ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC010603
Case Name	DUDZIK, MICHAEL v. IL DEPT OF CORRECTIONS
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0548
Number of Pages of Decision	19
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Andrew Galich
Respondent Attorney	David Christensen

DATE FILED: 11/1/2021

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL DUDZIK,

Petitioner,

vs. NO: 16 WC 010603

ILLINOIS DEPARTMENT OF CORRECTIONS,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission affirms the finding that Petitioner did not suffer a work-related heart attack. We write separately to clarify the law regarding heart attack claims.

CONCLUSIONS OF LAW

Accident

"It is well established that … [i]f there is work-related stress, either physical or emotional, that aggravates the [heart] disease so as to cause the heart attack, then there is an accidental injury or death arising out of and during the course of the employment." *Associates Corp. of North America v. Industrial Comm'n,* 167 Ill. App. 3d 988, 996, 522 N.E.2d 102, 108 (1st Dist. 1988). Here, Petitioner did not testify as to his emotional stress level during the warrant operation; instead, he claims his heart attack was caused by the physical stress of wearing 50 pounds of gear on a warm day. (T. 31, 33) The Commission finds Petitioner's claim fails because his cardiac event clearly started while he was at home on May 1, 2013, as reflected in the medical records.

The Commission relies upon the Loyola University Medical Center records that reveal that four individuals took a medical history from Petitioner on May 2, 2013, and memorialized that Petitioner stated his chest pain began the night before: Andrew Soltys, R.N. – "chest pain…intermittent since yestereay [*sic*]"; Dr. Bruce Johnson – "patient complains of recurrent substernal chest pain since last PM lasting about 30 minutes at a time."; Dr. Vibhav Rangarajan – "he was sleeping and was awoken by substernal chest pressure…pain lasted 30 min and then resolved…this occurred [three] times overnight, took [two] baby ASA and [two] Aleve and went back to sleep"; and Dr. Bruce Lewis/Dr. Conner O'Keefe – "Had stuttering angina for the last 24 hours. Described as a chest pressure. Started last night, woke up from sleep [three] times, relieved by aspirin." (PX1, RX7) The Commission further notes Dr. Fintel, Respondent's §12 examiner, found this fact significant in ruling out a causal connection between Petitioner's heart attack and his employment. (RX4)

While Petitioner denied telling the medical providers that he woke up the night before because of chest pain and testified he woke up because "[w]ell, probably maybe I had to use the washroom…[a]nd my knees are bad so I don't sleep comfortably at all" (T. 73), the Commission agrees with the Arbitrator that Petitioner's testimony is simply not credible. The Commission finds Petitioner failed to prove his heart attack was caused by work-related stress experienced on May 2, 2013, and therefore, his heart attack did not arise out of or in the course of his employment.

Given the findings on accident, all other issues are moot.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on September 11, 2019, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the Petitioner failed to meet the threshold burden of establishing his injury arose out of or in the course of his employment. Therefore, all benefits are denied.

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

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

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

November 1, 2021
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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 21IWCC0548
NOTICE OF ARBITRATOR DECISION

DUDZIK, MICHAEL Case# **16WC010603**
Employee/Petitioner

IL DEPARTMENT OF CORRECTIONS
Employer/Respondent

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

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

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

5319 DAVID F SZCZECIN & ASSOC
ANDREW A GALICH
205 W RANDOLPH ST SUITE 1801
CHICAGO, IL 60606

6149 ASSISTANT ATTORNEY GENL
DANIELLE CURTISS
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CHICAGO, IL 60601

1350 CENTRAL MANAGEMENT SERVICES
BUREAU OF RISK MANAGEMENT
PO BOX 19208
SPRINGFIELD, IL 62794-9208

0502 STATE EMPLOYEES RETIREMENT
2101 S VETERANS PARKWAY
PO BOX 19255
SPRINGFIELD, IL 62794-9255

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

SEP 11 2019

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

STATE OF ILLINOIS)
)
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

Michael Dudzik
Employee/Petitioner

v.

Illinois Department of Corrections
Employer/Respondent

Case # 16 WC 10603

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Arbitrator Carlson**, Arbitrator of the Commission, in the city of **Chicago**, on **June 18, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **May 2, 2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**84,252.00**; the average weekly wage was $**1620.00**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

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

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

ORDER

- The Petitioner failed to meet the threshold burden of establishing his injury arose out of her employment. Therefore, all benefits are denied.

- The Petitioner also failed to meet the threshold burden of establishing that timely notice of this accident was given to Respondent. Therefore, all benefits are denied.

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

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

Signature of Arbitrator

09-10-19
Date

SEP 11 2019

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION 19(B) DECISION

Michael Dudzik	)	
	)	
Employee/Petitioner	)	
v.	)	
	)	Case No. 16 WC 10603
State of Illinois,	)	
Illinois Department of Corrections	)	
	)	**Chicago, Illinois**
	)	
Employer/Respondent	)	

FINDINGS OF FACT

Petitioner pursued this action under the Workers' Compensation Act and sought relief from the Respondent-Employer Illinois Department of Corrections ("IDOC"). On June 18, 2019, the parties appeared at a hearing before Arbitrator Kurt Carlson. Attorney Andrew Galich of David F. Szczecin & Associates, Ltd. appeared on behalf of Petitioner. Assistant Attorney General Danielle Curtiss of the Illinois Attorney General's Office appeared on behalf of Respondent. At hearing, Petitioner's Exhibits 1-4 and Respondent's Exhibits 1-7 were admitted into evidence. The issues at hearing were accident, notice, causation, unpaid medical, outstanding temporary total disability benefits, and nature and extent. After hearing the proofs and reviewing the evidence presented, the Arbitrator makes the following findings on the disputed issues.

Petitioner's Testimony

Petitioner testified that he was employed as a Parole Sergeant with IDOC from March 6, 1989 to July 1, 2016. From 1989 until 1997, he worked at the Joliet Correctional Center, where he was responsible for the safety and security of the inmates. In 1997, Petitioner was promoted to Sargent, and worked on the hostage, tact, and search team. In June 2010, Petitioner became a

United States Marshal, while working at IDOC. Here, Petitioner worked as a street agent for fugitive apprehension, where he was responsible for serving warrants on individuals in Illinois, Indiana, and Wisconsin. As a US Marshal, Petitioner received assignments via telephone. He testified he would call in the night before to receive the assignment for the next day. While working on special assignments with the US Marshals, Petitioner was sometimes paid through the US Marshals, and sometimes paid through IDOC.

On May 1, 2013, Petitioner received an assignment to assist in serving a warrant on a wanted sex offender in Chicago, IL in the Englewood neighborhood. Despite the fact that Petitioner was working in his capacity as a US Marshal, he was on IDOC payroll for this assignment. Petitioner reported to the warrant service location in the morning of May 2, 2013. Sergeants Bonner, McCloud, and McEhrerney were present. All of the US Marshals were dressed in plainclothes, with a 10-pound bulletproof vest. They carried two magazines, a bullet shield, and tear gas. Petitioner estimated the gear to weigh a total of 50 pounds. Petitioner testified he "felt fine" that morning. The team walked up the steps to the house to serve the warrant, and Petitioner felt pain on his right side and right shoulder, near his collarbone. The warrant was not served, but the assignment was completed.

After the assignment was complete, Petitioner told Sergeants Bonner and McCloud that he was not feeling well and he was going to go home. They wanted to call an ambulance. Petitioner told them not to call the ambulance because he did not want to be treated at Holy Cross Hospital. Instead, Petitioner drove himself to Loyola University Hospital, where he was treated for a myocardial infarction. Petitioner testified that the trip from Englewood to Loyola took 15 minutes on the expressway.

Petitioner testified that he called his supervisor, Deon Dixon, while at the hospital, to let Mr. Dixon know that he had a heart attack. Petitioner also told Darryl Johnson, who was Deon Dixon's boss. While Petitioner was being treated at Loyola, his coworker Ed Zanghi drove Petitioner's car from the hospital back to his house. Petitioner treated with Dr. Lewis at Loyola.

Petitioner was off work from May 3, 2013 through July 15, 2013. He returned to work full duty without restrictions on July 16, 2013. The day he returned to work, Petitioner completed a notification of absence form, requesting to use sick time from May 3, 2013 through July 16, 2013.

Petitioner admitted that he has filed three prior workers' compensation claims with the Illinois Workers' Compensation Commission. In all of these cases, he completed notices of injury as part of the claim process. Petitioner admitted he never completed a notice of injury form for this case. He admitted he did not know this was a workers' compensation injury until a year later.

Petitioner testified that he never had heart problems prior to May 2, 2013. On cross-examination, he admitted that he woke up three times in the middle of the night on the evening of May 1, 2013. He denied having chest pain in the middle of the night, and testified he likely woke up to go to the bathroom. He denied taking any medication in the middle of the night. Petitioner testified that if the medical records reflect that he was having chest pain on the evening of May 1, 2013, they are incorrect.

Petitioner testified that he retired from IDOC on July 1, 2016. He currently works at another employer. Petitioner sometimes experiences elevated blood pressure.

Susan Miller's Testimony

Susan Miller has been employed as a Human Resources Specialist/Workers' Compensation Coordinator with IDOC since January 2019. She is responsible for overseeing workers' compensation claims with IDOC. In this role, she maintains employment files for individuals employed by parole.

Susan testified that she became aware of Petitioner when the Assistant Attorney General contacted her to review the matter in January 2019. Upon review of Petitioner's file, Ms. Miller determined that Petitioner never completed a notice of injury form. IDOC became aware that Petitioner was claiming his heart attack as a work-related injury on April 12, 2016, when Petitioner filed the Application for Adjustment of Claim (RX 1).

Ms. Miller testified that employees complete the IDOC Notification of Absence form in order to request time off work. (RX 3). The employee must state a reason for requesting absence, two choices being either sick leave- personal, or service connected sick leave. *Id.* Ms. Miller testified that "sick leave – personal" is taken by employees who have a non-work related sickness. Service connected sick leave is taken by employees who have claimed injuries related to work. Ms. Miller testified that when an employee requests service connected sick leave, that triggers HR to inform the employee that they must complete an Application of Adjustment of Claim. Petitioner requested sick leave- personal time for the dates off work through the IDOC Notification of Absence form. *Id.*

Ms. Miller testified that IDOC became aware that Petitioner was in an altercation with another individual on October 25, 2013. (RX 5). Petitioner was subsequently terminated, then re-hired. *Id.* IDOC became aware of another altercation in February 2014. *Id.* Petitioner's employment continued with IDOC. *Id.* Ms. Miller testified that IDOC became aware of a third

altercation, which occurred on January 20, 2016, of which Petitioner was charged with Aggravated Battery. (RX 5). Based on this Class 3 felony charge, Petitioner was suspended pending judicial verdict on March 10, 2016. *Id.* He was notified of this employment change on March 8, 2016. *Id.* IDOC terminated Petitioner's employment in June 2016.

Summary of Petitioner's Medical Treatment

Petitioner sought treatment at Primary Care Associates with Dr. Gershberg on March 20, 2013. (RX 6). He complained of pain in his right groin area that was aggravated with sitting. *Id.* Dr. Gershberg noted that Petitioner suffers from hypertension and hyperlipidemia, and prescribed statin. *Id.* He recommended therapeutic lifestyle changes including a low fat diet and regular exercise three to four times weekly. *Id.* Dr. Gershberg ordered Petitioner to undergo laboratory testifying. *Id.* Petitioner followed up with Dr. Gershberg on April 13, 2013 to follow up on his laboratory results. Petitioner reported that he did not take the statin. *Id.* He complains of daytime sleepiness, fatigue, and shortness of breath. *Id.* Dr. Gershberg ordered Petitioner to begin taking the statin medication.

Petitioner saw Dr. Bruce Lewis at Loyola on May 2, 2013. (RX 7). Dr. Lewis noted that Petitioner presented with "transient substernal chest pain for the past 24 hours." *Id.* Petitioner reported to Dr. Lewis that the chest pain started the night before, and woke him up from sleep three times. *Id.* When he awoke from sleep, the pain lasted for 30 minutes, then resolved. *Id.* Petitioner did not mention he was at work when the chest pain began on May 2, 2013. Dr. Lewis commented that Petitioner underwent a physical two weeks prior, and was told to start statin for high cholesterol, but had not started taking the medication yet. *Id.* Dr. Lewis diagnosed Petitioner with a non-ST elevated myocardial infarction, severe coronary artery disease, hypertension, and hyperlipidemia. *Id.* Petitioner underwent a cardiac catheterization with ventriculography, right

and left sided coronary angiography, drug stent PTCA single artery, drug-eluting stent, balloon angioplasty. *Id.* Petitioner was discharged on May 3, 2013. *Id.*

After discharge, Petitioner continued to see Dr. Lewis at Loyola. On June 6, 2013, he presented with complaints of chest pain. *Id.* He underwent an angiogram, and was diagnosed with right femoral artery disease. *Id.* Petitioner was discharged home in stable condition. *Id.*

On June 20, 2014, Petitioner followed up with Dr. Lewis. *Id.* He complained of atypical angina, with radiating pain lasting 60 seconds at a time. *Id.* Petitioner reported that he could walk 12 blocks without pain.

On July 21, 2014, Petitioner presented to MacNeal Hospital with a stab wound to the epigastrium *Id.* Petitioner reported that he was stabbed while trying to break up a bar fight. *Id.* Petitioner sustained caused cardiac tamponade, and underwent emergency heart surgery for evacuation. *Id.* Petitioner's left internal mammary artery was transected. *Id.* He was subsequently discharged home. *Id.* Petitioner followed up with Dr. Lewis on July 30, 2014, and complaints of night sweats since being discharged on July 20, 2014. *Id.* Petitioner was ordered to continue to follow up. *Id.*

Petitioner continued to seek treatment with Dr. Lewis, and the last medical record submitted is dated April 14, 2016. *Id.* Petitioner reported that he has chest wall pain at the stab wound site. *Id.* He can walk 12 blocks without pain. *Id.* Dr. Lewis ordered Petitioner to follow up as needed. *Id.*

Record Review by Dr. Dan Fintel

Dr. Fintel completed a record review at the Respondent's request on May 2, 2018. (RX 4). Upon reviewing records dating from 2013 through 2017, Dr. Fintel diagnosed Petitioner with coronary artery disease, NSTEMI without angina, hypertension, and hyperlipidemia. *Id.* He

opined that there was not a causal relationship between the Petitioner's history of NSTEMI and his employment as an officer for IDOC. *Id.* Dr. Fintel explained that Petitioner had significant risk factors for the development of coronary artery disease and heart attack that were independent of his employment. *Id.* Dr. Fintel noted the following risk factors: (1) highly elevated LDL cholesterol suggestive of possible genetic familial hyperlipidemia; (2) family history of premature coronary artery disease; (3) obesity; and (4) hypertension. Dr. Fintel opined that Petitioner's NSTEMI appeared to start the night prior to his admission to the hospital when he was awoken from sleep with chest pain. *Id.* He did not note any acute triggers of Petitioner's employment. As such, Dr. Fintel found that the incident was not related to Petitioner's employment. *Id.*

Deposition of Dr. Bruce Lewis

The deposition of Dr. Bruce Lewis was taken by the parties on October 16, 2018. (PX 4). He testified that he treated Petitioner for the NSTEMI event on May 2, 2013. *Id.* He testified that based upon the information given to him by Petitioner, the NSTEMI were caused by the stressors of Petitioner's employment. *Id.* He testified that he based his opinion solely on when the NSTEMI occurred. *Id.*

Dr. Lewis testified that risk factors of heart attack include hyperlipidemia, hypertension, family history of coronary artery disease, and obesity. Dr. Lewis admitted that he neither reviewed a job description, nor personally observed the gear Petitioner wore on the date of the alleged accident. *Id.* Dr. Lewis admitted that no psychological tests were performed on Petitioner immediately after the NSTEMI, or before returning Petitioner to work, to determine whether Petitioner's stress was sufficiently controlled.

II. CONCLUSIONS OF LAW

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

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

The Arbitrator finds Petitioner failed to meet his burden of showing an accident occurred that arose out of an in the course of his employment because he failed to present any credible evidence of an accident that arose out of his employment. The Courts have held that for a heart attack to arise out of one's employment, the work must create a higher degree of physical or emotional stress as compared to stress attendant to normal daily activities. *Majorie Richardson, Petitioner*, 05 IL. W.C. 54672 (Ill. Indus. Com'n June 11, 2010). While the Petitioner need not show that his employment was the sole factor in causing the heart attack, he must still prove that some act of employment was a causative factor in establishing that the heart attack arose out of his employment. *Id.* Furthermore, as a general rule, the determination of whether Petitioner's heart attack arose out of his employment is an issue of fact within the Commission's province. *Id.* As such, the Commission looks at whether there was any unusual physical or mental stress in the Petitioner's job immediately before the heart attack occurred, what time the attack occurred and whether there was an extreme deterioration of Petitioner's condition such that any of life's activities could have caused the attack. *Id.*

In assessing the factors above, the Arbitrator finds that Petitioner failed to present any proof establishing that his employment was a causative factor of the heart attack. First, Petitioner failed to present evidence of unusual physical or mental stress in his job immediately before the

heart attack. He testified that he began working as a US Marshal in 2010. In this role, he worked as a street agent for fugitive apprehension, where his duty was to serve warrants on wanted individuals. The heart attack occurred on May 2, 2013, three years into Petitioner's assignment as a US Marshal. He testified that on that day he was attempting to serve a warrant on an individual in the neighborhood of Englewood, in Chicago, Illinois. Petitioner failed to present any testimony or other credible evidence that this assignment presented any unusual physical or mental stress immediately before the heart attack occurred. He failed to present any specific evidence of the timing of the heart attack in relation to what time he was attempting to serve the warrant. In fact, Petitioner testified that he completed the assignment prior to leaving the scene. Petitioner was offered an ambulance, but he declined. Instead, he drove himself in his vehicle on the Eisenhower expressway for fifteen minutes to Loyola. Therefore, this Arbitrator finds that this factor weighs heavily against Petitioner.

Petitioner presented evidence via the deposition of Dr. Lewis that the heart attack was caused by the stressor of Petitioner's employment. (PX 4). Dr. Lewis testified that risk factors of heart attack include hyperlipidemia, hypertension, family history of coronary artery disease, and obesity. Dr. Lewis admitted that he neither reviewed a job description, nor personally observed the gear Petitioner wore on the date of the alleged accident. *Id.* Dr. Lewis admitted that no psychological tests were performed on Petitioner immediately after the NSTEMI, or before returning Petitioner to work, to determine whether Petitioner's stress was sufficiently controlled. He testified that he returned Petitioner to work solely based upon when Petitioner was ready to return to work. He was unable to recall as to whether Petitioner had any health issues prior to and leading up to the date of the heart attack. Dr. Lewis's testimony is not credible, and this Arbitrator does not place any weight on the opinion regarding causation.

Clearly, the extreme deterioration of Petitioner's condition was such that any of his life activities could have caused the heart attack. Petitioner was under a doctor's care for symptoms that placed him "at risk" for a heart attack, prior to the event. Petitioner was seeking treatment for hypertension and hyperlipidemia prior to the heart attack on May 2, 2013. (RX 6). He was prescribed statin, which is medication used to treat these conditions. *Id.* Despite being prescribed this medication on March 20, 2013, Petitioner did not take the medication leading up to the heart attack on May 2, 2013. *Id.* When he saw Dr. Gershberg on April 13, 2013, he ordered Petitioner to begin taking the statin that was previously prescribed. *Id.* When Petitioner was seen on May 2, 2013, he reported to Dr. Lewis that he had still not begun taking the statin. (RX 7). Petitioner was at a risk of heart attack prior to May 2, 2013.

Petitioner also showed signs of extreme deterioration of his condition on the morning of May 2, 2013. When Petitioner reported to Loyola after having chest pain on May 2, 2013, he complained of "transient substernal chest pain for the past 24 hours" (RX 6). He reported to Dr. Lewis that the chest pain started the night before, and woke him up from sleep three times. *Id.* When he awoke from sleep, the pain lasted for 30 minutes, then resolved. *Id.* Rather than seek emergency care on the morning of May 2, 2013, Petitioner reported to work. This was a conscious choice made by the Petitioner.

When questioned about both the prior treatment for hyperlipidemia and hypertension, Petitioner denied that he was ever treated for these conditions. This is a direct contradiction of the medical records submitted from March through April 2013. (See RX 6). Petitioner denied having chest pain in the evening leading up to May 2, 2013. He testified that if the medical records reflect this information, they are incorrect. *Id.* This Arbitrator finds Petitioner's self-

serving statements to lack credibility, and finds that the medical records are a reliable memorialization of Petitioner's condition.

Dr. Fintel's opinion is persuasive. According to Dr. Fintel, Petitioner exhibited the following risk factors: (1) highly elevated LDL cholesterol suggestive of possible genetic familial hyperlipidemia; (2) family history of premature coronary artery disease; (3) obesity; and (4) hypertension. Dr. Fintel opined that Petitioner's NSTEMI appeared to start the night prior to his admission to the hospital when he was awoken from sleep with chest pain. *Id.* He did not note any acute triggers of Petitioner's employment. Dr. Fintel opined that the incident was not related to Petitioner's employment. *Id.*

This Arbitrator finds that Petitioner has presented no credible evidence that an accident occurred which arose out of an in the course of his employment for Respondent and Petitioner is not entitled to compensation for his injuries.

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

The Arbitrator finds Petitioner failed to meet his burden of showing an accident occurred that arose out of and in the course of her employment because he failed to present any credible evidence of an accident.

Additionally, the Arbitrator finds that Petitioner failed to meet his burden of showing timely notice was given to Respondent. Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident, provided that no defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy. (Ill. Rev. Stat. ch. 48, para. 138.6(c)). Notice of the accident shall give the approximate date and place of the accident, if known, and may be

given orally or in writing. Where some notice is given but a defect or inaccuracy exists, the employer must prove he is unduly prejudiced." *Grazyna Marciniak, Petitioner*, 13 IL. W.C. 05446 (Ill. Indus. Com'n May 19, 2015)

In the case at bar, Petitioner clearly did not notify Respondent of the work accident within 45 days of the alleged accident. Evidence presented established that Respondent was first notified that Petitioner was claiming a work accident on April 12, 2016, when the Application for Adjustment of Claim was filed. (See RX 1). This was almost three years after the date of the alleged work accident occurred. Petitioner never completed a Notice of Injury with his employer. He did not request service connected leave, which would have alerted human resources to the fact that Petitioner was claiming a work-related injury. In fact, Petitioner's own testimony established that he did not believe a work accident had occurred until a year after the alleged accident.

The Arbitrator finds that Respondent has met the burden of proving that they were unduly prejudiced by the untimely notice. Respondent did not have the ability to interview witnesses, take photographs, and obtain the necessary medical opinions until nearly three years after the alleged accident occurred. Respondent could not corroborate Petitioner's claim that he was weighed down with 50 pounds of equipment to serve a warrant. Respondent was limited in the medical opinion that could be obtained. A record review, rather than a complete examination was done based upon the untimeliness of the reporting.

Arbitrator finds that Petitioner failed to meet his burden of showing timely notice was given to Respondent and all compensation is denied.

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

The Arbitrator finds Petitioner failed to meet his threshold burden of showing his injury arose out of her employment and therefore need not address causal connection.

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

The Arbitrator finds Petitioner failed to meet his threshold burden of showing his injury arose out of his employment and therefore Respondent is not liable for Petitioner's medical services related to his injury.

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

The Arbitrator finds Petitioner failed to meet his threshold burden of showing his injury arose out of his employment and therefore Petitioner is not entitled to any permanent partial disability benefits.

Arbitrator Kurt Carlson

9-10-19
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC028156
Case Name	GRAMES, HOLLY M v. JOSH ADDIS TRUCKING, INC
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0549
Number of Pages of Decision	11
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	James Keefe, Jr.
Respondent Attorney	R. Kent Schultz

DATE FILED: 11/1/2021

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Holly Grames,

Petitioner,

vs. NO: 19 WC 28156

Josh Addis Trucking, 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 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 August 3, 2020, is hereby affirmed and adopted.

