. Rodriguez testified that from the video it looked like Petitioner intentionally fell. She said her opinion was not based on her actual observation of the fall, but from the video, as she could not actually see her when she fell. The arbitrator then reversed his previous ruling allowing her to testify to her opinion of it being an intentional fall as she had not actually seen the fall and everyone could review the video and come to their own conclusion.

Ms. Rodriguez said that she did not see Petitioner holding her hand, it was always her shoulder. She said that while she subsequently saw Petitioner working, it was always with the opposite hand, and she held her right hand and arm close to her body.

Ms. Rodriguez said she knew Petitioner's father had come to the store, to check on her, but was unaware that he had come to pick her up, and Petitioner never made an attempt to tell her he was there to pick her up. She said she asked Petitioner numerous times if she was okay and she kept saying she was fine.

Ms. Rodriguez said she believed Kayla decided later to get absorbent pads to clean up the milk.

On cross-examination Ms. Rodriguez said she did not fill out paperwork about the accident, she called a team and a nurse took all of the information. She could not remember the date she did that, it would not have been on the date of the accident, but it would have been within a few days.

Ms. Rodriguez said that after the fall Petitioner was holding her shoulder and only using one hand, and that she had not done that prior to the fall.

MEDICAL EVIDENCE

On December 20, 2020 Petitioner was seen by Dr. Arun Gunda at Priority Care complaining of right shoulder pain of two day after falling at work onto a hard surface. She said that since that time she has been unable to moved her shoulder, and it became progressively stiffer. She said she had 8/10 pain which was worse with movement. Physical examination revealed decreased range of motion, tenderness, bony tenderness, swelling, and pain. X-rays of her right shoulder revealed lucency at the inferior glenoid rim which was concerning for an avulsion injury, and an MRI of the right shoulder was suggested. The diagnosis at that time was injury of the right shoulder, possible avulsion fracture of scapula, glenoid process. PX 1

Petitioner was seen the next day, December 21, 2020, at the Orthopedic Center of Illinois by Physician Assistant (PA) Robert Whitman for evaluation of the right shoulder and hand. She gave a history of slipping on milk at work on December 18, 2020 and falling with her right hand outstretched to break her fall, falling onto the right shoulder. She said the pain radiated into her neck and she had some numbness to her right thumb and index finger. She said the pain was 10/10 but the sling was helping her pain. Physical examination revealed difficulty with full finger flexion and weak grip strength in the right hand. While she had good elbow flexion, elbow extension was limited secondary to joint stiffness. PX 2

Examination of the right shoulder exhibited very limited active flexion and abduction, and a positive empty can test secondary to pain and weakness. Petitioner had increased pain with passive internal and external

rotation, as well as weakness to resisted external rotation. She had relatively normal internal rotation of the right shoulder. The x-rays previously taken were interpreted to confirm the lucency along the inferior aspect of the right glenoid which he, too, felt was consistent with an avulsion fracture. X-rays were taken that day of the right hand, and they revealed no fracture. PX 2

PA Whitman's impression was right shoulder pain with a concern for possible underlying rotator cuff tear after a fall and well as right hand pain and swelling status post fall. He felt the mechanism of injury was FOOSH (falling onto an outstretched hand). He advised her to continue using the sling and to work on elbow flexion and extension as the elbow was beginning to get very stiff in the antecubital fossa. Hydrocodone for pain was prescribed and he said they needed to get an MRI set up of the right shoulder, but noted that "was pending work comp approval." He was of the opinion that most of the right hand pain was due to swelling that was tracking down the arm due to gravity, as she said it would come and go. PX 2

PA Whitman issued a Work Status sheet on December 21, 2020 stating that Petitioner was to be excused from work until she had her MRI and had received her results from that test. PX 4

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner

Petitioner appeared to be in physical and emotional distress while testifying. She guarded her right arm up against her body consistently, even when testifying while upset. Her testimony is totally consistent with the medical records and with the video of the incident itself, Joint Exhibit 1.

Petitioner seemed forthright and did not appear to make any attempt to avoid answering questions on cross-examination. She did not appear to be exaggerating her complaints while testifying. The Arbitrator is of the opinion she testified credibly.

Tammy Rodriguez

Ms. Rodriguez was very defensive in her testimony. She had been present in the hearing room as the company representative during Petitioner's testimony, testimony which was quite critical of Ms. Rodriguez. She contradicted Petitioner's testimony in regard to being told to go home, yet acknowledged Petitioner's father had come to the store, seemingly to take Petitioner home. Her going back to watch Petitioner interact with a co-worker and then questioning both workers about what they were talking about appear somewhat paranoid, as did her denying seeing the accident when she was pictured in the video itself. The video clearly showed areas of milk on the floor that were individually up to three inches in diameter, but Ms. Rodriguez described them as

little splatters. Ms. Rodriguez did not deny ordering Petitioner out of the store into the rain or refusing to allow her to do other job tasks, such as watching training videos. The Arbitrator did not find Ms. Rodriguez to be very credible.

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 December 18, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, above, are incorporated herein.

In order for a claimant to be entitled to workers' compensation benefits, the injury must "arise out of" and occur "in the course of" the claimant's employment. 820 ILCS 305/1(d) (West 2014). Both elements must be present at the time of the accidental injury in order to justify compensation. *Illinois Bell Telephone Co. v. Indus. Comm'n*, 131 Ill. 2d 478, 483 (1989). Therefore, in order to obtain compensation under the Act, a claimant bears the burden of proving by a preponderance of the evidence two elements: (1) that the injury occurred in the course of claimant's employment and (2) that the injury arose out of claimant's employment. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203 (2003).

Here, there can be no dispute that the injury occurred in the course of Petitioner's work. She had been at work, in Respondent's store, performing her duties for over two hours when her fall occurred. Her duties required her to remove old milk from the refrigerators and place it in shopping carts and put new milk in the refrigerators. In the course of doing that milk leaked onto the floor. While continuing to perform her work tasks Petitioner clearly stepped into some spilt milk, slipped and fell onto her right side, as evidenced by the video shown at arbitration. The fall was sudden and swift. Even Respondent's store manager trainer, Ms. Rodriguez, testified that Petitioner fell exactly where the milk was located, as shown in the video. The fall therefore arose out of Petitioner's employment.

The Arbitrator finds that the Petitioner suffered an accident on December 18, 2020 which arose out of and in the course of her employment by Respondent. This finding is based upon the testimony of both the Petitioner and Respondent's witness as well as the video of Petitioner's fall. The best evidence is the video which clearly shows the Petitioner suffering a sudden fall while walking in an area where milk had spilled, landing on her right hand and arm.

In support of the Arbitrator's decision relating to whether Petitioner's current condition of ill-being, right shoulder injury, with possible avulsion fracture and possible rotator cuff tear, and swollen right hand, is causally related to the accident of December 18, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, above, are incorporated herein.

The findings in regard to accident, above, are incorporated herein.

Petitioner testified that she had not had right shoulder or hand problems prior to her fall on December 18, 2020. Ms. Rodriguez testified that Petitioner had never exhibited any signs of injury to her right hand or shoulder prior to her fall on December 18, 2020. No medical records were introduced indicating Petitioner had a prior condition of ill-being prior to December 18, 2020. Petitioner was seen at Priority Care two days following the fall and x-rays showed abnormalities, a lucency at the inferior glenoid rim, which was concerning for an avulsion injury, and Dr. Gunda suggested an MRI of the right shoulder be performed. The diagnosis at that time was injury of the right shoulder, possible avulsion fracture of scapula, glenoid process. On December 21, 2020 Petitioner was examined at Orthopedic Center of Illinois and PA Whitman's interpretation of the x-rays was the same. Petitioner had numerous objective abnormalities on physical examination at that time and in addition to the possible avulsion fracture of the scapula, the physical examination led PA Whitman to the conclusion of a possible underlying rotator cuff tear. An MRI of the right shoulder was ordered, "pending work comp approval."

The Arbitrator finds that the Petitioner's current condition of ill-being, right shoulder injury with possible avulsion fracture and possible rotator cuff tear, and swollen right hand, is causally related to the accident of December 18, 2020. This finding is based upon the Petitioner's testimony and the medical records offered into evidence, as well as the testimony of Respondent's witness that Petitioner was not exhibiting signs

of injury prior to her accident but did so immediately thereafter. A clear chain-of-events exists in this case proving causation, as Petitioner was in an apparent good state of health, with no evidence to the contrary, she suffered a sudden, traumatic accident, and she immediately, in the moments, hours, days and weeks following that accident, had severe right arm and shoulder pain and abnormal objective findings, including x-rays consistent with an avulsion fracture. As Petitioner's treatment has been very limited due to lack of authorization of the MRI ordered by the Orthopedic Center, the exact nature of that injury is not yet well defined, but the records suggest injury to Petitioner's right hand and shoulder and possibly her neck to be defined by further testing and treatment.

In support of the Arbitrator's decision relating to notice, 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.

Respondent's supervisor was present at the time of the December 18, 2020 fall. Respondent's supervisor immediately viewed closed circuit video of the incident and recorded that video onto her phone, which she exhibited to the attorneys and arbitrator at the arbitration hearing and which she testified she had immediately sent to her district manager. That video clearly exhibited the milk spilled on the floor and Petitioner slipping and falling where the milk was located. Petitioner and her supervisor discussed the fall and Petitioner's injuries in the moments following the fall.

The Arbitrator finds that Petitioner provided Respondent with notice of the December 18, 2020 fall within the 45 days following the accident. This finding is based upon the supervisor being present at the time of the fall and later that same morning viewing the fall on closed circuit video and her testimony that she forwarded the video of the fall to her district manager that same day.

In support of the Arbitrator's decision relating to what temporary benefits Petitioner is entitled to as a result of the accident of December 18, 2020, 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 notice, above, are incorporated herein.

Respondent's supervisor, Tammy Rodriguez, sent Petitioner home on December 18, 2020 due to the injuries she incurred in this fall. Petitioner texted Ms. Rodriguez the next morning, December 19, 2020, stating she would not be in to work that day as her shoulder was hurting. Petitioner went to Priority Care on December 20, 2020 complaining of shoulder pain and a possible avulsion fracture was seen on x-ray of the shoulder, and an MRI was recommended, and a sling provided. Ms. Rodriguez testified that Petitioner could not work with one arm, that was the reason she was sent home on December 18, 2020. Petitioner was seen on December 21, 2020 at Orthopedic Center of Illinois where after examination an MRI of the right shoulder was ordered, "pending work comp approval," and she was restricted from work "until she has had her MRI and has received results."

The Arbitrator finds that Petitioner was temporarily totally disabled as a result of the accident from December 19, 2020 through March 31, 2020, the date of the arbitration hearing, a period of 14 5/7 weeks. This finding is based upon the testimony of Petitioner, the testimony of Ms. Rodriguez, the medical records and the work status slip of December 21, 2020.

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 December 18, 2020, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

The summaries of medical evidence, above, are incorporated herein.

The findings in regard to accident, causal connection, notice and temporary total disability, above, are incorporated herein.

The medical to date has been minimal, due to the delay in obtaining approval for the recommended MRI. Petitioner's medical treatment has been limited to treatment on December 20 and 21, 2020, in the days immediately following this accident. The billing for that treatment at Priority Care and Orthopedic Center of Illinois, as evidenced by Petitioner Exhibit 3, is entirely for treatment to the right upper extremity, the area injured in this accident, and appears to be reasonable and necessary to treat or cure Petitioner for the injuries suffered in the accident of December 18, 2020.

The Arbitrator finds that all of the bills introduced into evidence in Petitioner Exhibit 3 are related to Petitioner's right shoulder, arm and hand injuries, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident and are to be paid by Respondent pursuant to the Medical Fee Schedule. This finding is based upon the testimony of Petitioner and the medical records introduced into evidence.

In support of the Arbitrator's decision relating to whether Petitioner is entitled to any prospective medical treatment, 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, notice, temporary total disability, and medical, above, are incorporated herein.

Both the Dr. Gunda and PA Whitman recommended an MRI be performed on Petitioner's right shoulder. Workers' compensation approval was required prior to the performance of that test. Respondent denied liability for this accident and no such approval was given, necessitating this arbitration proceeding.

The Arbitrator finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Gunda and PA Whitman, to wit, an MRI of Petitioner's right shoulder. This finding is based upon the medical records of Priority Care and Orthopedic Center of Illinois and Petitioner's testimony in regard to her complaints.

The Arbitrator further finds that based upon the testimony of Petitioner and the records of Priority Care and Orthopedic Center of Illinois, Petitioner has not reached maximum medical improvement, continues to be disabled and is in need of additional medical testing and treatment.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	09WC035111
Case Name	OCEGUERA, CARLOS v. ACCURATE COMFORT SYSTEMS
Consolidated Cases	
Proceeding Type	8(a)/19(h) Petition
Decision Type	Commission Decision
Commission Decision Number	22IWCC0062
Number of Pages of Decision	14
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Matthew Jones
Respondent Attorney	Elaine Newquist

DATE FILED: 2/18/2022

/s/ Deborah Baker, Commissioner

Signature

22IWCC0062

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARLOS OCEGUERA,

Petitioner,

vs. NO: 09 WC 35111

ACCURATE COMFORT SYSTEM,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(h) & §8(a) OF THE ACT

This matter comes before the Commission pursuant to Petitioner's Petition for Review Under §19(h) or §8(a) of the Act ("Petition"), alleging a material increase in his disability since the Corrected Decision of the Arbitrator dated July 20, 2015. A hearing on the Petition was held before Commissioner Deborah J. Baker on August 26, 2021 and a record was made. After reviewing the record in its entirety and being advised of the applicable law, the Commission grants Petitioner's Petition and finds that Petitioner established a material increase in his condition as required under Section 19(h) of the Act for the reasons set forth below.

I. FINDINGS OF FACT

A. Procedural History and Background

On July 30, 2009, Petitioner was working construction for Respondent when he suffered a work-related injury to his lumbar spine, which led to him undergoing two spinal surgeries with Dr. Ronjon Paul, including a microdiscectomy at L5-S1 on July 29, 2010, and a revision discectomy on November 8, 2010. In the following weeks, Petitioner began experiencing severe headaches. By February 22, 2011, Petitioner's lower back pain had also returned. Dr. Paul referred Petitioner to physiatrist Dr. Jeffrey Oken, and neurologist Dr. Henry Echiverri for his headaches. By September 19, 2011, Dr. Echiverri desired to refer Petitioner back to a neurosurgeon for possible repair of a cerebral spinal fluid leak. Dr. Echiverri provided Petitioner with a list of surgeons, and Petitioner chose Dr. Ramsis Ghaly. Eventually, Dr. Ghaly

recommended a third surgery in the form of bilateral L5-S1 laminoforaminotomies, a bilateral L5-S1 nerve root decompression, and posterior lumbar interbody fusion with hardware implantation. These procedures were performed on July 6, 2012. Subsequently, Petitioner experienced some relief of symptoms, although he continued to have some pain and functional deficits due to his condition. On May 16, 2013, Dr. Ghaly opined that Petitioner would always have some pain, numbness and tingling, and that he could have more back pain if he returned to work. On June 20, 2013, Dr. Ghaly released Petitioner from care. He was doing well but still suffered from functional deficits and daily pain. He still had back pain with right leg and buttock pain when lifting 35 pounds frequently. He was limited to lifting 30-35 pounds regularly. Petitioner never returned to work for Respondent, and did not work at all again until 2015. However, he testified that his low back pain never felt like it was ever back to 100 percent.

On July 20, 2015, Arbitrator Carlson filed a Corrected Decision finding that Petitioner's current condition of ill-being was causally related to the stipulated July 30, 2009 work accident. The Arbitrator found that Petitioner's injuries caused permanent partial disability to the extent of a 45 percent loss of a person-as-a-whole. The Arbitrator also found Respondent was entitled to credit in the amount of $21,170.67 for overpayment of maintenance benefits. The credit was to be applied against the amount awarded to Petitioner for permanent partial disability benefits.

On September 19, 2017, Petitioner filed the instant Petition, and a hearing was held before Commissioner Deborah J. Baker on August 26, 2021.

B. Work and Medical History after the March 2, 2015 Arbitration Hearing

At the August 26, 2021 Commission hearing, Petitioner testified through a qualified interpreter that his lumbar pain continued after the 2015 trial, and that at some point he gained employment with DHL as a forklift driver. Petitioner testified that this job was within his permanent restrictions. He testified that his back condition was never 100 percent remedied and he continued suffering from low back and right leg pain.

Petitioner began treating for chronic low back and radicular symptoms in May 2016 at Dreyer Medical Center. As noted in the referenced case no. 17 WC 13691, he treated there from May 5, 2016 through June 28, 2016 complaining of chronic low back pain with occasional radiation down the right leg.[1] The medical records indicate that Petitioner informed Dr. Janaki Natarajan he was initially injured while doing construction. The records also indicate he had returned to work one year ago at a job requiring a lot of bending and lifting and his pain had recurred over the last few months. It was noted that Petitioner's pain recurrence coincided with his increase in repetitive lumbar strain with bending/lifting of boxes at his new job. A lumbar spine MRI and physical therapy were ordered.

Physical therapy began on May 13, 2016. The record reflects Petitioner informed the physical therapist of his initial 2009 work injury, and that Petitioner indicated he had recently worked as a Forklift Driver, "stocking boxes, lifting etc." Petitioner also reported that his back pain was tolerable. However, he had started his new job two months before, which required

[1] The trial transcript from the hearing in case 17 WC 13691 was included as Respondent's Exhibit 6 in the instant case and is incorporated by reference.

bending, lifting, sitting and standing for prolonged periods. His pain had worsened in the last month.

The May 23, 2016 lumbar spine MRI revealed post-operative changes without evidence of complications and non-specific thickening of the right S1 nerve root with some enhancement which can be in the basis of radiculitis. Four days later, Dr. Natarajan opined that the MRI did not fully explain Petitioner's extreme worsening pain.

On June 6, 2016, Petitioner was referred by Dr. Natarajan to Dr. Reggie M. Augusthy. Petitioner informed Dr. Augusthy that his symptoms had not improved. Dr. Augusthy reviewed the MRI and agreed with Dr. Natarajan that there was no obvious pathology to explain Petitioner's symptoms. Dr. Augusthy diagnosed bilateral low back pain with right-sided sciatica.

Petitioner testified (in case no. 17 WC 13691) that after undergoing a lumbar epidural steroid injection on June 28, 2016, he had almost no pain for a while. Petitioner testified that his lumbar pain was a three or four out of ten after undergoing injections, whereas after his April 26, 2017 injury, it increased to an eight or nine out of ten.

Petitioner began working for HIPP Temp Staffing on March 20, 2017. Petitioner testified that he had very little low back problems at the time, and did not miss any work due to his back until April 26, 2017 when he developed increased back pain while working for HIPP Temp Staffing. On this date, an emergency room record from Presence Mercy Hospital indicated that Petitioner was experiencing worsening back pain. He was doing his typical job of standing and grinding ten to fifteen-pound metal pieces when he started experiencing low back pain yesterday and today. He also felt numbness down both legs and weakness as if he was about to fall, but he laid down to resolve the numbness. Petitioner testified he has not worked since this time. An Employer's Form 45 indicates Petitioner sustained a bending and twisting injury.

At Arbitration in case no. 17 WC 13691, a job description video was admitted into evidence and viewed. The video purports to depict the duties of a Grinder. The video shows a worker performing the following actions: reaching to grab a metal piece out of a box that is approximately waist-high, bringing the piece in front of him, grinding the piece on different sides with a hand-held tool, and throwing the piece into a bin or box that is on the opposite side of where the worker initially grabbed the piece. Petitioner testified that his duties were "something like that," but that the box where he retrieved the metal pieces was "almost always" on the ground, and that he would bend over to retrieve the pieces.

On May 3, 2017, Petitioner followed up at the Presence Mercy emergency room due to his low back pain radiating down his right leg after increased bending and twisting at work last week. He denied any numbness and tingling. He was diagnosed with lumbar radiculopathy and referred to a back specialist.

On May 25, 2017, Petitioner treated with Dr. Vivek Mohan at DuPage Medical Group, complaining of low back pain with bilateral leg pain which began several years ago. The specific injury referenced was a work injury seven years prior. Petitioner treated with Dr. Mohan because Dr. Paul was no longer with the practice group. Petitioner also noted another injury on April 26,

2017, which resulted in more back pain and numbness in his legs. Petitioner reported he had been off work ever since due to pain. It was noted that Petitioner could barely walk, but denied leg weakness. An examination revealed a positive straight leg raise on the right and moderate pain with lumbar range of motion. Physical therapy, medication, and a lumbar spine MRI were recommended as Dr. Mohan suspected a new herniation at L4-5. Dr. Mohan placed Petitioner off work.

On June 9, 2017, Petitioner underwent the MRI, revealing L5-S1 postoperative changes with minimal granulation tissue surrounding the posterior aspect of the disc space. Thickening of the right S1 nerve was noted but was unchanged since the May 23, 2016 lumbar spine MRI.

A CT scan was performed on June 14, 2017 and revealed post-surgical changes at L5-S1. The hardware was intact and there was a solid fusion.

On June 22, 2017, Dr. Mohan noted mild tenderness to palpation over the posterior instrumentation at L5-S1. The CT scan revealed that the fusion was well-healed. A surgical discussion was had, as Dr. Mohan noted the hardware seemed to bother Petitioner significantly. Dr. Mohan noted that once the procedure was cleared, he would proceed with surgical removal of the hardware that had been inserted during the July 2012 fusion surgery. Dr. Mohan did not recommend any further fusions at L4-5, but did approve of further injections at that location. Dr. Mohan recommended Petitioner remain off work.

On December 13, 2017, Petitioner underwent a Section 12 examination with Dr. Edward Goldberg at Respondent's request. Petitioner provided a history of low back pain with bilateral lower extremity numbness to his feet. Petitioner's three prior surgeries were noted, as well as the fact that he continued having back pain after the lumbar fusion, although it was a significant improvement from before the fusion. Petitioner indicated he had no medical treatment for one year leading up to the April 26, 2017 accident. Dr. Goldberg reviewed the job video, medical records from 2010 through 2016, and post-accident treatment through July 5, 2017. Dr. Goldberg opined that the job duties depicted in the video did not aggravate Petitioner's lumbar condition, and records revealed Petitioner had chronic right lower extremity symptoms one year before the April 26, 2017 accident. Dr. Goldberg did not recommend removal of the surgical hardware, as he did not believe it was the cause of Petitioner's pain, since there is nothing suggesting any loosening of lumbar pedicle screws and the fusion had healed.

On March 16, 2018, Petitioner treated with Dr. Krishna C. Chunduri at Illinois Orthopedic Network. Dr. Chunduri noted worsening lumbar pain with ongoing radiculopathy down to the right foot. Dr. Chunduri also noted that Petitioner's MRI did not reveal any significant pathology other than the post-surgical site. He opined it was possible that there was some aggravation in the area of the surgical site, thus he recommended a right sided epidural injection.

On April 2, 2018, Dr. Avi Bernstein at the Spine Center performed a records review at the request of Respondent. He referenced a May 4, 2016 incident in Petitioner's records which did not result in any treatment. Dr. Bernstein also noted the April 26, 2017 accident, wherein Petitioner had subjective complaints with no objective findings diagnostically. Dr. Bernstein opined that Dr.

Mohan's recommendation for hardware removal would be based on Petitioner's subjective complaints. Finally, he opined that if Petitioner was experiencing hardware-related pain, it would be related to the April 26, 2017 accident.

On May 14, 2018, Petitioner underwent a Section 12 examination with Dr. Bernstein at Respondent's request. Petitioner complained of severe low back pain radiating to his legs. Petitioner indicated that during the April 26, 2017 accident he was standing at his job grinding parts weighing up to twenty to thirty pounds. He had to bend and lift these parts, but over time developed severe back pain. Dr. Bernstein noted Petitioner moved slowly with a guarded gait, had minimal bending capability, intact strength and a negative straight leg raise test. Dr. Bernstein reviewed a multitude of diagnostic studies, including the May 23, 2016 MRI which revealed a prior fusion but was otherwise normal, as well as a June 9, 2017 MRI which revealed the same. Dr. Bernstein again found hardware removal to be reasonable, and again opined that the April 26, 2017 accident was the aggravating factor leading to Petitioner's current treatment.

On August 16, 2018, Dr. Bernstein provided an addendum report after reviewing pre-accident medical records from 2016, including a May 5, 2016 visit with Dr. Natarajan, physical therapy with Dreyer Clinic on May 13, 2016, a May 23, 2016 MRI, and a June 28, 2016 injection. Nevertheless, his opinions remained unchanged.

On September 25, 2018, Dr. Bernstein provided another addendum report after reviewing the job description video. He opined that the duties depicted in the video were at the light, physical demand level and would not result in a lumbar spine injury. However, since the injury history offered by Petitioner described bending and lifting activities, Dr. Bernstein's causation opinion remained unchanged as such activities would result in the instant injury.

On February 6, 2019, Dr. Goldberg drafted an addendum report to his initial December 13, 2017 Section 12 examination report. He reviewed diagnostics that were not available at the time of his initial report as well as Dr. Bernstein's records. Dr. Goldberg noted that he saw no diagnostic evidence of nerve compression that would substantiate Petitioner's lower extremity radicular complaints. He reiterated that records show Petitioner had residual right leg complaints prior to the April 26, 2017 accident, that the job video did not depict any bending, lifting, or twisting, and that the hardware was not the cause of Petitioner's pain.

In April 2020, Petitioner's Counsel requested a narrative report from Dr. Mohan. Dr. Mohan was provided additional evidence, including a job description video and records from Dr. Ghaly, Dr. Bernstein, Dr. Goldberg, and his former partner Dr. Paul. Dr. Mohan opined that the job duties of repeated bending and the vibration of the tool used were highly likely to have aggravated Petitioner since his pain got worse during that time. Dr. Mohan testified that Petitioner's back is not as strong as one that has not been operated on, which causes stiffness and places more force on the area, which can aggravate the arthrosis and muscles around the screws. Dr. Mohan opined that the need for removal of the screws is causally related to the July 2009 accident, noting that Petitioner's condition never fully resolved after said accident.

C. Deposition Testimony

i. Dr. Vivek Mohan

Dr. Mohan is a board-certified orthopedic surgeon. He reiterated that when he first treated Petitioner on May 25, 2017, Petitioner indicated his low back and bilateral leg pain had been ongoing for seven years. He also reiterated that on June 22, 2017, Petitioner had significant tenderness to palpation over the inserted screws which were near the facet joints of L4-5. Dr. Mohan opined that the screws were causing Petitioner's pain, thus leading to his recommendation for surgical removal of them. Dr. Mohan acknowledged that the Petitioner's 2012 fusion was still solid, and the screws were not loose; however, if the screws were abutting the facet joints, repeated extension of the lumbar spine could cause arthritis and pain. Dr. Mohan acknowledged that this occurrence is not very common in his own personal experience because of his careful placement of screws during surgery, but stated that even if the best technique is used, pain could still occur after occurrences such as repetitive activity, a car accident, a fall or an injury. Accordingly, he recommended removal of the screws.

Dr. Mohan confirmed that in April 2020, Petitioner's Counsel requested a narrative report from him. Dr. Mohan opined that Petitioner's job duties of repetitive bending and using vibratory tools while working at HIPP Temp Staffing were highly likely to have aggravated Petitioner since his pain worsened during that time. Dr. Mohan testified that Petitioner's back is not as strong as one that has not been operated on as the type of operation that Petitioner underwent causes stiffness and places more force on the area, which can aggravate the arthrosis and muscles around the implanted screws. Dr. Mohan opined that the need for removal of the screws is causally related to the July 2009 accident, relying on the evidence that Petitioner's condition never fully resolved after said accident. Accordingly, Dr. Mohan disagreed with Dr. Bernstein's opinion that the hardware removal is causally related to the April 26, 2017 accident.

On cross examination, Dr. Mohan acknowledged that in June 2017, Petitioner informed him of intermittent pain over the last two years since his fusion. Dr. Mohan noted that, while the fusion had actually taken place five years earlier, degeneration of facet joints can take time. He also pointed out that Petitioner had also complained of intermittent low back and radicular pain as far back as 2013, just one year after the fusion.

Dr. Mohan opined that the hardware was likely causing an issue one year after the 2012 fusion, but Petitioner had not returned to a full workload yet, so he had not pushed the limits of his back. Nothing had structurally changed in Petitioner's back, but his symptoms just progressed over time.

Dr. Mohan acknowledged that the April 26, 2017 incident was an aggravating factor. It accelerated Petitioner's ongoing pain since his fusion, but did not cause any new herniations. Dr. Mohan testified that Dr. Goldberg's disagreement with Dr. Mohan and Dr. Bernstein regarding the cause of Petitioner's pain is simply a matter of opinion. Dr. Mohan stated that assessing pain origination is difficult, but that the hardware removal is not an aggressive act, and is actually beneficial. He believes Petitioner may gain significant benefit from this removal.

ii. Dr. Avi Bernstein

Dr. Bernstein is a board-certified orthopedic surgeon. Dr. Bernstein testified he performed a records review on April 2, 2018 and a Section 12 examination on May 14, 2018. He also noted that Petitioner was initially injured while working construction in 2009, culminating in the July 2012 fusion surgery. He also referenced a May 4, 2016 incident during which Petitioner manifested some low back pain, but noted that there was not much in the way of related medical care.

During his Section 12 examination, Dr. Bernstein noted complaints of severe back pain in the area of Petitioner's prior lumbar spine surgery and implanted instrumentation that radiated to Petitioner's legs. He acknowledged that Petitioner's presentation and movements were consistent with someone experiencing low back pain possibly due to retained hardware. Dr. Bernstein found Petitioner to be credible, and thus agreed with Dr. Mohan's recommendation of hardware removal. Dr. Bernstein stated that there is scar tissue and muscle on top of hardware that can become inflamed. He referenced a former patient who was doing fine for 14 years after having hardware inserted and had no spinal issues. However, she then required hardware removal and had a great result because of it.

Dr. Bernstein subsequently drafted two addendum reports, the second of which is dated December 14, 2020. Dr. Bernstein had examined Petitioner again, noting that he was still tender to palpation in the low back and had non-radiating back pain with straight leg raise testing. Dr. Bernstein still recommended hardware removal surgery, but opined that it was causally related to the April 26, 2017 accident based on his assumption that Petitioner's job duties included bending, lifting, and twisting.

On cross examination, Dr. Bernstein agreed that but for the 2009 accident, Petitioner would not have had hardware inserted in 2012, and but for the 2012 fusion, there would be no need to remove any hardware present day.

II. CONCLUSIONS OF LAW

Section 19(h) of the Act states in relevant part:

> [A]s to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months… after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee has subsequently recurred, increased, diminished or ended.

In *Gay v. Indus. Comm'n*, 178 Ill. App. 3d 129, 132 (4th Dist. 1989), the Illinois Supreme Court explained that:

> The purpose of a proceeding under section 19(h) is to determine if a

> petitioner's disability has "recurred, increased, diminished or ended" since the time of the original decision of the Industrial Commission. (Ill. Rev. Stat. 1985, ch. 48, par. 138.19(h); *Howard v. Indus. Comm'n,* 89 Ill. 2d 428 (1982). To warrant a change in benefits, the change in a petitioner's disability must be material. *United States Steel Corp. v. Indus. Comm'n,* 133 Ill. App. 3d 811 (1985). In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the petitioner's position has changed materially since the time of the Industrial Commission's first decision. *Howard v. Indus. Comm'n*, 89 Ill. 2d 428 (1982). Whether there has been a material change in a petitioner's disability is an issue of fact, and the Industrial Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Id*.; *United States Steel Corp. v. Indus. Comm'n*, 133 Ill. App. 3d 811 (1985). (Citations Edited and page numbers omitted)

A. Causal Connection

Based on the record as a whole, including the transcript in case no. 17 WC 13691, the Commission finds that Petitioner's condition has changed materially since the July 20, 2015 Corrected Decision of the Arbitrator and Petitioner is now suffering from an increased disability which is still causally related to his July 30, 2009 injury. Accordingly, the Commission grants Petitioner's §19(h) and §8(a) petition.

The Commission finds that Petitioner's current condition is causally related to the July 30, 2009 accident, and that no intervening accident has broken the chain of causation. While Petitioner was doing well at the time of his June 2013 discharge from the care of Dr. Ghaly, he continued to experience back complaints at that time. Petitioner's back complaints continued subsequent to 2013, as evidenced by treating records of Dreyer Clinic in May of 2016 and Dr. Mohan in May of 2017. These records reflect that Petitioner had *chronic* back pain, and denote the inciting event to be a work injury that occurred in 2009, supporting a finding that Petitioner's pain never resolved after being discharged from Dr. Ghaly's care in 2013.

i. Petitioner's Credibility

Respondent questions Petitioner's credibility, arguing that Petitioner has initiated two separate claims for the same condition, and that his testimony in each case changed to fit each claim. Respondent argues that at the August 26, 2021 Commission hearing on the instant Petition, Petitioner testified that his current lower back condition was related to the July 30, 2009 accident and that although his pain was manageable after the 2009 accident, he was never "100 percent." However, in case no. 17 WC 13691, Petitioner named HIPP Temp Staffing as the Respondent and alleged that HIPP Temp Staffing should be liable for the recommended lumbar spine hardware removal due to the April 26, 2017 accident. Respondent notes that in that case, Petitioner testified that he had almost no pain for a while after undergoing the June 28, 2016 epidural steroid injection, and was basically fine until the April 26, 2017 injury. Contrastingly, in

the hearing on the instant Petition, Petitioner testified that he received no relief from this injection. Further, Respondent argues the record reflects that on May 5, 2016, Dr. Natarajan at Dreyer Clinic noted that Petitioner's lower back complaints were related to the work he had been doing over the past year. This record also indicates Petitioner had a recurrence of lower back pain after performing work duties that required a lot of bending. Thus, Respondent requests the Commission find that Petitioner has not presented a consistent credible basis for finding that his current condition is causally connected to the July 30, 2009 accident, and further requests the Commission find that causal connection terminated upon Petitioner's discharge from Dr. Ghaly's care in June of 2013.

The Commission finds that Petitioner was credible and that any inconsistencies in his testimony are inconsequential. The medical records support Petitioner's claim that after the July 30, 2009 accident, he improved, but his symptoms did not completely resolve. Additionally, Dr. Mohan opined that the hardware was likely causing an issue as early as 2013, but since Petitioner had not returned to a full workload yet, he had not yet pushed the limits of his back. Dr. Mohan's opinions are consistent with the medical records which show an apparent increase of symptomatology whenever Petitioner engaged in triggering work activity. Petitioner worked as a forklift driver in 2016. He testified that he still had pain, and although it was tolerable, it caused him to leave after a few months. From August to December of 2016, Petitioner was an Area Manager for Capital Building Supply, a commercial cleaning company. He would only clean occasionally when he had to fill-in for other workers. He then worked for Buck Services for a short time until he was hired and placed by HIPP Temp Staffing in March 2017. It was during this employment with repetitive activity and use of a vibratory hand-held grinding tool that Petitioner's aggravation manifested. Moreover, treating records of Dr. Natarajan at Dreyer Clinic in May of 2016 and Dr. Mohan in May of 2017 reflect that Petitioner had *chronic* back pain, which was related to his 2009 work injury. The record reflects that while Petitioner's back pain had improved after his 2012 surgery, it was nevertheless still present. The Commission notes that in light of Petitioner's lengthy history of lumbar spine problems, it would be understandable for him to report that his lumbar spine condition is related to both the 2009 work accident and the 2017 injury from the perspective of a lay person.

ii. Intervening Accident

The Commission acknowledges Respondent's apparent argument that Petitioner suffered new and presumptively intervening injuries in May 2016 and April 2017. The Commission disagrees.

Regarding a possible May 4, 2016 accident, Respondent argues it is possible that Petitioner had been injured while employed as a forklift driver. However, to find as such would amount to speculation, as there is no evidence in the record that an actual accident did in fact occur. This is supported by Dr. Bernstein's April 2, 2018 report, in which the May 4, 2016 date is referenced, but Dr. Bernstein noted that no medical treatment accompanied this date. Further, while there is a May 5, 2016 medical record, it reveals that Petitioner was treating for chronic low back pain stemming from a construction injury (which is the July 30, 2009 accident). It is important to distinguish that, in this note, it indicates that after surgical intervention Petitioner's *radicular* pain "resolved," while his *back* pain was simply "better," but was still present. His

back pain recurred with bending and lifting at his job at the time. Accordingly, the Commission finds that the objectively reasonable evidence supports a finding that no intervening accidents occurred in May of 2016, and that any back complaints Petitioner had at the time were still related to the 2009 accident.

As pertaining to the April 26, 2017 accident, the Commission finds that although an aggravation may have occurred on that date, it does not break the causation chain that was established during Petitioner's July 30, 2009 accident. Merely experiencing symptoms following a work-related injury while performing other activities does not rise to the standard of an intervening cause. *See Lasley Constr. Co., Inc., v. Industrial Comm'n*, 274 Ill. App. 3d 890, 893 (5th Dist. 1995); *see* also *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 786 (2nd Dist. 2005). 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. *See Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 787 (2d Dist. 2005). As the Court in *Lasley* aptly put it, "The fact that other incidents, whether work related or not, may have aggravated claimant's condition is irrelevant." *Lasley*, 274 Ill. App. 3d at 893; *see* also *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742-43 (1st Dist. 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).

An aggravation injury does not break the causal connection between the original work injury and the present condition when: (a) the original injury has not resolved, and (b) "but for" the work injury, the aggravation injury would have been tolerated. *Vogel v. Industrial Commission*, 354 Ill. App. 3d 780, 788 (2d Dist. 2005). In *Vogel*, the injured worker sustained a work accident and had been "feeling fine" up until his first aggravating car accident. *Id*. The appellate court reasoned that since the claimant's condition at the time of the aggravating accident was weakened because of his original work accident, the claimant's condition after the aggravating accident would not have been as severe "but for" the original work accident. *Id*. at 789-90. In other words, the claimant's condition nevertheless maintained a causal connection to his original work accident because his body was weakened at the time of the aggravating accident.

Here, the record indicates that after suffering the July 30, 2009 injury and undergoing a fusion in July 2012, Petitioner was initially symptom free, but beginning in December 2012 has had some degree of back pain since that time. This aligns with Dr. Ghaly's May 16, 2013 opinion that Petitioner would always have some pain, numbness, and tingling, and that it was possible a recurrence could happen if he returned to work. Moreover, a (pre-2017 accident) lumbar spine MRI performed on May 16, 2013 and a (post-2017-accident) MRI performed on June 9, 2017 were found to be structurally similar, and both Dr. Bernstein and Dr. Goldberg opined that the activity observed in the job description video was insufficient to cause a lumbar injury.

Taken as an aggregate, the Commission finds that the evidence supports a finding that Petitioner's 2009 injury had not fully resolved prior to the April 26, 2017 accident, and that "but for" the 2009 accident, Petitioner's activities on April 26, 2017 would have been tolerated and would not have caused a lumbar injury. The Commission finds that, absent the severity of the 2009 accident and subsequent multiple surgeries, Petitioner's physical response to his April 26, 2017

job activities would not have been as severe. Accordingly, the Commission finds that, although an accident did occur on April 26, 2017 (*see* the Commission's decision in case no. 17 WC 13691), it did not break the chain of causation initiated with the July 30, 2009 work accident.

iii. Medical Opinions

Dr. Mohan and Dr. Bernstein agree that there was ongoing pain related to the July 2012 fusion surgery and hardware implantation. Dr. Mohan opined it was highly likely that the bending and usage of the vibrating grinding tool used by Petitioner in March and April of 2017 aggravated the hardware due to the contemporaneous nature of these acts in relation to Petitioner's increased complaints. Dr. Mohan testified that Petitioner's back is not as strong as one that has not been operated on, and the type of operation Petitioner underwent causes stiffness and places more force on the area, which can aggravate the arthrosis and muscles around implanted screws.

Despite Dr. Mohan's acknowledgement that hardware issues are rare, he nevertheless opined that hardware issues were the cause of Petitioner's pain in this case, stating that he believes the hardware removal will benefit Petitioner. Respondent's own Section 12 Examiner, Dr. Bernstein, agreed, citing an anecdotal story of a former patient who was doing fine for fourteen years after having hardware inserted and had nothing wrong with her spine. However, she then eventually required hardware removal and had a great result because of it. Dr. Bernstein found Petitioner's complaints to be credible and consistent with someone who had pain due to retained hardware, stating that there is scar tissue and muscle on top of hardware that can become inflamed. Dr. Bernstein agreed that but for the 2009 accident, Petitioner would not have had hardware inserted in 2012, and but for the 2012 fusion, there would be no need to remove any hardware present day.

Based on the concurring opinions from both Dr. Mohan, Petitioner's treating physician, and Dr. Bernstein, Respondent's Section 12 examining physician, the Commission finds that the implanted hardware is the cause of Petitioner's discomfort. The testimony of Dr. Mohan and Dr. Bernstein highlight that the hardware removal surgery is warranted based on Petitioner's credible complaints, that the hardware removal procedure stands a good chance of alleviating some or all of Petitioner's pain, and that there is little risk in performing the hardware removal. However, the Commission also finds Dr. Bernstein's opinion that the hardware removal is causally related to the April 26, 2017 accident to be unpersuasive for the reasons discussed above with respect to the established law regarding intervening accidents. The Commission finds that Dr. Bernstein's opinion is essentially that the April 26, 2017 accident broke the chain of causation, which is contrary to the law as discussed above.

The Commission finds that Respondent remains liable for Petitioner's current lumbar spine condition and the chain of causation was not broken by the April 26, 2017 accident. However, the Commission also finds that the April 26, 2017 accident aggravated Petitioner's lumbar spine condition based on the opinions of Dr. Mohan, Dr. Bernstein and Dr. Chunduri. It is well established that the employment need only remain *a* cause, not the sole cause or even the principal cause, of a claimant's condition. *Rotberg v Industrial Comm'n*, 361 Ill. App. 3d 673, 682 (1st Dist. 2005). The totality of evidence supports a finding that but-for the July 30, 2009 injury and

subsequent lumbar fusion with hardware implantation, Petitioner would have been able to tolerate his job duties working for HIPP Temp Staffing in April 2017. Thus, the Commission finds Petitioner established a material increase in his disability that is causally related to the July 30, 2009 injury. Petitioner's Petition under §19(h) and §8(a) is hereby granted.

B. Medical Expenses/Prospective Medical Care

In keeping with the above causal connection findings, the Commission also awards incurred medical expenses as requested by Petitioner, as all such treatment was reasonable and necessary in treating Petitioner's ongoing back issues. These bills include:

-Illinois Orthopedic Network-	$2,384.84
-Midwest Specialty Pharmacy-	$7,311.42
-DuPage Medical Group-	$543.00
-Presence Mercy Medical-	$657.43
-Athletico-	$3,162.00
-IWP-	$1,711.83
-Premier HealthCare Services-	$3,263.66
-Chicago Neuro Diagnostics-	$3,550.00
-Advocate Medical Group/Dreyer-	$5,474.00

The Commission also awards the lumbar spine hardware removal surgery recommended by Dr. Mohan and Dr Bernstein as provided in §8(a) of the Act.

C. *Temporary Total Disability*

In keeping with the above causal connection findings, the Commission awards Petitioner temporary total disability benefits from May 25, 2017, the date when Dr. Mohan placed Petitioner off work initially, through the hearing date of August 26, 2021. The Commission notes that at the time of his April 2020 narrative report, Dr. Mohan released Petitioner to light duty work with a 15-pound lifting restriction and minimal bending. However, since 2013, Respondent has not offered Petitioner work within these restrictions.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Petition under §19(h) and §8(a) is hereby granted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all reasonable and necessary medical care incurred in relation to Petitioner's ongoing low back condition as listed above in the discussion regarding Medical Expenses

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall provide and pay for the lumbar spine hardware removal surgery recommended by Dr. Mohan and Dr Bernstein as provided in §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $255.51 per week for a period of 222 & 1/7ths weeks (May 25, 2017 through August

26, 2021), that being the period of temporary total incapacity in the amount of $56,759.72, as provided in §19(h) 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 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.

February 18, 2022

O: 12/22/21
DJB/wde
043

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

/s/ *Stephen Mathis*
Stephen Mathis

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC013691
Case Name	OCEGUERA, CARLOS v. HIPP TEMP STAFFING
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0063
Number of Pages of Decision	19
Decision Issued By	Deborah Baker, Commissioner, Deborah Simpson, Commissioner

Petitioner Attorney	Matthew Jones, Brenton Schmitz
Respondent Attorney	Ashley Vonah

DATE FILED: 2/18/2022

/s/ Deborah Baker, Commissioner

Signature

DISSENT

/s/ Deborah Simpson, Commissioner

Signature

22IWCC0063

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARLOS OCEGUERA,

Petitioner,

vs. NO: 17 WC 13691

HIPP TEMP STAFFING,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §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 to Petitioner's current condition, entitlement to incurred medical expenses, prospective medical care, 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 decision of the Arbitrator delineates the facts of the case in detail. As relevant to the issues on review, the Commission reverses the Arbitrator's denial of accident and writes additionally to analyze the accident issue. The Commission also strikes the Arbitrator's analysis with respect to prospective medical care as it is moot. The Commission affirms the Arbitrator's finding that Petitioner failed to prove causal connection between the April 26, 2017 work-related accident and his current condition of ill-being.

I. FINDINGS OF FACT

The Arbitrator found that Petitioner failed to prove by a preponderance of evidence that he

sustained accidental injuries arising out of and in the course of his employment with Respondent on April 26, 2017. The Commission disagrees.

The Petitioner in this case testified that he had been working with Respondent's temp agency since March 20, 2017, and had been placed with a company named C&F Forge, where he worked on a grinder. He testified that his job was to bend down and pick up metal pieces weighing between one and ten pounds out of a box on the floor, grind them with a hand-held electric tool, then place them into another box. Respondent offered Exhibit No. 8, which is a video purporting to depict the duties of a grinder. The video shows a worker performing the following actions: reaching to grab a metal piece out of a box that is approximately waist-high, bringing the piece in front of him, grinding the piece on different sides with a hand-held tool, and throwing the piece into a bin or box that is on the opposite side of where the worker initially grabbed the piece. The video was viewed at arbitration. Petitioner testified that his duties were "something like that," but that the box where he retrieved the metal pieces was "almost always" on the ground, and that he would bend over to retrieve the pieces.

The initial post-accident medical treatment at the Presence Mercy Hospital emergency room occurred on April 26, 2017, the same day as the accident. During that visit, Petitioner informed the treating physician that he had been doing his typical job of standing and grinding metal when he began experiencing low back pain.

Warren Magnuson, Respondent's owner, also testified at trial. Mr. Magnuson has been doing business with C&F Forge for over 20 years and testified that he has become familiar with the jobs that the temporary employees perform. Upon reviewing the job video, he stated that the video accurately depicted the job Petitioner was doing for C&F Forge. He had no knowledge of employees having to bend over to the ground to pick up metal pieces. However, he also acknowledged that he had never seen Petitioner perform his duties for C&F Forge. He testified that he visits the C&F Forge premises twice annually, staying for 30 minutes or less each time. He testified that most of his time there is spent talking with the owners.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found Petitioner's testimony that his work duties required him to bend over to be unpersuasive, based on the job duties video and Petitioner's inconsistent reporting of the event. The Arbitrator noted that initial Presence Mercy records do not note any bending. "The history given is that the Petitioner was at work doing his typical job of 'standing and grinding metal and started to experience lower back pain yesterday and today.'"

The "arising out of" component required to establish a compensable accident is primarily concerned with causal connection and is satisfied when a claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d. 193, 203 (2003). We recognize that the Arbitrator's decision pre-dates relevant case law, thus, the Commission must reevaluate this case in light of recent case law.

In *McAllister*, the Illinois Supreme Court reversed the Commission's determination that the claimant, a restaurant employee whose knee "popped" after kneeling to look for carrots at work, failed to show that his injury arose out of his employment. *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828, ¶ 2. The supreme court found that the claimant's knee injury "arose out of" an employment-related risk because the evidence established that at the time of the occurrence, his injury was caused by one of the risks distinctly associated with his employment as a sous-chef. *Id.* ¶ 47. The court also observed that "an employee who sustains an injury while rendering reasonably needed assistance to a coworker in furtherance of the employer's business is considered to have suffered an injury arising out of and in the course of employment when the act performed is within the reasonable contemplation of what the employee may do in the service of the employer." *Id.* ¶ 48; see also *Id.* ¶ 52.

The *McAllister* court further held that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d. 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a claimant's employment, that being when the claimant is "injured performing job duties involving common bodily movements or routine 'everyday activities.'" *Id.* ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny to the extent *Adcock* stands for the proposition that "injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister*, 2020 IL 124828, ¶ 64. In its place, the supreme court clarified "[o]nce it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities." *Id.*

Accordingly, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing: (1) acts he or she was instructed to perform by the employer; (2) acts that he or she had a common-law or statutory duty to perform; or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* at ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

Here, Petitioner testified that on April 26, 2017, he felt pulsating pain in his low back while bending over and lifting metal pieces which he was grinding. Alternatively, a job description video does not depict bending, but shows a worker reaching at waist-height and holding metal pieces. The Commission finds that, regardless of which act is more aligned with Petitioner's actual work duties, both acts are independently "within the reasonable contemplation of what the employee may do in the service of the employer." See *McAllister*, 2020 IL 124828, ¶ 48. Thus, the Commission finds that Petitioner sustained an accident while performing his job grinding metal pieces, an act Respondent reasonably expected him to perform to fulfill his job duties.

Accordingly, the Commission reverses the Arbitrator's denial of accident under the analysis set forth in the *McAllister* decision, and finds Petitioner proved accident by a preponderance of the evidence.

B. Prospective Medical Care

In addition to finding Petitioner failed to prove accident, the Arbitrator also found Petitioner failed to prove causal connection, the latter of which the Commission affirms. Based on these rulings, the Arbitrator found the remaining issues of medical expenses, prospective medical care, and temporary total disability to be moot. Therefore, the Commission strikes the Arbitrator's analysis of the reasonableness and necessity of prospective medical care from the decision as this issue is moot.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner did suffer an accident arising out of and in the course of his employment with Respondent on April 26, 2017.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 1, 2019, is modified as stated above, and affirmed and adopted in all other respects, including the Commission's affirmance that Petitioner failed to prove causal connection between the April 26, 2017 work-related accident and his current condition of ill-being.

IT IS FURTHER ORDERED BY THE COMMISSION that based on the causal connection finding, the issue of liability for incurred medical expenses is moot.

IT IS FURTHER ORDERED BY THE COMMISSION that based on the causal connection finding, the issue of liability for prospective medical care is moot.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's findings with respect to prospective medical care are hereby stricken.

IT IS FURTHER ORDERED BY THE COMMISSION that based on the causal connection finding, the issue of liability for temporary total disability is moot.

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.

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.

February 18, 2022

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

O: 12/22/21
DJB/wde
043

/s/ *Stephen Mathis*
Stephen Mathis

DISSENT IN PART AND CONCURRENCE IN PART

I respectfully dissent in part and concur in part with the Decision of the Majority. The Arbitrator found that Petitioner did not prove accident, Petitioner did not prove causation to a current condition of ill-being, and the Arbitrator denied compensation. The Majority affirmed the Arbitrator's denial of compensation but reversed the Arbitrator's finding that Petitioner did not sustain his burden of proving accident. I concur in the Majority's Decision to affirm the Arbitrator's denial of compensation. However, I dissent from its decision to reverse the Decision of the Arbitrator and its finding that Petitioner proved accident. I would have affirmed and adopted the Decision of the Arbitrator in its entirety. Therefore I respectfully dissent in part.

In finding Petitioner did not sustain his burden of proving a compensable accident, the Arbitrator found Petitioner's testimony "inconsistent with the preponderance of the evidence." The Arbitrator also noted that Petitioner's testimony about his work activities were inconsistent with videos taken of Petitioner's job activities. Petitioner testified that his work required extensive bending and twisting however, the evidence including the medical records, videos, and testimony from Respondent's owner all indicated that Petitioner's job activities did not involve such bending/twisting. The Arbitrator based his decision on his determination that Petitioner's testimony lacked credibility. In my opinion, while the Commission acts as a co-finder of fact with the Arbitrator, the Arbitrator actually observes the demeanor of the witnesses and therefore has a better basis upon which to assess credibility than the Commission. In my opinion, the Majority has no reason to substitute its assessment of credibility for that of the Arbitrator in this case.

In reversing the Arbitrator on the issue of accident, the Majority based its decision on the recent Illinois Supreme Court case of *McAllister v IWCC*. There, the Court found that everyday types of movement (including bending and twisting) can be considered work related if the claimant's job activities required him/her to perform such activities to a greater extent than members of the general public not so employed. *McAllister* does not eliminate the requirement that the risk of injury must be related to a claimant's work activities. In my opinion, the Arbitrator

was correct that Petitioner did not prove that he was exposed to greater risk of injury due to bending/twisting because of his work-related activities.

For the reasons stated above, I would have affirmed and adopted the Decision of the Arbitrator. Therefore, I respectfully concur in part and dissent in part from the Decision of the Majority.

DLS/dw

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

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

22IWCC0063

OCEGUERA, CARLOS Case# **17WC013691**

Employee/Petitioner

HIPP TEMPORARY STAFFING

Employer/Respondent

On 11/1/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.61% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2553 McHARGUE & JONES
MATT JONES
123 W MADISON ST SUITE 1800
CHICAGO, IL 60602

2284 LAW OFFICE OF LAWRENCE COZZI
MARK McCOLGAN ZAPF
27201 BELLA VISTA PKWY #410
WARRENVILLE, IL 60555

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)

Carlos Oceguera
Employee/Petitioner

v.

HIPP Temporary Staffing
Employer/Respondent

Case # **17** WC **13691**

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 **August 9, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **April 26, 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.

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 $**2,018.50**; the average weekly wage was $**428.17**.

On the date of accident, Petitioner was **32** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**19,124.48** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**33,971.15** for medical benefits.

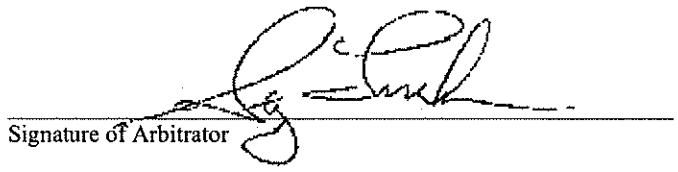
Respondent is entitled to a credit of $**0.00** under Section 8(j) of the Act.

ORDER

BECAUSE PETITIONER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HE SUSTAINED ACCIDENTAL INJURIES ARISING OUT OF HIS EMPLOYMENT WITH RESPONDENT ON APRIL 26, 2017 AND FURTHER FAILED TO PROVE BY A PREPONDERANCE OF THE EVIDENCE THAT HIS CONDITION OF ILL-BEING IS CAUSALLY CONNECTED TO HIS EMPLOYMENT WITH RESPONDENT, PETITIONER'S CLAIM OF COMPENSATION INCLUDING CLAIMS FOR TEMPORARY COMPENSATION, MEDICAL BENEFITS AND PROSPECTIVE MEDICAL BENEFITS IS DENIED.

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

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



Signature of Arbitrator

November 1, 2019
Date

ICArbDec19(b)

NOV - 1 2019

Statement of Facts

Petitioner Carlos Oceguera testified in Spanish through an interpreter. Petitioner testified that on April 26, 2017 he was working for Respondent HIPP Temporary Staffing since March 20, 2017. Respondent is a temporary staffing agency. During that time, he was placed C & F Forge. He worked on a grinder. Petitioner's job duties included grinding burrs off metal pieces, O bolt rings. Petitioner would have to grab metal pieces from a metal box, grind those metal pieces, and then place the pieces into a different metal box. He testified that the parts "almost always" were put on the ground. The parts would vary from 1 pound to about 10 pounds in weight. They would usually leave the bigger pieces in the box. Petitioner performed the same duty for eight hours a day. He testified that he would grind approximately five thousand metal pieces per day.

Warren Magnuson testified that he is owner and president of Respondent. He supplied Petitioner to C & Forge. He has done business with them for over 20 years. He has become familiar with the jobs that his employees do there. He is familiar with the job Petitioner was doing. He identified the video (PX 8) as accurately depicting the job. He does not agree that the pieces had to be picked off the ground. He testified that C & F Forge has about 3 or 4 workstations. They have less than 20 employees working at one time. He goes there around twice a year for about half an hour or less. The parts are various sizes and shapes. He has not seen anything 3 feet long. There may be nuances of the job he is not aware of. He testified it would not be very efficient to have the bolts on the floor.

PX 8 is a 3 minute video of an employee grinding O bolts that appear to be less than a foot long using a hand grinder. The bolts are taken from a chest high table and ground. Then they are dropped into a bin. The employee completes less than 3 bolts in the video. Petitioner testified the video was accurate except that the he was bending over to take pieces out a box on the floor. The pieces he was grinding were bigger than those shown in the video. Mr. Magnuson prepared a job description dated May 10, 2017. It lists continuous lifting up to 10 pounds, occasional reaching and twisting, no bending or squatting (RX 6).

Petitioner testified that from March 2017 through April 26, 2017, he had no problems with his back. It was little. He also testified that from 2009 through the present, he has always had some degree of back pain. On the morning of April 26, 2017, he was having no significant issues with his back or legs. On that date, he was grinding metal pieces weighing a little less than ten pounds each with a mounted grinder. The metal box containing the unfinished pieces was on the ground. Petitioner had to bend over to grab those metal pieces. Between 10:00 AM and 12:00 PM, Petitioner bent over to pick up a piece of metal from the box and his back began to hurt. He felt a pulsating pain in his lower back with numbness in both of his legs. Petitioner attempted to complete his shift, but was unable to do so. Petitioner notified his supervisor in between 11:00 AM and 1:00 PM that same day. Mr. Magnuson prepared an Employer's first report of injury describing the incident as bending and twisting, not lifting heavy parts. Petitioner moved back to table and felt back and leg pain (PX 12).

Prior Medical: Petitioner had suffered a previous lower back injury on July 30, 2009. There is a pending claim with his prior employer Accurate Comfort Systems under case number 09 WC 35111. The Arbitrator's Decision in that case was issued on July 17, 2015 awarding Petitioner 45% loss of use of the person as a whole for a twisting injury resulting in lumbar and right leg pain (PX 14). Petitioner retained open medical in that case. An 8(a) petition for surgical removal of the lumbar hardware is pending before the Commission as to Accurate Comfort Systems.

The Decision states Petitioner was breaking concrete with a sledgehammer. When he tried to shovel this over his shoulder, he twisted and experienced pain in his low back and right leg, with tingling in his right foot. After unsuccessful conservative treatment with multiple providers, Petitioner treated with Dr. Ronjon Paul at DuPage Medical Group. He diagnosed an L5-S1 herniation as a result of the accident. Petitioner underwent a series of epidural injections with Dr. Engle in 2009 and reported his radiating right leg pain completely resolved. Petitioner continued with back pain and sought other medical opinions. He underwent discography in January 2010. Petitioner underwent a L5-S1 microdiscectomy on July 29, 2010. Following Petitioner's L5-S1 microdiscectomy, Petitioner reported recurrent sciatic pain. An MRI was performed, which indicated fluid collection on the right side. As a result, Petitioner had a L5-S1 revision microdiscectomy with Dr. Paul on November 8, 2010 (PX 14).

Due to ongoing symptoms, Petitioner sought treatment with Dr, Ramsis Ghaly beginning September 29, 2011 (PX 10). He underwent an L4-S1 lumbar fusion with Dr. Ghaly on July 6, 2012 for a diagnosis of failed back syndrome, mechanical low back pain and chronic sciatica in the S1 distribution, L5-S1, lumbar spondylosis. On July 30, 2012, Petitioner reported complete resolution of the majority of his symptoms. By December 27, 2012, Dr. Ghaly recorded intermittent soreness in the back and some tension in the right buttock and hamstring. On May 16, 2013, Dr. Ghaly explained that Petitioner will always have some pain, numbness and tingling. On June 20, 2013, Petitioner's complaints were back pain and some right leg and buttock pain when he lifts. The records indicate that Dr. Ghaly discussed with the Petitioner that he has a 30% chance of needing more surgeries and that he may need a spinal cord stimulator. He was released with permanent 35-pound lifting restrictions on July 20, 2013 (PX 10).

Petitioner testified that he was seen by Dreyer Medical Center on different occasions for lower back pain between 2013 and April 2017. Petitioner began a course of treatment with Dreyer Medical Center on May 5, 2016 for evaluation and treatment of chronic low back pain with occasional radiation down the right leg to the knee (PX 13, RX 7). He gave a history of injuring his back doing construction and of his prior surgeries. He reported that his back pain was better after his surgeries and the radiating pain was resolved. He stated he just returned to working a year ago and his job duties require a lot of bending and lifting. His pain has returned over the last few months. The duration of symptoms is listed as 7 years. It is noted that the Petitioner's recurrence of pain coincides with his increase in repetitive lumbar strain with bending and lifting of boxes with a new job (different employer before the HIPP job). Physical therapy and a new MRI were ordered. The Petitioner was prescribed narcotic pain medicine and a TENS unit (RX 7, p 9-12). Petitioner filed a Workers' Compensation claim 17 WC 15667 against DHL for this accident, which claim was voluntarily dismissed in April 2018.

Petitioner began physical therapy on May 18, 2016. He reported his initial injury shoveling concrete 7 years ago. Worked as a forklift driver and his back pain was tolerable. He started a new job 2 months ago with bending and lifting, and his pain started getting worse in the last month (RX 7, p 38). Petitioner had an MRI of the lumbar spine on May 23, 2016.The report indicated post-operative changes without evidence of complication, and non-specific thickening of the right S1 nerve root with some enhancement can be in the basis of radiculitis (RX 7, p 178-179). On May 27, 2016 visit, the MRI was reviewed, and it was noted that the MRI findings do not fully explain the Petitioner's extreme worsening pain (RX 8. P 84). On June 6, 2016, Petitioner was referred for interventional management to Dr. Augusthy. He received a Kenalog injections on June 6, 2016 and epidural steroid injections on June 28, 2016 (RX 7, p 124-125, 156). The diagnosis was bilateral low back pain with right-sided sciatica and lumbar radiculopathy (RX 7, p 142). The records reflect that Petitioner was not released, but failed to follow up (RX 7, p 191). Petitioner testified that he continued to work cleaning a school during this treatment.

Treatment after April 26, 2017: Petitioner sought initial treatment at the emergency department at Presence Mercy Hospital on April 26, 2017 (PX 1). Petitioner arrived at 11:32 AM. The reason for visit is listed as chronic back pain. Working hard yesterday grinding metal and experienced worsening back pain today. The history given is that the Petitioner was at work doing his typical job of standing and grinding metal and started to experience lower back pain yesterday and today. Today he felt numbness down the entire bilateral lower extremities and weakness. He laid down which resolved the numbness. He was diagnosed with chronic back pain and lumbar radiculopathy. Petitioner was given Norco, Naproxen and Valium. Petitioner returned to the Presence Mercy ER on May 3, 2017. Petitioner at that time noted he was seen last Wednesday for right low back pain that radiates down his right leg after increased bending and twisting at work. He denies any other trauma. He reported the L5-S1 fusion 3 years ago and has no problems since. He was advised to follow up with a back specialist (PX 1).

The Petitioner was seen by Dr. Vivek Mohan beginning May 25, 2017 (PX 5). Petitioner reported low back pain with bilateral leg pain began several years ago. He reported a work injury 7 years ago and on 4/26/17 getting some parts and noted more back pain with numbness in the legs. He stated he can barely walk at home. He has numbness in the legs but denied weakness. The physical examination noted he moves slowly. He displayed a non-antalgic gait and could walk on heels and toes. He had moderate pain on range of motion with tenderness. Strength was normal and reflexes were +2 bilaterally. He had positive straight leg raising on the right with decreased sensation in the right L5 dermatome. X-rays noted the L5-S1 fusion appeared healed as there was no motion at that level on flexion and extension films. Dr. Mohan noted spondylosis at L4-5 facet joints. He ordered an MRI to address a possible new herniation at L4-5. He ordered physical therapy (PX 5).

The June 9, 2017 MRI of the lumbar spine noted L5-S1 post-operative changes with minimal granulation tissue surrounding the posterior aspect of the disk space. Thickening of the right S1 nerve is noted but remains unchanged since the prior outside study of May 23, 2016. On June 12, 2017, Dr. Mohan notes a history of having back and leg pain intermediately over the last two years since his fusion surgery. He notes the L4-5 level is fine, but Petitioner may have an L5-S1 pseudo arthrosis. He ordered a CT scan and noted Petitioner is scheduled for therapy (PX 5). The June 14, 2017 CT scan noted the postsurgical changes at L5-S1. The hardware was intact and there was a solid fusion. There was no gross central canal stenosis or high grade neural foraminal stenosis. On June 22, 2017, Dr. Mohan's physical examination noted mild tenderness over the posterior instrumentation at L5-S1. He notes the CT scan shows the fusion is well healed. He discussed the option of surgical removal of the hardware. He did not recommend any fusion at the L4-L5 level, noting Petitioner can continue injections for that level. He indicated that the risks of surgery include bleeding, infection, injury to nerves and muscles, blood vessels or clots, anesthetic complications, and possible further surgery. He also advised the Petitioner that the back pain may not resolve with surgery. He noted the plan to proceed and kept Petitioner off work (PX 5). Petitioner attended physical therapy at Athletico from June 13, 2017 through July 6, 2017 (PX 6).

Petitioner sought additional treatment with Dr. Murtaza at ION on November 14, 2017 (PX 3). He described his most recent accident as grinding metal parts, twisting, bending over to pick up parts. Petitioner advised of the earlier surgery. He stated that after the fusion his right lower extremity radiculopathy had completely resolved but now it is back. Physical examination noted an antalgic gait, loss of motion, 4/5 strength on plantar flexion and dorsiflexion weakness, and decreased sensation. Dr. Murtaza's assessment ordered an EMG (PX 3). The November 22, 2017 EMG impression was evidence of a chronic right-sided L5 radiculopathy with no axonal loss (PX 9). On December 6, 2017, Dr. Murtaza recommended right sided L4-5 and L5-S1 TF ESI (PX 3). On March 16, 2018, Petitioner was seen by Dr. Chunduri at ION. He noted ongoing right radiculopathy. He

commented that the MRI did not reveal any significant pathology. Right-sided ESI were again recommended. Dr. Chunduri had follow up visits on June 22, 2018 and July 20, 2018 noting the treatment had not been approved (PX 3).

On December 13, 2017, Dr. Edward Goldberg at Midwest Orthopedics at Rush performed a Section 12 Examination at Respondent's request (RX 2). Petitioner reported lower back pain with bilateral lower extremity numbness. He reported the earlier surgeries. He stated that after the fusion, he continued to have back pain, but it was significantly improved. He had no medical treatment for about a year before the new accident. Dr. Goldberg reviewed medical records of treatment through July 5, 2017 and records of prior treatment from 2010 through 2016. He also reviewed the job video. Physical examination noted flexion at 60 degrees and extension of 30 degrees. Sensation, reflexes and strength were normal. Dr. Goldberg noted negative Waddell test. Dr. Goldberg opined that the grinding activities depicted in the job video did not aggravate his lumbar condition. Dr. Goldberg specifically noted that Petitioner denied prior leg pain, but that the medical records reflect that he had chronic right lower extremity symptoms prior to the accident. Dr. Goldberg stated that the job activities portrayed on the video would not contribute to increased symptoms. Dr. Goldberg opined he would not recommend removal of the fusion hardware because he does not believe that the patient's lower back and lower extremity pain was due to the hardware. He opined that Petitioner could return to work with a 25 pound restriction, but that the restriction was not causally related to his April 26, 2017 accident (RX 2).

Dr. Avi Bernstein performed a record review on April 2, 2018 at the request of Accurate Comfort Systems (PX 2), Respondent in the 2009 pending claim. He reviewed records through the 2013 release by Dr. Ghaly. He noted that Petitioner was involved in the May 4, 2016 incident working for DHS. He notes there was no treatment subsequent to that event. He reviewed Petitioner's subsequent treatment with Presence Mercy and Dr. Mohan, and Dr. Goldberg's report. He stated that based upon the records, Petitioner suffered a new work-related accident on April 26, 2017, resulting in subjective complaints. There are no objective findings on any of the radiographic studies supporting any structural injury to the spine or any damage to the patient's prior spinal fusion. If he suffered a lumbar strain, he would have been expected to reach maximum medical improvement within 6 to 12 weeks. Hardware removal would be purely on a subjective basis. If so, it would be caused by the April 26, 2017 incident (PX 2).

Dr. Bernstein performed a Section 12 examination on May 14, 2018. He reviewed multiple diagnostic studies at that time. Petitioner reported severe pain in his lower back with radiating symptoms into his legs. Petitioner's history was that he was standing grinding parts the weigh 20 to 30 pounds. He would have to bend and lift these parts and that over time, he started to develop back pain. On physical examination, Dr. Bernstein noted that Petitioner was moving very slowly. He demonstrated minimal bending capability. He was tender to palpation in the area of his prior incision and surgery. He had intact strength, sensation and reflexes. Straight leg raising was negative. Dr. Bernstein opined that the patient appears to have had an incident or event, which resulted in the onset of severe subjective complaints of low back pain. Although his hardware is definitely implanted as a result of his July 30, 2009 incident, it is the most recent accident which resulted in a symptomatic aggravation leading to his treatment and care. I do think it is reasonable for this patient to pursue hardware removal. I see it as a relatively benign operation with little downside (PX 2).

On August 16, 2018, Dr. Bernstein provided an addendum after reviewed medical records of the 2016 treatment. He stated his opinions were unchanged (PX 2). On September 25, 2018, Dr. Bernstein provided a further addendum after reviewing the job video. He stated that he did not find the activity demonstrated in any way biomechanically challenging to the lumbar spine, or would result in a lumbar spine injury. He noted

Petitioner's history described bending activity. If he is required to bend and lift, this would result in the subsequent injury (PX 2).

Dr. Goldberg prepared an IME addendum report on February 5, 2019 (RX 3). Dr. Goldberg reviewed diagnostic films and Dr. Bernstein's reports. Dr. Goldberg stated he saw no evidence of nerve compression on the diagnostic studies. He opined that Petitioner's June 9, 2017 lumbar spine MRI and June 12, 2017 lumbar spine CT scan did not substantiate Petitioner's lower extremity radicular symptoms. Dr. Goldberg opined that the work activities depicted in the job video would not cause an aggravation of his preexisting lumbar condition. He did not feel the Petitioner's condition was due to painful hardware (RX 3).

Dr. Goldberg testified by evidence deposition taken April 1, 2019 (RX A). Dr. Goldberg testified to his review of the medical records and diagnostic studies. He described the job video. He outlined his physical examination. He noted that the Petitioner's range of motion was commiserate with someone who has undergone a fusion. He testified that there was nothing the MRI studies done in 2016 or 2017 that would warrant removal of the fusion hardware. The fusion at L5-S1 was healed, and that the pedicle screws at that level did not show any evidence of loosening. There is no nerve impingement. Dr. Goldberg testified that it is very rare to have painful instrumentation. Dr. Goldberg diagnosed chronic lumbar problems. He noted Petitioner was referred to a pain physician in May 2016 which was inconsistent with what Petitioner told him and what was in the medical records. Petitioner has basically subjective complaints. He believed the lifting restriction is the same as previously provided by Dr. Ghaly. Dr. Goldberg noted that Petitioner had three prior L5-S1 surgeries. It would be reasonable to expect that Petitioner might have ongoing symptoms from his surgeries. Dr. Goldberg also stated that fusion hardware could become painful or irritable as a result of coughing, sneezing, bending, or twisting. But not here. A lumbar muscle strain or trauma would not cause the hardware to become problematic (RX A).

Petitioner testified he as not worked anywhere since April 26, 2017. No treatment has been authorized since his examination with Dr. Goldberg. He has not returned to Respondent. He has not been offered limited duty. Petitioner testified he currently has pain in the back and tingling in the sole of his right foot. His pain before was lesser. He could tolerate it. He did not have the tingling in his foot. He currently takes Gabapentin and Cyclobenzaprine daily. Petitioner testified he wants the surgery Dr. Mohan recommended.

Conclusions of Law

In support of the Arbitrator's decision with respect to (C) Accident and (F) Causal Connection, the Arbitrator finds as follows:

The claimant in a workers' compensation case 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, 403 N.E.2d 221, 38 Ill. Dec. 133 (1980)*. 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. Included within that burden is proof that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003). If the claimant had health problems prior to a work-related injury, he bears the burden of showing that the preexisting condition was aggravated by the employment and that the aggravation occurred as a result of an accident which arose out of and in the course of his employment. *Nunn v. Industrial Comm'n,* 157 Ill. App. 3d 470, 476, 510 N.E.2d 502, 505, 109 Ill. Dec. 634 (1987). 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. Id. at 205. "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." Id. A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n*, 92 Ill. 2d 30, 36 (1982). In a repetitive trauma case, issues of accident and causation are intertwined. Therefore, a review of the evidence allows both issues to be resolved together." *Boettcher v. Spectrum Property Group and First Merit Venture Realty Group,* 97 W.C. 44539, 991.I.C. 0961.

Petitioner herein is seeking compensation, medical and prospective medical care for his current condition of ill-being in the lumbar spine. He has a significant previous injury with multiple surgeries and extended disability and permanent restrictions. He is claiming that his job duties for Respondent as a grinder resulted in a new accident. Petitioner's claim is that the bending and twisting aggravated his pre-existing lumbar condition. In assessing this claim, the Arbitrator must evaluate the extent of Petitioner's pre-existing condition included the extent of ongoing symptoms and disability as well as the extent of the physical exertion claimed on his job with Respondent as a grinder. In doing so, the weight and credibility of Petitioner's testimony, disputed by Respondent, must be assessed.

Petitioner testified his job duties required him to grab metal pieces from a metal box, grind those metal pieces, and then place the pieces into a different metal box. He testified that the parts "almost always" were put on the ground. The parts would vary from 1 pound to about 10 pounds in weight. They would usually leave the bigger pieces in the box. He testified that he would grind approximately five thousand metal pieces per day. With respect to the condition of his back, he testified that from starting with Respondent in March 2017 through April 26, 2017, he had no problems with his back. It was little. He also testified that from 2009 through the present, he has always had some degree of back pain. On the morning of April 26, 2017, he was having no significant issues with his back or legs. On that date, he was grinding metal pieces weighing a little less than ten pounds each with a mounted grinder. The metal box containing the unfinished pieces was on the ground. Petitioner had to bend over to grab those metal pieces. Between 10:00 AM and 12:00 PM, Petitioner bent over to pick up a piece of metal from the box and his back began to hurt. The Arbitrator finds that Petitioner's testimony is inconsistent with the preponderance of the evidence. The Arbitrator finds that Petitioner has contradicted himself repeatedly in his descriptions of both on the nature of his preexisting condition and the mechanism of injury, such that whether to give any weight to his testimony must be questioned.

Petitioner's medical treatment and histories are inconsistent with his testimony that he was without significant back symptoms since his release by Dr. Ghaly in 2013. Dr. Ghaly explained that he will always have some pain, numbness and tingling. On June 20, 2013, Petitioner's complaints were back pain and some right leg and buttock pain when he lifts. Although Petitioner had not returned to work when his earlier case went to trial in May 2015, the Arbitrator recorded that "from the date of accident through the date of trial, Petitioner experienced pain in his lower back as well as radiating right leg pain." Petitioner testified at that time that he continues to experience pain with standing or sitting greater than two hours, pain bending at the waist, inability to clean or cook around the house. After returning to work in 2016, Petitioner has significant symptoms in May and June 2016 and received physical therapy, a TENS unit and epidural injections. It is noted that the Petitioner's recurrence of pain over the last few months coincided with his increase in repetitive lumbar strain with bending and lifting of boxes with a new job. At Presence Mercy Hospital on April 26, 2017, the reason for visit is listed as chronic back pain. Dr. Mohan documents on May 25, 2017, Petitioner reported low back pain with bilateral leg pain began several years ago. On June 12, 2017, Dr. Mohan notes at history of having back

and leg pain intermediately over the last two years since his fusion surgery. Based upon this volume of evidence, the Arbitrator finds Petitioner's claim that he did not have ongoing radicular symptoms in his testimony and medical histories to Presence Mercy, Dr, Murtaza, Dr. Goldberg and Dr. Bernstein inaccurate and unpersuasive.

The Arbitrator also notes the multiple inconsistencies in the description of his job and the accident alleged. Petitioner claims to have worked on 5000 parts per day. He agreed that the job video was accurate except for the parts being on a table. The part shown in the video was smaller than the part Petitioner claims to have been grinding on April 26, 2017 and the Arbitrator infers that it would likely be easier to grind than a larger piece. Yet, in the 3 minute video, the employee does not even complete 3 parts. At less than a part per minute, an employee would be doing less that 500, not 5000, per day. The Arbitrator also notes that the table on which parts were placed appears permanent and to put parts on the floor would have necessitated a longer walk to get them, which does not make sense. Mr. Magnuson's testimony and job description appears more realistic, despite his limited exposure to the work environment.

The question of whether Petitioner was bending and twisting also is disputed by his inconsistent reporting of the event. The initial Presence Mercy records do not note this activity. They report a history of working hard yesterday grinding metal and experienced worsening back pain today. The history given is that the Petitioner was at work doing his typical job of "standing and grinding metal and started to experience lower back pain yesterday and today. The Arbitrator notes that in addition to failing to address any bending and twisting, this history also notes "worsening back pain" which evolved over two days, inconsistent with Petitioner's testimony that he had no problems on the morning of April 26, 2017. The Arbitrator also notes that Petitioner reported to Dr. Bernstein that the pieces weighed 20 to 30 pounds, clearly not accurate.

Claimant's varied and inconsistent histories of the April 26, 2017 incident, his work duties, and his prior medical treatment and condition undermine his claim that he suffered accidental injuries arising out of and in the course of his employment. Based upon the above evidentiary inconsistencies, the Arbitrator give less weight to the Petitioner's testimony.

Cases involving aggravation of a preexisting condition concern primarily medical questions and not legal ones. That is, if a claimant is in a certain condition, an accident occurs, and following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition; it is the resulting deterioration from whatever the previous condition had been. *Nanette Schroeder v. The Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160192WC (4th Dist., 2017). Petitioner has presented the medical opinion of Dr. Bernstein, Respondent's expert in Petitioner's earlier claim, that the April 26, 2017 incident was a new accident. Petitioner's subsequent symptoms and need for treatment are caused by that incident. Respondent has offered the opinions of Dr. Goldberg that the work activities depicted in the job video would not cause an aggravation of his preexisting lumbar condition. Dr. Goldberg diagnosed chronic lumbar problems. He notes Petitioner has basically subjective complaints.

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.

Having heard the testimony, reviewed the exhibits, and in light of the Arbitrator's assessment of the weight to be given to Petitioner's testimony, the Arbitrator finds the opinions of Dr. Goldberg more persuasive that those of Dr. Bernstein. The Arbitrator notes the Dr. Bernstein was given a history of bending and lifting parts weighing 20 to 30 pounds. Dr. Bernstein's initial record review noted that there are no objective findings on any of the radiographic studies supporting any structural injury to the spine or any damage to the patient's prior spinal fusion. If he suffered a lumbar strain, he would have been expected to reach maximum medical improvement within 6 to 12 weeks. Hardware removal would be purely on a subjective basis. In May 2018, Dr. Bernstein's physical examination is completely objectively normal. Dr. Bernstein stated, after viewing the video, that he did not find the activity demonstrated in any way biomechanically challenging to the lumbar spine, or would result in a lumbar spine injury. Only if Petitioner was lifting and bending would the work be a factor. Dr. Bernstein's opinions also include Petitioner's minimizing his prior problems including initially assuming no treatment at all following the 2016 incident. The Arbitrator also considers Petitioner's work history, noting that each time he attempted return to work in 2016 and 2017, he developed increased symptoms consistent with Dr. Ghaly's expectations.

Based upon the record as a whole, the Arbitrator finds that Petitioner failed to prove by a preponderance of the evidence that he sustained accidental injuries arising out of and in the course of his employment with Respondent on April 26, 2017 and further failed to prove that any condition of ill-being was causally connected to his work activities with Respondent.

In support of the Arbitrator's decision with respect to (E) Notice the Arbitrator finds as follows:

Although further disputed issues are moot based upon the Arbitrator's findings with respect to Accident and Causal Connection, the Arbitrator notes that the Application for Adjustment or Claim was filed in this matter within the 45 day time limit and therefore notice was provided to Respondent within the time limits stated in the Act.

In support of the Arbitrator's decision with respect to (J) Medical, and (L) Temporary Compensation, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the issues of Medical and Temporary Compensation are moot. Petitioner's claim for benefits is denied

In support of the Arbitrator's decision with respect to (K) Prospective Medical, the Arbitrator finds as follows:

Based upon the Arbitrator's findings with respect to Accident and Causal Connection, the issue of Prospective Medical is moot. However, the Arbitrator notes that, in addition to the denial of Prospective Medical based upon Accident and Causal Connection, Dr. Goldberg also found that the proposed surgery for hardware removal was not reasonable and necessary. As more fully addressed above, the Arbitrator found the opinions of Dr. Goldberg more persuasive that those of Dr. Bernstein. The Arbitrator notes that Dr. Bernstein's initial record review stated that there are no objective findings on any of the radiographic studies supporting any structural injury to the spine or any damage to the patient's prior spinal fusion. If he suffered a lumbar strain, he would have been expected to reach maximum medical improvement within 6 to 12 weeks. Hardware removal would be purely on a subjective basis. Dr. Mohan, who recommended the hardware removal, advised Petitioner that it may not relieve his back pain. Dr. Bernstein's May 2018 physical examination was objectively normal. The Arbitrator's opinion that Dr. Goldberg's opinions are more persuasive would also apply to the issue of whether the proposed surgery to remove the hardware is reasonable and necessary.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC037365
Case Name	ELLIS, DONALD v. M-CLASS MINING, LLC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0064
Number of Pages of Decision	15
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Julie Webb, Kenneth Werts

DATE FILED: 2/22/2022

/s/Carolyn Doherty, 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

DONALD ELLIS,
Petitioner,
vs. NO: 17 WC 37365

M-CLASS MINING, LLC,
Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of occupational disease, Section 1(d), 1(f), causal connection, permanent partial disability, and legal/evidentiary error, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 10, 2021, is hereby affirmed and adopted.

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

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

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.

February 22, 2022

o 02/17/22
CMD/ma
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC037365
Case Name	ELLIS,DONALD v. M-CLASS MINING, LLC
Consolidated Cases	
Proceeding Type	Request for Hearing
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	13
Decision Issued By	Jeanne AuBuchon, Arbitrator

Petitioner Attorney	Kirk Caponi
Respondent Attorney	Kenneth Werts

DATE FILED: 8/10/2021

INTEREST RATE FOR THE WEEK OF AUGUST 10, 2021 0.05%

/s/ Jeanne AuBuchon, Arbitrator
Signature

CERTIFIED as a true and correct copy

pursuant to 820 ILCS 305/14

AUGUST 10, 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

DONALD ELLIS
Employee/Petitioner

v.

M-CLASS MIINING, LLC
Employer/Respondent

Case # **17** WC **037365**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jeanne L. AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville**, on **May 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. ☐ What temporary benefits are in dispute?
☐ TPD ☐ Maintenance ☐ TTD
L. ☒ What is the nature and extent of the injury?
M. ☐ Should penalties or fees be imposed upon Respondent?
N. ☐ Is Respondent due any credit?
O. ☒ Other **Sections 1(d)-(f) of the Occupational Diseases Act**

FINDINGS

On **November 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 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's earnings were $**67,181.92** and his average weekly wage was **$1,291.96**.

On the date of accident, Petitioner was **66** years of age, ***married*** with **0** dependent children.

Petitioner claims no medical.

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

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.

Jeanne L. AuBuchon

Signature of Arbitrator

Date: August 10, 2021

PROCEDURAL HISTORY

This matter proceeded to trial on May 7, 2021, pursuant to Section 7 of the Illinois Workers' Occupational Diseases Act (820 ILCS 310) (hereinafter "the Act"). The issues in dispute are: 1) whether the Petitioner sustained an occupational disease arising out of and in the course of his employment, including whether the requirements of Sections 1(d)-(f) were met; 2) the causal connection between exposure to the occupational disease and the Petitioner's current condition of ill being; and 3) the nature and extent of the Petitioner's injury.

FINDINGS OF FACT

An Application for Adjustment of Claim was filed on December 20, 2017, wherein the Petitioner alleged he sustained an occupational disease of his lungs, heart, pulmonary system and respiratory tracts. (AX2) The Petitioner alleged he sustained an occupational disease as a result of inhalation of coal mine dust, including but not limited to coal dust, rock dust, fumes and vapors for a period in excess of 35 years, with the date of last exposure being November 15, 2016. (Id.)

The Petitioner was 67 years old at the time of his last exposure. (AX2) He lives in Harrisburg, Illinois, with his wife. (T. 11) He graduated from high school and attended junior college for a year, then vocational school at Southern Illinois University, where he received an associate's degree in civil technology. (T. 11-12) He worked in the mines for more than 30 years and spent the first 24 to 25 years working underground. (T. 12) In addition to coal dust, he was regularly exposed to and breathed silica dust and diesel fumes. (T. 12) The Petitioner began working in the mines as a surveyor, setting up controls that tell the miners where to cut coal. (T. 16-17) This occurred while miners were cutting coal. (T. 17) From approximately 2005 to 2007, the Petitioner worked in construction as a surveyor. (T. 18-19) He went back to surveying in the mines in 2007 and left the mines again in 2008 to work in land surveying for a year. (T. 19-20)

He returned to mine surveying in 2009. (T. 20) A heart conditioned the Petitioner to move above ground in 2010 to work as a train loader until his retirement in 2016. (T. 21) As a train loader, the Petitioner used an automated system in which train cars travel under a silo of coal, where the coal was then dumped into the train cars. (T. 21-22) Although the Petitioner loaded the train cars from a coal-resistant booth, he had to go out and clean the track and get samples out of the sample building – tasks he described as involving "an ungodly amount of coal dust." (T. 23) The Petitioner decided to retire from mining at that time because he "just needed to get away from it." (T. 14) Since retiring, the Petitioner has been working as a self-employed land surveyor. (T. 15) His earnings vary from $8,000 to $30,000 per year. (Id.) He also receives Social Security benefits and a pension (T. 29-30)

While working at the mines, the Petitioner underwent periodic chest X-ray screenings by the National Institute for Occupational Safety and Health (NIOSH). (T. 34) He did not recall receiving letters regarding the results of those screenings. (Id.) None of the prior screenings were submitted as evidence.

The Petitioner testified that he had breathing problems while working in the mines during an escape drill that required walking out a secondary escape way of about a 9-degree slope uphill. (T. 23) He said that when he got to the top, he was very short-winded and was about to gag – knowing something wasn't right. (Id.) He also reported coughing up black soot when getting cleaned up after his shifts. (T. 24-25) He stated that his breathing problems worsened from when he first noticed them until he left mining and had stayed about the same since. (T. 25) The Petitioner said he currently gets short-winded after walking 100 yards in thick grass and after walking a half mile on asphalt or gravel. (Id.) He also has to take his time climbing steps and when he does survey jobs, resting at times when breathing becomes difficult. (T. 26)

The Petitioner was never a smoker, but he suffered a heart attack in 2010 and had knee replacement surgery in 2015. (T. 27-28) Prior medical records showed that in September 2010, the Petitioner suffered a heart attach while working in the mine. (RX3) He underwent a balloon angioplasty and had a stent placed. (Id.) A chest X-ray at that time showed mild interstitial fibrosis in his lungs. (Id.) In March 2014, he had two additional stents placed. (Id.) Throughout his visits to Prairie Cardiovascular Consultants from 2010 to 2020, the Petitioner denied chronic cough but occasionally reported shortness of breath with physical exertion that his doctors related to his heart condition. (Id.) Records from Primary Care Group show visits for sinus issues from 2005 to 2020 and a chest X-ray in 2015 that was positive for pneumonia. (RX4)

On June 26, 2017, Dr. Henry K. Smith, a "B-reader" radiologist, examined a chest X-ray of the Petitioner taken on May 26, 2017, and found interstitial fibrosis of classification p/p, in the bilateral mid to lower zones of a profusion 1/0. (PX2) He found no chest wall placques, classifications or large opacities. (Id.) Dr. Smith's diagnosis was early simple coal worker's pneumoconiosis (CWP) with small opacities. (Id.)

On March 19, 2018, at the request of his attorney, the Petitioner saw Dr. Suhail Istanbouly, a board-certified practitioner in internal medicine, pulmonary medicine, critical care medicine and sleep medicine. (PX1, Deposition Exhibit 2) The Petitioner reported to Dr. Istanbouly a history or intermittent, occasional, mild cough that had been going on for years and was triggered by strenuous activities. (Id.) While working in the mines, the cough was aggravated by hot showers and produced dark-brown sputum. (Id.) Since leaving the mines, his coughs no longer produce dark-brown sputum. (Id.) The Petitioner also reported getting short of breath walking up to a quarter mile at a slow pace. (Id.) He complained of occasional episodes of wheezing. (Id.)

Dr. Istanbouly examined the Petitioner and found his lungs to be normal. (Id.) A ventilation study (also known as a spirometry test) conducted that day at Harrisburg Medical Center showed normal lung functioning – FEV1 (forced expiratory volume) of 3.28 liters, 103% predicted; FVC (forced vital capacity) of 4.34 liters, 101% predicted; and FEV1/FVC of 76%. (Id.) Dr. Istanbouly also reviewed the chest X-ray from May 26, 2017, which he said revealed mild interstitial changes bilaterally to lower zones. (Id.) Dr. Istanbouly is not certified as an A- or B-reader of -rays. (PX1) Dr. Istanbouly diagnosed the Petitioner with early stage simple CWP related to long-term coal dust inhalation. (PX1, Deposition Exhibit 2) In his report, he wrote that the Petitioner's long-term coal dust inhalation was a significant contributor to his chronic respiratory symptoms of cough, sputum production, wheezing and exertional dyspnea. (Id.) He advised that the Petitioner should avoid any further coal dust exposure to prevent the progression of his pulmonary disease. (Id.)

In a deposition on December 14, 2020, Dr. Istanbouly testified consistently with his report, explaining that although coal dust may not be the only factor causing the Petitioner's symptoms, he found that coal dust exposure was a significant contributor to the Petitioner's condition. (Id.) He admitted that other causes for exertional dyspnea included heart disease and obesity. (Id.)

In discussing CWP in general, Dr. Istanbouly stated that CWP requires a tissue reaction to the coal mine dust in a person's lungs – commonly called scarring or fibrosis. (Id.) Nodules of trapped coal mine dust surrounded by fibrosis or scarring is the macule of CWP, and that macular nodule can't perform the same function as normal, healthy lung tissue. (Id.)

Regarding pulmonary function tests, Dr. Istanbouly explained that the "predicted" value is a specific number for an individual and the range surrounding that is based on gender, age and ethnic group. (Id.) The range of normal includes 95 percent of similar people. (Id.) He said that

even with normal pulmonary function tests, as the Petitioner had, it was possible for a patient to have early stage lung disease. (PX1) He agreed that it is possible for a person to begin his coal-mining occupation with lung function at the top range of normal and leave at the bottom range of normal, having a significant loss of lung function. (Id.)

On May 2, 2018, the Petitioner underwent additional pulmonary function tests performed by Dr. Jeffrey Selby a pulmonologist at The Lung Centre. (RX5) The tests revealed an FVC of 4.54 liters, 116% predicted; an FEV1 of 3.51 liters, 113% predicted; and an FEV1 of 77%. A diffusing capacity test resulted in 110% predicted, corrected for lung volumes 97% predicted.

On May 12, 2018, at the request of the Respondent, Dr. Cristopher Meyer, a "B-reader" radiologist, reviewed the May 26, 2017, chest X-ray and found no CWP. (RX1, Deposition Exhibit B) He noted that the Petitioner's lungs were clear, and there were no small-rounded, small-irregular or large opacities. (Id.) In his report, Dr. Meyer disagreed with Dr. Smith's findings, stating that the examination was normal. (Id.)

At his deposition on September 25, 2018, Dr. Meyer testified consistently with his report. (RX1) He acknowledged that two equally qualified "B-readers" of chest X-rays can disagree as to whether they think they are seeing small opacities. (Id.) He added that it is important to recognize that reading X-rays is an interpretative skill, and that is why there are divergences of opinion. (Id.) He explained that all coal miners have coal dust in their lungs, and the question is whether a miner has reached a threshold where the coal is seen on an X-ray. (Id.) Dr. Meyer stated that the 1/0 profusion level is the lowest level that would be considered positive for small macules, implying that the relative number of opacities is barely perceptible. (Id.) He acknowledged that simple CWP can progress to life-threatening conditions, such as progressive massive fibrosis and cor pulmonale. (Id.) He said that the rate of progression of CWP varies in

different individuals, depending on the person's tissue reaction to coal dust and the composition of the dust itself. (Id.) However, he said that simple pneumoconiosis typically won't progress once exposure to coal dust ceases. (Id.) He also stated that finding opacities in the mid and lower lung zones and not the upper lung zones (as Dr. Smith found in the Petitioner's chest X-ray) occurs very rarely. (Id.)

A review of the Petitioner's medical records was conducted on January 25, 2019, by Dr. David Rosenberg, a board-certified physician in internal medicine, pulmonary disease and occupational medicine hired by the Respondent. (RX2, Deposition Exhibit B) He concluded that the Petitioner did not have a coal-mine-dust-related disorder. (Id.) He noted that the Petitioner's pulmonary function tests were normal and his diffusing capacity was normal. (Id.) Dr. Rosenberg, who is a certified B-reader, also performed a reading of the Petitioner's chest X-ray and found no parenchymal changes related to past coal mine dust exposure. (Id.) He related the Petitioner's coughing symptoms to recurrent sinusitis use of lisinopril and related his dyspnea (shortness of breath) to his underlying heart disease. (Id.)

In making his conclusions, Dr. Rosenberg reviewed records from Primary Care Group, Prairie Cardiovascular, Dr. Smith, Dr. Meyer, Dr. Istanbouly and The Lung Centre. (Id.). These records were admitted as exhibits at Arbitration.

Dr. Rosenberg testified consistently with his report and opined that from a pulmonary standpoint, the Petitioner was capable of heavy manual labor. (PX2) He explained that the Petitioner's shortness of breath could be explained by his heart condition, classified as a "Class 2" under the New York Heart Association Functional Classification for Heart Disease. (Id.) On cross-examination, he admitted that the Petitioner's coughing and shortness of breath could be related to coal dust exposure but explained that there is nothing in the Petitioner's medical records

or testing to indicate a pulmonary etiology for the Petitioner's symptoms. (Id.) He said there was a zero percentage that the Petitioner's cough and shortness of breath was caused by coal dust exposure because there were no objective testing results that would support a finding that coal dust inhalation was even a minimal contributor to the Petitioner's symptoms. (Id.)

Regarding interpretations of chest X-rays in diagnosing CWP, Dr. Rosenberg testified that interpretations vary from one reader to another. (Id.) He also said that in general, about 30 percent of people with an X-ray that is negative for CWP can have a minimal degree of pathologic findings of CWP. (Id.) He stated that a profusion of 1/0 on a chest X-ray is a significant change from "normal," explaining that profusion is measured on a 12-point scale, representing 12 degrees of changes. (Id.) A 1/0 profusion would equate to a 4 out of 12, which is considered significant. (Id.) A chest X-ray showing a profusion of 0/1 would be considered negative for CWP. (Id.)

Regarding the diffusing capacity testing, Dr. Rosenberg explained that diffusing capacity is a measure of the intactness of the alveolar capillary bed. (Id.) He stated that normal diffusing capacity, such as the Petitioner's, supports the fact that there were no clinically significant interstitial changes or pneumonoconiosis. (Id.)

He also stated that although simple pneumoconiosis can progress once exposure to coal dust ceases, it is fairly rare. (Id.) He admitted that a person could have radiologically significant CWP but have normal pulmonary function tests, normal blood gasses, a normal physical exam and no symptoms. (Id.)

CONCLUSIONS OF LAW

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

Issue C: Did the Petitioner suffer an occupational disease which arose out of and in the course of his employment by the Respondent?

Section 1(d) of the Act provides that the term "Occupational Disease" means a disease arising out of and in the course of the employment or which has become aggravated and rendering disabling as a result of the exposure of the employment. Further, such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public.

The Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that he has an occupational disease as defined by the Act. Although Dr. Smith reported small opacities on the Petitioner's chest X-ray and Dr. Istanbouly diagnosed the Petitioner with CWP, there were no other indications of lung disease, such as chronic bronchitis, asthma or emphysema. Dr. Istanbouly found cough and sputum production, but these symptoms were lacking during the Petitioner's numerous doctor visits from 205 through 2020. The Petitioner did report exertional dyspnea, but that apparently was related to his heart disease. In addition, two sets of lung function tests above normal functioning.

On the other hand, Drs. Meyer and Rosenberg's testimony correlated with the Petitioner's broader medical history. Although they recognized that different B-readers could reach different conclusions when reading X-rays and that Dr. Smith's reading was not necessarily "wrong," they pointed to a slight likelihood of the Petitioner developing lung disease. A slight likelihood does not suffice for proof by a preponderance of the evidence. In addition, Dr. Smith's interpretation of the Petitioner's chest X-ray showing interstitial fibrosis in the bilateral mid to lower zones was inconsistent with what Dr. Meyer testified to as the general progression of CWP typically beginning in the upper lung zones. Thus, the Arbitrator gives greater weight to Drs. Meyer and Rosenberg's opinions.

Regarding the element of disablement, Section 1(e) of the Act provides defines the term as an impairment or partial impairment, temporary or permanent, in the function of the body or any of the members of the body, or the event of becoming disabled from earning full wages at the work in which the employee was engaged when last exposed to the hazards of the occupational disease by the employer from whom he or she claims compensation, or equal wages in other suitable employment.

There was little to no evidence of disablement that could be connected to CWP. Although the Petitioner suffered from recurrent dyspnea, it is at least as likely that this is caused by his heart disease. Therefore, the Arbitrator finds that the Petitioner has not proved disablement by a preponderance of the evidence.

Lastly, Section 1(f) of the Act provides that no compensation shall be payable for or on account of any occupational disease unless disablement occurs within two years after the last day of the last exposure to the hazards of the disease. Based on the findings above, this issue is not reached.

Based on all of the above, the Arbitrator finds that the Petitioner has not proved by a preponderance that he suffers from a compensable occupational disease, as defined by the Act, that arose out of and in the course of his employment with the Respondent.

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

In light of the findings above, the Arbitrator does not reach this issue.

Issue L: What is the nature and extent of the Petitioner's injury?

In light of the findings above, the Arbitrator does not reach this issue.

Issue O: Other issues: Disease, causation and Sections 1(d)-(f) of the Occupational Diseases Act.

These issues were addressed above under Issue C.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC039649
Case Name	NAVA, FERNANDO v. MARSHALL BROTHERS INC, IWBF
Consolidated Cases	
Proceeding Type	Petition for Review Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0065
Number of Pages of Decision	9
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	David Feuer
Respondent Attorney	Adam McCall

DATE FILED: 2/22/2022

/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

Fernando Nava,

Petitioner,

vs. No. 14 WC 39649

G.P. Marshall Brothers, Inc., and
Illinois State Treasurer as Ex-Officio Custodian of
The Injured Workers' Benefit Fund,

Respondents.

DECISION AND OPINION ON REVIEW

A Petition for Review having been filed by the Injured Workers' Benefit Fund (the Fund) and notice given to all parties, the Commission, after considering the issue of jurisdiction and being advised of the facts and law, dismisses the Petition for Review for lack of jurisdiction and remands the matter to the Arbitrator for further proceedings.

On November 24, 2014, Petitioner filed an application for adjustment of claim against Respondent-Employer alleging that on October 21, 2014, he sustained multiple injuries while working. At some point, Petitioner added the Fund as co-Respondent. On April 9, 2020, the Arbitrator filed an "Arbitration Decision" concluding and ordering as follows: "The Arbitrator finds that the proceedings of September 25, 2018 were conducted without proper notice to Respondent-Employer. The Arbitrator strikes those proceedings from the record, and orders that a new date for a full hearing be set." On May 6, 2020, the Fund filed a Petition for Review raising the issues of jurisdiction and notice.

The transcript of the proceedings on September 25, 2018, shows appearances by Petitioner's counsel and the Office of the Illinois Attorney General on behalf of the Fund. The Fund disputed all issues, but raised no objection to proceeding with the arbitration hearing. Three witnesses testified. The hearing was then continued to "a mutually agreed upon date."

The transcript of the proceedings a year later, on September 25, 2019, again shows appearances by Petitioner's counsel and the Office of the Illinois Attorney General. The

Arbitrator admitted into evidence Petitioner's exhibits and closed proofs. The Fund did not object. Petitioner's Exhibit 19 contains notices to Respondent-Employer of the hearing on September 25, 2019. The certified mail envelopes were marked by USPS: "Return to Sender. Unclaimed. Unable to forward."

As noted, on April 9, 2020, the Arbitrator filed an "Arbitration Decision" concluding and ordering as follows: "The Arbitrator finds that the proceedings of September 25, 2018 were conducted without proper notice to Respondent-Employer. The Arbitrator strikes those proceedings from the record, and orders that a new date for a full hearing be set." The Arbitrator explained that during the status calls between the two arbitration hearing dates, the parties advised her of an error in Respondent-Employer's address, and the Fund objected to the *ex-parte* proceedings on September 25, 2018.[1] The Arbitrator found that final notices of the hearing on September 25, 2019, were sent to correct addresses.

On review, the Fund asserts: "The Arbitrator correctly found that the proceedings of September 25, 2018, were conducted without proper notice to Respondent-Employer." However, the Fund argues the Arbitrator erred in striking the proceedings from the record and ordering a new hearing. The Fund claims the ruling gives Petitioner a second chance to try his claim and creates a substantial prejudice for the Fund. The Fund also argues the Arbitrator erred in bifurcating the proceedings.

The Commission cannot address the Fund's arguments because the Arbitrator's "Decision," which should have issued as an order, is interlocutory. Such interlocutory rulings are not ripe for review until the issuance of a decision on the merits. See *St. Pierre v. La Leche League Int'l*, 18 IWCC 0707; *Ralph v. Currier's Hydro Service*, 15 IWCC 0502; *Branham v. Lenny Szarek, Inc.*, 06 IWCC 0699. The Commission dismisses the Petition for Review for lack of jurisdiction, as the "Decision" is interlocutory, and remands the matter to the Arbitrator for further proceedings, which should culminate in a decision on the merits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Fund's Petition for Review is dismissed. The matter is remanded to the Arbitrator for further proceedings.

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.

February 22, 2022

SJM/sk
o-01/26/2022
44

/s/Stephen J. Mathis
Stephen J. Mathis
/s/ Deborah J. Baker
Deborah J. Baker
/s/ Deborah L. Simpson
Deborah L. Simpson

[1] We have no transcript(s) of the status calls.

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

22IWCC0065

NAVA, FERNANDO
Employee/Petitioner

Case# **14WC039649**

G P MARSHALL BROTHERS INC ILLINOIS STATE TREASURER AS EX-OFFICIO CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND
Employer/Respondent

On 4/9/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

0000 G P MARSHALL BROTHERS INC
29870 N SKOKIE HWY
LAKE BLUFF, IL 60044

5002 ILLINOIS ATTORNEY GENERAL
JOSEPH BLEWITT
100 W RANDOLPH ST 13TH FL
CHICAGO, IL 60601

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

FERNANDO NAVA
Employee/Petitioner

v.

G.P. Marshall Brothers Inc., Illinois State Treasurer as Ex-Officio Custodian of the Injured Workers' Benefit Fund
Employer/Respondent

Case # **14** WC **39649**

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 **WAUKEGAN**, on **September 25, 2018 and September 25, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

ORDER

The Arbitrator finds that the proceedings of September 25, 2018 were conducted without proper notice to Respondent-Employer. The Arbitrator strikes those proceedings from the record, and orders that a new date for a full hearing be set.

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.

Susan C. Mezyk

Signature of Arbitrator

4-6-2020
Date

APR 9 - 2020

STATE OF ILLINOIS)
)
COUNTY OF LAKE)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Fernando Nava,	)	Case No. 14 WC 039649
	)	
Petitioner,	)	Waukegan, IL
	)	
v.	)	
	)	
G.P. Marshall Brothers Inc., Illinois State Treasurer as *Ex-Officio Custodian* of the Injured Workers' Benefit Fund	)	
	)	
Respondents.	)	

ADDENDUM TO THE DECISION OF THE ARBITRATOR

FINDINGS OF FACT

An Application for Adjustment of Claim was filed by Petitioner, Fernando Nava, seeking relief under the Illinois Workers' Compensation Act from Respondent-Employer, G.P. Marshall Brothers, Inc. This action sought further relief from the Illinois Workers' Benefit Fund (IWBF) because Respondent-Employer allegedly did not maintain workers' compensation insurance. A bifurcated hearing was held before Arbitrator Jessica Hegarty on September 25, 2018 and September 25, 2019 in Waukegan, Illinois. The Illinois Attorney General's Office appeared on behalf of the Illinois State Treasurer, as *ex-officio custodian* of the IWBF.

The dispositive issue is whether Petitioner provided proper notice of the hearings to Respondent-Employer, G.P. Marshall Brothers, Inc.

This case was set for hearing on September 25, 2018 in Waukegan, Illinois. Petitioner and Respondent-IWBF appeared for the matter. No one representing Respondent-Employer appeared. Respondent-IWBF inquired of Petitioner whether it had served Respondent-Employer with notice of the hearing. Petitioner's counsel indicated that he had sent notice to Respondent-Employer, but did not have documentation with him to prove service was completed. Petitioner's counsel indicated that this documentation did exist and that he could furnish a copy to the Court, he just did not have the documentation with him at that time. Respondent-IWBF objected to continuing with the hearing without Respondent-Employer and without the documentation showing that Respondent-Employer had been served with notice of hearing.

After discussion between the parties and the Arbitrator, the Arbitrator allowed Petitioner to continue his case-in-chief, based on Petitioner's counsel's representation to the Court that he had completed service to Respondent-Employer. The matter was bifurcated, with proofs to be closed on a later date in order to give Petitioner the opportunity to bring the documentation showing notice to Respondent-Employer, as well as re-notice Respondent-Employer of the new date. The parties chose December 18, 2018 to return.

On December 18, 2018, Petitioner and Respondent-IWBF again appeared in Waukegan. No one representing Respondent-Employer appeared. Petitioner tendered to Respondent-IWBF copies of letters giving Respondent-Employer notice of the hearing for both the September 25, 2018 and December 18, 2018 court

dates. Petitioner's counsel indicated that he had not received a response from Respondent-Employer and that while he had sent the notice of the December 18, 2018 date via USPS Certified Mail, there had been no update in the tracking of that mail since October 12, 2018. There was also no indication of its delivery. In cross-referencing the information contained in these documents with information about Respondent-Employer available through the Illinois Secretary of State, Respondent-IWBF discovered that the address to which Petitioner had sent both notices and letters was incorrect. Service therefore had not been perfected for either date.

When the parties appeared before the Arbitrator, both Petitioner and Respondent-IWBF informed the Arbitrator of the error in Respondent-Employer's address. Respondent-IWBF renewed its objections to both the December and September proceedings as having occurred *ex parte* due to the imperfect service of notice to Respondent-Employer.

The Arbitrator recommended that a transcript of the proceedings be provided to Respondent-Employer at Petitioner's expense. The Arbitrator then recommended that Petitioner re-notice Respondent-Employer, at the correct address, for March 15, 2019.

Subsequent to this discussion, Petitioner's counsel emailed both Respondent-IWBF and the Arbitrator indicating that he would not be able to proceed with closing proofs during the March calendar, as he would be out of town on vacation. The parties and arbitrator, via email, agreed to close proofs on June 24, 2019, at which time Petitioner would tender proof of proper service to Respondent-Employer.

On June 24, 2019, Petitioner and Respondent-IWBF appeared in front of the Arbitrator. No one representing Respondent-Employer appeared. Petitioner's counsel showed Respondent-IWBF's counsel and the Arbitrator copies of letters of notice he sent to Respondent-Employer. The address to which Petitioner had sent the notices was again incorrect. In front of the Arbitrator, Respondent-IWBF's counsel handed Petitioner's counsel a note with the correct individuals and addresses for service to Respondent-Employer. The Arbitrator allowed Petitioner one more opportunity to serve notice to Respondent-Employer. The parties agreed to close proofs on September 25, 2019. Ahead of the agreed date, Respondent-IWBF filed a Motion to Close Proofs at the September date.

The Parties appeared in Waukegan on September 25, 2019. No one representing Respondent-Employer appeared. Petitioner tendered to Respondent-IWBF and the Arbitrator copies of the letters and notices it sent to Respondent-Employer via USPS Certified mail, informing Respondent-Employer of the September 25, 2019 hearing date. These letters and notices had been sent to the correct individuals and addresses. Petitioner tendered these documents into evidence, along with the remainder of Petitioner's exhibits. Respondent-IWBF did not object. Respondent-IWBF did not have any exhibits to tender. The Arbitrator closed proofs.

The Arbitrator finds that the proceedings of September 25, 2018 were conducted without proper notice to Respondent-Employer. The Arbitrator strikes those proceedings from the record, and orders that a new date for a full hearing be set.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC017309
Case Name	MASTERS, KIMBERLY v. EXPRESSJET
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	22IWCC0066
Number of Pages of Decision	27
Decision Issued By	Kathryn Doerries, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	CHRISTOPHER MOSE, David Jerome
Respondent Attorney	Michael Scully

DATE FILED: 2/22/2022

/s/Kathryn Doerries, Commissioner

Signature

DISSENT

/s/Thomas Tyrrell, Commissioner

Signature

22IWCC0066

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

KIMBERLY MASTERS,

Petitioner,

vs. NO: 18 WC 17309

EXPRESSJET AIRLINES, 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 accident, causal connection, notice, average weekly wage/benefit rates, temporary total disability, medical expenses, prospective medical, other-procedural & evidentiary issues raised on the record, objection to trial setting, motion to quash, Respondent's credit and evidentiary issues, and penalties & attorney fees, and being advised of the facts and law, reverses the Decision of the Arbitrator and denies Petitioner's claim for compensation, and affirms the Arbitrator's decision regarding Respondent's credit, for the reasons stated below.

Procedural History

This matter was heard by Arbitrator Kay in Chicago on July 23, 2020, and August 20, 2020. Arbitrator Kay was no longer with the Commission before the decision was rendered. The parties agreed and consented for Arbitrator Wesley to render the decision in this matter. Respondent and Petitioner filed Petitions for Review May 28, 2021, and June 9, 2021, respectively.

Findings of Fact

Testimony

Petitioner was employed as an airline pilot for Respondent ExpressJet since April 25, 2005.

Petitioner testified her salary in 2017 was about $49,000. For the week ending February 28, 2017, she was paid $188.40 for that pay period. Petitioner testified she took time off during that week to be with her mother and father who needed help after her father had been hospitalized. (07/23/2020 T. 26-28)

Petitioner testified her job as a pilot for Respondent required her to "be in good health" and to undergo flight physicals every year. (07/23/2020 T. 28) She testified she had to have "range of motion of her limbs" and to be able to control the flight controls. If a system broke down, she had to be able to manually manipulate flight controls with force. (07/23/2020 T. 28)

Petitioner's job also required her to be able to utilize emergency equipment such as an emergency brake. Additionally, she needed to be able to pull out the cockpit window, the exit door in the passenger cabin and the cockpit door if needed. If she did not show she was physically capable of demonstrating those activities every year during training, she would not be allowed to work as a pilot for Respondent. (07/23/2020 T. 29-31)

Petitioner testified that her responsibilities as First Officer included performing the walk-around of the aircraft before and after every single flight. (07/23/2020 T. 54) For each flight, Petitioner had to go down and up a jet bridge stairs to access the aircraft and the ramp. Petitioner would traverse the stairs two times for every flight. (07/23/2020 T. 54)

Petitioner testified that on December 17, 2017, she was doing a walk-around of the aircraft and she slipped on de-icing fluid in front of the ramp crew, right next to the belt loader, and she fell. (T.31) Petitioner testified she landed on her left knee with "very hard force" and her right knee went out at a 45-degree angle. She stated that there was a "guy" standing next to her who asked what he could do and she responded, "You can help me up." (07/23/2020 T. 32) She did not recall how her hands were when she fell. She testified that she felt a lot of pain after the fall; specifically, she felt pain, "In my knees, all over, my arms, everywhere. I was covered in de-icing fluid. My pants were soaked in the de-icing fluid." (07/23/2020 T. 33)

Petitioner testified that she was able to complete that flight and she was off work after that flight through the Christmas holidays. (07/23/2020 T. 33)

Petitioner testified she sought medical treatment with Dr. Sloan at the beginning of January 2018 and complained of pain in both of her knees and on the inside of her elbows. (07/23/2020 T. 34) Dr. Sloan prescribed physical therapy and an MRI scan. (07/23/2020 T.35) Petitioner testified she notified the chief pilot of her accident right after she left the doctor's office on January 5. (T.7/23/2020, T. 36) The chief pilot asked her questions over the phone, she testified. (07/23/2020 T.36)

Petitioner further testified:

Q: After the accident happened, did you notify anybody that there was an accident?
A: I notified my company.
Q: How did you do that?
A: My chief pilot.

Q: I'm sorry, right after it happened?
A: I called my chief pilot.
(07/23/2020 T.37)

Petitioner agreed in May 2018 Respondent asked her to attend a Section 12 exam with Dr. George Paletta in St. Louis for an evaluation of her left knee.

Petitioner subsequently sought treatment with Dr. Cory Solman, Jr., orthopedic surgeon. Petitioner agreed she underwent surgery on her left knee on September 12, 2018 (*The Commission notes this date is incorrect. The date of surgery is October 23, 2018, per the operative report*). She testified she was unable to return to work after surgery because she was not in the physical condition required in order to perform her duties to fly the aircraft. (07/23/2020 T. 41) Petitioner underwent work conditioning in February of 2019 and the therapist stated another round would be beneficial. (07/23/2020 T. 42) Petitioner received cortisone injections for her elbows and was recommended to undergo surgery. Petitioner testified Dr. Solman recommended an injection of plasma rich platelets which has not been performed. (07/23/2020 T. 44)

Petitioner testified she was scheduled to undergo an IME with Dr. Sagerman in Chicago in June 2020. Petitioner stated that was a problem for her. Petitioner stated that she lives in the middle of Missouri, northeast of Jefferson City which is about 407 miles from Chicago, and she has no family around there. Her mother lives in St. Louis and is very frail, so getting to Chicago would be very difficult for her. Petitioner stated she has three very active boys and her mother could not care for them and her husband works in St. Louis and is only home on the weekends. (07/23/2020 T. 44-46)

Petitioner was aware Respondent offered to fly her to Chicago for the Section 12 exam, but that was a problem for her because she did not want to get sick and did not want her kids or mother to get sick due to the COVID virus. Petitioner agreed if she was working, she would be flying. In response to whether she would be exposed to the COVID virus, she responded, "We are up in the cockpit. There is a door. I am not dealing with the passengers as they are getting on and off. I feel more protected." (07/23/2020 T. 47)

Petitioner testified that, besides driving, other activities such as throwing a baseball, playing football with her kids, carrying a laundry basket, and pushing down on a shampoo bottle, cause pain in her elbows. (07/23/2020 T. 51) Petitioner testified that her elbow conditions have gotten worse since the accident. Petitioner testified she can usually tell when a weather front is coming in because her knees and elbows usually hurt a lot more. (07/23/2020 T. 52)

Petitioner testified walking stairs causes pain in her knees. When she kneels at church, her left knee hurts. As a pilot, she did not have to kneel. However, she did need to go up stairs and walk inclines. (07/23/2020 T. 51-54) Petitioner testified that as First Officer she is responsible for the walk-around the aircraft before and after every single flight and she traverses the jet bridge stairs to access the aircraft and the ramp and she goes down and up each flight. She testified she goes up and down the stairs two times for every flight. (07/23/2020 T. 54)

On cross-examination, Petitioner agreed she was aware of the procedures in place any time a member of the crew is injured. The procedure involves completing a written report on the same

day as the injury. (07/23/2020 T. 66) Petitioner agreed she completed her flight after her fall on December 17, 2017, and she did not report an injury to work until January 5, 2018. (07/23/2020 T. 66-67)

Petitioner agreed she was trained on Respondent's standard operating procedures which included being trained using Respondent's Flight Operations Manual. (07/23/2020 T. 71) Petitioner agreed that it is mandatory that any incidents on the plane be reported and this includes when a flight crew member has an injury or illness. (07/23/2020 T. 72) Petitioner agreed on cross-examination that any of the incidents that require mandatory reporting must be reported to the Federal Aviation Administration (FAA) and the National Transportation Safety Board (NTSB). (07/23/2020 T. 73-75) Petitioner agreed a report must be submitted at the end of a flight on the day of the incident. (07/23/2020 T. 75) Petitioner agreed that failure to complete a report would violate ExpressJet procedures, and the FAA and NTSB regulations and rules. (07/23/2020 T. 75) Petitioner testified she did not complete any report for an incident after completion of her flight on December 17, 2017. (7/23/2020, T. 75)

After reviewing her flight schedule for December 17, 2017, Petitioner agreed that on that date, she flew from Chicago O'Hare International Airport to Charleston International Airport in South Carolina, departing at 3:12 p.m. and arriving at 6:10 p.m. Petitioner agreed she departed South Carolina that same evening and landed at George Bush Intercontinental Airport in Houston, Texas. (07/23/2020 T. 76-77) Petitioner agreed she was on duty for 11 hours and 1 minute on December 17, 2017. Petitioner had a ten hour layover in Houston and stayed in a hotel.

Petitioner agreed that on December 18, 2017, she flew from Houston, Texas, departing at 11:57 a.m., to Killeen Fort Hood Regional Airport in Texas. On that same day, Petitioner flew back to George Bush Intercontinental Airport in Houston, Texas. On that same day, she departed Houston, Texas, for Alexandria International Airport located in Louisiana and landed at 8:42 p.m. Petitioner agreed she was on duty for 9 hours and 57 minutes. (07/23/2020 T. 78) Petitioner agreed that she had a sixteen-hour layover in Louisiana and stayed in a hotel that night.