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

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

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

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

November 1, 2021
o10/27/21
DLS/rm
046

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

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

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

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

21IWCC0549

GRAMES, HOLLY
Employee/Petitioner

Case# **19WC028156**

JOSH ADDIS TRUCKING INC
Employer/Respondent

On 8/3/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0299 KEEFE & DePAULI PC
JAMES K KEEFE JR
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

1256 HOLTKAMP LIESE SCHULTZ KAFOURY
R KENT SCHULTZ
217 N 10TH ST
ST LOUIS, MO 63101

STATE OF ILLINOIS)
)SS.
COUNTY OF Jefferson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Holly Grames
Employee/Petitioner
v.
Josh Addis Trucking, Inc.
Employer/Respondent

Case # **19** WC **28156**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Collinsville**, on **6/12/2020**. 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, **6/13/2019**, 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 $**30,232.28**; the average weekly wage was $**581.39**.

On the date of accident, Petitioner was **25** years of age, ***single*** with **2** dependent children.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $**8,471.61** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**8,471.61**.

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

ORDER

The Arbitrator finds that Petitioner failed to prove that her current condition of ill-being is causally related to the injury.

The Arbitrator finds that Petitioner was able to return to work full duty and reached maximum medical improvement as of November 13, 2019 and, therefore, Petitioner's claim for prospective medical care, including Dr. Gornet's recommended treatment for the neck and back, is denied.

Respondent shall pay reasonable and necessary medical services through November 13, 2019, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner TTD that has accrued from June 14, 2019 through November 13, 2019, or 21 6/7 weeks, at a rate of $387.59.

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

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

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

Edward Lee, Arbitrator

7/31/20
Date

ICArbDec19(b)

AUG 3 – 2020

FINDINGS OF FACT

The Petitioner is 26 years of age, hired by Respondent on December 19, 2018, driving a FedEx truck delivering packages, ranging anywhere from small envelopes to packages weighing up to 200 pounds. On June 13, 2019 in the course and scope of her employment she went to the back of her truck to get a package and when coming out she fell over a package, falling backwards out of the truck, a distance of 3 to 4 feet off the ground, landing on half concrete and half rocks, onto her back, and hitting her head.

She could not move at first but after awhile was able to get to the front of the truck and call her boss. He came, drove her to her car, and she drove home. She sought treatment the following day, going to St. Anthony's Emergency Department. Their records are contained in Petitioner's Exhibit 2. She presented with low back and left hip pain with history of fell out of truck, landing on her buttocks. X-rays of the left hip were negative. CT of the lumbar spine was negative as well. Diagnosis was low back and left hip pain. She was prescribed Hydrocodone, and taken off of work.

She then treated with her primary care provider, Fayette County Hospital Wellness Complex. Their records are contained in Petitioner's Exhibit 1. She was under their care from June 17, 2019 through September 16, 2019, Sharon Draper, NP. Her complaints at first were left hip and low back pain, but later included her mid back, thoracic spine, as well. She was kept on restricted duty and they had a thoracic MRI done on July 12, 2019. It is contained in Petitioner's Exhibit 3, and according to the radiologist revealed mild disc degeneration, no compression fracture, no disc herniation, and no spinal canal stenosis. The assessment after the MRI was mild thoracic degenerative disc disease, and referral to Dr. Bryan Ogan of the Illinois Spine and Pain Center was recommended.

She was under Dr. Ogan's care from July 31, 2019 through September 10, 2019. His records are contained in Petitioner's Exhibit 4. His impression was displacement of thoracic intervertebral disc and thoracic radiculopathy. He ordered physical therapy and epidural steroid injections, which were done on August 1, 2019 (T8-9), and September 10, 2019 (T7-8). She reported no improvement and he recommended that she see a surgeon. He also continued her on restricted duty.

At the Hearing, she testified that she reported to every provider all her symptoms and complaints. Also, she testified that her symptoms and complaints were all present and continuing since the accident date.

On October 5, 2019 she came under the care of Dr. Matthew Gornet. His records are contained in Petitioner's Exhibit 5. He had her complete an Intake Form and Patient Pain Diagram. It is found in Petitioner's Exhibit 5 and Respondent's Exhibit 1. In the pain diagram she described pain from the base of her neck down her entire spine. Numbness covering her entire upper extremities from her shoulders to and including both hands, and her entire lower extremities from her hips to and including both feet.

Dr. Gornet performed a physical examination and found mild decrease in biceps and wrist dorsiflexion on the right at C4-5, and decrease sensation to touch at C6 on the right side only. He reviewed the thoracic MRI done on July 12, 2019, and his impression was disc protrusion at C5-6 and C6-7. He recommended cervical and lumbar MRIs, which were done on October 5, 2019, and are contained in Petitioner's Exhibit 7. His impression was annular tears and protrusions at C5-6 and C6-7, annular tearing at L4-5, and central beaking at L5-S1.

Dr. Gornet recommended work restrictions of lifting up to 10 pounds, no repetitive bending or lifting, alternate between sitting and standing as needed, and no overhead work. He ordered physical therapy and also referred her to Dr. Helen Blake for epidural steroid injections. Her records are contained in Petitioner's Exhibit 8. She performed epidural steroid injections at L5-S1 on October 22, 2019, L4-5 on November 5, 2019, and C5-6 on December 10, 2019.

Following the injections she returned to Dr. Gornet, seeing him on January 9, 2020. She reported only temporary relief from the injections, and he recommended surgery of the cervical spine, consisting of disc replacements at C5-6 and C6-7.

The Respondent had her evaluated by Dr. Frank Petkovich on November 5, 2019. His report is contained in Respondent's Exhibit 2. He reported that she complained of persistent headaches and pain in her neck. Pain in her upper back and lower back. No pain in her right and left lower extremity, and only some occasional numbness in her right lower extremity. He performed a physical exam of her entire spine and her upper and lower extremities, and his conclusion was a normal exam, with no objective abnormalities.

He reviewed the July 12, 2019 thoracic MRI and his impression was mild degenerative changes with central protrusions at T7-8 and T8-9. He reviewed the cervical and lumbar MRIs done on October 5, 2019, and his impression was very mild central bulging at C3-4, C5-6 and C6-7, with no disc herniation, nerve root compression, spinal canal compromise, fissuring or annular tearing. With respect to the lumbar spine, his findings were mild protrusion at L3-4, L4-5 and L5-S1, with no disc herniation, nerve root compression, fissuring or annular tearing.

He opined that her current subjective complaints were grossly out of proportion to her objective physical findings and radiographic studies. She has a normal physical examination with regard to her spine, and the radiographic studies show only mild degenerative changes with no acute findings. He did not believe that any of her present subjective complaints of pain have anything to do with the incident occurring at work on June 13, 2019. He concluded that the work injury was limited to contusions of her cervical, thoracic and lumbar spines, that she had reached MMI, and could work without restrictions.

Dr. Gornet's deposition was taken and is found in Petitioner's Exhibit 6. He testified that there are two components of her complaints. One is neck pain, at the base of her neck going into both trapezius shoulders, and arms, right greater than left, with numbness and tingling into her thumb, with associated headaches. The second was low back pain, central to both sides, going into her buttocks, legs, and occasionally her feet, along with tenderness in the mid back. He related all these complaints to her work injury. (Petitioner's Exhibit 6, p.6, 7).

He testified that the abnormalities on her cervical and lumbar MRIs were causally connected to her work injury. Included in his deposition are images from the MRIs done on October 5, 2019 that he marked to show the abnormalities he found. Exhibit 2 is Image 10 of 15 of the cervical spine. He marked it with arrows pointing to the disc protrusions at C5-6 and C6-7. Exhibit 3 is Image 8 of 15, which again he marked to show the herniation at C6-7 with annular tear, with smaller ones at C3-4 and C5-6. He believed that the pathology was either caused or aggravated by the work injury. (Petitioner's Exhibit 6, p.15-16).

As to the lumbar MRI, he testified that it looked fairly good. Possibly a small central fragment at L4-5, and central beaking at L5-S1. He thought that this may represent a disc injury and further diagnostic studies may be in order. He recommended that if the cervical disc replacements did not provide relief in her lumbar spine, additional testing would be needed. (Petitioner's Exhibit 6, p.21, 22).

Dr. Petkovich's deposition was taken and is contained in Respondent's Exhibit 2. He testified as to his review of all the medical records and noted that nowhere in the records prior to her visit with Dr. Gornet, was there any complaints of neck pain and cervical pain. (Respondent's Exhibit 2, p.17). He testified that her physical exam when he saw her was entirely normal, and she did not have decrease in her biceps and wrists dorsiflexion nor decreased sensation to light touch at C6. (Respondent's Exhibit 2, p.21, 22).

He reviewed all of the MRIs films and also reviewed the images Dr. Gornet had marked which were included in Dr. Gornet's deposition. He disagreed with Dr. Gornet's opinions as to what they showed, and explained the basis for his opinion that all that they did show was mild degenerative changes, consistent with her age. (Respondent's Exhibit 2, p.23-25).

Finally, he reaffirmed his opinion that the work injury was limited to contusions, that is bruises, of her spine. These all had resolved by the time he saw her. The work injury did not cause, exacerbate, aggravate or accelerate, the preexisting degenerative changes in her spine. (Respondent's Exhibit 2 p.28, 29).

Petitioner testified at the Hearing that she wants the cervical disc replacements recommended by Dr. Gornet. Her current symptoms are numbness in her arms and legs, back pain and neck pain. Most of the time she can hardly get out of bed. Can't take care of her children, and do the house chores that she should.

She denied any prior treatment, any prior symptoms, relating to her neck, upper back, thoracic and lumbar spine. She admitted attempting to return to work after she saw Dr. Petkovich. Went back to full duty with the Respondent from November 15, 2019 through November 26, 2019, but had to discontinue due to pain.

She testified that the pain and numbness that she described on the pain diagram that she completed when she saw Dr. Gornet, she had been experiencing since the accident date. She testified on direct examination that she had no prior work related injuries or claims. On cross examination she was questioned about Respondent's Exhibit 3. This consisting of Case Docket Sheet from the Commission website with her name, employer Hodgson Mill, and an accident

date of January 14, 2015. Represented by Hassakis & Hassakis of Mt. Vernon, with status of Settlement Contract approved. This involving multiple body parts, and a settlement of 3 percent of the body as a whole. With this inquiry she initially responded that she could not remember. After further inquiry she did admit that she had worked there, remembered that she fell, but did not remember the parts of body, medical treatment, attorney, or that she received a settlement. Knows that they fired her but doesn't remember anything else.

CONCLUSIONS OF LAW

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

The Arbitrator concludes that Petitioner failed to meet her burden of proof that her current condition of ill-being is causally related to the work injury. The basis for this is I do not find the Petitioner to be a credible witness, and I do find Dr. Petkovich's opinions and conclusions to be more persuasive and believable than the opinions and conclusions of Dr. Gornet.

The pain diagram that the Petitioner completed at the time of Dr. Gornet's evaluation supports Dr. Petkovich's opinion of Petitioner's exaggeration of her complaints. Her testimony that what she demonstrated on the pain diagram was present since the accident date and consistent with what she had reported to all of her medical providers, is in contradiction with what is reported in the records of the medical providers that she had seen before Dr. Gornet. This coupled with her initial denial of any prior work related claims, makes her credibility suspicious at best, and renders Dr. Gornet's opinions to be less persuasive as her symptoms and complaints that she reported to him was a factor in his opinions as to causation and recommendation for treatment.

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

Having found above that Petitioner's current condition of ill-being is not causally related to the work injury, and Dr. Petkovich's opinions and conclusions to be more persuasive than Dr. Gornet, the Arbitrator finds that the nature of injuries sustain as a result of the work injury was contusions/bruising of the cervical, thoracic and lumbar spines. Petitioner had reached maximum medical improvement for the work related injury as of the date that she saw Dr. Petkovich, on November 13, 2019. Arbitrator finds that Respondent shall pay the reasonable and necessary medical services contained in Petitioner's Exhibit 9 for dates of service to November 13, 2019, subject to the medical fee schedule as provided in Sections 8(a) and 8.2 of the Act.

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

Having found above that Petitioner's current condition of ill-being is not causally related to the work injury, Dr. Petkovich's opinions and conclusions to be more persuasive than Dr. Gornet, and that Petitioner reached maximum medical improvement for the work related injury by the time she saw Dr. Petkovich on November 13, 2019, Petitioner is not entitled to any prospective medical care.

L. What temporary total disability benefits are owed?

Having found that Petitioner failed in her burden proof on the issue of her current condition of ill-being is related to the work injury, and having found Dr. Petkovich's opinions and conclusions to be more persuasive than Dr. Gornet, the Arbitrator finds that Petitioner was able to return to full duty work as of the date that she saw Dr. Petkovich on November 13, 2019. Respondent shall pay Petitioner TTD benefits that has accrued from June 14, 2019 through November 13, 2019.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC013957
Case Name	REEVES, MICKEL v. WATCO COMPANIES CO
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0550
Number of Pages of Decision	21
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Laurel Hall

DATE FILED: 11/3/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICKEL REEVES,

Petitioner,

vs. NO: 19 WC 13957

WATCO COMPANIES,

Respondent.

DECISION AND OPINION ON REVIEW

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

Respondent argues the Arbitrator erred in finding Petitioner's cervical condition causally related to his March 8, 2019 work accident, which Respondent claims only resulted in a torn right biceps tendon.

The first question is whether Petitioner has a symptomatic cervical condition. The Arbitrator found that "both Dr. Gornet and Dr. Ruyle determined that there was an acute injury on top of the chronic condition" and "Dr. Ahmed, the neurologist, was unable to rule out a spinal injury as the cause of Petitioner's complaints." *Dec. 8*. In contrast, Respondent's §12 examiner, Dr. Butler, "disagreed with Dr. Gornet's interpretation of the MRI and stated that the Petitioner had no stenosis on the right side of the neck to correlate with Petitioner's subjective complaints" and "indicated that the EMG confirmed the absence of any clinical correlation." *Dec. 5*. Dr. Butler

opined that "there was no causal relationship between a cervical spine condition and the work accident." *Dec. 6.*

This is a difficult question to answer since both experts are quite adamant in their opinions about what the MRIs reveal. This is not a situation where both experts admit there are degenerative changes and the only issue is whether they were aggravated by the accident. Here, Dr. Gornet specifically opines that Petitioner's December 9, 2019 MRI shows a "fragment of disc on the right side C6-7 best seen on image number 10, and also the acute fragmented disc at C5-6 best seen on image number 9." *Px14 at 10*. Dr. Gornet opined that the axial neck pain, of which Petitioner complained from the onset, is consistent with a disc injury and at least a portion of Petitioner's symptoms are cervically related. *Id. at 13*. Dr. Gornet testified that the new MRI on June 15, 2020 "again revealed some loss of disc height at C5-6 and [lesser] extent at C6-7, and the foraminal views which were not present on the original scan. And that's important because foraminal views have been shown to see at least 30 percent more disc herniations than standard MRIs. These show again disc protrusions and narrowing of the foramen at C5-6, C6-7." *Id. at 14*. His opinion is that Petitioner's objective physical examination and complaints correlate with the MRI as being cervical in origin. *Id. at 15*. He "strongly" disagrees with Dr. Butler's opinion that there is no right-sided foraminal narrowing or disc herniation because "the images are quite clear that there is pathology into the right foramen." *Id. at 17*. He testified that a cervical disc replacement at C5-6 and C6-7 "will help him with his neck pain, his residual arm pain that Dr. Paletta was unable to treat because it was actually emanating from his cervical spine" and "it'll help some of the facial numbness, even though that's not typically described, will certainly help some of his headaches. So all those things I think will dramatically improve." *Id. at 16-17*.

In contrast, Dr. Butler is adamant that, regardless of causation, Petitioner's MRI findings do not show any acute injury or structural nerve compression that would require any pain management or surgical intervention and that Petitioner's symptoms do not correlate with a cervical injury because he had no right upper extremity complaints to correlate with any cervical compression. *Rx7 at 15-16, 17*. He opined that other than the one note on April 15, 2019, which documented pain at the base of the neck and "some non-defined numbness of the fingers," there was no pattern or radiation and, from that point on, there was no other mention of any type of numbness, tingling, weakness or radiating pain as one would expect with a cervical radiculopathy. *Id. at 18*. He further opined that the post-surgical numbness on the top of the shoulder and up into the neck and face do not correlate with a cervical radiculopathy. Id. Dr. Butler admitted that Petitioner's mechanism of injury could cause a disc injury or aggravate a pre-existing cervical condition and that there can be a significant amount of overlap between shoulder and cervical conditions and symptoms. *Rx7 at 33*. However, he disagreed with Dr. Gornet's, Dr. Paletta's and the radiologist's interpretation that the canal narrowing was severe. *Id. at 36*. He did not see any acute disc herniation at C5-6 because "the disc is completely collapsed. There's almost no disc in that space to herniate." *Id. at 48*. He also disagreed that there was a disc protrusion at C6-7 and opined that C6-7 is "without any nerve compression on either side." *Id*. He testified that the radiologist's interpretation that the new MRI showed "acute on chronic" changes "would be somewhat inconsistent" because "acute is usually something within three months" and acute on chronic changes in June 2020 would not correlate with a work injury in March 2019. *Id. at 47-48*.

After a thorough review of the evidence, we find Dr. Gornet's opinion that Petitioner has a symptomatic cervical condition to be persuasive. He is Petitioner's treating physician and his opinion is most consistent with those of the radiologists and Dr. Paletta. In contrast, Dr. Butler's opinion is an outlier, which we find less persuasive.

Having found that Petitioner has proven he has cervical-related symptoms, we next address whether they are related to his work accident. Dr. Gornet testified that at Petitioner's first visit with Dr. Paletta, on April 15, 2019, Petitioner had pain in his biceps and shoulder, which would be considered referred pain from the neck, along with occasional numbness into his fingers, which would also be radicular symptoms. *Px14 at 12*. Although Dr. Paletta noted that Petitioner "does not really complain about radicular symptoms," Dr. Gornet opined that "his symptoms in his arm and shoulder as well as numbness are all radicular" and "they would not be considered isolated shoulder, especially the numbness, which clearly would indicate nerve irritation" and not a shoulder problem. *Id.* Petitioner also described pain extending to the base of his neck. *Id*. Dr. Gornet testified that it is not a "coincidence that [Petitioner] has continued pain [even after the shoulder surgery] because he has continued problem at C5-6. *Id. at 17*.

Dr. Gornet discounted the initial medical records prior to Petitioner's visit with Dr. Patella because "when he went to the first qualified specialist [Dr. Patella], he clearly documented not only neck symptoms, but occasionally tinging into his digits." *Id. at 42*. He also opined, "It's typical for someone to have, with a shoulder injury, to have pain only in their arm, because it's called referred pain. This person's referred pain is in C5-6 distribution, which is consistent with the biceps, which is exactly where he's also injured. So the overlap is obvious to qualified practitioners." *Id. at 43*. He testified, "just because you can't figure out an entire problem at the initial visit doesn't mean that it isn't present." *Id. at 44*.

In contrast, Dr. Butler testified, "The medical records are very clear that his initial complaints and report all relate directly to the presence of a rupture of his bicep tendon on the right side, and not a neck injury." *Id. at 4*. He also opined that, in cases where there are combined shoulder/cervical issues, "in my experience, the neurologic issues are present from the beginning. And it's exceptionally rare with this type of history that you would have someone with a cervical issue present this far after the work injury." *Id. at 44*.

Again, we find Dr. Gornet's opinion to be most persuasive in that Petitioner's continued neck and right upper extremity complaints post-shoulder surgery, remain causally related to his work injury. We further note that Petitioner had no pre-accident neck or right upper extremity complaints or treatment, there was no gap in treatment after his work accident during which Petitioner was symptom free, and there is no evidence of any intervening accident to his neck.

We next address Respondent's arguments regarding omissions and discrepancies in the Arbitrator's decision. We acknowledge that the decision does not include the fact that the March 8, 2019 record indicates "no numbness in right hand" and "denies numbness." The decision also does not mention that the March 18, 2019 examination revealed "full painless neck motion" and that Petitioner "denies any numbness or tingling." These omitted facts do conflict with the Arbitrator's finding that "neck issues were a common thread that ran throughout the medical records, and he reported these issues on multiple occasions." *Dec. 8*. Therefore, we modify the

decision to acknowledge that there were no complaints of numbness, tingling and neck pain at the initial visits but, nevertheless, find that just because Petitioner did not have these symptoms initially does not mean that a portion of his right shoulder and arm pain was not referred from the neck. We also modify that sentence to state, "neck issues were a common thread that ran through the medical records since the first visit with Dr. Patella on April 15, 2019, and he reported these issue on multiple occasions." *Dec. 8*.

We also acknowledge that Petitioner's post-operative symptoms were considered "atypical" by Dr. Paletta, and Dr. Butler testified that Petitioner's post-surgical symptoms of pain shooting up into the head causing a headache, facial pain and numbness and facial droop do not correlate with a cervical radiculopathy. *Rx 7 at 5*. Petitioner testified that after his surgery and during physical therapy, his neck was "worsening and worsening" and his shoulder symptoms were getting "worse." *T.19*. Although Dr. Paletta's operative report states, "There were no intraoperative complications," his July 22, 2019 record indicates that Petitioner was getting some "atypical complaints" across the shoulder into the neck and right side of his face for the last couple of weeks. His September 4, 2019 record indicates that the numbness was in a non-dermatomal distribution, but Petitioner also has some neck pain. On September 10, 2019, Dr. Paletta wrote that Petitioner claimed, "this numbness has been present since surgery" and "claims this began postoperatively." However, this note does *not* state that Petitioner's *neck* symptoms began postoperatively.

Significantly, Dr. Paletta had previously noted, on April 15, 2019 (one month prior to his shoulder surgery), that Petitioner's pain "also extends up to the base of the neck." Therefore, there is documented evidence of Petitioner's neck symptoms before the surgery. On November 6, 2019, Dr. Ahmed wrote that "*after the surgery he has noticed worsening of the pain involving the right side of the neck* that will shoot up into the head causing headaches and also right facial pain and discomfort." (Emphasis added.) This does not contradict Petitioner's testimony that he had neck pain prior to the surgery and supports his testimony that it worsened afterwards.

Similarly, on January 7, 2020, Dr. Gornet noted "increasing neck pain" during his post-surgery rehabilitation. Although Petitioner believed the majority of his symptoms began after physical therapy, this does not contradict Petitioner's testimony that he had pain at the base of his neck from the beginning. Significantly, Dr. Gornet wrote, "activities such as this [rehabilitation] could either aggravate or cause a cervical injury."

The physical therapy records themselves reflect a worsening of Petitioner's complaints. When he started therapy on June 6, 2019, he had 2/10 pain at rest, 9/10 pain with activity and it was a dull, achy, throbbing pain. Just over a month later, on July 10, 2019, Petitioner's pain had increased to 6/10 pain at rest, 10/10 with activity and it had become a "sharp stabbing pain while reaching." These documented complaints of increased pain support Petitioner's testimony that his condition worsened during rehabilitation.

Respondent argues that Petitioner's credibility is called into question because Dr. Gornet's January 7, 2020 report indicates Petitioner complained of bilateral neck pain down both sides of the neck but this is the first time the records mention any left-sided neck pain and Petitioner did not testify to left-sided symptoms at trial. We agree that this mention of left-sided symptoms in

Dr. Gornet's record is inconsistent with Petitioner's otherwise consistent complaints and testimony of right-sided symptoms. However, we do not believe this inconsistency in a record created by Dr. Gornet reflects poorly on Petitioner's credibility.

Respondent also argues that Petitioner's lack of radicular symptoms is not addressed in the decision. We find Dr. Gornet's testimony persuasive that "pain in his biceps, and shoulder, and arm is again consistent with a cervical spine injury." *Px14 at 17*. In other words, we find that just because Petitioner did not have consistent radicular symptoms all the way to his fingers does not mean that he did not aggravate a pre-existing cervical condition that had overlapping symptoms with his bicep tendon rupture.

Respondent argues the Arbitrator did not mention the discrepancy between Petitioner's testimony regarding how he swung the sledgehammer and the testimony of its witness, Daniel Spanglar. We acknowledge that Petitioner testified that he used a sledgehammer "raising it above my head pounding excess coal out of the hopper and I heard a pop." *T.14*. In contrast, Mr. Spanglar, testified that "in watching other people do it you typically swing from right or left side, lower up" and you would not swing over your head. *T.52-53*. However, it does not appear Mr. Spanglar ever performed this job himself. Therefore, we are unwilling to impugn Petitioner's credibility regarding how he was performing his job at the time of the accident with Mr. Spanglar's belief, which is based solely on "watching other people."

Respondent argues that the initial Application for Adjustment of Claim, filed on May 14, 2019, only lists Petitioner's right arm and bicep as the injured body parts and he did not make a claim for neck pain until the Application was amended on the date of hearing. We find that this is not unusual considering Dr. Gornet's persuasive opinion that pain in the biceps and shoulder are consistent with a cervical spine injury.

Respondent further argues that Petitioner is not credible because he denied attending a float trip before later admitting it after being impeached with evidence noted in his medical records. *R-brief at 9*. On cross-examination, Petitioner testified:

Q: And then it looks like in your physical therapy records you went on a float trip around August of 2019, do you recall that?
A: No, ma' am.
Q: Do you recall telling a therapist that the float trip went well?
A: No, ma' am. *T.36*.

On redirect examination, he testified:

Q: Float trip. Do you remember going on a float trip following your shoulder surgery?
A: No, sir.
Q: If you would have gone on a float trip, would you have done any floating?
A: No, sir.
Q: Why not?
A: I couldn't. I couldn't bear the pain.

Q: Is it possible that you went along for the ride and let others do the floating and recreating?
A: If I went, I probably just sat underneath a tree and drank a cold beer. *T.43*.

Respondent's implication is that something occurred during this "float trip" in August 2019. Admittedly, Petitioner's denial in recalling his having gone on a float trip, which is specifically referenced in the physical therapy records, followed by a half-admission that if he did go, he would not have done any floating because "I couldn't bear the pain," is a consideration in evaluating his credibility. However, Petitioner already had documented neck pain and occasional numbness into his fingers as early as Dr. Paletta's April 15, 2019 visit. Furthermore, a month before this float trip in August, Petitioner had reported to the physical therapist on July 10, 2019, that his pain level had increased to 6/10 at rest and 10/10 during activity with "sharp stabbing pain while reaching." According to the August 19, 2019 record, Petitioner complained that the right side of his neck was "stiff and sore too" and his arm felt "numb like" sometimes. This was prior to the August 26, 2019 physical therapy record indicating that Petitioner was on a float trip that previous weekend and "did well" with his condition being "about the same as always." Therefore, we do not believe the evidence reflects that anything significant occurred on this float trip to cause or aggravate Petitioner's cervical condition.

Finally, the Arbitrator wrote Dr. Paletta noted "basic cervical" discomfort on July 22, 2019. *Dec. 2*. However, the record actually states, "basicervical" discomfort, which is confusing. We take judicial notice that "basicervical" typically refers to a rare type of hip fracture (neck of the femur). Therefore, we find it most likely that Dr. Paletta's note intended to refer to Petitioner's cervical area.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $792.93 per week for an additional period of 36-4/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay for prospective treatment, including surgery, as recommended by Dr. Gornet under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

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

November 3, 2021

/s/ *Maria E. Portela*

SE/
O: 9/7/21
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0550
NOTICE OF 19(b) ARBITRATOR DECISION

REEVES, MICKEL
Employee/Petitioner

Case# **19WC013957**

WATCO COMPANIES
Employer/Respondent

On 11/19/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

2904 HENNESSY & ROACH PC
LAUREL K HALL
2501 CHATHAM RD SUITE 220
SPRINGFIELD, IL 62704

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)

Mickel Reeves
Employee/Petitioner

v.

Watco Companies
Employer/Respondent

Case # **19** WC **13957**

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 AuBuchon**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **October 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **03/08/2019**, 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 $**61,848.28**; the average weekly wage was $**1,189.39**.

On the date of accident, Petitioner was **59** 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 $**38,060.64** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**38,060.64**.

Respondent is entitled to a credit of $**38,060.64** under Section 8(j) of the Act.

ORDER

Respondent is ordered to pay Petitioner temporary total disability benefits pursuant to Section 8(b) of the Act for 36 4/7 weeks, from 02/14/2020 through 10/28/2020.

Respondent is ordered to pay the medical expenses contained in Petitioners Exhibit 1 pursuant to Section 8(a) of the Act and in accordance with the Medical Fee Schedule (Section 8.2) The Respondent shall have credit for any amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Respondent shall authorize and pay for the prospective treatment recommended by Dr. Gornet, including, but not limited to, surgery.

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

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

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

Signature of Arbitrator

11/18/2020
Date

ICArbDec19(b)

NOV 19 2020

PROCEDURAL HISTORY

This matter proceeded to trial on October 27, 2020, pursuant to Sections 19(b) and 8(a) if the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's cervical spine injuries; 2) payment of medical bills incurred on and after January 7, 2020; 3) entitlement to TTD benefits after February 14, 2020; and 4) entitlement to prospective medical care to the Petitioner's cervical spine.

FINDINGS OF FACT

The Petitioner is employed with Respondent, Watco Companies, as an operator/laborer and has been for the past 12 years. (T. 12-13) On March 8, 2019, the Petitioner sustained accidental injuries in the course of and arising out of his employment when he used a sledgehammer to pound out coal that had become stuck in a hopper (a device that loads coal onto a belt). (T. 14) The Petitioner testified that while doing so, he heard a pop but kept working. *Id.* He testified that as the day went on, he felt pain from the base of his neck to the top of his arm across his right shoulder. *Id.* The Petitioner denied having any prior injury, treatment or surgery to his neck or right shoulder. *Id.* at 15.

On the day of the accident, the plant manager took the Petitioner to MedExpress, an urgent care facility. (T. 16. PX3) The MedExpress records state that the Petitioner complained of right biceps tenderness and pain. (PX3) The MedExpress nurse practitioner, in consultation with the physician, diagnosed a suspected right biceps tendon rupture and referred the Petitioner to Illinois Southwest Orthopedics. *Id.*

On March 18, 2019, the Petitioner saw Scott Knox, a physician's assistant at Illinois Southwest Orthopedics. (PX4) Mr. Knox's assessment was a proximal biceps tendon rupture, and he recommended conservative treatment. *Id.* The Petitioner next saw Mr. Knox on April 1, 2019,

and the assessment was the same. *Id.* Mr. Knox discussed surgery with the Petitioner and advised against it. *Id.*

Desiring to get his arm fixed, the Petitioner went to The Orthopedic Center of St. Louis and saw Dr. George Paletta, on April 15, 2019. (PX5) Dr. Paletta's records reflect that the Petitioner complained of some pain in the biceps and shoulder, with most of the pain in the shoulder itself and extending up to the base of the neck. *Id.* The Petitioner noted occasional numbness into his fingers but did not really complain about radicular symptoms. *Id.* Following an MRI arthrogram April 23, 2019, Dr. Paletta diagnosed a rupture of the long head of the biceps tendon of the right shoulder with associated labral tear, as well as a probable retained fragment and a partial tear of the subscapularis. *Id.* Dr. Paletta recommended arthroscopy with probable labral repair versus labral debridement, and debridement of the retained fragment or labral fragment, as well as debridement or possible repair of the subscapularis. *Id.* The surgery was performed on May 14, 2019. *Id.*

The Petitioner returned to Dr. Paletta on June 3, 2019, for his initial post-op visit status, and Dr. Paletta recommended physical therapy. *Id.* On July 22, 2019, the Petitioner had another follow-up visit with Dr. Paletta. *Id.* The Petitioner complained of intermittent numbness across the top of the shoulder, up into the neck and onto the right side of the face. *Id.* In addition, the Petitioner noted that his arm was sore from the mid arm up to the top of the shoulder and said he had some basic cervical discomfort. *Id.* Dr. Paletta believed that the numbness and tingling could be related to the residual from the surgery. *Id.* The Petitioner returned to Dr. Paletta on September 4, 2019, and continued to note intermittent numbness along the right cheek and jaw and over the top of the shoulder, as well as pain in the upper arm and neck. *Id.* Because of the ongoing symptoms, Dr. Paletta recommended the Petitioner consult a neurologist. *Id.*

During the time the Petitioner was seeing Dr. Paletta, the Petitioner was undergoing physical therapy at ATI Physical Therapy. (PX8) On four occasions, the physical therapist noted in the records that the Petitioner was reporting neck pain, stiffness and/or soreness. *Id.* On other occasions, the Petitioner reported stabbing pain, but the records did not reflect the exact location of such pain. *Id.*

The Petitioner underwent a neurological examination with Dr. Zaheer Ahmed at St. Luke's Hospital on November 6, 2019. (PX9) The Petitioner's chief complaints were neck pain, headache and right shoulder pain and discomfort. *Id.* Dr. Ahmed's physical examination showed that the Petitioner's neck movements from side to side were somewhat limited on the right, motor strength was normal, shoulder abduction was limited, and the Petitioner's sensation was well preserved. *Id.* Dr. Ahmed's diagnosis was right-sided neck pain, right shoulder pain, recent surgery for a rotator cuff tear and headaches/facial numbness. *Id.* He recommended MRI scans of the brain and cervical spine and an EMG nerve conduction study. *Id.* Dr. Ahmed stated that most likely the Petitioner's right-sided neck pain was related to the rotator cuff tear and the problems he was having in the right shoulder but could not rule out the possibility of cervical disc herniation, neuropathy or radiculopathy. *Id.*

The MRI of the brain and brain stem and the EMG nerve condition study results were normal. (PX10) The MRI of the cervical spine showed: 1) severe canal narrowing at C5-6 secondary to spondylosis and posterior ligamentous thickening; 2) mild canal narrowing at C4-5 and C6-7 secondary to mild spondylosis; 3) mild spondylosis with a small central/left paracentral disc protrusion at C7-T1; and 4) mild central disc bulging at C3-4. *Id.*

On, December 20, 2019, the Petitioner again saw Dr. Paletta, who reviewed the MRI results and referred the Petitioner to Dr. Matt Gornet (also at The Orthopedic Center of St. Louis) or

another qualified cervical spine specialist. (PX5) Dr. Paletta's impression was C5-6 canal stenosis with cord compression. *Id.* Dr. Paletta reported that it was highly likely that a component of the Petitioner's symptoms was originating from the cervical spine. *Id.*

Dr. Gornet first saw the Petitioner on January 7, 2020. (PX11) His examination showed 1) limited range of motion on extension and rotation to both sides of the neck; 2) decrease in biceps, wrist dorsiflexion and volar flexion, as well as triceps on the right side; 3) normal deep tendon reflexes; and 4) normal sensation. *Id.* Cervical x-rays taken at that visit showed loss of disc height at C5-6 and C6-7 with some foraminal narrowing at the same levels. *Id.* Dr. Gornet reviewed the MRI report and noted that it showed an acute fragment of disc on the right side at C6-7 and disc osteophyte and an acute fragment at C5-6. *Id.* He recommended steroid injections at C5-6 and C6-7 and a new high-resolution MRI and plain CT scans both with foraminal views. *Id.* He placed work restrictions on the Petitioner for light duty with a 10-pound limit and no overhead work. *Id.*

The Petitioner received two steroid injections to his neck on February 25, 2020, and March 10, 2020. (PX12) The Petitioner testified that the injections helped for a little bit, but his pain returned. (T. 23) The Petitioner demonstrated that he was still having pain from the base of his neck, over the top of his shoulder and down his arm. *Id.*

The CT scan and MRI of June 15, 2020, were read by the radiologist, Dr. Matthew Ruyle at MRI Partners of Chesterfield. (PX13, 6) Dr. Ruyle stated in his reports that on the CT scan he saw circumferential disc bulges and spurring at C5-6 and C6-7, mild central canal stenosis at C5-6, moderate foraminal stenosis at C5-6 and mild foraminal stenosis at C6-7. (PX13). He also noted central protrusions at C2-3 and C3-4 with left-sided facet arthropathy at C3-4, resulting in mild left foraminal stenosis. *Id.* On the MRI, Dr. Ruyle noted that at C5-6, he saw disc height loss, circumferential disc bulge and left foraminal protrusion with soft disc material extending beyond

the margin of endplate spurs that could indicate acute on chronic disease. (PX6) At C6-7, he saw circumferential disc bulge with a left lateral recess-foraminal soft disc protrusion resulting in moderate to severe left greater than right foraminal stenosis. *Id.* At C3-4 and C4-5, he saw central protrusions with extension into the foramina resulting in mild to moderate foraminal stenosis. *Id.*

The Petitioner returned to Dr. Gornet on June 15, 2020, with complaints of shoulder pain, neck pain into the trapezius and upper arms with restriction of range of motion of his right shoulder and right arm. (PX11) Dr. Gornet reviewed the new MRI scan and believed it showed loss of disc height at C5-6 and C6-7, with some foraminal narrowing, disc osteophyte and disc protrusions at those levels. *Id.* The CT scan showed no evidence of significant facet arthropathy but showed some widening of the Petitioner's left-sided facet joint at C4-5. *Id.* He opined that there may be some subtle changes in his facets at C2-3 and C3-4 on the left. *Id.* Again, he noted disc osteophyte. *Id.* Dr. Gornet recommended disc replacements at C5-6 and C6-7 and maintained the prior work restrictions. *Id.* These work restrictions were maintained again on August 24, 2020. *Id.*

Dr. Gornet testified by way of deposition. (PX14) He testified consistently with the findings and recommendations that appear in his records as stated above. Dr. Gornet believed that Petitioner's injuries were causally related to the accident as he described. *Id.* at 11.

Dr. Jesse Butler conducted a Section 12 examination of the Petitioner on February 14, 2020. (RX4) He reviewed the history of the injuries, the Petitioner's medical records, the electrodiagnostic studies, and the MRI of the cervical spine from December 9, 2019. *Id.* Dr. Butler diagnosed the Petitioner with degenerative disc disease at C5-6 and C6-7 with mild stenosis. Id. Dr. Butler disagreed with Dr. Gornet's interpretation of the MRI and stated that the Petitioner had no stenosis on the right side of the neck to correlate with Petitioner's subjective complaints. *Id.* He also indicated that the EMG confirmed the absence of any clinical correlation. *Id.* In his report,

he stated that there was no causal relationship between a cervical spine condition and the work accident of March 8, 2019. *Id.* He stated that the Petitioner requires no treatment for the cervical spine. Id.

Dr. Butler also issued a July 31, 2020, report, consisting of a review of latest MRI and CT scan on June 15, 2020. (RX5). Dr. Butler maintained his disagreement with Dr. Gornet's opinion. *Id.* At Dr. Butler's deposition on September 11, 2020, the Petitioner's counsel objected to admission of this second report and any testimony regarding it because the report was furnished to the Petitioner's counsel less than 24 hours prior to the deposition – a violation of the 48-hour rule in Section 12 of the Act, also known as the *Ghere* rule. The Arbitrator reviewed *Ghere v. Industrial Comm'n*, 278 Ill.App.3d 840 (1996) and its progeny, specifically *Homebrite Ace Hardware v. Industrial Comm'n*, 351 Ill.App.3d 333 (2004). Both cases call for the trial court (or in this case the Arbitrator) to examine the physician's records to determine whether the opposing party was put on notice regarding the possibility that the physician might provide the testimony being proffered. *Homebrite*, 351 Ill.App.3d at 339.

This Arbitrator did examine the records and determines that there would be no surprise to the Petitioner that at his deposition, Dr. Butler would give his opinion on the imaging studies that were conducted after his examination of the Petitioner. Therefore, the objection is overruled.

Dr. Butler testified consistently with his reports and stated that Petitioner's pain and symptoms did not correlate with his cervical injury because there was no there were no radicular complaints into his right upper extremity that correlated with any cervical compression. *Id.* at 17. Dr. Butler does not perform disc replacement surgery, but he does perform revisions to disc replacements. *Id.* at 28-29. He acknowledged that Dr. Gornet is an expert on disc replacement surgery in the central Illinois area. *Id.* at 29.

Dr. Butler did agree that the mechanism of injury could cause a cervical disc injury and aggravate a pre-existing cervical spine condition and cause it to become symptomatic. *Id.* at 33. He also stated there is a significant amount of overlap between shoulder and cervical spine conditions and symptoms, and the sort of mechanism of injury which Petitioner experienced could cause both shoulder and cervical problems. *Id.* at 32, 33.

He disagreed with both Dr. Gornet and the radiologist, Dr. Ruyle, on the interpretation of imaging studies in that he did not believe they showed a significant abnormality at C5-6. *Id.* at 35, 36.

At Arbitration, Petitioner testified that he currently experiences a lot of pain from the base of his neck through his shoulder and into his arm. (T. 23) He testified that he wishes to have the cervical surgery done so he can get better and get back to work. (T. 24) The Petitioner's supervisor at work testified that aside from two days of sitting in the mailroom at Watco, the Petitioner has not returned to work, and there is no light duty work available to him. (T. 54)

CONCLUSIONS OF LAW

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

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

An accident need not be the sole or primary cause as long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 ILL. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover

where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

The doctors agreed that the Petitioner had a degenerative condition. However, both Dr. Gornet and Dr. Ruyle determined that there was an acute injury on top of the chronic condition. Dr. Gornet has vast experience and expertise in diagnosing and treating cervical spine injuries that are even acknowledged by Dr. Butler. Dr. Gornet's opinions are backed up by those of Dr. Ruyle and the fact that Dr. Ahmed, the neurologist, was unable to rule out a spinal injury as the cause of the Petitioner's complaints.

The circumstantial evidence also backs up Dr. Gornet's opinion. There was no evidence that the Petitioner had any prior issues with his cervical spine, nor was there evidence of any other trauma since the accident on March 8, 2019.

It is true that the Petitioner did not complain of neck issues at each visit with every doctor, nurse practitioner, physician's assistant and therapist. However, the records showed that his neck issues were a common thread that ran throughout the medical records, and he reported these issues on multiple occasions.

Therefore, the Arbitrator finds that the Petitioner has met his burden of proof establishing causal connection between the accident and the Petitioner's cervical spine condition.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

Based on the fact that Dr. Paletta suspected additional pathology in the Petitioner's cervical spine after the Petitioner's complaints were not resolved following full recovery from shoulder surgery, the Arbitrator finds that it was reasonable and necessary for Dr. Paletta to refer the Petitioner to Dr. Gornet and for Dr. Gornet to order the testing and treatment that he did. The Respondent has not paid for these medical services.

The Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 1, including those related to Petitioner's cervical spine. The Respondent shall have credit for any amounts already paid or paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

The Petitioner has subjective symptoms that correlate with his objective pathology. Conservative treatment, specifically steroid injections, have failed. His condition has not stabilized nor otherwise reached maximum medical improvement, and Dr. Gornet has recommended a cervical disc replacement at C5-6 and C6-7 to alleviate Petitioner's symptoms.

The Arbitrator finds that the Petitioner is entitled to prospective medical care as recommended by Dr. Gornet, and the Respondent shall authorize and pay for such care.

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

The parties dispute temporary total disability benefits for the period of February 14, 2020, through the date of trial on October 28, 2020. An employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 118 (1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Id.* at 121.

The Petitioner has been unable to return to work since the accident, and the Respondent is unable to accommodate the light duty restrictions put in place by Dr. Gornet. Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 36 4/7 weeks, from February 14, 2020 through October 28, 2020.

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	12WC023096
Case Name	JIMENEZ, YESENIA v. HELP AT HOME
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0551
Number of Pages of Decision	9
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	David Feuer, Michael Lulay
Respondent Attorney	Mark Zapf

DATE FILED: 11/3/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Yesenia Jimenez,

Petitioner,

vs. NO: 12 WC 023096

Help At Home,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issue of attorneys' 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.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 29, 2018 is hereby affirmed and adopted.

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

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

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

November 3, 2021

MEP/ypv
o 100521
49

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0551

NOTICE OF ARBITRATOR DECISION

ATTORNEY FEE DISPUTE

JIMENEZ, YESENIA Case# **12WC023096**

Employee/Petitioner

HELP AT HOME

Employer/Respondent

On 8/29/2018, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.21% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0226 GOLDSTEIN BENDER & ROMANOFF
DAVID Z FEUER
ONE N LASALLE ST SUITE 1000
CHICAGO, IL 60602

4220 LULAY LAW OFFICES
MICHAEL B LULAY
2323 NAPERVILLE RD SUITE 220
NAPERVILLE, IL 60563

2284 COZZI & GOGGIN-WARD
MARK H 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)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
ATTORNEY FEE DISPUTE

Yesenia Jiminez
Employee/Petitioner

v.

Help at Home
Employer/Respondent

Case # 12 WC 23096

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 **Jessica A. Hegarty**, Arbitrator of the Commission, in the city of **Wheaton**, on **5/5/17**. 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 ATTORNEY FEE DISPUTE

ORDER

The Arbitrator awards Lulay Law Office 20% of the disputed fee or $1600.00. (See attached for the Arbitrator's findings).

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

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

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

Jason C. Hegarty

Signature of Arbitrator

8/30/18
Date

ICArbDec19(b)

AUG 29 2018

STATE OF ILLINOIS)
)SS
COUNTY OF DUPAGE)

ILLINOIS WORKERS' COMPENSATION COMMISSION

ATTORNEY FEE DISPUTE DETERMINATION

YESENIA JIMINEZ,
Employee/Petitioner,

v.

12-WC-023096
Arbitrator Jessica Hagerty
Wheaton, Illinois

HELP AT HOME.
Employer/Respondent.

Attorney David Feuer of Goldstein, Bender & Romanoff ("Goldstein") testified to the following:

1. Petitioner, Yesenia Jimenez, retained Goldstein's services on August 8, 2012 after discharging her former law firm, Ankin Law Offices;

2. Goldstein provided various legal services for Petitioner including the deposition of Respondent's IME physician, after which, Respondent offered to settle the case for approximately $22,000. Petitioner, apparently unhappy with the offer, obtained the services of Michael Lulay of the Lulay Law Offices ("Lulay") who filed a substitution of attorney on December 3, 2014;

3. In August of 2016, Petitioner returned to Goldstein's office, "saying she no longer wished to be represented by Mr. Lulay and so we then resumed the representation of the Petitioner and obtained an offer of $40,000 in January of 2017";

4. Petitioner ended up, after fees and bills, with a net settlement of $22,084.13;

5. The disputed attorney's fees in this case is $8,000.00.

6. On April 26, 2017, a settlement contract between the Petitioner-Employee and the Employer-Respondent in the amount of $40,000 was approved by the Arbitrator for work-related injuries suffered by Petitioner on May 25, 2012. (Goldstein 1).

Attorney Emily Vinyard testified on behalf of the Lulay Law Offices ("Lulay") to the following:

1. When Lulay became Petitioner's attorney in October of 2014, there was already a settlement offer of $22,800 obtained by Goldstein;

2. Lulay handled the case until August of 2016;

3. Although there were "multiple settlement negotiations" between Lulay and Respondent's counsel, Mark Zapf, there was not a formal settlement offer tendered by Respondent.

4. At the time Petitioner fired Lulay in August of 2016, "we believe that the case had been propelled to a position where it was very close to a point where it could be settled. And then counsel took over the case and a few months later did obtain a settlement offer of $40,000.";

5. Lulay spent approximately 40 hours and his staff spent approximately 100 hours of time working on this case.

The Arbitrator notes Attorney Mark Zapf was present for the hearing but did not testify. Petitioner, Yesenia Jimenez was not at the hearing.

In Illinois, a client has the right to discharge her attorney at any time, with or without cause. (Rhoades v. Norfolk & Western Ry. Co. (1979), 78 Ill.2d 217; 35 Ill.Dec. 680; 399 N.E.2d 969. A discharged attorney is entitled only to fees calculated on a quantum meruit basis. (Rhoades, 78 Ill.2d at 227-29, 35 Ill.Dec. 680, 399 N.E.2d 969.)

The term quantum meruit literally means 'as much as he deserves.' Van C. Argiris & Co. v. FMC Corp. (1986), 144 Ill.App.3d 750, 753; 98 Ill.Dec. 601; 494 N.E.2d.

The time and labor required in a given case is but one factor to be considered in assessing a reasonable attorney fee under the doctrine of quantum meruit. Johns v. Klecan (1990), 198 Ill.App.3d 1013, 1019; 145 Ill.Dec. 71; 556 N.E.2d 689.