On December 19, 2017, Petitioner departed Louisiana at 2:00 p.m. for George Bush Intercontinental Airport in Houston, Texas. From there, Petitioner flew from Houston, Texas, to Bill and Hillary Clinton National Airport in Little Rock, Arkansas. Petitioner then traveled from Little Rock, Arkansas, to Chicago O'Hare International Airport, landing at 8:00 p.m. On December 19, 2017, Petitioner was on duty for seven hours. (07/23/2020 T. 80)

Petitioner testified her scheduled vacation began on December 25, 2017. (07/23/2020 T. 82) Petitioner further testified that while she was working from December 17 through December 19, 2017, her husband was on vacation from work and watched their children. (07/23/2020 T. 82)

On redirect examination, Petitioner testified she did not remember the name of the chief pilot. She believed his name was Chris but could not recall. (07/23/2020 T. 84-86) Petitioner testified she was First Officer on December 17, December 18, and December 19, and only the flights that were flown required her to walk up and down the jet bridge. (07/23/2020 T. 87-88) Sometimes the captains offer to do the walk-arounds she testified. When asked if she recalled if the captain did the walk- arounds she responded, "I know he did some." (07/23/2020 T. 88)

Petitioner testified she did not seek medical treatment at that time and responded that it was a Sunday and the medical people in Chicago are not open on Sundays. (07/23/2020 T. 88)

On re-cross examination, Petitioner agreed one of her job duties as First Officer is to conduct a pre- and post-flight inspection of the aircraft for every flight she takes. (07/23/2020 T. 90)

Testimony of Mr. Whitestone

On July 23, 2020, Mr. Lorenzo Whitestone testified at hearing for Respondent. Mr. Whitestone is a private investigator, owner/operator of Whitestone Investigations for about three years. They handle Workers' Compensation, criminal, civil, and domestic cases. He was familiar with Petitioner in this matter. He started surveillance of Petitioner and provided services August 2 through August 4, 2019. He did a background check, checked social media and performed a data search to confirm her residence and also performed a vehicle registration check to be sure they had the right target. (7/23/2020 T. 97-100)

Mr. Whitestone testified when the investigation was over he memorialized his findings in a formal report noting his observations and he took photos and video as was his regular practice and course of business. He identified RX 5 as the report. (7/23/20 20 T. 100-103)

Mr. Whitestone testified of his efforts August 3, 2019, at Petitioner's residence; he confirmed the address based on what he received from Respondent and information he verified through background checks. He first arrived about 2:17 p.m. on August 3, 2019, and he observed Petitioner and the vehicle she was driving. He followed Petitioner to an ice rink in Jefferson City, and he observed Petitioner at the arena. He stated when she arrived, she exited her vehicle and went inside and, shortly after, Mr. Whitestone went inside to observe Petitioner's activities. He stated she was walking normally and wearing tube socks, sandals and shorts. He stated she had no assistive devices for walking; everything seemed normal. He stated she appeared to have full flexibility in her upper and lower extremities. Mr. Whitestone stated Petitioner was inside the arena talking to other people and she was not wearing any medical devices and she stood the whole time. (7/23/2020 T. 104-108)

Mr. Whitestone testified that he took cell phone video at the ice arena as he could not take his camera inside (August 3, 2019). Video showed him walking inside trying to locate Petitioner and identify her on video. He noted Petitioner was standing beside the rink looking at the skaters. (7/23/2020 T. 141-145)

Mr. Whitestone stated he observed Petitioner leave by herself and go to her car. She re-entered the arena and later exited with her child. Mr. Whitestone noted she was carrying a large red bag in her right arm. He followed Petitioner after the arena. He stated Petitioner and the child entered the vehicle and left, as seen in the video. He observed Petitioner and the child enter Aldi and, when she exited the store, she was pushing a cart to the car. She placed the groceries in her car and left. He indicated he obtained video for August 3, 2019, and he had not altered the video in any way. Once his investigation was completed, he forwarded the report and video to Respondent. He verified the copy prior to hearing for accuracy and he stated it was true and accurate. (T.108-114) He identified Petitioner in the room as the person in the video. (7/23/2020

T. 114-116)

On cross examination, Mr. Whitestone identified video from August 3, 2019, 12:44 p.m., while conducting mobile surveillance of Petitioner in her Mustang, operating her vehicle normally. (7/23/2020 T. 139-141)

On August 20, 2020, Mr. Whitestone testified under further cross-examination. He was provided a copy of his report (RX 5). He was pointed to page 9 of the report. He agreed it showed photos of Petitioner with his comments under them. He agreed one showed Petitioner leaving the ice arena and he noted Petitioner "walking normally and showing no signs of pain or discomfort". He agreed that he did not know how Petitioner normally walked. He stated based on his observation, she was walking normally. He agreed a person can experience pain without showing it on their face. (8/20/2020 T. 9-13)

Mr. Whitestone was directed to page 10, Petitioner "bending over entering the vehicle showing no signs of pain". On page 11 he noted Petitioner "was walking normally back toward the ice arena without any medical equipment or devices". He testified that he did not observe Petitioner limping when walking during that time. The bottom of page 11, he noted Petitioner "standing inside the ice arena without any assistance of medical equipment and no signs of pain!" He was shown page 13, Petitioner "seen carrying a red bag". He agreed that he did not know what was in the bag or how heavy it was. He further noted that in his opinion, Petitioner was placing equipment inside a vehicle and showing "full flexibility with her arms and legs". As to flexibility, he stated he was basing that on his observations of what he saw her doing. He agreed he did not know what full flexibility was for Petitioner at the time. (8/20/2020 T. 13-18)

On re-direct examination, Mr. Whitestone testified that he did not witness Petitioner limping and he did not witness her facial grimacing while walking. As to the red bag she was noted to be carrying, in his report he stated it appeared to be hockey equipment she was carrying for the child. He testified the information provided in his report and video surveillance accurately reflected his observations on those dates. (8/20/2020 T. 21-24)

Medical Records

Petitioner sought medical care with Dr. Bradley Sloan at Jefferson City Medical Group on January 5, 2018. Petitioner reported pain and swelling in the left knee, specifically, the medial and anterior aspects of the knee. She reported the knee is very weak and unstable feeling and the pain is worse with walking and bending, better with rest. It was noted she had no other issues or concerns as of that date. Petitioner advised while walking at the airport on December 17, 2017, she slipped and landed on her knee. Examination of the left knee revealed positive knee tenderness in medial and lateral joint line, positive for pain in patella with all motions, positive pes anserine. Dr. Sloan's assessment was medial line tenderness of the left knee. He further noted medial compartment degenerative changes and was concerned there was a meniscus tear. The problem list/past medical noted mild intermittent asthma without complication and closed fracture of lateral portion of left tibial plateau. Petitioner was referred for an MRI scan. (PX 2)

An x-ray examination of the left knee was performed on January 5, 2018, and revealed no

effusion, mild medial compartment narrowing representing mild degenerative changes. There was no fracture identified. The Impression was mild degenerative changes, medial compartment of the left knee. (PX 2)

An MRI scan was performed January 24, 2018, which revealed a nondisplaced incomplete fracture of the inferior aspect of the patella, findings were compatible with a late subacute early chronic injury, chronic minimal bi-compartmental osteoarthritis, no ligamentous or meniscal tear was identified. (PX 2)

Petitioner returned for follow-up on January 25, 2018, reporting pain in the left knee, pain in her right knee and right elbow. She advised this happened during the fall. Dr. Sloan's assessment was a closed non-displaced longitudinal fracture of the left patella, medial epicondylitis on the right, and pes anserine bursitis. Dr. Sloan prescribed a straight leg brace and crutches as needed for the left knee. He noted treatment was for a fracture of the patella without manipulation. He prescribed a right wrist splint but further x-rays of the elbow were on hold at this time. Corticosteroid injections for the right knee were discussed but Petitioner wanted to hold off at this time. Dr. Sloan recommended seated work. (PX 2)

The January 25, 2018 Workers' Compensation Registration Form signed by Petitioner indicates Petitioner fell on de-icing fluid while doing walk around of aircraft. (PX 2)

Petitioner returned for follow-up with Dr. Sloan on February 8, 2018, complaining of numbness in her left leg most of the time, significant pain in her left knee, pain in her right elbow, and a little bit of left elbow pain. She reported her elbows hurt worse than her knees. The same assessment was noted. (PX 2)

Petitioner returned for follow-up on February 22, 2018, for her left knee/patella fracture. She rated the pain as 3-4 out of 10 at times. She rated her elbow pain as 3-4 out of 10. Petitioner reported her knee was doing better and she reported elbow pain with certain movements. (PX 2)

The February 28, 2018, and March 7, 2018, general evaluations at Outbound Rehab noted Petitioner's reported fall on December 17, 2017, when she fell in Chicago while doing a check around the plane before takeoff. They further documented Petitioner worked a couple weeks but had ongoing pain. They documented Petitioner was seen by Dr. Sloan and testing revealed a fractured patella and put in long leg immobilizer. Petitioner also reported she had pain in her elbows that worsened during that time. Petitioner had 10-pound lifting restriction, 10-pound push/pull restriction, and 10 pound carrying restriction. The same diagnosis was noted. (PX 2)

Petitioner followed up on March 8, 2018, with Dr. Sloan and reported her knee is feeling much better since going to physical therapy. She reported her range of motion has come back substantially. Her elbows were still hurting, especially with certain movements. She continued to wear all three of her braces. (PX 2)

Petitioner returned on March 22, 2018, for follow-up with Dr. Sloan rating her left knee pain as 3 out of 10, and pain in both elbows at 4 out of 10. She reported, "I don't think I'm ready for stairs yet but I'm getting there." The diagnosis was again noted as a non-displaced fracture

transverse left patella, closed fracture lateral portion left tibial plateau. (PX 2)

Petitioner returned on April 5, 2018, for her left knee fracture and reported her knee brace was not fitting well and she used the one she had at home from a previous injury. She reported falling again on Easter Sunday, feeling like her knee gave out and she fell into the refrigerator. She reported physical therapy was going well and rated her knee pain as 2 out of 10. (PX 2)

The April 19, 2018, follow-up with Dr. Sloan again noted the closed fracture left patella, pes anserine bursitis, medial epicondylitis left and right, and left lateral epicondylitis. Petitioner rated her left knee pain as 3 out of 10, bilateral elbow pain at 2 out of 10, left more than right and some elbow tenderness. Petitioner reported her left knee was hurting for the past several days and she was upset she was forced to quit therapy and she felt she may have gone backwards. (PX 2) Dr. Sloan's assessment and plan included: closed fracture of patella, prescribed Biodex test, and return once completed; pes anserine bursitis, resolved; medial epicondylitis, right, resolved; left lateral epicondylitis, resolved. (PX 2)

Petitioner saw Dr. Solman at the Orthopedic Sports Medicine & Spine Care Institute on June 20, 2018, for evaluation of bilateral elbow and knee pain. Dr. Solman's assessment was left knee severe patella contusion versus non-displaced fracture, possible sequalae of patella chondromalacia post fracture, right elbow medial epicondylitis, post traumatic, and left elbow medial epicondylitis, post traumatic versus compensatory. Dr. Solman indicated Petitioner certainly described a mechanism of injury that can cause knee injury. He recommended a corticosteroid injection in the left knee. Dr. Solman noted the force of a patella fracture can create areas of fibrillation of cartilage and chondromalacia and can cause thickness and scarring. Dr. Solman examined Petitioner's right knee and did not think she had any structural abnormalities in her right knee. Because she continues to complain of pain, he recommended she undergo an MRI to fully evaluate the right knee complaints. He noted the physical examination findings consistent with medical epicondylitis on the right and recommended an MRI of the right arm. Regarding her left elbow, although Petitioner reported pain in her left elbow since the fall, Dr. Solman noted it was not reported until over six weeks post injury. He found the clinical findings on the left arm less significant than the right and recommended an MRI to evaluate the soft tissue complaints. (PX 4)

Petitioner returned to Dr. Solman on September 12, 2018, for follow-up for bilateral knees and elbows. His assessment was the same and he continued to keep Petitioner off work. Due to continuing complaints, Dr. Solman believed her condition warranted left knee arthroscopy with patella chondroplasty and debridement and inspection of her articular cartilage surfaces post-contusion. He further stated if she is approved for this surgery, he would plan on doing a right knee corticosteroid injection and bilateral elbow medial epicondyle injections and also doing an intra-articular injection in the right elbow. (PX 4)

On October 23, 2018, Petitioner underwent a post left knee arthroscopy with patella chondroplasty and open debridement of her pre-patellar tendon bursa and removal of her infrapatellar branch of the saphenous nerve, intra-articular injection of the right knee, bilateral medical epicondyle injections for medial epicondylitis. (PX 4)

Petitioner returned on November 2, 2018, for follow-up. Dr. Solman noted Petitioner's post bilateral elbow injections, left knee arthroscopy, and right knee injection. He noted Petitioner was doing "okay" and was to start physical therapy and home exercises. He kept Petitioner off work. (PX 4)

Petitioner returned on January 18, 2019, for her left knee and bilateral upper extremities. Dr. Solman noted Petitioner's left knee was doing a little better. Petitioner reported the burning she had before surgery was gone. She reported some grinding when walking stairs, and also shoulder pain anteriorly the prior few weeks. Dr. Solman noted Petitioner had not worked since the injury. His assessment was post left knee arthroscopy, bilateral epicondylitis, post traumatic, and shoulder pain. Dr. Solman continued aggressive physical therapy. Dr. Solman noted Petitioner's shoulder pain was a relatively new onset. He noted at the time of injury she injured both elbows, not necessarily her shoulders and he felt Petitioner may have some biceps tendinitis from normal activities of life. Petitioner was kept off work. On February 20, 2019, Dr. Solman noted Petitioner's ongoing bilateral elbow pain. He further noted, "She continues to state that her anterior shoulders are still quite painful but I have opined previously that I did not think that these were related to her work-related fall as this is more of a new problem and seemed to develop after she was off of work for several months." (PX 4)

Dr. Solman saw Petitioner on March 22, 2019, for left knee and bilateral upper extremities. Examination of the left knee revealed full range of motion, 5/5 strength, no instability, and no patellar instability. The right knee examination revealed full range of motion, 5/5 strength no instability, no patellar instability, and no patellar facet tenderness. It was noted she was neurovascularly intact in the right lower extremity. He noted Petitioner did not have therapy since the prior visit, but she was getting some improvement with stairs; Petitioner reported she was okay with small height stairs. Examination of the bilateral elbows revealed tenderness over the medial epicondyles, negative Tinel's over the ulnar nerve, and no direct compression pain over the ulnar nerve. Range of motion was full otherwise, 5/5 strength. He noted Petitioner continued to complain of significant medical epicondyle pain and he would like to proceed with more aggressive management which would consist of bilateral medial epicondyle debridement and fascial lengthening at the flexor pronator mass. Petitioner was kept off work. (PX 4)

At the May 8, 2019, follow-up appointment, Petitioner reported some increased knee pain, weather change problems, and continued elbow pain bilaterally. Dr. Solman noted Petitioner was concerned about her ability to return to work because she would need to climb stairs. Petitioner was again kept off work. (PX 4)

Petitioner returned on June 12, 2019, for follow-up and Dr. Solman noted Petitioner's left knee was getting stronger, but Petitioner reported significant pain bilaterally in the medial elbows. He recommended physical therapy for her knee to improve strength. He noted Petitioner still had bilateral elbow pain and he prescribed anti-inflammatory medications and injections for her elbows. Petitioner was again kept off work. (PX 4)

Petitioner returned on July 19, 2019, for follow-up for her left knee and bilateral upper extremities. Dr. Solman noted Petitioner's elbows were still tender and painful. Petitioner reported that her husband hit into her elbow over the weekend and she had some increased pain. Dr. Solman

noted the MRI showed bilateral elbow tendinitis. He was unsure if she may require surgery, but he felt she would benefit from debridement and fascial lengthening to relieve her pain. Petitioner indicated she wanted to proceed with surgery. Dr. Solman noted Petitioner's left knee was doing fairly well with therapy, but she still has problems with inclines. Dr. Solman stated it would be unsafe for Petitioner to try push open emergency doors on a plane. He noted Petitioner's ongoing problem with prolonged walking. Petitioner was kept off work. (PX 4)

Petitioner returned on August 30, 2019, for follow-up with Dr. Solman who noted Petitioner had been in work conditioning for her knees and getting stronger and she felt she was improving. Dr. Solman noted Petitioner's ongoing bilateral elbow pain. Dr. Solman prescribed restrictions of no jumping, no lifting/pushing/pulling more than 20 pounds and he continued work conditioning. Petitioner suggested workers' compensation may be okay with another round of injections. Dr. Solman recommended elbow surgery, and he indicated the lateral epicondyle issues may not necessarily be related as they developed since she has been off work. (PX 4)

Petitioner returned on October 4, 2019, for follow-up with Dr. Solman who noted Petitioner's left knee was doing fairly well and the right knee was still painful, with inflammation in the patellofemoral joint. Dr. Solman noted Petitioner still had bilateral elbow medial epicondylitis. He continued knee strengthening and kept the same restrictions. Dr. Solman prescribed injections with either PRP or stem cells to the right knee and bilateral elbows. Dr. Solman indicated the injections were the only way to avoid potential bilateral elbow surgeries. Dr. Solman believed Petitioner's right knee would respond to biologic injections to decrease inflammation. Petitioner was kept off work and with the same restrictions. (PX 4)

Petitioner returned on November 8, 2019, for follow-up and Dr. Solman noted Petitioner had increased pain with weather changes and she complained of ongoing elbow pain. Dr. Solman recommended further physical therapy and prescribed the platelet-rich plasma injections for her elbows. Petitioner was kept off work and with the same restrictions. (PX 4)

Petitioner returned on January 3, 2020, for follow-up and Dr. Solman noted Petitioner's complaints of pain in the anterior portion of both knees. She completed her work conditioning activities but has not been approved for anymore, he noted. She met 95% of the goals on the return to participation of her occupational activities and lifting. He continued to recommend injections in both knees. Dr. Solman noted Petitioner still had fairly significant elbow pain and recommended PRP injections in the medial epicondyle areas. He noted she may have some mild ulnar neuritis which can be concomitant with medical epicondylitis, but she did not necessarily complain of this at the time of the injury. She also had some mild lateral epicondyle issues but also did not have any significant lateral elbow pain at all at the time of her injury. (PX 4)

Job Description, Flight Operations Manual and Pairing Schedule

The job description for ExpressJet First Officer was admitted into evidence and shows that the job duties include, *inter alia*, safety and security of the aircraft as second-in-command, conducting pre- and post-flight inspections of the aircraft, assisting with pre-flight preparation and communications, all phases of flight, and assisting in emergency situations. (RX 1)

The Flight Operations Manual, Reportable Incidents section, admitted into evidence shows mandatory events that are reportable to the company, the FAA and NTSB. (RX 2)

The Pairing Schedule admitted into evidence shows Petitioner's flights on Sunday, December 17, 2017, Monday, December 18, 2017, and Tuesday, December 19, 2017. The schedule shows on December 17, Petitioner completed a total of two flights, logging 11 hours and 1 minute on duty, and 10 hours on layover; on December 18, she completed a total of 3 flights, logging 9 hours and 57 minutes on duty and 16 hours and 18 minutes on layover; and on December 19, she completed a total of 3 flights, logging 6 hours and 58 minutes on duty. The Pairing Schedule shows that on each of the flights on December 17, December 18, and December 19, the Captain was Matt Moritz and the flight attendant was Candy Glover. (RX 3)

Surveillance Video

The Whitestone Investigative surveillance video of August 3, 2019, shows Petitioner exiting her car and walking into an ice arena. Petitioner is seen exiting the arena with a child. Petitioner is seen inside the arena standing and talking to people. Petitioner then exited the arena carrying a large red athletic bag. She then bent over and put the bag and hockey stick into the car. Petitioner is then seen shopping with her child, pushing a shopping cart with her child riding on the front. (RX 6)

Conclusions of Law

The burden is on the party seeking an award to prove by a preponderance of credible evidence the elements of his claim, particularly the prerequisites that the injury complained of arose out of and in the course of the employment. *Illinois Institute of Technology v. Industrial Commission*, 68 Ill.2d. 236, 369 N.E.2d 853, 12 Ill. Dec. 146 (1977). It is the function of the Commission to decide questions of fact and causation, to judge the credibility of witnesses, and to resolve conflicting medical evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). The question of whether a claimant's injury arose out of his or her employment is typically a question of fact to be resolved by the commission, whose finding will not be disturbed unless it is against the manifest weight of the evidence. *Johnson Outboards v. Industrial Comm'n*, 77 Ill. 2d 67, 71 (1979); *Illinois Valley Irrigation, Inc. v. Industrial Comm'n*, 66 Ill. 2d 234, 239 (1977) (citing *Warren v. Industrial Comm'n*, 61 Ill. 2d 373, 376 (1975)).

It is primarily for the Commission to resolve conflicts in the record, evaluate the credibility of witnesses, and draw inferences from and assign weight to the evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 678-79 (2009). 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). 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 Comm'n*, 8 Il1.2d 407,

134 N.E. 2d 307 (1956). 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 Comm*'n, 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 Comm'n*, 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 Comm'n,* 147 Ill.Dec 353, 559 N.E.2d 526, 201 Ill.App.3d 880 (2nd Dist. 1990), see also, *Seiber v Industrial Comm'n*, 82 Ill.2d 87, 411 N.E.2d 249 (1980).

After a careful review of the totality of the evidence, the Commission finds that Petitioner failed to prove by a preponderance of the credible evidence that she sustained an accident arising out of and in the course of her employment on December 17, 2017.

There are clear questions raised throughout the record as to Petitioner's credibility and the reliability of Petitioner's testimony. The Commission views the evidence differently as it relates to the evaluation of Petitioner's credibility and gives no weight to Arbitrator Wesley's credibility assessment noting, in part, she did not observe Petitioner testify. Petitioner's testimony that she injured her left knee, specifically a fracture of the patella, her right knee, and both elbows as a result of slipping on de-icing fluid while performing a walk-around of an aircraft during pre-flight inspection on December 17, 2017, is not credible.

The record contains multiple inconsistencies with respect to this claimed injury, including Petitioner's actions on the date of accident and during the next 19 days. First, Petitioner, a pilot for Respondent since 2005, or 12 years, agreed she was aware that if a member of the flight crew was injured, a report must be filed internally and with the FAA and the NTSB. Petitioner admitted she did not complete these reports as required despite being well aware of this requirement. Second, Petitioner did not notify her chief pilot on December 17, December 18 or December 19 of an accident. In fact, she testified she did not know her chief pilot's name. Further, she did not notify her chief pilot until January 6, 2018. Third, Petitioner continued to perform her job duties as First Officer on the date of the alleged accident and for two days thereafter. The Commission finds it particularly significant that, as a pilot, Petitioner was required to be "physically healthy," which included being able to remove the cockpit door and window, and passenger door, as well as perform pre- and post-flight inspections by walking around the aircraft and through the aircraft for every flight. Petitioner was also required to traverse the stairs to the aircraft two times for each flight. The Commission finds it incredible that Petitioner would have been able to physically perform her job by walking around and through each aircraft before and after each flight with a fractured patella on December 17, December 18 and December 19. Thus, Petitioner's failure to complete injury reports, failure to advise her chief pilot on the date of the alleged injury and for almost three weeks thereafter, and her ability to perform her job duties as a pilot with a fractured patella belies her testimony.

Petitioner's testimony that she was able to complete her flight on December 17 but was off work after that flight through the Christmas holidays is disputed by the credible evidence of record and impacts her credibility. Respondent's Pairing Schedule contradicts Petitioner's testimony. The Commission places great weight on the Pairing Schedule which disputes Petitioner's testimony

and details with specificity her schedule for the next two days (RX 3). The schedule shows that on Sunday, December 17, 2017, Petitioner flew from Chicago O'Hare Airport to Charleston International Airport in South Carolina. Based on Petitioner's testimony, she performed the post-flight inspection after arriving at Charleston. Before departing Charleston, she performed a pre-flight inspection by walking around and through the aircraft. Petitioner then flew to George Bush International Airport in Houston, Texas, and again performed pre- and post-flight inspections.

The next day, Petitioner flew from Houston, Texas to Killeen Fort Hood Regional Airport in Texas where again she performed pre- and post-flight inspections of the aircraft. From Killeen Fort Hood Regional Airport, she flew back to George Bush Intercontinental Airport in Houston, Texas and from there flew to Alexandria International Airport in Louisiana, which again required pre- and post-flight inspections. On December 19, Petitioner flew from Alexandria International Airport, Louisiana to George Bush Intercontinental Airport, Houston, Texas, requiring pre- and post-fight inspections, and then from Houston, Texas to Bill and Hillary Clinton National Airport in Little Rock, Arkansas, again requiring pre- and post-flight inspections. Finally, Petitioner flew from Little Rock, Arkansas to O'Hare International Airport in Chicago. The Pairing Schedule shows that not only did Petitioner continue to work as First Officer for two days after December 17, contrary to her testimony, but she took multiple flights, eight in all, that required her to walk in and around aircrafts and traverse stairs, two times per flight. Her testimony is contradicted by the uncontroverted Pairing Schedule and thus is unreliable.

Further, the Commission notes the Pairing Schedule shows the crew members assigned to each flight. (RX 3) Petitioner flew with the same pilot, captain Matt Moritz, and the same flight attendant, Cindy Glover, for each flight during those three days. If Petitioner was soaked in de-icing fluid and sustained a fracture of her patella, it stands to reason her co-workers would have generated a report in compliance with the FAA and NTSB. The Commission notes no reports were generated and, moreover, no crew members were called to testify.

Petitioner's reason for not seeking medical treatment on the date of the alleged accident casts further doubt on her credibility. Petitioner testified that medical facilities were closed on Sundays. The Commission finds it difficult to believe O'Hare International Airport would not have medical personnel available and likewise the surrounding hospitals. Petitioner's testimony is simply unconvincing.

Petitioner's failure to seek medical treatment for 19 days thereafter further taints her credibility. Petitioner had multiple opportunities to seek medical treatment at the multiple airports during the next two days, during her 10 hour layover on December 17, or her 16 hour layover on December 18, on December 19, or during her vacation starting December 20, 2017. Petitioner's failure to seek medical treatment for 19 days is inconsistent with her testimony she sustained a fractured patella, injury to both elbows and her right knee on December 17.

The medical records further undermine Petitioner's credibility. Petitioner testified she was in a lot of pain after the fall "in her knees, all over, her arms, everywhere." (07/23/2020 T. 33) However, when Petitioner first sought medical attention 3 weeks later, she complained of pain only in her left knee. Further, Petitioner reported pain in her shoulders to Dr. Solman and claimed they too were affected by the alleged accident. On February 20, 2019, Dr. Solman stated, "[s]he

continues to state that her anterior shoulders are still quite painful but I have opined previously that I did not think that these were related to her work-related fall as this is more of a new problem and seemed to develop after she was off of work for several months." (PX 4)

In summary, Petitioner's claim she sustained a fractured patella, injury to her right knee and bilateral elbows on December 17, 2017, is unsupported by the credible evidence. Petitioner continued to perform her job duties including pre- and post-flight inspections for a total of eight flights on December 17, December 18 and December 19, 2017. She continued to traverse two flights of stairs for every flight she took during those three days. She never advised her chief pilot on those three days or for 19 days thereafter of any purported accident. Petitioner did not file any internal or external reports for almost three weeks, in violation of known rules and regulations, and did not seek any medical treatment for almost three weeks despite numerous opportunities to do so at each airport, during layovers, and in each city. Finally, Petitioner did not seek any medical treatment while she was on vacation from work, beginning December 20, 2017, until after she returned from an out of state trip.

Based on the above, and the record taken as a whole, with Petitioner's credibility a key issue, the Commission reverses the decision of the Arbitrator and finds that Petitioner failed to prove by a preponderance of the evidence that she suffered accidental injuries arising out of and in the course of her employment on December 17, 2017, and, as such, all other issues, except Respondent's credit, are rendered moot.

Accordingly, the Arbitrator's decision is hereby reversed and Petitioner's claim for compensation is denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award dated May 24, 2021 is vacated and Petitioner's claim for compensation is denied. All remaining issues, except credit due Respondent, are rendered moot.

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

The bond requirement in Section 19(f)(2) is applicable only when "the Commission shall have entered an award for the payment of money." *820 ILCS 305/19(f)(1) (West 2013)*. Based upon the denial of compensation herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

February 22, 2022

o- 12/21/21
KAD/jsf

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

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

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 testified credibly and met her burden of proving she sustained a compensable accidental injury on December 17, 2017.

Petitioner has worked for Respondent as a pilot since 2005. On December 17, 2017, Petitioner testified that she sustained an injury when she slipped and fell on de-icing fluid while conducting a pre-flight inspection of an aircraft. Petitioner testified that a coworker witnessed her fall and helped her stand up. While Petitioner did not immediately seek medical treatment, the medical records revealed that she sustained significant injuries to her knees and elbows. Petitioner testified that she was able to complete her work duties with some help during the two days following her injury and was then off work due to the holiday season.

I respectfully disagree with the majority's determination that Petitioner was not a credible witness. The majority places great weight on minor inconsistencies in Petitioner's testimony and reports to her doctors. However, the credible evidence overwhelmingly supports a finding that Petitioner sustained injuries due to her accidental fall on the date of accident. While the majority focuses on the fact that Petitioner was able to continue to work for two days after her fall, there is absolutely no evidence that Petitioner's injuries would have precluded her from completing her work duties at that time. Respondent did not present any expert witness testimony or opinions that a person with Petitioner's injuries would not have been able to complete her flights and work duties scheduled during the two days following her fall. Following those final two days of work, Petitioner credibly testified that she was off work until after the Christmas and New Year holidays. She then sought medical treatment when her injuries had not improved. The majority's opinion that Petitioner was not a credible witness is almost entirely premised on the majority's apparent belief that Petitioner should not have been able to continue to perform her job duties in the few days immediately following her injury. However, in the absence of any expert opinion rebutting Petitioner's testimony that she was able to continue to perform her job duties following her injury, I believe Petitioner was a credible witness.

I believe the Arbitrator correctly considered and weighed all the evidence and reached the correct conclusion that Petitioner met her burden of proving by a preponderance of the evidence that she sustained injuries due to her December 17, 2017, work accident. While Respondent made many allegations regarding Petitioner's credibility, or lack thereof, these allegations and suppositions are simply not supported by the credible evidence.

For the forgoing reasons, I would affirm and adopt the Decision of the Arbitrator in its entirety. Petitioner met her burden of proving she sustained significant injuries due to the December 17, 2017, work incident.

/s/ Thomas J. Tyrrell
Thomas J. Tyrrell

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC017309
Case Name	MASTERS, KIMBERLY v. EXPRESSJET
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Corrected Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	11
Decision Issued By	Raychel A Wesley, Arbitrator

Petitioner Attorney	Christopher Mose
Respondent Attorney	Kelsey Moore, Jennifer Kiesewetter

DATE FILED: 5/24/2021

INTEREST RATE FOR THE WEEK OF MAY 18, 2021 0.03%

/s/ Raychel Wesley, Arbitrator

Signature

)SS.

COUNTY OF COOK)

☐ Rate Adjustment Fund (§8(g))
☐ Second Injury Fund (§8(e)18)
☒ None of the above

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

KIMBERLY MASTERS,)
Employee/Petitioner,) Case No.: 18 WC 17309
)
v)
)
EXPRESSJET,)
Employer/Respondent.)

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Tiffany Kay, Arbitrator of the Commission, in the city of Chicago on 7/23/2020 and 8/20/2020. Arbitrator Kay is no longer with the Commission and the parties agreed via written consent for Arbitrator Raychel A. Wesley to render the decision. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

B. ☐ Was there an employee-employer relationship?

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

D. ☐ What was the date of the accident?

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

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

G. ☒ What were Petitioner's earnings?

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

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

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

K. ☒ 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 Prospective medical care, Petitioner's failure to attend IME pursuant to Section 12, Respondent's Motion to Bifurcate and Respondent's Objection to Trial date set by attorney not on file.

FINDINGS

On the date of accident, **12/17/2017**, 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.

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

In the year preceding the injury, Petitioner earned **$49,148.19**; the average weekly wage was **$945.16**.

On the date of accident, Petitioner was **42** years of age, ***married*** with **3** dependent children.

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

Respondent shall be given a credit of **$76,474.10** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**20,938.40** for other benefits, for a total credit of $**97,412.50**.

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

ORDER

The Respondent shall pay to the Petitioner the sum of ~~**$653.07**~~ **$630.11 (RAW)** for temporary total disability payments for a period of 133 weeks, for the period of January 5, 2018 through July 23, 2020 pursuant to Section 8(b) of the Act, subject to the credit Respondent shall receive, as described above, for amounts previously paid.

Respondent shall authorize the injection of plasma-rich platelets as recommended by Dr. Solman and additional diagnostic procedures.

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.

Raychel A. Wesley

Signature of Arbitrator

MAY 24, 2021

ICArbDec19(b)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kimberly Masters,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 18 WC 17309
	)	
ExpressJet Airlines, Inc.,	)	
	)	
Respondent.	)	

CORRECTED ARBITRATOR'S DECISION

PROCEDURAL HISTORY

Kimberly Masters (Petitioner) filed a Petition for Immediate Hearing pursuant to Section 19(b) of the Illinois Workers Compensation Act (Act) against ExpressJet Airlines, Inc. (Respondent).

Petitioner filed an Application for Adjustment of Claim on June 11, 2018 for an accident date of December 17, 2017. Petitioner received temporary total disability benefits from January 31, 2018 through June 11, 2020, at which time benefits were terminated because Petitioner did not attend a Section 12 examination with Dr. Scott Sagerman of Arlington Heights, Illinois.

The case proceeded to hearing on July 23, 2020 and was continued due to time constraints. The hearing was continued on August 20, 2020, in Chicago, Illinois, before Arbitrator Kay. By consent of the parties, a decision is rendered by Arbitrator Raychel A. Wesley.

STATEMENT OF FACTS

On direct testimony Petitioner testified that she works as a pilot for ExpressJet and has worked as a pilot since April 25, 2005. (T1-26). She testified that her salary during 2017 was $49,000 and a wage statement was admitted into evidence without objection (PX.1 – Wage Statement).

Petitioner testified regarding the physical requirements for the job. (T1-26) Her job duties included conducting pre-flight and post-flight inspections of the aircraft. Petitioner testified that on December 17, 2017 she sustained an injury while doing a walk around of the aircraft, when she slipped on de-icing fluid and fell. She stated that she landed at a 45-degree angle. (T1-31-32) She testified that she landed very hard, to the point where the guy standing right next to her asked what can I do. She testified that she responded, you can help me up. She did not remember how her hands were when she fell but testified to feeling a lot of pain in her knees, all over her body, arms, everywhere and she was covered in de-icing fluid. (T1-32-33) She testified that she completed flights, including layovers, through December 19, 2017 and then was off through the Christmas holidays. (T1-33)

Petitioner testified that she first sought medical care with Dr. Bradley Sloan on January 5, 2018, at Jefferson City Medical Group. (T1-33)

Dr. Sloan's January 5, 2018 note states:

> while walking at the airport she slipped and landed on her knee. She points to the medial and anterior aspect of her left knee as the site of pain. She states there was some swelling. Pain is moderate. She also got a little bit of an abrasion/burn on the front of her left knee from some type of liquid can call on the tarmac. She states the knee is very weak and unstable feeling. The pain is worse with walking and bending. The pain is better with rest. She has no other issues or concerns today. (PX2,28)

Dr. Sloan's assessment noted medial joint line tenderness of left knee. (PX2, 30) Petitioner was instructed to undergo an MRI and follow-up. (PX2, 30) Past medical history included a closed fracture of the lateral portion of left tibial plateau. (PX2,30) At trial, Petitioner testified that when she saw Dr. Sloan, she was complaining of pain in both her knees and elbows and that she never had pain in her elbows prior to the injury. (T1-33-34)

On January 24, 2018, Petitioner underwent the MRI Dr. Sloan had ordered (PX2,138). The impressions of the MRI report included nondisplaced incomplete fracture of the inferior aspect of the patella. The findings were compatible with a late subacute early chronic injury, chronic minimal bicompartmental osteoarthritis and no ligamentous or meniscus tear was identified. (PX2,138) On January 25, 2018, Petitioner returned to Dr. Sloan to go over the results. Petitioner also reported having pain in her right knee and right elbow which she reported happened during the fall. (PX2,24) Dr. Sloan's assessment noted closed nondisplaced longitudinal fracture of left patella, medial epicondylitis right and PES anserine bursitis. (PX2, 26) Petitioner continued to undergo conservative treatment with Dr. Sloan through April 19, 2018. (PX2, 4)

On June 20, 2018, Petitioner began treating with an orthopedic surgeon, Dr. Corey G. Solman, Jr. of Orthopedic Sports Medicine & Spine Care Institute. (PX4,2) Petitioner gave Dr. Solman a history of the accident.

After initial conservative treatment, Petitioner underwent surgery performed by Dr. Solman on October 23, 2018. Post- operative diagnosis was 1) Bilateral elbow medial epicondylitis, posttraumatic, 2) Right elbow radio capitellar joint chondromalacia posttraumatic, 3) Right knee patellofemoral chondromalacia, 4) Left knee patellofemoral chondromalacia, contusion of infrapatellar branch of saphenous nerve, and prepatellar bursitis, posttraumatic. (PX4,14-16)

Petitioner testified she was not able to return to work after the knee surgery because she was not in the physical condition to perform the duties that are required of her to fly an aircraft. (T1-41)

Petitioner further testified that there is other medical treatment required which has been ordered by Dr. Solman but not approved by Respondent. The procedures which have been ordered include MRI's for both elbows, further physical therapy and platelet injections. (T1-42-43)

Petitioner testified that she called her chief pilot right after leaving Dr. Sloan's office and filled out an accident report over the phone on January 5, 2018. (T1-36-37) She also testified that right after the accident happened, she notified her company by calling her chief pilot. (T1-37)

Petitioner testified that ExpressJet asked her to see Dr. George Paletta in St. Louis, in May of 2018. His examination was limited to her left knee. (T1-37-38)

Petitioner testified that Dr. Solman prescribed work conditioning in February of 2019 and that the work conditioning helped. Petitioner last saw Dr. Solman in January of 2020. (T1-43,44) With respect to future care, Petitioner testified that Dr. Solman has prescribed an injection of plasma rich platelets and that she would like this treatment, but it has not been authorized. (T1-44).

Petitioner testified that she was asked to attend a Section 12 examination on June 10, 2020 and that it was a problem for her. She testified that she did not want to fly during the global pandemic COVID restrictions because of possible risk to her, her children and her mother. (T1-46) She testified that even though she would be working if not for the injury, she would not be exposed to the virus because she would be in the cockpit, away from passengers and would feel more protected. (T1-47)

She testified that while driving to the workers compensation trial, the drive had an adverse affect on her arms; pain started on the inside of both elbows within ten minutes of the start of the drive. (T1-51). When questioned about activities, she testified activities with her children and everyday chores produce pain and that the painful condition has gotten worse. (T1-51)

She testified that Dr. Solman currently has ordered work restrictions on lifting 15 to 20 pounds and that she has not worked since January 5, 2018. (T1-55).

With respect to temporary total disability benefits, she testified that at first, she was receiving $630.21 and that the benefits were reduced to $540.18 last September and she does not know why. (T1-56) She further testified that temporary total disability benefits were terminated on June 11, 2020 (T1-50).

On cross examination, Petitioner testified that she treated with multiple doctors, nurses, therapists and other professionals for the injuries she sustained in the accident, and that the history she has given them has been honest, truthful, complete and accurate. (T1-57)

She testified that she was scheduled with Dr. Sagerman in October of 2019 at the request of the employer and was provided notice of this appointment by her attorney. She did not attend this examination because of the distance from her house. (T1-58-59) Another examination with Dr. Sagerman was scheduled for June 10, 2020. (T1-60). She did not attend the appointment again, because of the distance and issues she had with childcare. She wanted her employer to pay for childcare or for the expenses of the children to travel with her to be paid. (T1-61-62) When cross examined about receiving benefits, she testified to receiving off work benefits from January 25, 2018 through June 10, 2020 (T1- 61). At the time of hearing, she was rescheduled with Dr. Sagerman for August 19, 2020. (T1-62)

She testified that her current residence is 10790 Phoenix Road, Tebbetts, Missouri and that this was her residence on June 10, 2020. (T1-62)

She testified that she spent Christmas vacation with her in-laws, and that they drove there on the 25th but could not recall the return date. (T1-62-64)

She testified that she did not complete a written report for the injury on the day of the accident even though having worked for ExpressJet for over 10 years and received safety training, she was aware of the procedures in place anytime a member of the crew is injured. Among the procedures, is the requirement that a written report be completed the same day. (T1-65)

Petitioner testified that she reported the injury on January 5, 2018. She has not returned to work. (T1-68)

When asked about her duties, Petitioner testified that she was responsible for safety of everyone on the plane and had a duty to adhere to standard operating procedures. She described the duties and testified that she was supposed to follow a flight operations manual which was admitted as Respondent's Exhibit 2. She identified a flight schedule (RX3) which contained the flights and layovers from December 17, 2017 through December 19, 2017. She testified that on some of these flights she rode in the back-jump seat.

Petitioner testified that she reported the accident to the chief pilot on January 5, and believes his name is Chris. (T1-86) She testified that she was very sore during the three-day period following the accident. (T1-87) She explained her assigned flights and layovers during this period and further testified that the captain assisted in some of her duties and she did not have to perform any emergency functions. (T1-87)

On re-cross examination, Petitioner confirmed her duties of postflight and preflight inspections and confirmed that she sought no medical treatment until January 5, 2018.

Petitioner rested her case in chief.

Respondent called investigator, Lorenzo Whitestone, to testify. Mr. Whitestone testified that the Respondent hired him to conduct an investigation of Petitioner on August 2, 3, and 4, 2019. (T1-97)

Mr. Whitestone testified he had observed Petitioner and conducted video surveillance on August 3, 2019 and that the surveillance occurred at an ice rink. (T1-105) He testified that she was walking normal (sic) and did not have any medical devices to assist her in walking. He testified that she appeared to have full flexibility in her upper and lower extremities. (T1-107)

He testified that when she exited the rink, she was carrying a large red bag. He testified that he followed Petitioner from the ice rink to a local grocery store where he observed Petitioner and a young boy enter the store. (T1-109) He also testified that when he observed Petitioner exiting the store, she was pushing a cart with the young boy on the front of the cart, and she was pushing it towards her vehicle. (T1-110) Respondent then played portions of the video. (RX# 5)

On cross-examination, the witness was asked to play the entire video of the surveillance activity and narrated it while viewing. (T1-130). The first hearing concluded due to time constraints.

Hearing resumed on August 20, 2020 with the continued cross examination of Lorenzo Whitestone. Mr. Whitestone confirmed that he does not know how Petitioner normally walks. (T2-11). He further testified that based on her facial expressions and her walking pattern he didn't see any kind of distress. He acknowledged that a person can experience pain without showing it on their face. (T2-12-13) He was further questioned about his statement that Petitioner was placing equipment inside a vehicle and showing full flexibility with her arms and legs. He testified that he does not know what Petitioner's full flexibility is and that he is not a doctor, nor did he perform an examination (T2-15-16)

On redirect, the witness testified that he did not see Petitioner limping or grimacing. (T2- 21)

In rebuttal, the Petitioner testified that the hockey bag she was carrying for her son that day was less than ten pounds. (T2-28). She further testified that her restrictions with Dr. Solman were 15-20 pounds. (T2-29)

Petitioner testified that she does not agree with the Lorenzo Whitestone's assessment of whether she was in pain, stating that she has been in pain every day since the day she was injured. (T2-33)

Respondent rested.

OPINION AND ORDER

In support of the Arbitrator's Decision as to C. *Whether Petitioner suffered accidental injuries which arose out of and in the course of her employment with Respondent, the Arbitrator finds the following:*

Petitioner credibly testified, without rebuttal, regarding the facts of her accident. Petitioner credibly testified that on December 17, 2017, while she was conducting the pre-flight inspection of the aircraft, she slipped on de-icing fluid and fell on her left knee and her right leg went out at a 45-degree angle. Petitioner's credible testimony was that she felt a lot of pain in her knees, arms and all over her body following the fall.

Petitioner's credible testimony is corroborated by the medical records. Based upon the foregoing, the Arbitrator concludes that Petitioner has proven that she sustained an accidental injury arising out of or in the course of her employment with Respondent, ExpressJet Airlines, Inc.

In support of the Arbitrator's Decision as to *E. Whether Petitioner provided appropriate notice of the work-related injury*, the Arbitrator finds the following:

Petitioner testified that she notified the chief pilot immediately after the accident and provided additional notice after her January 5, 2018 appointment with Dr. Bradley Sloan. Both notices of accident are well within the 45-day requirement under the Act.

Petitioner's testimony was not rebutted by Respondent. Instead, Respondent objects that Petitioner did not complete an accident report on the day of the accident as required by its own internal policies. The time for giving notice, however, is not governed by any policy of any Respondent but is set forth in Section 6 of the Act.

Based upon the foregoing, the Arbitrator finds that timely notice was provided by Petitioner to Respondent.

In support of the Arbitrator's Decision as to F. *Whether Petitioner's current condition of ill being is causally related to the injury*, the Arbitrator finds the following:

Dr. Sloan rendered the first opinion regarding Petitioner's condition of ill being. Dr. Solman, reviewed and adopted Dr. Sloan's opinion and rendered his medical opinion based on his June 20, 2018 examination of the Petitioner's bilateral elbows and bilateral lower extremities. Dr. Solman found that both elbows had tenderness to palpation over the medial epicondyle, right greater than left, and further that her left knee had tenderness over anterolateral joint line and medial joint line. Her right knee had some tenderness over the anteromedial and anterolateral joint line, and he observed that she walked with a slightly antalgic gait. He noted the findings of the MRI and found them consistent with her accident, concluding that her fall on December 17, 2017 was the prevailing factor in the development of her pathologies. Regarding her right elbow, Dr. Solman opined that Petitioner fell onto her elbows and has had relatively significant medial epicondylitis symptoms since that time. He noted Dr. Sloan's observations and treatment and recommended MRI's of both elbows to further evaluate. (PX#4, 6-7)

The Arbitrator is persuaded by the medical opinions of Drs. Sloan and Solman and finds that they are consistent with Petitioner's credible testimony. Respondent argues that the doctors' opinions are based on a false presentation of the history and mechanism of the injury. The Arbitrator is not persuaded by Respondent's argument that Petitioner is required to recite in minute detail the mechanism of the injury.

The Arbitrator notes by way of example, in Dr. Solman's November 8, 2019 examination of Petitioner, he says "With regards to her elbows, first of all, her elbows did start hurting around the time of her incident in December of 2017, thus the injury at work continues to be the substantial contributing factor in the development of her bilateral elbow pain and need for further treatment. I would recommend platelet-rich plasma injections into both elbows which she would agree to."

The Arbitrator has considered the credible testimony of the Petitioner and the history of accident and complaints set forth in the medical records. There is no evidence that Petitioner could not perform her job or intervening actions which would account for the Petitioner's current condition.

Based upon the foregoing, the Arbitrator concludes that Petitioner has met her burden of proving that her current condition is causally related to the injury.

In support of the Arbitrator's Decision as to *G. What were Petitioner's earnings*, the Arbitrator finds the following:

A wage statement was submitted into evidence by Petitioner which shows earnings which was unrebutted by Respondent. Based on that, the Arbitrator finds the Petitioner's earnings were $49,148.19 in the 52 weeks worked prior to the date of injury.

In support of the Arbitrator's Decision as to *J. What amount of reasonable and necessary medical expenses should be awarded*; the Arbitrator finds the following:

Respondent's defense on this issue is premised on causal connection. This issue has been resolved in favor of Petitioner. Therefore, the Arbitrator finds that the medical benefits are reasonable and necessary and related to the accidental injuries.

In support of the Arbitrator's Decision as to *K. Whether any prospective medical should be awarded*, the Arbitrator finds the following:

The video surveillance of Petitioner obtained on August 3, 2019 does not contradict Petitioner's current complaints. At trial, Petitioner's credible testimony is that she is not in the physical condition to perform the duties that are required of her to fly an aircraft and that she is in significant pain which is getting worse each day. The surveillance video did not measure pain, provided no basis of comparison and certainly was not demonstrative of flexibility or measures of pain and discomfort as initially alleged by Respondent. Petitioner has not been released to return to work by any doctor and is not at maximum medical improvement. Mr. Whitestone is not qualified to render medical opinions and thus the surveillance video is not considered in terms of the analysis for prospective medical care.

As previously stated, the Arbitrator finds Petitioner is a credible witness who has suffered a compensable work accident. Her present condition is causally related to her work accident and the Arbitrator finds that Petitioner is entitled to ongoing post-operative treatment as prescribed.

Respondent objected to Petitioner's request for prospective medical treatment on the grounds that Petitioner had not previously demanded it. However, the Petition for Immediate Hearing filed by Petitioner had marked "Additional Medical Treatment" under "Other Issue" (PX 7).

Based on the causal connection, the Arbitrator finds that Petitioner's request for prospective medical treatment is proper. The evidence demonstrates that such treatment is reasonable and necessary to relieve the effects of Petitioner's injury. The Arbitrator therefore orders Respondent to authorize and pay for the prospective medical care.

In support of the Arbitrator's Decision as to *L. What amount of temporary total disability expenses should be awarded;* the Arbitrator finds the following:

Temporary total disability payments were terminated after Petitioner did not attend the Section 12 examination. Respondent relies on the case of *R.D. Masonry v. Industrial Commission,* 215 Ill.2d 397, 830 N.E. 2d 584, 294 Ill.Dec. 172 (2005) for the proposition that a claimant's TTD benefits may be terminated when a Petitioner does not attend an exam that Respondent has scheduled pursuant to Section 12 of the Act. *R.D. Masonry*, however, does not address the issue of the reasonableness and the convenience to the claimant of the scheduled exam.

The issue of whether a Section 12 exam is reasonably convenient for a claimant was addressed by the Commission in *Anders v. OTR Wheel* and upheld by the Appellate Court in *Anders v. Industrial Commission*. 322 Ill.App.3d 501 (2002). In *Anders*, the employee lived in Quincy, Illinois and Respondent scheduled a Section 12 Examination with Dr. Marshall Matz in Chicago. In *Anders*, the Commission found among other things, that it was unreasonable for the Respondent to schedule an examination so far from the claimant's home when there were physicians who had previously provided expert opinions before the Commission who were closer. The Commission therefore found it unreasonable and vexatious for the Respondent to have terminated the claimant's TTD benefits for his failure to attend the exam and awarded full TTD benefits to the Petitioner *Anders*, supra. This Decision was subsequently affirmed.

This case is similar to the one in *Anders v. OTR Wheel*. The Respondent is asking the Petitioner to attend an examination with a doctor over 400 miles from her home to examine her for a relatively common condition for which there are numerous orthopedic doctors who are qualified to evaluate her who are much closer to her home. The Respondent had previously had Petitioner examined by a doctor in the St. Louis area and this did not present a problem for the Petitioner. Respondent gives no reason why Petitioner could not be examined by the same doctor or another in the St. Louis area. The distance of Arlington Heights and Petitioner's home in Tebbets, Missouri is outside of the reasonableness parameters set forth in the Act.

Two Motions to Quash were filed regarding the scheduling of the Section 12 examinations which questioned the reasonableness of requiring the Petitioner to attend the exam. During pre-trial conferences, Arbitrator Kay made recommendations regarding rescheduling in the vicinity of Petitioner's home or alternatively, providing transportation for Petitioner's children to go with her. The recommendations were not followed even though there seems to have been some representation that the recommendations would be followed. There was a change of Respondent's counsel during this time period as well. It is clear that the fact that Petitioner did not attend the Section 12 Examination was the basis for the termination of Petitioner's temporary total disability benefits. The exams which Respondent scheduled in Arlington Heights, Illinois pursuant to Section 12 of the Act were not at a time and place reasonably convenient to Petitioner as required by the Act. The Arbitrator finds that the Petitioner's nonattendance of examinations over 400 miles away from her home was a not a valid basis for termination of her temporary total disability benefits. Respondent had originally agreed to accommodate the Petitioner and that did not happen.

The Arbitrator finds that the Petitioner was temporarily and totally disabled from January 5, 2018 through July 23, 2020, a period of 133 weeks. The Arbitrator finds that Respondent previously paid temporary total disability payments to the Petitioner for the period of January 5, 2018 through June 10, 2020, or 126-6/7 weeks, at a rate of $630.21 per week from January 5, 2018 through September 8, 2019 and later $540.18 per week from September 9, 2019 through June 10, 2020, for a total of $76,474.10. The Arbitrator finds that the Respondent shall be entitled to a credit for $76,474.10 reflective of all temporary total disability payments made by the Respondent to date. Respondent shall pay the additional temporary total disability due from the termination date through the present.

In support of the Arbitrator's Decision as to *M. Is Petitioner entitled to any penalties or fees*, the Arbitrator finds the following:

The Arbitrator does not find that Respondent's actions have been entirely unreasonable and vexatious, and no fees or penalties are assessed.

In support of the Arbitrator's Decision as to *N. Is the Respondent due any credit*, the Arbitrator finds the following:

The parties have stipulated that Respondent is entitled to a credit of $20,938.40 for payment of medical expenses and $76,474.10 in TTD benefits. Therefore, the Arbitrator concludes that Respondent is entitled to a credit of $20,938.40 for all medical expenses paid to date as well as $76,474.10 in TTD benefits, for a total credit of $97,412.50.

In support of the Arbitrator's Decision as to *O. Other issues*, the Arbitrator finds the following:

A. Motion to Bifurcate: Respondent made a Motion to Bifurcate the July 23, 2020 trial date. Arbitrator Kay denied the motion. However, the first hearing was continued from July 23, 2020 to August 20, 2020 due to time constraints. Therefore, no ruling is required because the issue of bifurcating became moot with the continuance.

B. **Objection to Setting of Trial Date by Attorney Not on File:** Respondent objected to the setting of the trial by an attorney whose appearance had not been entered. The Arbitrator finds it sufficient that Attorney Mose's Appearance was entered prior to the beginning of testimony. The objection is overruled.

C. **Reserved ruling on Motions to Quash:** Arbitrator Kay reserved the right to make a finding with regards to Petitioner's Motions to Quash. The Arbitrator grants the Motions to Quash based on the findings that it is unreasonable to compel the Petitioner to travel over 400 miles when there are other

doctors and specialists available. The Arbitrator directs the Respondent to set a Section 12 examination if desired which is consistent with the reasonableness requirement of the Act.

D. **Reserved ruling on Affidavit of Philip J. Johnson:** The Arbitrator reserved the right to make a finding with regards to the Affidavit of Philip J. Johnson, Respondent's prior counsel. The objection is overruled, and the Affidavit is admitted. The Affidavit is given no weight.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC000754
Case Name	CARRASQUILLO, ISMAEL v. KUUSAKOSKI
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0067
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Kenneth Smith

DATE FILED: 2/22/2022

/s/ Deborah Simpson, Commissioner

Signature

DISSENT

/s/ Deborah Baker, 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

Ismael Carrasquillo,

Petitioner,

vs. NO: 17 WC 754

Kuusakoski,

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

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

February 22, 2022

o12/22/21
DLS/rm
046

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

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

DISSENT

I disagree with the majority's decision to affirm the Arbitrator's finding that Petitioner failed to prove that his current lumbar spine condition of ill-being is causally related to the stipulated January 4, 2017 work accident. In my view, Petitioner established by a preponderance of the evidence that his current lumbar spine condition is causally related to the January 4, 2017 work accident and that he requires further medical treatment for his condition as recommended by Dr. Ross.

The medical records demonstrate that Petitioner has consistently reported lumbar spine complaints since the January 4, 2017 work accident. There is no evidence that Petitioner had any lumbar spine problems prior to the work accident. On January 25, 2017, Petitioner underwent a lumbar spine MRI that showed: posterior central disc protrusions at L2-L3 and L3-L4, a broad-based right paracentral protrusion at L4-L5, and a broad-based posterior central protrusion and prominent posterior disc osteophyte complex at L5-S1. The February 9, 2017, EMG, which was interpreted by Dr. Goldvekht, produced evidence supportive of mild, active, left L5 and/or S1 radiculopathy, suggestive of an acute to sub-acute process.

On October 18, 2017, Petitioner treated with Dr. Ross upon Dr. Novoseletsky's referral. Dr. Ross found Petitioner's pain was primarily at the low back area on the beltline. Dr. Ross examined Petitioner and reviewed the lumbar spine MRI. Dr. Ross opined that the lumbar spine MRI showed disk desiccation at the L2-L3, L3-L4, L4-L5, and L5-S1 levels. Dr. Ross opined

further that the MRI showed slight bulging and annular tears at L2-L3 and L3-L4, a small disc herniation at L4-L5 eccentric to the right side, and a more pronounced bulge at L5-S1. Dr. Ross diagnosed Petitioner with disabling low back and nonradicular left leg pain, and recommended Petitioner undergo a diagnostic discogram based on Petitioner's failed course of conservative treatment. Petitioner underwent the discogram on January 9, 2018. Dr. Ross opined that the discogram did not identify a distinct pain generator, and as such, he recommended a continued diagnostic workup which included facet block injections at the L3-L4, L4-L5, and L5-S1 levels. Dr. Ross opined that if Petitioner experienced temporary pain improvement when the facet joints were blocked, he would be a candidate for radiofrequency medial branch nerve ablation. Dr. Ross did not recommend a fusion surgery.

On January 24, 2018, Petitioner followed-up with Dr. Novoseletsky and reported that his pain was primarily in the low back and he had numbness in the legs with sitting. Consistent with this, Petitioner testified at the arbitration hearing that his current pain is in the "lower part" of his back and he continues to experience numbness, cramping, and tingling in his legs, primarily in the left leg. Subsequently, Dr. Novoseletesky recommended Petitioner undergo a thoracic spinal cord stimulator on a trial basis and disagreed with Dr. Ross' recommendation of facet block injections.

On June 12, 2017, Dr. Butler examined Petitioner pursuant to Section 12 of the Act at Respondent's request, and without reviewing the diagnostic testing, opined that Petitioner sustained a lumbar strain. Dr. Butler also opined that Petitioner demonstrated Waddell's signs of pain on simulation testing and non-anatomic sensory changes, as well as overreaction. On July 5, 2017, after reviewing the diagnostic testing, Dr. Butler issued an addendum report and opined that his diagnosis of lumbar strain remained unchanged and Petitioner had reached maximum medical improvement and could return to work full duty. On September 10, 2018, Dr. Butler issued a second addendum report and opined that the EMG showed a mild, left L5 and/or S1 radiculopathy. Dr. Butler also opined that Petitioner had "give away weakness" of both legs and global sensory deficit in the right leg.

During his deposition testimony, Dr. Butler admitted that the EMG showed radicular symptoms that correlated with Petitioner's subjective complaints, however, in his opinion, the EMG was ordered "too early." When asked whether he was aware if the Official Disability Guidelines (ODG) indicate that performing an EMG four weeks after an injury is permissible, Dr. Butler stated that back issues are not always "algorithmic" and that reasonable physicians could disagree on when to order an EMG. With respect to the facet injections recommended by Dr. Ross, Dr. Butler agreed that the injections are a diagnostic tool, and are usually performed to see if a radiofrequency ablation will be helpful; however, Dr. Butler opined that he believed radiofrequency ablation procedures are "somewhat sketchy" in general and he has only referred patients for this two to three times throughout his career. Dr. Butler's opinion that the facet injections were not reasonable appeared to be based on his lack of faith in the radiofrequency ablation procedure, which Dr. Ross noted would be the next step if the facet injections revealed a specific pain generator.

Based on the entirety of the evidence, I would find that Petitioner proved his current lumbar spine condition is causally related to the undisputed January 4, 2017 work accident. The evidence shows that Petitioner was able to perform his full job duties prior to the work accident, but after the work accident, he was no longer able to perform his full job duties. Further, there is no evidence that Petitioner injured his back prior to the work accident. I would find Dr. Butler's opinions unpersuasive as: he diagnosed Petitioner prior to seeing the MRI imaging, he acknowledged that the EMG showed radiculopathy, he is the only physician who opined Petitioner had positive Waddell's signs, and he admitted that facet block injections are a diagnostic tool and his opinions against facet block injections appear to stem from his belief that any subsequent radiofrequency ablation procedure is "somewhat sketchy."

Accordingly, I would award Petitioner all incurred medical expenses for the lumbar spine condition through the date of the arbitration hearing. I would also award prospective medical treatment in the form of the facet block injections recommended by Dr. Ross so that Petitioner may complete the diagnostic workup. I would not award the thoracic spinal cord stimulator recommended by Dr. Novoseletsky as the evidence and Petitioner's testimony indicate it is not reasonable or necessary because Petitioner primarily has lumbar spine complaints, not thoracic spine complaints. Further, I would award temporary total disability benefits through the date of the arbitration hearing as Petitioner was terminated from his position immediately after the stipulated accident and his lumbar spine condition has not yet stabilized. I would award incurred medical expenses for the thoracic spine through October 18, 2017, the date when Dr. Ross found that the majority of Petitioner's symptoms were at the low back area, indicating that Petitioner's thoracic spine complaints had resolved.

For the above reasons, I respectfully dissent.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC000754
Case Name	CARRASQUILLO, ISMAEL v. KUUSAKOSKI
Consolidated Cases	
Proceeding Type	19(b)/8A Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	6
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Brenton Schmitz
Respondent Attorney	Kenneth Smith

DATE FILED: 5/14/2021

INTEREST RATE FOR THE WEEK OF MAY 11, 2021 0.03%

/s/ Carolyn Doherty, 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)/8A

ISMAEL CARRASQUILLO
Employee/Petitioner

v.

KUUSAKOSKI
Employer/Respondent

Case # **17** WC **754**

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 **CAROLYN DOHERTY**, Arbitrator of the Commission, in the city of **CHICAGO**, on **4/12/21**. 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, **1/4/2017**, 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*** 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 through July 5, 2017, ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $**N/A**; the average weekly wage was $**501.67**. ARB EX 1

On the date of accident, Petitioner was **54** 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 $**9,651.27** for TTD, $**0** for TPD, $**0** for maintenance, and $**30,717.87** for other benefits, for a total credit of $**40,369.14**. ARB EX 1.

Respondent is entitled to a credit of $**n/a** under Section 8(j) of the Act. ARB EX 1.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $334.45/week for 25-6/7 weeks commencing 1/7/2017 through 7/5/2017, as provided in Section 8(b) of the Act. Respondent shall receive credit for amounts paid.

Respondent shall pay Petitioner the reasonable and necessary medical services incurred in connection with the causally related condition through July 5, 2017, pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

Petitioner's request for prospective medical treatment is denied.

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

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

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

Carolyn M. Doherty

Signature of Arbitrator

MAY 14, 2021

FINDINGS OF FACT

At trial, Petitioner testified via interpreter. It is undisputed that Petitioner, a 54 year old forklift operator, sustained a work accident while an employee of Respondent Kuusakoski on 1/4/17. ARB EX 1. Petitioner began working for the Respondent recycling facility operating a forklift in 2015. Petitioner testified that on 1/4/17, he struck a wall while operating the forklift at work. He testified that he immediately experienced pain in his back and that he could "hardly walk." Petitioner further testified that he reported the incident to his supervisor and the he was immediately fired.

Petitioner testified that the day after the accident, Respondent sent him to Physicians Immediate Care for treatment and he received x-rays and pain medication. Px1. At PIC, Petitioner reported 10/10 pain in his low back since January 4 at 9:30am. Id. The history is consistent with that given by Petitioner at trial, stating, "Patient was at work yesterday and his(sic) a wall with the forklift. He was going reverse." Id. The notes further indicate, "When he moves his left leg he has low back pain, no leg pain or foot pain, …" Physical examination was largely normal, although flexion and extension were significantly reduced. Id. Petitioner was given naproxen and Tylenol, and told to return to work full duty as of 1/5/17. Id. Petitioner's x-rays showed no abnormality of the low back. PX 1.

On 1/6/17, Petitioner reported to RNS physical therapy and Dr. Rivera. Px2. The history taken on intake was consistent with Petitioner's trial testimony in that Petitioner reported backing up into a wall while driving a forklift. Id. The notes further indicate that Petitioner's pain developed "a couple hours after his injury." Petitioner reported moderate pain on the bilateral lumbo-sacral upon straight leg raiser test. Dr. Rivera noted that Petitioner was in good health and "expected to make good progress and recovery. He has osteoarthritis and no noted contraindications to care. Based on his history and examination, it is reasonable to believe that his recovered may take longer than an average patient with an uncomplicated case." He further noted, "Based on the history that was provided by Ismael Carrasquillo, which includes the patient's mechanism of injury as well as his reported subjective complaints, the findings uncovered within the clinical examination and the x-ray studies performed." The diagnosis was lumbar spine sprain/strain and thoracic strain/sprain. Dr. Rivera opined that Petitioner's condition at that point was related to the work accident. Id. Dr. Gabriel Rivera ordered physical therapy for 12 weeks, and took Petitioner off work. Id. Petitioner would remain off work as of the date of trial. Petitioner continued physical therapy through August 2017. PX 2.

Dr. Rivera referred Petitioner to a pain specialist, Dr. Dimitry Novoseletsky, who he saw for the first time on January 12, 2017. Px3. The history taken by Dr. Novoseletsky indicated, "He states he was injured at work while driving a forklift and driving backwards into a wall. He states he immediately started experiencing sharp pain on his lower back from the impact. … Patient states he has been experiencing constant sharp shooting pain on his lower back. He states his pain flares up with certain movements… radiates occasionally down his left leg… pain really flares up on his left leg when he is walking for too long… occasionally feels numbness and tingling on his left foot." PX 3. Dr. Novoseletsky performed a physical examination, which was positive for paraspinal muscle/facet tenderness bilaterally, with limited range of motion on flexion, extension, and rotation. FABER test was positive bilaterally, as was the SI Distraction test. Id. Dr. Novoseletsky ordered an MRI of the lumbar spine, as well as a lower extremity EMG/NCV test. Id. He continued Petitioner off work.

The lumbar MRI was performed January 25, 2017, and the radiologist noted multilevel disc protrusions from L2-S1 and lumbar spondylosis and scoliosis. Id. The EMG, performed February 9, 2017, was "supportive of mild active left L5 and/or S1 radiculopathy." On February 16, 2017, Dr. Novoseletsky reviewed both tests with Petitioner, and recommended continued physical therapy and a lumbar epidural steroid injection. The L5-S1

ESI was performed on April 5, 2017, with good coverage of both the L5-S1 and L4-5 spinal levels. Id. A repeat injection was performed May 23, 2017. Id. Dr. Novoseletsky recommended a third injection, which was never ultimately performed. Id.

Petitioner continued following up with Dr. Novoseletsky until Dr. Novoseletsky eventually referred Petitioner to a spinal surgeon, Dr. Matthew Ross. Petitioner saw Dr. Ross on October 18, 2017. Px4. Dr. Ross again took a consistent history. Id. Dr. Ross recommended a diskogram pain study at the L4-S1 levels, with L2-3 or L3-4 used as a control. If the diskogram was positive with negative control discs, Dr. Ross stated he would recommend surgical decompression and fusion. Id. The diskogram was performed January 9, 2018. Based on the diskogram results, Dr. Ross recommended against a fusion surgery and instead recommended facet blocks at the L3-S1 levels. Id. On 1/24/18, Dr. Ross noted that the "diskogram pain study was not able to identify a distinct pain generator. There was no nonpainful control disk level. As a result, surgical fusion cannot be recommended." PX 4. He continued to recommend the facet injections at his visit with Petitioner on 5/13/19. PX 4. At that point, Dr. Ross noted that Petitioner reported right leg pain of uncertain origin as well. PX 4.

On February 1, 2018, Dr. Novoseletsky reviewed the opinions of Dr. Ross. Id. Dr. Novoseletsky disagreed with the recommendation for facet injections, based upon Petitioner's complaints of radicular pain. Id. Instead, Dr. Novoseletsky recommended a thoracic spinal cord stimulator trial. Id. He stated this was reasonable based upon six months of intractable pain, failed conservative management, the contraindication for surgery, and the clinical findings of radiculopathy confirmed by EMG. Id. By June 27, 2019, Dr. Novoseletsky eventually agreed that lumbar medial branch blocks could be reasonable, as recommended by Dr. Ross. Id. As of the date of trial, both recommendations for injections and the spinal cord stimulator trial were pending.

Petitioner emotionally testified that as of the date of trial, he is afraid of undergoing the recommended treatment. However, he stated that he wants to get better and would consent to further treatment despite his panic over the recommended treatment. He stated he has not worked for any employer since his injury at work. He cannot sit or stand for long periods of time. He is taking medication for anxiety. He has occasional numbness in his legs. He is unable to assist with household tasks. Petitioner testified that prior to the accident he had no difficulty with this low back and no prior treatment for his low back. At trial, Petitioner was wearing a weight belt that was not prescribed by a doctor. He chose to wear the belt that he is able to tighten on his own which he testified helps with his symptoms.

Petitioner was seen one time under Section 12 of the Act, by Dr. Jesse Butler. The evaluation was June 12, 2017. Rx1(2). Dr. Butler opined that Petitioner suffered an acute lumbar strain causally related to the accident although he had not yet reviewed the MRI film. RX 1, p. 10-11. He opined the Petitioner's physical therapy was excessive and there were some findings of symptom magnification on exam resulting in concern over the objective basis for Petitioners subjective complaints. P. 10-11. As of July 5, 2017, Dr. Butler reviewed the MRI film from January 25, 2017 and determined that Petitioner had degenerative changes with no significant nerve compression at any level or any sign of an acute injury. P. 13. He testified that the review of the MRI films bolstered his opinion that Petitioner sustained a lumbar strain as a result of the accident. P. 13.

In a subsequent report dated September 2018 following a records review, Dr. Butler opined that he disagreed with Dr. Novoseletsky's recommendation of a spinal cord stimulator based on Petitioner's condition of a lumbar strain, the imaging studies (MRI and EMG) demonstrating non specific degenerative changes with no acute findings, and on the Petitioner's exam wherein he demonstrated give way weakness of both legs as well as a global sensory deficit on the right leg with some positive findings of symptom magnification.. He did not agree that Petitioner had intractable radicular pain which would require a spinal cord stimulator. P. 16. He further opined that Petitioner did not need facet injections based on sensory dysfunction that was inexplicable and on demonstrated symptom magnification. P. 30-31. Dr. Butler does not "see a lot of patients in the radiofrequency

group obtaining significant benefit for any duration" thus detracting from the need for facet injections in anticipation of that procedure. P. 30-31.

Dr. Novoseletsky opined in response that the diagnosis of a lumbar strain would not adequately explain the patient's symptoms, nor would it cause the consistent symptoms in the legs. He states that the recommendation for a spinal cord stimulator is based, in part, on Dr. Butler's opinions that Petitioner is not a candidate for decompression or fusion surgery as also opined by Dr. Ross. PX 3.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law.

F. Is the Petitioner's Current Condition of Ill-being Related to the Work Injury?

Based on a preponderance of the credible evidence at trial, the Arbitrator finds that Petitioner sustained a lumbar strain which was causally related to the undisputed work accident of 1/4/17 through July 5, 2017, only. The Arbitrator specifically finds no causal connection for any other diagnosed condition of ill-being. The Arbitrator's conclusion is based on the objective test results in the form of the MRI and the EMG, the inconclusive diskogram, and on Petitioner's protracted subjective complaints to his physicians. The Arbitrator notes that the described accident in which Petitioner backed the forklift into a wall at low speeds is not a credible cause of Petitioner's continued subjective complaints four years later without objective support in the medical records. Accordingly, the Arbitrator finds that Petitioner sustained a lumbar strain on the accident date of 1/4/17 and that this condition of ill-being was causally related through July 5, 2017 and not thereafter.

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 the Petitioner entitled to any prospective medical treatment in the form of a spinal cord stimulator or facet injections?

Based on the Arbitrator's findings on the issue of causal connection through July 5, 2017, the Arbitrator further finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the diagnosis, care and treatment of his causally related lumbar strain through July 5, 2017 pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid, if any.

Based on the Arbitrator's findings on the issue of causal connection through July 5, 2017, the Arbitrator further finds that Petitioner is not entitled to any additional prospective medical treatment in the form of a Spinal Cord Stimulator or facet injections as a result of the January 4, 2017 accident.

L. What Temporary Benefits are due? TTD

The Petitioner is seeking TTD benefits from January 6, 2017, to April 12, 2021. Dr. Butler advised that the Petitioner's diagnosis was that of a lumbar strain and returned him to work full duty as of July 5, 2017. Based on the Arbitrator's findings on the issue of causal connection through July 5, 2017, the Arbitrator further finds that Petitioner is entitled to TTD from January 7, 2017 to July 5, 2017, a period of 25-6/7 weeks. Respondent shall receive credit for amounts paid, if any.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010819
Case Name	SONETZ, LOUIS v. GREAT LAKES ELECTRICAL CONTRACTORS
Consolidated Cases	16WC010820 17WC031995 17WC034520
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0068
Number of Pages of Decision	22
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matt Walker
Respondent Attorney	Robert Sabetto

DATE FILED: 2/22/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOUIS SONETZ,

Petitioner,

vs. NO: 16 WC 10819

GREAT LAKES ELECTRICAL
CONTRACTORS and
ALDRIDGE ELECTRIC, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent Great Lakes Electrical Contractors and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

This claim was consolidated with claim numbers 16 WC 10820, 17 WC 31995 and 17 WC 34520 for purposes of arbitration hearing and Review before the Commission. Separate Decisions have been issued for each claim. The Commission writes to clarify that as to claim numbers 16 WC 10819 and 16 WC 10820, there is only one bond comprising both claims in the amount of $75,000.00. Both claims share the same award for TTD and medical bills as well as the same amount of credit under Section 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 28, 2021 is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Great Lakes Electrical Contractors 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 Great Lakes Electrical Contractors is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

February 22, 2022

CAH/pm
O: 2/17/2022
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010819
Case Name	SONETZ, LOUIS v. GREAT LAKES ELECTRICAL CONTRACTORS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Matt Walker
Respondent Attorney	Robert Sabetto

DATE FILED: 7/28/2021

THE INTEREST RATE FOR THE WEEK OF JULY 27, 2021 0.05%

/s/ Carolyn Doherty, 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

Louis Sonetz
Employee/Petitioner
v.
Great Lakes Electrical Contractors
Employer/Respondent

Case # **16** WC **10819**

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 **Chicago**, on **June 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 **January 26, 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 $**90,272.00**; the average weekly wage was $**1,736.00**.

On the date of accident, Petitioner was **47** years of age, ***married*** with **2** dependent children.

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

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

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

Respondent is entitled to a credit of up to $**80,335.69** under Section 8(j) of the Act. Respondent shall hold Petitioner safe and harmless up to the amount of the credit.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $1157.33 / WEEK FOR 76 6/7 WEEKS, COMMENCING JULY 26, 2017 THROUGH JANUARY 14, 2019 , AS PROVIDED IN SECTION 8(A) OF THE ACT.

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES AS PUT FORTH IN THE ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, ATTACHED. ALL AWARDED MEDICAL BILLS SHALL BE PAID AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT.

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $735.37 / WEEK FOR 108.15 WEEKS, BECAUSE THE INJURIES SUSTAINED CAUSED 15 % LOSS OF THE PERSON AS A WHOLE (RIGHT SHOULDER), AS PROVIDED IN SECTION 8(D)(2) OF THE ACT, PLUS 5% LOSS OF USE OF THE RIGHT ARM AND 10% LOSS OF USE OF THE LEFT HAND AS PROVIDED IN SECTION 8(E). SEE THE ARBITRATOR'S ATTACHED FINDINGS FOR A FULL DESCRIPTION OF THE WEIGHT GIVEN TO THE FACTORS AS REQUIRED BY SECTION 8.1B(B) 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.

Carolyn M. Doherty

Signature of Arbitrator

JULY 28, 2021

PROCEDURAL HISTORY

Petitioner, Louis Sonetz, filed four applications for adjustment of claim with the Illinois Workers' Compensation Commission. The first is claim number 16 WC 10819, alleging injuries to the right shoulder, right elbow and left wrist on January 26, 2015 while in the course and scope of his employment with Great Lakes Electrical Contractors.

The second is claim number 16 WC 10820, alleging injuries to the left shoulder on May 27, 2015 while Petitioner was in the course and scope of his employment with Respondent Great Lakes.

The third is claim number 17 WC 31995, which alleges repetitive trauma injuries to Petitioner's bilateral shoulders, right elbow and left wrist with a manifestation date of June 8, 2015. That manifestation date corresponds to Petitioner's first encounter with Dr. Marcoski on June 8, 2015. The fourth and final application for adjustment of claim is claim number 17 WC 34520. Petitioner alleges that on April 11, 2017, he injured his left shoulder in the course and scope of his employment with a different employer, Aldridge Electric.

All four claims were consolidated. The first hearing took place in Chicago, Illinois on July 14, 2020. The second hearing took place on October 14, 2020 in New Lenox Illinois. The third and final hearing was held on June 17, 2021 in Chicago, Illinois.

FINDINGS OF FACT

Petitioner testified that he has worked over 30 years as a journeyman electrician. As such, he is required to lift on a daily basis. He testified that he is routinely required to lift bundles of conduit, and cases and rolls of wire weighing up to 80 pounds. He also engages in pushing and pulling on a daily basis. He testified that 90% of his work requires overhead work including lifting fixtures overhead that weigh up to 70 pounds.

Petitioner testified that he worked at Great Lakes in approximately 2009 performing all of the described activity through April 2016. On January 26, 2015, Petitioner worked as a foreman at Great Lakes. His job duties at Great Lakes included everything from underground electrical work involving trenching conduit to low voltage installations. The trenching work involved using a machine to dig the trench, manual shoveling of gravel, laying pipes and then back filling with gravel using a shovel. He testified that all back filling done close to the building or in the building was done with a shovel. Petitioner further testified that while at Great Lakes he performed both rough interior electrical work and underground electrical work. Petitioner testified that he worked with a pipe threader at waist level height. He also used a hammer drill to drill through concrete block surfaces 20% of his work time. In so doing, his arms were outstretched and the machine weighed between 20 to 50 pounds.

Petitioner testified that prior to 1/26/15 he had no problems or restrictions with either his right or left shoulder and was working full duty. Petitioner testified that on 1/26/15 he worked for Great Lakes on the "Impact" job which was a ground up office building with an underground parking garage. Petitioner testified that he was a "working foreman" and as such was working with a back fill to lay underground pipes in the electrical room. On 1/26/15, he arrived at 6:30 am and unlocked the building and tools to finish the piping and back fill in the electrical room. His co-worker on the project was Gary Costain.

Petitioner testified that on 1/26/15, he back filled gravel for 3-4 hours that morning using a shovel to toss gravel. He estimated that he used the shovel 100 times while tossing gravel. Petitioner testified that during one of the shovel maneuvers he pitched the gravel and felt a pop in his right shoulder. Petitioner put the shovel down and told his co-worker Gary to finish. Petitioner went to his truck and took a break from the work as he had pain in his right shoulder.

Petitioner testified that around noon he spoke to the project manager Alan Tertian to report the right shoulder pain and to request an accident report. Petitioner testified that Allen told him he would go to the back room and get an accident report for Petitioner to complete. Petitioner returned to doing only light work with Gary doing the heavy lifting. Petitioner finished the day at work and testified that he went home to ice his right shoulder due to extreme soreness. Petitioner testified that despite his request, he was never supplied an accident report to complete. Petitioner took Advil for the pain and soreness but did not seek medical treatment.

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day.

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete. He testified that after speaking with Mr. Yurko over the phone he went back to work but performed no physical activity. He testified that it was difficult to drive home from the job that day in that he could not lift his left arm high enough to reach the steering wheel.

Petitioner testified that he made an appointment to see Dr. Marcoski. While waiting for the appointment, Petitioner continued to work lying out and marking blue prints. He testified while waiting for the appointment he continued to notice pain and burning in both his right and left shoulders.

Petitioner's first visit with Dr. Marcoski took place on June 8, 2015. The third application lists an accident date of 6/8/15 with injuries to the man as a whole and bilateral arms and shoulders. The accident date corresponds with Petitioner's first date of treatment.

Petitioner completed an intake form at PX1. He listed his occupation as electrician and indicated a work injury 1/29/15 and 5/27/15. Petitioner testified that he made a mistake on the form listing 1/29/15 as his accident date was 1/26/15. Petitioner testified that a page from his time log at PX 10 indicates that on 1/26/15, he was shoveling gravel between 11 am and 12 pm and that is the date he is alleging with regard to his right shoulder injury. Petitioner further testified that on the 6/8/15 intake form he indicated right shoulder injury but forgot to list the left shoulder pain as well. He further indicated pain in his right elbow and forearm which are symptoms that began after he injured his right shoulder.

In the June 8, 2015 chart note, Dr. Marcoski records the following history: "Patient is here for right shoulder pain that began in January after shoveling gravel and reinjuring on May 27th while carrying pipes. Patient complaints of radiating pain to elbow and numbness. No previous history."

Marcoski went on to record the following: "Patient is seen for evaluation of pain in both shoulders right side worse than left. His history of right shoulder problems begins back in December when he was shoveling gravel and he overdid it feeling some soreness and strain in his right upper arm and shoulder. He took it easy for a period of time and seemed to get a little bit better but then he noticed some numbness and tingling right around his elbow. That's continued to him since it began and it seems to be aggravated by activity. Usually his left shoulder he's noticed this is tender to touch but it doesn't really hurt him when he works. He denies any history of any trouble with his shoulder past but he has been a very hard working tradesman throughout his entire working life. (Petitioner's Exhibit #1, pp. 2-3).

Marcoski diagnosed bilateral rotator cuff syndrome, radiating pain and numbness to his right elbow with right shoulder pain, and left shoulder tender to touch. He recommended options of either a symptomatic injection or to employ moist local heat, massage, and to avoid any aggravating factors. Petitioner declined the injection, but Marcoski noted that if Petitioner remained symptomatic then bilateral shoulder MRI's would be considered. (Petitioner's Exhibit #1 p. 3). Petitioner was not taken off work.

Petitioner testified that he continued to work for Great Lakes and that he had problems with his right shoulder and elbow while at work. On November 23, 2015, Petitioner returned to Dr. Marcoski for bilateral shoulder injections. PX 1. He continued working for Great Lakes.

PX 11 is an email dated January 5, 2016 written by Petitioner and sent to Michelle Bruno at Great Lakes attaching medical bills. The subject was "my shoulders." Petitioner indicated that the medical bills had been submitted to "insurance because I had no info to give them" and he asked for a report to complete. Petitioner testified that he submitted the medical bills but they were not paid because he did not have an accident report on file. PX 12 is an email from Petitioner to Michelle Bruno at Great Lakes dated January 26, 2016. The subject was "form". Petitioner wrote that he was required to submit the attached form. Michelle Bruno responded on the same date indicating "no worries… you have to cover yourself!!" PX 12. PX 13 is another email from Petitioner to Michelle Bruno dated February 5, 2016 wherein he asked "what do I do now" with regard to an attached bill. The subject line was "shoulder injury at work."

PX 14 is an email from Petitioner to Michelle Bruno dated March 3, 2016 along with her emailed response. Petitioner emailed "injury report?" and Ms. Bruno responded "I'll discuss again with Dick tomorrow." PX 15 is an email from Petitioner to Dick Anderson, the owner of Great Lakes. The email is dated March 23, 2016 and Petitioner indicates that he "had to sign a subrogation statement to get the bill paid for my shoulders that I injured on the job in January 2015 at the Impact and subsequently the other shoulder in May 2015 at CLC. I have tried for over a year to get an accident report from Great Lakes for the first and over nine months for the other." Petitioner did not receive a response from Mr. Anderson.

At trial**,** Alan Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was an estimator and project manager for Great Lakes although he was never formally assigned as the estimator or project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. At trial, it was learned that Mr. Arndt is deceased.

Mr. Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he knows the Petitioner. Mr. Yurko testified that he was the project manager on the College of Lake County job in May 2015. He further testified that Petitioner he worked with Petitioner at the

time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents.

Mr. Dick Anderson testified for Great Lakes in his capacity as owner of Great Lakes. He testified that Petitioner was hired by Great Lakes through the union hall as an electrician and foreman from 2008/9 to April 2016 when Petitioner left the company on his own. He testified that in 2015, Great Lakes had an accident reporting procedure in place and that information about accidents when to Paul Arndt who was the office manager. If the accident was severe, Paul would tell Mr. Anderson immediately. He testified that Mr. Arndt would not tell him about minor accidents or injuries. He testified that Paul would talk to the injury party, complete a report and investigate the accident. Mr. Anderson testified that Mr. Arndt never gave him and accident report or told him about any accident pertaining to Petitioner. He testified that Michelle Bruno became the office manager after Mr. Arndt passed away in September 2015. He does not recall that Mr. Arndt and Michelle Bruno overlapped at any time at Great Lakes.

Mr. Anderson testified that he was never told by Michelle about Petitioner's shoulder or any accident suffered by Petitioner at any time. He does not recall receiving the email from Petitioner at PX 15. He denies ever being asked by Petitioner for an accident report to complete. He does not recall ever being presented with medical bills pertaining to Petitioner's accidents. He testified that Petitioner was a good foreman who would know how to report an accident. He testified that neither Messrs. Terzian nor Yurko ever reported an accident to him pertaining to Petitioner on any job. He further testified that Great Lakes contributed to the group health insurance plan in place. He verified all of the job duties testified to by Petitioner and that Petitioner might use a threader or hammer on the job site albeit not often. Lastly, he agreed to the trenching testified to by Petitioner regarding the Impact job but disputed that such trenching would be done in the winter. He was not 100% sure trenching was done in January 2015 on the Impact job.

Petitioner testified that he was laid off from Great Lakes starting April 1, 2016. He began working for Respondent Aldridge Electric on April 14, 2016. He testified that at the time he continued to have issues with both shoulders and his right elbow. Petitioner testified that he was hired by Aldridge to do fire alarm wiring and low voltage work, including light installation. He testified that both shoulders were extremely sore and his right elbow pain made it hard to carry things including his tool bag. Petitioner testified that on 4/11/2017, he was working for Aldridge as a foreman on the new Lake County court house project laying out electrical, opening, measuring and reading blue prints. He testified that on 4/11/17 he had been working for Aldridge a year between his hire date in April 2016 and 4/11/17.

Petitioner testified that on 4/11/17, a truck pulled up to make a delivery and truck was lower than the dock platform so Petitioner could not use a pallet jack to unload the material. Petitioner testified that he had to physically lift the materials from truck to the dock and felt a pop in the *left* shoulder while lifting materials. He testified that he reported the accident to project manager Kevin. Notice is not in dispute. PX 16 is an incident report completed by Kevin with accident date of 4/11/17 indicating the same facts regarding the incident. Kevin took the pictures attached to the report which depict the material in the truck and the height difference between the truck and the dock. The report is dated 4/12/17 and indicates that Petitioner reported that his shoulder was sore and that Petitioner "believes it is from yesterday (4/11/17) while unloading a delivery… there has been no medical treatment due to his incident but he did state that he was due to get a shot as he did 2 years

ago for prior discomfort in the same shoulder." PX 16. Petitioner testified that he continued working for Aldridge after 4/11/17.

Petitioner returned to Dr. Marcoski on April 17, 2017. (Petitioner's Exhibit #1, p. 11). In the "History of Present Illness" section, Marcoski charted the following: "Patient is here for left shoulder pain s/p rotator cuff syndrome, last inj. 11/23/15. Patient felt a pop while lifting at work a week ago. Patient is seen for evaluation of a new problem one of pain in his left shoulder. His history of present illness begins last week Tuesday when he was lifting a heavy pallet loaded onto an overhead platform dock and he felt a pop in his left shoulder. He had immediate onset of discomfort on the top part of the wing bone and upper part of his arm bone and although is easing up but still remain sore. About a year and a half ago back in November of 2015 he had adhesive capsulitis with impingement syndrome of the shoulder that was treated with a cortisone injection. He did get better following that and his shoulder was doing well up until this recent mishap. (Petitioner's Exhibit #1, p. 11).

Marcoski recorded his impression as "strain of the left shoulder with history of previous impingement syndrome and adhesive capsulitis." (Petitioner's Exhibit #1, p. 12). Marcoski recommended nonoperative management to include massage, moist local heat, and activity modification. If there was no improvement, then an MRI scan would be obtained.

Dr. Michael Murphy evaluated Petitioner on May 8, 2017, pursuant to Section 12 of the Act, at the request of Respondent Great Lakes. GL RX 1. This exam took place only a few weeks after the accident of 4/11/17. Dr. Murphy's evidence deposition was taken on 10/25/17. GL RX 1. Dr. Murphy testified that Petitioner reported a right shoulder injury on 1/20/15 while shoveling gravel and a felt a pop. He reported a left shoulder injury on 5/27/15 noticing pain and a pop in the left shoulder while carrying conduit. P. 8. Petitioner made no mention of an injury to his left shoulder on 4/11/17. Based on his review of Petitioner's treating records and from bilateral shoulder x-rays he ordered, he determined that Petitioner had bilateral shoulder degenerative changes to the AC joint. P. 11-12. Following physical exam, Dr. Murphy determined that Petitioner's symptoms and history could be related to rotator cuff pathology. P. 14. He agreed that bilateral shoulder MRI's were appropriate and necessary. P. 15.

Bilateral shoulder MRI's were performed on July 14, 2017. (Petitioner's Exhibit #1, pp. 14-15). The radiologist's impression of the left shoulder MRI was "[l]ateral downsloping of a curved type II acromion, correlate for outlet impingement. Bursal surface fraying of the supraspinatus tendon but no full thickness rotator cuff tears. Degenerative disease of the AC joint. Small glenohumeral detachment of the inferior aspect of the posterior labrum." (Petitioner's Exhibit #1, p. 14).

The radiologist's impression of the right shoulder was "SLAP type tear of the superior labrum extending into the superior aspect of the posterior labrum. Inferiorly projecting AC arthrosis, correlate for outlet impingement. No rotator cuff tear is identified." (Petitioner's Exhibit #1, p. 15).

Marcoski reviewed the MRIs on July 20, 2017. (Petitioner's Exhibit #1, p. 16). He recorded his impression: Patient is seen for follow-up of his bilateral symptomatic shoulders with impingement syndrome. Since I last saw him he had MRI scans done of both shoulders and the results were discussed with him. The left shoulder basically has impingement syndrome with downsloping of the acromion undersurface or bursal fraying of the supraspinatus tendon, but no full thickness tear. Also noted is degenerative changes in the a.c. joint The right shoulder has very classic SLAP lesion. The patient states that his left shoulder is sore to touch and hurts with lifting and the right shoulder seems to hurt with throwing a ball with his daughters. Impression is bilateral symptomatic shoulders with impingement syndrome left shoulder with classic MRI findings and the right shoulder with SLAP tear. Plan is to recommend deferring to Dr. Chudik for consultation and treatment.

Dr. Chudik first saw Petitioner on July 26, 2017. (Petitioner's Exhibit #1, p. 18). Chudik recorded a history as follows: Louis J. Sonetz is a 50 year old male who presents today with a chief complaint of bilateral shoulder pain. It began approximately on January of 2015. The problem resulted from an injury at work. The problem resulted from right shoulder while shoveling gravel (1/2015) and left shoulder while carrying object at work (05/2015). Right elbow onset gradually (4/2017). The pain is located bilateral shoulders and right elbow. Currently it is a 5 on a pain scale of 10. Prior to this problem, the patient had not sustained significant injury to this part of the body. Prior to this problem, the patient has not had surgery on this part of the body in the past. The patient has seen another orthopedist for this problem. The patient has seen Dr. Marcoski for this problem. The patient has had the following tests and / or treatments performed for this problem: X-ray, MRI, injections. The timing of the pain / problem is constant, at rest, during activity. Pain occurs when reaching, lifting, carrying. The pain / symptoms do not radiate. The patient states that changing arm position alleviates the pain and / or symptoms. The patient stats that reaching, lifting aggravates or increases the pain and / or symptoms.

He continued: Patient is here today for MRI review referred by Dr. Marcoski. Patient is here for bilateral shoulder pain from two separate injuries at work, and elbow pain. He reports he experienced right shoulder pain from shoveling frozen gravel at work in January 2015. He states that in May 2015, he experienced a pop and significant left shoulder pain while carrying something in his left arm to avoid use of his right arm. He states he could not move the left arm well and has difficulty reaching into his back pocket. He reports he had an injection in 11/2015 in both shoulders that did help to alleviate pain, but pain never completely resolved. Today, he states that the left shoulder has worsened and also sometimes has pain at rest. Patient reports that he has been working with the shoulder pain but he is currently laid off. He also reports right elbow pain as of April 2017, but is unsure if elbow pain is related to the shoulder injuries. Right elbow pain has had a gradual onset and denies a mechanism.

Chudik diagnosed Petitioner with bilateral shoulder impingement and right elbow lateral epicondylitis. (Petitioner's Exhibit #1, p. 21). Chudik recommended conservative treatment, including physical therapy. Chudik took Petitioner off of work as of July 26, 2017. (Petitioner's Exhibit #1, p. 23).

On August 24, 2017, Section 12 examining physician Dr. Murphy reviewed the MRI reports from July. He also testified that he did not recall for certain whether he reviewed the actual MRI films. P. 18-21. However, it was determined that Respondent did send him the actual MRI films for review. Dr. Murphy testified that after his review of the MRI reports and films, "… I felt that the MRI findings would be consistent with degenerative changes. There was no full thickness tear of either rotator cuff. The rotator cuff demonstrated absolutely no abnormalities about the rotator cuff. I mentioned some bursal fraying, but no full thickness tear." p. 21. He opined that these noted changes "would not be abnormal for someone at an age beyond 30." P. 21. He further opined that the findings on the bilateral MRI's were not related to his work accident stating, "There's no signs of a traumatic condition. He has a SLAP tear on the right shoulder, which in his age group is often a normal finding." P. 21. He opined that Petitioner did not need surgery on either shoulder based on the physical exam and the history of injury mechanics which Dr. Murphy opined were inconsistent with a SLAP tear. He further testified, "Even if he had this exam that was consistent with it, those findings are often degenerative in nature." P. 24.

On cross exam, Dr. Murphy testified that to his knowledge, Petitioner worked as a foreman electrician and that he did occasional lifting. p. 34. He did not receive any job description from the Respondent. Murphy noted that during his physical examination, Petitioner's Hawkins test was positive bilaterally, greater on the left than the right, Neers test was mildly positive on the left and the right, there was pain over the lateral aspect of the shoulder at the insertion of the rotator cuff, and pain at the end range of abduction and flexion, greater on the left than the right. Petitioner's strength was normal, but limited by pain. P. 13. He noted that the left shoulder was more painful than the right shoulder. P. 35-36.

Dr. Murphy acknowledged that Petitioner had no shoulder issues prior to the accident. and that Petitioner was still symptomatic at the time he was examined by Murphy in May of 2017. P. 42. There was no indication of malingering. Murphy agreed that by the time he had an opportunity to examine the Petitioner, Petitioner's bilateral shoulder conditions were chronic in nature. Murphy further acknowledged that Petitioner's bilateral shoulder pain had not returned to baseline. p. 43-46.

Murphy was unable to answer whether or not Mr. Sonetz's job duties as a union electrician were a contributing factor to his bilateral shoulder conditions. P. 56. Murphy did agree that Petitioner's bilateral shoulders were "aggravated" although he could not specify when that aggravation ended. Rather, he testified "So, an aggravation is based on he had a symptom of discomfort and pain, but I don't have an objective finding on MRI to support his continued complaint." P. 51-52.

On September 6, 2017, Chudik noted Petitioner had seen improvements with PT, but continued to have shoulder pain that had not improved. (Petitioner's Exhibit #1, p. 25). Chudik recommended bilateral shoulder arthroscopies. (Petitioner's Exhibit #1, p. 26). On September 12, 2017, Petitioner agreed to proceed with the recommended surgeries. (Petitioner's Exhibit #1, p. 30).

On October 9, 2017, Chudik performed left shoulder surgery consisting of a left shoulder arthroscopy, left biceps tenodesis (subpectoral / open), left labral debridement, left capsular release of SGHL, and a left subacromial decompression. (Petitioner's Exhibit #5, pp.28-30). The postoperative diagnoses were: left shoulder pain, left biceps instability and partial rupture, left labral SLAP tear, left adhesive capsulitis, and left impingement syndrome.

Petitioner engaged in postoperative therapy and was continued off work by Dr. Chudik. On March 1, 2018, Dr. Chudik performed right shoulder surgery, which consisted of a right shoulder arthroscopy, right biceps tenodesis (subpectoral / open), extensive debridement of the rotator cuff and labrum, right capsular release of SGHL and a right subacromial decompression. (Petitioner's Exhibit #5, pp. 8-10).

Dr. Aaron Bare examined Petitioner at the request of Respondent Aldridge on April 18, 2018., after both shoulder surgeries. (Respondent Aldridge Exhibit #1). Bare opined that Petitioner was status post arthroscopic surgery of his left shoulder, that he had improved with postoperative physical therapy and was now approximately 7 months after the procedure. Bare opined that Petitioner was at maximum, medical improvement and capable of returning to full duty work without restrictions. Regarding causation, Bare opined that Petitioner injured his left shoulder in 2015 and continued to complain of pain and discomfort throughout that year without documentation that his symptoms had resolved. Bare indicated "I agree with the medical records and the statement made by Dr. Murphy that suggest that the findings were degenerative in nature and that his shoulder pain never completely resolved and at the time of the evaluation in 05/2017, which was after the second injury of 04/2017, he confirmed that his shoulder pain is chronic in nature involving both shoulders with the left being greater than the right."

Dr. Bare opined that the injury of 4/2017, while Petitioner worked for Aldridge, was a temporary aggravation of a pre-existing problem but did not cause any acute pathology. He opined, "It did not accelerate his condition and it also do not lead towards surgical intervention." Aldridge RX 1. He further stated that the MRI indicated degenerative findings only without trauma or definitive tears.

Petitioner continued to follow up with Chudik and was kept off of work. On July 12, 2018, Petitioner reported a sudden onset of right elbow pain on July 6, 2018, noting that there was no mechanism of injury for the elbow pain. Chudik recommended an EMG and MRI for the right elbow. PX 1, p. 89. The MRI revealed a minimally thickened common extensor tendon with subtle intratendinous signal possibly from low-grade tendinosis. The remainder of the examination was otherwise unremarkable. PX 1. The EMG / NCS performed on July 20, 2018

of the right elbow showed a focal conduction abnormality of the media nerve at the wrist, consistent with mild right wrist carpal tunnel syndrome, and irritation of the ulnar nerve at the elbow. PX 1.

On July 25, 2018, Dr. Chudik opined that the carpal tunnel and cubital tunnel syndrome were secondary to immobilization following the right shoulder surgery. PX 1, p. 101. He continued Petitioner off of work.

Dr. Chudik testified via evidence deposition taken on August 20, 2018. PX 6. Dr. Chudik is an orthopedic surgeon specializing in shoulders and sports medicine. (Petitioner's Exhibit #6, p. 2). He is board certified and licensed to practice medicine in the State of Illinois. Dr. Chudik testified that he is familiar with the general job duties of an electrician. PX 6. P. 14.

Chudik reviewed the chart notes from Dr. Marcoski and examined Petitioner on July 26, 2017. P. 25. Petitioner reported a history of bilateral shoulder pain in the right resulting from an injury at work shoveling gravel in January 2015 and then an injury to his left shoulder while carrying an object at work in May 2015. P. 26. Petitioner reported no prior problems with either shoulder. Petitioner reported that he continued working with conservative treatment to both shoulders in the form of injections. He reported that the pain was never relieved completely. P. 27. Petitioner also reported gradual onset of right elbow pain since April 2017 with initial right elbow complaints documented after the January 2015 accident. P. 27.

Dr. Chudik reviewed the shoulder MRI's and testified that he initially prescribed conservative care and physical therapy for both shoulders due to initially diagnosed bilateral shoulder impingement syndrome and rotator cuff syndrome along with right elbow epicondylitis. P. 29. Having failed conservative care as of September 2017, Dr. Chudik performed the left shoulder arthroscopy with debridement of a superior labral tear type two and a subacromial decompression removing inflamed bursa and soft tissue from the rotator cuff syndrome and impingement. P. 31-32. Petitioner was placed in a sling and in physical therapy. Eight weeks post-op, Petitioner reported left forearm and wrist pain and swelling in the left hand. P. 35. Dr. Chudik noted these complaints as "part of the morbidity of doing surgery on an extremity." P. 35,37. As of December 27, due to continued left hand pain, numbness and weakness following the surgery on the left extremity, and EMG study was discussed.

Due to right shoulder continued complaints and the prior right shoulder MRI showing SLAP tear, Dr. Chudik perform a right shoulder partial rotator cuff repair and debridement of type two labral tear, subacromial decompression, and right biceps tenodesis. P. 42. As of the April 12, 2018 visit, Petitioner complained of increased right elbow symptoms due to immobilization of the right arm. P. 46. Right elbow MRI and EMG results were consistent with right mild carpal tunnel syndrome and some irritation of the ulnar nerve at the elbow without a focal condition block noted but that world be consistent with some cubital tunnel. Dr. Chudik testified, "… we did note that he had some symptoms after the first injury, but I believe the immobilization from the surgery had a big effect on that and the swelling from the surgery…" p. 51.

Dr. Chudik last saw Petitioner on July 25, 2018. On that date, he ordered continued therapy for the shoulders and a brace for the right elbow. Petitioner was to return in 6 weeks for follow up.

With regard to the right shoulder, Dr. Chudik opined that Petitioner injured his right shoulder while shoveling at work on January 26, 2015. P. 58. He opined that Petitioner injury his left shoulder as a result of the work injuries on May 27, 2015 and April 11, 2017 when Petitioner was at work lifting a heavy pallet and felt a pop in his left shoulder. P. 57-58. With regard to the right elbow, Dr. Chudik opined that the right lateral epicondylitis was the result of the work injury on January 26, 2015 and April 11, 2017, as there was right elbow complaints made after each injury. P. 59. He further opined that the immobilization following the right shoulder surgery also contributed to the ultimately diagnosed right cubital tunnel syndrome. P. 60.

Further with regard to the right shoulder, Dr. Chudik testified that Petitioner's right shoulder condition is causally related to the January 26, 2015 work accident stating, "The answer is with a reasonable degree of medical certainty that his current condition in his right shoulder was contributed to by the injuries sustained on January 26th, 2015. I think if we look at the whole clinical course of the patient, the objective findings on the MRI – well, the clinical course, which includes the proximate reporting of symptoms of right shoulder pain had been – had continued from that injury and had been refractory treatment through that whole course, conservative treatment, including injections and therapy with an MRI and surgical findings that objectively confirmed that he did, indeed, suffer from a superior labral tear that was made – injured and made symptomatic from that accident, and obviously, my experience as an orthopedic surgeon specializing and treating shoulders and surgeries are all the bases for my opinion. P. 61-62.

Chudik also testified that Petitioner's right elbow condition is related in part to the January 26, 2015 work accident stating, "Yeah. My response was that the current condition related to his right elbow was contributed by the injuries sustained on January 26, 2015. I do think that elbow pain and the numbness and tingling that he had were more likely than not an indication of some cubital tunnel symptoms, and I think they just reared their ugly head later when the provocative swelling and immobilization of the elbow contributed to it. So I think there is some contributing factor of that accident to his right elbow pathology in general. (Petitioner's Exhibit #6, pp. 16-17). … So I think there is more likely than not some contribution from the January 26, 2015 injury as well as the additional trauma of the surgery to the shoulder and the immobilization and swelling that occurs with it that is provoking those symptoms." P. 64-65.

With regard to the left shoulder, Dr. Chudik opined that Petitioner's left shoulder injury was caused by the carrying of heavy objects at work on May 27, 2015. He testified, "As I explained before, that kind of carrying, lifting with a pop in the shoulder would be very consistent with a superior labral tear. It would be consistent with that mechanism." P. 66.

With regard to any connection between the left shoulder and elbow and the accident of April 11, 2017, Dr. Chudik testified, "He had a very significant mechanism with the pop in the left shoulder in May (2015) and I think the April (2017) lifting again, just-if you have got a superior labral tear like that and then- it is going to – it is very easy to re-aggravate it with that lifting." So I imagine it might have made it worse some possibly, but I think that the injury had already occurred; and this was just- it may have been a temporary aggravation, but I believe the pathology already occurred. He had already had a very significant mechanism and symptoms that occurred with the first injury. So I think there was probably some contribution, but I think that the bulk of the injury was responsible from the May." P. 67.

Dr. Chudik further opined that the right elbow injury and underlying pathology pre-existed the April 11, 2017 lifting accident and that accident only temporarily aggravated that condition which originally resulted from the January 26, 2015 injury. P. 68.

On cross-exam, Dr. Chudik testified Petitioner's diagnosed type two SLAP tear is not typically seen without injury or precipitating event. P. 82-83. Dr. Chudik further testified that Petitioner's right elbow symptoms began after the January 2015 injury to this right shoulder as initially reported and then were further aggravated by immobilization after the right shoulder surgery. He testified, "I think if he didn't have any preexisting pathology there, I don't think we would see any of those type of symptoms from just the immobilization…if there wasn't any preexisting problems with the entrapment of those nerves, we wouldn't have expected that after surgery." P. 90-91. With regard to the left shoulder, Dr. Chudik noted that the first left shoulder pop was felt in the accident of May 2015 and the second left shoulder pop was felt in April 2017. He opined that the first accident resulted in the labral tear and the April 2017 accident could have made is worse but it is more likely than not "…he has had continued symptoms with that shoulder." He testified that a person can "work around" a labral tear more easily than with a rotator cuff tear and a labral tear is more tolerable to manage over

a period of time. A person can continue to work with a superior labral tear. P. 96, 100. Dr. Chudik testified that the April 2017 accident "also contributed to it further" referencing the original left shoulder injury from May 2015. He testified, "I think they are both contributory, and I think it is more likely than not that the superior labral tear started with popping event in May, and how much worse or how much aggravation or temporary exacerbation the April one I think is hard to determine." P. 103. Petitioner never reported being pain free in either shoulder to Dr. Chudik at his first visit date of July 26, 2017. P. 108.

Lastly, Dr. Chudik testified that the right elbow injury did not occur with the April 2017 accident. P. 112.

On October 19, 2018, Chudik noted aggravation of pre-existing lumbar spine pain due to physical therapy. (Petitioner's Exhibit #1, p. 111). Chudik recommended work conditioning and continued Petitioner off of work. (Petitioners Exhibit #1, pp. 111-112).

While in work conditioning, Petitioner injured his left wrist. (Petitioner's Exhibit #4, pp 77-80). Dr. Chudik recommended Petitioner continue work conditioning as tolerated and referred Petitioner to Dr. Fajardo for the wrist pain. (Petitioner's Exhibit #2, pp. 128-130). Petitioner was seen by Dr. Fajardo for the left wrist. (Petitioner's Exhibit #2, p. 131). Fajardo ordered an MRI and placed Petitioner in a wrist guard. (Petitioner's Exhibit #2, p. 132).

The MRI of the left wrist was done on December 11, 2018. (Petitioner's Exhibit #2, p. 133). Fajardo diagnosed left wrist TFCC tear and dorsal ulnar bone bruise. (Petitioner's Exhibit #2, p. 136). A steroid injection was performed, and wrist guard was continued. At the next visit on January 9, 2019, Fajardo recommended finishing PT, and prescribed NSAIDs. Fajardo recommended weight bearing as tolerated with the left wrist only, and advised Petitioner to return as needed (Petitioner's Exhibit #2, p. 145).

A functional capacity assessment was performed at ATI Physical Therapy on January 11, 2019. (Petitioner's Exhibit #2, p. 149). Petitioner demonstrated a physical demand level of "very heavy", and on January 14, 2019, Chudik recommended a trial return to work with no restrictions. (Petitioner's Exhibit #2, p. 147).

On January 18, 2019, Fajardo recorded a history of left wrist pain at the end of the functional capacity assessment. (Petitioner's Exhibit #2, p. 159). Fajardo administered an injection, and advised Petitioner to return as needed.

At a follow up on February 25, 2019 Chudik again released Petitioner without restrictions. (Petitioner's Exhibit #2, p. 167). The final visit took place on April 22, 2019, at which time Petitioner was placed at maximum, medical improvement. (Petitioner's Exhibit #2, pp. 169-170)

At trial, Petitioner testified that he returned to full duty work as of February 25, 2019, without restrictions. Petitioner testified to intermittent pain with activities and at the end of the work day. Petitioner testified that he continues to work for Bandwidth Inc. as an electrician. He has not sustained any additional accidents or injuries. He testified that he continues to notice bilateral shoulder constant tightness and aching after work. He uses Aspirin and Advil four times per week for these symptoms. He further testified that he notices right elbow "tightness". Petitioner testified that if he needs help at work he asks for help or switches arms but that his conditions do not prevent him from working his full duty job. At home, Petitioner notices pain with throwing and is unable to ride his touring motorcycle. He stops every hour while driving. Petitioner notices weakness with overhead lifting and reaching and he drops things in his right hand. He can no longer boat, water ski or tube.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law are made in the consolidated cases of 16 WC 10819 doa 1/26/15 injuries to right shoulder, right elbow and left wrist; case 16 WC 10820 doa 5/27/15 injuries to left shoulder; case 17 WC 31995 doa 6/8/15 alleged manifestation date of repetitive trauma to bilateral shoulders; and case 17 WC 34520 doa 4/11/17 injury to left shoulder

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 accident? E. Was timely notice of accident given Respondent?

ACCIDENT – DOA 1/26/15

Based on the credible testimony of Petitioner as buttressed by the treating medical records of Dr. Marcoski, the Arbitrator finds that Petitioner sustained a work related accident on 1/26/15 while at work for Respondent Great Lakes at the Impact job site. Petitioner testified that he felt a pop in his right shoulder while shoveling gravel at the Impact job working in his capacity as a foreman electrician for Respondent Great Lakes. Petitioner's credible testimony is buttressed by his treating medical records which document that he injured his right shoulder while shoveling gravel on January 26, 2015, and shortly thereafter experienced pain and discomfort that was ongoing. This evidence was unrebutted by the Respondent Great Lakes.

Wherefore, the Arbitrator finds that an accident occurred on January 26, 2015 at the "Impact Job" in Mettawa that arose out of and in the course of Petitioner's employment as a foreman electrician for the Respondent Great Lakes.

NOTICE

The Arbitrator further finds that Respondent Great Lakes received proper and timely notice of Petitioner's accident of 1/26/15. The finding is based on a review and assessment of Petitioner's testimony and that of his co-worker Alan Terzian. In so finding, the Arbitrator places greater credibility on the testimony of Petitioner and Mr. Terzian than on the testimony of Dick Anderson provided at trial. At trial**,** Allen Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was the informal project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. Several witnesses at trial identified Mr. Arndt at the office manager at Great Lakes. Mr. Anderson verified that accidents were to be reported to Mr. Arndt as he was in charge of the insurance in the office. After his death, Michelle Bruno was placed in his position at Great Lakes.

Petitioner's requests for an accident report and attempts to have the medical bills paid for by Respondent Great Lakes' workers' compensation are also documented and clearly support Petitioner's ongoing efforts to report his work related injury to Great Lakes. PX 11- 14. Lastly, the Arbitrator notes that Petitioner's application for adjustment of claim was filed in 2016, at a minimum placing Respondent on sufficient, albeit defective, notice of Petitioner's accident. There is no evidence in the record to support a finding of undue prejudice by Great Lakes.

ACCIDENT – DOA 5/27/15

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury in January 2015. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day. Petitioner's testimony was again supported by the medical records documenting the left shoulder injury while working on May 27, 2015 and was unrebutted at trial. Accordingly, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Great Lakes on May 27, 2015.

NOTICE

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete.

Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he was the project manager on the College of Lake County job in May 2015. He further testified that he worked with Petitioner at the time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents. Again, on the issue of notice, the Arbitrator places greater weight on the testimony of Petitioner and Mr. Yurko.

The trial testimony and the Arbitrator's findings are further supported by the emails between Petitioner and Michelle Bruno. The emails support Petitioner's testimony on his unsuccessful attempt to provide notice to Respondent and obtain an accident report. PX 11-14. Based on the foregoing, the Arbitrator finds that notice to Respondent of the May 27, 2015 work accident was both timely and proper.

ACCIDENT – DOA 6/8/15

Petitioner alleges repetitive trauma to his bilateral shoulders, right elbow and left wrist arising out of and in the course of his employment with Respondent Great Lakes manifesting on June 8, 2015, his first date of treatment with Dr. Marcoski. As did Dr. Marcoski, the Arbitrator acknowledges Petitioner's job duties as a working foreman electrician for Great Lakes and his 30 plus years of heavy physical labor as an electrician and the likely physical toll taken on Petitioner. However, the Arbitrator finds, in light of the record in its entirety in this particular matter, that Petitioner's years of physical labor alone as mused upon by Dr. Marcoski are not sufficient to support a finding of repetitive trauma to any alleged body part manifesting on June 8, 2015 under

the Act. Rather, the Arbitrator refers to the foregoing findings of specific trauma on January 26, 2015 and May 27, 2015 and again notes the support in the record for the finding of accident on those dates.

Based on the Arbitrator's finding of no repetitive trauma manifesting on June 8, 2015, all other issues in case 17 WC 31995 are moot. No award of benefits is made in 17 WC 31995.

ACCIDENT – DOA 4/11/17 – RESPONDENT ALDRIDGE

Petitioner testified that Petitioner on 4/11/17, he was at work as a foreman electrician for Respondent Aldridge on the Lake County Courthouse job site. He testified that while lifting and moving material from a truck onto a loading dock he felt a pop in his left shoulder. Petitioner's testimony regarding this incident was unrebutted at trial and supported by the medical records documenting consistent left shoulder treatment thereafter. As such, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Aldridge on 4/11/17.

Notice was not in dispute at trial in case 17 WC 34520 against Respondent Aldridge.

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

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

At trial, Petitioner testified that he was working full duty with no right shoulder complaints prior to the accident on January 26, 2015. (T. 29). After that, his condition did not return to baseline, and symptoms continued as recorded in the medical records and noted by Dr. Chudik, Dr. Bare and Dr. Murphy. Petitioner testified that he had to self-limit after the work accident on January 26, 2015 but that he was able to continue working with pain.

Petitioner initially sought treatment for right shoulder complaints and complaints of right elbow pain to Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the right shoulder and elbow on January 26, 2015 and noted no prior injury to those parts. Dr. Chudik further opined that Petitioner sustained right shoulder and elbow injury at work on January 26, 2015 and that his conditions were causally related to that accident given the mechanism of injury described and the lack of prior injury to those parts. In finding causal connection for the right shoulder and elbow, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's right shoulder condition was merely degenerative in nature and completely without aggravation from the accident of January 26, 2015.

Petitioner's left wrist injury occurred while he was engaged in postoperative therapy for the right shoulder surgery. Therefore, the left wrist injury flowed from the injury to the right shoulder on January 26, 2015.

Based on the above, the Arbitrator accordingly finds that Petitioner has proven by a preponderance of the credible evidence that his right shoulder condition, right elbow condition and left wrist condition are all causally related to the work accident that took place on the Impact job site on January 26, 2015.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder. Petitioner injured his left shoulder carrying conduit on May 27, 2015 as noted above.

Petitioner initially sought treatment for left shoulder complaints with Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the left on May 27, 2015 and noted no prior injury to the left shoulder. Dr. Chudik further opined that Petitioner sustained left shoulder injury at work on May 27, 2015 and that his condition was causally related to that accident given the mechanism of injury described and the lack of prior injury to the left shoulder. In finding causal connection for the left shoulder condition, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's left shoulder condition was merely degenerative in nature and completely without aggravation from the accident of May 27, 2015.

Accordingly, the Arbitrator finds that Petitioner has proven by a preponderance of the credible evidence that his left shoulder condition is causally related to the work accident that took place on the Impact job site on May 27, 2015.

DOA 4/11/17 – 17 WC 34520 – left shoulder- Respondent Aldridge

The Arbitrator notes the finding of accident on 4/11/17 and Petitioner's complaints of left shoulder pain thereafter. However, the Arbitrator finds that based upon the credible evidence at trial, the accident of 4/11/17 sustained by Petitioner while working for Aldridge resulted only in a temporary aggravation of Petitioner's pre-existing left shoulder condition.

In so finding, the Arbitrator notes the opinion of Dr. Chudik that Petitioner's accident in May of 2015 "would have been probably the most significant causation of the labral tear." PX 6. Dr. Chudik testified "[i]f we have to give an opinion with a reasonable degree of medical and surgical certainty, I think more likely than not, I think the tear happened in May of 2015." PX 6. Dr. Chudik's opinion is in line with Dr. Bare's opinion that the April 11, 2017 work accident was merely a temporary exacerbation of symptoms and that surgery was required based on Petitioner's left shoulder condition that pre-dated the accident on April 11, 2017.

Wherefore, the Arbitrator finds that the April 11, 2017 work accident resulted in a non-compensable temporary exacerbation of symptoms, and that Petitioner's current condition as relates to the left shoulder is not causally related to the April 11, 2017 work accident. As such, all remaining issues are moot and no benefits are awarded Petitioner in case 17 WC 34520 involving Respondent Aldridge.

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?

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's right shoulder, right elbow and left wrist conditions.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the right shoulder, right elbow and left wrist shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

DOA 5/27/15 – 16 WC 10820 – left shoulder

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's left shoulder.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the left shoulder shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

K. What temporary benefits are in dispute? (TTD)

DOA 1/16/15- 16 WC 10819

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his right shoulder, right elbow and left wrist injuries. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

DOA 5/27/15 – 16 WC 10820

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his left shoulder injury. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

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

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b (b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the right shoulder injury, 5% loss of use of the arm for the right elbow injury and 10% loss of use of the left hand for the left wrist injury.

DOA 5/27/15 – 16 WC 10820 – left shoulder

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b),the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the left shoulder injury that occurred on May 27, 2015.

N. Is Respondent due any credit?

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010820
Case Name	SONETZ, LOUIS v. GREAT LAKES ELECTRICAL CONTRACTORS
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0069
Number of Pages of Decision	22
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matt Walker
Respondent Attorney	Robert Sabetto

DATE FILED: 2/22/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOUIS SONETZ,

Petitioner,

vs. NO: 16 WC 10820

GREAT LAKES ELECTRICAL CONTRACTORS and ALDRIDGE ELECTRIC, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent Great Lakes Electrical Contractors and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

This claim was consolidated with claim numbers 16 WC 10819, 17 WC 31995 and 17 WC 34520 for purposes of arbitration hearing and Review before the Commission. Separate Decisions have been issued for each claim. The Commission writes to clarify that as to claim numbers 16 WC 10819 and 16 WC 10820, there is only one bond comprising both claims in the amount of $75,000.00. Both claims share the same award for TTD and medical bills as well as the same amount of credit under Section 8(j) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 28, 2021 is hereby affirmed and adopted.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent Great Lakes Electrical Contractors 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 Great Lakes Electrical Contractors is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

February 22, 2022

CAH/pm

O: 2/17/2022
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010820
Case Name	SONETZ, LOUIS v. GREAT LAKES ELECTRICAL CONTRACTORS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Matt Walker
Respondent Attorney	Robert Sabetto

DATE FILED: 7/28/2021

THE INTEREST RATE FOR THE WEEK OF JULY 27, 2021 0.05%

/s/ Carolyn Doherty, 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

Louis Sonetz Case # **16** WC **10820**
Employee/Petitioner
v.
Great Lakes Electrical Contractors
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 **Chicago**, on **June 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 **May 27, 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 $**90,272.00**; the average weekly wage was $**1,736.00**.

On the date of accident, Petitioner was **48** years of age, ***married*** with **2** dependent children.

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

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

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

Respondent is entitled to a credit of up to **$80,335.69** under Section 8(j) of the Act. Respondent shall hold Petitioner safe and harmless up to the amount of the credit.

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $ 1157.33 / WEEK FOR 76 6/7 WEEKS, COMMENCING JULY 26, 2017 THROUGH JANUARY 14, 2019 , AS PROVIDED IN SECTION 8(A) OF THE ACT.

RESPONDENT SHALL PAY REASONABLE AND NECESSARY MEDICAL SERVICES AS PUT FORTH IN THE ARBITRATOR'S FINDINGS OF FACT AND CONCLUSIONS OF LAW, ATTACHED. ALL AWARDED MEDICAL BILLS SHALL BE PAID AS PROVIDED IN SECTIONS 8(A) AND 8.2 OF THE ACT.

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $ 735.37 / WEEK FOR 75 WEEKS, BECAUSE THE INJURIES SUSTAINED CAUSED 15 % LOSS OF THE PERSON AS A WHOLE, AS PROVIDED IN SECTION 8(D)(2) OF THE ACT. SEE THE ARBITRATOR'S ATTACHED FINDINGS FOR A FULL DESCRIPTION OF THE WEIGHT GIVEN TO THE FACTORS AS REQUIRED BY SECTION 8.1B(B) 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.

Carolyn M. DeCheesky

Signature of Arbitrator

JULY 28, 2021

PROCEDURAL HISTORY

Petitioner, Louis Sonetz, filed four applications for adjustment of claim with the Illinois Workers' Compensation Commission. The first is claim number 16 WC 10819, alleging injuries to the right shoulder, right elbow and left wrist on January 26, 2015 while in the course and scope of his employment with Great Lakes Electrical Contractors.

The second is claim number 16 WC 10820, alleging injuries to the left shoulder on May 27, 2015 while Petitioner was in the course and scope of his employment with Respondent Great Lakes.

The third is claim number 17 WC 31995, which alleges repetitive trauma injuries to Petitioner's bilateral shoulders, right elbow and left wrist with a manifestation date of June 8, 2015. That manifestation date corresponds to Petitioner's first encounter with Dr. Marcoski on June 8, 2015. The fourth and final application for adjustment of claim is claim number 17 WC 34520. Petitioner alleges that on April 11, 2017, he injured his left shoulder in the course and scope of his employment with a different employer, Aldridge Electric.

All four claims were consolidated. The first hearing took place in Chicago, Illinois on July 14, 2020. The second hearing took place on October 14, 2020 in New Lenox Illinois. The third and final hearing was held on June 17, 2021 in Chicago, Illinois.

FINDINGS OF FACT

Petitioner testified that he has worked over 30 years as a journeyman electrician. As such, he is required to lift on a daily basis. He testified that he is routinely required to lift bundles of conduit, and cases and rolls of wire weighing up to 80 pounds. He also engages in pushing and pulling on a daily basis. He testified that 90% of his work requires overhead work including lifting fixtures overhead that weigh up to 70 pounds.

Petitioner testified that he worked at Great Lakes in approximately 2009 performing all of the described activity through April 2016. On January 26, 2015, Petitioner worked as a foreman at Great Lakes. His job duties at Great Lakes included everything from underground electrical work involving trenching conduit to low voltage installations. The trenching work involved using a machine to dig the trench, manual shoveling of gravel, laying pipes and then back filling with gravel using a shovel. He testified that all back filling done close to the building or in the building was done with a shovel. Petitioner further testified that while at Great Lakes he performed both rough interior electrical work and underground electrical work. Petitioner testified that he worked with a pipe threader at waist level height. He also used a hammer drill to drill through concrete block surfaces 20% of his work time. In so doing, his arms were outstretched and the machine weighed between 20 to 50 pounds.

Petitioner testified that prior to 1/26/15 he had no problems or restrictions with either his right or left shoulder and was working full duty. Petitioner testified that on 1/26/15 he worked for Great Lakes on the "Impact" job which was a ground up office building with an underground parking garage. Petitioner testified that he was a "working foreman" and as such was working with a back fill to lay underground pipes in the electrical room. On 1/26/15, he arrived at 6:30 am and unlocked the building and tools to finish the piping and back fill in the electrical room. His co-worker on the project was Gary Costain.

Petitioner testified that on 1/26/15, he back filled gravel for 3-4 hours that morning using a shovel to toss gravel. He estimated that he used the shovel 100 times while tossing gravel. Petitioner testified that during one of the shovel maneuvers he pitched the gravel and felt a pop in his right shoulder. Petitioner put the shovel down and told his co-worker Gary to finish. Petitioner went to his truck and took a break from the work as he had pain in his right shoulder.