Other factors to be considered include the attorney's skill and standing, the nature of the cause and the novelty and difficulty of the subject matter, the degree of responsibility in managing the cause, the usual and customary charge in the community, and the benefits resulting to the client. Neville v. Davinroy (1976), 41 Ill.App.3d 706, 711; 355 N.E.2d 86.

A review of the Lulay exhibits shows that Lulay Law Offices sent out a substantial number of e-mails to the Respondent. For the most part these e-mails demanded payment of disputed medical bills and demanded compensation for the Petitioner's injuries. Unfortunately, these e-mails did not result in the payment of any disputed medical bills nor did they result in any offer of settlement.

When Petitioner returned to Goldstein in August of 2016, Petitioner's medical bills and lien in the amount of $20,359.80 were denied and unpaid. Goldstein reduced that amount to $9,713.52.

The only settlement offers in this case were obtained by Goldstein.

The only deposition in this case, that of Respondent's IME physician, was taken by Goldstein.

Based on the above, the Arbitrator awards Lulay Law Office 20% of the disputed fee or $1600.00

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC036482
Case Name	BRAYFIELD, DANIEL v. GILSTER-MARY LEE CORPORATION
Consolidated Cases	19WC022971
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0552
Number of Pages of Decision	20
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jason Coffey
Respondent Attorney	Pieter Schmidt

DATE FILED: 11/4/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL BRAYFIELD,

Petitioner,

vs. NO: 18 WC 36482

GILSTER-MARY LEE CORP.,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission finds that the Petitioner sustained a low back strain/sprain or aggravation of his degenerative disc disease that was causally related to the November 7, 2018 work accident. However, the Commission finds Petitioner was not credible regarding his ongoing complaints of ill-being and finds Petitioner reached maximum medical improvement as of September 3, 2019. Accordingly, the Commission modifies the Arbitrator's award of temporary total disability benefits from 65 weeks for December 3, 2018 through March 28, 2019 and August 6, 2019 through July 9, 2020, to December 3, 2018 through March 28, 2019 and August 6, 2019 through September 3, 2019 for a total of 20 5/7 weeks. The Commission also modifies the award for medical expenses and reduces the amount of medical expenses awarded to $567.00 due and owing Chester Memorial Hospital; and $425.00 due and owing So. Ortho Assoc/Ortho Inst of W KY, totaling $992.00 as any treatment after September 3, 2019 is not causally connected to the November 7, 2018, work accident. The Commission vacates the award of $3,009.04 to Victor's Medicenter Pharmacy and $200.00 to S. Ortho Assoc/Ortho Inst of W KY as these charges were for treatment incurred after Petitioner had reached MMI on September 3, 2019, and therefore, Respondent is not liable for

payment of same. Additionally, the Commission vacates the award for prospective medical treatment.

The Commission finds that Petitioner's credibility is questionable, at best. Following the November 7, 2018 work injury, the Petitioner presented to the Chester Hospital ED on November 10, 2018. However, he then continued to present to the ED multiple times, even after finding a primary care physician, for what the Commission believes to be drug seeking behavior. Petitioner presented to the Chester ED on November 10, 2018, November 12, 2018, November 14, 2018, November 23, 2018, November 27, 2018, January 16, 2019, and January 17, 2019 – all with complaints of severe back pain. Petitioner appeared to receive narcotic pain medication at each of these visits.

On November 16, 2018, Petitioner was seen at Chester Clinic and given work restrictions. On November 21, 2018, Petitioner returned to Chester Clinic requesting a Norco refill. Dr. Kirkpatrick, who saw Petitioner on that date, indicated Petitioner should be weaned off the Norco and also recommended physical therapy but Petitioner refused to sign paperwork to allow the physical therapy referral. On December 3, 2018, Petitioner returned to the Chester Clinic and was seen by Dr. Molnar. Notwithstanding Dr. Kirkpatrick's recommendation that he be weaned off Norco, Petitioner received a prescription for same. On December 17, 2018, Petitioner was once again seen at the Chester Clinic by Dr. Molnar and received yet another prescription for a Norco refill. On January 7, 2019, Petitioner returned to Dr. Molar seeking more Norco.

On January 28, 2019, Petitioner was initially seen by Dr. Gornet. Dr. Gornet wanted him weaned off narcotics. Petitioner's subjective symptoms upon presentation to Dr. Gornet were worse than they had been at the time of his visits to Chester Hospital or Chester Clinic. Dr. Gornet reviewed the CT scan of November 14, 2018 and performed x-rays which showed some mild loss of disc height at L5-S1. Dr. Gornet also ordered an MRI which was performed on January 28, 2019. Following the MRI, Dr. Gornet's working diagnosis was disc injury at L5-S1 and potentially at L4-5. Dr. Gornet again stressed he wanted Petitioner weaned off narcotics and recommended injections at L4-5 right and L5-S1 right. (Px3)

On April 2, 2019, Petitioner underwent an L5-S1 lumbar epidural steroid injection by Dr. Helen Blake at the Orthopedic Ambulatory Surgery Center of Chesterfield. Prior to discharge, Petitioner reported pain scores of 2-3/10.

Between epidural steroid injections and prior to his follow up visit with Dr. Gornet, on April 5, 2019, Petitioner returned to Dr. Molnar seeking more Norco. Petitioner reported to Dr. Molnar that Dr. Gornet diagnosed him with multiple bulging discs in his back during the January 28, 2019 visit.

On April 8, 2019, Petitioner saw Dr. Gornet one final time. Petitioner reported he returned to work 2 weeks prior, and had been trying to work, but his pain increased. Despite Petitioner's continued complaints of pain, Dr. Gornet released Petitioner to work light duty. Dr. Gornet wanted Petitioner to complete the second injection and return in two months. If at that time Petitioner continued to have pain and was off all narcotics, Dr. Gornet opined Petitioner's only option would be to undergo a discogram at 3-4 and 4-5 with the presumption that 5-1 would need to be treated. (Px3)

On April 16, 2019, Petitioner underwent a second lumbar epidural steroid injection at L4-L5 with Dr. Blake. Prior to discharge, he reported pain scores of 0/10. At no point did Petitioner attempt to wean off the narcotics as recommended by Dr. Gornet. Moreover, Petitioner never returned for a follow up visit with Dr. Gornet.

By May 2, 2019, Petitioner returned to Dr. Molnar stating the pain was too bad to work. On May 13, 2019, Petitioner reported to Dr. Molnar that he did not yet have a date for surgery from the back surgeon.

On May 20, 2019, Petitioner returned to Dr. Molnar seeking more Norco. Petitioner requested a different surgeon as of May 29, 2019. Petitioner told Dr. Molnar that his reason for wanting to switch doctors was due to his inability to get into see Dr. Gornet and that it was too far a drive from his home to Dr. Gornet's office. In reviewing the totality of the records, the Commission finds that a more plausible explanation is that Petitioner did not want to wean himself off narcotics nor did he want to undergo the further testing recommended by Dr. Gornet. Petitioner reported to Drs. Jones and Wayne that the injections Dr. Gornet performed provided no relief.

Based on the apparent non-compliant and drug seeking behaviors, as well as the doctor shopping and significant differences in symptoms in his presentations to the doctors, the Commission finds that Petitioner simply was not credible regarding the extent of his injuries.

Additionally, the Commission does not find the opinions of Drs. Gornet or Jones as persuasive as those of Dr. Wayne.

Dr. Wayne was credible in his opinions in that Petitioner sustained a low back sprain/strain and aggravation of a pre-existing degenerative disc disease condition. Dr. Wayne recommended that Petitioner undergo an MRI, physical therapy and imposed work restrictions. Although Petitioner underwent the lumbar MRI as recommended by Dr. Gornet on January 28, 2019, Petitioner failed to cooperate in undergoing physical therapy. Dr. Wayne reviewed all treating records and personally reviewed the MRI films from January 28, 2019. Dr. Wayne agreed with Dr. Gornet that Petitioner should be weaned off narcotics. Dr. Wayne examined Petitioner for a second time on September 3, 2019. He opined that Petitioner had reached MMI as of that date. Dr. Wayne based his opinions on the fact that Petitioner reported no relief from the injections, his findings of symptom magnification and in comparing his own 2 independent medical examinations side by side and finding that the Petitioner presented with more of a general pain presentation with more global problems on the second evaluation. The Commission finds that Dr. Wayne's causation opinions that Petitioner simply suffered a low back strain and was exaggerating his symptoms out of proportion with the diagnostic findings to be persuasive.

Dr. Gornet was not deposed and Dr. Gornet's treatment recommendations indicated that if Petitioner continued to have pain and was off all narcotics, then his only other option would be to perform a discogram at 3-4 and 4-5 with again the presumption that 5-1 will need to be treated. (Px3) Dr. Gornet wanted Petitioner to return to work light duty following the April 8, 2019 appointment. Petitioner did not return to Dr. Gornet for the recommended follow up appointment and, in fact, requested a different back surgeon referral in May of 2019. Petitioner never stopped taking narcotics, left in the middle of his shift on May 2, 2019 when returning to work, and gave the doctors conflicting information regarding his pain levels post lumbar epidural spinal injections.

Dr. Jones was deposed but based his recommendations off Petitioner's subjective complaints and never performed or ordered his own imaging. "[u]nless there is some evidence that he's had back problems this whole time, I mean, you just got to go with what they tell you, and that's the big thing in this business." (Px5, p. 14) It is unclear if Dr. Jones reviewed the January 29, 2019 report of the January 28, 2019 lumbar MRI, or the films themselves as he referenced his physician assistant's note that stated "MRI of the lumbar spine shows modest lumbar spondylosis." (Px5, p. 9) Further, Dr. Jones testified that they did not have the actual MRI scan in their file, but simply Dr. Gornet's note. (Px5, p. 9) Moreover, Dr. Jones did not review any other treating records, including Chester Hospital or Chester Clinic. Dr. Jones testified that with a strain, you hope it resolves with physical therapy, and that even with some types of disc problems, they will resolve with physical therapy. (Px5, p. 17) Petitioner never underwent physical therapy.

Based on the totality of the evidence, the Commission finds that Petitioner sustained a low back strain/sprain or aggravation of his degenerative disc disease that was causally related to the November 7, 2018 work-accident. However, due to Petitioner's lack of credibility, the Commission modifies the award of medical benefits and temporary total disability benefits based on the second IME report of Dr. Wayne and ceases benefits as of September 3, 2019. Additionally, the Commission vacates the award of prospective medical treatment.

Finally, the Commission corrects the "Findings" section of the Arbitrator's Decision to reflect a credit of $1,188.00 for a PPD advance, for a total credit of $4,282.18 for TTD and PPD.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $253.68 per week for a period of 20 5/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $992.00 for medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act. Specifically, the Respondent is ordered to pay $567.00 due and owing Chester Memorial Hospital; and $425.00 due and owing So. Ortho Assoc/Ortho Inst of W KY. The Commission vacates the award of $3,009.04 to Victor's Medicenter Pharmacy and $200.00 to S. Ortho Assoc/Ortho Inst of W KY as these charges were for treatment incurred after Petitioner had reached MMI on September 3, 2019, and therefore, Respondent is not liable for payment of same. 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.

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.

As the credits due and owing the Respondent are greater than the award of benefits, no bond is required. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 4, 2021

/s/ *Maria E. Portela*

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

MEP/dmm
O: 09/07/21
49

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0552
NOTICE OF 19(b) ARBITRATOR DECISION

BRAYFIELD, DANIEL
Employee/Petitioner

Case# **18WC036482**
19WC022971

GILSTER-MARY LEE CORPORATION
Employer/Respondent

On 9/10/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4075 FISHER KERHOVER COFFEY
JASON E COFFEY
600 STATE ST
CHESTER, IL 62233

0693 FEIRICH MAGER GREEN RYAN
PIETER N SCHMIDT
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Daniel Brayfield
Employee/Petitioner

v.

Gilster-Mary Lee Corporation
Employer/Respondent

Case # **18** WC **36482**

Consolidated cases: **19-WC-22971**

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 **July 9, 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, **11/07/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**N/A**; the average weekly wage was $**380.52**.

On the date of accident, Petitioner was **36** 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 $**3,094.18** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**3,094.18**.

Respondent is entitled to a credit of $**9,409.61** under Section 8(j) of the Act.

ORDER

Respondent shall pay medical expenses contained in Petitioner's group exhibit #7 as they relate to his work-related accident of November 7, 2018 in the amount of **$4,201.04**, as provided in Section 8(a) and Section 8.2 of the Act. Specifically, Respondent is ordered to pay $567.00 due and owing Chester Memorial Hospital; $625.00 due and owing So Ortho Assoc/Ortho Inst of W KY; and $3,009.04 due and owing Victor's Medicenter Pharmacy. The Arbitrator finds that prescription charges for Levetiracetam contained in Petitioner's group exhibit #7 are not related to Petitioner's work accident of November 7, 2018, but related to a seizure disorder pursuant to Dr. Kirkpatrick's medical record dated December 2, 2019, and therefore, Respondent is not liable for payment of same. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit.

Respondent shall authorize and pay for the necessary treatment recommended by Dr. Jeffery Jones, including, but not limited to, the referral to Dr. Colle for a discogram.

Respondent shall pay Petitioner temporary total disability benefits of **$253.68**/week for **65 weeks**, commencing **12/3/18 through 3/28/19 and 8/6/19 through 7/9/20**, as provided in Section 8(b) of the Act.

Respondent shall be given credit of **$1,188.00** for permanent partial disability benefits advanced and paid under Section 8(d)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.

Signature of Arbitrator

9/7/20
Date

SEP 10 2020

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DANIEL BRAYFIELD,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 18-WC-36482
	)	
GILSTER-MARY LEE CORPORATION,	)	Consolidated Case: 19-WC-22971
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 9, 2020, pursuant to Section 19(b) of the Act. On September 16, 2019, the above-captioned case was consolidated with Case No. 19-WC-22971 by Arbitrator Edward Lee. The issues in dispute are causal connection, medical expenses, temporary total disability benefits, credit for permanent partial disability advance, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 36 years old at the time of the accident. Petitioner was hired by a temporary agency, Talent Force, to work in Respondent's facility. He worked 120 days for Talent Force and was hired by Respondent full-time three days prior to his accident on November 7, 2018. Petitioner testified that on November 7, 2018 he was working in the marshmallow department and the machine went down. Petitioner had to go upstairs and clean and move skids and boxes out of the way. Petitioner was operating a hand jack to move a heavy skid of marshmallow boxes. The wheels on the hand jack were sticky due to being covered with marshmallows and he had to push and pull on the jack to get it to move. When Petitioner attempted to pull up on the hand jack he felt a pinch and sharp pain in his back.

Petitioner reported the injury to his supervisor, Richard McLean. Petitioner testified that Mr. McLean told him to continue working and an accident report was not completed. Petitioner returned to work and his back pain worsened. He testified he never received medical treatment for his back prior to November 7, 2018. Petitioner went to the emergency room at Chester Memorial Hospital on November 10, 2018 and provided a history of accident. Petitioner testified he kept returning to the emergency room over the next several weeks due to pain and because he did not have a primary care physician at that time. Petitioner obtained work slips each time he

reported to the emergency room because his supervisor, Juan Anaya, told him his job would be in jeopardy if he did not.

Petitioner testified he established a primary care physician who referred him to Dr. Matthew Gornet. Dr. Gornet recommended an MRI and steroid injections. Petitioner underwent two injections that provided only temporary relief. Petitioner returned to his primary care physician in May 2019 requesting a second opinion. Petitioner saw Dr. Jeffrey Jones in August 2019 who took him off work. Petitioner was working light duty prior to Dr. Jones taking him off work. Dr. Jones recommended a discogram to be performed by Dr. Colle and injections, both of which were denied by Respondent. Petitioner could not financially afford this treatment. He testified he was eventually evaluated by Dr. Colle but his office would not accept an Illinois medical card. Petitioner testified he wants to undergo the discogram as recommended by Dr. Gornet and Dr. Jones.

Petitioner testified he suffered a subsequent injury while working light duty for Respondent on July 26, 2019. Petitioner testified he was standing on a concrete floor on an industrial rubber mat inspecting boxes of material that were placed on a table. He testified he requested that the floor to be swept several times and he was told to do it himself. The mat went out from under him and he fell to the floor between a tote and the folding table. He testified that a coworker witnessed him fall and she helped him off the floor.

On cross-examination, Petitioner testified that his primary care physician returned him to light duty work on November 16, 2018. Despite having a primary care physician, Petitioner reported to the emergency room because he either left work early to seek treatment or his doctor's office was closed. He agreed that Dr. Gornet advised him in April 2019 to wean off narcotics which he did not do.

Petitioner agreed that he called Dr. Gornet's office on May 6, 2019 requesting to move his appointment up. He denies having received a return call from Dr. Gornet's office moving his appointment up per his request. He testified he did not see Dr. Gornet again because of scheduling issues and switched his treatment to Dr. Jeffrey Jones.

Petitioner testified that while working light duty he was placed at a "rework" station that was quite a distance from the front door. He complained to Respondent that the walk was aggravating his back and they moved the station within approximately 50 feet of the front door which he was able to walk. He testified his light duty position allowed him to sit and stand at the table as needed. Although most of the boxes were placed on the table for him, he would have to lift some of the boxes himself. He was required to lift all of the boxes in order to dump its material into totes.

Petitioner testified he reviewed a witness statement authored by Derek Brake and denied having the conversation with Mr. Brake.

Respondent called Derek Brake as a witness. Mr. Brake has been employed by Respondent for approximately one and a half years in the Sanitation Department. Mr. Brake testified he cleans the floors around the machines. Mr. Brake testified he was working with Petitioner approximately one week prior to Petitioner's accident on July 26, 2019. The mat that

Petitioner stood on near the rework table slid a little and Petitioner stated to Mr. Brake he could not wait for the f'ing mat to slip out from under him so it would be one more thing to add to it. Mr. Brake testified he believed Petitioner was referring to his pending workers' compensation case. Mr. Brake testified he told a couple of his coworkers about Petitioner's statement and was off work on a mission trip when Petitioner allegedly injured himself on July 26, 2019. Upon Mr. Brake's return to work he was asked by his supervisor to fill out a statement regarding his conversation with Petitioner. Mr. Brake testified there is a lot of sugar and starch on the factory floor used in the production of marshmallows. The starch is slippery depending upon which part of the factory you are located.

Respondent offered four witness statements into evidence that are all dated July 30, 2019. (RX10). Consistent with his testimony, Derek Brake stated he, "was working with Daniel in the rework and he [Petitioner] made the comment I can't wait for this fucking mat to slip out from under me so that I can just add that to my list of things that happened to me working here." Peggy Frazier stated, "I was opening up carton of cereal and saw Daniel on the floor, mat slipped out from underneath him. Went over to help him he was getting up but I helped him." Sarah Rains stated, "Last Tuesday Derek and I was on break and he told me he felt uncomfortable working with this guy. Because he had told him to look at this mat and how it slides around. That he couldn't wait to fall and get a bigger lawsuit. I told Derek that wasn't right and he should probably say something." The author of the fourth statement is not legible and states, "Looks like he slide on pad and caught himself on table."

MEDICAL HISTORY

Petitioner presented to the emergency department at Chester Memorial Hospital on November 10, 2018 with complaints of back pain. He reported wrenching his back at work and had persistent back pain for 36 hours. X-rays showed no acute spinal injury and a left spondylolysis defect at level L5. Petitioner was diagnosed with low back pain and ordered to follow-up with his primary care physician.

Petitioner returned to the emergency department at Chester Memorial Hospital on November 12, 2018 complaining of low back pain radiating to his right hip. Petitioner provided a history of injuring his back at work while using a hand jack. Petitioner had continued right lower back pain radiating down the back of his leg. Physical examination revealed right paraspinal tenderness with radiation to the SI joint and radiculopathy. Petitioner was diagnosed with a lumbar strain and received an injection of Marcaine.

On November 14, 2018, Petitioner presented again to Chester Memorial Hospital complaining of low back pain. Petitioner reported he was at work pushing and pulling a heavy cart when he developed pain in the right lumbar area. Petitioner acknowledged receiving an injection two days prior that provided only temporary relief. Petitioner underwent a CT Scan that revealed no acute or aggressive osseous abnormality, but did show mild discogenic disease most advanced at L5-S1. Petitioner was diagnosed with acute right-sided low back pain and was ordered to follow-up with his primary care physician.

On November 16, 2018, Petitioner presented to his primary care physician, Dr. Kirkpatrick at Chester Clinic, where he reported he was moving a heavy skid on November 7, 2018 and had since been in and out of the hospital for back pain. Petitioner stated he noticed the pain but was able to continue working. Throughout the day he had increased inflammation and loss of function. He reported he still has tightness mostly on the right side that radiates down his hip. He described dull pain with intermittent sharp pain and muscle spasms. Petitioner was diagnosed with a low back strain and physical therapy was ordered. He was ordered off work through November 19, 2018 and to return to work on November 20, 2018 with restrictions of no lifting, pushing, or pulling greater than 10 pounds.

On November 21, 2018, Petitioner reported to Dr. Kirkpatrick he had to leave work early on November 20, 2018 due to pain. Dr. Kirkpatrick noted Respondent denied physical therapy pending a Section 12 examination. Dr. Kirkpatrick refilled Petitioner's Norco prescription and ordered him to continue taking Tylenol and Ibuprofen as needed. Dr. Kirkpatrick ordered Petitioner to return to work on November 21, 2018 with additional restrictions of no bending, and no lifting, pushing, or pulling more than 10 pounds for one week.

Petitioner reported to the emergency department on November 23, 2018 complaining of severe low back pain that radiated into his right buttock and right groin beginning on November 7, 2018 while doing heavy labor at work. Petitioner was diagnosed with lumbar back pain with radiculopathy affecting the right lower extremity.

On November 27, 2018, Petitioner was seen again in the emergency department complaining of low back pain which persisted since November 7, 2018 when injured at Gilster-Mary Lee. Petitioner had continuing pain making him unable to go to work that day. Petitioner was diagnosed with low back pain and ordered to follow-up with a primary care physician.

Petitioner returned to Dr. Kirkpatrick on December 3, 2018 at which time he reported being off work since the date of injury because Respondent did not have a position for him. Petitioner reported right-sided low back radiating into his right hip and groin. He has difficulty sitting or standing for longer than 15 minutes without changing positions. Dr. Kirkpatrick took Petitioner off work until his follow up visit on December 17, 2018.

On January 7, 2019, Petitioner returned to Chester Clinic for a medication refill and advised an MRI was scheduled with Dr. Matthew Gornet on January 28, 2019.

Petitioner returned to the emergency room on January 17, 2018 and January 18, 2018 complaining of continued back pain and reporting he was working in spite of his employer making him perform duties outside of his restrictions.

Petitioner was evaluated by Dr. Matthew Gornet on January 28, 2019 at which time he complained of bilateral low back pain, greater on the right, and right buttock, hip, and leg pain radiating to his calf with numbness and tingling. Petitioner reported the pain began on November 7, 2018 while working for Respondent when pulling a large pallet with a pallet jack. Petitioner reported no previous low back problems of significance and no treatment for his low back prior to November 7, 2018. Dr. Gornet's physical examination revealed mild decrease of EHL function and decreased sensation in the L5 dermatome on the right. Dr. Gornet felt Petitioner's

symptoms were fairly consistent with a disc injury and ordered an MRI. Dr. Gornet noted "based upon the information I have, I do believe the patient's current symptoms are causally connected to his work related injury of 11/07/18".

The MRI revealed a central disc protrusion at L5-S1 with annular tears at L3-4 and L4-5. Dr. Gornet ordered Petitioner to wean off all narcotics and ordered injections at L4-5 and L5-S1 on the right. Dr. Gornet opined that if the injections did not improve Petitioner's condition he would order a discogram. Petitioner was placed off work by Dr. Gornet from January 28, 2019 through March 28, 2019.

Petitioner underwent an L5-S1 epidural steroid injection with Dr. Helen Blake at the Orthopedic Ambulatory Surgery Center of Chesterfield on April 2, 2019. Petitioner returned to Dr. Gornet on April 8, 2019 and reported he had not undergone the second injection yet due to transportation issues and his wife's recent neck surgery. Dr. Gornet allowed Petitioner to return to light duty work and again ordered him to wean off all narcotic medication. Petitioner underwent an L4-5 epidural steroid injection on April 16, 2018.