Petitioner testified that around noon he spoke to the project manager Alan Tertian to report the right shoulder pain and to request an accident report. Petitioner testified that Allen told him he would go to the back room and get an accident report for Petitioner to complete. Petitioner returned to doing only light work with Gary doing the heavy lifting. Petitioner finished the day at work and testified that he went home to ice his right shoulder due to extreme soreness. Petitioner testified that despite his request, he was never supplied an accident report to complete. Petitioner took Advil for the pain and soreness but did not seek medical treatment.

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day.

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete. He testified that after speaking with Mr. Yurko over the phone he went back to work but performed no physical activity. He testified that it was difficult to drive home from the job that day in that he could not lift his left arm high enough to reach the steering wheel.

Petitioner testified that he made an appointment to see Dr. Marcoski. While waiting for the appointment, Petitioner continued to work lying out and marking blue prints. He testified while waiting for the appointment he continued to notice pain and burning in both his right and left shoulders.

Petitioner's first visit with Dr. Marcoski took place on June 8, 2015. The third application lists an accident date of 6/8/15 with injuries to the man as a whole and bilateral arms and shoulders. The accident date corresponds with Petitioner's first date of treatment.

Petitioner completed an intake form at PX1. He listed his occupation as electrician and indicated a work injury 1/29/15 and 5/27/15. Petitioner testified that he made a mistake on the form listing 1/29/15 as his accident date was 1/26/15. Petitioner testified that a page from his time log at PX 10 indicates that on 1/26/15, he was shoveling gravel between 11 am and 12 pm and that is the date he is alleging with regard to his right shoulder injury. Petitioner further testified that on the 6/8/15 intake form he indicated right shoulder injury but forgot to list the left shoulder pain as well. He further indicated pain in his right elbow and forearm which are symptoms that began after he injured his right shoulder.

In the June 8, 2015 chart note, Dr. Marcoski records the following history: "Patient is here for right shoulder pain that began in January after shoveling gravel and reinjuring on May 27th while carrying pipes. Patient complaints of radiating pain to elbow and numbness. No previous history."

Marcoski went on to record the following: "Patient is seen for evaluation of pain in both shoulders right side worse than left. His history of right shoulder problems begins back in December when he was shoveling gravel and he overdid it feeling some soreness and strain in his right upper arm and shoulder. He took it easy for a period of time and seemed to get a little bit better but then he noticed some numbness and tingling right around his elbow. That's continued to him since it began and it seems to be aggravated by activity. Usually his left shoulder he's noticed this is tender to touch but it doesn't really hurt him when he works. He denies any history of any trouble with his shoulder past but he has been a very hard working tradesman throughout his entire working life. (Petitioner's Exhibit #1, pp. 2-3).

Marcoski diagnosed bilateral rotator cuff syndrome, radiating pain and numbness to his right elbow with right shoulder pain, and left shoulder tender to touch. He recommended options of either a symptomatic injection or to employ moist local heat, massage, and to avoid any aggravating factors. Petitioner declined the injection, but Marcoski noted that if Petitioner remained symptomatic then bilateral shoulder MRI's would be considered. (Petitioner's Exhibit #1 p. 3). Petitioner was not taken off work.

Petitioner testified that he continued to work for Great Lakes and that he had problems with his right shoulder and elbow while at work. On November 23, 2015, Petitioner returned to Dr. Marcoski for bilateral shoulder injections. PX 1. He continued working for Great Lakes.

PX 11 is an email dated January 5, 2016 written by Petitioner and sent to Michelle Bruno at Great Lakes attaching medical bills. The subject was "my shoulders." Petitioner indicated that the medical bills had been submitted to "insurance because I had no info to give them" and he asked for a report to complete. Petitioner testified that he submitted the medical bills but they were not paid because he did not have an accident report on file. PX 12 is an email from Petitioner to Michelle Bruno at Great Lakes dated January 26, 2016. The subject was "form". Petitioner wrote that he was required to submit the attached form. Michelle Bruno responded on the same date indicating "no worries… you have to cover yourself!!" PX 12. PX 13 is another email from Petitioner to Michelle Bruno dated February 5, 2016 wherein he asked "what do I do now" with regard to an attached bill. The subject line was "shoulder injury at work."

PX 14 is an email from Petitioner to Michelle Bruno dated March 3, 2016 along with her emailed response. Petitioner emailed "injury report?" and Ms. Bruno responded "I'll discuss again with Dick tomorrow." PX 15 is an email from Petitioner to Dick Anderson, the owner of Great Lakes. The email is dated March 23, 2016 and Petitioner indicates that he "had to sign a subrogation statement to get the bill paid for my shoulders that I injured on the job in January 2015 at the Impact and subsequently the other shoulder in May 2015 at CLC. I have tried for over a year to get an accident report from Great Lakes for the first and over nine months for the other." Petitioner did not receive a response from Mr. Anderson.

At trial**,** Alan Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was an estimator and project manager for Great Lakes although he was never formally assigned as the estimator or project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. At trial, it was learned that Mr. Arndt is deceased.

Mr. Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he knows the Petitioner. Mr. Yurko testified that he was the project manager on the College of Lake County job in May 2015. He further testified that Petitioner he worked with Petitioner at the

time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents.

Mr. Dick Anderson testified for Great Lakes in his capacity as owner of Great Lakes. He testified that Petitioner was hired by Great Lakes through the union hall as an electrician and foreman from 2008/9 to April 2016 when Petitioner left the company on his own. He testified that in 2015, Great Lakes had an accident reporting procedure in place and that information about accidents when to Paul Arndt who was the office manager. If the accident was severe, Paul would tell Mr. Anderson immediately. He testified that Mr. Arndt would not tell him about minor accidents or injuries. He testified that Paul would talk to the injury party, complete a report and investigate the accident. Mr. Anderson testified that Mr. Arndt never gave him and accident report or told him about any accident pertaining to Petitioner. He testified that Michelle Bruno became the office manager after Mr. Arndt passed away in September 2015. He does not recall that Mr. Arndt and Michelle Bruno overlapped at any time at Great Lakes.

Mr. Anderson testified that he was never told by Michelle about Petitioner's shoulder or any accident suffered by Petitioner at any time. He does not recall receiving the email from Petitioner at PX 15. He denies ever being asked by Petitioner for an accident report to complete. He does not recall ever being presented with medical bills pertaining to Petitioner's accidents. He testified that Petitioner was a good foreman who would know how to report an accident. He testified that neither Messrs. Terzian nor Yurko ever reported an accident to him pertaining to Petitioner on any job. He further testified that Great Lakes contributed to the group health insurance plan in place. He verified all of the job duties testified to by Petitioner and that Petitioner might use a threader or hammer on the job site albeit not often. Lastly, he agreed to the trenching testified to by Petitioner regarding the Impact job but disputed that such trenching would be done in the winter. He was not 100% sure trenching was done in January 2015 on the Impact job.

Petitioner testified that he was laid off from Great Lakes starting April 1, 2016. He began working for Respondent Aldridge Electric on April 14, 2016. He testified that at the time he continued to have issues with both shoulders and his right elbow. Petitioner testified that he was hired by Aldridge to do fire alarm wiring and low voltage work, including light installation. He testified that both shoulders were extremely sore and his right elbow pain made it hard to carry things including his tool bag. Petitioner testified that on 4/11/2017, he was working for Aldridge as a foreman on the new Lake County court house project laying out electrical, opening, measuring and reading blue prints. He testified that on 4/11/17 he had been working for Aldridge a year between his hire date in April 2016 and 4/11/17.

Petitioner testified that on 4/11/17, a truck pulled up to make a delivery and truck was lower than the dock platform so Petitioner could not use a pallet jack to unload the material. Petitioner testified that he had to physically lift the materials from truck to the dock and felt a pop in the left shoulder while lifting materials. He testified that he reported the accident to project manager Kevin. Notice is not in dispute. PX 16 is an incident report completed by Kevin with accident date of 4/11/17 indicating the same facts regarding the incident. Kevin took the pictures attached to the report which depict the material in the truck and the height difference between the truck and the dock. The report is dated 4/12/17 and indicates that Petitioner reported that his shoulder was sore and that Petitioner "believes it is from yesterday (4/11/17) while unloading a delivery… there has been no medical treatment due to his incident but he did state that he was due to get a shot as he did 2 years

ago for prior discomfort in the same shoulder." PX 16. Petitioner testified that he continued working for Aldridge after 4/11/17.

Petitioner returned to Dr. Marcoski on April 17, 2017. (Petitioner's Exhibit #1, p. 11). In the "History of Present Illness" section, Marcoski charted the following: "Patient is here for left shoulder pain s/p rotator cuff syndrome, last inj. 11/23/15. Patient felt a pop while lifting at work a week ago. Patient is seen for evaluation of a new problem one of pain in his left shoulder. His history of present illness begins last week Tuesday when he was lifting a heavy pallet loaded onto an overhead platform dock and he felt a pop in his left shoulder. He had immediate onset of discomfort on the top part of the wing bone and upper part of his arm bone and although is easing up but still remain sore. About a year and a half ago back in November of 2015 he had adhesive capsulitis with impingement syndrome of the shoulder that was treated with a cortisone injection. He did get better following that and his shoulder was doing well up until this recent mishap. (Petitioner's Exhibit #1, p. 11).

Marcoski recorded his impression as "strain of the left shoulder with history of previous impingement syndrome and adhesive capsulitis." (Petitioner's Exhibit #1, p. 12). Marcoski recommended nonoperative management to include massage, moist local heat, and activity modification. If there was no improvement, then an MRI scan would be obtained.

Dr. Michael Murphy evaluated Petitioner on May 8, 2017, pursuant to Section 12 of the Act, at the request of Respondent Great Lakes. GL RX 1. This exam took place only a few weeks after the accident of 4/11/17. Dr. Murphy's evidence deposition was taken on 10/25/17. GL RX 1. Dr. Murphy testified that Petitioner reported a right shoulder injury on 1/20/15 while shoveling gravel and a felt a pop. He reported a left shoulder injury on 5/27/15 noticing pain and a pop in the left shoulder while carrying conduit. P. 8. Petitioner made no mention of an injury to his left shoulder on 4/11/17. Based on his review of Petitioner's treating records and from bilateral shoulder x-rays he ordered, he determined that Petitioner had bilateral shoulder degenerative changes to the AC joint. P. 11-12. Following physical exam, Dr. Murphy determined that Petitioner's symptoms and history could be related to rotator cuff pathology. P. 14. He agreed that bilateral shoulder MRI's were appropriate and necessary. P. 15.

Bilateral shoulder MRI's were performed on July 14, 2017. (Petitioner's Exhibit #1, pp. 14-15). The radiologist's impression of the left shoulder MRI was "[l]ateral downsloping of a curved type II acromion, correlate for outlet impingement. Bursal surface fraying of the supraspinatus tendon but no full thickness rotator cuff tears. Degenerative disease of the AC joint. Small glenohumeral detachment of the inferior aspect of the posterior labrum." (Petitioner's Exhibit #1, p. 14).

The radiologist's impression of the right shoulder was "SLAP type tear of the superior labrum extending into the superior aspect of the posterior labrum. Inferiorly projecting AC arthrosis, correlate for outlet impingement. No rotator cuff tear is identified." (Petitioner's Exhibit #1, p. 15).

Marcoski reviewed the MRIs on July 20, 2017. (Petitioner's Exhibit #1, p. 16). He recorded his impression: Patient is seen for follow-up of his bilateral symptomatic shoulders with impingement syndrome. Since I last saw him he had MRI scans done of both shoulders and the results were discussed with him. The left shoulder basically has impingement syndrome with downsloping of the acromion undersurface or bursal fraying of the supraspinatus tendon, but no full thickness tear. Also noted is degenerative changes in the a.c. joint The right shoulder has very classic SLAP lesion. The patient states that his left shoulder is sore to touch and hurts with lifting and the right shoulder seems to hurt with throwing a ball with his daughters. Impression is bilateral symptomatic shoulders with impingement syndrome left shoulder with classic MRI findings and the right shoulder with SLAP tear. Plan is to recommend deferring to Dr. Chudik for consultation and treatment.

Dr. Chudik first saw Petitioner on July 26, 2017. (Petitioner's Exhibit #1, p. 18). Chudik recorded a history as follows: Louis J. Sonetz is a 50 year old male who presents today with a chief complaint of bilateral shoulder pain. It began approximately on January of 2015. The problem resulted from an injury at work. The problem resulted from right shoulder while shoveling gravel (1/2015) and left shoulder while carrying object at work (05/2015). Right elbow onset gradually (4/2017). The pain is located bilateral shoulders and right elbow. Currently it is a 5 on a pain scale of 10. Prior to this problem, the patient had not sustained significant injury to this part of the body. Prior to this problem, the patient has not had surgery on this part of the body in the past. The patient has seen another orthopedist for this problem. The patient has seen Dr. Marcoski for this problem. The patient has had the following tests and / or treatments performed for this problem: X-ray, MRI, injections. The timing of the pain / problem is constant, at rest, during activity. Pain occurs when reaching, lifting, carrying. The pain / symptoms do not radiate. The patient states that changing arm position alleviates the pain and / or symptoms. The patient stats that reaching, lifting aggravates or increases the pain and / or symptoms.

He continued: Patient is here today for MRI review referred by Dr. Marcoski. Patient is here for bilateral shoulder pain from two separate injuries at work, and elbow pain. He reports he experienced right shoulder pain from shoveling frozen gravel at work in January 2015. He states that in May 2015, he experienced a pop and significant left shoulder pain while carrying something in his left arm to avoid use of his right arm. He states he could not move the left arm well and has difficulty reaching into his back pocket. He reports he had an injection in 11/2015 in both shoulders that did help to alleviate pain, but pain never completely resolved. Today, he states that the left shoulder has worsened and also sometimes has pain at rest. Patient reports that he has been working with the shoulder pain but he is currently laid off. He also reports right elbow pain as of April 2017, but is unsure if elbow pain is related to the shoulder injuries. Right elbow pain has had a gradual onset and denies a mechanism.

Chudik diagnosed Petitioner with bilateral shoulder impingement and right elbow lateral epicondylitis. (Petitioner's Exhibit #1, p. 21). Chudik recommended conservative treatment, including physical therapy. Chudik took Petitioner off of work as of July 26, 2017. (Petitioner's Exhibit #1, p. 23).

On August 24, 2017, Section 12 examining physician Dr. Murphy reviewed the MRI reports from July. He also testified that he did not recall for certain whether he reviewed the actual MRI films. P. 18-21. However, it was determined that Respondent did send him the actual MRI films for review. Dr. Murphy testified that after his review of the MRI reports and films, "… I felt that the MRI findings would be consistent with degenerative changes. There was no full thickness tear of either rotator cuff. The rotator cuff demonstrated absolutely no abnormalities about the rotator cuff. I mentioned some bursal fraying, but no full thickness tear." p. 21. He opined that these noted changes "would not be abnormal for someone at an age beyond 30." P. 21. He further opined that the findings on the bilateral MRI's were not related to his work accident stating, "There's no signs of a traumatic condition. He has a SLAP tear on the right shoulder, which in his age group is often a normal finding." P. 21. He opined that Petitioner did not need surgery on either shoulder based on the physical exam and the history of injury mechanics which Dr. Murphy opined were inconsistent with a SLAP tear. He further testified, "Even if he had this exam that was consistent with it, those findings are often degenerative in nature." P. 24.

On cross exam, Dr. Murphy testified that to his knowledge, Petitioner worked as a foreman electrician and that he did occasional lifting. p. 34. He did not receive any job description from the Respondent. Murphy noted that during his physical examination, Petitioner's Hawkins test was positive bilaterally, greater on the left than the right, Neers test was mildly positive on the left and the right, there was pain over the lateral aspect of the shoulder at the insertion of the rotator cuff, and pain at the end range of abduction and flexion, greater on the left than the right. Petitioner's strength was normal, but limited by pain. P. 13. He noted that the left shoulder was more painful than the right shoulder. P. 35-36.

Dr. Murphy acknowledged that Petitioner had no shoulder issues prior to the accident. and that Petitioner was still symptomatic at the time he was examined by Murphy in May of 2017. P. 42. There was no indication of malingering. Murphy agreed that by the time he had an opportunity to examine the Petitioner, Petitioner's bilateral shoulder conditions were chronic in nature. Murphy further acknowledged that Petitioner's bilateral shoulder pain had not returned to baseline. p. 43-46.

Murphy was unable to answer whether or not Mr. Sonetz's job duties as a union electrician were a contributing factor to his bilateral shoulder conditions. P. 56. Murphy did agree that Petitioner's bilateral shoulders were "aggravated" although he could not specify when that aggravation ended. Rather, he testified "So, an aggravation is based on he had a symptom of discomfort and pain, but I don't have an objective finding on MRI to support his continued complaint." P. 51-52.

On September 6, 2017, Chudik noted Petitioner had seen improvements with PT, but continued to have shoulder pain that had not improved. (Petitioner's Exhibit #1, p. 25). Chudik recommended bilateral shoulder arthroscopies. (Petitioner's Exhibit #1, p. 26). On September 12, 2017, Petitioner agreed to proceed with the recommended surgeries. (Petitioner's Exhibit #1, p. 30).

On October 9, 2017, Chudik performed left shoulder surgery consisting of a left shoulder arthroscopy, left biceps tenodesis (subpectoral / open), left labral debridement, left capsular release of SGHL, and a left subacromial decompression. (Petitioner's Exhibit #5, pp.28-30). The postoperative diagnoses were: left shoulder pain, left biceps instability and partial rupture, left labral SLAP tear, left adhesive capsulitis, and left impingement syndrome.

Petitioner engaged in postoperative therapy and was continued off work by Dr. Chudik. On March 1, 2018, Dr. Chudik performed right shoulder surgery, which consisted of a right shoulder arthroscopy, right biceps tenodesis (subpectoral / open), extensive debridement of the rotator cuff and labrum, right capsular release of SGHL and a right subacromial decompression. (Petitioner's Exhibit #5, pp. 8-10).

Dr. Aaron Bare examined Petitioner at the request of Respondent Aldridge on April 18, 2018., after both shoulder surgeries. (Respondent Aldridge Exhibit #1). Bare opined that Petitioner was status post arthroscopic surgery of his left shoulder, that he had improved with postoperative physical therapy and was now approximately 7 months after the procedure. Bare opined that Petitioner was at maximum, medical improvement and capable of returning to full duty work without restrictions. Regarding causation, Bare opined that Petitioner injured his left shoulder in 2015 and continued to complain of pain and discomfort throughout that year without documentation that his symptoms had resolved. Bare indicated "I agree with the medical records and the statement made by Dr. Murphy that suggest that the findings were degenerative in nature and that his shoulder pain never completely resolved and at the time of the evaluation in 05/2017, which was after the second injury of 04/2017, he confirmed that his shoulder pain is chronic in nature involving both shoulders with the left being greater than the right."

Dr. Bare opined that the injury of 4/2017, while Petitioner worked for Aldridge, was a temporary aggravation of a pre-existing problem but did not cause any acute pathology. He opined, "It did not accelerate his condition and it also do not lead towards surgical intervention." Aldridge RX 1. He further stated that the MRI indicated degenerative findings only without trauma or definitive tears.

Petitioner continued to follow up with Chudik and was kept off of work. On July 12, 2018, Petitioner reported a sudden onset of right elbow pain on July 6, 2018, noting that there was no mechanism of injury for the elbow pain. Chudik recommended an EMG and MRI for the right elbow. PX 1, p. 89. The MRI revealed a minimally thickened common extensor tendon with subtle intratendinous signal possibly from low-grade tendinosis. The remainder of the examination was otherwise unremarkable. PX 1. The EMG / NCS performed on July 20, 2018

of the right elbow showed a focal conduction abnormality of the media nerve at the wrist, consistent with mild right wrist carpal tunnel syndrome, and irritation of the ulnar nerve at the elbow. PX 1.

On July 25, 2018, Dr. Chudik opined that the carpal tunnel and cubital tunnel syndrome were secondary to immobilization following the right shoulder surgery. PX 1, p. 101. He continued Petitioner off of work.

Dr. Chudik testified via evidence deposition taken on August 20, 2018. PX 6. Dr. Chudik is an orthopedic surgeon specializing in shoulders and sports medicine. (Petitioner's Exhibit #6, p. 2). He is board certified and licensed to practice medicine in the State of Illinois. Dr. Chudik testified that he is familiar with the general job duties of an electrician. PX 6. P. 14.

Chudik reviewed the chart notes from Dr. Marcoski and examined Petitioner on July 26, 2017. P. 25. Petitioner reported a history of bilateral shoulder pain in the right resulting from an injury at work shoveling gravel in January 2015 and then an injury to his left shoulder while carrying an object at work in May 2015. P. 26. Petitioner reported no prior problems with either shoulder. Petitioner reported that he continued working with conservative treatment to both shoulders in the form of injections. He reported that the pain was never relieved completely. P. 27. Petitioner also reported gradual onset of right elbow pain since April 2017 with initial right elbow complaints documented after the January 2015 accident. P. 27.

Dr. Chudik reviewed the shoulder MRI's and testified that he initially prescribed conservative care and physical therapy for both shoulders due to initially diagnosed bilateral shoulder impingement syndrome and rotator cuff syndrome along with right elbow epicondylitis. P. 29. Having failed conservative care as of September 2017, Dr. Chudik performed the left shoulder arthroscopy with debridement of a superior labral tear type two and a subacromial decompression removing inflamed bursa and soft tissue from the rotator cuff syndrome and impingement. P. 31-32. Petitioner was placed in a sling and in physical therapy. Eight weeks post-op, Petitioner reported left forearm and wrist pain and swelling in the left hand. P. 35. Dr. Chudik noted these complaints as "part of the morbidity of doing surgery on an extremity." P. 35,37. As of December 27, due to continued left hand pain, numbness and weakness following the surgery on the left extremity, and EMG study was discussed.

Due to right shoulder continued complaints and the prior right shoulder MRI showing SLAP tear, Dr. Chudik perform a right shoulder partial rotator cuff repair and debridement of type two labral tear, subacromial decompression, and right biceps tenodesis. P. 42. As of the April 12, 2018 visit, Petitioner complained of increased right elbow symptoms due to immobilization of the right arm. P. 46. Right elbow MRI and EMG results were consistent with right mild carpal tunnel syndrome and some irritation of the ulnar nerve at the elbow without a focal condition block noted but that world be consistent with some cubital tunnel. Dr. Chudik testified, "… we did note that he had some symptoms after the first injury, but I believe the immobilization from the surgery had a big effect on that and the swelling from the surgery…" p. 51.

Dr. Chudik last saw Petitioner on July 25, 2018. On that date, he ordered continued therapy for the shoulders and a brace for the right elbow. Petitioner was to return in 6 weeks for follow up.

With regard to the right shoulder, Dr. Chudik opined that Petitioner injured his right shoulder while shoveling at work on January 26, 2015. P. 58. He opined that Petitioner injury his left shoulder as a result of the work injuries on May 27, 2015 and April 11, 2017 when Petitioner was at work lifting a heavy pallet and felt a pop in his left shoulder. P. 57-58. With regard to the right elbow, Dr. Chudik opined that the right lateral epicondylitis was the result of the work injury on January 26, 2015 and April 11, 2017, as there was right elbow complaints made after each injury. P. 59. He further opined that the immobilization following the right shoulder surgery also contributed to the ultimately diagnosed right cubital tunnel syndrome. P. 60.

Further with regard to the right shoulder, Dr. Chudik testified that Petitioner's right shoulder condition is causally related to the January 26, 2015 work accident stating, "The answer is with a reasonable degree of medical certainty that his current condition in his right shoulder was contributed to by the injuries sustained on January 26th, 2015. I think if we look at the whole clinical course of the patient, the objective findings on the MRI – well, the clinical course, which includes the proximate reporting of symptoms of right shoulder pain had been – had continued from that injury and had been refractory treatment through that whole course, conservative treatment, including injections and therapy with an MRI and surgical findings that objectively confirmed that he did, indeed, suffer from a superior labral tear that was made – injured and made symptomatic from that accident, and obviously, my experience as an orthopedic surgeon specializing and treating shoulders and surgeries are all the bases for my opinion. P. 61-62.

Chudik also testified that Petitioner's right elbow condition is related in part to the January 26, 2015 work accident stating, "Yeah. My response was that the current condition related to his right elbow was contributed by the injuries sustained on January 26, 2015. I do think that elbow pain and the numbness and tingling that he had were more likely than not an indication of some cubital tunnel symptoms, and I think they just reared their ugly head later when the provocative swelling and immobilization of the elbow contributed to it. So I think there is some contributing factor of that accident to his right elbow pathology in general. (Petitioner's Exhibit #6, pp. 16-17). … So I think there is more likely than not some contribution from the January 26, 2015 injury as well as the additional trauma of the surgery to the shoulder and the immobilization and swelling that occurs with it that is provoking those symptoms." P. 64-65.

With regard to the left shoulder, Dr. Chudik opined that Petitioner's left shoulder injury was caused by the carrying of heavy objects at work on May 27, 2015. He testified, "As I explained before, that kind of carrying, lifting with a pop in the shoulder would be very consistent with a superior labral tear. It would be consistent with that mechanism." P. 66.

With regard to any connection between the left shoulder and elbow and the accident of April 11, 2017, Dr. Chudik testified, "He had a very significant mechanism with the pop in the left shoulder in May (2015) and I think the April (2017) lifting again, just-if you have got a superior labral tear like that and then- it is going to – it is very easy to re-aggravate it with that lifting." So I imagine it might have made it worse some possibly, but I think that the injury had already occurred; and this was just- it may have been a temporary aggravation, but I believe the pathology already occurred. He had already had a very significant mechanism and symptoms that occurred with the first injury. So I think there was probably some contribution, but I think that the bulk of the injury was responsible from the May." P. 67.

Dr. Chudik further opined that the right elbow injury and underlying pathology pre-existed the April 11, 2017 lifting accident and that accident only temporarily aggravated that condition which originally resulted from the January 26, 2015 injury. P. 68.

On cross-exam, Dr. Chudik testified Petitioner's diagnosed type two SLAP tear is not typically seen without injury or precipitating event. P. 82-83. Dr. Chudik further testified that Petitioner's right elbow symptoms began after the January 2015 injury to this right shoulder as initially reported and then were further aggravated by immobilization after the right shoulder surgery. He testified, "I think if he didn't have any preexisting pathology there, I don't think we would see any of those type of symptoms from just the immobilization…if there wasn't any preexisting problems with the entrapment of those nerves, we wouldn't have expected that after surgery." P. 90-91. With regard to the left shoulder, Dr. Chudik noted that the first left shoulder pop was felt in the accident of May 2015 and the second left shoulder pop was felt in April 2017. He opined that the first accident resulted in the labral tear and the April 2017 accident could have made is worse but it is more likely than not "…he has had continued symptoms with that shoulder." He testified that a person can "work around" a labral tear more easily than with a rotator cuff tear and a labral tear is more tolerable to manage over

a period of time. A person can continue to work with a superior labral tear. P. 96, 100. Dr. Chudik testified that the April 2017 accident "also contributed to it further" referencing the original left shoulder injury from May 2015. He testified, "I think they are both contributory, and I think it is more likely than not that the superior labral tear started with popping event in May, and how much worse or how much aggravation or temporary exacerbation the April one I think is hard to determine." P. 103. Petitioner never reported being pain free in either shoulder to Dr. Chudik at his first visit date of July 26, 2017. P. 108.

Lastly, Dr. Chudik testified that the right elbow injury did not occur with the April 2017 accident. P. 112.

On October 19, 2018, Chudik noted aggravation of pre-existing lumbar spine pain due to physical therapy. (Petitioner's Exhibit #1, p. 111). Chudik recommended work conditioning and continued Petitioner off of work. (Petitioners Exhibit #1, pp. 111-112).

While in work conditioning, Petitioner injured his left wrist. (Petitioner's Exhibit #4, pp 77-80). Dr. Chudik recommended Petitioner continue work conditioning as tolerated and referred Petitioner to Dr. Fajardo for the wrist pain. (Petitioner's Exhibit #2, pp. 128-130). Petitioner was seen by Dr. Fajardo for the left wrist. (Petitioner's Exhibit #2, p. 131). Fajardo ordered an MRI and placed Petitioner in a wrist guard. (Petitioner's Exhibit #2, p. 132).

The MRI of the left wrist was done on December 11, 2018. (Petitioner's Exhibit #2, p. 133). Fajardo diagnosed left wrist TFCC tear and dorsal ulnar bone bruise. (Petitioner's Exhibit #2, p. 136). A steroid injection was performed, and wrist guard was continued. At the next visit on January 9, 2019, Fajardo recommended finishing PT, and prescribed NSAIDs. Fajardo recommended weight bearing as tolerated with the left wrist only, and advised Petitioner to return as needed (Petitioner's Exhibit #2, p. 145).

A functional capacity assessment was performed at ATI Physical Therapy on January 11, 2019. (Petitioner's Exhibit #2, p. 149). Petitioner demonstrated a physical demand level of "very heavy", and on January 14, 2019, Chudik recommended a trial return to work with no restrictions. (Petitioner's Exhibit #2, p. 147).

On January 18, 2019, Fajardo recorded a history of left wrist pain at the end of the functional capacity assessment. (Petitioner's Exhibit #2, p. 159). Fajardo administered an injection, and advised Petitioner to return as needed.

At a follow up on February 25, 2019 Chudik again released Petitioner without restrictions. (Petitioner's Exhibit #2, p. 167). The final visit took place on April 22, 2019, at which time Petitioner was placed at maximum, medical improvement. (Petitioner's Exhibit #2, pp. 169-170)

At trial, Petitioner testified that he returned to full duty work as of February 25, 2019, without restrictions. Petitioner testified to intermittent pain with activities and at the end of the work day. Petitioner testified that he continues to work for Bandwidth Inc. as an electrician. He has not sustained any additional accidents or injuries. He testified that he continues to notice bilateral shoulder constant tightness and aching after work. He uses Aspirin and Advil four times per week for these symptoms. He further testified that he notices right elbow "tightness". Petitioner testified that if he needs help at work he asks for help or switches arms but that his conditions do not prevent him from working his full duty job. At home, Petitioner notices pain with throwing and is unable to ride his touring motorcycle. He stops every hour while driving. Petitioner notices weakness with overhead lifting and reaching and he drops things in his right hand. He can no longer boat, water ski or tube.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law are made in the consolidated cases of 16 WC 10819 doa 1/26/15 injuries to right shoulder, right elbow and left wrist; case 16 WC 10820 doa 5/27/15 injuries to left shoulder; case 17 WC 31995 doa 6/8/15 alleged manifestation date of repetitive trauma to bilateral shoulders; and case 17 WC 34520 doa 4/11/17 injury to left shoulder

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 accident? E. Was timely notice of accident given Respondent?

ACCIDENT – DOA 1/26/15

Based on the credible testimony of Petitioner as buttressed by the treating medical records of Dr. Marcoski, the Arbitrator finds that Petitioner sustained a work related accident on 1/26/15 while at work for Respondent Great Lakes at the Impact job site. Petitioner testified that he felt a pop in his right shoulder while shoveling gravel at the Impact job working in his capacity as a foreman electrician for Respondent Great Lakes. Petitioner's credible testimony is buttressed by his treating medical records which document that he injured his right shoulder while shoveling gravel on January 26, 2015, and shortly thereafter experienced pain and discomfort that was ongoing. This evidence was unrebutted by the Respondent Great Lakes.

Wherefore, the Arbitrator finds that an accident occurred on January 26, 2015 at the "Impact Job" in Mettawa that arose out of and in the course of Petitioner's employment as a foreman electrician for the Respondent Great Lakes.

NOTICE

The Arbitrator further finds that Respondent Great Lakes received proper and timely notice of Petitioner's accident of 1/26/15. The finding is based on a review and assessment of Petitioner's testimony and that of his co-worker Alan Terzian. In so finding, the Arbitrator places greater credibility on the testimony of Petitioner and Mr. Terzian than on the testimony of Dick Anderson provided at trial. At trial**,** Allen Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was the informal project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. Several witnesses at trial identified Mr. Arndt at the office manager at Great Lakes. Mr. Anderson verified that accidents were to be reported to Mr. Arndt as he was in charge of the insurance in the office. After his death, Michelle Bruno was placed in his position at Great Lakes.

Petitioner's requests for an accident report and attempts to have the medical bills paid for by Respondent Great Lakes' workers' compensation are also documented and clearly support Petitioner's ongoing efforts to report his work related injury to Great Lakes. PX 11- 14. Lastly, the Arbitrator notes that Petitioner's application for adjustment of claim was filed in 2016, at a minimum placing Respondent on sufficient, albeit defective, notice of Petitioner's accident. There is no evidence in the record to support a finding of undue prejudice by Great Lakes.

ACCIDENT – DOA 5/27/15

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury in January 2015. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day. Petitioner's testimony was again supported by the medical records documenting the left shoulder injury while working on May 27, 2015 and was unrebutted at trial. Accordingly, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Great Lakes on May 27, 2015.

NOTICE

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete.

Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he was the project manager on the College of Lake County job in May 2015. He further testified that he worked with Petitioner at the time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents. Again, on the issue of notice, the Arbitrator places greater weight on the testimony of Petitioner and Mr. Yurko.

The trial testimony and the Arbitrator's findings are further supported by the emails between Petitioner and Michelle Bruno. The emails support Petitioner's testimony on his unsuccessful attempt to provide notice to Respondent and obtain an accident report. PX 11-14. Based on the foregoing, the Arbitrator finds that notice to Respondent of the May 27, 2015 work accident was both timely and proper.

ACCIDENT – DOA 6/8/15

Petitioner alleges repetitive trauma to his bilateral shoulders, right elbow and left wrist arising out of and in the course of his employment with Respondent Great Lakes manifesting on June 8, 2015, his first date of treatment with Dr. Marcoski. As did Dr. Marcoski, the Arbitrator acknowledges Petitioner's job duties as a working foreman electrician for Great Lakes and his 30 plus years of heavy physical labor as an electrician and the likely physical toll taken on Petitioner. However, the Arbitrator finds, in light of the record in its entirety in this particular matter, that Petitioner's years of physical labor alone as mused upon by Dr. Marcoski are not sufficient to support a finding of repetitive trauma to any alleged body part manifesting on June 8, 2015 under

the Act. Rather, the Arbitrator refers to the foregoing findings of specific trauma on January 26, 2015 and May 27, 2015 and again notes the support in the record for the finding of accident on those dates.

Based on the Arbitrator's finding of no repetitive trauma manifesting on June 8, 2015, all other issues in case 17 WC 31995 are moot. No award of benefits is made in 17 WC 31995.

ACCIDENT – DOA 4/11/17 – RESPONDENT ALDRIDGE

Petitioner testified that Petitioner on 4/11/17, he was at work as a foreman electrician for Respondent Aldridge on the Lake County Courthouse job site. He testified that while lifting and moving material from a truck onto a loading dock he felt a pop in his left shoulder. Petitioner's testimony regarding this incident was unrebutted at trial and supported by the medical records documenting consistent left shoulder treatment thereafter. As such, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Aldridge on 4/11/17.

Notice was not in dispute at trial in case 17 WC 34520 against Respondent Aldridge.

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

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

At trial, Petitioner testified that he was working full duty with no right shoulder complaints prior to the accident on January 26, 2015. (T. 29). After that, his condition did not return to baseline, and symptoms continued as recorded in the medical records and noted by Dr. Chudik, Dr. Bare and Dr. Murphy. Petitioner testified that he had to self-limit after the work accident on January 26, 2015 but that he was able to continue working with pain.

Petitioner initially sought treatment for right shoulder complaints and complaints of right elbow pain to Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the right shoulder and elbow on January 26, 2015 and noted no prior injury to those parts. Dr. Chudik further opined that Petitioner sustained right shoulder and elbow injury at work on January 26, 2015 and that his conditions were causally related to that accident given the mechanism of injury described and the lack of prior injury to those parts. In finding causal connection for the right shoulder and elbow, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's right shoulder condition was merely degenerative in nature and completely without aggravation from the accident of January 26, 2015.

Petitioner's left wrist injury occurred while he was engaged in postoperative therapy for the right shoulder surgery. Therefore, the left wrist injury flowed from the injury to the right shoulder on January 26, 2015.

Based on the above, the Arbitrator accordingly finds that Petitioner has proven by a preponderance of the credible evidence that his right shoulder condition, right elbow condition and left wrist condition are all causally related to the work accident that took place on the Impact job site on January 26, 2015.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder. Petitioner injured his left shoulder carrying conduit on May 27, 2015 as noted above.

Petitioner initially sought treatment for left shoulder complaints with Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the left on May 27, 2015 and noted no prior injury to the left shoulder. Dr. Chudik further opined that Petitioner sustained left shoulder injury at work on May 27, 2015 and that his condition was causally related to that accident given the mechanism of injury described and the lack of prior injury to the left shoulder. In finding causal connection for the left shoulder condition, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's left shoulder condition was merely degenerative in nature and completely without aggravation from the accident of May 27, 2015.

Accordingly, the Arbitrator finds that Petitioner has proven by a preponderance of the credible evidence that his left shoulder condition is causally related to the work accident that took place on the Impact job site on May 27, 2015.

DOA 4/11/17 – 17 WC 34520 – left shoulder- Respondent Aldridge

The Arbitrator notes the finding of accident on 4/11/17 and Petitioner's complaints of left shoulder pain thereafter. However, the Arbitrator finds that based upon the credible evidence at trial, the accident of 4/11/17 sustained by Petitioner while working for Aldridge resulted only in a temporary aggravation of Petitioner's pre-existing left shoulder condition.

In so finding, the Arbitrator notes the opinion of Dr. Chudik that Petitioner's accident in May of 2015 "would have been probably the most significant causation of the labral tear." PX 6. Dr. Chudik testified "[i]f we have to give an opinion with a reasonable degree of medical and surgical certainty, I think more likely than not, I think the tear happened in May of 2015." PX 6. Dr. Chudik's opinion is in line with Dr. Bare's opinion that the April 11, 2017 work accident was merely a temporary exacerbation of symptoms and that surgery was required based on Petitioner's left shoulder condition that pre-dated the accident on April 11, 2017.

Wherefore, the Arbitrator finds that the April 11, 2017 work accident resulted in a non-compensable temporary exacerbation of symptoms, and that Petitioner's current condition as relates to the left shoulder is not causally related to the April 11, 2017 work accident. As such, all remaining issues are moot and no benefits are awarded Petitioner in case 17 WC 34520 involving Respondent Aldridge.

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?

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's right shoulder, right elbow and left wrist conditions.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the right shoulder, right elbow and left wrist shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

DOA 5/27/15 – 16 WC 10820 – left shoulder

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's left shoulder.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the left shoulder shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

K. What temporary benefits are in dispute? (TTD)

DOA 1/16/15- 16 WC 10819

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his right shoulder, right elbow and left wrist injuries. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

DOA 5/27/15 – 16 WC 10820

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his left shoulder injury. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

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

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b (b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the right shoulder injury, 5% loss of use of the arm for the right elbow injury and 10% loss of use of the left hand for the left wrist injury.

DOA 5/27/15 – 16 WC 10820 – left shoulder

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b),the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the left shoulder injury that occurred on May 27, 2015.

N. Is Respondent due any credit?

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC031995
Case Name	SONETZ, LOUIS v. GREAT LAKES ELECTRICAL CONTRACTORS
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0070
Number of Pages of Decision	23
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matt Walker
Respondent Attorney	Robert Sabetto

DATE FILED: 2/22/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOUIS SONETZ,

Petitioner,

vs. NO: 17 WC 31995

GREAT LAKES ELECTRICAL CONTRACTORS and ALDRIDGE ELECTRIC, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical benefits, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. This claim was consolidated with claim numbers 16 WC 10819, 16 WC 10820 and 17 WC 34520 for purposes of arbitration hearing and Review before the Commission. Separate Decisions have been issued for each claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 28, 2021 is hereby affirmed and adopted.

The bond requirement in Section 19(f)(2) of the Act 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. 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.

February 22, 2022

CAH/pm

O: 2/17/2022
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC031995
Case Name	SONETZ, LOUIS v. GREAT LAKES ELECTRICAL CONTRACTORS
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Matt Walker
Respondent Attorney	Robert Sabetto

DATE FILED: 7/28/2021

THE INTEREST RATE FOR THE WEEK OF JULY 27, 2021 0.05%

/s/ Carolyn Doherty, 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

Louis Sonetz Case # **17** WC **31995**
Employee/Petitioner

v.

Great Lakes Electrical Contractors
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 **Chicago**, on **June 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 **June 8, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

NO FURTHER FINDINGS ARE MADE

ORDER

BASED ON THE ARBITRATOR'S FINDING OF NO ACCIDENT ON JUNE 8, 2015, NO FURTHER FINDINGS ARE MADE AND 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.

Carolyn M. Doherty

Signature of Arbitrator

JULY 28, 2021

PROCEDURAL HISTORY

Petitioner, Louis Sonetz, filed four applications for adjustment of claim with the Illinois Workers' Compensation Commission. The first is claim number 16 WC 10819, alleging injuries to the right shoulder, right elbow and left wrist on January 26, 2015 while in the course and scope of his employment with Great Lakes Electrical Contractors.

The second is claim number 16 WC 10820, alleging injuries to the left shoulder on May 27, 2015 while Petitioner was in the course and scope of his employment with Respondent Great Lakes.

The third is claim number 17 WC 31995, which alleges repetitive trauma injuries to Petitioner's bilateral shoulders, right elbow and left wrist with a manifestation date of June 8, 2015. That manifestation date corresponds to Petitioner's first encounter with Dr. Marcoski on June 8, 2015. The fourth and final application for adjustment of claim is claim number 17 WC 34520. Petitioner alleges that on April 11, 2017, he injured his left shoulder in the course and scope of his employment with a different employer, Aldridge Electric.

All four claims were consolidated. The first hearing took place in Chicago, Illinois on July 14, 2020. The second hearing took place on October 14, 2020 in New Lenox Illinois. The third and final hearing was held on June 17, 2021 in Chicago, Illinois.

FINDINGS OF FACT

Petitioner testified that he has worked over 30 years as a journeyman electrician. As such, he is required to lift on a daily basis. He testified that he is routinely required to lift bundles of conduit, and cases and rolls of wire weighing up to 80 pounds. He also engages in pushing and pulling on a daily basis. He testified that 90% of his work requires overhead work including lifting fixtures overhead that weigh up to 70 pounds.

Petitioner testified that he worked at Great Lakes in approximately 2009 performing all of the described activity through April 2016. On January 26, 2015, Petitioner worked as a foreman at Great Lakes. His job duties at Great Lakes included everything from underground electrical work involving trenching conduit to low voltage installations. The trenching work involved using a machine to dig the trench, manual shoveling of gravel, laying pipes and then back filling with gravel using a shovel. He testified that all back filling done close to the building or in the building was done with a shovel. Petitioner further testified that while at Great Lakes he performed both rough interior electrical work and underground electrical work. Petitioner testified that he worked with a pipe threader at waist level height. He also used a hammer drill to drill through concrete block surfaces 20% of his work time. In so doing, his arms were outstretched and the machine weighed between 20 to 50 pounds.

Petitioner testified that prior to 1/26/15 he had no problems or restrictions with either his right or left shoulder and was working full duty. Petitioner testified that on 1/26/15 he worked for Great Lakes on the "Impact" job which was a ground up office building with an underground parking garage. Petitioner testified that he was a "working foreman" and as such was working with a back fill to lay underground pipes in the electrical room. On 1/26/15, he arrived at 6:30 am and unlocked the building and tools to finish the piping and back fill in the electrical room. His co-worker on the project was Gary Costain.

Petitioner testified that on 1/26/15, he back filled gravel for 3-4 hours that morning using a shovel to toss gravel. He estimated that he used the shovel 100 times while tossing gravel. Petitioner testified that during one of the shovel maneuvers he pitched the gravel and felt a pop in his right shoulder. Petitioner put the shovel down and

told his co-worker Gary to finish. Petitioner went to his truck and took a break from the work as he had pain in his right shoulder.

Petitioner testified that around noon he spoke to the project manager Alan Tertian to report the right shoulder pain and to request an accident report. Petitioner testified that Allen told him he would go to the back room and get an accident report for Petitioner to complete. Petitioner returned to doing only light work with Gary doing the heavy lifting. Petitioner finished the day at work and testified that he went home to ice his right shoulder due to extreme soreness. Petitioner testified that despite his request, he was never supplied an accident report to complete. Petitioner took Advil for the pain and soreness but did not seek medical treatment.

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day.

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete. He testified that after speaking with Mr. Yurko over the phone he went back to work but performed no physical activity. He testified that it was difficult to drive home from the job that day in that he could not lift his left arm high enough to reach the steering wheel.

Petitioner testified that he made an appointment to see Dr. Marcoski. While waiting for the appointment, Petitioner continued to work lying out and marking blue prints. He testified while waiting for the appointment he continued to notice pain and burning in both his right and left shoulders.

Petitioner's first visit with Dr. Marcoski took place on June 8, 2015. The third application lists an accident date of 6/8/15 with injuries to the man as a whole and bilateral arms and shoulders. The accident date corresponds with Petitioner's first date of treatment.

Petitioner completed an intake form at PX1. He listed his occupation as electrician and indicated a work injury 1/29/15 and 5/27/15. Petitioner testified that he made a mistake on the form listing 1/29/15 as his accident date was 1/26/15. Petitioner testified that a page from his time log at PX 10 indicates that on 1/26/15, he was shoveling gravel between 11 am and 12 pm and that is the date he is alleging with regard to his right shoulder injury. Petitioner further testified that on the 6/8/15 intake form he indicated right shoulder injury but forgot to list the

left shoulder pain as well. He further indicated pain in his right elbow and forearm which are symptoms that began after he injured his right shoulder.

In the June 8, 2015 chart note, Dr. Marcoski records the following history: "Patient is here for right shoulder pain that began in January after shoveling gravel and reinjuring on May 27th while carrying pipes. Patient complaints of radiating pain to elbow and numbness. No previous history."

Marcoski went on to record the following: "Patient is seen for evaluation of pain in both shoulders right side worse than left. His history of right shoulder problems begins back in December when he was shoveling gravel and he overdid it feeling some soreness and strain in his right upper arm and shoulder. He took it easy for a period of time and seemed to get a little bit better but then he noticed some numbness and tingling right around his elbow. That's continued to him since it began and it seems to be aggravated by activity. Usually his left shoulder he's noticed this is tender to touch but it doesn't really hurt him when he works. He denies any history of any trouble with his shoulder past but he has been a very hard working tradesman throughout his entire working life. (Petitioner's Exhibit #1, pp. 2-3).

Marcoski diagnosed bilateral rotator cuff syndrome, radiating pain and numbness to his right elbow with right shoulder pain, and left shoulder tender to touch. He recommended options of either a symptomatic injection or to employ moist local heat, massage, and to avoid any aggravating factors. Petitioner declined the injection, but Marcoski noted that if Petitioner remained symptomatic then bilateral shoulder MRI's would be considered. (Petitioner's Exhibit #1 p. 3). Petitioner was not taken off work.

Petitioner testified that he continued to work for Great Lakes and that he had problems with his right shoulder and elbow while at work. On November 23, 2015, Petitioner returned to Dr. Marcoski for bilateral shoulder injections. PX 1. He continued working for Great Lakes.

PX 11 is an email dated January 5, 2016 written by Petitioner and sent to Michelle Bruno at Great Lakes attaching medical bills. The subject was "my shoulders." Petitioner indicated that the medical bills had been submitted to "insurance because I had no info to give them" and he asked for a report to complete. Petitioner testified that he submitted the medical bills but they were not paid because he did not have an accident report on file. PX 12 is an email from Petitioner to Michelle Bruno at Great Lakes dated January 26, 2016. The subject was "form". Petitioner wrote that he was required to submit the attached form. Michelle Bruno responded on the same date indicating "no worries… you have to cover yourself!!" PX 12. PX 13 is another email from Petitioner to Michelle Bruno dated February 5, 2016 wherein he asked "what do I do now" with regard to an attached bill. The subject line was "shoulder injury at work."

PX 14 is an email from Petitioner to Michelle Bruno dated March 3, 2016 along with her emailed response. Petitioner emailed "injury report?" and Ms. Bruno responded "I'll discuss again with Dick tomorrow." PX 15 is an email from Petitioner to Dick Anderson, the owner of Great Lakes. The email is dated March 23, 2016 and Petitioner indicates that he "had to sign a subrogation statement to get the bill paid for my shoulders that I injured on the job in January 2015 at the Impact and subsequently the other shoulder in May 2015 at CLC. I have tried for over a year to get an accident report from Great Lakes for the first and over nine months for the other." Petitioner did not receive a response from Mr. Anderson.

At trial**,** Alan Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was an estimator and project manager for Great Lakes although he was never formally assigned as the estimator or project manager for Great Lakes on the Impact job. He testified

that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. At trial, it was learned that Mr. Arndt is deceased.

Mr. Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he knows the Petitioner. Mr. Yurko testified that he was the project manager on the College of Lake County job in May 2015. He further testified that Petitioner he worked with Petitioner at the time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents.

Mr. Dick Anderson testified for Great Lakes in his capacity as owner of Great Lakes. He testified that Petitioner was hired by Great Lakes through the union hall as an electrician and foreman from 2008/9 to April 2016 when Petitioner left the company on his own. He testified that in 2015, Great Lakes had an accident reporting procedure in place and that information about accidents when to Paul Arndt who was the office manager. If the accident was severe, Paul would tell Mr. Anderson immediately. He testified that Mr. Arndt would not tell him about minor accidents or injuries. He testified that Paul would talk to the injury party, complete a report and investigate the accident. Mr. Anderson testified that Mr. Arndt never gave him and accident report or told him about any accident pertaining to Petitioner. He testified that Michelle Bruno became the office manager after Mr. Arndt passed away in September 2015. He does not recall that Mr. Arndt and Michelle Bruno overlapped at any time at Great Lakes.

Mr. Anderson testified that he was never told by Michelle about Petitioner's shoulder or any accident suffered by Petitioner at any time. He does not recall receiving the email from Petitioner at PX 15. He denies ever being asked by Petitioner for an accident report to complete. He does not recall ever being presented with medical bills pertaining to Petitioner's accidents. He testified that Petitioner was a good foreman who would know how to report an accident. He testified that neither Messrs. Terzian nor Yurko ever reported an accident to him pertaining to Petitioner on any job. He further testified that Great Lakes contributed to the group health insurance plan in place. He verified all of the job duties testified to by Petitioner and that Petitioner might use a threader or hammer on the job site albeit not often. Lastly, he agreed to the trenching testified to by Petitioner regarding the Impact job but disputed that such trenching would be done in the winter. He was not 100% sure trenching was done in January 2015 on the Impact job.

Petitioner testified that he was laid off from Great Lakes starting April 1, 2016. He began working for Respondent Aldridge Electric on April 14, 2016. He testified that at the time he continued to have issues with both shoulders and his right elbow. Petitioner testified that he was hired by Aldridge to do fire alarm wiring and low voltage work, including light installation. He testified that both shoulders were extremely sore and his right elbow pain made it hard to carry things including his tool bag. Petitioner testified that on 4/11/2017, he was working for Aldridge as a foreman on the new Lake County court house project laying out electrical, opening, measuring and

reading blue prints. He testified that on 4/11/17 he had been working for Aldridge a year between his hire date in April 2016 and 4/11/17.

Petitioner testified that on 4/11/17, a truck pulled up to make a delivery and truck was lower than the dock platform so Petitioner could not use a pallet jack to unload the material. Petitioner testified that he had to physically lift the materials from truck to the dock and felt a pop in the *left* shoulder while lifting materials. He testified that he reported the accident to project manager Kevin. Notice is not in dispute. PX 16 is an incident report completed by Kevin with accident date of 4/11/17 indicating the same facts regarding the incident. Kevin took the pictures attached to the report which depict the material in the truck and the height difference between the truck and the dock. The report is dated 4/12/17 and indicates that Petitioner reported that his shoulder was sore and that Petitioner "believes it is from yesterday (4/11/17) while unloading a delivery… there has been no medical treatment due to his incident but he did state that he was due to get a shot as he did 2 years ago for prior discomfort in the same shoulder." PX 16. Petitioner testified that he continued working for Aldridge after 4/11/17.

Petitioner returned to Dr. Marcoski on April 17, 2017. (Petitioner's Exhibit #1, p. 11). In the "History of Present Illness" section, Marcoski charted the following: "Patient is here for left shoulder pain s/p rotator cuff syndrome, last inj. 11/23/15. Patient felt a pop while lifting at work a week ago. Patient is seen for evaluation of a new problem one of pain in his left shoulder. His history of present illness begins last week Tuesday when he was lifting a heavy pallet loaded onto an overhead platform dock and he felt a pop in his left shoulder. He had immediate onset of discomfort on the top part of the wing bone and upper part of his arm bone and although is easing up but still remain sore. About a year and a half ago back in November of 2015 he had adhesive capsulitis with impingement syndrome of the shoulder that was treated with a cortisone injection. He did get better following that and his shoulder was doing well up until this recent mishap. (Petitioner's Exhibit #1, p. 11).

Marcoski recorded his impression as "strain of the left shoulder with history of previous impingement syndrome and adhesive capsulitis." (Petitioner's Exhibit #1, p. 12). Marcoski recommended nonoperative management to include massage, moist local heat, and activity modification. If there was no improvement, then an MRI scan would be obtained.

Dr. Michael Murphy evaluated Petitioner on May 8, 2017, pursuant to Section 12 of the Act, at the request of Respondent Great Lakes. GL RX 1. This exam took place only a few weeks after the accident of 4/11/17. Dr. Murphy's evidence deposition was taken on 10/25/17. GL RX 1. Dr. Murphy testified that Petitioner reported a right shoulder injury on 1/20/15 while shoveling gravel and a felt a pop. He reported a left shoulder injury on 5/27/15 noticing pain and a pop in the left shoulder while carrying conduit. P. 8. Petitioner made no mention of an injury to his left shoulder on 4/11/17. Based on his review of Petitioner's treating records and from bilateral shoulder x-rays he ordered, he determined that Petitioner had bilateral shoulder degenerative changes to the AC joint. P. 11-12. Following physical exam, Dr. Murphy determined that Petitioner's symptoms and history could be related to rotator cuff pathology. P. 14. He agreed that bilateral shoulder MRI's were appropriate and necessary. P. 15.

Bilateral shoulder MRI's were performed on July 14, 2017. (Petitioner's Exhibit #1, pp. 14-15). The radiologist's impression of the left shoulder MRI was "[l]ateral downsloping of a curved type II acromion, correlate for outlet impingement. Bursal surface fraying of the supraspinatus tendon but no full thickness rotator cuff tears. Degenerative disease of the AC joint. Small glenohumeral detachment of the inferior aspect of the posterior labrum." (Petitioner's Exhibit #1, p. 14).

The radiologist's impression of the right shoulder was "SLAP type tear of the superior labrum extending into the superior aspect of the posterior labrum. Inferiorly projecting AC arthrosis, correlate for outlet impingement. No rotator cuff tear is identified." (Petitioner's Exhibit #1, p. 15).

Marcoski reviewed the MRIs on July 20, 2017. (Petitioner's Exhibit #1, p. 16). He recorded his impression: Patient is seen for follow-up of his bilateral symptomatic shoulders with impingement syndrome. Since I last saw him he had MRI scans done of both shoulders and the results were discussed with him. The left shoulder basically has impingement syndrome with downsloping of the acromion undersurface or bursal fraying of the supraspinatus tendon, but no full thickness tear. Also noted is degenerative changes in the a.c. joint The right shoulder has very classic SLAP lesion. The patient states that his left shoulder is sore to touch and hurts with lifting and the right shoulder seems to hurt with throwing a ball with his daughters. Impression is bilateral symptomatic shoulders with impingement syndrome left shoulder with classic MRI findings and the right shoulder with SLAP tear. Plan is to recommend deferring to Dr. Chudik for consultation and treatment.

Dr. Chudik first saw Petitioner on July 26, 2017. (Petitioner's Exhibit #1, p. 18). Chudik recorded a history as follows: Louis J. Sonetz is a 50 year old male who presents today with a chief complaint of bilateral shoulder pain. It began approximately on January of 2015. The problem resulted from an injury at work. The problem resulted from right shoulder while shoveling gravel (1/2015) and left shoulder while carrying object at work (05/2015). Right elbow onset gradually (4/2017). The pain is located bilateral shoulders and right elbow. Currently it is a 5 on a pain scale of 10. Prior to this problem, the patient had not sustained significant injury to this part of the body. Prior to this problem, the patient has not had surgery on this part of the body in the past. The patient has seen another orthopedist for this problem. The patient has seen Dr. Marcoski for this problem. The patient has had the following tests and / or treatments performed for this problem: X-ray, MRI, injections. The timing of the pain / problem is constant, at rest, during activity. Pain occurs when reaching, lifting, carrying. The pain / symptoms do not radiate. The patient states that changing arm position alleviates the pain and / or symptoms. The patient stats that reaching, lifting aggravates or increases the pain and / or symptoms.

He continued: Patient is here today for MRI review referred by Dr. Marcoski. Patient is here for bilateral shoulder pain from two separate injuries at work, and elbow pain. He reports he experienced right shoulder pain from shoveling frozen gravel at work in January 2015. He states that in May 2015, he experienced a pop and significant left shoulder pain while carrying something in his left arm to avoid use of his right arm. He states he could not move the left arm well and has difficulty reaching into his back pocket. He reports he had an injection in 11/2015 in both shoulders that did help to alleviate pain, but pain never completely resolved. Today, he states that the left shoulder has worsened and also sometimes has pain at rest. Patient reports that he has been working with the shoulder pain but he is currently laid off. He also reports right elbow pain as of April 2017, but is unsure if elbow pain is related to the shoulder injuries. Right elbow pain has had a gradual onset and denies a mechanism.

Chudik diagnosed Petitioner with bilateral shoulder impingement and right elbow lateral epicondylitis. (Petitioner's Exhibit #1, p. 21). Chudik recommended conservative treatment, including physical therapy. Chudik took Petitioner off of work as of July 26, 2017. (Petitioner's Exhibit #1, p. 23).

On August 24, 2017, Section 12 examining physician Dr. Murphy reviewed the MRI reports from July. He also testified that he did not recall for certain whether he reviewed the actual MRI films. P. 18-21. However, it was determined that Respondent did send him the actual MRI films for review. Dr. Murphy testified that after his review of the MRI reports and films, "… I felt that the MRI findings would be consistent with degenerative changes. There was no full thickness tear of either rotator cuff. The rotator cuff demonstrated absolutely no abnormalities about the rotator cuff. I mentioned some bursal fraying, but no full thickness tear." p. 21. He

opined that these noted changes "would not be abnormal for someone at an age beyond 30." P. 21. He further opined that the findings on the bilateral MRI's were not related to his work accident stating, "There's no signs of a traumatic condition. He has a SLAP tear on the right shoulder, which in his age group is often a normal finding." P. 21. He opined that Petitioner did not need surgery on either shoulder based on the physical exam and the history of injury mechanics which Dr. Murphy opined were inconsistent with a SLAP tear. He further testified, "Even if he had this exam that was consistent with it, those findings are often degenerative in nature." P. 24.

On cross exam, Dr. Murphy testified that to his knowledge, Petitioner worked as a foreman electrician and that he did occasional lifting. p. 34. He did not receive any job description from the Respondent. Murphy noted that during his physical examination, Petitioner's Hawkins test was positive bilaterally, greater on the left than the right, Neers test was mildly positive on the left and the right, there was pain over the lateral aspect of the shoulder at the insertion of the rotator cuff, and pain at the end range of abduction and flexion, greater on the left than the right. Petitioner's strength was normal, but limited by pain. P. 13. He noted that the left shoulder was more painful than the right shoulder. P. 35-36.

Dr. Murphy acknowledged that Petitioner had no shoulder issues prior to the accident. and that Petitioner was still symptomatic at the time he was examined by Murphy in May of 2017. P. 42. There was no indication of malingering. Murphy agreed that by the time he had an opportunity to examine the Petitioner, Petitioner's bilateral shoulder conditions were chronic in nature. Murphy further acknowledged that Petitioner's bilateral shoulder pain had not returned to baseline. p. 43-46.

Murphy was unable to answer whether or not Mr. Sonetz's job duties as a union electrician were a contributing factor to his bilateral shoulder conditions. P. 56. Murphy did agree that Petitioner's bilateral shoulders were "aggravated" although he could not specify when that aggravation ended. Rather, he testified "So, an aggravation is based on he had a symptom of discomfort and pain, but I don't have an objective finding on MRI to support his continued complaint." P. 51-52.

On September 6, 2017, Chudik noted Petitioner had seen improvements with PT, but continued to have shoulder pain that had not improved. (Petitioner's Exhibit #1, p. 25). Chudik recommended bilateral shoulder arthroscopies. (Petitioner's Exhibit #1, p. 26). On September 12, 2017, Petitioner agreed to proceed with the recommended surgeries. (Petitioner's Exhibit #1, p. 30).