On May 13, 3019, Petitioner returned to Dr. Kirkpatrick for an off work slip. Petitioner reported he was returned to light duty work and he could not stay at work for a full shift due to lumbar discomfort. Dr. Kirkpatrick provided a work slip for May 13, 2019, prescribed Gabapentin, and ordered him to return to work the next day.

Petitioner returned to Dr. Kirkpatrick on May 29, 2019 requesting a referral to a neurosurgeon because he could not get in touch with Dr. Gornet's office. Dr. Kirkpatrick attempted to contact Dr. Gornet's office and was unable to communicate with a representative of Dr. Gornet so he referred Petitioner to a neurosurgeon.

On July 26, 2019, Petitioner presented at the emergency room with complaints of right elbow, upper back, and rib pain after slipping on a mat and falling at work earlier that day. X-rays of Petitioner's right hip, wrist, elbow, and ribcage were negative. Petitioner was diagnosed with sprains of the right radiocarpal joint, hip, back, and elbow.

On August 5, 2019, Petitioner returned to Dr. Kirkpatrick reporting he left work early due to back pain and he was scheduled to see neurosurgeon, Dr. Jeffery Jones, the following day. On August 6, 2019, Petitioner was evaluated by Dr. Jones for complaints of lumbar pain aggravated by extension, flexion, walking, and daily activities. Petitioner reported he was pushing and pulling a wheeled cart at work when he injured his back and felt right groin discomfort that radiates down his posterior thigh. Physical examination revealed severe tenderness to palpation over the right SI joint with reproducible symptoms and positive FABER sign. Dr. Jones recommended SI joint injections and ordered Petitioner off work.

On August 26, 2019, Petitioner returned to Dr. Kirkpatrick for a refill of pain medication. Petitioner reported he cannot sleep due to back pain and he is irritable and angry all the time. Petitioner returned to Dr. Jones on January 10, 2020 with continued low back pain. Dr. Jones reviewed Dr. Gornet's medical records and agreed a discogram was appropriate.

On December 2, 2019, Petitioner followed up with Dr. Kirkpatrick for a recent hospitalization related to seizures. Dr. Kirkpatrick prescribed Levetiracetam for the seizures.

On May 5, 2020, Petitioner followed up with Dr. Jones who noted Petitioner was not able to see the neurosurgeon he recommended for the discogram. Dr. Jones stated there was nothing he could do for Petitioner until he underwent a discogram, which he needs before returning to work. Dr. Jones released Petitioner from his care.

Dr. Jeffrey Jones testified by way of deposition. Dr. Jones is a neurosurgeon and testified consistent with his medical records. Dr. Jones recommended that Petitioner see Dr. Colle in Cape Girardeau, MO for a discogram and further work up. Dr. Jones opined Petitioner's injury could definitely be an aggravation of his degeneration condition at levels L-4-5, L5-S1, and L3-4 due to the fact there is no evidence of any prior back problems predating Petitioner's alleged work injury. On cross examination, Dr. Jones stated he reviewed Dr. Gornet's medical records, but did not review records from Chester Memorial Hospital on November 10, 2018. Dr. Jones disagreed that Petitioner only suffered a back strain on November 7, 2018 and testified that a discogram could explain where the source of Petitioner's pain is originating.

Dr. Jones testified he did review the MRI films. Dr. Jones testified that Petitioner had disc problems at three levels and whether you called them bulges or herniations you would still need a discogram to determine which level or levels were causing Petitioner pain. Dr. Jones testified it would be hard for him to opine why Petitioner went to the hospital as opposed to his primary care physician, but clarified Petitioner did not ask him for any narcotic medication and further saw no "drug-seeking" behavior from Petitioner.

Dr. Jones testified he placed Petitioner off work due to the fact he might require surgery following the discogram. Dr. Jones admitted he was relying on Petitioner's history and pain complaints to be accurate in giving his opinions.

Section 12 examiner Dr. Andrew Wayne testified by way of two evidence depositions. On March 5, 2019, Dr. Wayne testified he is a board-certified physiatrist who specializes in spine injuries. Dr. Wayne examined Petitioner on December 21, 2018 and reviewed medical records from Chester Memorial Hospital, Chester Clinic, and Dr. Gornet. Dr. Wayne took a history of Petitioner's work injury of November 7, 2018 and performed a physical examination of Petitioner which he described as extremely dramatic in response to light pressure applied to the right mid to low back. Dr. Wayne stated the physical examination findings were inconsistent to those found by Dr. Gornet in his evaluation on January 28, 2019. Dr. Wayne had no explanation for why the findings were inconsistent. Dr. Wayne diagnosed Petitioner with a lower lumbar sprain/strain injury occurring at work on November 7, 2018. He recommended physical therapy and felt Petitioner could work sedentary duty with no lifting over five pounds and avoidance of bending.

Dr. Wayne's interpretation of the MRI films dated January 28, 2018 revealed disc degeneration at L3-4, L4-5, and L5-S1, with a small central degenerative protrusion at L5-S1. Dr. Wayne opined he did not see anything on the MRI films correlating to Petitioner's alleged

injury. Dr. Wayne disagreed with the need for injections but still felt Petitioner required work restrictions as of February 8, 2019.

On cross-examination, Dr. Wayne testified Petitioner did suffer a work-related injury on November 7, 2018. Dr. Wayne opined the medical treatment provided to Petitioner through January 28, 2019 was both reasonable and necessary. Dr. Wayne testified he reviewed no medical records for any treatment pre-dating November 7, 2018. Dr. Wayne opined that an aggravation of a chronic condition can occur as a temporary aggravation. Dr. Wayne also testified that Petitioner provided consistent histories of the alleged work injuries to both he and Dr. Gornet. Although Dr. Wayne believed that his physical examination findings were "magnified," he still placed Petitioner on a five-pound work restriction. Dr. Wayne stated the injections recommended by Dr. Gornet were not necessary because Petitioner's pain complaints were more diffuse and not focal, but he did concede the injections could localize Petitioner's pain source. Dr. Wayne testified he does not perform surgery as a part of his practice.

Dr. Wayne testified again by way of evidence deposition on October 22, 2019. Dr. Wayne testified he evaluated Petitioner a second time on September 3, 2019 and reviewed updated records relating to Petitioner's second alleged injury on July 26, 2019. Dr. Wayne reviewed four witness statements and recited various portions of the statements in his records. Dr. Wayne testified that Petitioner still had not weaned himself off narcotic medication and he reported no pain relief from the injections. Dr. Wayne testified this was significant because if there was no pain relief from the injections, the pain generators could not be coming from levels L4-5 and L5-S1 where he had the injections. Dr. Wayne opined Petitioner was at maximum medical improvement and needed no further medical treatment.

On cross-examination, Dr. Wayne conceded that, of the four witness statements he was provided regarding Petitioner's July 2019 accident, only two of the individuals were eyewitness and they gave a similar description of the accident as that provided by Petitioner. Dr. Wayne testified he would never make a recommendation for surgery as a part of his practice and refers patients to surgeons for potential surgical treatment. Dr. Wayne testified he reviewed medical records from April 2, 2019 and April 16, 2019 with regard to the injections Petitioner underwent. Dr. Wayne identified in the record dated April 2, 2019 that Petitioner reported a pain score of 2-3 out of 10 following the injection, as well as a pain score of 0 out of 10 following the injection of April 16, 2019.

CONCLUSIONS OF LAW

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

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, 864 N.E.2d 266, 272-273 (5th Dist. 2007). Accidental injury need only be a causative factor in the resulting condition of ill-being. Sisbro, Inc. v. Indus. Comm'n, 797 N.E.2d 665, 672 (Ill. 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, 797 N.E.2d 665 (Ill. 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, 834 N.E.2d 583 (2d Dist. 2005). Employers are to take their employees as they find them. A.C.& S. v. Industrial Comm'n, 710 N.E.2d 837 (Ill. App. 1st Dist. 1999) citing General Electric Co. v. Industrial Comm'n, 433 N.E.2d 671, 672 (1982). The 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); see also Illinois Valley Irrigation, Inc. v. Indus. Comm'n, 362 N.E.2d 339 (Ill. 1977).

The parties stipulate that Petitioner sustained an accidental injury that arose out of and within the course of his employment. Petitioner testified credibly that he felt a pinch and sharp pain in his low back when pulling up on a hand jack. He testified he did not have a primary care physician at the time of the accident as he was just hired full-time with Respondent three days before the accident occurred. Petitioner testified he had no problem with his low back prior to November 7, 2018 and he had not received any treatment for his low back prior to that date. There were no medical records or other evidence to rebut Petitioner's testimony in this regard.

On November 10, 2018, Petitioner presented to the emergency room and reported a consistent history of accident and pain for the past three days. Five days after the accident Petitioner reported radiating pain in his right hip and down the back of his leg. A CT Scan revealed mild discogenic disease of the lower lumbosacral spine, most advanced at L5-S1. Petitioner treated with his primary care physician from November 16, 2018 through August 26, 2019 for complaints of low back pain and radiculopathy that had not resolved since his November 7, 2018 incident.

Petitioner did not see Dr. Matthew Gornet until January 28, 2019 at which time he complained of bilateral low back pain, greater on the right, and right buttock, hip, and leg pain to his calf with numbness and tingling. Petitioner provided a consistent history of accident to Dr. Gornet. Dr. Gornet noted mild decrease of EHL function and decreased sensation in the L5 dermatome on the right. Dr. Gornet felt Petitioner's symptoms were fairly consistent with a disc injury and that Petitioner's condition was causally connected to his work injury based on the information provided him.

The MRI revealed a central disc protrusion at L5-S1 with annular tears at L3-4 and L4-5. Dr. Gornet recommended injections, followed by a discogram if Petitioner's symptoms did not improve. Petitioner testified he received only temporary relief from the injections. Petitioner chose not to treat with Dr. Gornet and was referred to Dr. Jeffery Jones. Petitioner reported a consistent history of accident to Dr. Jones on August 6, 2019, at which time Petitioner continued to complain of lumbar pain aggravated by extension, flexion, walking, and daily activities. Dr. Jones noted severe tenderness to palpation over the right SI joint with reproducible symptoms and positive FABER sign. Dr. Jones recommended SI joint injections and kept Petitioner off

work. In January, 2020, Dr. Jones agreed that a discogram was appropriate to determine the source of Petitioner's lumbar pain.

The Arbitrator finds the opinions of Dr. Matthew Gornet and Dr. Jeffrey Jones more persuasive than the opinion of Dr. Andrew Wayne. Both Dr. Gornet, an orthopedic surgeon, and Dr. Jones, a neurosurgeon, opine Petitioner's condition is causally related to the injury of November 7, 2018 and a discogram is appropriate to determine the source of Petitioner's pain. An MRI revealed compromised discs at levels L-3 through S1, a condition which Petitioner neither treated for nor had issues with prior to his work-related accident. Petitioner was able to work full-time without restrictions for at least four months prior to November 7, 2018. The evidence suggests Petitioner suffered more than a back strain as opined by Section 12 examiner, Dr. Wayne. Dr. Wayne, although a board-certified physiatrist, does not perform spine surgeries. Petitioner continues to experience symptoms that cause him to seek treatment and take pain medication and he has not reached maximum medical improvement.

Based on the foregoing, the Arbitrator finds that Petitioner has met his burden of proof and established that his current condition of ill-being in his lumbar spine is causally related to the accidental injury of November 7, 2018.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to recover for the medical expenses thus far and is entitled to prospective care since he has not reached maximum medical improvement. Respondent shall therefore pay the expenses contained in Petitioner's group exhibit #7 as they relate to his work-related accident of November 7, 2018 in the amount of $4,201.04, as provided in Section 8(a) and Section 8.2 of the Act. Petitioner offered the following medical bills into evidence and Respondent is ordered to pay: $567.00 due and owing Chester Memorial Hospital; $625.00 due and owing So Ortho Assoc/Ortho Inst of W KY; and $3,009.04 due and owing Victor's Medicenter Pharmacy.

The Arbitrator finds that prescription charges for Levetiracetam contained in Petitioner's group exhibit #7 are not related to Petitioner's work accident of November 7, 2018, but related to a seizure disorder pursuant to Dr. Kirkpatrick's medical record dated December 2, 2019, and therefore, Respondent is not liable for payment of same.

Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit. Respondent shall

authorize and pay for the necessary treatment recommended by Dr. Jeffery Jones, including, but not limited to, the referral to Dr. Colle for a discogram.

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

To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1, 13. Respondent paid 11-5/7 weeks of temporary total disability benefits from 12/3/18 through 1/15/19 and 9/15/19 through 10/22/19, for a total of $3,094.18. The record establishes that Petitioner was taken off work by Dr. Kirkpatrick on 12/3/18 through 2/4/19. Petitioner was taken off work by Dr. Gornet on 1/28/19 through 3/28/19, and again by Dr. Jones on 8/6/19 until he released him from his care on 5/5/20. Dr. Jones opined that Petitioner should undergo a discogram as recommended by himself and Dr. Gornet before returning to work. Dr. Jones released Petitioner from his care because there was nothing he could do for him until a discogram was performed.

Respondent shall therefore pay temporary total disability benefits of $253.68/week for 65 weeks, commencing 12/3/18 through 3/28/19 and 8/6/19 through 7/9/20, as provided in Section 8(b) of the Act.

Issue (N): Is Respondent due any credit?

The parties stipulated that Respondent is due a credit of $1,188.00 for permanent partial disability benefits advanced on February 22, 2019 pursuant to Section 8(d)2 of the Act.

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

Arbitrator Linda J. Cantrell

9/7/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC022971
Case Name	BRAYFIELD, DANIEL v. GILSTER-MARY LEE CORPORATION
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0553
Number of Pages of Decision	12
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Jason Coffey
Respondent Attorney	Pieter Schmidt

DATE FILED: 11/4/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DANIEL BRAYFIELD,

Petitioner,

vs. NO: 19 WC 22971

GILSTER-MARY LEE CORPORATION,

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, causation, medical expenses, prospective medical treatment and temporary total disability benefits and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof, but makes a clarification as outlined below. The Commission 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 Commision clarifies the last sentence of the third paragraph of the Arbitrator's Decision under "Issue (C)" entitled "Conclusions of Law" to read: "Petitioner did not credibly testify what caused the mat to slip or provide any details as to how the mat slipped."

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2020, is hereby affirmed and adopted.

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

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

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

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.

November 4, 2021

/s/ *Maria E. Portela*

MEP/dmm
O: 09/07/21
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0553
NOTICE OF 19(b) ARBITRATOR DECISION

BRAYFIELD, DANIEL
Employee/Petitioner

Case# **19WC022971**

18WC036482

GILSTER-MARY LEE CORPORATION
Employer/Respondent

On 9/10/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

4075 FISHER KERHOVER COFFEY
JASON E COFFEY
600 STATE ST
CHESTER, IL 62233

0693 FEIRICH MAGER GREEN RYAN
PIETER N SCHMIDT
2001 W MAIN ST SUITE 101
CARBONDALE, IL 62903

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Daniel Brayfield
Employee/Petitioner

v.

Gilster-Mary Lee Corporation
Employer/Respondent

Case # **19** WC **22971**

Consolidated cases: **18-WC-36482**

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 **July 9, 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, **07/26/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did 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 $**5,053.27**; the average weekly wage was $**380.52**.

On the date of accident, Petitioner was **36** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**0.00** 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 $**1,567.37** under Section 8(j) of the Act.

ORDER

Based on the Arbitrator's finding that Petitioner did not sustain an accident that arose out of and in the course of his employment on 7/26/19, Petitioner's benefits are hereby denied. Respondent is not liable for Petitioner's medical expenses, temporary total disability benefits, or prospective medical care.

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

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

Signature of Arbitrator

9/7/20
Date

ICArbDec19(b)

SEP 10 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DANIEL BRAYFIELD,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-22971
	)	
GILSTER-MARY LEE CORPORATION,	)	Consolidated Case: 18-WC-36482
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 9, 2020, pursuant to Section 19(b) of the Act. On September 16, 2019, the above-captioned case was consolidated with Case No. 18-WC-36482 by Arbitrator Edward Lee. The issues in dispute are accident, causal connection, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 36 years old at the time of his alleged accident on July 26, 2019. Petitioner was hired by a temporary agency, Talent Force, to work in Respondent's facility. He worked 120 days for Talent Force and was hired by Respondent full-time three days prior to his first accident on November 7, 2018. Respondent does not dispute that Petitioner's accident of November 7, 2018 arose out of and within the course of Petitioner's employment. Respondent does dispute that Petitioner's alleged accident of July 26, 2019 arose out of and within his employment with Respondent.

Petitioner testified that on November 7, 2018 he was working in the marshmallow department and the machine went down. Petitioner had to go upstairs and clean and move skids and boxes out of the way. Petitioner was operating a hand jack to move a heavy skid of marshmallow boxes. The wheels on the hand jack were sticky due to being covered with marshmallows and he had to push and pull on the jack to get it to move. When Petitioner attempted to pull up on the hand jack he felt a pinch and sharp pain in his back.

Petitioner reported the injury to his supervisor, Richard McLean. Petitioner testified that Mr. McLean told him to continue working and an accident report was not completed. Petitioner returned to work and his back pain worsened. He testified he never received medical treatment for his back prior to November 7, 2018. Petitioner went to the emergency room at Chester

Memorial Hospital on November 10, 2018 and provided a history of accident. Petitioner testified he kept returning to the emergency room over the next several weeks due to pain and because he did not have a primary care physician at that time. Petitioner obtained work slips each time he reported to the emergency room because his supervisor, Juan Anaya, told him his job would be in jeopardy if he did not.

Petitioner testified he established a primary care physician who referred him to Dr. Matthew Gornet. Dr. Gornet recommended an MRI and steroid injections. Petitioner underwent two injections that provided only temporary relief. Petitioner returned to his primary care physician in May 2019 requesting a second opinion. Petitioner saw Dr. Jeffrey Jones in August 2019 who took him off work. Petitioner was working light duty prior to Dr. Jones taking him off work. Dr. Jones recommended a discogram to be performed by Dr. Colle and injections, both of which were denied by Respondent. Petitioner could not financially afford this treatment. He testified he was eventually evaluated by Dr. Colle but his office would not accept an Illinois medical card. Petitioner testified he wants to undergo the discogram as recommended by Dr. Gornet and Dr. Jones.

Petitioner testified he suffered a subsequent injury while working light duty for Respondent on July 26, 2019. Petitioner testified he was standing on a concrete floor on an industrial rubber mat inspecting boxes of material that were placed on a table. He testified he requested that the floor to be swept several times and he was told to do it himself. The mat went out from under him and he fell to the floor between a tote and the folding table. He testified that a coworker witnessed him fall and she helped him off the floor.

On cross-examination, Petitioner testified that his primary care physician returned him to light duty work on November 16, 2018. Despite having a primary care physician, Petitioner reported to the emergency room because he either left work early to seek treatment or his doctor's office was closed. He agreed that Dr. Gornet advised him in April 2019 to wean off narcotics which he did not do.

Petitioner agreed that he called Dr. Gornet's office on May 6, 2019 requesting to move his appointment up. He denies having received a return call from Dr. Gornet's office moving his appointment up per his request. He testified he did not see Dr. Gornet again because of scheduling issues and switched his treatment to Dr. Jeffrey Jones.

Petitioner testified that while working light duty he was placed at a "rework" station that was quite a distance from the front door. He complained to Respondent that the walk was aggravating his back and they moved the station within approximately 50 feet of the front door which he was able to walk. He testified his light duty position allowed him to sit and stand at the table as needed. Although most of the boxes were placed on the table for him, he would have to lift some of the boxes himself. He was required to lift all of the boxes in order to dump its material into totes.

Petitioner testified he reviewed a witness statement authored by Derek Brake and denied having the conversation with Mr. Brake.

Respondent called Derek Brake as a witness. Mr. Brake has been employed by Respondent for approximately one and a half years in the Sanitation Department. Mr. Brake testified he cleans the floors around the machines. Mr. Brake testified he was working with Petitioner approximately one week prior to Petitioner's accident on July 26, 2019. The mat that Petitioner stood on near the rework table slid a little and Petitioner stated to Mr. Brake he could not wait for the f'ing mat to slip out from under him so it would be one more thing to add to it. Mr. Brake testified he believed Petitioner was referring to his pending workers' compensation case. Mr. Brake testified he told a couple of his coworkers about Petitioner's statement and was off work on a mission trip when Petitioner allegedly injured himself on July 26, 2019. Upon Mr. Brake's return to work he was asked by his supervisor to fill out a statement regarding his conversation with Petitioner. Mr. Brake testified there is a lot of sugar and starch on the factory floor used in the production of marshmallows. The starch is slippery depending upon which part of the factory you are located.

Respondent offered four statements into evidence that are all dated July 30, 2019. (RX10). Consistent with his testimony, Derek Brake stated he, "was working with Daniel in the rework and he [Petitioner] made the comment I can't wait for this fucking mat to slip out from under me so that I can just add that to my list of things that happened to me working here." Peggy Frazier stated, "I was opening up a carton of cereal and saw Daniel on the floor, mat slipped out from underneath him. Went over to help him he was getting up but I helped him." Sarah Rains stated, "Last Tuesday Derek and I was on break and he told me he felt uncomfortable working with this guy [Petitioner]. Because he had told him to look at this mat and how it slides around. That he couldn't wait to fall and get a bigger lawsuit. I told Derek that wasn't right and he should probably say something." The name of the author of the fourth statement is illegible and states, "Looks like he slide on pad and caught himself on table."

MEDICAL HISTORY

On July 26, 2019, Petitioner presented to the emergency room at Chester Memorial Hospital with complaints of right elbow, upper back, and rib pain after slipping on a mat and falling at work earlier that day. X-rays of Petitioner's right hip, wrist, elbow, and ribcage were negative. Petitioner was diagnosed with sprains of the right radiocarpal joint, hip, back, and elbow. On the date of accident, Petitioner was working with light duty restrictions due to his lumbar injury that occurred on November 7, 2018.

Section 12 examiner Dr. Andrew Wayne testified by way of two evidence depositions. His deposition testimony on October 22, 2019 addresses his opinions with regard to Petitioner's alleged work accident of July 26, 2019. Dr. Wayne testified he evaluated Petitioner on September 3, 2019 and reviewed records relating to Petitioner's second alleged injury on July 26, 2019. Dr. Wayne also reviewed four witness statements and recited various portions of the statements in his records. He felt the witness statements brought concerns about Petitioner's credibility.

Dr. Jeffrey Jones testified by way of deposition. Dr. Jones is a neurosurgeon and testified he was unaware that Petitioner had been injured in a second accident occurring on July 26, 2019. Dr. Jones testified that assuming it is true Petitioner made the comment to

co-worker Mr. Brake one week prior to his accident, it would be a cause for concern about Petitioner's credibility.

CONCLUSIONS OF LAW

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

An injury is an accident when it is traceable to a definite time, place and cause and occurs in the course of employment, unexpectedly, and without affirmative act or design of the employee. *Matthiessen and Haegler Zinc Co. v. Industrial Commission,* 284 Ill. 378, 120 N.E.2d 249 (1918). In order to receive benefits under the Act, a claimant must prove by the preponderance of the evidence that he sustained an accidental injury arising out of and in the course of his employment. *Quality Wood Products Corp. v. Indus. Comm'n*, 97 Ill. 2d 417, 423 (1983). An injury is considered "accidental" for purposes of workers' compensation if it is caused by the performance of an employee's job. *Peoria County Belwood Nursing Home v. Indus. Comm'n*, 115 Ill. 2d 524, 529-30 (1987). The accidental injury need neither be the sole or primary causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 205 (2003).

Petitioner has the burden of proving an accidental injury on July 26, 2019. Because there was conflicting evidence concerning the alleged accident, the credibility of Petitioner becomes paramount. The Arbitrator does not find Petitioner's testimony credible with regard to his alleged accident of July 26, 2019. Petitioner testified that while working light duty for his injuries that occurred on November 7, 2018 he was placed at a "rework" station that was quite a distance from the front door. He complained to Respondent that the walk was aggravating his back and they moved the station within approximately 50 feet of the front door which he was able to walk.

Petitioner testified that on July 26, 2019 he was standing on a concrete floor on an industrial rubber mat inspecting boxes of material at the rework station. He testified he requested several times that the floor to be swept and was told to do it himself. He stated the mat went out from under him and he fell to the floor between a tote and the folding table. He testified that a coworker witnessed him fall and she helped him off the floor. Petitioner did not testify what caused the mat to slip or provide any details as to how the mat slipped.

Petitioner's co-worker, Derek Brake, testified that he worked with Petitioner approximately one week prior to July 26, 2019. Mr. Brake testified that the mat Petitioner was standing on at the rework station slid a little and Petitioner stated he, "could not wait until the "f'ing mat slid out from under him because it would just be one more thing to add to it." Mr. Brake understood "it" to mean Petitioner's first pending workers' compensation claim that occurred on November 7, 2018. Petitioner denied having this conversation with Mr. Brake.

Mr. Brake testified he told a couple of his coworkers about Petitioner's statement and was off work on a mission trip when Petitioner allegedly injured himself on July 26, 2019. Upon Mr. Brake's return to work he was asked by his supervisor to fill out a statement regarding his conversation with Petitioner. Mr. Brake prepared a written statement on July 30, 2019 that stated, "he was working with Daniel in the rework and he [Petitioner] made the comment I can't wait

for this fucking mat to slip out from under me so that I can just add that to my list of things that happened to me working here."

Respondent offered four additional statements into evidence that are also dated July 30, 2019. Petitioner's co-worker Peggy Frazier stated, "I was opening up a carton of cereal and saw Daniel on the floor, mat slipped out from underneath him. Went over to help him he was getting up but I helped him." Mr. Frazier does not state she witnessed Petitioner fall and did not testify at arbitration.

Sarah Rains stated, "Last Tuesday Derek and I was on break and he told me he felt uncomfortable working with this guy [Petitioner]. Because he had told him to look at this mat and how it slides around. That he couldn't wait to fall and get a bigger lawsuit. I told Derek that wasn't right and he should probably say something." A fourth co-worker stated, "Looks like he slide on pad and caught himself on table." This co-worker does not state he witnessed Petitioner fall.

Dr. Wayne testified that Mr. Brake's written statement, along with the other three statements, brought concern about Petitioner's credibility. Dr. Jones testified he was not aware Petitioner sustained a second injury. Dr. Jones also testified that assuming Mr. Brake's statement was true that Petitioner made the comment one week prior to his accident, it would raise a concern about Petitioner's credibility.

Therefore, based on Mr. Brake's unbiased testimony and written statement, and there being no eyewitnesses to Petitioner's fall, the Arbitrator finds Petitioner fabricated the July 26, 2019 accident. Based on the evidence, Petitioner has failed to meet this burden of proving an accidental injury on July 26, 2019 and is not entitled to an award of any benefits resulting from the alleged accident on July 26, 2019.

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

Based on the Arbitrator's decision with regard to Issue (C), the Arbitrator finds Petitioner's current condition of ill-being is not causally connected to his work injury of July 26, 2019 and awards no benefits.

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?

Based on the Arbitrator's decision with regard to Issues (C) and (F), the Arbitrator finds Petitioner is not entitled to recover medical expenses related to his alleged injury that occurred on July 26, 2019 and no benefits are awarded, including prospective medical treatment.

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

Based on the Arbitrator's decision with regard to Issues (C) and (F), the Arbitrator finds Petitioner is not entitled to temporary total disability benefits.

Linda J. Cantrell, Arbitrator

9/7/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC011671
Case Name	CLARK, PAMELA v. FIRST MIDWEST BANK
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0554
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Steven Seidman
Respondent Attorney	Kenneth Smith

DATE FILED: 11/5/2021

/s/Marc Parker, 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

Pamela Clark,

Petitioner,

vs. NO: 15 WC 11671

First Midwest Bank,

Respondent.

DECISION AND OPINION ON REVIEW

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $5,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 5, 2021

/s/ *Marc Parker*
Marc Parker

MP:yl
o 11/4/21
68

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CLARK, PAMELA
Employee/Petitioner

Case# **15WC011671**

FIRST MIDWEST BANK
Employer/Respondent

On 11/9/2020, 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 0.11% 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:

1747 SEIDMAN MARGULIS & FAIRMAN LLP
STEVEN SEIDMAN
20 S CLARK ST SUITE 700
CHICAGO, IL 60603

0532 HOLECEK & ASSOCIATES
PO BOX 64093
ST PAUL, MN 53164

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

Pamela Clark
Employee/Petitioner

v.

First Midwest Bank
Employer/Respondent

Case # **15** WC **11671**

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 **New Lenox**, on **October 9, 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

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

FINDINGS

On January 22, **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 repetitive trauma type injuries that arose out of and in the course of employment and manifested on January 22, 2015.

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 $**32,331.52**; the average weekly wage was $**621.76**.

On the date of accident, Petitioner was **49** 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 $**34,261.82** under Section 8(j) of the Act.

ORDER

RESPONDENT SHALL PAY PETITIONER THE REASONABLE AND NECESSARY MEDICAL EXPENSES INCURRED IN CONNECTION WITH THE CARE AND TREATMENT OF HER CAUSALLY RELATED INJURIES PURSUANT TO SECTIONS 8 AND 8.2 OF THE ACT. RESPONDENT SHALL RECEIVE CREDIT FOR AMOUNTS PAID, INCLUDING AMOUNTS PAID PURSUANT TO SECTION 8(J) OF THE ACT AND RESPONDENT SHALL HOLD PETITIONER HARMLESS FOR THOSE AMOUNTS FOR WHICH RESPONDENT RECEIVES 8(J) CREDIT. ARB EX 1.

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS OF $414.51 PER WEEK FOR A PERIOD OF 66-5/7 WEEKS COMMENCING February 12, 2015 to May 23, 2016. Respondent shall receive credit for amounts paid if any.

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS OF $373.06 PER WEEK FOR A PERIOD OF 30.75 WEEKS AS PETITIONER SUSTAINED 15% LOSS OF USE OF THE RIGHT HAND PURSUANT TO SECTION 8(E) OF THE ACT.

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

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

Carolyn M. Doherty

Signature of Arbitrator

10/28/20
Date

NOV 9 - 2020

FINDINGS OF FACT

Petitioner Pamela Clark was 49 years old and an employee of First Midwest Bank on January 22, 2015, working in customer service. (AX1, T 7.) At trial, Petitioner testified that her job duties included helping customers with banking account issues. She testified that she sat at a cubicle desk during the work day and that he was required to use the computer keyboard and mouse during the work day. (T 7, 10-11.) Petitioner is right-hand dominant and she used her right hand to navigate the mouse. (T 10-11.) Petitioner worked an 8-hour shift. (T 9.) Petitioner testified that with the exception of a 30-minute lunch and a 15-minute break, she was on the computer for her entire shift helping customers with banking issues which required her to "type" all day. (T 9, 10.) Petitioner described working over the phone with customers using both hands all day to type and enter information into the computer. She further described that she "keyboarded" all account information using the keyboard and the mouse and that she used the mouse all day to navigate on and between screens to assist customers. T. 10-11. Petitioner had been working for Respondent for approximately five years. (T 6-7.) Petitioner testified that prior to 1/22/15, she had no problem, complaint or treatment to her right finger, arm, or hand and that she had no thyroid or diabetes. She took heart medication only. T. 28.

Respondent submitted a document entitled "First Midwest Position Description" describing Petitioner's job responsibilities. (RX3.) Petitioner testified that the document accurately described her job duties, but that it omitted typing and use of the mouse. (T 12-13.) It described her duties in customer service as it related to the bank but it did not describe the physical activities she had to perform to carry them out. (T 13.) RX 3 does indicate "Proficiency with a PC required." RX 3.

At trial, Petitioner testified that in early 2015, she began to notice numbness and pain shooting through her right thumb. (T 11-12.) Petitioner testified that on January 22, 2015, she was at work, using her computer mouse when she felt a popping sensation in her right thumb and wrist area. (T 11-14.) Petitioner testified that her last date of work for Respondent was on 2/12/15. T. 14.

At trial, Petitioner testified that she sought medical attention following the popping in her right thumb and wrist. (T 12, 14.) On January 23, 2015, Petitioner went first to the hospital, but the wait was too long. (T 15.) Instead, on January 23, 2015, Petitioner went to Quick Care in Plainfield, Illinois. (T 15.) They performed an x-ray of Petitioner's right hand, wrapped it, and referred Petitioner to Dr. Mukund Komanduri at MK Orthopedic Surgery. (T 15.)

On January 26, 2015, Petitioner had her initial visit with Dr. Komanduri. (T 16.) She presented to him at MK Orthopaedics in Joliet. (T 35.) On that date, Petitioner related the popping incident of January 22, 2015 in her right hand and wrist. (T 30-31.) Dr. Komanduri administered two injections to Petitioner's right hand, placed her hand in a splint, and prescribed two weeks of physical therapy at MK Orthopaedics. (T 35-37; PX3; PX6.) Of note, records for this initial visit were not among the records provided by MK Orthopaedics, but records from her subsequent visits reference the January 26, 2015 visit repeatedly. (PX3.) In addition, Petitioner was adamant in her testimony that she saw Dr. Komanduri on January 26, 2015, despite the lack of medical record indicating a visit. T. 16.

On February 13, 2015, Petitioner returned to Dr. Komanduri. The records indicate that Petitioner was there for an office visit "right hand" and that "Patient presents for follow-up of right hand. She states he is having increase in pain in her right hand across the top. No new injury or increase activity." PX

3. The record of 2/13/15 specifically references a history taken from Petitioner on 1/26/15 and that there was no change required in that history. PX 3. These records further reference that Petitioner had already received injections. (PX3.) Again, the records note the visit type as "Follow-up" and explicitly mention that Petitioner had received injections prior to this visit. (PX3.)

On 2/13/15, Dr. Komanduri noted that Petitioner was "...having a lot of radiating pain up the arm and she complains of numbness in her thumb." On examination on 2/13/15, Dr. Komanduri observed that Petitioner "clearly has a positive medial nerve compression test and the Tinel's at the wrist. On top of the de Quervain's tenosynovitis and the thumb trigger finger, she has developed carpal tunnel." (PX3.) Dr. Komanduri noted that Petitioner's pain was severe, and that she had called off from work. (PX3.) Dr. Komanduri ordered a bilateral EMG, as Petitioner's symptoms typically appear in both hands. (PX3.) He ordered labs to test for diabetes and labs to test for inflammation markers; he put Petitioner on a Medrol Dosepak for her pain, encouraged her to brace and ice her hand, and took her off work "until released." (PX3.)

On February 20, 2015, Petitioner underwent an EMG needle test at St. Joseph's Medical Center with Dr. Komanduri as the attending physician. (PX4.) In the clinical history, it was noted that Petitioner had pain in her right thumb and wrist traveling from the wrist to the elbow, with numbness of the thumb on the right side. (PX4.) Petitioner stated that she sometimes had pain in her left hand as well, but that the right hand was worse than the left. (PX4.) Petitioner reported that numbness and tingling woke her up at night. (PX4.) On testing, the electrodiagnostic results were normal, despite the clinical consideration of carpal tunnel . (PX3,4.)

On February 25, 2015, Petitioner followed up with Dr. Komanduri for a "one month recheck right hand EMG blood work". (PX3.) She continued to complain of clicking and pain in her thumb and pain in her right hand trigger finger. Dr. Komanduri stated that Petitioner's "carpal tunnel symptoms have remained steady." (PX3.) These records again refer to reviewing Petitioner's past medical and surgical histories "from 01/26/2015," and discuss the possibility of "another anesthetic down the road to treat her carpal tunnel." (PX3.)

Upon reviewing her lab results, Dr. Komanduri opined that "all her lab work is normal" with the exception of hemoglobin A1C of 6.4 and fasting blood sugar of 137. (PX3.) He opined that these results technically reflect a prediabetic condition, and that he believed a lot of her hand complaints were related to that condition. (PX3.) Dr. Komanduri stated that because the complaints had persisted and injections had not worked, he recommended a trigger finger release and de Quervain's release procedure. (PX3.) Dr. Komanduri reviewed Petitioner's EMG results; he opined that Petitioner exhibited symptoms of carpal tunnel syndrome on examination, but that the EMG results were not yet severe enough to proceed with carpal tunnel surgery. (PX3.)

Given Dr. Komanduri's surgical recommendations, on March 2, 2015, Petitioner sought a second opinion from Dr. Paul Papierski with Chicago Hand and Orthopedic Centers. (T 17.) Petitioner complained of pain and paresthesias in her right upper extremity. (PX6.) She related her history of injury: Petitioner was a customer service representative involved quite a bit with the keyboard, writing and typing. (PX6.) She started having pain in her right thumb and wrist, with some extending down the base of her thumb on the palmar aspect and radiating out towards the distal portion of the thumb, with some clicking and occasional locking of the distal portion of the thumb as well as clicking and pain in the dorsal radial aspect of the right wrist, worse with some thumb and wrist movement. (PX6.)

Her symptoms worsened in early January 2015. (PX6.) He noted her prior injections and conservative care without improvement. Petitioner's current symptoms included continuous numbness over the dorsal radial aspect of her thumb nearly up to the tip, occasional triggering of the right thumb, as well as stiffness of the right wrist and thumb with crepitation when moving either. (PX6.) She further reported occasional triggering of the right thumb. Petitioner had no left extremity complaints. (PX6.)

On examination, Dr. Papierski noted tenderness and a nodule at the A1 pulley of the right thumb; tenderness of the right radial styloid and a positive Finkelstein's test; tenderness over the second extensor tendon compartment of the right wrist; tenderness of the scaphoid trapezium trapezoid joint on the right, not noted on the left; reduced range of motion of the right thumb and normal range of motion of the left thumb; reduced range of motion of the right wrist and normal range of motion of the left wrist. (PX6.) Dr. Papierski took lateral and clenched-fist x-rays of Petitioner's right wrist; they revealed a scapholunate interval of 3-4 mm at an angle of 85 to 90 degrees as well as positive ulnar variance, worse with clenched fist. (PX6.)

Dr. Papierski opined that the physical examination findings were fairly consistent with trigger finger of the right thumb, de Quervain's tenosynovitis of the wrist, and perhaps a little bit of intersection syndrome as well. (PX6.) Dr. Papierski further stated that her x-ray findings may reveal ulnar impaction syndrome and/or a tear of the triangular fibrocartilage complex. (PX6.) Dr. Papierski diagnosed Petitioner with De Quervain's/Radial Styloid Tenosynovitis, trigger finger, disturbance of skin sensation, and joint derangement of the hand/wrist/finger. (PX6.) Dr. Papierski kept Petitioner off work and ordered an MRI of Petitioner's right wrist. (T 18; PX6.)

Dr. Papierski noted that Petitioner indicated her symptoms had been worse with her job activities, "particularly writing and most use as she is right-handed." (PX6.) He stated: "There may be some contribution to the development of some of her symptoms as a result of her activities." (PX6.) Petitioner was kept off work as of 3/2/15 pending the MRI. PX 6.

On March 16, 2015, Petitioner underwent a CT scan and arthrogram of the right wrist at Silver Cross Hospital, collectively revealing "complete disruption of the lunotriquetral ligament," and "evidence of a partial disruption of the scapholunate ligament along its distal margin given the presence of mild scapholunate interval widening." (PX7.)

On March 23, 2015, Petitioner returned to Dr. Papierski. (PX6.) Petitioner's right wrist, hand, and finger symptoms remained unchanged from her prior visit. (PX6.) She still did not have any symptoms in her left upper extremity. (PX6.) Dr. Papierski reviewed the results of Petitioner's March 16, 2015 CT scan and arthrogram studies and noted that there was confirmed ulnar impaction syndrome without a TFCC tear and a scapholunate instability pattern. (PX6.) Dr. Papierski reiterated his diagnosis of De Quervain's tenosynovitis and right trigger thumb, as well as opining with greater confidence that there was impaction syndrome as well. (PX6.) He recommended surgery to release the first and second dorsal extensor tendon compartments of Petitioner's wrist as well as her right trigger thumb. (PX6.) He reiterated his opinion that Petitioner's work activities may have contributed to her symptoms. (PX6.) Dr. Papierski kept Petitioner off work pending surgery. (PX6.)

On April 27, 2015, Dr. Papierski performed surgery on Petitioner's right hand and wrist at Northwest Surgical Center. (T 18-19; PX6; PX9.) Dr. Papierski performed a release of right trigger thumb, release of de Quervain's, and release of intersection syndrome with tenosynovectomy of the 1st and 2nd

extensor compartments of the right wrist. (PX6; PX9.) Both pre-operatively and post-operatively, Dr. Papierski diagnosed Petitioner with right trigger thumb, right de Quervain's, and right intersection syndrome. (PX6; PX9.)

Petitioner continued to follow up with Dr. Papierski post-surgery, reporting pain and throbbing at her May 1, 2015 appointment. (PX6.) Dr. Papierski observed mild swelling and moderate stiffness of her thumb and wrist. (PX6.) Dr. Papierski stated that this was as expected; he kept her in a wrist splint and off of work. (PX6.) Over subsequent visits, Petitioner continued recovering as expected, and was released back to work sedentary duty with use of the left hand only. (PX6.) Subsequently, Dr. Papierski referred Petitioner to Midwest Hand Care for physical therapy. (T 20; PX12.) Petitioner continued to attend physical therapy. PX 6.

On May 14, 2015, Petitioner presented for a Section 12 examination with Dr. Tulipan. (RX1, Ex. 3.) Petitioner reported persistent pain in her wrist from the surgery; her thumb pain had diminished, and the numbness and tingling in her thumb had resolved since the surgery. (RX1, Ex. 3.) She related that her job involved typing, talking on the phone with a headset, and using a mouse 40 hours a week. (RX1, Ex. 3.) Petitioner provided a history of repetitive use of her wrist and her keyboarding and daily activities that caused her symptoms. Dr. Tulipan stated that there was "very little in the literature" to support any correlation between trigger finger and computer use or regarding De Quervain and the use of computers. (RX1, Ex. 3.) He noted there has been "some postulation" that excessive mouse work can predispose to de Quervain syndrome although "there is no scientific studies yet to support that". He opined that the medical record did not support any specific work injury, and that "intermittent use of the hand" would most likely not produce De Quervain syndrome or trigger thumb. (RX1, Ex. 3.) Lastly, he stated that if Petitioner "truly had diabetes" there would be a strong clinical correlation between her current state of ill-being and the diabetes. RX 1, EX 3.

In September 2015, she received further injection into the radiocarpal joint from Dr. Papierski to relieve joint pain. PX 6. An additional CT scan was ordered in December 2015 due to continued radiocarpal joint symptoms. The 12/8/15 CT scan again indicated subtle widening of the scapholunate space and some arthritic changes but was otherwise normal. PX 6. An FCE was ordered. PX 6. On January 11, 2016, Petitioner underwent a functional capacity evaluation at Athletico. (PX6.) The FCE concluded that Petitioner was functionally employable at the sedentary demand level, but that she was capable of greater functional abilities than demonstrated during the FCE. (PX6.) It was noted that the "overall results of this FCE do NOT represent a true and accurate representation of the client's function performance." Following the FCE, Dr. Papierski placed Petitioner at MMI from the surgery while indicating continued arthritic changes at the right wrist. Petitioner was recommended continued use of the splint with activities only and the use of Aleve. He recommended that "she be placed on light duty work for the time being or for a permanent basis. I can see her back again on an as-needed basis." PX 6. Petitioner received another radiocarpal joint injection from Dr. Papierski on 9/9/16 due to continued pain symptoms. Petitioner has not seen Dr. Papierski since September 2016.

On November 4, 2016, Dr. Papierski offered sworn testimony at an evidence deposition. (PX15.) Dr. Papierski is a board-certified orthopedic surgeon who has been practicing orthopedic surgery with a focus on hand and upper extremity surgery since 1991. (PX15, 4.) Dr. Papierski explained that Petitioner's right hand and wrist conditions, including the trigger thumb, are all conditions of the tendons. (PX15, 13.) When the tendons become inflamed, the fingers and wrist can become swollen and stiff to move, and sometimes the tendon going to an individual digit can catch or become locked

intermittently. (PX15, 13-14.)

Dr. Papierski opined to a reasonable degree of medical and surgical certainty that Petitioner's job activities contributed to her conditions of trigger thumb, intersection syndrome, wrist tendonitis, and De Quervain's tendonitis. (PX15, 21.) On cross-exam, Dr. Papierski testified that he based his understanding of Petitioner's job duties on the history offered by Petitioner and did not discuss the percentage of these activities during the work day or the length of the work day with Petitioner. PX 15, p. 22. Dr. Papierski explained that keyboarding, on its own, can cause or aggravate De Quervain's and intersection tendonitis because it requires the individual to hold their wrist up in an extended posture the entire time they are typing. (PX15, 27.) Even an ergonomic setup cannot prevent this. Ergonomists have found that "...one still has to fire those tendons in order to stabilize the wrist... so one still has to be holding and maintaining tension and muscular activity on those wrist extensor tendons, including the intersection and the De Quervain's, in order to hold our hands floating above the keyboard without your hands dropping down onto the keyboard." (PX15, 31-32.)

Dr. Papierski further explained that the only way to hold a free-standing mouse is to use one's thumb flexor, and that the pinch-and-grip position of the hand and wrist, as well as the force applied, plays into the development of trigger thumb according to the medical literature on work-related factors. (PX15, 23-24, 28-29.)

Dr. Papierski testified that Petitioner possessing a fasting blood sugar of 137 would not be enough to change his opinions; it is uncontrolled diabetes that contributes to trigger finger. (PX15, 32-33.) Diabetes can put someone at greater predisposition for trigger finger and trigger thumb. (PX15, 33.) Petitioner, to his knowledge, was not diabetic. (PX15, 32.) Dr. Papierski testified that his bills are fair and reasonable for the geographic community in which he practices. (PX15, 21.)

On May 9, 2017, Dr. Tulipan offered sworn testimony at an evidence deposition. RX 1. Dr. Tulipan is board certified in orthopedic surgery with a certificate of added qualification in hand surgery. He testified the he only performs surgery from the fingertips to the elbow. RX 1, p. 6. Dr. Tulipan testified that Petitioner gave him a history of pain development in her right thumb in January 2015 and that she related the symptoms to her use of the keyboard and mouse having denied any trauma or increased activity. RX 1, p. 10. Dr. Tulipan testified that Petitioner had de Quervain syndrome and trigger thumb according to Dr. Papierski. RX 1, p. 11. De Quervain's and trigger thumb are essentially forms of tendonitis. (RX 1, 11.) Dr. Tulipan testified that in the majority of cases, 60 to 70%, both conditions occur without any known cause. He further testified that both conditions can correlate to diabetes and other health conditions. (RX 1, 12.)

When asked his opinion on whether Petitioner's de Quervain's or trigger thumb could have been caused or aggravated by her position as a customer service rep he responded, "I did not fee based on current state of knowledge among hand surgeons that this was related to keyboard use." RX 1, p. 12. Dr. Tulipan testified that there was nothing in the current literature among hand surgeons that would indicate either de Quervain or trigger thumb is related to repetitive keyboard use or mouse use. (RX 1, 12.) Dr. Tulipan further opined that Petitioner's elevated A1C level had a "much greater possibility of causing both the de Quervain and trigger finger than any other cause that I could see after this interview." RX 1, p. 14.

Dr. Tulipan conceded that a repeating a particular motion day after day could possibly irritate the sheath around the two tendons causing thickening and swelling that restricts their movement. He testified that the movement is "...more stressful to the wrist rather than just simple motion that one would see in keyboard use. ...". RX 1, p. 17-18. Dr. Tulipan further testified that literature may discuss work related cumulative trauma disorders such as de Quervain and trigger fingers but that literature is not specifically hand surgery literature and might not be produced by "people that are actually treating the syndrome." RX 1, p. 18.

Dr. Tulipan testified that he did not recall being given any information about Petitioner's job duties, and that he did not know about her keyboard or mouse setup at work. (RX 1, 20-21.) Dr. Tulipan testified that he still believed Petitioner had an equivocal history of diabetes but that he had no confirmation and correlation that Petitioner truly had diabetes. RX 1, 19-20.)