On October 9, 2017, Chudik performed left shoulder surgery consisting of a left shoulder arthroscopy, left biceps tenodesis (subpectoral / open), left labral debridement, left capsular release of SGHL, and a left subacromial decompression. (Petitioner's Exhibit #5, pp.28-30). The postoperative diagnoses were: left shoulder pain, left biceps instability and partial rupture, left labral SLAP tear, left adhesive capsulitis, and left impingement syndrome.

Petitioner engaged in postoperative therapy and was continued off work by Dr. Chudik. On March 1, 2018, Dr. Chudik performed right shoulder surgery, which consisted of a right shoulder arthroscopy, right biceps tenodesis (subpectoral / open), extensive debridement of the rotator cuff and labrum, right capsular release of SGHL and a right subacromial decompression. (Petitioner's Exhibit #5, pp. 8-10).

Dr. Aaron Bare examined Petitioner at the request of Respondent Aldridge on April 18, 2018., after both shoulder surgeries. (Respondent Aldridge Exhibit #1). Bare opined that Petitioner was status post arthroscopic surgery of his left shoulder, that he had improved with postoperative physical therapy and was now approximately 7 months after the procedure. Bare opined that Petitioner was at maximum, medical improvement and capable of returning

to full duty work without restrictions. Regarding causation, Bare opined that Petitioner injured his left shoulder in 2015 and continued to complain of pain and discomfort throughout that year without documentation that his symptoms had resolved. Bare indicated "I agree with the medical records and the statement made by Dr. Murphy that suggest that the findings were degenerative in nature and that his shoulder pain never completely resolved and at the time of the evaluation in 05/2017, which was after the second injury of 04/2017, he confirmed that his shoulder pain is chronic in nature involving both shoulders with the left being greater than the right."

Dr. Bare opined that the injury of 4/2017, while Petitioner worked for Aldridge, was a temporary aggravation of a pre-existing problem but did not cause any acute pathology. He opined, "It did not accelerate his condition and it also do not lead towards surgical intervention." Aldridge RX 1. He further stated that the MRI indicated degenerative findings only without trauma or definitive tears.

Petitioner continued to follow up with Chudik and was kept off of work. On July 12, 2018, Petitioner reported a sudden onset of right elbow pain on July 6, 2018, noting that there was no mechanism of injury for the elbow pain. Chudik recommended an EMG and MRI for the right elbow. PX 1, p. 89. The MRI revealed a minimally thickened common extensor tendon with subtle intratendinous signal possibly from low-grade tendinosis. The remainder of the examination was otherwise unremarkable. PX 1. The EMG / NCS performed on July 20, 2018 of the right elbow showed a focal conduction abnormality of the media nerve at the wrist, consistent with mild right wrist carpal tunnel syndrome, and irritation of the ulnar nerve at the elbow. PX 1.

On July 25, 2018, Dr. Chudik opined that the carpal tunnel and cubital tunnel syndrome were secondary to immobilization following the right shoulder surgery. PX 1, p. 101. He continued Petitioner off of work.

Dr. Chudik testified via evidence deposition taken on August 20, 2018. PX 6. Dr. Chudik is an orthopedic surgeon specializing in shoulders and sports medicine. (Petitioner's Exhibit #6, p. 2). He is board certified and licensed to practice medicine in the State of Illinois. Dr. Chudik testified that he is familiar with the general job duties of an electrician. PX 6. P. 14.

Chudik reviewed the chart notes from Dr. Marcoski and examined Petitioner on July 26, 2017. P. 25. Petitioner reported a history of bilateral shoulder pain in the right resulting from an injury at work shoveling gravel in January 2015 and then an injury to his left shoulder while carrying an object at work in May 2015. P. 26. Petitioner reported no prior problems with either shoulder. Petitioner reported that he continued working with conservative treatment to both shoulders in the form of injections. He reported that the pain was never relieved completely. P. 27. Petitioner also reported gradual onset of right elbow pain since April 2017 with initial right elbow complaints documented after the January 2015 accident. P. 27.

Dr. Chudik reviewed the shoulder MRI's and testified that he initially prescribed conservative care and physical therapy for both shoulders due to initially diagnosed bilateral shoulder impingement syndrome and rotator cuff syndrome along with right elbow epicondylitis. P. 29. Having failed conservative care as of September 2017, Dr. Chudik performed the left shoulder arthroscopy with debridement of a superior labral tear type two and a subacromial decompression removing inflamed bursa and soft tissue from the rotator cuff syndrome and impingement. P. 31-32. Petitioner was placed in a sling and in physical therapy. Eight weeks post-op, Petitioner reported left forearm and wrist pain and swelling in the left hand. P. 35. Dr. Chudik noted these complaints as "part of the morbidity of doing surgery on an extremity." P. 35,37. As of December 27, due to continued left hand pain, numbness and weakness following the surgery on the left extremity, and EMG study was discussed.

Due to right shoulder continued complaints and the prior right shoulder MRI showing SLAP tear, Dr. Chudik perform a right shoulder partial rotator cuff repair and debridement of type two labral tear, subacromial decompression, and right biceps tenodesis. P. 42. As of the April 12, 2018 visit, Petitioner complained of increased right elbow symptoms due to immobilization of the right arm. P. 46. Right elbow MRI and EMG results were consistent with right mild carpal tunnel syndrome and some irritation of the ulnar nerve at the elbow without a focal condition block noted but that world be consistent with some cubital tunnel. Dr. Chudik testified, "… we did note that he had some symptoms after the first injury, but I believe the immobilization from the surgery had a big effect on that and the swelling from the surgery…" p. 51.

Dr. Chudik last saw Petitioner on July 25, 2018. On that date, he ordered continued therapy for the shoulders and a brace for the right elbow. Petitioner was to return in 6 weeks for follow up.

With regard to the right shoulder, Dr. Chudik opined that Petitioner injured his right shoulder while shoveling at work on January 26, 2015. P. 58. He opined that Petitioner injury his left shoulder as a result of the work injuries on May 27, 2015 and April 11, 2017 when Petitioner was at work lifting a heavy pallet and felt a pop in his left shoulder. P. 57-58. With regard to the right elbow, Dr. Chudik opined that the right lateral epicondylitis was the result of the work injury on January 26, 2015 and April 11, 2017, as there was right elbow complaints made after each injury. P. 59. He further opined that the immobilization following the right shoulder surgery also contributed to the ultimately diagnosed right cubital tunnel syndrome. P. 60.

Further with regard to the right shoulder, Dr. Chudik testified that Petitioner's right shoulder condition is causally related to the January 26, 2015 work accident stating, "The answer is with a reasonable degree of medical certainty that his current condition in his right shoulder was contributed to by the injuries sustained on January 26th, 2015. I think if we look at the whole clinical course of the patient, the objective findings on the MRI – well, the clinical course, which includes the proximate reporting of symptoms of right shoulder pain had been – had continued from that injury and had been refractory treatment through that whole course, conservative treatment, including injections and therapy with an MRI and surgical findings that objectively confirmed that he did, indeed, suffer from a superior labral tear that was made – injured and made symptomatic from that accident, and obviously, my experience as an orthopedic surgeon specializing and treating shoulders and surgeries are all the bases for my opinion. P. 61-62.

Chudik also testified that Petitioner's right elbow condition is related in part to the January 26, 2015 work accident stating, "Yeah. My response was that the current condition related to his right elbow was contributed by the injuries sustained on January 26, 2015. I do think that elbow pain and the numbness and tingling that he had were more likely than not an indication of some cubital tunnel symptoms, and I think they just reared their ugly head later when the provocative swelling and immobilization of the elbow contributed to it. So I think there is some contributing factor of that accident to his right elbow pathology in general. (Petitioner's Exhibit #6, pp. 16-17). … So I think there is more likely than not some contribution from the January 26, 2015 injury as well as the additional trauma of the surgery to the shoulder and the immobilization and swelling that occurs with it that is provoking those symptoms." P. 64-65.

With regard to the left shoulder, Dr. Chudik opined that Petitioner's left shoulder injury was caused by the carrying of heavy objects at work on May 27, 2015. He testified, "As I explained before, that kind of carrying, lifting with a pop in the shoulder would be very consistent with a superior labral tear. It would be consistent with that mechanism." P. 66.

With regard to any connection between the left shoulder and elbow and the accident of April 11, 2017, Dr. Chudik testified, "He had a very significant mechanism with the pop in the left shoulder in May (2015) and I think the April (2017) lifting again, just-if you have got a superior labral tear like that and then- it is going to – it is very easy to re-aggravate it with that lifting." So I imagine it might have made it worse some possibly, but I think that the injury had already occurred; and this was just- it may have been a temporary aggravation, but I believe the pathology already occurred. He had already had a very significant mechanism and symptoms that occurred with the first injury. So I think there was probably some contribution, but I think that the bulk of the injury was responsible from the May." P. 67.

Dr. Chudik further opined that the right elbow injury and underlying pathology pre-existed the April 11, 2017 lifting accident and that accident only temporarily aggravated that condition which originally resulted from the January 26, 2015 injury. P. 68.

On cross-exam, Dr. Chudik testified Petitioner's diagnosed type two SLAP tear is not typically seen without injury or precipitating event. P. 82-83. Dr. Chudik further testified that Petitioner's right elbow symptoms began after the January 2015 injury to this right shoulder as initially reported and then were further aggravated by immobilization after the right shoulder surgery. He testified, "I think if he didn't have any preexisting pathology there, I don't think we would see any of those type of symptoms from just the immobilization…if there wasn't any preexisting problems with the entrapment of those nerves, we wouldn't have expected that after surgery." P. 90-91. With regard to the left shoulder, Dr. Chudik noted that the first left shoulder pop was felt in the accident of May 2015 and the second left shoulder pop was felt in April 2017. He opined that the first accident resulted in the labral tear and the April 2017 accident could have made is worse but it is more likely than not "…he has had continued symptoms with that shoulder." He testified that a person can "work around" a labral tear more easily than with a rotator cuff tear and a labral tear is more tolerable to manage over a period of time. A person can continue to work with a superior labral tear. P. 96, 100. Dr. Chudik testified that the April 2017 accident "also contributed to it further" referencing the original left shoulder injury from May 2015. He testified, "I think they are both contributory, and I think it is more likely than not that the superior labral tear started with popping event in May, and how much worse or how much aggravation or temporary exacerbation the April one I think is hard to determine." P. 103. Petitioner never reported being pain free in either shoulder to Dr. Chudik at his first visit date of July 26, 2017. P. 108.

Lastly, Dr. Chudik testified that the right elbow injury did not occur with the April 2017 accident. P. 112.

On October 19, 2018, Chudik noted aggravation of pre-existing lumbar spine pain due to physical therapy. (Petitioner's Exhibit #1, p. 111). Chudik recommended work conditioning and continued Petitioner off of work. (Petitioners Exhibit #1, pp. 111-112).

While in work conditioning, Petitioner injured his left wrist. (Petitioner's Exhibit #4, pp 77-80). Dr. Chudik recommended Petitioner continue work conditioning as tolerated and referred Petitioner to Dr. Fajardo for the wrist pain. (Petitioner's Exhibit #2, pp. 128-130). Petitioner was seen by Dr. Fajardo for the left wrist. (Petitioner's Exhibit #2, p. 131). Fajardo ordered an MRI and placed Petitioner in a wrist guard. (Petitioner's Exhibit #2, p. 132).

The MRI of the left wrist was done on December 11, 2018. (Petitioner's Exhibit #2, p. 133). Fajardo diagnosed left wrist TFCC tear and dorsal ulnar bone bruise. (Petitioner's Exhibit #2, p. 136). A steroid injection was performed, and wrist guard was continued. At the next visit on January 9, 2019, Fajardo recommended finishing

PT, and prescribed NSAIDs. Fajardo recommended weight bearing as tolerated with the left wrist only, and advised Petitioner to return as needed (Petitioner's Exhibit #2, p. 145).

A functional capacity assessment was performed at ATI Physical Therapy on January 11, 2019. (Petitioner's Exhibit #2, p. 149). Petitioner demonstrated a physical demand level of "very heavy", and on January 14, 2019, Chudik recommended a trial return to work with no restrictions. (Petitioner's Exhibit #2, p. 147).

On January 18, 2019, Fajardo recorded a history of left wrist pain at the end of the functional capacity assessment. (Petitioner's Exhibit #2, p. 159). Fajardo administered an injection, and advised Petitioner to return as needed.

At a follow up on February 25, 2019 Chudik again released Petitioner without restrictions. (Petitioner's Exhibit #2, p. 167). The final visit took place on April 22, 2019, at which time Petitioner was placed at maximum, medical improvement. (Petitioner's Exhibit #2, pp. 169-170)

At trial, Petitioner testified that he returned to full duty work as of February 25, 2019, without restrictions. Petitioner testified to intermittent pain with activities and at the end of the work day. Petitioner testified that he continues to work for Bandwidth Inc. as an electrician. He has not sustained any additional accidents or injuries. He testified that he continues to notice bilateral shoulder constant tightness and aching after work. He uses Aspirin and Advil four times per week for these symptoms. He further testified that he notices right elbow "tightness". Petitioner testified that if he needs help at work he asks for help or switches arms but that his conditions do not prevent him from working his full duty job. At home, Petitioner notices pain with throwing and is unable to ride his touring motorcycle. He stops every hour while driving. Petitioner notices weakness with overhead lifting and reaching and he drops things in his right hand. He can no longer boat, water ski or tube.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law are made in the consolidated cases of 16 WC 10819 doa 1/26/15 injuries to right shoulder, right elbow and left wrist; case 16 WC 10820 doa 5/27/15 injuries to left shoulder; case 17 WC 31995 doa 6/8/15 alleged manifestation date of repetitive trauma to bilateral shoulders; and case 17 WC 34520 doa 4/11/17 injury to left shoulder

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 accident? E. Was timely notice of accident given Respondent?

ACCIDENT – DOA 1/26/15

Based on the credible testimony of Petitioner as buttressed by the treating medical records of Dr. Marcoski, the Arbitrator finds that Petitioner sustained a work related accident on 1/26/15 while at work for Respondent Great Lakes at the Impact job site. Petitioner testified that he felt a pop in his right shoulder while shoveling gravel at the Impact job working in his capacity as a foreman electrician for Respondent Great Lakes. Petitioner's credible testimony is buttressed by his treating medical records which document that he injured his right shoulder while shoveling gravel on January 26, 2015, and shortly thereafter experienced pain and discomfort that was ongoing. This evidence was unrebutted by the Respondent Great Lakes.

Wherefore, the Arbitrator finds that an accident occurred on January 26, 2015 at the "Impact Job" in Mettawa that arose out of and in the course of Petitioner's employment as a foreman electrician for the Respondent Great Lakes.

NOTICE

The Arbitrator further finds that Respondent Great Lakes received proper and timely notice of Petitioner's accident of 1/26/15. The finding is based on a review and assessment of Petitioner's testimony and that of his co-worker Alan Terzian. In so finding, the Arbitrator places greater credibility on the testimony of Petitioner and Mr. Terzian than on the testimony of Dick Anderson provided at trial. At trial**,** Allen Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was the informal project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. Several witnesses at trial identified Mr. Arndt at the office manager at Great Lakes. Mr. Anderson verified that accidents were to be reported to Mr. Arndt as he was in charge of the insurance in the office. After his death, Michelle Bruno was placed in his position at Great Lakes.

Petitioner's requests for an accident report and attempts to have the medical bills paid for by Respondent Great Lakes' workers' compensation are also documented and clearly support Petitioner's ongoing efforts to report his work related injury to Great Lakes. PX 11- 14. Lastly, the Arbitrator notes that Petitioner's application for adjustment of claim was filed in 2016, at a minimum placing Respondent on sufficient, albeit defective, notice of Petitioner's accident. There is no evidence in the record to support a finding of undue prejudice by Great Lakes.

ACCIDENT – DOA 5/27/15

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury in January 2015. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day. Petitioner's testimony was again supported by the medical records documenting the left shoulder injury while working on May 27, 2015 and was unrebutted at trial. Accordingly, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Great Lakes on May 27, 2015.

NOTICE

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete.

Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he was the project manager on the College of Lake County job in May 2015. He further testified that he worked with Petitioner at the time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents. Again, on the issue of notice, the Arbitrator places greater weight on the testimony of Petitioner and Mr. Yurko.

The trial testimony and the Arbitrator's findings are further supported by the emails between Petitioner and Michelle Bruno. The emails support Petitioner's testimony on his unsuccessful attempt to provide notice to Respondent and obtain an accident report. PX 11-14. Based on the foregoing, the Arbitrator finds that notice to Respondent of the May 27, 2015 work accident was both timely and proper.

ACCIDENT – DOA 6/8/15

Petitioner alleges repetitive trauma to his bilateral shoulders, right elbow and left wrist arising out of and in the course of his employment with Respondent Great Lakes manifesting on June 8, 2015, his first date of treatment with Dr. Marcoski. As did Dr. Marcoski, the Arbitrator acknowledges Petitioner's job duties as a working foreman electrician for Great Lakes and his 30 plus years of heavy physical labor as an electrician and the likely physical toll taken on Petitioner. However, the Arbitrator finds, in light of the record in its entirety in this particular matter, that Petitioner's years of physical labor alone as mused upon by Dr. Marcoski are not sufficient to support a finding of repetitive trauma to any alleged body part manifesting on June 8, 2015 under the Act. Rather, the Arbitrator refers to the foregoing findings of specific trauma on January 26, 2015 and May 27, 2015 and again notes the support in the record for the finding of accident on those dates.

Based on the Arbitrator's finding of no repetitive trauma manifesting on June 8, 2015, all other issues in case 17 WC 31995 are moot. No award of benefits is made in 17 WC 31995.

ACCIDENT – DOA 4/11/17 – RESPONDENT ALDRIDGE

Petitioner testified that Petitioner on 4/11/17, he was at work as a foreman electrician for Respondent Aldridge on the Lake County Courthouse job site. He testified that while lifting and moving material from a truck onto a loading dock he felt a pop in his left shoulder. Petitioner's testimony regarding this incident was unrebutted at trial and supported by the medical records documenting consistent left shoulder treatment thereafter. As such, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Aldridge on 4/11/17.

Notice was not in dispute at trial in case 17 WC 34520 against Respondent Aldridge.

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

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

At trial, Petitioner testified that he was working full duty with no right shoulder complaints prior to the accident on January 26, 2015. (T. 29). After that, his condition did not return to baseline, and symptoms continued as recorded in the medical records and noted by Dr. Chudik, Dr. Bare and Dr. Murphy. Petitioner testified that he had to self-limit after the work accident on January 26, 2015 but that he was able to continue working with pain.

Petitioner initially sought treatment for right shoulder complaints and complaints of right elbow pain to Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the right shoulder and elbow on January 26, 2015 and noted no prior injury to those parts. Dr. Chudik further opined that Petitioner sustained right shoulder and elbow injury at work on January 26, 2015 and that his conditions were causally related to that accident given the mechanism of injury described and the lack of prior injury to those parts. In finding causal connection for the right shoulder and elbow, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's right shoulder condition was merely degenerative in nature and completely without aggravation from the accident of January 26, 2015.

Petitioner's left wrist injury occurred while he was engaged in postoperative therapy for the right shoulder surgery. Therefore, the left wrist injury flowed from the injury to the right shoulder on January 26, 2015.

Based on the above, the Arbitrator accordingly finds that Petitioner has proven by a preponderance of the credible evidence that his right shoulder condition, right elbow condition and left wrist condition are all causally related to the work accident that took place on the Impact job site on January 26, 2015.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder. Petitioner injured his left shoulder carrying conduit on May 27, 2015 as noted above.

Petitioner initially sought treatment for left shoulder complaints with Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the left on May 27, 2015 and noted no prior injury to the left shoulder. Dr. Chudik further opined that Petitioner sustained left shoulder injury at work on May 27, 2015 and that his condition was causally related to that accident given the mechanism of injury described and the lack of prior injury to the left shoulder. In finding causal connection for the left shoulder condition, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's left shoulder condition was merely degenerative in nature and completely without aggravation from the accident of May 27, 2015.

Accordingly, the Arbitrator finds that Petitioner has proven by a preponderance of the credible evidence that his left shoulder condition is causally related to the work accident that took place on the Impact job site on May 27, 2015.

DOA 4/11/17 – 17 WC 34520 – left shoulder- Respondent Aldridge

The Arbitrator notes the finding of accident on 4/11/17 and Petitioner's complaints of left shoulder pain thereafter. However, the Arbitrator finds that based upon the credible evidence at trial, the accident of 4/11/17 sustained by Petitioner while working for Aldridge resulted only in a temporary aggravation of Petitioner's pre-existing left shoulder condition.

In so finding, the Arbitrator notes the opinion of Dr. Chudik that Petitioner's accident in May of 2015 "would have been probably the most significant causation of the labral tear." PX 6. Dr. Chudik testified "[i]f we have to give an opinion with a reasonable degree of medical and surgical certainty, I think more likely than not, I think the tear happened in May of 2015." PX 6. Dr. Chudik's opinion is in line with Dr. Bare's opinion that the April 11, 2017 work accident was merely a temporary exacerbation of symptoms and that surgery was required based on Petitioner's left shoulder condition that pre-dated the accident on April 11, 2017.

Wherefore, the Arbitrator finds that the April 11, 2017 work accident resulted in a non-compensable temporary exacerbation of symptoms, and that Petitioner's current condition as relates to the left shoulder is not causally related to the April 11, 2017 work accident. As such, all remaining issues are moot and no benefits are awarded Petitioner in case 17 WC 34520 involving Respondent Aldridge.

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?

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's right shoulder, right elbow and left wrist conditions.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the right shoulder, right elbow and left wrist shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

DOA 5/27/15 – 16 WC 10820 – left shoulder

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's left shoulder.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the left shoulder shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

K. What temporary benefits are in dispute? (TTD)

DOA 1/16/15- 16 WC 10819

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his right shoulder, right elbow and left wrist injuries. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

DOA 5/27/15 – 16 WC 10820

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his left shoulder injury. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

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

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b (b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the right shoulder injury, 5% loss of use of the arm for the right elbow injury and 10% loss of use of the left hand for the left wrist injury.

DOA 5/27/15 – 16 WC 10820 – left shoulder

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b),the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the left shoulder injury that occurred on May 27, 2015.

N. Is Respondent due any credit?

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC034520
Case Name	SONETZ, LOUIS v. ALDRIDGE ELECTRIC, INC/ AGT CORP AGENTS INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	22IWCC0071
Number of Pages of Decision	22
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Matt Walker
Respondent Attorney	Lindsey Beukema

DATE FILED: 2/22/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LOUIS SONETZ,

Petitioner,

vs. NO: 17 WC 34520

GREAT LAKES ELECTRICAL CONTRACTORS and ALDRIDGE ELECTRIC, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of causal connection, medical benefits, temporary total disability (TTD) benefits, and permanent partial disability (PPD) benefits, and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. This claim was consolidated with claim numbers 16 WC 10819, 16 WC 10820 and 17 WC 31995 for purposes of arbitration hearing and Review before the Commission. Separate Decisions have been issued for each claim.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 28, 2021 is hereby affirmed and adopted.

The bond requirement in Section 19(f)(2) of the Act 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. 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.

February 22, 2022

CAH/pm

O: 2/17/2022
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC034520
Case Name	SONETZ, LOUIS v. ALDRIDGE ELECTRIC, INC
Consolidated Cases	
Proceeding Type	
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	20
Decision Issued By	Carolyn Doherty, Arbitrator

Petitioner Attorney	Matt Walker
Respondent Attorney	Lindsey Beukema

DATE FILED: 7/28/2021

THE INTEREST RATE FOR THE WEEK OF JULY 27, 2021 0.05%

/s/ Carolyn Doherty, 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

Louis Sonetz Case # **17** WC **34520**
Employee/Petitioner

v.

Aldridge Electric, 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 **Carolyn Doherty**, Arbitrator of the Commission, in the city of **Chicago**, on **June 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 **April 11, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

CAUSAL CONNECTION IS DENIED AND NO FURTHER FINDINGS ARE MADE

ORDER

BASED ON THE ARBITRATOR'S FINDINGS OF NO CAUSAL CONNECTION NO FURTHER FINDINGS ARE MADE AND NO AWARD OF BENEFITS IS MADE.

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. Doherty

Signature of Arbitrator

JULY 28, 2021

PROCEDURAL HISTORY

Petitioner, Louis Sonetz, filed four applications for adjustment of claim with the Illinois Workers' Compensation Commission. The first is claim number 16 WC 10819, alleging injuries to the right shoulder, right elbow and left wrist on January 26, 2015 while in the course and scope of his employment with Great Lakes Electrical Contractors.

The second is claim number 16 WC 10820, alleging injuries to the left shoulder on May 27, 2015 while Petitioner was in the course and scope of his employment with Respondent Great Lakes.

The third is claim number 17 WC 31995, which alleges repetitive trauma injuries to Petitioner's bilateral shoulders, right elbow and left wrist with a manifestation date of June 8, 2015. That manifestation date corresponds to Petitioner's first encounter with Dr. Marcoski on June 8, 2015. The fourth and final application for adjustment of claim is claim number 17 WC 34520. Petitioner alleges that on April 11, 2017, he injured his left shoulder in the course and scope of his employment with a different employer, Aldridge Electric.

All four claims were consolidated. The first hearing took place in Chicago, Illinois on July 14, 2020. The second hearing took place on October 14, 2020 in New Lenox Illinois. The third and final hearing was held on June 17, 2021 in Chicago, Illinois.

FINDINGS OF FACT

Petitioner testified that he has worked over 30 years as a journeyman electrician. As such, he is required to lift on a daily basis. He testified that he is routinely required to lift bundles of conduit, and cases and rolls of wire weighing up to 80 pounds. He also engages in pushing and pulling on a daily basis. He testified that 90% of his work requires overhead work including lifting fixtures overhead that weigh up to 70 pounds.

Petitioner testified that he worked at Great Lakes in approximately 2009 performing all of the described activity through April 2016. On January 26, 2015, Petitioner worked as a foreman at Great Lakes. His job duties at Great Lakes included everything from underground electrical work involving trenching conduit to low voltage installations. The trenching work involved using a machine to dig the trench, manual shoveling of gravel, laying pipes and then back filling with gravel using a shovel. He testified that all back filling done close to the building or in the building was done with a shovel. Petitioner further testified that while at Great Lakes he performed both rough interior electrical work and underground electrical work. Petitioner testified that he worked with a pipe threader at waist level height. He also used a hammer drill to drill through concrete block surfaces 20% of his work time. In so doing, his arms were outstretched and the machine weighed between 20 to 50 pounds.

Petitioner testified that prior to 1/26/15 he had no problems or restrictions with either his right or left shoulder and was working full duty. Petitioner testified that on 1/26/15 he worked for Great Lakes on the "Impact" job which was a ground up office building with an underground parking garage. Petitioner testified that he was a "working foreman" and as such was working with a back fill to lay underground pipes in the electrical room. On 1/26/15, he arrived at 6:30 am and unlocked the building and tools to finish the piping and back fill in the electrical room. His co-worker on the project was Gary Costain.

Petitioner testified that on 1/26/15, he back filled gravel for 3-4 hours that morning using a shovel to toss gravel. He estimated that he used the shovel 100 times while tossing gravel. Petitioner testified that during one of the shovel maneuvers he pitched the gravel and felt a pop in his right shoulder. Petitioner put the shovel down and told his co-worker Gary to finish. Petitioner went to his truck and took a break from the work as he had pain in his right shoulder.

Petitioner testified that around noon he spoke to the project manager Alan Tertian to report the right shoulder pain and to request an accident report. Petitioner testified that Allen told him he would go to the back room and get an accident report for Petitioner to complete. Petitioner returned to doing only light work with Gary doing the heavy lifting. Petitioner finished the day at work and testified that he went home to ice his right shoulder due to extreme soreness. Petitioner testified that despite his request, he was never supplied an accident report to complete. Petitioner took Advil for the pain and soreness but did not seek medical treatment.

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day.

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete. He testified that after speaking with Mr. Yurko over the phone he went back to work but performed no physical activity. He testified that it was difficult to drive home from the job that day in that he could not lift his left arm high enough to reach the steering wheel.

Petitioner testified that he made an appointment to see Dr. Marcoski. While waiting for the appointment, Petitioner continued to work lying out and marking blue prints. He testified while waiting for the appointment he continued to notice pain and burning in both his right and left shoulders.

Petitioner's first visit with Dr. Marcoski took place on June 8, 2015. The third application lists an accident date of 6/8/15 with injuries to the man as a whole and bilateral arms and shoulders. The accident date corresponds with Petitioner's first date of treatment.

Petitioner completed an intake form at PX1. He listed his occupation as electrician and indicated a work injury 1/29/15 and 5/27/15. Petitioner testified that he made a mistake on the form listing 1/29/15 as his accident date was 1/26/15. Petitioner testified that a page from his time log at PX 10 indicates that on 1/26/15, he was shoveling gravel between 11 am and 12 pm and that is the date he is alleging with regard to his right shoulder injury. Petitioner further testified that on the 6/8/15 intake form he indicated right shoulder injury but forgot to list the left shoulder pain as well. He further indicated pain in his right elbow and forearm which are symptoms that began after he injured his right shoulder.

In the June 8, 2015 chart note, Dr. Marcoski records the following history: "Patient is here for right shoulder pain that began in January after shoveling gravel and reinjuring on May 27th while carrying pipes. Patient complaints of radiating pain to elbow and numbness. No previous history."

Marcoski went on to record the following: "Patient is seen for evaluation of pain in both shoulders right side worse than left. His history of right shoulder problems begins back in December when he was shoveling gravel and he overdid it feeling some soreness and strain in his right upper arm and shoulder. He took it easy for a period of time and seemed to get a little bit better but then he noticed some numbness and tingling right around his elbow. That's continued to him since it began and it seems to be aggravated by activity. Usually his left shoulder he's noticed this is tender to touch but it doesn't really hurt him when he works. He denies any history of any trouble with his shoulder past but he has been a very hard working tradesman throughout his entire working life. (Petitioner's Exhibit #1, pp. 2-3).

Marcoski diagnosed bilateral rotator cuff syndrome, radiating pain and numbness to his right elbow with right shoulder pain, and left shoulder tender to touch. He recommended options of either a symptomatic injection or to employ moist local heat, massage, and to avoid any aggravating factors. Petitioner declined the injection, but Marcoski noted that if Petitioner remained symptomatic then bilateral shoulder MRI's would be considered. (Petitioner's Exhibit #1 p. 3). Petitioner was not taken off work.

Petitioner testified that he continued to work for Great Lakes and that he had problems with his right shoulder and elbow while at work. On November 23, 2015, Petitioner returned to Dr. Marcoski for bilateral shoulder injections. PX 1. He continued working for Great Lakes.

PX 11 is an email dated January 5, 2016 written by Petitioner and sent to Michelle Bruno at Great Lakes attaching medical bills. The subject was "my shoulders." Petitioner indicated that the medical bills had been submitted to "insurance because I had no info to give them" and he asked for a report to complete. Petitioner testified that he submitted the medical bills but they were not paid because he did not have an accident report on file. PX 12 is an email from Petitioner to Michelle Bruno at Great Lakes dated January 26, 2016. The subject was "form". Petitioner wrote that he was required to submit the attached form. Michelle Bruno responded on the same date indicating "no worries… you have to cover yourself!!" PX 12. PX 13 is another email from Petitioner to Michelle Bruno dated February 5, 2016 wherein he asked "what do I do now" with regard to an attached bill. The subject line was "shoulder injury at work."

PX 14 is an email from Petitioner to Michelle Bruno dated March 3, 2016 along with her emailed response. Petitioner emailed "injury report?" and Ms. Bruno responded "I'll discuss again with Dick tomorrow." PX 15 is an email from Petitioner to Dick Anderson, the owner of Great Lakes. The email is dated March 23, 2016 and Petitioner indicates that he "had to sign a subrogation statement to get the bill paid for my shoulders that I injured on the job in January 2015 at the Impact and subsequently the other shoulder in May 2015 at CLC. I have tried for over a year to get an accident report from Great Lakes for the first and over nine months for the other." Petitioner did not receive a response from Mr. Anderson.

At trial**,** Alan Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was an estimator and project manager for Great Lakes although he was never formally assigned as the estimator or project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. At trial, it was learned that Mr. Arndt is deceased.

Mr. Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he knows the Petitioner. Mr. Yurko testified that he was the project manager on the College of Lake County job in May 2015. He further testified that Petitioner he worked with Petitioner at the

time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents.

Mr. Dick Anderson testified for Great Lakes in his capacity as owner of Great Lakes. He testified that Petitioner was hired by Great Lakes through the union hall as an electrician and foreman from 2008/9 to April 2016 when Petitioner left the company on his own. He testified that in 2015, Great Lakes had an accident reporting procedure in place and that information about accidents when to Paul Arndt who was the office manager. If the accident was severe, Paul would tell Mr. Anderson immediately. He testified that Mr. Arndt would not tell him about minor accidents or injuries. He testified that Paul would talk to the injury party, complete a report and investigate the accident. Mr. Anderson testified that Mr. Arndt never gave him and accident report or told him about any accident pertaining to Petitioner. He testified that Michelle Bruno became the office manager after Mr. Arndt passed away in September 2015. He does not recall that Mr. Arndt and Michelle Bruno overlapped at any time at Great Lakes.

Mr. Anderson testified that he was never told by Michelle about Petitioner's shoulder or any accident suffered by Petitioner at any time. He does not recall receiving the email from Petitioner at PX 15. He denies ever being asked by Petitioner for an accident report to complete. He does not recall ever being presented with medical bills pertaining to Petitioner's accidents. He testified that Petitioner was a good foreman who would know how to report an accident. He testified that neither Messrs. Terzian nor Yurko ever reported an accident to him pertaining to Petitioner on any job. He further testified that Great Lakes contributed to the group health insurance plan in place. He verified all of the job duties testified to by Petitioner and that Petitioner might use a threader or hammer on the job site albeit not often. Lastly, he agreed to the trenching testified to by Petitioner regarding the Impact job but disputed that such trenching would be done in the winter. He was not 100% sure trenching was done in January 2015 on the Impact job.

Petitioner testified that he was laid off from Great Lakes starting April 1, 2016. He began working for Respondent Aldridge Electric on April 14, 2016. He testified that at the time he continued to have issues with both shoulders and his right elbow. Petitioner testified that he was hired by Aldridge to do fire alarm wiring and low voltage work, including light installation. He testified that both shoulders were extremely sore and his right elbow pain made it hard to carry things including his tool bag. Petitioner testified that on 4/11/2017, he was working for Aldridge as a foreman on the new Lake County court house project laying out electrical, opening, measuring and reading blue prints. He testified that on 4/11/17 he had been working for Aldridge a year between his hire date in April 2016 and 4/11/17.

Petitioner testified that on 4/11/17, a truck pulled up to make a delivery and truck was lower than the dock platform so Petitioner could not use a pallet jack to unload the material. Petitioner testified that he had to physically lift the materials from truck to the dock and felt a pop in the *left* shoulder while lifting materials. He testified that he reported the accident to project manager Kevin. Notice is not in dispute. PX 16 is an incident report completed by Kevin with accident date of 4/11/17 indicating the same facts regarding the incident. Kevin took the pictures attached to the report which depict the material in the truck and the height difference between the truck and the dock. The report is dated 4/12/17 and indicates that Petitioner reported that his shoulder was sore and that Petitioner "believes it is from yesterday (4/11/17) while unloading a delivery… there has been no medical treatment due to his incident but he did state that he was due to get a shot as he did 2 years

ago for prior discomfort in the same shoulder." PX 16. Petitioner testified that he continued working for Aldridge after 4/11/17.

Petitioner returned to Dr. Marcoski on April 17, 2017. (Petitioner's Exhibit #1, p. 11). In the "History of Present Illness" section, Marcoski charted the following: "Patient is here for left shoulder pain s/p rotator cuff syndrome, last inj. 11/23/15. Patient felt a pop while lifting at work a week ago. Patient is seen for evaluation of a new problem one of pain in his left shoulder. His history of present illness begins last week Tuesday when he was lifting a heavy pallet loaded onto an overhead platform dock and he felt a pop in his left shoulder. He had immediate onset of discomfort on the top part of the wing bone and upper part of his arm bone and although is easing up but still remain sore. About a year and a half ago back in November of 2015 he had adhesive capsulitis with impingement syndrome of the shoulder that was treated with a cortisone injection. He did get better following that and his shoulder was doing well up until this recent mishap. (Petitioner's Exhibit #1, p. 11).

Marcoski recorded his impression as "strain of the left shoulder with history of previous impingement syndrome and adhesive capsulitis." (Petitioner's Exhibit #1, p. 12). Marcoski recommended nonoperative management to include massage, moist local heat, and activity modification. If there was no improvement, then an MRI scan would be obtained.

Dr. Michael Murphy evaluated Petitioner on May 8, 2017, pursuant to Section 12 of the Act, at the request of Respondent Great Lakes. GL RX 1. This exam took place only a few weeks after the accident of 4/11/17. Dr. Murphy's evidence deposition was taken on 10/25/17. GL RX 1. Dr. Murphy testified that Petitioner reported a right shoulder injury on 1/20/15 while shoveling gravel and a felt a pop. He reported a left shoulder injury on 5/27/15 noticing pain and a pop in the left shoulder while carrying conduit. P. 8. Petitioner made no mention of an injury to his left shoulder on 4/11/17. Based on his review of Petitioner's treating records and from bilateral shoulder x-rays he ordered, he determined that Petitioner had bilateral shoulder degenerative changes to the AC joint. P. 11-12. Following physical exam, Dr. Murphy determined that Petitioner's symptoms and history could be related to rotator cuff pathology. P. 14. He agreed that bilateral shoulder MRI's were appropriate and necessary. P. 15.

Bilateral shoulder MRI's were performed on July 14, 2017. (Petitioner's Exhibit #1, pp. 14-15). The radiologist's impression of the left shoulder MRI was "[l]ateral downsloping of a curved type II acromion, correlate for outlet impingement. Bursal surface fraying of the supraspinatus tendon but no full thickness rotator cuff tears. Degenerative disease of the AC joint. Small glenohumeral detachment of the inferior aspect of the posterior labrum." (Petitioner's Exhibit #1, p. 14).

The radiologist's impression of the right shoulder was "SLAP type tear of the superior labrum extending into the superior aspect of the posterior labrum. Inferiorly projecting AC arthrosis, correlate for outlet impingement. No rotator cuff tear is identified." (Petitioner's Exhibit #1, p. 15).

Marcoski reviewed the MRIs on July 20, 2017. (Petitioner's Exhibit #1, p. 16). He recorded his impression: Patient is seen for follow-up of his bilateral symptomatic shoulders with impingement syndrome. Since I last saw him he had MRI scans done of both shoulders and the results were discussed with him. The left shoulder basically has impingement syndrome with downsloping of the acromion undersurface or bursal fraying of the supraspinatus tendon, but no full thickness tear. Also noted is degenerative changes in the a.c. joint The right shoulder has very classic SLAP lesion. The patient states that his left shoulder is sore to touch and hurts with lifting and the right shoulder seems to hurt with throwing a ball with his daughters. Impression is bilateral symptomatic shoulders with impingement syndrome left shoulder with classic MRI findings and the right shoulder with SLAP tear. Plan is to recommend deferring to Dr. Chudik for consultation and treatment.

Dr. Chudik first saw Petitioner on July 26, 2017. (Petitioner's Exhibit #1, p. 18). Chudik recorded a history as follows: Louis J. Sonetz is a 50 year old male who presents today with a chief complaint of bilateral shoulder pain. It began approximately on January of 2015. The problem resulted from an injury at work. The problem resulted from right shoulder while shoveling gravel (1/2015) and left shoulder while carrying object at work (05/2015). Right elbow onset gradually (4/2017). The pain is located bilateral shoulders and right elbow. Currently it is a 5 on a pain scale of 10. Prior to this problem, the patient had not sustained significant injury to this part of the body. Prior to this problem, the patient has not had surgery on this part of the body in the past. The patient has seen another orthopedist for this problem. The patient has seen Dr. Marcoski for this problem. The patient has had the following tests and / or treatments performed for this problem: X-ray, MRI, injections. The timing of the pain / problem is constant, at rest, during activity. Pain occurs when reaching, lifting, carrying. The pain / symptoms do not radiate. The patient states that changing arm position alleviates the pain and / or symptoms. The patient stats that reaching, lifting aggravates or increases the pain and / or symptoms.

He continued: Patient is here today for MRI review referred by Dr. Marcoski. Patient is here for bilateral shoulder pain from two separate injuries at work, and elbow pain. He reports he experienced right shoulder pain from shoveling frozen gravel at work in January 2015. He states that in May 2015, he experienced a pop and significant left shoulder pain while carrying something in his left arm to avoid use of his right arm. He states he could not move the left arm well and has difficulty reaching into his back pocket. He reports he had an injection in 11/2015 in both shoulders that did help to alleviate pain, but pain never completely resolved. Today, he states that the left shoulder has worsened and also sometimes has pain at rest. Patient reports that he has been working with the shoulder pain but he is currently laid off. He also reports right elbow pain as of April 2017, but is unsure if elbow pain is related to the shoulder injuries. Right elbow pain has had a gradual onset and denies a mechanism.

Chudik diagnosed Petitioner with bilateral shoulder impingement and right elbow lateral epicondylitis. (Petitioner's Exhibit #1, p. 21). Chudik recommended conservative treatment, including physical therapy. Chudik took Petitioner off of work as of July 26, 2017. (Petitioner's Exhibit #1, p. 23).

On August 24, 2017, Section 12 examining physician Dr. Murphy reviewed the MRI reports from July. He also testified that he did not recall for certain whether he reviewed the actual MRI films. P. 18-21. However, it was determined that Respondent did send him the actual MRI films for review. Dr. Murphy testified that after his review of the MRI reports and films, "… I felt that the MRI findings would be consistent with degenerative changes. There was no full thickness tear of either rotator cuff. The rotator cuff demonstrated absolutely no abnormalities about the rotator cuff. I mentioned some bursal fraying, but no full thickness tear." p. 21. He opined that these noted changes "would not be abnormal for someone at an age beyond 30." P. 21. He further opined that the findings on the bilateral MRI's were not related to his work accident stating, "There's no signs of a traumatic condition. He has a SLAP tear on the right shoulder, which in his age group is often a normal finding." P. 21. He opined that Petitioner did not need surgery on either shoulder based on the physical exam and the history of injury mechanics which Dr. Murphy opined were inconsistent with a SLAP tear. He further testified, "Even if he had this exam that was consistent with it, those findings are often degenerative in nature." P. 24.

On cross exam, Dr. Murphy testified that to his knowledge, Petitioner worked as a foreman electrician and that he did occasional lifting. p. 34. He did not receive any job description from the Respondent. Murphy noted that during his physical examination, Petitioner's Hawkins test was positive bilaterally, greater on the left than the right, Neers test was mildly positive on the left and the right, there was pain over the lateral aspect of the shoulder at the insertion of the rotator cuff, and pain at the end range of abduction and flexion, greater on the left than the right. Petitioner's strength was normal, but limited by pain. P. 13. He noted that the left shoulder was more painful than the right shoulder. P. 35-36.

Dr. Murphy acknowledged that Petitioner had no shoulder issues prior to the accident. and that Petitioner was still symptomatic at the time he was examined by Murphy in May of 2017. P. 42. There was no indication of malingering. Murphy agreed that by the time he had an opportunity to examine the Petitioner, Petitioner's bilateral shoulder conditions were chronic in nature. Murphy further acknowledged that Petitioner's bilateral shoulder pain had not returned to baseline. p. 43-46.

Murphy was unable to answer whether or not Mr. Sonetz's job duties as a union electrician were a contributing factor to his bilateral shoulder conditions. P. 56. Murphy did agree that Petitioner's bilateral shoulders were "aggravated" although he could not specify when that aggravation ended. Rather, he testified "So, an aggravation is based on he had a symptom of discomfort and pain, but I don't have an objective finding on MRI to support his continued complaint." P. 51-52.

On September 6, 2017, Chudik noted Petitioner had seen improvements with PT, but continued to have shoulder pain that had not improved. (Petitioner's Exhibit #1, p. 25). Chudik recommended bilateral shoulder arthroscopies. (Petitioner's Exhibit #1, p. 26). On September 12, 2017, Petitioner agreed to proceed with the recommended surgeries. (Petitioner's Exhibit #1, p. 30).

On October 9, 2017, Chudik performed left shoulder surgery consisting of a left shoulder arthroscopy, left biceps tenodesis (subpectoral / open), left labral debridement, left capsular release of SGHL, and a left subacromial decompression. (Petitioner's Exhibit #5, pp.28-30). The postoperative diagnoses were: left shoulder pain, left biceps instability and partial rupture, left labral SLAP tear, left adhesive capsulitis, and left impingement syndrome.

Petitioner engaged in postoperative therapy and was continued off work by Dr. Chudik. On March 1, 2018, Dr. Chudik performed right shoulder surgery, which consisted of a right shoulder arthroscopy, right biceps tenodesis (subpectoral / open), extensive debridement of the rotator cuff and labrum, right capsular release of SGHL and a right subacromial decompression. (Petitioner's Exhibit #5, pp. 8-10).

Dr. Aaron Bare examined Petitioner at the request of Respondent Aldridge on April 18, 2018., after both shoulder surgeries. (Respondent Aldridge Exhibit #1). Bare opined that Petitioner was status post arthroscopic surgery of his left shoulder, that he had improved with postoperative physical therapy and was now approximately 7 months after the procedure. Bare opined that Petitioner was at maximum, medical improvement and capable of returning to full duty work without restrictions. Regarding causation, Bare opined that Petitioner injured his left shoulder in 2015 and continued to complain of pain and discomfort throughout that year without documentation that his symptoms had resolved. Bare indicated "I agree with the medical records and the statement made by Dr. Murphy that suggest that the findings were degenerative in nature and that his shoulder pain never completely resolved and at the time of the evaluation in 05/2017, which was after the second injury of 04/2017, he confirmed that his shoulder pain is chronic in nature involving both shoulders with the left being greater than the right."

Dr. Bare opined that the injury of 4/2017, while Petitioner worked for Aldridge, was a temporary aggravation of a pre-existing problem but did not cause any acute pathology. He opined, "It did not accelerate his condition and it also do not lead towards surgical intervention." Aldridge RX 1. He further stated that the MRI indicated degenerative findings only without trauma or definitive tears.

Petitioner continued to follow up with Chudik and was kept off of work. On July 12, 2018, Petitioner reported a sudden onset of right elbow pain on July 6, 2018, noting that there was no mechanism of injury for the elbow pain. Chudik recommended an EMG and MRI for the right elbow. PX 1, p. 89. The MRI revealed a minimally thickened common extensor tendon with subtle intratendinous signal possibly from low-grade tendinosis. The remainder of the examination was otherwise unremarkable. PX 1. The EMG / NCS performed on July 20, 2018

of the right elbow showed a focal conduction abnormality of the media nerve at the wrist, consistent with mild right wrist carpal tunnel syndrome, and irritation of the ulnar nerve at the elbow. PX 1.

On July 25, 2018, Dr. Chudik opined that the carpal tunnel and cubital tunnel syndrome were secondary to immobilization following the right shoulder surgery. PX 1, p. 101. He continued Petitioner off of work.

Dr. Chudik testified via evidence deposition taken on August 20, 2018. PX 6. Dr. Chudik is an orthopedic surgeon specializing in shoulders and sports medicine. (Petitioner's Exhibit #6, p. 2). He is board certified and licensed to practice medicine in the State of Illinois. Dr. Chudik testified that he is familiar with the general job duties of an electrician. PX 6. P. 14.

Chudik reviewed the chart notes from Dr. Marcoski and examined Petitioner on July 26, 2017. P. 25. Petitioner reported a history of bilateral shoulder pain in the right resulting from an injury at work shoveling gravel in January 2015 and then an injury to his left shoulder while carrying an object at work in May 2015. P. 26. Petitioner reported no prior problems with either shoulder. Petitioner reported that he continued working with conservative treatment to both shoulders in the form of injections. He reported that the pain was never relieved completely. P. 27. Petitioner also reported gradual onset of right elbow pain since April 2017 with initial right elbow complaints documented after the January 2015 accident. P. 27.

Dr. Chudik reviewed the shoulder MRI's and testified that he initially prescribed conservative care and physical therapy for both shoulders due to initially diagnosed bilateral shoulder impingement syndrome and rotator cuff syndrome along with right elbow epicondylitis. P. 29. Having failed conservative care as of September 2017, Dr. Chudik performed the left shoulder arthroscopy with debridement of a superior labral tear type two and a subacromial decompression removing inflamed bursa and soft tissue from the rotator cuff syndrome and impingement. P. 31-32. Petitioner was placed in a sling and in physical therapy. Eight weeks post-op, Petitioner reported left forearm and wrist pain and swelling in the left hand. P. 35. Dr. Chudik noted these complaints as "part of the morbidity of doing surgery on an extremity." P. 35,37. As of December 27, due to continued left hand pain, numbness and weakness following the surgery on the left extremity, and EMG study was discussed.

Due to right shoulder continued complaints and the prior right shoulder MRI showing SLAP tear, Dr. Chudik perform a right shoulder partial rotator cuff repair and debridement of type two labral tear, subacromial decompression, and right biceps tenodesis. P. 42. As of the April 12, 2018 visit, Petitioner complained of increased right elbow symptoms due to immobilization of the right arm. P. 46. Right elbow MRI and EMG results were consistent with right mild carpal tunnel syndrome and some irritation of the ulnar nerve at the elbow without a focal condition block noted but that world be consistent with some cubital tunnel. Dr. Chudik testified, "… we did note that he had some symptoms after the first injury, but I believe the immobilization from the surgery had a big effect on that and the swelling from the surgery…" p. 51.

Dr. Chudik last saw Petitioner on July 25, 2018. On that date, he ordered continued therapy for the shoulders and a brace for the right elbow. Petitioner was to return in 6 weeks for follow up.

With regard to the right shoulder, Dr. Chudik opined that Petitioner injured his right shoulder while shoveling at work on January 26, 2015. P. 58. He opined that Petitioner injury his left shoulder as a result of the work injuries on May 27, 2015 and April 11, 2017 when Petitioner was at work lifting a heavy pallet and felt a pop in his left shoulder. P. 57-58. With regard to the right elbow, Dr. Chudik opined that the right lateral epicondylitis was the result of the work injury on January 26, 2015 and April 11, 2017, as there was right elbow complaints made after each injury. P. 59. He further opined that the immobilization following the right shoulder surgery also contributed to the ultimately diagnosed right cubital tunnel syndrome. P. 60.

Further with regard to the right shoulder, Dr. Chudik testified that Petitioner's right shoulder condition is causally related to the January 26, 2015 work accident stating, "The answer is with a reasonable degree of medical certainty that his current condition in his right shoulder was contributed to by the injuries sustained on January 26th, 2015. I think if we look at the whole clinical course of the patient, the objective findings on the MRI – well, the clinical course, which includes the proximate reporting of symptoms of right shoulder pain had been – had continued from that injury and had been refractory treatment through that whole course, conservative treatment, including injections and therapy with an MRI and surgical findings that objectively confirmed that he did, indeed, suffer from a superior labral tear that was made – injured and made symptomatic from that accident, and obviously, my experience as an orthopedic surgeon specializing and treating shoulders and surgeries are all the bases for my opinion. P. 61-62.

Chudik also testified that Petitioner's right elbow condition is related in part to the January 26, 2015 work accident stating, "Yeah. My response was that the current condition related to his right elbow was contributed by the injuries sustained on January 26, 2015. I do think that elbow pain and the numbness and tingling that he had were more likely than not an indication of some cubital tunnel symptoms, and I think they just reared their ugly head later when the provocative swelling and immobilization of the elbow contributed to it. So I think there is some contributing factor of that accident to his right elbow pathology in general. (Petitioner's Exhibit #6, pp. 16-17). … So I think there is more likely than not some contribution from the January 26, 2015 injury as well as the additional trauma of the surgery to the shoulder and the immobilization and swelling that occurs with it that is provoking those symptoms." P. 64-65.

With regard to the left shoulder, Dr. Chudik opined that Petitioner's left shoulder injury was caused by the carrying of heavy objects at work on May 27, 2015. He testified, "As I explained before, that kind of carrying, lifting with a pop in the shoulder would be very consistent with a superior labral tear. It would be consistent with that mechanism." P. 66.

With regard to any connection between the left shoulder and elbow and the accident of April 11, 2017, Dr. Chudik testified, "He had a very significant mechanism with the pop in the left shoulder in May (2015) and I think the April (2017) lifting again, just-if you have got a superior labral tear like that and then- it is going to – it is very easy to re-aggravate it with that lifting." So I imagine it might have made it worse some possibly, but I think that the injury had already occurred; and this was just- it may have been a temporary aggravation, but I believe the pathology already occurred. He had already had a very significant mechanism and symptoms that occurred with the first injury. So I think there was probably some contribution, but I think that the bulk of the injury was responsible from the May." P. 67.

Dr. Chudik further opined that the right elbow injury and underlying pathology pre-existed the April 11, 2017 lifting accident and that accident only temporarily aggravated that condition which originally resulted from the January 26, 2015 injury. P. 68.

On cross-exam, Dr. Chudik testified Petitioner's diagnosed type two SLAP tear is not typically seen without injury or precipitating event. P. 82-83. Dr. Chudik further testified that Petitioner's right elbow symptoms began after the January 2015 injury to this right shoulder as initially reported and then were further aggravated by immobilization after the right shoulder surgery. He testified, "I think if he didn't have any preexisting pathology there, I don't think we would see any of those type of symptoms from just the immobilization…if there wasn't any preexisting problems with the entrapment of those nerves, we wouldn't have expected that after surgery." P. 90-91. With regard to the left shoulder, Dr. Chudik noted that the first left shoulder pop was felt in the accident of May 2015 and the second left shoulder pop was felt in April 2017. He opined that the first accident resulted in the labral tear and the April 2017 accident could have made is worse but it is more likely than not "…he has had continued symptoms with that shoulder." He testified that a person can "work around" a labral tear more easily than with a rotator cuff tear and a labral tear is more tolerable to manage over

a period of time. A person can continue to work with a superior labral tear. P. 96, 100. Dr. Chudik testified that the April 2017 accident "also contributed to it further" referencing the original left shoulder injury from May 2015. He testified, "I think they are both contributory, and I think it is more likely than not that the superior labral tear started with popping event in May, and how much worse or how much aggravation or temporary exacerbation the April one I think is hard to determine." P. 103. Petitioner never reported being pain free in either shoulder to Dr. Chudik at his first visit date of July 26, 2017. P. 108.

Lastly, Dr. Chudik testified that the right elbow injury did not occur with the April 2017 accident. P. 112.

On October 19, 2018, Chudik noted aggravation of pre-existing lumbar spine pain due to physical therapy. (Petitioner's Exhibit #1, p. 111). Chudik recommended work conditioning and continued Petitioner off of work. (Petitioners Exhibit #1, pp. 111-112).

While in work conditioning, Petitioner injured his left wrist. (Petitioner's Exhibit #4, pp 77-80). Dr. Chudik recommended Petitioner continue work conditioning as tolerated and referred Petitioner to Dr. Fajardo for the wrist pain. (Petitioner's Exhibit #2, pp. 128-130). Petitioner was seen by Dr. Fajardo for the left wrist. (Petitioner's Exhibit #2, p. 131). Fajardo ordered an MRI and placed Petitioner in a wrist guard. (Petitioner's Exhibit #2, p. 132).

The MRI of the left wrist was done on December 11, 2018. (Petitioner's Exhibit #2, p. 133). Fajardo diagnosed left wrist TFCC tear and dorsal ulnar bone bruise. (Petitioner's Exhibit #2, p. 136). A steroid injection was performed, and wrist guard was continued. At the next visit on January 9, 2019, Fajardo recommended finishing PT, and prescribed NSAIDs. Fajardo recommended weight bearing as tolerated with the left wrist only, and advised Petitioner to return as needed (Petitioner's Exhibit #2, p. 145).

A functional capacity assessment was performed at ATI Physical Therapy on January 11, 2019. (Petitioner's Exhibit #2, p. 149). Petitioner demonstrated a physical demand level of "very heavy", and on January 14, 2019, Chudik recommended a trial return to work with no restrictions. (Petitioner's Exhibit #2, p. 147).

On January 18, 2019, Fajardo recorded a history of left wrist pain at the end of the functional capacity assessment. (Petitioner's Exhibit #2, p. 159). Fajardo administered an injection, and advised Petitioner to return as needed.

At a follow up on February 25, 2019 Chudik again released Petitioner without restrictions. (Petitioner's Exhibit #2, p. 167). The final visit took place on April 22, 2019, at which time Petitioner was placed at maximum, medical improvement. (Petitioner's Exhibit #2, pp. 169-170)

At trial, Petitioner testified that he returned to full duty work as of February 25, 2019, without restrictions. Petitioner testified to intermittent pain with activities and at the end of the work day. Petitioner testified that he continues to work for Bandwidth Inc. as an electrician. He has not sustained any additional accidents or injuries. He testified that he continues to notice bilateral shoulder constant tightness and aching after work. He uses Aspirin and Advil four times per week for these symptoms. He further testified that he notices right elbow "tightness". Petitioner testified that if he needs help at work he asks for help or switches arms but that his conditions do not prevent him from working his full duty job. At home, Petitioner notices pain with throwing and is unable to ride his touring motorcycle. He stops every hour while driving. Petitioner notices weakness with overhead lifting and reaching and he drops things in his right hand. He can no longer boat, water ski or tube.

CONCLUSIONS OF LAW

The above findings of fact are incorporated into the following conclusions of law. The following conclusions of law are made in the consolidated cases of 16 WC 10819 doa 1/26/15 injuries to right shoulder, right elbow and left wrist; case 16 WC 10820 doa 5/27/15 injuries to left shoulder; case 17 WC 31995 doa 6/8/15 alleged manifestation date of repetitive trauma to bilateral shoulders; and case 17 WC 34520 doa 4/11/17 injury to left shoulder

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 accident? E. Was timely notice of accident given Respondent?

ACCIDENT – DOA 1/26/15

Based on the credible testimony of Petitioner as buttressed by the treating medical records of Dr. Marcoski, the Arbitrator finds that Petitioner sustained a work related accident on 1/26/15 while at work for Respondent Great Lakes at the Impact job site. Petitioner testified that he felt a pop in his right shoulder while shoveling gravel at the Impact job working in his capacity as a foreman electrician for Respondent Great Lakes. Petitioner's credible testimony is buttressed by his treating medical records which document that he injured his right shoulder while shoveling gravel on January 26, 2015, and shortly thereafter experienced pain and discomfort that was ongoing. This evidence was unrebutted by the Respondent Great Lakes.

Wherefore, the Arbitrator finds that an accident occurred on January 26, 2015 at the "Impact Job" in Mettawa that arose out of and in the course of Petitioner's employment as a foreman electrician for the Respondent Great Lakes.

NOTICE

The Arbitrator further finds that Respondent Great Lakes received proper and timely notice of Petitioner's accident of 1/26/15. The finding is based on a review and assessment of Petitioner's testimony and that of his co-worker Alan Terzian. In so finding, the Arbitrator places greater credibility on the testimony of Petitioner and Mr. Terzian than on the testimony of Dick Anderson provided at trial. At trial**,** Allen Terzian testified pursuant to subpoena. He testified that he worked for Great Lakes in January 2015 with Petitioner. Mr. Terzian testified that he was the informal project manager for Great Lakes on the Impact job. He testified that on 1/26/15 he met with the electricians on the Impact job site and that Petitioner mentioned that he had aches and pains in his shoulder and that Petitioner asked for an accident report. Mr. Terzian testified that when he returned to the office he relayed Petitioner's shoulder complaints to the office manager Paul Arndt and to Michelle Bruno. He testified that he does not know if an accident report was completed. He further testified that there was no system in place for reporting work accidents or completing forms. Rather, he thought simply had to report such complaints to Paul Arndt. Several witnesses at trial identified Mr. Arndt at the office manager at Great Lakes. Mr. Anderson verified that accidents were to be reported to Mr. Arndt as he was in charge of the insurance in the office. After his death, Michelle Bruno was placed in his position at Great Lakes.

Petitioner's requests for an accident report and attempts to have the medical bills paid for by Respondent Great Lakes' workers' compensation are also documented and clearly support Petitioner's ongoing efforts to report his work related injury to Great Lakes. PX 11- 14. Lastly, the Arbitrator notes that Petitioner's application for adjustment of claim was filed in 2016, at a minimum placing Respondent on sufficient, albeit defective, notice of Petitioner's accident. There is no evidence in the record to support a finding of undue prejudice by Great Lakes.

ACCIDENT – DOA 5/27/15

Petitioner testified that he continued to work the Impact job for Great Lakes but that his ability to work was impacted by the right shoulder injury in January 2015. He testified that he could not carry conduit or ladders on his right shoulder. He testified that the right shoulder pain never went away prior to May 27, 2015.

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder.

On May 27, 2015, Petitioner was a working foreman on the chemistry lab addition to the College of Lake County. He testified that the building addition was from the "dirt up". Petitioner testified that on May 27, 2015, he walked over to the lock up area and while grabbing conduit he felt pain and a pop in his left shoulder. He described the pain in his left shoulder as knife like. Petitioner testified that he was not able to perform any physical activity at work for the rest of the day. Petitioner's testimony was again supported by the medical records documenting the left shoulder injury while working on May 27, 2015 and was unrebutted at trial. Accordingly, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Great Lakes on May 27, 2015.

NOTICE

Petitioner testified that he reported the accident to the project manager Rick Yurko. Specifically, he testified that he called Mr. Yurko, reported the injury to his left shoulder, described how the accident occurred and requested an accident report. Petitioner testified that he never received an accident report to complete.

Rick Yurko also testified at trial pursuant to subpoena as a former Great Lakes employee from 2010 to 2018. He testified that he was the project manager on the College of Lake County job in May 2015. He further testified that he worked with Petitioner at the time Petitioner alleged his shoulder injury on May 27, 2015. Mr. Yurko testified that there was no reporting protocol in place at the time for Great Lakes but testified that since Paul Arndt was in a management position with Great Lakes, Mr. Yurko advised Paul Arndt about Petitioner's reported accident and injury in May 2015. He further testified that he was responsible for relaying information from the job site to Great Lakes management. He testified that Petitioner came into the office "right away" to fill out paperwork which the witness assumes was an accident report but is not certain. He further testified he thought Mr. Arndt filled out "comp paperwork" but he never saw those documents. Again, on the issue of notice, the Arbitrator places greater weight on the testimony of Petitioner and Mr. Yurko.

The trial testimony and the Arbitrator's findings are further supported by the emails between Petitioner and Michelle Bruno. The emails support Petitioner's testimony on his unsuccessful attempt to provide notice to Respondent and obtain an accident report. PX 11-14. Based on the foregoing, the Arbitrator finds that notice to Respondent of the May 27, 2015 work accident was both timely and proper.

ACCIDENT – DOA 6/8/15

Petitioner alleges repetitive trauma to his bilateral shoulders, right elbow and left wrist arising out of and in the course of his employment with Respondent Great Lakes manifesting on June 8, 2015, his first date of treatment with Dr. Marcoski. As did Dr. Marcoski, the Arbitrator acknowledges Petitioner's job duties as a working foreman electrician for Great Lakes and his 30 plus years of heavy physical labor as an electrician and the likely physical toll taken on Petitioner. However, the Arbitrator finds, in light of the record in its entirety in this particular matter, that Petitioner's years of physical labor alone as mused upon by Dr. Marcoski are not sufficient to support a finding of repetitive trauma to any alleged body part manifesting on June 8, 2015 under

the Act. Rather, the Arbitrator refers to the foregoing findings of specific trauma on January 26, 2015 and May 27, 2015 and again notes the support in the record for the finding of accident on those dates.

Based on the Arbitrator's finding of no repetitive trauma manifesting on June 8, 2015, all other issues in case 17 WC 31995 are moot. No award of benefits is made in 17 WC 31995.

ACCIDENT – DOA 4/11/17 – RESPONDENT ALDRIDGE

Petitioner testified that Petitioner on 4/11/17, he was at work as a foreman electrician for Respondent Aldridge on the Lake County Courthouse job site. He testified that while lifting and moving material from a truck onto a loading dock he felt a pop in his left shoulder. Petitioner's testimony regarding this incident was unrebutted at trial and supported by the medical records documenting consistent left shoulder treatment thereafter. As such, the Arbitrator finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent Aldridge on 4/11/17.

Notice was not in dispute at trial in case 17 WC 34520 against Respondent Aldridge.

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

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

At trial, Petitioner testified that he was working full duty with no right shoulder complaints prior to the accident on January 26, 2015. (T. 29). After that, his condition did not return to baseline, and symptoms continued as recorded in the medical records and noted by Dr. Chudik, Dr. Bare and Dr. Murphy. Petitioner testified that he had to self-limit after the work accident on January 26, 2015 but that he was able to continue working with pain.

Petitioner initially sought treatment for right shoulder complaints and complaints of right elbow pain to Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the right shoulder and elbow on January 26, 2015 and noted no prior injury to those parts. Dr. Chudik further opined that Petitioner sustained right shoulder and elbow injury at work on January 26, 2015 and that his conditions were causally related to that accident given the mechanism of injury described and the lack of prior injury to those parts. In finding causal connection for the right shoulder and elbow, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's right shoulder condition was merely degenerative in nature and completely without aggravation from the accident of January 26, 2015.

Petitioner's left wrist injury occurred while he was engaged in postoperative therapy for the right shoulder surgery. Therefore, the left wrist injury flowed from the injury to the right shoulder on January 26, 2015.

Based on the above, the Arbitrator accordingly finds that Petitioner has proven by a preponderance of the credible evidence that his right shoulder condition, right elbow condition and left wrist condition are all causally related to the work accident that took place on the Impact job site on January 26, 2015.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Petitioner testified that on May 27, 2015 he was still working for Great Lakes in his same capacity as working foreman. He was now working on the "College of Lake County" job. Petitioner testified that he did not take any break in jobs between January 2015 and May 2015. Rather, he testified that between those dates he worked multiple jobs while noticing problems and pain in his right shoulder during all of his work activities. He testified that he was not able to carry with his right shoulder but rather only with his left shoulder. Petitioner injured his left shoulder carrying conduit on May 27, 2015 as noted above.

Petitioner initially sought treatment for left shoulder complaints with Dr. Marcoski on June 8, 2015. Dr. Marcoski noted the report of work injury to the left on May 27, 2015 and noted no prior injury to the left shoulder. Dr. Chudik further opined that Petitioner sustained left shoulder injury at work on May 27, 2015 and that his condition was causally related to that accident given the mechanism of injury described and the lack of prior injury to the left shoulder. In finding causal connection for the left shoulder condition, the Arbitrator places greater weight on the more reasoned and detailed opinion of Dr. Chudik than on the general opinion of Dr. Murphy that Petitioner's left shoulder condition was merely degenerative in nature and completely without aggravation from the accident of May 27, 2015.

Accordingly, the Arbitrator finds that Petitioner has proven by a preponderance of the credible evidence that his left shoulder condition is causally related to the work accident that took place on the Impact job site on May 27, 2015.

DOA 4/11/17 – 17 WC 34520 – left shoulder- Respondent Aldridge

The Arbitrator notes the finding of accident on 4/11/17 and Petitioner's complaints of left shoulder pain thereafter. However, the Arbitrator finds that based upon the credible evidence at trial, the accident of 4/11/17 sustained by Petitioner while working for Aldridge resulted only in a temporary aggravation of Petitioner's pre-existing left shoulder condition.

In so finding, the Arbitrator notes the opinion of Dr. Chudik that Petitioner's accident in May of 2015 "would have been probably the most significant causation of the labral tear." PX 6. Dr. Chudik testified "[i]f we have to give an opinion with a reasonable degree of medical and surgical certainty, I think more likely than not, I think the tear happened in May of 2015." PX 6. Dr. Chudik's opinion is in line with Dr. Bare's opinion that the April 11, 2017 work accident was merely a temporary exacerbation of symptoms and that surgery was required based on Petitioner's left shoulder condition that pre-dated the accident on April 11, 2017.

Wherefore, the Arbitrator finds that the April 11, 2017 work accident resulted in a non-compensable temporary exacerbation of symptoms, and that Petitioner's current condition as relates to the left shoulder is not causally related to the April 11, 2017 work accident. As such, all remaining issues are moot and no benefits are awarded Petitioner in case 17 WC 34520 involving Respondent Aldridge.

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?

DOA 1/26/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's right shoulder, right elbow and left wrist conditions.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the right shoulder, right elbow and left wrist shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

DOA 5/27/15 – 16 WC 10820 – left shoulder

The Arbitrator finds that based on the testimony of Dr. Chudik, the medical services provided to Petitioner were reasonable and necessary. The Arbitrator awards the medical bills as put forth in Petitioner's Exhibit 9 that relate to the Petitioner's left shoulder.

Medical bills shall be paid pursuant to Sections 8 and 8.2 of the Illinois Workers' Compensation Act. Respondent shall hold Petitioner safe and harmless for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7. All out of pocket payments related to the left shoulder shall be reimbursed directly to Petitioner by Respondent Great Lakes. Respondent's credit is addressed below.

K. What temporary benefits are in dispute? (TTD)

DOA 1/16/15- 16 WC 10819

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his right shoulder, right elbow and left wrist injuries. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

DOA 5/27/15 – 16 WC 10820

The Arbitrator finds that Petitioner is entitled to Temporary Total Disability benefits for time missed as a result of his left shoulder injury. As supported by the medical records and the testimony of Petitioner at the time of the hearing, the Arbitrator finds that Respondent shall pay Petitioner Temporary Total Disability Benefits of $1,157.33 per week for 76 6/7 weeks, commencing July 26, 2017 through January 14, 2019, as provided in Section 8(b) of the Act. Respondent Great Lakes shall receive credit for amounts paid, if any.

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

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b (b), the Arbitrator notes that Petitioner was 47 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the right shoulder injury, 5% loss of use of the arm for the right elbow injury and 10% loss of use of the left hand for the left wrist injury.

DOA 5/27/15 – 16 WC 10820 – left shoulder

With regard to subsection (i) of §8.1b(b), the Arbitrator notes that no permanent partial disability impairment report and /or opinion was submitted into evidence. The Arbitrator therefore gives no weight to this factor.

With regard to subsection (ii) of §8.1b(b), the occupation of the employee, the Arbitrator notes that the record reveals that Petitioner was employed as a union electrician at the time of the accident and that as of the date of the hearing, he had returned to work as a union electrician. The Arbitrator notes that the Petitioner's work as an electrician is physically demanding. The Arbitrator gives greater weight to this factor.

With regard to subsection (iii) of §8.1b(b),the Arbitrator notes that Petitioner was 48 years old at the time of the accident. Because Petitioner still has several years of work as an electrician ahead of him which is likely to require heavy work and overhead work, the Arbitrator gives greater weight to this factor.

With regard to subsection (iv) of §8.1b(b),Petitioner's future earning capacity, the Arbitrator notes that Petitioner has returned to work as a union electrician. Because Petitioner is not physically precluded from pursuing his customary line of work as a union electrician, the Arbitrator gives lesser weight to this factor.

With regard to subsection (v) of §8.1b(b),evidence of disability corroborated by the treating medical records, the Arbitrator notes that Petitioner still notices achiness, stiffness and loss of strength that adversely affects his work and daily activities and necessitate taking over the counter medications including aspirin and Advil several times per week. 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 15% loss of use of the person as a whole for the left shoulder injury that occurred on May 27, 2015.

N. Is Respondent due any credit?

DOA 1/16/15- 16 WC 10819- Right Shoulder, Right Elbow, Left Wrist

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

DOA 5/27/15 – 16 WC 10820 – left shoulder

Respondent Great Lakes shall receive an 8(j) credit for payments made by the IBEW Local 150 Welfare Fund as evidenced in Petitioner's Exhibit #7, and shall hold Petitioner safe and harmless for same.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC026001
Case Name	STEELE, ROBERT v. BERRY GLOBAL FILMS, LLC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0072
Number of Pages of Decision	19
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Mark Schaffner
Respondent Attorney	Mark Vizza

DATE FILED: 2/25/2022

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT STEELE,

Petitioner,

vs. NO: 17 WC 26001

BERRY GLOBAL FILMS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission, herein, modifies the Arbitrator's decision under Section (F), last paragraph, striking the entire last sentence beginning with, "Function" and ending with "2019".

All else otherwise is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed July 13, 2021, is hereby affirmed and adopted with changes as stated herein.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $2,906.56 for medical expenses under §8(a) of the Act, and Respondent shall authorize and pay for the ACDF surgery prescribed by Dr. Sokolowski for the reasonable and necessary treatment of Petitioner's causally related cervical radiculopathy pursuant to the Fee Schedule and as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $23,000.00. 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.

February 25, 2022

o- 2/15/22
KAD/jsf

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC026001
Case Name	STEELE, ROBERT v. BERRY GLOBAL FILMS, LLC
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	16
Decision Issued By	William McLaughlin, Arbitrator

Petitioner Attorney	Mark Schaffner
Respondent Attorney	Mark Vizza

DATE FILED: 7/13/2021

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

/s/William McLaughlin, 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)

Robert Steele,
Employee/Petitioner

v.

Berry Global Films, LLC,
Employer/Respondent

Case # **17** WC **26001**

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 **William McLaughlin**, Arbitrator of the Commission, in the city of **Chicago**, on **May 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 28, 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 $**17,974.28**; the average weekly wage was $**540.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **3** dependent children.

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

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

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

ORDER

This arbitrator finds that Petitioner's current condition of ill-being is causally related to his industrial accident of August 28, 2017 and that the prospective treatment prescribed by Dr. Mark Sokolowski is reasonable and necessary for the treatment of Petitioner's related cervical radiculopathy. Respondent is ordered to approve and pay for the prescribed ACDF surgery pursuant to the IWCC Fee Schedule.

Respondent shall pay reasonable and necessary medical services, pursuant to the medical fee schedule, of $1,139.58 to Petitioner for the bill of Function First P.T., $1,339.24 to Petitioner for the bill of Prescription Partners, and $427.74 to Petitioner for the bill of Dr. Mark Sokolowski, as provided in Sections 8(a) and 8.2 of the Act.

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

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

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

JULY 13, 2021

Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

ROBERT STEELE,	)	
	)	
Petitioner,	)	
	)	**Case No. 17 WC 26001**
v.	)	
	)	
BERRY GLOBAL FILMS, L.L.C.,	)	
	)	
Respondent.	)	

This matter came for hearing before this Arbitrator on May 27, 2021 on Petitioner's Section 8(a) Petition. The parties completed a stipulation sheet, agreeing that the sole issues for this arbitrator are causal connection, approval for prospective medical and outstanding medical.

FINDINGS OF FACT

The petitioner testified on August 28, 2017 he had been employed by Berry Global for approximately 2 ½ to 3 years. He was doing the same job when he started through August 28, 2017. His job was that of forklift operator. He would unload and reload trucks. He would also load boxes on pallets to be loaded on the truck. The boxes he put on the pallets weighed approximately 20 to 70 pounds. He would lift the boxes which were filled with rolls of film. From 6:00 a.m. to 11:30 a.m., he would fill the pallets and then he would load the trucks with the forklift. On August 28, 2017, he was picking up a box that weighed between 25 and 40 pounds to put it on a pallet. He felt pain in his neck, down his arm. The pain was from his ear to his elbow on the right side. When he was lifting, it was a twisting motion. He lifted the box from his left side to the right. Prior to August 28, 2017, he had no prior problems or treatment to his neck or arm.

Prior to August 28, 2017 Petitioner had never experienced any problem with his neck or right shoulder, in performing the full duties of his job. He testified that he had never previously received treatment for his

neck or right shoulder and arm and had never lost time from work or had restrictions because of his neck and right shoulder and arm.

On August 29, 2017, the Petitioner presented to Ingalls Occupational Medicine Center, reporting that on August 28, 2017 "he was picking up boxes off a skid when he felt a sharp pain to his right shoulder and to the back of his neck." (PX 2, p. 5. The pain was reported to be worse with head movement. (PX 2 at p. 6). Petitioner was diagnosed with cervicalgia and pain in the right shoulder. He was initially treated with flexeril, Tylenol es, moist heat and restricted duty. (PX 2 at p. 6).

Petitioner saw physicians at Ingalls Occupational Medicine Center on two additional dates, September 1 and September 7, 2017, reporting that the pain to his neck and shoulder had increased despite the medications. (PX 2 at p. 25). On the last visit, on September 7, 2017 the Petitioner reported that he wished to follow up with his own doctor. (PX 2 at p. 25).

On September 5, 2017 the Petitioner presented as a new patient to Dr. Mark Sokolowski. (PX 5 at p. 213). Mr. Steele testified that he was referred to Dr. Sokolowski by a family member and had never seen the doctor before this date. Petitioner reported neck pain, right shoulder pain and arm pain. Following an initial orthopedic evaluation, Dr. Sokolowski diagnosed cervical pain, cervical radiculopathy and right rotator cuff tendinitis. The doctor ordered an MRI of the cervical spine and of the right shoulder, and began Petitioner on physical therapy. (PX 5 at pp. 213-4).

The MRIs were completed on September 19, 2017. The report of the cervical spine MRI reported a moderate-sized central and right of center posterior disc protrusion at the C3-4 level with a moderate encroachment on the central vertebral canal and right neural foramen as well as moderate bulging at the C5-6 level, also resulting in mild encroachment of the anterior aspect of the central vertebral canal. (PX 5 at p. 211). The right shoulder MRI reported tendinosis of the superior subscapularis and the anterior supraspinatus and mild biceps tendinosis. (PX 5 at p. 209). Dr. Sokolowski reviewed the MRIs on September 21, 2017 with a treatment plan of physical therapy, use of anti-inflammatory medications and restrictions on activity. (PX 5 at p. 205).

Physical therapy was scheduled at Athletico, where Petitioner received therapy from September 22, 2017 through January 2, 2018. In the interim, Dr. Sokolowski attempted an epidural injection on his visit of November 27, 2017, which only provided short-term relief. (PX 5 at p. 137). When Dr. Sokolowski evaluated him on January 5, 2018, he reported that therapy had failed to provide much benefit and, based on a diagnostically significant right shoulder injection, referred Petitioner to Dr. Kevin Tu for a right shoulder arthroscopy. (PX 5 at p. 132).

On January 25, 2018 Respondent had Petitioner evaluated by Dr. Steven Mash. Dr. Mash reviewed medical records and examined Petitioner, concluding that he had both a rotator cuff syndrome of the right shoulder and a cervical radiculopathy. (PX 8, Exh. 3). The doctor opined that the rotator cuff injury as well as the cervical radiculopathy was related to the work injury of August 28, 2017. (PX 8, Exh. 3).

On January 10, 2018 Dr. Tu evaluated Petitioner for his right shoulder, at which time he formed an impression of a possible right shoulder labral tear and proximal biceps tendinitis. (PX 3 at p. 18). The initial plan was to inject the shoulder with cortisone and re-evaluate in two weeks. (PX 3 at p. 18). On Petitioner's two week follow up, he continued to report difficulty with overhead and reaching activities with continued significant pain at the anterior and lateral aspects of the shoulder. (PX 3 at p. 17). Dr. Tu prescribed surgical intervention with possible labral repair and sub acromial decompression. (PX 3 at p. 17).

On April 20, 2018 Dr. Tu performed a right shoulder arthroscopic sub acromial decompression, distal clavicle excision and extensive debridement at Loyola Ambulatory Surgery Center. (PX 3 at p. 108). Dr. Tu reported in his surgical report findings of anterior, superior and posterior labral tearing, which he surgically excised. (PX 3 at p. 108). Dr. Tu started Petitioner on a course of post-surgical physical therapy on April 26, 2018. (PX 3 at p. 14).

By the July 19, 2018 visit with Dr. Tu, Petitioner was continuing to complain of pain in his right shoulder and difficulty with external rotation. (PX 3 at p. 11). In order to evaluate the continued complaints, a new right shoulder MRI was ordered by Dr. Tu. (PX 3 at p. 11). On August 23, 2018 the MRI was completed by Community Imaging of Dupage. (PX 3 at p. 77). Based on the continued complaints of pain and limited

range of motion, as well as the failure to respond to therapy, Dr. Tu prescribed a second right shoulder diagnostic arthroscopy, lysis of adhesion, manipulation under anesthesia and capsulotomy. (PX 3 at p. 9).

On December 14, 2018 the right shoulder manipulation under anesthesia, repeat sub acromial decompression and revision distal clavicle excision was performed by Dr. Tu. (PX 3 at p. 44). Again Petitioner was placed in post-surgical physical therapy. By his evaluation of February 28, 2019 Dr. Tu reported Petitioner had plateaued in his therapy, with continued limitations in external rotation. (PX 3 at p. 5). Accordingly, Dr. Tu referred Petitioner for a functional capacity evaluation in order to determine what permanent restrictions were required. (PX 3 at p. 5).

On March 14, 2019 a FCE was performed at Athletico Physical Therapy. The report of FCE reported that Petitioner failed to meet the job demands in numerous categories, including floor to waist lift, 12 inch to waist lift, waist to shoulder lift, overhead lift and numerous other functional categories. (PX 3 at p. 25). However, the examiner found inconsistent findings and reported the FCE likely did not reflect the Petitioner's true abilities. (PX 3 at p. 24). The Petitioner reported increased neck pain during the course of the evaluation. (PX 3 at p. 25). On March 21, 2019 Dr. Tu released Petitioner with the notation that further treatment is unlikely to improve his right shoulder and, based on the FCE, placed no restriction on the right shoulder use. (PX 3 at p. 4).

On May 9, 2019 Dr. Sam Biafora performed an independent medical evaluation of the Petitioner's right shoulder at the request of Respondent. He reported a diagnosis consistent with Dr. Tu of a labral tear and impingement/rotator cuff tendinitis. (PX 9 at p. 8). He further opined that Petitioner's work injury contributed to his right shoulder condition, confirming Mr. Steele's trial testimony that there is no indication of any condition of the right shoulder that predated the injury. Dr. Biafora further reported that the right shoulder condition was directly caused by his work activities. (PX 9 at p. 8). As of the date of the evaluation, the doctor concluded Petitioner was at maximum medical improvement as to the right shoulder. (PX 9 at p. 10).

Throughout his treatment with Dr. Tu for his right shoulder, Petitioner continued to be followed by Dr. Sokolowski. On his September 11, 2018 visit. Dr. Sokolowski reported the Petitioner had a coexisting cervical radiculopathy, and referred him to a pain management physician. On September 18, 2018 Dr. Henry

Kurzydlowski, of Pain Care Consultants, reported his evaluation findings and plan to proceed with a cervical epidural fluoroscopy. (PX 5 at p. 57). However, on October 12, 2018 Dr. Sokolowski found the injection had not significantly diminished the cervical radicular pain, and planned to proceed with an EMG for evaluation of the peripheral neuropathic process. (PX 5 at p. 50).

The prescribed EMG was performed on October 29, 2018 at Athenos Medical. The report of EMG was abnormal, finding evidence of a cervical radiculopathy affecting the right C5, 6, 7 and the left C6 root levels. (PX 5 at p. 48-9). Based on this EMG, Dr. Sokolowski reported on December 6, 2018 that it confirmed a cervical radiculopathy consistent with the C3-4 pathology and concluded that the patient would require either cervical epidural injections or surgical management for the pain. (PX 5 at p. 44).

Following the release of Mr. Steele from Dr. Tu's care, Dr. Sokolowski saw Petitioner again on April 26, 2019, at which time Petitioner continued to complain of neck pain with radiation to the right arm and periscapular region. On examination on this date, the doctor noted near full range of motion of the right arm, but positive impingement signs on the right and sensory changes in the right C5 and C6 dermatomes. (PX 5 at p. 31). Based on the persistent radiculopathy, Dr. Sokolowski ordered a new MRI. (PX 5 at p. 31).

On June 5, 2019 a cervical MRI was performed at Hawthorne Works Medical Imaging. The report of MRI found, among other findings, a mild disc bulge and superimposed small central disc protrusion at C3-C4, mild to moderate spinal stenosis and mild bilateral neural foraminal narrowing at C3-C4. It reported the ventral aspect of the cervical spinal cord was mildly indented at the C3-C4 disc level. (PX 5 at p. 13-5). Dr. Sokolowski saw Petitioner the same day and, based on his serial clinical examinations and the results of the new MRI, felt he would benefit from a C3-4 Anterior Cervical Disc Fusion (ACDF) surgery. (PX 5 at p. 26). As Petitioner considered his options, Dr. Sokolowski ordered a new FCE to objectively determine his capabilities. (PX 5 at p. 26).

Petitioner completed the Functional Capacity Evaluation on July 3, 2019 at Function First Physical Therapy. The examiner found this was a valid test as Petitioner demonstrated a consistent effort throughout 93.1% of the test, suggesting full effort. (PX 5 at p. 19). The FCE concluded Petitioner could not perform the job of a forklift operator and picker packer. (PX 5 at pp. 19-20).

Petitioner has continued to see Dr. Sokolowski on a regular basis to the date of trial, with his records reporting neck pain with periscapular and arm pain. The doctor continues to order the previously described surgery and is awaiting approval. To the date of the trial in this matter, Petitioner testified that the cervical surgery has not been approved by Respondent and remains pending.

Petitioner credibly testified he continues to experience pain from the neck over his right shoulder on a continuing and regular basis. The pain is always right-sided. The pain is described as like needles inserted into his neck and shoulder. He did acknowledge that the surgeries performed by Dr. Tu allowed him to regain use of his right arm, but that the shoulder surgery did nothing to relieve the pain to his neck and right shoulder. The Petitioner described the pain as extending in a flashlight pattern from his neck over his right shoulder, referring to the pattern that becomes increasingly broad the farther it is from its source.

Dr. Sokolowski testified by deposition. He recited having personally reviewed the MRI images of he September 21, 2017 MRI, and found a disc herniation at C3-C4 with central and right foraminal stenosis, as well as a smaller herniation at C5-C6. (PX 8 at p. 13). As a result, the doctor found a reduction in size of the spinal canal by approximately 55%, causing narrowing of the canal and impingement of the traversing elements. (PX 8 at p. 13-4). The doctor reported that the C-4 dermatomes include the right shoulder and right periscapular regions. (PX 8 at p. 14).

The cervical injection performed by Dr. Kurdzylowki was intended partially as a diagnostic tool. Since Petitioner received some temporary relief, it confirmed for the doctor his diagnosis of cervical radiculopathy. (PX 8 at p. 20).

Dr. Sokolowski reported reading the films of the June 5, 2019 cervical MRI as well, and found a disc herniation at C3-4 with central and right lateral recessed stenosis and a smaller herniation at C5-6. (PX 8 at p. 23). The findings the doctor read on the MRI were significant enough to explain Petitioner's ongoing complaints of pain. (PX 8 at p. 24). The doctor explained his recommendation for surgery as follows:

". . . So he's had at this point two MRI's that show a C3-4 protrusion read by two different radiologists with resultant stenosis. So we know he's got a C3-4 protrusion, which is a type of herniation. He's had an EMG that shows cervical radiculopathy. He's had short-term benefit from an epidural. . . . and the goal is to relieve that herniation, relieve the pressure upon the traversing roots, address the radiculopathy." (PX 8 at p. 27).

Dr. Sokolowski offered his professional opinion that the prescribed cervical surgery for Petitioner is medically necessary as the best opportunity to diminish pain and improve function. (PX 8 at p. 33). Conservative treatment has been tried and failed. (PX 8 at p. 34). Dr. Sokolowski testified that in his opinion Petitioner's current condition is causally related to the work injury, citing in support:

1. The temporal correlation between the onset of symptoms and the inciting event;
2. The diagnosis shortly after the injury by the company clinic of cervicalgia and right shoulder pathology;
3. Confirmatory findings on serial physical examinations;
4. Corroborative findings on multiple MRI studies;
5. Corroborative findings on EMG;
6. Positive short-lived response to an epidural injection directed at the site of pathology. (PX 8 at pp. 35-6).

The doctor explained that in his reading of the EMG report, it was not significant that there was nothing shown at the C3-4 level, as that level is difficult to elicit on an EMG, but Petitioner had abnormal findings on all the roots distal to C3-4. (PX 8 at p. 40).

At Respondent's request, Dr. Edward Goldberg performed an independent medical evaluation of the Petitioner's cervical spine. This examination occurred on July 12, 2019. (RX 2 at p. 8). Dr. Goldberg testified he reviewed the films of the June 5, 2019 MRI and found some minimal bulging at C3-4, but no disc herniation at that level. (RX 2 at p. 10). He did not review the film of the September 19, 2017 MRI. (RX 2 at p. 11). Since there was not a herniation he could identify, Dr. Goldberg opined that Petitioner would not be a candidate for cervical fusion. (RX 8 at p. 11). While not a surgical candidate, the doctor opined he could be managed on oral anti-inflammatories. (RX 8 at p. 14). On examination, he observed a positive impingement sign of the right shoulder and some tenderness to palpation. (RX 8 at p. 12).

Based on history, Dr. Goldberg opined that on the date of the alleged accident Petitioner did injure his cervical spine as a result of his work exposure, but that if there was a herniation, it has now resorbed or otherwise resolved. (RX 8 at p. 13). The doctor noted the Athletico FCE was invalid, but based on his reading

of the most recent MRI, Petitioner could do full duty work from a cervical spine standpoint. (RX 8 at p. 14). The doctor did not see or review the second FCE, but did not feel it would alter his opinion. (RX 8 at p. 29).

Conclusions of Law

The aforementioned Statement of Facts is hereby incorporated into each section of these Conclusions of Law.

Section l(b)3(d) of the Act provides that, in order to obtain compensation under the Act, the employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. 820 ILCS 305/1(b)3(d). To obtain compensation under the Act, Petitioner has the burden of proving, by a preponderance of the evidence, all of the elements of her claim (O'Dette v. Industrial Commission, 79 Ill. 2d 249, 253 (1980)), including that there is some causal relationship between her employment and her injury. *Caterpillar Tractor Co. v. Industrial Commission*, 129 Ill. 2d 52, 63 (1989).

Decisions of an arbitrator shall be based exclusively on the evidence in the record of the proceeding and material that has been officially noticed. 820 ILCS 305/1.1(e). The burden of proof is on a claimant to establish the elements of 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. *Board of Trustees v. Industrial Commission*, 44 Ill. 2d 214 (1969).

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

The Arbitrator finds that the Petitioner has met the burden of proof for accident and the burden of proof necessary to prove causation. In making this finding, the Arbitrator relied heavily on the Petitioner's testimony as to his rendition of the facts. The Arbitrator finds Petitioner's testimony to be credible.

To obtain compensation under the Act, the claimant bears the burden of showing by a preponderance of the evidence, he suffered a disabling injury which arose out of, and in the course of his employment. *Baggett v. Industrial Commission*, 201, Ill 2d. 187, 266 Ill. Dec. 836, 775 N.E. 2d 908 (2001).

The Arbitrator has carefully reviewed and considered all the evidence and finds that Petitioner has proven by the preponderance of the credible evidence that his current current condition is a result of his August 28, 2017, accident, as set forth more fully below.

The sole causal connection issue presented to this Commission is whether Petitioner's current cervical spine condition is causally related to his accident of August 28, 2017. The evidence is not disputed that Petitioner's right shoulder condition was causally connect, as both of Respondent's IME physicians, Dr. Steven Mash and Dr. Sam Biafora opined that the right shoulder condition, and in particular the tear of the labrum and tendinitis were caused by Petitioner's described work exposure. Dr. Biafora concluded that Petitioner had reached maximum medical improvement as to his right shoulder, a finding consistent with the treating doctor, Dr. Tu, who has released Petitioner from his care. However, this opinion was limited to the right shoulder and did not address the cervical spine, which presents the issue before this arbitrator.

This arbitrator concludes that Petitioner's cervical spine condition continues to be causally related to his work exposure of August 28, 2017. The arbitrator concludes that the cervical spine injury was caused by the accident alleged in this case. In relying in his conclusion, Arbitrator relies on Dr. Steven Mash, who performed the first IME of the Petitioner, who opined that Petitioner sustained both a shoulder injury and a cervical radiculopathy. The doctor's opinion was based on his examination of the Petitioner and review of the records including the September 21, 2017 MRI that demonstrated a C3-4 herniation. This finding was consistent with the opinion of the treating doctor, Dr. Mark Sokolowski, and also consistent with the opinion of Dr. Edward

Goldberg who opined that the work exposure initially was related to the cervical condition, although admitting he never reviewed the 2017 MRI.

Despite Dr. Goldberg conclusion that he did not see any herniation when he reviewed the 2019 MRI and did not believe there was a condition that required surgical intervention, Arbitrator gives more credence to the diagnosis of Dr. Sokolowski who reported that he personally read the MRI films and concluded that there was a C3-4 herniation that caused stenosis of the spinal canal and impinged the nerves. Dr. Sokolowski testified that the herniation he observed on the 2019 MRI was consistent with the 2017 MRI and was consistent with Petitioner's complaints of pain. This arbitrator notes that Dr. Sokolowski's reading of the MRI films is consistent with the report of the radiologist who read the June 5, 2019 MRI films.

Dr. Sokolowski's opinion is further supported by objective evidence of record. In particular, an EMG was performed on October 29, 2018 that confirmed a cervical radiculopathy and irritation of nerve roots that innervate the right shoulder. Dr. Sokolowski further ordered a cervical spine steroid injection, which served as a diagnostic tool to confirm the presence of a cervical radiculopathy. Since it provided relief, albeit it temporary, it was a further confirmation of the continuing cervical radiculopathy.

Function First Physical Therapy performed a functional capacity evaluation on July 3, 2019.

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

The Arbitrator finds that all medical benefits are awarded as they are causally related and reasonable and necessary medical expenses.

This arbitrator finds, based on the number of confirmatory tests and supporting radiologist opinions, as well as prior IME opinions, that the opinions of Dr. Sokolowski in this matter are more persuasive than those offered by Dr. Goldberg. This arbitrator therefore adopts Dr. Sokolowski's opinion that Petitioner's current cervical radiculopathy remains causally related to his work exposure and that the prescribed surgical treatment of the cervical spine is causally related and therefore necessary and reasonable.

Petitioner submitted unpaid medical bills of Function First Physical Therapy, Prescription Partners and Dr. Mark Sokolowski. For the following reasons, this arbitrator concludes that the treatment was necessary and reasonable for a causally connected cervical injury.

The bill of Function First Physical Therapy resulted from a FCE performed to obtain an objective basis for Petitioner's work abilities. The prior test at Athletico was invalid and provided little, if any, guidance to the doctors for Petitioner's work abilities. In fact, Respondent benefited from the second FCE as it allowed Dr. Sokolowski to release Petitioner to limited duty consistent with the limitations contained in the FCE. Since the FCE does not evaluate only one body part, its performance was just as applicable to the right shoulder injury as it was to the cervical spine injury. Respondent is ordered to pay to Petitioner the sum of $1,139.58, representing the bill of Function First Physical Therapy reduced to its Fee Schedule rate.

The bills of Prescription Partners relate to medications provided in September and October 2017. This was shortly after the work exposure and before any of Respondent's IMEs. However, on February 14, 2018 Respondent's first IME physician, Dr. Steven Mach, reported affirmatively in response to a question of whether all treatment, testing, therapy, medications, etc. to date had been reasonable. (PX 8, Exh. 3). Based on this opinion, the bills of Prescription Partners are reasonable, necessary and causally related to Petitioner's work exposure. Respondent is ordered to pay to Petitioner the sum of $1,339.24, representing the bill of Prescription Partners reduced to its Fee Schedule rate.

Finally, the bills for medical visits to Dr. Mark Sokolowski between July 17, 2019 and November 16, 2020 are also causally related and should be approved. As found above, Petitioner had continuous pain and was under medical management of his pain pending approval for cervical spine surgery. This arbitrator adopts his findings in Section 2(A), *supra*, relating to causal connection. Accordingly, Respondent is ordered to pay to Petitioner the sum of $427.74, representing the outstanding bill of Dr. Mark Sokolowski reduced to its Fee Schedule rate.

(K.) Whether any prospective medical should be awarded, the Arbitrator finds the following:

Since Petitioner has met her burden of proof as to accident and causal connection, the Arbitrator finds that prospective medical should be awarded. The Arbitrator finds the opinions of Petitioner's treating physicians at Jefferson City Medical Group and Orthopedic Sports Medicine & Spine Care Institute are credible.

The Arbitrator finds that the treating physicians were able to accurately comment on the necessity of prospective future medical care as it relates to the mechanism of injury in this claim

Dr. Mark Sokolowski has prescribed an anterior cervical disc fusion at C3-4 to reduce Petitioner's on-going complaints of pain and to improve function. As the doctor described, while a fusion generally reduces motion of the spine, where pain is already a limiting factor the ACDF is anticipated to actually improve function through the reduction of pain. (PX 8 at p. 27).

This arbitrator adopts his reasoning and conclusions set forth in section 2(A), *supra*, concluding that the prescribed ACDF prescribed by Dr. Sokolowski remains connected to the August 28, 2017 work exposure and is medically necessary to return the Petitioner to maximum medical improvement and to full industrial function. Respondent shall approve and pay for the prescribed ACDF surgery.

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015718
Case Name	ALVARADO, DANIEL v. TERRACOTTA INDUSTRIES, INC.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remand Arbitration
Decision Type	Commission Decision
Commission Decision Number	22IWCC0073
Number of Pages of Decision	35
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Louis G Atsaves
Respondent Attorney	Erin Fiore

DATE FILED: 2/28/2022

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF WINNEBAGO)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL ALVARADO,

Petitioner,

vs.

NO: 20 WC 15718

TERRACOTTA INDUSTRIES, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed under Section 19(b) of the Act by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, notice, benefit rates, causal connection, medical benefits, temporary total disability (TTD) benefits and penalties and attorney's fees, and being advised of the facts and law, reverses the Decision of the Arbitrator for the reasons outlined below. The Commission finds that Petitioner sustained accidental injuries that arose out of and in the course of Petitioner's employment by Respondent on June 12, 2020. The Commission further finds in favor of Petitioner on the issues of notice, causal connection, medical expenses, prospective medical care and TTD benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings as it relates to Petitioner's left knee injury:

1) Petitioner was employed by Respondent as a general laborer on June 12, 2020. (T.7). He offered into evidence Petitioner's Exhibit 2 which was Respondent's job description for his position – officially titled Multi-Machine Operator 1. (PX2). As part of his job duties, Petitioner was assigned to operate a crane on June 12, 2020. (T.10-11).

2) Petitioner identified photographs marked as Petitioner's Exhibit 1 which depicted the staircase and the steel material Petitioner worked with. (T.11-15; PX1). The first photograph showed "[t]he steps that day that I went up and got injured." (T.11; PX1). Petitioner explained that there were about 20 steps, "and then you got to pivot around the other side and go another 20 up until you got the platform until you get in the crane." (T.12; PX1). Petitioner estimated that he was about two stories high when he reached the landing

of the second set of steps. (T.12). Petitioner was required to use this staircase to reach the crane.

3) Petitioner testified as to what he noticed in his left leg on June 12, 2020:

> I was fine that day when I came to work, but I noticed when I got in the crane that day after having a soda with a fellow colleague Emmanuel Alvarado that I noticed when I got into the crane is when I noticed a warming sensation on the inner part of my leg, and I just continued working, because I didn't think of it as anything until I went home and it was really red and it was sore. (T.15; T.44).

4) Petitioner confirmed that he normally started his workday at 8:00 a.m. and that he had his soda break between 1:00 p.m. and 2:00 p.m. on June 12, 2020. (T.15-16). Petitioner stated that after getting the soda, he went up to the crane. This was his fourth time up the stairs. (T.16-17).

5) Petitioner explained that at the top of the stairs, there was a platform and a gate for the crane. (T.13; T.17). After moving the fencing, or gate, and getting into the crane, Petitioner noticed: "So when I got in, I felt my leg kind of like buckled, and I just went in and continued on with my job that day. . ." (T.18). Petitioner testified that after noticing symptoms in his left knee, he continued to work for an hour or so and then he came down from the crane to speak with Dennis Pineda, his supervisor. (T.19-20).

> I took my time holding the railing and I walked – I came down the steps. And then I had ran into him, but he was busy. So he told me he'd get back to me. But then before I left that day, I distinctly went up to him and mentioned that I felt like a warm, tingling sensation. And he told me to keep – to let him know how I felt that Monday; and if I didn't feel well, that I would have to go get that looked into. (T.20).

Petitioner confirmed that he had one conversation with Mr. Pineda on Friday, June 12, 2020 at approximately 4:00 p.m. (T.22-23).

6) During cross-examination, Petitioner confirmed that he had neither fallen nor tripped on the stairs, that his foot had not gotten stuck, and that he had not made a misstep. Petitioner was also not rushing up the stairs and was only carrying his walkie-talkie on the date of injury. (T.42-43). Petitioner was not aware of anything wrong with the stairs. (T.43).

7) Petitioner also testified during cross-examination that when he left his shift on June 12 he was in pain and had difficulty walking. He confirmed that prior to June 12, he had not experienced knee pain, his left knee did not affect his daily life activities, he had no issues walking and he could perform his work duties. (T.44-46).

8) Petitioner iced his leg over the weekend. He believed he had overworked himself and that his condition would resolve on its own. (T.24; T.60).

9) Petitioner returned to work on Monday, June 15, 2020. (T.24). He testified that he saw Mr. Pineda at the start of his work shift at 8:00 a.m. and told him he was not feeling well. Mr. Pineda allowed Petitioner to go home for the day. According to Petitioner, Mr. Pineda told him "to go get a doctor's note and basically go get checked out." (T.25-26; T.48). Petitioner left work after an hour in an Uber; he had been dropped off at work earlier. He did not perform any work on June 15, 2020. (T.26-28).

10) During cross-examination, Petitioner testified that he was able to walk into his work building on his own on June 15, but it was difficult to do so. (T.46-47). He also testified that he had not reported any kind of specific work accident until he spoke with Mr. Pineda on June 15. (T.47).

11) When Petitioner returned home, he noticed that his left knee was irritated. "I couldn't figure out what was wrong with it. It was hard to walk on it. It was buckling a lot. It was hard getting up and downstairs. It was hard to sleep. I'd wake in the middle of the night with pain." (T.28). He further testified that right when he got home, his leg had felt alright "until I think I applied the ice is when it started to irritate me." (T.28). The buckling of his leg happened later that evening. (T.28).

12) Petitioner first sought treatment at Physicians Immediate Care on June 17, 2020. (T.29; T.48; PX4). The history recorded stated that Petitioner had been experiencing constant joint pain in the left knee since Friday, June 12, 2020. The medical record further indicated, "Pt does not recall any particular activity or injury which caused the pain." The record noted that Petitioner worked as a general laborer in a steel factory, and that he had a longstanding history of knee problems – "lt knee was always larger than rt from birth." Petitioner denied any feeling of giving out or locking. Petitioner reported greater pain on the lateral side than medial side. He also had numbness and tingling. (PX4).

13) X-rays completed on June 17, 2020 revealed no fractures or avulsions; but mild degenerative changes were noted. (T.29; PX4). Petitioner was diagnosed with a left knee sprain/strain. The physician prescribed ibuprofen and Tylenol. Icing the knee and wearing a knee brace at all times except sleeping were recommended. The medical record also stated, "Petitioner was ill and seen in our clinic for knee strain, please excuse him." (PX4).

14) Petitioner testified that he was given a work status form which allowed him to return to desk duty at work and he provided that form to Mr. Pineda. (T.29-30; T.48). Petitioner additionally completed an accident report on June 18, 2020. (T.30; RX1).

15) Respondent's Exhibit 1 was the Employee Accident Statement. (T.30; RX1). The date of accident was listed as June 12, 2020 and June 18, 2020 was listed as the date the accident was reported to Mr. Pineda. The report stated that Petitioner had been walking up and down the stairs to the crane on Friday when he sprained his knee or muscle on the left side of the knee cap. (RX1). Petitioner confirmed that he did not speak to anyone else in management

about the accident other than Mr. Pineda, and he did not see any witness accident statement completed by Mr. Pineda. (T.31). Petitioner testified that he was not provided with light duty work. (T.29; T.31).

16) During cross-examination, Petitioner testified that when he returned to work on June 18 he had been limping. (T.48-49). At arbitration, Respondent's attorney showed Petitioner video footage marked as Respondent's Exhibit 6. There were six video clips dated June 11, 2020 through June 18, 2020, wherein Petitioner appeared to be walking into work and leaving work. In the videos, he appeared slightly slouched and walking with a waddle or limp. Petitioner confirmed that he had reviewed a series of videos the morning of trial with his attorney and that the videos depicted him walking in and leaving work. (T.50).

17) Petitioner followed-up with Physicians Immediate Care on June 24, 2020. The medical record stated that Petitioner's left knee pain was now intermittent and mild. Again, Petitioner did not recall any activity or injury which caused the pain. On this date, Petitioner was given work restrictions of no prolonged standing, no lifting over the shoulder greater than 25 pounds using either arm, no lifting from waist to shoulder greater than 25 pounds using either arm, no lifting below the waist greater than 25 pounds using either arm, and he was directed to wear a splint. Petitioner could sit down as needed for knee pain and using a knee brace and ice were recommended. (PX4).

18) Petitioner visited Physicians Immediate Care again on July 1, 2020 before seeking treatment with Dr. Joshua Alpert on July 6, 2020. (T.31-32; PX4). Petitioner's restrictions were changed on July 1, 2020 to no climbing ladders entirely, performing only sit-down work, and it was recommended that he wear a knee brace. The medical record also stated that this was a non-work-related injury. Petitioner had reported moderate left knee pain at the July 1, 2020 appointment. (PX4).

19) On July 6, 2020, Petitioner consulted with Dr. Alpert regarding his left knee pain which he reported occurred at work. The medical record noted that Petitioner worked as a general laborer for Respondent. "He was at work on a Friday, June 12, 2020, when he felt pain going up and down stairs and into and out of a crane repetitively." The record stated that Petitioner never had an issue with the left knee prior to this and that it swelled up over the weekend. Petitioner also reported shooting pain with walking, and he had pain medially and laterally. Examination of the left knee revealed swelling, effusion, tenderness with palpation of the patella and patellar tendon. Range of motion on passive and active extension was zero degrees. Range of motion on passive flexion was 135 degrees. Petitioner indicated pain during range of motion testing. There was also crepitus noted. Petitioner was unable to perform a straight leg raise. Dr. Alpert further noted that medial and lateral McMurray tests were positive, there was tenderness to palpation at the medial and lateral joint lines, and Petitioner had calf tenderness. Dr. Alpert's assessment was a left knee strain and possible meniscus tear that were work-related. (PX6).

20) Dr. Alpert also reviewed the x-rays of the left knee, "which do show some mild to moderate patellofemoral arthritis. It seems the swelling he is having is either from a meniscus tear

from a work injury or irritation of the arthritis due to repetitive use at work." Dr. Alpert ordered an MRI and took Petitioner off work. (T.32-33; PX6).

21) Petitioner completed the MRI of the left knee on July 9, 2020. The results revealed no significant effusion and subcentimeter loose body posteriorly. The lateral meniscus showed mild lateral extrusion of the body but no discrete tear. The medial meniscus showed high-grade tearing of the posterior root ligament, mild medial extrusion and intrasubstance degeneration. There was moderate medial compartment osteoarthritis and mild lateral compartment osteoarthritis. Severe lateral patellofemoral arthropathy with high-grade chondral loss, mild lateral patellar subluxation, and shallow trochlear groove suggesting dysplasia were also noted. (PX6).

22) Dr. Alpert reviewed the MRI results on July 10, 2020. "His MRI findings show advanced arthritic changes under the kneecap, as well as some mild to moderate arthritis medially. It also shows a relatively significant medial meniscus tear." Dr. Alpert removed Petitioner's knee brace at the appointment and noted swelling, pain over the medial joint line, pain laterally and pain underneath the kneecap. Petitioner was able to flex and extend, sensation was intact to light touch, there was no significant instability and Petitioner was neurologically intact. Dr. Alpert diagnosed Petitioner with an aggravation of knee arthritis and a medial meniscus tear. Dr. Alpert administered a cortisone injection to Petitioner's left knee on July 10, 2020. He further recommended a home exercise program and prescribed Mobic. Dr. Alpert gave Petitioner restrictions of desk-work activities only. (T.32; PX6).

23) Petitioner returned to Dr. Alpert on July 27, 2020. The medical record stated that Petitioner "had a work-related injury where he twisted his knee. He has a medial meniscus tear and some arthritic changes." Despite the injection and anti-inflammatory medication, Petitioner reported a fair amount of soreness in the left knee and was limping. Dr. Alpert recommended physical therapy and kept Petitioner's work restrictions the same. (T.32; PX6).

24) Petitioner commenced physical therapy for his left leg at Athletico. (T.33). The Initial Evaluation took place on July 30, 2020 and noted that Petitioner reported left knee pain after climbing into a crane on June 12, 2020. (PX6).

25) Petitioner testified that he last saw Dr. Alpert on September 14, 2020. (T.34). On this date, Dr. Alpert stated that despite conservative treatment, Petitioner remained symptomatic. He recommended a left knee arthroscopy with partial medial meniscectomy, chondroplasty and debridement. "He understands that any pain from the medial meniscus tear would be cured with the surgery, but the osteoarthritic pain would not be helped with surgery." (PX6). Dr. Alpert provided Petitioner with a work status on September 14, 2020 that stated, "Desk work only." (PX8). Petitioner confirmed that he has not seen any other doctors as of the date of arbitration. (T.35). He remained off work. (T.35).

26) Respondent sent Petitioner for a Section 12 examination with Dr. Charles Bush-Joseph on September 28, 2020. (T.35; PX8). Dr. Bush-Joseph reviewed Petitioner's medical records,

the job description and photographs of the crane entrance area. The history of injury recorded was:

> The patient claims that on June 12, 2020, he was heading up approximately 40 stairs into his crane when he developed pain, soreness of his left knee. He repeatedly denied prior injury, treatment, or trauma to the knee and also denied any specific events of trauma such as a fall, twist or other occurrence as well as ascending the stairs. He states he has been performing the same activity over the past 2-1/2 years. (PX8).

27) Dr. Bush-Joseph's physical examination revealed bilateral lower leg thickening with left greater than right varus alignment. Petitioner walked with a mild waddling gait. In the supine position, Petitioner had obvious varus deformity with significant varicose veins of the left knee. He also had an eight-degree flexion contracture, could not flex further than 90 degrees, and had bony crepitation both medially and laterally and over the patellofemoral joint. (PX8).

28) Dr. Bush-Joseph took x-rays of Petitioner's left knee at the appointment. Dr. Bush-Joseph's report stated that x-rays demonstrated moderate-to-severe medial compartment arthritis of the left knee with varus alignment. There was mild osteoarthritis of the right knee with slight varus alignment. There was also end-stage patellofemoral arthritis with osteophytes and loose body formation. Dr. Bush-Joseph diagnosed Petitioner with moderate-to-severe osteoarthritis of the left knee and mild osteoarthritis of the right knee. Dr. Bush-Joseph stated in his report that the osteoarthritis was longstanding and of unclear etiology. He added: "[G]iven his age, the radiographs are suggestive of significant remote trauma. I believe his underlying condition is degenerative in nature. The mere active rising up and down stairs is the simple activity of daily living. The patient denies any traumatic injury, fall or twist that would accentuate his symptoms." Dr. Bush-Joseph also indicated that the MRI was consistent with longstanding osteoarthritis of the left knee. (PX8).

29) Dr. Bush-Joseph opined: "The current conditions are due to his underlying degenerative condition and seem to be unrelated to any specific work activity of June 12, 2020." He stated that Petitioner's condition was no more than a temporary exacerbation of his underlying condition. Notwithstanding current causation, Dr. Bush-Joseph found Petitioner's treatment to be reasonable and appropriate and that Dr. Alpert's recommended treatment was typical for patients with incapacitating osteoarthritis of the knee. "His young age precludes him from consideration of joint arthroplasty." (T.35; PX8).

30) On November 16, 2020, following a request from Petitioner's counsel, Dr. Alpert authored a narrative report responding to Dr. Bush-Joseph's Section 12 report. Dr. Alpert reviewed his own medical records, Dr. Bush-Joseph's Section 12 report, the pictures from Petitioner's work and the job description. On this date, Dr. Alpert's current diagnoses for Petitioner were left knee patellofemoral arthritis, severe mild-to-moderate medial and lateral compartment arthritis with a medial meniscus tear. With respect to causal connection, Dr. Alpert wrote:

> [T]he arthritic changes in his left knee were pre-existing and also certainly these arthritic changes appear to be asymptomatic. If what the patient states to me in the office, as well as the job duties are accurate, and the pictures I reviewed for him to go up into a crane including going up 35-40 steps multiple times in a day, then that certainly is a competent mechanism for a patient such as Mr. Alvarado who is 38 and young to aggravate and irritate his pre-existing asymptomatic osteoarthritis to become symptomatic and irritate his pre-existing asymptomatic meniscus tear that likely is degenerative to also become symptomatic. Of note, the meniscus also appears to be slightly extruded on his MRI, which certainly can occur from repetitive activities including repetitive going up and down multiple stairs in a day. (PX7).

31) Dr. Alpert continued to recommend only desk work activities and the left knee surgery. In support of overall causation, Dr. Alpert again reiterated as he had in his medical records that Petitioner never had a problem with his left knee in his life until his injury at work. However, Dr. Alpert stated in his report:

> [I]f there are medical records that would state that the patient had left knee pain before his complaints on June 12, 2020, if there are medical records that state that he saw a doctor prior to June 12, 2020, or if he had injections prior to June 12, 2020, then certainly my opinion could and would change. (PX7).

32) Petitioner testified that he continued to ice his leg and testified that his left leg pulsated a lot and turned red in certain areas. “I tend to wake up in the middle of the night with cramps or even pulling, and it feels really numb. It’s just something I’ve never dealt with.” (T.39).

33) Petitioner testified that at home, he would stay on the main floor because it was difficult to go up and down the stairs. (T.50). He did not have issues using stairs prior to June 12, 2020. (T.50-51).

34) Petitioner further confirmed on re-direct that the stairs he used at work were not found outside of work. (T.58-59). He did not use those stairs at work after June 12, 2020. (T.59).

35) Petitioner testified that he never injured his left knee prior to June 12, 2020, but he did recall slipping and falling on some ice previously. (T.39; T.52). Petitioner was treated at Sherman Hospital on December 14, 2010. The history recorded stated that Petitioner had slipped on ice in his driveway which caused him to twist his left knee. He complained of pain and swelling in the left knee. The record further stated that Petitioner had reported a patellar dislocation when he was younger, “he states immediately after the injury he palpated his knee and felt that his patella was dislocated laterally, he states he pushed on the patella and flexed his knee and believes he reduced the patella.” X-rays revealed large knee joint effusion, but no evidence of an acute fracture or dislocation. Petitioner was

diagnosed with a left knee strain, left knee effusion and possible internal knee derangement. Petitioner's leg was placed in a knee brace and he was instructed on crutch use. (T.40; RX9). Despite this history, Petitioner confirmed that he first noticed his symptoms of pain, cramping and buckling while at home on June 15, 2020. (T.40-41).

36) Respondent's counsel also had Petitioner review certified records from Advocate Sherman Hospital at arbitration. (RX9). He confirmed that he reported to the emergency room on May 5, 2018 for complaints of right leg pain/sharp posterior thigh pain. "Works at heat related steel mill in crane, mostly sitting, 8 hour shifts. Felt a pop in the back of his leg this morning, got to work today and noticed that he is kind of dragging his foot." Petitioner was diagnosed with a strain of the right hip and thigh. (T.52-53; RX9). The medical records also stated that Petitioner had a bad left leg and had dislocated his knee a number of times. (RX9).

37) Petitioner did not recall any prior work accidents with Respondent. (T.54). Respondent's attorney questioned Petitioner on Respondent's Exhibit 7 – an Employee Accident Statement dated February 28, 2020. (T.54; RX7). Petitioner was listed as the injured employee and explained: "I was straightening material on press 4 and pinched my leg in between the material." (RX7). After reviewing Respondent's Exhibit 7, Petitioner clarified that he did recall having a prior work injury. "I just didn't remember the date of the time this happened." (T.55). Respondent's Exhibit 8 was the Supervisor Incident Report which was consistent with Respondent's Exhibit 7 and added that Petitioner "pinched about 3" of his skin on his left thigh." (RX8). At arbitration, Petitioner revealed a scar about three inches above his knee. (T.56). Petitioner was treated in the first aid department and he also iced his leg. (T.56). Petitioner did not see a doctor for this injury. (T.57; T.60-61).

38) Respondent called Dennis Pineda as its witness. (T.62). Mr. Pineda confirmed that he had worked for Respondent for 10 years. His job title was first shift mill product supervisor. "I manage and I supervise the first shift team in the products division." (T.63).

39) Mr. Pineda confirmed that he knew Petitioner and that Petitioner worked for Respondent on the first shift as a crane operator/general laborer. (T.63-64). Mr. Pineda testified that Petitioner did not have to use the crane every day; some days Petitioner would be working entirely on the floor. (T.65). Petitioner would also not be using the crane for an entire shift. (T.65).

40) Mr. Pineda confirmed that Petitioner was at work on June 12, 2020. (T.67). He testified that he did not notice anything different about Petitioner during his shift on June 12, 2020 and denied that Petitioner came to his office in the afternoon of June 12, 2020 to report anything to him. (T.67; T.69).

41) Mr. Pineda saw Petitioner in the morning on June 15, 2020. "I seen him mention to me that he was having pain in his left leg like about a number 9. And that it may have been from – and his leg sometimes gets like that heat and so that's what he mentioned to me." (T.68; T.79). Mr. Pineda further testified, "I asked him, because I had seen his facial expression, and it seemed like there was something going on. So that's when I asked him what's going

on, how you doing." (T.68). Mr. Pineda stated that he did not want Petitioner to aggravate his leg, so he gave Petitioner permission to go home. (T.69). Mr. Pineda testified that had Petitioner reported a work injury on June 15, an incident statement and accident investigation would have been completed. (T.69). Mr. Pineda denied telling Petitioner that he needed to see a doctor. (T.69).

42) Mr. Pineda confirmed that Petitioner did report a work injury on June 18. "He had mentioned that he was working on the 12th, that Friday, going up and down the stairs, and I guess in that area he had heard a pop in his leg." (T.70). Petitioner had reported to Mr. Pineda that he had experienced a pop in his knee, and when Mr. Pineda asked why he did not report this previously: "He had mentioned that he was going to ice it down and try to take care of it at home." (T.70).

43) Mr. Pineda testified that Petitioner had reported another work accident prior to June 12, 2020. (T.70). "I know he had injured his leg, left leg. He had pinched it on some material." (T.71). Mr. Pineda confirmed that that injury occurred on February 28, 2020 and an accident report was completed the same day. (T.71). Mr. Pineda also knew that Petitioner had a history pertaining to his left leg. "He had mentioned that, you know, maybe in birth he had an abnormality, and he was also involved in an accident." (T.72).

44) Prior to June 12, 2020, Mr. Pineda had observed Petitioner periodically rubbing his leg or taking breaks. (T.72). Petitioner would also miss at least one day of work per year due to his leg condition. (T.73-74). Mr. Pineda did not recall seeing Petitioner have trouble using the stairs prior to June 12, 2020. (T.73). With respect to walking, Mr. Pineda testified, "I don't know if he had a problem. I know he walked, you know, with you know not – walked with a little bit of a limp or something . . ." (T.73).

45) Mr. Pineda identified Respondent's Exhibit 2 – a Witness Accident Statement. (T.74; RX2). "This is a statement that was written by myself the day that Mr. Daniel Alvarado came in and reported his injury." (T.74). The report provided three dates: the June 12, 2020 alleged date of accident, the June 15, 2020 date "when Daniel complained about pain in his Left leg," and the June 18, 2020 date "when Daniel came in and said he injured his leg here at TC." (T.74-75; RX2). Mr. Pineda confirmed that this was the first time Petitioner reported an injury to him. (T.75-76; T.91).

46) Respondent's Exhibit 2 – the Witness Accident Statement was three pages. The first page was consistent with what Mr. Pineda testified to with respect to the timeline of injury, complaints and reporting. The second page was a type-written dictation of a conversation between Mr. Pineda and Petitioner. The report stated, "On Friday I came to work (6-12-2020) I had a pop in my left knee, so I just continued to work." The report also stated that Petitioner felt the pop in his left knee some time after 12:00 p.m. and he was going up the stairs when this occurred. The pain began to bother Petitioner when he got home. The report further stated, "I felt the pop on the top of my knee. I was in the crane and bent my left knee a few times trying to stretch it and felt another pop, so I thought it was going to feel better, so I continued to work." The report next stated, "The second pop felt like it was a

relief and it felt like I could keep working." After this second pop, Petitioner reported excruciating pain. (RX2).

47) Respondent's Exhibit 3 was the Illinois Form 45: Employer's First Report of Injury. The report was dated June 18, 2020 and stated that Petitioner was walking up the stairs to the crane when he heard a pop and injured his left knee. The date and time of accident was listed as June 12, 2020 at 12:00 p.m. The report was completed by Rich Geilfuss, EHS Manager. (RX3).

48) Respondent called its second witness, Erich Hoffman, to testify. (T.99). Mr. Hoffman had been employed by Respondent for 23 years. His current job title was HR and EHS Director. Mr. Hoffman's duties included hiring, training, benefits and overseeing separation of employment. He knew Petitioner. (T.100).