On September 15, 2015, Dr. Papierski released Petitioner back to work with Respondent with light duty restrictions. (T 20.) Respondent could not accommodate the restrictions. On January 11, 2016, Petitioner underwent a functional capacity evaluation at Athletico. (PX6.) The FCE concluded that Petitioner was functionally employable at the sedentary demand level, but that she was capable of greater functional abilities than demonstrated. (PX6.) On May 23, 2016 Petitioner was separated from her position with Respondent. (T 21-22.) Petitioner testified that while under restrictions from September 15, 2015 to May 23, 2016, she was not accommodated by Respondent and she looked for another job.

On May 24, 2016, Petitioner began working for Fidelity National Title as a contract closer. (T 22-23.) Petitioner only worked when they needed her, and they were able to accommodate her restrictions. (T 23.) She worked there for approximately two years, and then in 2018 moved on to a similar position at Stewart Title Company. (T 23.) This position, too, was within her physical restrictions. (T 23.) In July of 2020, Petitioner returned to working for Fidelity National Title, where she currently works from home and reviews documents. (T 24-25, 26-27.) This new position involves use of the keyboard, but not as much. (T 26.) Petitioner continues to work for Fidelity Title Company. (T 5-6.)

At the hearing, Petitioner displayed her scars from the April 27, 2015 surgery; one on the ulnar side of her right hand stretching from the base of her thumb down to her wrist, as well as the upper side of the base of her thumb down the side of her forearm wrist area. (T 19.) The scar is approximately half an inch thick and one inch long. (T 19.)

As of the date of hearing, Petitioner still experiences pain in her right thumb and wrist area on some days, but not as bad as before. (T 26.) She still experiences stiffness sometimes as well. (T 27.) Petitioner manages her symptoms with over-the-counter Tylenol. (T 27.) To this day, Petitioner has never been diagnosed with diabetes. (T 37.)

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 with

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

Respondent disputes that Petitioner sustained a work related injury on any date and that Petitioner's alleged condition of ill-being is causally related to her work duties. ARB EX 1. Based on the testimony at trial and on the record in its entirety, the Arbitrator finds that Petitioner sustained cumulative and repetitive type trauma resulting in de Quervain's and trigger thumb arising out of and in the course of her employment with Respondent and manifesting on January 22, 2015. The Arbitrator further finds that Petitioner's conditions of ill-being are causally related to her employment with Respondent.

In so finding, the Arbitrator notes Petitioner's unrebutted and credible testimony establishes that she began to suffer symptoms in her right upper extremity in January 2015 after five years of working for Respondent, and that on January 22, 2015, while performing her job during work hours on Respondent's premises, she experienced a popping in her right hand and wrist that prompted her to seek medical attention the next day and consistently thereafter. Petitioner had no problems or complaints related to her right wrist and hand prior to early January 2015. The Arbitrator finds that Petitioner's popping sensation on January 22, 2015 preceded by symptoms in her right upper extremity while at work is a sufficient basis to support a finding of injury manifestation arising out of and in the course of her employment on January 22, 2015.

The Arbitrator further and specifically finds that Petitioner's conditions of ill-being having manifested on January 22, 2015 are causally related to her job duties with Respondent. Here, the Petitioner's unrebutted testimony establishes that prior to early 2015, she had no medical issues with her right arm, hand, or fingers in the five years she worked for Respondent. In early 2015, Petitioner began to experience numbness and pain shooting through her thumb and on January 22, 2015, Petitioner was at work, using her computer mouse when she felt a popping sensation in her right thumb and wrist area. On January 26, 2015, Petitioner had her initial visit with Dr. Komanduri where she related the popping incident of January 22, 2015. (T 16, 30-31.) Petitioner consistently treated thereafter culminating in surgery performed by Dr. Papierski as noted above. The chain of events as supported by the medical records in evidence clearly supports a finding of causal connection.

Both Dr. Tulipan and Dr. Papierski testified that Petitioner's right hand and wrist conditions, including the trigger thumb, are conditions of the tendons. (PX15, 13.) When the tendons become inflamed, the fingers and wrist can become swollen and stiff to move, and sometimes the tendon going to an individual digit can catch or become locked intermittently. (PX15, 13-14.) Both physicians agree that Petitioner was properly diagnosed with trigger thumb, intersection syndrome, wrist tendonitis, and De Quervain's tendonitis. Where the experts differed, however, is in whether repetitive mouse and keyboard use can produce this inflammation and these conditions.

Petitioner's unrebutted and highly credible testimony establishes that her job required her to type and use a mouse all day as a customer service representative for a bank. (T 7, 10-11.) Petitioner worked an 8-hour shift; with the exception of a 30-minute lunch and a single 15-minute break, Petitioner was on the computer for her entire 8-hour shift. (T 9, 10.) Petitioner performed this work for 5 years. Based on this testimony and on the record in its entirety, the Arbitrator finds that the evidence lends more support to the opinion of Dr. Papierski than that of Dr. Tulipan regarding causal relationship of the agreed conditions of ill being and Petitioner's job for Respondent. Specifically, the Arbitrator agrees with Dr. Papierski in this matter and finds the work duties described by Petitioner mandated sufficient

repetition, force and tension to support a finding of causal connection for Petitioner's trigger thumb, intersection syndrome, wrist tendonitis, and De Quervain's tendonitis.

Finally, the Arbitrator further finds that any suggestion of a diabetic condition sufficient to cause any of Petitioner's diagnosed conditions of ill-being for which she was treated in this case to be mere speculation and completely unsupported by the medical record. Petitioner has never been diagnosed with diabetes or treated for that condition.

For the above reasons, the Arbitrator finds that Petitioner sustained cumulative and repetitive type trauma arising out of and in the course of her employment with Respondent with injury manifesting on January 22, 2015. The Arbitrator further finds that Petitioner's conditions of ill-being in her right wrist and hand are causally related to her employment with Respondent.

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

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Petitioner's medical services were reasonable and necessary to treat the causally related conditions of ill-being in her right hand and wrist. Accordingly, the Arbitrator finds that Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred in the care and treatment of Petitioner's causally related conditions pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid including amounts paid pursuant to Section 8(j) and shall hold Petitioner harmless for all group payments pursuant to Section 8(j) of the Act, if any. ARB EX 1.

K. What temporary benefits are in dispute?

Based on the Arbitrator's findings on the issues of accident and causal connection, the Arbitrator further finds that Petitioner was temporarily and totally disabled for a period of 66-5/7 weeks commencing February 12, 2015 to May 23, 2016. Respondent shall receive credit for amounts paid, if any.

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

Pursuant to Section 8.1b(b) of the Act, the Arbitrator considers the following factors in determining the level of permanent partial disability:

(i) Neither party submitted an impairment rating report. No weight is given to this factor.
(ii) Petitioner's current occupation involves reviewing documents for Fidelity Title Company. (T 25.) The employment is similar to her work for Respondent without the substantial computer work. Some weight is given to this factor.
(iii) Petitioner was 49 years old at the time of her injury. Petitioner has many years left in the work force. Some weight is given to this factor.

(iv) No evidence as to Petitioner's future earnings capacity was submitted and no weight is given this factor.

(v) Petitioner offered evidence of disability in the form of testimony at the arbitration hearing, as well as via extensive medical documentation. Petitioner underwent a multi-stage surgical procedure on her right hand that required months of post surgical physical therapy. At the hearing, Petitioner displayed her scars from the April 27, 2015 surgery; one on the ulnar side of her right hand stretching from the base of her thumb down to her wrist, as well as the upper side of the base of her thumb down the side of her forearm wrist area. (T 19.) The scar is approximately half an inch thick and one inch long. (T 19.) Although Petitioner underwent an FCE that found she was employable at the sedentary demand level, it found that she was capable of greater function than demonstrated. Petitioner further testified that she has had no medical care subsequent to 2016, and that she has returned to work full duty without the need to perform similar computer and desk work. She takes Tylenol for the occasional pain and stiffness she experiences in her right thumb and wrist area. Petitioner is right hand dominant. The Arbitrator gives some weight to his factor.

Having weighed the relevant factors as stated above, the Arbitrator finds that Petitioner is entitled to permanent partial disability equal to 15% loss of use of the right hand pursuant to Section 8(e) of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC035565
Case Name	BROOKS, MELANIE D v. WESTERN ILLINOIS UNIVERSITY
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0555
Number of Pages of Decision	37
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Charles Edmiston
Respondent Attorney	Joseph L. Moore

DATE FILED: 11/8/2021

DISSENT

/s/ Deborah Baker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MELANIE D. BROOKS,

Petitioner,

vs. NO: 19 WC 35565

WESTERN ILLINOIS UNIVERSITY,

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 whether Petitioner's left hip condition of ill-being remains causally related to her undisputed accidental injury, entitlement to temporary disability benefits, and entitlement to incurred medical expenses as well as prospective medical care, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

PROLOGUE

During the hearing, both parties affirmed to the Arbitrator that their respective exhibits were in compliance with Supreme Court Rule 138. T. 14, *Ill. S. Ct. R. 138* (eff. Jan. 1, 2018). The Commission observes, however, Petitioner's personal identity information was unredacted throughout Petitioner's Exhibit 3. The Commission has redacted Petitioner's Exhibit 3 to bring it into compliance with Supreme Court Rule 138, and we caution Counsel to redact his exhibits in the future.

FINDINGS OF FACT

The Findings of Fact set forth in the Decision of the Arbitrator sufficiently details the medical records as well as the deposition testimony and we incorporate that portion of the Findings of Fact herein. However, with respect to Petitioner's testimony, the Commission finds the single-sentence reference to Petitioner's cross-examination testimony is not representative of the full breadth of the testimony elicited regarding prior left hip treatment. The Commission strikes the fourth paragraph of the Findings of Fact and substitutes the following:

Questioning turned to Petitioner's pre-accident left hip condition. Specifically, Petitioner was asked if she had hip pain prior to the October 8, 2019 fall, and Petitioner responded that she had seen Dr. Stortzum for pain that started on the side of her left knee. T. 20. The following exchange then occurred:

Q. You saw Doctor Stortzum about your left hip?
A. Uh-huh, yes, but I saw Doctor Stortzum first about my knee.

Q. Okay. But prior to this accident had you seen him about your left hip?
A. No, because we didn't know that it was my hip.

Q. Okay.
A. Until later on. T. 20-21.

Petitioner confirmed Dr. Stortzum had eventually referred her to Dr. White, who administered two injections to her left hip. T. 21. She volunteered that the first injection "really worked well" and provided four months of relief, however the second injection "only worked two weeks at the max. And I didn't go in for a third because it - - Doctor Stortzum said it probably wasn't going to do any better than the second one." T. 21. Petitioner testified she did not have a return appointment scheduled with Dr. White at the time of her work accident. T. 21.

Petitioner testified her condition changed after the October 8, 2019 accident, and her increased symptoms affected both her ability to work and her overall daily functioning. Petitioner has been a Building Service Worker since 2006 and, with the exception of time missed following a neck injury, she worked continually and was able to perform her job duties which included moving furniture, moving her equipment cart with its 10-gallon bucket of water, using vacuums and foamers, and using heavy-duty shampooers. T. 33-34, 55-56. Petitioner explained that prior to her accident, when she used this equipment, she had only occasional mild symptoms: "It caused as far as, you know, my knee hurt every now and then; but it didn't cause any burning sensation in my feet or in the groin or in the left side here or in the hip, I didn't have that." T. 57. She testified that when she returned to work after the accident, within a few hours she was in significant pain. T. 23. She indicated her symptoms changed in location and intensity:

> I felt a lot of pain and discomfort left hip, left knee[,] both sides of my lower back, left and right, my groin area was getting worse where the pain was intense. I noticed that it was - - The pain would last a lot longer. In fact there would be times when it

just wouldn't go away. It might have gotten milder, but it was there and it was very disruptive in my daily activities. T. 35.

Petitioner further testified her overall functioning has changed since the accident. She only gets two or three good hours of sleep per night because the pain wakes her up and laying down is very uncomfortable. T. 27. There is a continuous pain starting "in my knee and work its way up to my left side in the buttocks on the left side. It's starting to go from the left side of my back and it goes over to the right in the lower back." T. 27. Her mobility is very limited. T. 27-28. She cannot do walking for health benefits because it hurts: "It hurts on my left hip, and it starts at the knee and radiates up the left. And it's like a burning sensation and like you are being just pinched." T. 28. When traversing stairs, she has "problems as far as when you go to prop your leg or your foot up to get to the next stair, okay, it's very painful." T. 28. Dr. Stortzum recently prescribed Tramadol. T. 28. Petitioner testified she can stand for 15 minutes before she needs to move around or sit down or find a more comfortable position. T. 29. She has not been grocery shopping for some time, instead relying on family and friends. T. 29-30. Petitioner testified she did not have problems "to this extent" prior the October 8, 2019 fall and explained her left knee would hurt "now and then," but she was "not at all" limited in her activity. T. 30-31.

On cross-examination, there was a further exchange about prior left hip treatment:

Q. So before [the fall in the shower] did you have medical treatment for your left hip?
A. My medical treatment started with the knee, okay. And I don't know what - - I guess I am not understanding what you mean by this pain that I was having.

Q. I don't know how to say it any differently than did you have left hip medical treatment before this fall - -
A. No, not in the hip itself, I was having problems with my knee and right here (indicating). Right here like.
Counsel: For the record you are indicating the outside of your thigh.
A. Yes, yes, that was my major complaint.

Q. Before this fall that we are here today about?
A. Yes, it all started in the knee. I am trying to tell you I didn't realize it was a hip problem and neither did the doctors.

Q. Okay. So we are talking years prior to this fall that we are here today about you are saying you did not have left hip treatment?
A. Not to my knowledge…I don't know. I might have - - No, I don't think so. I don't think I had treatment. T. 36-38.

CONCLUSIONS OF LAW

I. Causal connection

In finding Petitioner did not prove her current left hip condition of ill-being is causally related to her undisputed accidental injury, the Arbitrator made an adverse credibility determination. The Arbitrator highlighted Petitioner's cross-examination testimony and found it "incomprehensible" that Petitioner denied, to her knowledge, having received any treatment to the left hip prior to the accident of October 8, 2019. The Commission views the evidence differently. As explained below, we believe the finding that Petitioner denied prior left hip treatment focuses on a single response taken out of context and does not accurately reflect Petitioner's testimony. *See R & D Thiel v. Illinois Workers' Compensation Commission*, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870 (2010) (When evaluating whether the Commission's credibility findings which are contrary to those of the arbitrator are against the manifest weight of the evidence, "resolution of the question can only rest upon the reasons given by the Commission for the variance.")

The Commission observes that early in Petitioner's testimony, immediately after she described her undisputed accident, Petitioner was specifically questioned about her pre-accident hip condition. When asked if she had hip pain prior to the fall, Petitioner testified she had seen Dr. Stortzum about her left hip, but it was left knee complaints that initially led her to seek care. Petitioner explained her symptoms were localized to the side of her left knee and "we didn't know that it was my hip…Until later on." T. 20-21. During cross-examination, Petitioner reiterated that she first sought treatment for symptoms in her knee and the outside of her thigh: "Yes, it all started in the knee. I am trying to tell you I didn't realize it was a hip problem and neither did the doctors." T. 37. Rather than an outright denial of left hip treatment, Petitioner was explaining that the impetus for her seeking treatment was left knee complaints; as such, some workup was necessary before Dr. Stortzum realized her hip was causing her symptoms and referred her to Dr. White. The Commission notes Petitioner's testimony is corroborated by Dr. Stortzum's narrative report (Pet.'s Ex. 3) as well as his treatment records from January 16, 2015 (Resp.'s Ex. 4); November 16, 2018 (Pet.'s Ex. 3); December 19, 2018 (Pet.'s Ex. 3); and March 25, 2019 (Pet.'s Ex. 3), which document complaints of left knee symptoms and diagnoses of left knee pain and iliotibial band syndrome. The Commission finds Petitioner was honest about her pre-accident condition and we find her credible.

The Commission further views the medical evidence differently. While the Arbitrator afforded little weight to Dr. Stortzum's and Dr. Capecci's opinions because they were based on Petitioner's subjective complaints, we observe worsened symptoms can constitute an exacerbation of a pre-existing condition. *See*, *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, 79 N.E.3d 833. Moreover, the Commission believes limiting causal connection to only the date of accident is inconsistent with Petitioner suffering an undisputed accident, undergoing immediate emergency room care with imposition of work restrictions, followed thereafter with ongoing follow-up care and continuing activity restrictions. We find there was a clear deterioration in Petitioner's condition following the work accident. The question is if, and if so, when, the deterioration resolved.

There is no question Petitioner had a significant pre-existing condition: both treating physicians, Dr. Stortzum and Dr. Capecci, as well as Respondent's chosen expert, Dr. Williams, concluded Petitioner had long-standing left hip degenerative osteoarthritis. While Dr. Stortzum and Dr. Capecci opined Petitioner's fall permanently exacerbated her underlying condition, the Commission finds the evidence establishes Petitioner's condition had returned to her pre-accident baseline as of the March 9, 2020 examination with Dr. Williams.

The Commission first notes that although Dr. Stortzum has been Petitioner's primary physician for many years, the doctor is a general medicine practitioner and not a board certified orthopedic surgeon. Pet.'s Ex. 5, p. 4-5. As such, we find Dr. Stortzum's testimony as to changes in the severity of Petitioner's complaints after the October 8, 2019 fall, as well as changes to the conservative treatment plan that he recommended in response, is credible and persuasive. However, we are less inclined to accept Dr. Stortzum's opinions on the progression of the underlying orthopedic disease process itself. Rather, the Commission finds the competing expert opinions of Dr. Capecci and Dr. Williams to be the most reliable and probative on the issue.

Dr. Capecci concluded Petitioner's work accident resulted in an exacerbation of her pre-existing condition and accelerated her need for hip replacement. Pet.'s Ex. 6, p. 13, 15. The Commission finds it significant, though, that Dr. Capecci's opinion is based, in part, on the fact that Petitioner had not seen him prior to the fall, so "we would assume she was not having enough symptoms to warrant orthopedic intervention." Pet.'s Ex. 6, p. 18. Petitioner's pre-accident treatment with Dr. White belies Dr. Capecci's assumption. Therefore, the Commission affords Dr. Capecci's causation opinion less weight. *See*, *e.g.*, *Sunny Hill of Will County v. Illinois Workers' Compensation Commission*, 2014 IL App (3d) 130028WC, ¶36, 14 N.E.3d 16 (Expert opinions must be supported by facts and are only as valid as the facts underlying them.)

Dr. Williams, in contrast, concluded there was no evidence the fall caused a permanent change in Petitioner's condition. Resp.'s Ex. 2, p. 11. While Dr. Williams agreed a fall such as Petitioner's could exacerbate arthritis pain and opined Petitioner's treatment had been reasonable and necessary, the doctor noted that as of the March 9, 2020 examination, Petitioner had only minimal objective findings: "The only pertinent objective finding is the possible weakness in knee extension on the left." Resp.'s Ex. 2, p. 19, Resp. Ex. 2, Dep. Ex. 2. Emphasizing Petitioner's physical ability was not limited in any way, Dr. Williams concluded Petitioner had reached maximum medical improvement and was capable of full duty. Resp.'s Ex. 2, p. 13. The Commission finds Dr. Williams' opinions to be persuasive.

The Commission finds Petitioner's undisputed work accident resulted in a temporary exacerbation of her pre-existing condition. We further find Petitioner's condition of ill-being returned to its pre-accident baseline as of March 9, 2020, the date Dr. Williams found Petitioner to be at maximum medical improvement and capable of performing full duty work.

II. Temporary Disability

On the Request for Hearing, Petitioner alleged she was temporarily and totally disabled from October 8, 2019 through November 13, 2020. Arb.'s Ex. 1. The Commission observes, however, Petitioner testified that following her accident, she continued to work off and on until

"approximately" October 26, 2019, when Respondent advised it could not accommodate the restrictions imposed by Dr. Stortzum. T. 22, 24-25. The Commission finds Petitioner's testimony comports with Respondent's stipulation that Petitioner was entitled to TTD benefits as of October 23, 2019. Arb.'s Ex. 1. Consistent with our finding that Petitioner reached maximum medical improvement as of the date of Dr. Williams' §12 examination, we find Petitioner's TTD period ended on March 9, 2020.

The Arbitrator found Petitioner's average weekly wage to be $759.62, and that calculation is not challenged on Review. This yields a Temporary Total Disability benefit rate of $506.41. Therefore, the Commission finds Petitioner entitled to Temporary Total Disability benefits of $506.41 per week from October 23, 2019 through March 9, 2020.

III. Medical

The medical bill exhibit submitted by Petitioner details medical expenses incurred for Petitioner's left hip treatment. Pet.'s Ex. 7. The Commission finds the treatment rendered from October 8, 2019 through March 9, 2020 was reasonable, necessary, and related to the undisputed accident, and Respondent is liable for same. Pursuant to our maximum medical improvement determination, Petitioner's request for prospective treatment is denied.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2020, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $506.41 per week for a period of 19 6/7 weeks, representing October 23, 2019 through March 9, 2020, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b), this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses set forth in Petitioner's Exhibit 7, limited to charges for treatment rendered from October 8, 2019 through March 9, 2020, as provided in §8(a), subject to §8.2 of the Act. Respondent shall be given a credit for medical benefits that have been paid, and Respondent shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in §8(j) of the Act.

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

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

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

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

/s/ *Stephen Mathis*

/s/ *Deborah L. Simpson*

PARTIAL CONCURRENCE AND DISSENT

I concur with the majority's modification of the Findings of Fact as well as the positive credibility assessment of Petitioner. I disagree, however, with the majority's finding that Petitioner suffered only a temporary aggravation of her pre-existing condition. In my view, Petitioner established by the preponderance of the evidence that her undisputed fall resulted in an ongoing aggravation of her left hip arthritis.

Initially, I note our panel unanimously found Petitioner to be a credible witness, and that is the lens through which her testimony is viewed. Petitioner acknowledged she had a pre-existing degenerative condition, and she further acknowledged she experienced some difficulties as a result of her arthritis prior to her October 8, 2019 accident. Petitioner testified there was a distinct change in her condition following the fall, and this impacted her ability to perform her work duties as well as her activities of daily living. It is undisputed that Petitioner's work duties are physically demanding; she routinely moves furniture, pushes her equipment cart with its 10-gallon bucket of water, and uses vacuums, foamers, and heavy-duty shampooers. T. 33-34, 55-56. Prior to her fall on the concrete floor, she could use that equipment and only experience occasional knee pain. T. 57. Following her work accident, however, performing those same tasks caused severe pain. T. 23. Petitioner explained that not only was her pain more intense, but she also had symptoms in more areas of her body:

> I felt a lot of pain and discomfort left hip, left knee[,] both sides of my lower back, left and right, my groin area was getting worse where the pain was intense. I noticed that it was - - The pain would last a lot longer. In fact there would be times when it just wouldn't go away. It might have gotten milder, but it was there and it was very disruptive in my daily activities. T. 35.

Petitioner further detailed the marked change in her overall functioning since the accident. She now has a continuous pain in her knee which radiates into the buttocks on the left side. T. 27. As a result, her mobility is very limited and her sleep is compromised. T. 27-28. Petitioner testified she can stand for 15 minutes before she needs to move around or sit down or find a more comfortable position. T. 29. She has not been grocery shopping for some time, instead relying on family and friends. T. 29-30. Petitioner testified she did not have problems "to this extent" prior to the October 8, 2019 fall; while her left knee would hurt "now and then," she was "not at all" limited in her activity. T. 30-31. I find Petitioner's credible testimony establishes a clear deterioration in her condition as a result of the work accident, and that deterioration remains unresolved.

In addition, having considered the conflicting medical opinions, I find the opinions of Dr. Stortzum and Dr. Capecci to be more credible and persuasive. I believe that because Dr. Stortzum has been Petitioner's physician for nearly two decades (Pet.'s Ex. 5, p. 6), he is uniquely qualified to evaluate an exacerbation of her symptoms. Dr. Stortzum explained the character of Petitioner's complaints changed after the October 8, 2019 work accident: "She's been much more persistent in complaining of pain and significant limitation to the point where I actually just saw her four days ago because she can't sleep now because of the pain." Pet.'s Ex. 5, p. 15. Dr. Stortzum confirmed Petitioner's complaints of hip pain have remained consistent since the October 2019 accident. Pet.'s Ex. 5, p. 16. Dr. Stortzum has seen Petitioner fairly frequently since he has been her physician, and he has no reason to doubt the veracity of Petitioner's complaints. Pet.'s Ex. 5, p. 24. Based upon his knowledge of Petitioner's condition over several years as well as the fall she described and her complaints thereafter, Dr. Stortzum concluded Petitioner suffered an exacerbation of her underlying osteoarthritis, and that exacerbation was ongoing and had not returned to baseline. Pet.'s Ex. 5, p. 14.