49) Mr. Hoffman explained Respondent's attendance policy which involved a point system. "[A]n employee would be discharged at 9 points." (T.101). Mr. Hoffman confirmed that Petitioner was no longer employed by Respondent. (T.38; T.101). "His employment ended because – on self-resignation, he refused to come back to work." (T.101-102). Mr. Hoffman identified Respondent's Exhibit 5. (T.37; RX5). It was a letter sent to Petitioner regarding the September 28, 2020 Section 12 examination and the determination that Petitioner had reached MMI. Mr. Hoffman explained that Petitioner had exhausted all his paid time off, FMLA and short-term disability benefits. Petitioner was provided with a leave of absence period. Mr. Hoffman testified that he had a discussion with Petitioner on October 29 and asked that Petitioner return to work on November 4. "[H]e did fail to return to work or call in, so we considered that self-resignation. And his employment ended effective November 9, 2020." (T.35; T.102-103; RX5). Petitioner earlier explained, "I was told to, but I just couldn't. It's hard to do anything." (T.38).

50) Mr. Hoffman further testified with respect to reporting workers' compensation accidents and how reports were stored. (T.103-104).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972). The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties.

The Arbitrator had noted that Petitioner's injury was the result of using stairs, analyzed the claim under a neutral risk theory, and concluded that Petitioner did not sustain a work-related accident. By its Brief, Respondent argued similarly, emphasizing that there was no evidence of any defect in the subject staircase, and the record was confusing as to the mechanism of injury and as to when Petitioner reported the accident. Respondent claimed that Petitioner asserted a specific injury while sitting in the cab of a crane at work on June 12, 2020, but the medical records and

exhibits submitted at trial indicated that the injury occurred while ascending stairs. Respondent additionally argued that Petitioner's left knee condition was pre-existing.

Respondent disputed that Petitioner sustained a repetitive trauma injury with a manifestation date of June 12, 2020. "Petitioner presented no testimony about prior stair use. Instead, he testified as to how many times he used the stairs on June 12, 2020." (Respondent's Brief, pg. 14). Respondent stated that Petitioner testified to sometimes using the stairs up to eight times a shift or not at all. "That amount of stair usage is not enough to prove a repetitive trauma injury from traversing stairs." (Respondent's Brief, pg. 14). Respondent clarified in its Brief, that there were 15 stairs on the first level, a landing, and then 17 more stairs.

Petitioner, by his Brief, argued that Petitioner's injury was the result of performing employment-related acts: "Petitioner was instructed to go up the steep industrial staircase depicted in the photographs in evidence (Px1) to operate a crane . . ." (Petitioner's Brief, pg. 10). Petitioner admitted that Petitioner's and Mr. Pineda's testimonies at arbitration were confusing. He further alleged that his injury was the result of repetitive trauma which clearly manifested on June 12, 2020.

In reviewing the evidence, the Commission notes Petitioner's testimony that on June 12, 2020, he had climbed the stairs to the crane about three to four times. There was discrepancy regarding the number of stairs, but the photographs (PX1) and Respondent's Brief provided a close estimate as to the type and number of stairs. Petitioner stated that he had noticed symptoms in his left leg after his soda break and after he got in the crane on June 12, 2020. Petitioner continued to work that day and his symptoms worsened after he left work and went home.

The first medical record from Physicians Immediate Care, dated June 17, 2020, noted that Petitioner had been experiencing constant joint pain in the left knee since Friday, June 12, 2020. The medical record also noted that Petitioner did not recall any particular accident but indicated that Petitioner worked as a general laborer in a steel factory. Dr. Alpert's July 6, 2020 office visit note documented the June 12, 2020 alleged accident date and that Petitioner felt pain after going up and down stairs and into and out of a crane repetitively. The Athletico physical therapy notes from July 30, 2020 indicated that Petitioner reported left knee pain after climbing into a crane on June 12, 2020. Similarly, Respondent's Section 12 examiner, Dr. Bush-Joseph, noted that Petitioner reported pain and soreness in the left knee after climbing stairs into the crane on June 12, 2020; Petitioner had denied any traumatic injury, fall or twist.

The various accident report/witness statements also noted the June 12, 2020 accident date and that Petitioner reported injury to his left knee after taking the stairs to the crane. Specifically, Respondent's Exhibit 2 – the Witness Accident Statement – stated, "On Friday I came to work (6-12-2020) I had a pop in my left knee, so I just continued to work." The report also stated that Petitioner felt the pop in his left knee some time after 12:00 p.m. and he was going up the stairs when this occurred. The report further stated, "I felt the pop on the top of my knee. I was in the crane and bent my left knee a few times trying to stretch it and felt another pop, so I thought it was going to feel better, so I continued to work." The report next stated, "The second pop felt like it was a relief and it felt like I could keep working." After this second pop, Petitioner reported excruciating pain. Respondent's Exhibit 3 was the Illinois Form 45: Employer's First Report of

Injury. The report was dated June 18, 2020 and stated that Petitioner was walking up the stairs to the crane when he heard a pop and injured his left knee. The date and time of accident was listed as June 12, 2020 at 12:00 p.m. The report was completed by Rich Geilfuss, EHS Manager. Respondent's video surveillance did not contradict the evidence with respect to accident. When Petitioner formally reported his injury to Mr. Pineda on June 18, 2020, Mr. Pineda explained: "He had mentioned that he was working on the 12th, that Friday, going up and down the stairs, and I guess in that area he had heard a pop in his leg." (T.70).

The Commission will first address Petitioner's claim that his left knee injury was the result of repetitive trauma. Our Supreme Court case of *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 155 Ill. 2d 524 (1987), defined this concept. The issue raised in *Peoria County Belwood Nursing Home* was whether an injury sustained as a result of work-related repetitive trauma was compensable under the Workers' Compensation Act without a finding that the injury occurred as a result of one specific incident traceable to a definite time, place and cause. *Id.* at 527. The Court answered in the affirmative and explained: "[T]he purpose behind the Workers' Compensation Act is best served by allowing compensation in a case like the instant one where an injury has been shown to be caused by the performance of the claimant's job and has developed gradually over a period of time, without requiring complete dysfunction." *Id.* at 529.

In the case at bar, neither Petitioner's testimony nor the medical records provided any evidence of left knee complaints as a result of his work activities that had been ongoing or gradually developing over a period of time, and which finally manifested on June 12, 2020. While Petitioner may have had pre-existing issues related to his left knee, the medical evidence did not reveal any ongoing issues that were or may have been work-related. In fact, Petitioner testified that he was "fine" when he arrived at work on June 12, 2020. Petitioner reported to Dr. Alpert on July 6, 2020 and to Dr. Bush-Joseph on September 28, 2020 that he never had any issue, injury, treatment or trauma to the left knee prior to June 12, 2020. Petitioner's alleged work injury was not the result of repetitive trauma as defined by case law.

What the evidence demonstrated, however, was that Petitioner sustained a specific injury to his left knee on June 12, 2020 – an injury traceable to a definite time, place and cause.

> To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment. (Citation omitted). 'In the course of employment' refers to the time, place and circumstances surrounding the injury. (Citation omitted). That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment. (Citation omitted). It is not enough, however, to simply show that an injury occurred during work hours or at the place of employment. The injury must also 'arise out of' the employment. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 203 (2003).

Petitioner was "in the course of employment" at the time of the injury; he was working as a crane

operator on June 12, 2020, going up the stairs to get in a crane when he noticed symptoms in his left knee. With respect to the "arising out of" component, our Supreme Court instructed as such in *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848:

> The first step in risk analysis is to determine whether the claimant's injuries arose out of an employment-related risk—a risk distinctly associated with the claimant's employment. (Citation omitted). As noted above, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* at ¶ 46.

Per *McAllister*, the first step is to determine whether Petitioner's injuries arose out of an employment-related risk. Here, Petitioner's injuries arose out of his employment because he was performing an act that he would be reasonably be expected to perform incident to his assigned duties. Although Respondent argued that the record was confusing as to the mechanism of injury, the fact remains that Petitioner was injured while performing his work-related duties as a crane operator for Respondent on June 12, 2020. Respondent's witnesses did not dispute or rebut Petitioner's testimony of having to negotiate a staircase that was approximately two stories high in order to access and enter the crane. The evidence demonstrated that Petitioner noticed symptoms while both climbing the stairs and getting in the crane. This evidence, as well as the time the injury occurred, were consistent throughout the record. Additionally, Petitioner, the subject staircase, and the crane were all on Respondent's facility at the time of the injury.

Having determined that Petitioner encountered an employment-related risk, there is no need to address whether Petitioner's knee injury is compensable under a neutral-risk analysis. *McAllister v. Ill. Workers' Comp. Comm'n*, 2020 IL 124848, ¶ 66; see also *Flex-N-Gate Logistics v. Ill. Workers' Comp. Comm'n*, 2020 IL App (4th) 190467WC-U, ¶28 and ¶30. (The arbitrator determined that the claimant sustained a work-related injury while traversing stairs on the employer's property. The Commission affirmed the finding but utilized a traveling employee theory. The Appellate Court affirmed the Commission's finding of a work-related accident but emphasized *McAllister*: "Traversing those stairs belonged to or was connected with what the claimant had to do in fulfilling his job duties. Thus, walking up the stairs at the Danville facility was an act that the claimant might 'reasonably be expected to perform incident to his assigned duties.' Because he was injured while walking up those stairs, the claimant's injuries are compensable." The Appellate Court stated that it need not address either neutral risk or traveling employee arguments).

Based on the foregoing, the Commission hereby reverses the Arbitrator's Decision and finds that Petitioner proved by a preponderance of the evidence that he sustained an accident that arose out of and in the course of his employment by Respondent; namely, Petitioner sustained a specific injury at work on June 12, 2020 while traversing stairs and getting in a crane.

With respect to the issue of notice, the Arbitrator considered this issue moot. In reversing the Arbitrator's Decision on the issue of accident, the Commission has considered and so finds that Respondent received proper notice of Petitioner's injury. Petitioner and Respondent's witness, Mr. Pineda, testified to completing accident reports on June 18, 2020 – well within the 45-day period provided under the Act.

The Arbitrator also made findings as to causal connection even though the Arbitrator found that Petitioner did not sustain a work-related accident. The Arbitrator indicated that the opinions of Dr. Bush-Joseph were more persuasive than Dr. Alpert's opinions, and additionally noted, inter alia, that Petitioner denied any known issues with his left knee prior to June 12, 2020 despite medical records that demonstrated longstanding left leg issues. The Arbitrator did not find Petitioner credible and concluded that Petitioner's current condition of ill-being was not related to the alleged June 12, 2020 injury. By its Brief, Respondent discussed Petitioner's pre-existing left knee condition and stated that its surveillance camera footage demonstrated that Petitioner had no apparent change in his gait following the alleged accident. Respondent stated that the video contradicted Petitioner's testimony that he felt totally normal and then had excruciating pain. Petitioner's supervisor, Mr. Pineda, also testified that Petitioner always walked with a limp.

The Commission finds instead that Petitioner's current condition of ill-being as to his left knee is causally related to the June 12, 2020 work injury. Petitioner testified that he was fine when he came into work on June 12, 2020, and that some time after 12:00 p.m., he had noticed symptoms in his left knee after using the staircase and getting into the crane. Although Petitioner's supervisor, Mr. Pineda, was not aware on June 15, 2020 that Petitioner had injured his left knee at work, Mr. Pineda corroborated Petitioner's testimony that Petitioner was symptomatic in his left knee on Monday, June 15, 2020; Petitioner testified and Mr. Pineda corroborated that Petitioner was sent home an hour later. Surveillance video is consistent with the testimony of both men.

Thereafter, Petitioner sought treatment at Physicians Immediate Care on June 17, 2020. The history of injury noted was consistent with the arbitration testimony and evidence. Petitioner was diagnosed with a left knee sprain/strain. The physician prescribed ibuprofen and Tylenol and made recommendations to ice the knee and wear a brace. Petitioner was also given work restrictions. Dr. Alpert noted Petitioner's June 12, 2020 work injury involving the stairs and crane. Dr. Alpert's July 6, 2020 office visit note indicated that Petitioner never had an issue with the left knee prior to this and that it swelled up over the weekend. Petitioner reported shooting pain with walking and he had pain medially and laterally. Dr. Alpert's examination findings included left knee swelling, effusion, tenderness with palpation of the patella and patellar tendon, and crepitus. Dr. Alpert further noted that medial and lateral McMurray tests were positive, there was tenderness to palpation at the medial and lateral joint lines, and Petitioner had calf tenderness. The July 9, 2020 MRI of the left knee revealed findings of osteoarthritis and a medial meniscus high-grade tear.

The Commission finds that the chain of events supports Petitioner's position that his left knee symptoms and complaints immediately started after his injury at work on June 12, 2020. Petitioner sought treatment less than a week later at Physician Immediate Care. The subsequent evidence indicated a continuous and consistent timeline of left knee complaints and treatment recommendations, including medication, a knee brace, an injection, a home exercise program,

physical therapy, as well as the current recommendation for a left knee arthroscopy. Petitioner was also given work restrictions or taken off work completely.

Respondent's Section 12 examiner, Dr. Bush-Joseph, had diagnosed Petitioner with moderate-to-severe osteoarthritis of the left knee based on his examination, x-rays completed at the Section 12 examination, and Petitioner's MRI of the left knee. Dr. Bush-Joseph opined: "The current conditions are due to his underlying degenerative condition and seem to be unrelated to any specific work activity of June 12, 2020." He stated that Petitioner's condition was no more than a temporary exacerbation of his underlying condition. (T.35; PX8). Dr. Bush-Joseph also indicated that traversing stairs was a "simple activity of daily living," and that Petitioner had denied any traumatic injury, fall or twist on June 12, 2020.

Dr. Alpert similarly noted Petitioner's degenerative findings in the left knee. He acknowledged that the arthritic changes in his left knee were pre-existing and even stated that Petitioner may have had a pre-existing meniscus tear. Notwithstanding, Dr. Alpert testified that these conditions were asymptomatic prior to June 12, 2020. He further opined that climbing the stairs at work was a competent mechanism of injury for a patient, such as Petitioner, who was 37 years old at the time of the accident, to aggravate and irritate his pre-existing asymptomatic conditions. Dr. Alpert's diagnoses for Petitioner's left knee, as of November 16, 2020, were patellofemoral arthritis, severe mild-to-moderate medial and lateral compartment arthritis with a medial meniscus tear.

The Arbitrator, in line with Respondent's position, could not reconcile Petitioner denying prior left knee injuries. It is noted that Dr. Alpert stated in his narrative report that evidence of prior issues with the left knee could change his opinions. Notwithstanding, Petitioner acknowledged slipping and falling on ice in 2010 during direct examination, and despite any reference to a bad left leg, dislocating the knee a number of times, or a longstanding history of knee problems, the evidence did not demonstrate that Petitioner had any ongoing, specific left knee issues following his injury in 2010 that required actual treatment. There was no indication that Petitioner was restricted from the full performance of his job duties, and there were no pending diagnostic tests or imaging, or any surgical recommendations at the time of or immediately prior to Petitioner's June 12, 2020 work injury. The most recent injury in February 2020 involved pinched skin to the left thigh and had nothing to the do with Petitioner's left knee. The Commission therefore finds that Petitioner proved by the preponderance of the evidence that his left knee condition was more than a temporary exacerbation and that his current condition of ill-being is causally related to the June 12, 2020 work injury.

Petitioner had marked the issue of benefit rates on the Petition for Review. However, this issue was not in dispute at the arbitration hearing. In fact, the parties stipulated on the Request for Hearing form that Petitioner's average weekly wage was $587.20. Neither party discussed this issue in their respective Briefs. The Commission considers this issue waived.

With respect to medical benefits and TTD benefits, Respondent disputed liability for payment of benefits on the basis of its position on accident and causal connection. Having found in favor of Petitioner of the issues of accident, notice and causation, the Commission finds Petitioner is entitled to benefits under the Act. The Commission awards the claimed medical bills

identified in Petitioner's Exhibit 3. Notwithstanding current causation, Dr. Bush-Joseph found Petitioner's treatment to be reasonable and appropriate. The Commission further finds that Respondent is entitled to a credit under Section 8(j) of the Act pursuant to the parties' stipulation on the Request for Hearing form which indicated that Respondent was entitled to a credit in the amount of $4,723.51.

The Commission additionally finds that Petitioner is entitled to the treatment recommended by Dr. Alpert including, but not limited to, the left knee arthroscopy. Again, notwithstanding causation and Dr. Bush-Joseph's diagnosis of osteoarthritis of the left knee, he agreed with Dr. Alpert's recommended treatment.

The Commission also awards TTD benefits from June 17, 2020 [the first date of treatment] through March 23, 2021 [the date of arbitration]. Petitioner was either off work or given work restrictions. There was no indication or evidence that Respondent accommodated Petitioner's light duty restrictions. In fact, Respondent's witness and current HR and EHS Director, Mr. Hoffman, confirmed that Petitioner had been using and had used all his paid time off, FMLA and short-term disability benefits. Petitioner was also provided with a leave of absence period.

Petitioner also marked the issue of penalties and attorney's fees on the Petition for Review. However, neither party advanced any arguments in their respective Briefs. The Arbitrator addressed this issue in the Decision and denied Petitioner's request for penalties and attorney's fees. The Arbitrator found that Respondent had a reasonable basis to deny the claim including the initial treating records indicating that the injury was not work-related, "the less-than-obvious existence of an injury without a clear mechanism of injury" and its reliance on Dr. Bush-Joseph's opinions. (Arbitrator's Decision, pgs. 15-16). The Commission finds that a reasonable dispute existed between the parties with respect to accident and causal connection and therefore affirms the Arbitrator's Decision with respect to penalties and attorney's fees.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed on June 4, 2021, is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay all reasonable, necessary, and related medical bills as evidenced in Petitioner's Exhibit 3, pursuant to Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $4,723.51 pursuant to Section 8(j) of the Act for those bills paid by its group medical plan. Respondent shall hold Petitioner harmless for any claims for reimbursement from any health insurance provider.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to the treatment recommended by Dr. Alpert including, but not limited to, the left knee arthroscopy.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner temporary total disability benefits of $391.47 per week for 40 weeks, from June 17,

2020 through March 23, 2021, that being the period of temporary total incapacity for work under Section 8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for Sections 19(k) and 19(l) penalties as well as Section 16 attorney's fees is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all other amounts paid to or on behalf of Petitioner on account of said accidental injury, including the $3,146.00 in non-occupational indemnity disability benefits as stipulated by the parties in the Request for Hearing form.

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 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 $29,200.00. 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 the Circuit Court.

February 28, 2022

CAH/pm

O: 2/17/2022
052

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

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

/s/ *Marc Parker*
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC015718
Case Name	ALVARADO, DANIEL v. TERRACOTTA INDUSTRIES, INC.
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	17
Decision Issued By	Gerald Napleton, Arbitrator

Petitioner Attorney	Louis G Atsaves
Respondent Attorney	Erin Fiore

DATE FILED: 6/4/2021

INTEREST RATE FOR THE WEEK OF JUNE 4, 2021 0.03%

/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)

Daniel Alvarado
Employee/Petitioner

v.

Terracotta Industries, Inc.
Employer/Respondent

Case # **20** WC **15718**

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 **March 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, **June 12, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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 $**30,534.40**; the average weekly wage was $**587.20**.

On the date of accident, Petitioner was **37** years of age, ***single*** 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 $**3,146.00** for other benefits, for a total credit of $**3146.00**.

Respondent is entitled to a credit of $**4,723.51** under Section 8(j) of the Act.

ORDER

Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent.

Petitioner's claims for TTD, medical bills, and prospective medical care are denied.

Petitioner's Petition for penalties and attorneys' fees is denied.

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

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

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

/s/ Gerald W. Napleton — **JUNE 4, 2021**

Signature of Arbitrator

ICArbDec19(b)

STATE OF ILLINOIS)
) SS
COUNTY OF WINNEBAGO)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Daniel Alvarado, Petitioner,	)	
vs.	)	No. 20 WC 15718
Terracotta Industries, Inc., Respondent.	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter was heard by the Arbitrator pursuant to Petitioner's Request for Hearing under Section 19(b) of the Illinois Workers' Compensation Act.

FINDINGS OF FACT

Testimony of Petitioner

Petitioner testified that he was employed by Respondent as a general laborer and that his job duties included assisting coworkers as needed and working a press machine. He was also being trained to operate the crane. His formal job description is in evidence and lists additional duties such as loading and unloading material, using a lift truck, using pneumatic hand hoists, maintaining production records, and performing calibration checks. Petitioner testified that he was in regular contact with Dennis Pineda, his supervisor, who trained Petitioner. Dennis Pineda would be with Petitioner for periods of time at first when he was learning but then would leave Petitioner alone once he "got the ropes." Petitioner testified he had to carry a walkie-talkie radio and use the it to communicate with his coworkers. Petitioner would report to Mr. Pineda's office every morning to receive his radio.

On June 12, 2020, Petitioner was operating the crane and helping as needed. He testified that he ascended and descended the steps to the crane three or four times that day. Petitioner identified the stairs he used to get to the crane in Petitioner's Exhibit 1 and testified that these were the steps he was injured on. He described the steps as being two-stories high, having 20 steps up, a pivot to the side, and an additional 20 steps up until you reach a fenced-in platform that leads to

a Whiting 20-ton crane which moved on rails. The crane lifts and moves steel flats towards rollers where it is pushed into a furnace.

Petitioner testified that he felt fine on the morning of June 12, 2020, when he arrived at work. He started his day around 8am. He stated that he ascended and descended the crane stairs between three and four times that day. Petitioner testified that he took a break for a soda with a co-employee sometime between noon and 2pm and after this break he ascended the stairs to the crane and experienced a warm sensation in his left leg and that his leg "kind of like buckled" when he went into the crane's cab. He believed this was his fourth climb up the stairs of the day. He continued to work for another hour feeding material into furnace three which was being operated by his supervisor, Mr. Pineda. On cross examination, Petitioner was asked to clarify the first moment he felt pain that day. He stated that it was when he was standing in the cab. He further testified that when he had ascended the stairs immediately prior, he had not fallen, tripped, got his foot stuck, nor stepped incorrectly. No defect in the steps was described. He testified he was always rushing for his job but did not testify that he was rushing for any particular reason at that time.

Petitioner testified that his supervisor, Dennis Pineda, was running furnace number three which is close to his crane. He stated that when he descended the crane, he had to take his time and hold the railing and that he was in pain at the end of his shift. He testified that descended the crane stairs and ran into Mr. Pineda but he was busy so he would get back to Petitioner. Petitioner then had a conversation with him shortly thereafter where he said he had a warm tingling sensation and Mr. Pineda told him to let him know how he felt on Monday and they would deal with it from that point. Petitioner clarified this conversation took place in Mr. Pineda's office at the end of his shift, or around four p.m. He testified that Mr. Pineda took a bunch of notes as he said he had to keep a log of it. Petitioner testified he talked to Mr. Pineda once on Friday June 12, 2020, about his knee symptoms. Petitioner was not asked to fill out an accident report that day.

Over the weekend, Petitioner testified that he did nothing but ice his leg. He appeared for work on Monday, June 15, 2020 and stated had difficulty walking into the building on his own. Petitioner testified that Mr. Pineda came up to him while he was standing at furnace number one and asked him how he was doing. Petitioner testified he told him he was not feeling all right and that Mr. Pineda allowed him to go home and to get a doctor's note. T at 25-26. However, he later clarified that they were talking about cleaning out the quench and that was when he reported the

ongoing issue with his leg and was told to go home. He testified he did not even get to cleaning the quench as he went home early by an Uber.

Petitioner testified when he got home, he noticed his knee was irritated, it was hard to walk on, it was buckling a lot and it was hard to navigate stairs. T at 28. When asked how his knee was doing on the day of June 15th, Petitioner testified it was alright until he applied ice and it started to irritate him.

Petitioner testified that he went to Physicians Immediate Care in Elgin on the following Wednesday where Petitioner reported left knee pain since June 12, 2020. The treating record notes he did not recall any particular activity or injury which caused the pain. The note states Petitioner "has had long-standing knee problems, and LT knee was always larger than RT from birth." Petitioner underwent X-Rays and was advised to get a knee brace and if he was unable to see his primary care physician, he can return to the clinic. Petitioner testified he was restricted to desk duty, but the medical records show Petitioner was excused only the day he was treated at the Immediate Care clinic.

Petitioner testified that he reported to work to give the light duty note to Mr. Pineda on June 18, 2020. He testified he only came in because did not want to accumulate points under their attendance policy and that he filled out an accident report at that time. Petitioner reviewed Respondent's Exhibit 1, which was his own accident statement, completed on June 18, 2020. He testified he was limping that day.

On cross-examination, Petitioner was shown Respondent's Exhibit 6, which is security camera footage from Respondent's place of business. Petitioner testified that the clips were footage of him walking in and out of the building. The timestamp on the clips show Petitioner walking in and out of the work building on Friday, June 12, 2020, Monday, June 15, 2020, and Thursday, June 18, 2020. The Arbitrator notes that Petitioner seemed to walk with a very mild limp, but the Arbitrator did not have any basis to compare the Petitioner's gait as depicted in the video versus his usual or pre-accident gait.

Petitioner testified that he returned to Physicians Immediate Care three or four times and was given light duty restrictions that were never accommodated. The medical records indicate that Petitioner was seen on June 17, 2020 and again on July 1, 2020 when he was told to follow-up with an orthopedic physician for a non-work-related injury. His July 1, 2020 work status slip lists

restrictions of avoiding climbing ladders, sit down work only and that they are in effect until July 7, 2020.

Petitioner sought medical care with Dr. Joshua Alpert at Fox Valley Orthopedic Associates on July 6, 2020. He testified that they talked about a Cortisone shot, wearing a knee brace, attending physical therapy and obtaining an MRI. He discussed with the doctor that he felt pain going up and down the stairs into a crane repetitively at work. He reported he has never had issues with the left knee prior to this.

Petitioner underwent an MRI of the left knee on July 9, 2020. The impression was: 1) severe lateral patellofemoral arthropathy as described above with shallow trochlear grooves suggesting trochlear dysplasia which should be correlated with chronic patellar tracking abnormality; 2) moderate medial compartment osteoarthritis, mild lateral compartment osteoarthritis and no fracture; 3) high-grade tearing of the posterior root ligament of the medial meniscus with mild medial extrusion; and 4) no significant effusion with a subcentimeter loose body posteriorly.

Petitioner attended physical therapy at Athletico. Dr. Alpert eventually prescribed surgery on September 14, 2020 consisting of an arthroscopic partial medial meniscectomy, chondroplasty and debridement of the left knee. Petitioner continued to report to Dr. Alpert that he did not have left knee problems prior to this injury.

Petitioner testified that he had not returned to work and that no doctor other than the Section 12 examining doctor has released him to work in any capacity. He was ordered back to work by the Respondent after his release to return to work from Dr. Bush-Joseph, Respondent's Section 12 examiner. He was written off work by Dr. Alpert.

The parties stipulated Petitioner received $3,146.00 in non-occupational benefits. Petitioner further testified he incurred medical bills, some of which were paid by Blue Cross Blue Shield, the insurance policy provided by Respondent. He testified the remaining bills have not been paid. Petitioner's Exhibit 3 is an accounting of the medical bills as well as his fee schedule analysis. According to Petitioner's fee schedule analysis, there are $8,744.92 in charges due from all providers. The exhibit also states that Blue Cross and Blue Shield has a lien for $4,722.51.

When asked about his current condition, Petitioner states that he has been icing his leg. He testified that his leg would pulsate and turns red on the outside and the inside. He feels cramps, pulling and numbness. Petitioner testified the first time he began experiencing these symptoms

was when he was at home after he injured his leg, or after June 15, 2020. T at 40-41. He testified he is taking no medications.

On cross-examination, Petitioner confirmed that he did not fall or trip on the stairs. He was asked how long he had issues using stair to which Petitioner initially testified that he never uses them, but later clarified that he has not used a single stair since his injury on June 12, 2020. Petitioner testified that prior to June 12, 2020, he was able to use stairs in people's houses and in public places. He testified that he does not use stairs like those at Respondent's place of business at his own home or others.

On direct examination, Petitioner testified he never injured his left knee prior to June 12, 2020. Petitioner later admitted that he had slipped on ice once and that the emergency room gave him a brace and crutches. He testified he never had other episodes with his knee after that date and that his left knee did not affect his daily life, is ability to walk or his ability to work or perform daily activities.

On cross-examination, Petitioner was questioned again regarding any prior left knee issues. He testified his knee was in perfect condition prior to June 12, 2020. Petitioner was then given Respondent's Exhibit 9 and asked to review page 61 which is an emergency room record dated May 5, 2018. Petitioner was asked to review the paragraph under History of Present Illness. Although Petitioner reported for treatment to his right leg, this paragraph states, "Has bad left leg, dislocated his knee a number of times." Petitioner was questioned whether he made that statement to the doctors and he answered yes. He later testified he did not remember making that statement.

Petitioner testified that he had one prior work injury at Respondent, on February 8, 2020, and reported it to his supervisor and completed accident paperwork that same day. Petitioner testified he had a bruise on his left leg, about three inches above his knee, when it was pinched by material. Mr. Pineda confirmed this was Petitioner's only prior work accident and it was reported same day.

Testimony of Dennis Pineda

Mr. Pineda testified that he was the first shift mill product supervisor, and that he knew Petitioner as an employee on the first shift. Mr. Pineda testified that Petitioner was a crane operator/laborer which involved working in the crane, loading and unloading bundles and if he was not on the crane, then he was on the floor sweeping and pulling down bars. Mr. Pineda testified

that Petitioner would not have to use the crane every day for his job as some days he would be entirely on the floor. The amount of times he would have to go up to the crane could vary from zero to six or eight times per shift. However, there were times that he would never use the stairs at all.

Mr. Pineda testified about accident reporting procedures for Respondent. If an employee is injured, they are to find their lead man or management, report the incident and then management starts an investigation. The supervisor then completes statements and does an internal report. If a person needs medical treatment, they determine the severity of it and can do first aid type treatment there or they are sent to the emergency room. Mr. Pineda testified that Respondent always uses Centegra McHenry Hospital if an injured worker needs medical treatment.

Mr. Pineda was asked to recall the events of June 12, 2020 to which he testified he noticed nothing different about Petitioner and denied that Petitioner came into his office the afternoon. Mr. Pineda testified he does not keep a log of all conversations he has in his office but does document any conversation about a work injury. He testified he never told Petitioner to go home on June 12, 2020 and come back Monday if he felt better. Petitioner was regularly scheduled off of work on Saturdays and Sundays.

Mr. Pineda testified that Petitioner next worked on Monday, June 15, 2020, and Petitioner mentioned his left knee issue that day. He saw Petitioner that morning and Petitioner said his knee was hurting and that his leg sometimes gets like that from the heat. He testified he asked Petitioner how he was doing because he could see from Petitioner's facial expression that something was going on. He testified that he told Petitioner to go home if he wanted as he did not want him to aggravate it. Mr. Pineda testified that if Petitioner had reported a work injury at that time, he would not have sent him home but would have had to do an accident statement, investigation and find corrective actions. He testified he did not tell Petitioner to go see a doctor.

Mr. Pineda testified that Petitioner returned on June 18, 2020. Petitioner at that time reported a work injury, saying on Friday the 12th he was going up and down the stairs and heard a pop in his leg. He testified Petitioner told him he did not report it earlier because he was going to ice his knee and take care of it at home.

Mr. Pineda testified he completed his own accident statement on June 18, 2020. He testified he had not drafted any other written documents regarding a June 12, 2020, accident prior to June 18, 2020, as that was the first time Petitioner reported it to him. On cross-examination, Mr. Pineda

was questioned regarding his accident statement contained in Respondent's Exhibit 2. Mr. Pineda admitted that the report was dated June 15, 2020 and admitted to speaking to Petitioner on June 12 but denied he was told of knee problems and further denied telling him to go home and come back on Monday if he felt better. Mr. Pineda was further unable to explain Petitioner's reference to heat which may have caused an injury. Mr. Pineda was further unable to expound about a reference to an attachment to his report that was not attached to the exhibit. Upon production of the missing pages by Respondent's counsel, Mr. Pineda claimed he typed those pages despite referring to himself in the third person.

Mr. Pineda was then asked whether Petitioner brought up any issues with his left leg before June 12, 2020. Mr. Pineda testified Petitioner had reported a birth abnormality and that he may have been involved in an accident. He further testified that he had observed Petitioner have knee problems before June 12, 2020, when Petitioner would rub it or take breaks. He testified this happened periodically. He could not recall whether he ever had problems using the stairs before. He testified that Petitioner always walked with a little bit of a limp. He further claimed Petitioner also had to miss work at least one time a year for his knee and this is documented in their time record system.

Testimony of Erich Hoffmann

Mr. Hoffman is the HR and EHS Director for Respondent and stated he is responsible for hiring, training, and benefits and was responsible for administering Respondent's attendance policy. He testified as to how an employee can accumulate points for attendance issues, and that when an employee reaches five points, there is a verbal warning, seven points is a written warning, eight points is a suspension, and when he reaches nine points, there is a discharge. Mr. Hoffman testified that he had a phone call on October 29, 2020, with Petitioner about a return to work on November 4, 2020. Mr. Hoffmann testified he drafted the letter to Petitioner, advising he had accumulated too many points, had not returned to work and they accepted his self-resignation as evidenced in Respondent's Exhibit 5.

Mr. Hoffman acknowledged that there was a disagreement in medical opinions from Dr. Alpert and Dr. Bush-Joseph. He testified that he chose to rely on Dr. Bush-Joseph's opinions over Dr. Alpert's. Mr. Hoffmann conceded he is not the person to make the legal determination of

whether an accident is work-related, however, he does have to make factual determinations regarding the cause of an injury.

Medical Opinion of Dr. Charles A. Bush-Joseph

Petitioner was examined by Dr. Bush-Joseph pursuant to Section 12 of the Act to provide an opinion regarding Petitioner's injuries, causal connection, and the need for further treatment. Dr. Bush-Joseph examined Petitioner on September 28, 2020. Dr. Bush-Joseph noted that Petitioner claimed he developed pain while heading up approximately 40 stairs. Prior injury treatment and trauma to the knee was denied by Petitioner. Dr. Bush-Joseph reviewed pictures of the stairs in question and stated that it appeared to be a standard, routine staircase. Dr. Bush-Joseph was advised that Petitioner would climb the stairs to the crane 3- 8 times per day. Dr. Bush-Joseph was also advised that Respondent would offer evidence that Petitioner had walked with a limp since his employment with Respondent started.

Dr. Bush-Joseph diagnosed Petitioner with longstanding, moderate to severe osteoarthritis of the left knee, with radiographs suggestive of significant remote trauma. He believes that the "mere [act of] rising up and down stairs is the simple activity of daily living" and noted Petitioner denied any traumatic injury, fall or twist that would have accentuated the symptoms. He opines that Petitioner's symptoms are related to longstanding osteoarthritis and not related to any specific work activity on June 12, 2020. Dr. Bush Joseph opined that Petitioner's condition is a temporary exacerbation of an underlying condition, and that the treatment proposed by Dr. Alpert is typical in this scenario, but it is not related to any work activity. He states that there is no injury from June 12, 2020, and also states Petitioner is at maximum medical improvement.

Medical Opinion of Dr. Joshua Alpert

Dr. Joshua Alpert provided his opinion via narrative report on November 16, 2020. Dr. Alpert disagreed with Dr. Bush-Joseph's opinions as he believed that Petitioner had pre-existing asymptomatic arthritic changes but that if he had to use the crane in the picture that was sent to him consisting of 35 to 40 steps multiple times in the day, it could aggravate his condition. He stated that the meniscus appears to be slightly extruded which could occur from repetitive activities including repetitive use of stairs.

Under question number four asking about causal relationship, Dr. Alpert stated, "He has never had a problem with his left knee in his life until he was doing repetitive activities at work including going down a large volume of stairs. This certainly is different than going up or down your stairs at home given the number of stairs that the patient has to up and down multiple times in a day, and I respectfully disagree with Dr. Bush-Joseph that this is not a work-related condition. In my opinion, this is all due to his work-related activities of an aggravation of a pre-existing asymptomatic knee arthritis." He goes on to state under question number five, "Of note, if there are medical records that would state that the patient had left knee pain before his complaints on June 12, 2020, if there are medical records that state that he saw a doctor prior to June 12, 2020, or if he had injections prior to June 12, 2020, then certainly my opinion could and would change." The doctor goes on to opine that Petitioner is a candidate for a knee arthroscopy due to his work-related activities.

CONCLUSIONS OF LAW

C. In support of the Arbitrator's finding as it relates to whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator states as follows:

Petitioner bears the burden of proving by a preponderance of the evidence that an injury arose out of and in the course of his employment. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 203 (2003). For an injury to arise out of one's employment, "it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.*

To determine whether a claimant's injury arose out of his or her employment we must categorize the risk to which the claimant was exposed. *Dukich v. Illinois Workers' Compensation Comm'n,* 2017 Ill.App (2d) 160351WC. There are three categories of risk: (1) risks distinctly associated with the employment, (2) risks personal to the employee, and (3) neutral risks which nave no particular employment or personal characteristics. *Caterpillar Tractor Co., v. Industrial Comm'n,* 129 Ill. 2d 52 (1989). See also *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill.App.3d 149, 162 (2000). Injuries while traversing stairs is a neutral risk and generally does not arise from one's employment, however, if the employment conditions

create a risk to which the general public is not exposed, either qualitatively or quantitatively, the injury may be compensable. *Illinois Consol. Tel. Co. v. Industrial Comm'n,* 314 Ill. App. 3d 347, 353 (2000). Walking up or down a staircase does not establish a risk greater than those faced outside of work. See *Elliot v. Industrial Comm'n,* 153 Ill.App.3d 238, 244 (1987); See also *Illinois Consol. Tel. Co. v. Industrial Comm'n,* 314 Ill. App. 3d 347, 353 (2000).

Petitioner's testimony, accident reports and medical records indicate he felt pain when using the stairs at work. Petitioner did not present any evidence that the condition of the staircase contributed to his injury or placed him in an increased position to be injured. Since traversing these stairs is a neutral risk, Petitioner must demonstrate that his employment exposed him to either an increased qualitative or quantitative risk of injury to the knee.

The recent *McAllister* decision does not change the above analysis. See *McAllister v. Illinois Workers' Compensation Comm'n,* 2020 IL 124848 (2020). The *McAllister* Court stated, "*Caterpillar Tractor* has not been overruled and remains the starting point for analyzing "arising out of" injuries, even those that involve common bodily movements and everyday activities." Id. at. ¶ 62. In the instant case, Petitioner's alleged injury or pain after traversing stairs remains a neutral risk and is not compensable. Accordingly, Petitioner must prove that was exposed to either a qualitatively or quantitatively increased risk of injury at work. He did not prove either by a preponderance of the evidence.

Petitioner testified that he felt pain in his left knee after using the staircase to the crane. He testified there was nothing wrong with the staircase. Petitioner, however, argues that this staircase is different than a customary residential staircase. The Arbitrator was provided with pictures of the staircase in question which show a yellow, metal, industrial-style staircase. The Arbitrator notes that this is likely taller than a staircase found in homes, however, the Arbitrator was not provided with any measurements of the riser height, degree of incline, width of steps, or any other information that would demonstrate that the stairway in question was noticeably different than a normal staircase.

Petitioner further testified that he was not carrying anything in his hands. He testified his shoe did not get caught. Although he testified, he was rushing at work, the Arbitrator believes his testimony was that he was generally trying to work at a quick pace while at work and was not rushing for anything specific at the time of this accident. This Arbitrator finds that there was negligeable evidence that qualitatively increased Petitioner's risk of injury from traversing the

stairs at work. The Arbitrator does not find any increased risk based on the qualitative factors in evidence.

Turning to a quantitative analysis, the Arbitrator finds that although Petitioner testified that he had to use the stairs three to four times on June 12, 2020, that use does not rise to the level of a quantitative increased risk. A petitioner can prove his injury is compensable if he can prove that he was exposed to a common risk more frequently than that of the general public. *Village of Villa Park v. Ill. Workers' Comp. Comm'n*, 2013 IL App (2d) 120038WC (2013). In *Village of Villa Park*, the petitioner testified that he had to walk a set of stairs that consisted of 20 stairs plus a landing, at least six times per day. *Id*. at 887. Petitioner in *Villa Park* testified that as he was going down the stairs, his knee gave out and he fell down the stairs. *Id*. The Appellate court found that injury compensable, as "the frequency with which the claimant was required to traverse the stairs constituted an increased risk on a quantitative basis from that to which the general public is exposed." *Id*. at 891.

The Arbitrator finds that Petitioner did not prove a quantitatively increased risk as the petitioner did in *Village of Villa Park*. The Court in *Village of Villa Park* noted that Petitioner had to traverse the stairs in question at least six times per day. Here, Petitioner testified he only used the stairs three to four times on June 12, 2020. Also, the petitioner in *Village of Villa Park* had to use those stairs at least six times every single shift. Here, Petitioner may not use stairs at all during an entire shift depending on the material his team was working with. The Arbitrator notes the stairs here are slightly more than the 20-stair staircase in *Village of Villa Park*, however, without any evidence of an atypical stair structure, different rise or a different step, the staircase should not be differentiated. Taking all of this into account, Petitioner did not prove that he was at a quantitative increased risk of injury by traversing the stairs to the crane. Lastly, having found that Petitioner's injury did not arise out of his employment, either quantitatively or qualitatively, there is no need to address whether Petitioner's claimed injury happened in the course of his employment. Accordingly, Petitioner has not proven that his accident arose out of his employment.

E. In Support of the Arbitrator's Decision as It relates To Whether Timely Notice of the Accident Was Given to Respondent, The Arbitrator Finds the Following:

As Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent, the issue of notice is moot.

F. In Support of The Arbitrator's Decision as It Relates to Whether Petitioner's Current Condition of Ill Being Is Causally Related to The Injury, The Arbitrator Finds the Following:

As Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent, the issue of casual connection is moot. That said, if Petitioner were able to prove that a work-related accident occurred, this Arbitrator would not find causal connection based upon the medical records, the credibility of the Petitioner, and reliance on the opinions of Dr. Charles Bush-Joseph.

Petitioner testified that he had no known issues with his left knee prior to the alleged incident of June 12, 2020, and only thereafter did he experience any issues. However, the medical records demonstrate that Petitioner had reported longstanding left leg issues on other occasions. This is corroborated by Mr. Pineda that testified that Petitioner had complained about a birth defect in his knee, would rub his knee at times, and had required time off in the past to address his knee. Considering the medical records, Petitioner's testimony, and the testimony of Mr. Pineda, this Arbitrator finds that Petitioner's recollection of the condition of his knee was not credible.

The evidence demonstrates that Petitioner had a long-standing issue with his knee. Accordingly, the Arbitrator finds that Dr. Alpert's opinions were not based upon the full facts and are not entirely credible. Dr. Alpert concedes "if there are medical records that would state that the patient had left knee pain before his complaints on June 12, 2020, if there are medical records that state that he saw a doctor prior to June 12, 2020, or if he had injections prior to June 12, 2020, then certainly my opinion could *and would* change. (emphasis added)." If Dr. Alpert were presented the evidence adduced at trial it is likely that Dr. Alpert would modify his causation opinion.

Through no fault of his own, Dr. Alpert's opinion was based on incomplete information. Accordingly, the Arbitrator finds the opinion of Dr. Charles Bush-Joseph to be more credible. Dr. Bush-Joseph opines that Petitioner had longstanding, moderate to severe osteoarthritis of the left knee and opines that the act of going up or down stairs would not cause Petitioner's symptoms, but that the symptoms are instead related to the longstanding osteoarthritis. This Arbitrator notes that Dr. Bush-Joseph states "the mere [act of] rising up and down stairs is the simple activity of daily living," yet the stairs in question are not similar to a flight of stairs in one's home. However,

the doctor had pictures of the stairs in question and did not allege any medical difference from climbing the steel staircase versus climbing one's own stairs. While the Petitioner claims that the steps in question are unlike steps one would find in a home the Arbitrator was not provided with any objective evidence that these stairs are different in anything other than appearance and composition.

Therefore, if this Arbitrator had to address causation, this Arbitrator would not find that Petitioner had proved his left knee condition was related to any events of June 12, 2020.

J. In Support of The Arbitrator's Decision as It Relates to Whether Respondent Has Paid All Appropriate Medical Charges, The Arbitrator Finds the Following:

As Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent, the issue of medical charges is moot. Petitioner's claim for payment of medical bills is denied.

K. In Support of The Arbitrator's Decision as It Relates to Whether Petitioner Is Entitled to Any Prospective Care, The Arbitrator Finds the Following:

As Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent, the issue of prospective care is moot. Petitioner's claim for prospective medical care is denied.

L. In Support of The Arbitrator's Decision as It Relates to Whether Petitioner Is Entitled to Temporary Total Disability Benefits, The Arbitrator Finds the Following:

As Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent, and further that a causal relationship has not been demonstrated, the issue of temporary total disability benefits is moot.

M. In Support of The Arbitrator's Decision as It Relates to Whether Penalties and Fees Should Be Imposed Upon Respondent, The Arbitrator Finds the Following:

As Petitioner did not prove that his accident arose out of and in the course of his employment with Respondent, the issue of penalties and fees is moot. Nonetheless, even if this were a compensable injury the Arbitrator would deny the petition for penalties and fees.

Respondent had several reasonable bases for denial of this claim: the initial treating records indicating that the injury was not work related; the less-than-obvious existence of an injury without a clear mechanism of injury; and the opinions of Dr. Bush-Joseph. These bases for denial do not demonstrate that the Respondent acted unreasonably, vexatiously, nor in bad faith.

/s/Gerald W. Napleton 6/4/21
Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC020294
Case Name	INSURANCE COMPLIANCE v. D.A.R. ENTERPRISE CONSTRUCTION INC
Consolidated Cases	
Proceeding Type	Petition for Penalties
Decision Type	Commission Decision
Commission Decision Number	22IWCC0074
Number of Pages of Decision	7
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	David Christensen
Respondent Attorney	

DATE FILED: 2/28/2022

/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

Illinois Workers' Compensation Commission,
Insurance Compliance Department,

Petitioner,

vs.

No: 19 WC 20294
10INC00067

D.A.R. Enterprise Construction Inc.,
Donald Remus Individually and
as President, and Brian McMillen
Individually and as an Officer,

Respondents.

DECISION AND OPINION REGARDING INSURANCE NON-COMPLIANCE

Petitioner, the Illinois Department of Insurance, Insurance Compliance Department (formerly known as the Illinois Workers' Compensation Commission, Insurance Compliance Department), brings this action, by and through the Office of the Illinois Attorney General, against the above-captioned Respondents, alleging violations of section 4(a) of the Illinois Workers' Compensation Act for failure to procure mandatory workers' compensation insurance. Petitioner alleges that Respondents knowingly and willfully lacked workers' compensation insurance for 1,424 days. On September 11, 2018, after proper and timely notice to Respondents they were found in default by the Commission and the matter was continued thereafter for a hearing. A hearing was held before Commissioner Carolyn M. Doherty in Chicago, Illinois on February 8, 2022. Petitioner was represented by the Office of the Illinois Attorney General. Respondent did not appear in person or through counsel. A record was taken.

Petitioner seeks the maximum fine allowed under the Act, $500.00 per day for each of the 1,424 days, from July 20, 2005 until June 12, 2009, when Respondents did business and failed to provide coverage for its employees. In addition, Petitioner seeks reimbursement for the liability

incurred by the Injured Workers' Benefit Fund in claim 07 WC 22595 in the amount of $23,911.73. Petitioner seeks a total award of $735,911.73.

The Commission, after considering the record in its entirety and being advised of the applicable law, finds that Respondents knowingly and willfully violated section 4(a) of the Act and section 9100.100 of the Rules Governing Practice before the Illinois Workers' Compensation Commission (Rules) during the period in question. As a result, Respondent shall be held liable for non-compliance with the Act and shall pay a penalty in accordance with section 4(d) of the Act. For the following reasons, the Commission assesses a civil penalty against Respondents under section 4 of the Act in the sum of $712,000.00 and orders Respondents to reimburse the Injured Workers' Benefit Fund in the amount of $23,911.73, for a total of $735,911.73.

I. Findings of Facts

Antonio Smith, an investigator for Petitioner, identified Petitioner's Exhibit 2 as an LLC File Detail Report for Respondents. The report indicates that D.A.R. Enterprise Construction Inc. (D.A.R.) was formed on January 7, 2004 and was dissolved on June 12, 2009. The report also indicates that Donald Remus was the president and agent for D.A.R. PX2. In the regular course of his investigation, Petitioner also obtained the Articles of Incorporation, the Annual Reports and the Certificate of Dissolution related to D.A.R. Enterprise Construction Inc. The Articles indicate that Mr. Remus was the president and registered agent for D.A.R. PX10.

Mr. Smith also identified, and the Commission took judicial notice of, the Commission's arbitration decision in *Delgado v. Brian McMillen d/b/a DAR Enterprises, Inc. and the State Treasurer as* ex officio *Custodian of the Injured Workers' Benefit Fund*, Ill. Workers' Comp. Comm'n, No. 06 WC 5439 (Dec. 24, 2009). In the *Delgado* decision, the arbitrator concluded that the parties were operating under the Act as employee and employer. The Arbitrator also concluded that Delgado described work bringing him within the automatic coverage of section 3 of the Act. The Arbitrator further concluded that D.A.R. was uninsured on the accident date of December 13, 2005. The Arbitrator awarded Delgado medical expenses, temporary total disability benefits, permanent partial disability benefits, and additional compensation. PX4.

Mr. Smith further identified Petitioner's Exhibit 5 as fund disbursement documents from the Petitioner, the Injured Workers' Benefit Fund, and the State Comptroller kept in the regular course of Petitioner's business. These documents indicate that the Injured Workers' Benefit Fund issued payment to Delgado in the amount of $23,911.73. PX5.

Mr. Smith additionally identified Petitioner's Exhibit 3 as a Notice of Non-Compliance mailed to Mr. McMillen, individually and d/b/a DAR Enterprises. This document indicates that it was filed with the Commission on September 10, 2013. The notice also states that the Commission's records indicated that Mr. McMillen, individually and d/b/a DAR Enterprises, was not in compliance with the requirements of section 4(a) for the period from July 20, 2005 through September 10, 2013. The notice includes an affidavit indicating service by mail on September 10, 2013. PX3.

Mr. Smith testified that Petitioner's Exhibit 6, a certified finding from the Department of

Self-Insurance that Respondents were not self-insured with the State of Illinois during the dates indicated, was a type of document requested in the ordinary course of Petitioner's investigations. The document indicates that no certificate of approval to self-insure was issued to D.A.R. for the period of July 20, 2005 through February 2, 2010. PX6.

Mr. Smith also requested insurance information on Respondents from the National Council of Compliance Insurance (NCCI), which was submitted into evidence as Petitioner's Exhibit 7. The NCCI certified that it is the agent designated by the Commission for the purpose of collecting proof of insurance coverage information on Illinois employers and that neither D.A.R. nor Mr. Remus filed policy information showing proof of workers compensation insurance at any time from July 20, 2005 through February 2, 2010. PX7.

In the regular course of his investigation, Mr. Smith further requested information on Respondents from the Illinois Department of Revenue. Petitioner submitted Petitioner's Exhibit 8, comprised of certified records indicating the Department of Revenue had no information showing tax returns were filed by D.A.R. PX8. Mr. Smith also obtained driver's license photographs of Mr. McMillen and Mr. Remus from the Illinois Secretary of State's office. PX9.

Mr. Smith testified that based upon his investigation, Petitioner determined that Respondent did not have workers' compensation insurance for the period for which it requested relief, from July 20, 2005 (the first date of the NCCI certification) to June 12, 2009 (the date of the corporation's dissolution).

Petitioner additionally submitted the notices for the February 8, 2022 insurance compliance hearing, accompanied by investigative reports signed by investigator Michael Cadman, indicating that Mr. McMillen was personally served with notice of the hearing on January 3, 2022, and that Mr. Remus was personally served on December 30, 2021. PX11b, PX11c. Lastly, Petitioner submitted certified mail receipts signed by a "D. Remus" on behalf of Mr. Remus and D.A.R. PX11d.

II. Conclusions of Law

At the outset, the Commission considers whether Respondents are subject to the Act. Pursuant to Section 3 of the Act, certain employers and their employees are automatically subject to the provisions of the Act if they engage in specific businesses, including: "the erection, maintain, removing, remodeling, altering or demolishing of any structure"; "[c]onstruction, excavating or electrical work"; and "any enterprise in which sharp edged cutting tools, grinders or implements are used, including all enterprises which buy, sell or handle junk and salvage, demolish or reconstruct machinery." 820 ILCS 305/3(1),(2),(8) (West 2004).

The Commission finds that Respondents' business falls within sections 3(1), 3(2), and 3(8) of the Act. While there was no direct testimony as to the nature of Respondents' business during the period of non-compliance, the Commission takes judicial notice of the findings by the Arbitrator in this regard as contained in the Decision rendered in *Delgado v. Brian McMillen d/b/a DAR Enterprises, Inc. and the State Treasurer as* ex officio *Custodian of the Injured Workers' Benefit Fund*, Ill. Workers' Comp. Comm'n, No. 06 WC 5439 (Dec. 24, 2009). Petitioner's

unrebutted testimony therein established that Delgado was employed by D.A.R. as a carpenter and worked at numerous houses, using tools provided by D.A.R. such as hammers, saws, and a nail gun. Accordingly, the Commission finds that the work Respondents engaged in automatically subjected them to the provisions of the Illinois Workers' Compensation Act.

Pursuant to section 4(a) of the Act, all employers who come within the auspices of the Act are required to provide workers' compensation insurance. See 820 ILCS 305/4(a) (West 2004). Section 9100.90(a) of our Rules similarly provides that any employer subject to section 3 of the Act shall insure payment of compensation required by section 4(a) of the Act "by obtaining approval from the Commission to operate as a self-insurer or by insuring its entire liability to pay the compensation in some insurance carrier authorized, licensed or permitted to do such insurance business in Illinois." 50 Ill. Adm. Code 9100.90(a) (1986). Section 9100.90(d)(3)(E) of our Rules similarly provides that a certification from a Commission employee "that an employer has not been certified as a self-insurer shall be deemed prima facie evidence of that fact." 50 Ill. Adm. Code 9100.90(d)(3)(D) (1986). Section 9100.90(d)(3)(D) of our Rules provides that "[a] certification from an employee of the National Council on Compensation Insurance stating that no policy information page has been filed in accordance with Section 9100.20 shall be deemed prima facie evidence of that fact." 50 Ill. Adm. Code 9100.90(d)(3)(D) (1986).

In this case, Petitioner submitted a certified finding from the Department of Self-Insurance that no certificate of approval to self-insure was issued to D.A.R. for the period of July 20, 2005 through February 2, 2010. Petitioner also submitted the NCCI certification that neither D.A.R. nor Mr. Remus filed policy information showing proof of workers' compensation insurance at any time from July 20, 2005 through February 2, 2010. Mr. Smith testified that based upon his investigation, Petitioner determined that Respondents did not provide workers' compensation insurance for the period for which it requested relief, from July 20, 2005 to June 12, 2009. Respondents did not attend the hearing and thus presented no evidence indicating that they provided workers' compensation insurance of any kind during this period. Accordingly, the Commission concludes that Petitioner proved that Respondents failed to comply with the legal obligations imposed by section 4(a) of the Act from July 20, 2005 to June 12, 2009.

Regarding the issue of penalties for failure to maintain workers' compensation insurance coverage, Section 4(d) of the Act states:

> "Upon a finding by the Commission, after reasonable notice and hearing, of the knowing and willful failure or refusal of an employer to comply with any of the provisions of paragraph (a) of this Section ***, the Commission may assess a civil penalty of up to $500 per day for each day of such failure or refusal after the effective date of this amendatory Act of 1989. The minimum penalty under this Section shall be the sum of $10,000. Each day of such failure or refusal shall constitute a separate offense. The Commission may assess the civil penalty personally and individually against the corporate officers and directors of a corporate employer, the partners of an employer partnership, and the members of an employer limited liability company, after a finding of a knowing and willful refusal or failure of each such named corporate officer, director, partner, or member to comply with this Section. The liability for the

> assessed penalty shall be against the named employer first, and if the named employer refuses to pay the penalty to the Commission within 30 days after the final order of the Commission, then the named corporate officers, directors, partners, or members who have been found to have knowingly and willfully refused or failed to comply with this Section shall be liable for the unpaid penalty or any unpaid portion of the penalty." 820 ILCS 305/4(d) (West 2004).

Section 9100.90(b) of the Rules similarly provides that penalties may be assessed for non-compliance after a reasonable notice and hearing. 50 Ill. Adm. Code 9100.90(b) (1986). Section 9100.90(c) of the Rules describes the proper notice of non-compliance to be served upon the employer and provides that the employer may request an informal conference to resolve the matter. 50 Ill. Adm. Code 9100.90(c) (1986). Section 9100.90(d) of the Rules describes the manner of notice and service for an insurance compliance hearing and the procedure for conducting the hearing. 50 Ill. Adm. Code 9100.90(d) (1986).

In this case, Petitioner submitted into evidence the Notice of Non-Compliance mailed to Mr. McMillen, individually and d/b/a DAR Enterprises, in the form prescribed by our Rules and including an affidavit of service. Respondents did not request an informal conference in this matter. Petitioner also submitted the notices for the February 8, 2022 insurance compliance hearing, in the form prescribed by our Rules, accompanied by signed investigative reports indicating that Mr. McMillen and Mr. Remus were personally served, as well as certified mail receipts signed by a "D. Remus" on behalf of Mr. Remus and D.A.R. The insurance compliance hearing allowed the Commission to introduce evidence and testimony, and afforded Respondents the opportunity to do the same, had any of them chosen to attend personally or through counsel. Accordingly, the Commission concludes that reasonable and proper notice and hearing was provided to Respondents.

On the merits, the Commission has considered the following factors in assessing penalties against an uninsured employer: (1) the length of time the employer had been violating the Act; (2) the number of workers' compensation claims brought against the employer; (3) whether the employer had been made aware of his conduct in the past; (4) the number of employees working for the employer; (5) the employer's ability to secure and pay for workers' compensation coverage; (6) whether the employer had alleged mitigating circumstances; and (7) the employer's ability to pay the assessed amount. See, *e.g.*, *State of Illinois v. Murphy Container Service*, Ill. Workers' Comp. Comm'n, No. 03 INC 00155, 7 IWCC 1037 (Aug. 2, 2007).

The Commission finds that the period of time during which the Respondents violated the Act by failing to obtain workers' compensation insurance was significant. The Respondents failed to have insurance for 1,424 days, from July 20, 2005 until at least June 12, 2009. In the *Delgado* decision, the claimant's unrebutted testimony established that D.A.R. employed up at least six employees. In fact, one of Respondents' employees sustained a work injury. As Respondents failed to have workers' compensation insurance, the Injured Workers' Benefit Fund paid benefits to Delgado as a result of the injury. Respondents were notified of their non-compliance under the Act by Petitioner and elected to not obtain workers' compensation insurance. In the *Delgado* decision, Petitioner testified without rebuttal that he stopped treatment (apparently in April or May 2006) because he had no insurance and that he spoke to D.A.R.'s owner, who said he had no

insurance. Moreover, having reviewed the record, the Commission finds no evidence as to Respondent's inability to secure and pay for workers' compensation coverage and no evidence of mitigating circumstances.

The Commission concludes that Respondents knowingly and willfully failed to comply with the Act. Based on the significant period of time that Respondents failed to comply with the Act, the Commission assesses a penalty of $712,000.00 against Respondents, D.A.R. ENTERPRISE CONSTRUCTION, INC., DONALD REMUS individually and as President of D.A.R., and Brian McMillen individually and as an officer of D.A.R. Pursuant to Section 9100.85(a)(1) of the Rules, the Commission is also entitled to obtain reimbursement from Respondents in the amount of $23,911.73. representing the compensation obligations paid by the Injured Workers' Benefit Fund in the *Delgado* case.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondents, D.A.R. Enterprise Construction Inc., and Donald Remus individually and as president and Brian McMillen individually and as an officer, pay to the Illinois Workers' Compensation Commission the sum of $735,911.73 pursuant to Section 4(d) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that payment shall be made according to the following procedure: (1) payment of the penalty shall be made by certified check or money order made payable to the Illinois Workers' Compensation Commission; and (2) payment shall be mailed or presented within thirty (30) days of the final order of the Commission or the order of the court of review after final adjudication to:

Department of Insurance
Attn: Insurance Compliance
122 South Michigan Avenue, 19th floor
Chicago, Illinois 60603

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.

February 28, 2022
r: 2/8/22
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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