Dr. Capecci likewise concluded Petitioner's work accident resulted in an exacerbation of her pre-existing condition and accelerated her need for hip replacement. Pet.'s Ex. 6, p. 13, 15. Dr. Capecci explained a fall for someone with arthritis can cause both pain and pathology changes: "It can exacerbate the symptoms, but it also may allow progression of further articular cartilage destruction and demise." Pet.'s Ex. 6, p. 27. Dr. Capecci testified, in Petitioner's case, her symptoms were definitely aggravated: "I would say that arthritis does have times and opportunities when it may be quiescent and more times when it is exacerbated, and at the time that I visited with her, it appeared she was in an active flare stage and suffering a great deal." Pet.'s Ex. 6, p. 26. Dr. Capecci explained that when deciding whether to perform a hip replacement on someone with arthritis, the person's pain level is "the most important factor," and the effect the person's pain has on his/her ability to work is also significant (Pet.'s Ex. 6, p. 27-28); Dr. Capecci is recommending hip replacement be done now because of Petitioner's severe pain and decreased functionality, both of which resulted from the work accident. Pet.'s Ex. 6, p. 28.

I do not find Dr. Williams' contrary conclusions to be persuasive. I note that in denying causation, Dr. Williams repeatedly emphasized Petitioner's arthritis is the source of her pain and her arthritis predated the work accident. Resp.'s Ex. 2, Dep. Ex. 2. That does not end the inquiry. The analysis must consider whether the fall was *a* factor in Petitioner's current level of arthritis pain. As the doctor conceded, a patient's pain level cannot be determined from X-ray, and some

patients with arthritis on X-ray will not have much pain while others will have a great deal of pain. Resp.'s Ex. 2, p. 19. Dr. Williams confirmed that the patient's pain level is a significant factor when a physician is deciding whether to proceed with hip replacement, as is the effect of the patient's pain on his/her function. Resp.'s Ex. 2, p. 19-20. Significantly, Dr. Williams agreed a fall such as Petitioner's can exacerbate pain from arthritis, yet Dr. Williams did not discuss with Petitioner what effect her pain had on her ability to function. Resp.'s Ex. 2, p. 23, 19.

In my view, *Schroeder v. Illinois Workers' Compensation Commission*, 2017 IL App (4th) 160192WC, 79 N.E.3d 833, is applicable to the facts herein and compels a finding that Petitioner's condition of ill-being remains causally related to her undisputed work accident. As in *Schroeder*, Petitioner was working and able to perform physically-demanding job duties prior to her work accident. T. 55-56. Following the accident, there was a change in Petitioner's ability to work. The emergency room physician authorized Petitioner off work for three days. Thereafter, she returned to work for one full day and "After a couple of hours I was done, I was in extreme pain, and it just didn't go away." T. 57. Petitioner was evaluated by Dr. Stortzum that day, and Dr. Stortzum concluded her increased pain complaints precluded her from performing her full job duties. Pet.'s Ex. 3. Petitioner's treating physicians have thereafter either authorized her off work completely or restricted her to modified duty, and have concluded hip replacement surgery can no longer be deferred. Pet.'s Ex. 3. *See*, *Schroeder*, ¶ 32 ("Finally, we point out that where an accident *accelerates* the need for surgery, a claimant may recover under the Act. *Caterpillar Tractor Co.*, 92 Ill. 2d at 36." (Emphasis in original)).

Based on the above, I find Petitioner proved she suffered an exacerbation of her pre-existing condition which accelerated her need for hip replacement surgery. Regarding the disputed benefits, I find Petitioner was temporarily and totally disabled from December 23, 2019 through November 13, 2020. The medical expenses award should include the charges incurred for left hip treatment from October 8, 2019 through the date of hearing, as detailed in Petitioner's Exhibit 7. In addition, I would order Respondent to provide and pay for left hip replacement surgery. For all of the above reasons, I respectfully dissent.

November 8, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 9/15/21

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

21IWCC0555

BROOKS, MELANIE D
Employee/Petitioner

Case# **19WC035565**

WESTERN ILLINOIS UNIVERSITY
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0834 KANOSKI BRESNEY
CHARLES N EDMISTON
129 S CONGRESS
RUSHVILLE, IL 62681

6140 ASSISTANT ATTORNEY GENERAL
JOSEPH L MOORE
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SPRINGFIELD, IL 62706

0498 STATE OF ILLINOIS
ATTORNEY GENERAL
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PO BOX 2710 STATION A
CHAMPAIGN, IL 61825

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

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

DEC 28 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Melanie D. Brooks
Employee/Petitioner

v.

Case # **19** WC **35565**

Consolidated cases: **N/A**

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

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 8, 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 **$39,500.33**; the average weekly wage was **$759.62.**

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

Respondent shall be given a credit of **$12,060.40** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational disability benefits, and **$0** in other benefits, for a total credit of **$12,060.40.**

Respondent shall be given a credit of **$ANY 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 October 8, 2019, Petitioner's request for prospective medical treatment as recommended by Dr. Capecci is denied.

Respondent shall pay for medical services **rendered on October 8, 2019** 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 on October 8, 2019** directly to Petitioner. Respondent shall pay any unpaid, related medical expenses **for treatment rendered on October 8, 2019** 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 **$12,060.40** for TTD, **$0** for TPD, **$0** for maintenance, **$0** in non-occupational disability benefits, and **$0** in other benefits, for a total credit of **$12,060.40.**

Respondent shall be given a credit of **$ANY 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.

Signature of Arbitrator

12/20/2020
Date

ICArbDec19(b)

DEC 28 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(B)

Melanie D. Brooks
Employee/Petitioner

v.

Western Illinois University
Employer/Respondent

Case # **19** WC **35565**

Consolidated cases: **N/A**

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner testified that on October 8, 2019, she was employed with Respondent as a Building Service Worker 1. Petitioner testified that she had been employed at the university since June of 2006. Petitioner described her job duties, in general, as cleaning dorm rooms and office buildings, which included vacuuming and cleaning windows. She described her position as that of a custodian.

Petitioner testified that on October 8, 2019, she was cleaning the women's bathroom and that, when exiting a shower, she slipped on the wet floor and fell. Petitioner testified that she fell backwards onto a cement floor. She testified that immediately after the fall she felt pain in her back, buttocks, hips, and "all around." She testified that she was taken by ambulance after the fall to McDonough District Hospital in Macomb. The Arbitrator notes that, due to an unavailable witness, the parties stipulated at the time of arbitration that the ambulance was dispatched as a matter of protocol and was not based on any assessment of the severity of the injury involved.

Petitioner testified that she continued her treatment with her primary care physician, Dr. Stortzum. Petitioner testified that Dr. Capecci in January 2020 recommended a left hip replacement. Petitioner further testified that she wished to undergo the procedure.

On cross examination, Petitioner denied, to her knowledge, having received any treatment to the left hip prior to the accident of October 8, 2019.

The records of Lifeguard Ambulance Service were entered into evidence at the time of arbitration as Petitioner's Exhibit 1. The records reflect that on October 8, 2019, Petitioner was treated and transported by ambulance to McDonough District Hospital in Macomb after a fall for a chief complaint of left hip pain for a duration of 20 minutes. It was noted that Dispatch stated that Petitioner may have broken a hip, that the Lifeguard Medic 2 arrived on scene to find an adult female patient sitting on the floor in the women's bathroom at a local university dorm, that she stated that she was cleaning the bathroom when she slipped on the wet floor resulting in a fall from a standing position, and that she stated that she thought she may have broken her hip. It was noted that Petitioner stated that she was having mild left lateral hip pain, that she told EMS that she had a "bad hip" on the left already, that she stated that she did not really want to go into the hospital, and that she was advised by her employer that she needed to go to the hospital for "work comp stuff." It was noted that Petitioner stated that she would go to the hospital since it was required by her employer, that she denied hitting her head, and that she denied taking any blood thinners. The records reflect that Petitioner currently reported left lateral hip pain, that she denied any other complaints at that

time, and that she denied any numbness or tingling. It was noted that upon arrival to the destination facility, Petitioner remained conscious, alert, oriented x 4, and continued to report left lateral hip pain. (PX 1).

The medical records of McDonough District Hospital were entered into evidence at the time of arbitration as Petitioner's Exhibit 2. The records reflect that on November 21, 2019, Petitioner underwent a CT of the thorax. Petitioner underwent x-rays of the lumbar spine on April 6, 2020 with a noted "Reason for Exam" of low back pain. Petitioner underwent x-rays of the pelvis on October 8, 2019 with a noted "Reason for Exam" of hip pain, which were interpreted as revealing Reidel's lobe of the liver, indeterminate soft tissue fullness in pelvis of at least 11 cm, moderate left to advanced hip osteoarthritic change, mild right hip osteoarthritic change, no acute bony abnormality, and multiple other findings as mentioned. It was noted that the most recent comparison was that of a left hip arthrogram of September 4, 2019. The records reflect that Petitioner underwent x-rays of the left femur on October 8, 2019 with a noted "Reason for Exam" of a fall, which were interpreted as revealing mild osteoarthritic change about the left knee; the remainder of the femur unremarkable. (PX2).

The records of McDonough District Hospital reflect that Petitioner was seen in the emergency room on October 8, 2019, at which time it was noted that she presented with complaints of status post fall. It was noted that Petitioner stated that she was at work cleaning the floors and that while she was cleaning a shower, she slipped and fall onto her left hip. It was noted that Petitioner stated that it occurred between 8:00 and 8:30 that morning, that she stated that she was planning to get a left hip replacement performed, that she was presently complaining of pain to her left hip and upper thigh, and that she denied numbness or tingling. The "Review of Systems" noted that Petitioner's musculoskeletal symptoms included left hip pain, left thigh pain, and no back pain. It was noted that Petitioner's "Active Problems" included left hip pain, left buttock pain, left knee pain, left leg pain, primary osteoarthritis of the left knee, and low back pain, among others. The diagnosis was noted to be that of accidental fall and contusion of the left hip. It was noted that the plan was to discharge Petitioner home with a prescription for Ibuprofen, and that she was to follow-up with her primary care physician in 3-5 days. (PX2).

The records of McDonough District Hospital reflect that Petitioner underwent a CT of the thorax on May 26, 2020. The records reflect that Petitioner underwent a diagnostic mammogram on May 21, 2020. The records reflect that Petitioner also underwent an MRI of the lumbar spine on August 28, 2020, which was interpreted as revealing L5-S1, right foraminal roof abutment/compression; swollen enhancing exiting right L5 root likely inflammatory versus the differential of neuroma or metastasis; L4-5 moderate to severe degenerative central stenosis; superimposed left paracentral disc protrusion and left cranial caudal settling with left L4 foraminal root abutment, left lateral recess root abutment greater on the left of L5; L3-4 moderate degenerative central stenosis with lateral recess stenosis and mild left foraminal L3 root contact; T11-12 focal right paracentral disc protrusion with some spurring abutting cord. (PX2).

The medical records of Springfield Clinic were entered into evidence at the time of arbitration as Petitioner's Exhibit 3.[1] The records reflect that Petitioner was seen on September 9, 2019 by Dr. Stortzum, at which time it was noted that she was there to discuss migraines. It was noted that Petitioner stated that it was "job" dependent as to what she was assigned to do at WIU, that it was worse when she had to use larger machines and was using them with her upper extremities, and that it was also made worse by reduced sleep due to hip and knee pain. It was noted that Petitioner had a steroid shot in the left hip on September 4th, that the burning pain was gone but that stiffness was still present for awhile after sitting and then moving, and that after the first steroid injection it took about five days to take effect. It was noted that Petitioner noted that her biggest concern at that point was quitting smoking, that she had been smoking for several years, that she was coughing more, and that occasionally it was productive. The assessment was noted to be that of (1) headache, migraine; (2) tobacco use disorder. It was noted that they discussed

[1] Any markings that appear in the exhibit were not made by the Arbitrator.

different options in adjusting Petitioner's medications for mood and chronic pain, as well as to help with quitting smoking. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on August 13, 2019, at which time she was seen for a chief complaint of cough, ear feels clogged, nasal congestion, nausea, and headache. The assessment was noted to be that of acute sinusitis. At the time of the July 19, 2019 visit, it was noted that Petitioner was seen for hand pain and swelling, ongoing left ankle and leg swelling, and a known history of left hip and knee osteoarthritis. It was noted that in the past week Petitioner had had increased pain, that she was not sleeping due to pain, that she was trying CopperFit compression gloves to help with her hands, and that her left knee was swelling more. It was noted that at work they were getting more aggressive physical jobs, that Petitioner was having more difficulty managing the heavy equipment associated with this particular job, that she noted that this would go on for the next two weeks as they were getting ready for the next year, and that her hands were hurting, making her grip more painful and difficult. It was noted that left hip x-rays dated March 25, 2019 were reviewed, showing progressive dinner [*sic*] changes about the left hip with marked narrowing of the superolateral joint, and that the x-rays of the left knee dated February 1, 2018 showed a moderate amount of medial compartment narrowing and hypertrophic changes. It was noted that Petitioner was also having a persistent headache for the last two days that seemed to be accelerating, and that it was not responding to Ibuprofen, Tylenol, or aspirin. The assessment was noted to be that of (1) osteoarthritis of the left knee; (2) osteoarthritis of the left hip; (3) bilateral hand pain, likely osteoarthritis; (4) headache, migraine. It was noted that due to the persistence of headache and failure to respond to more conservative oral medications Petitioner was to be given a Toradol injection, and that the Toradol should start to get her some relief for joint pain, but that due to the intensity and well documented osteoarthritis of the left hip and knee Dr. Stortzum was going to extend a Medrol Dosepak. It was noted that Petitioner was also encouraged to ice and elevate the knee and hip. It was further noted that due to an exacerbation of underlying arthritis and the physical demands of Petitioner's job in the next couple of weeks, Dr. Stortzum felt it would be best for her safety, as well as healing, to avoid any strenuous activity. It was noted that Petitioner was going to be provided an FMLA form for him to complete due to underlying left hip and knee arthritis. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on July 3, 2019, at which time it was noted that she was there due to depression. It was noted that Petitioner stated that there were a lot of things going on contributing to her increase in depression, that she was having difficulties at work, that she was also having large financial difficulties, and that she expressed the need to get better and requested help. The assessment was noted to be that of (1) depression; (2) hoarding behavior. It was noted that Petitioner was strongly encouraged to restart counseling. At the time of the May 13, 2019 visit, it was noted that Petitioner was there for cough, sore throat, hoarseness, and that she just did not feel well for the past week. The assessment was noted to be that of (1) COPD exacerbation; (2) left ankle pain. It was noted that Petitioner noted that after a recent left intraarticular hip injection on April 25, 2019 which she did see improvement and saw her left hip pain and definitely her lower back buttock pain, but that she saw some discomfort going on in the left lateral thigh. It was noted that about two days after the injection Petitioner had rather severe pain over the left distal lateral leg and ankle region, and that it had been fairly persistent since that time. Petitioner was given a Depo Medrol injection and was recommended to complete a full course of antibiotics as prescribed. It was noted that they were also going to see if the Depo Medrol helped at all with Petitioner's left lateral ankle pain, and that if she was not seeing any notable improvement with this in the next 5-7 days, she was to notify Dr. Stortzum and they would pursue left ankle x-ray. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on April 22, 2019, at which time it was noted that she was seen for left hip pain. It was noted that Petitioner had had it for over a year but that it had been severe in the past few days, and that she was having trouble walking. It was noted that Petitioner was using Tylenol Arthritis that was not giving any relief, that she was feeling it all over the left hip region (groin, thigh, buttock), that she could not get comfortable in any position, that laying on the left

side was painful and difficult, and that her left knee felt like it was twisted and was getting worse with time as well. It was noted that the left hip x-ray report dated March 25, 2019 was reviewed and that it showed progression of degeneration about the left hip joint, that there was marked narrowing of the superior lateral joint area, and that there were also hypertrophic changes of the medial and lateral aspects of the femoral head/neck junction. The assessment was noted to be that of osteoarthritis of the left hip. It was noted that Dr. Stortzum wanted to be more aggressive using an NSAID, but that with Petitioner's GI history he wanted to first discuss with Dr. Biagini to assure that he did not see any significant contraindications. It was noted that Petitioner was also encouraged to keep her appointment with Dr. White for the next day. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on March 25, 2019, at which time it was noted that she was there for left leg pain that extended into the buttocks around the left groin and around the low part of the back, and that she wanted to talk about an appointment to treat moles. It was noted that Petitioner had ongoing left hip and knee pain, that she had a diagnosis of IT band syndrome, that she was last evaluated in November, and that the pain had never resolved. It was noted that Petitioner did a lot of walking and standing at work. It was further noted that Petitioner feel [*sic*] going to her car on the way to work that morning. It was noted that Petitioner had tried heat, creams, ice, and rest with questionable help, that sometimes it felt a little better but that she was not sure what make it feel worse or better, that lying flat was uncomfortable particularly on the left side, and that it was better if she was more upright. It was further noted that Petitioner had tried multiple modalities to help with pain including physical therapy, left knee injection, anti-inflammatories, and even Prednisone, that left hip and pelvis x-rays dated February 13, 2015 showed mild narrowing of the superior aspect of the left hip joint, and that she was noted to have a subtle irregularity of the articular surface of the left femoral head felt to be degenerative. The assessment was noted to be that of (1) IT band syndrome, left; (2) chronic left hip pain. It was noted that due to the fact that Petitioner was not having any pain reading [*sic*] into the groin as well as the buttock, additional x-rays were ordered. It was noted that if the x-rays did show a more advanced arthritis or bony changes they could consult with orthopedics sooner rather than later, and that Petitioner may also need to pursue an MRI of the hip as part of ongoing evaluation. It was noted that if this did not show much change, Dr. Stortzum wanted to move forward with a PT evaluation and treatment to include dry needling, as well as orthopedic consultation for a second opinion due to persistence and worsening of pain. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on March 14, 2019, at which time it was noted that she complained of shortness of breath, that her chest hurt, and that she had a "croupy" cough, a headache, fever, and sore throat off and on. The assessment was noted to be that of (1) COPD; (2) acute bronchitis. At the time of the February 6, 2019 visit, it was noted that Petitioner was seen for a chief complaint of vomiting, chills, headache, fever, and diarrhea. The assessment was noted to be that of (1) viral gastroenteritis; (2) viral upper respiratory infection with cough. At the time of the December 19, 2018 visit, it was noted that Petitioner was there for low back pain that was radiating around the front of the left hip down her leg to her left knee, and that it was causing her left knee to swell and be more painful. It was noted that Petitioner's left lower back pain was radiating into the hip and knee, that her knee felt swollen, that she was doing more at work which exacerbated it, and that the pain was worse with certain positions such as sitting for long periods of time, as well as with getting up from the sitting position. It was further noted that the pain was constant but fluctuated in intensity, and that Petitioner had a history of IT band syndrome that had never fully resolved, and was currently exacerbated due to increased activity. The assessment was noted to be that of (1) IT band syndrome, left. Petitioner was recommended to do a Prednisone taper, take over-the-counter Tylenol, and to follow-up if worsening. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on December 13, 2018, at which time it was noted that she was there for abdominal pain on the left side that radiated around to the back, that she had swollen glands in her neck, a sore throat, and a cough, and that she was still taking Amoxicillin that was prescribed for her eye laceration. The assessment was noted to be that of (1) tobacco use disorder; (2) low back strain; (3) acute bronchitis. At the time of the December 7, 2018 visit, it was noted that

Petitioner was seen for a laceration to the left eyebrow. It was noted that there were some cats fighting in Petitioner's garage, that it was dark, that she went to separate them, and that one of them caught her across the left upper eyebrow. The assessment was noted to be that of (1) laceration, left eyelid. It was noted that due to the depth of injury over the upper eyelid, Dr. Stortzum suggested that it be reapproximated with sutures. At the time of the November 16, 2018 visit, it was noted that Petitioner was there to discuss temporary disability and to get her MRI results as she was still having left side pain. It was noted that there was a cyst on the liver, that last month she had had left lower quadrant abdominal discomfort that also radiated around to the back and into the left anterior hip and thigh region, that it was becoming more persistent, and that she described it as a pinching-type sensation. The assessment was noted to be that of (1) liver lesion; (2) serrated adenoma of colon; (3) chronic left lower quadrant pain; (4) need for influenza vaccine; (5) IT band syndrome, left; (6) osteoarthritis of left knee. It was noted that Dr. Stortzum advised Petitioner that he felt her symptoms in the left lower quadrant/hip were more musculoskeletal in nature, that he did not feel that imaging was necessary, and that it would be interesting to see what her upcoming colonoscopy showed. It was noted that a long discussion was had regarding implications of short and long-term disability, that Petitioner had missed a fair amount of work for different conditions such as migraines, illness, and knee pain, as well as ongoing doctor's appointments and medical evaluations. It was noted that it was Dr. Stortzum's understanding with short-term disability that there was a defined problem or issue that would foreseeably resolve in the somewhat near future, and that he did not see anything at that point that fit that circumstance. It was noted that as to long-term disability, it would be something that would be done through the Social Security Administration. It was noted that Petitioner may want to look for a different position that was not so physically demanding as Dr. Stortzum felt that this was contributing to some of her frequent work absences, and that she noted that she had discussed retirement but was concerned about what this would do for income and benefits. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on October 11, 2018, at which time it was noted that she was there for a sore throat, chest pain, and cough. The assessment was noted to be that of (1) cough; (2) pharyngitis, acute. At the time of the October 5, 2018 visit, it was noted that Petitioner was there for a rash on the left arm and right hand. The assessment was noted to be that of (1) pruritic rash. At the time of the September 7, 2018 visit, it was noted that Petitioner was seen for a sore throat, fever, congestion, and headache, and that she had been exposed to mono, strep throat, and hand-foot-and-mouth disease. The assessment was noted to be that of (1) acute sinusitis; (2) seborrheic keratosis. At the time of the June 6, 2018 visit, it was noted that Petitioner was seen for sore throat and ear pain/pressure. The assessment was noted to be that of (1) acute left otitis media. At the time of the June 18, 2018 visit, it was noted that Petitioner was seen for a non-productive cough and shortness of breath with exertion. The assessment was noted to be that of (1) chronic bronchitis; (2) tobacco use disorder. At the time of the April 26, 2018 visit, it was noted that Petitioner stated that she went to stand up from using the restroom and that she felt something pop/pull in her lower back. It was noted that Petitioner stated that she was now having severe pain in her left hip and left side of her back, that she had been using ice and heat but was getting no relief, and that she had also been using Tylenol which was not touching the pain. It was further noted that Petitioner presented with a complaint of left lower back pain that radiated into her groin that began last night after she was going from a sitting to standing after urinating, that she felt a tightness and possibly a popping sensation when she moved between these positions, that she stated that the pain was not necessarily radiating down her leg though she did have IT band pain that was persisting without changing, and that the current new pain in the left lower back was constant, throbbing, and achy. It was noted that Petitioner denied any current numbness or tingling, that she rated the pain 8/10, and that she had tried heat, ice, and Ben Gay without relief and had also taken Tylenol once that day. The assessment was noted to be that of (1) low back strain. Petitioner was given a prescription for a muscle relaxant to use as needed, and she was also recommended to continue with Tylenol and take it on a schedule to reduce pain. Petitioner was also encouraged continuing with physical therapy/work hardening therapy to reduce pain and condition her core, and to also continue with heat and topical pain creams. (PX3).

The records of Springfield Clinic reflect that FMLA papers were signed by Dr. Stortzum on July 23, 2019 and referenced an approximate date condition commenced of January 16, 2015, that Petitioner had arthritis of the left hip and knee, that physical therapy had helped temporarily in part, that orthopedics discussed surgery, and that injections gave temporary relief. The records reflect that Petitioner underwent an arthrogram of the left hip on April 25, 2019 for a "Reason for Exam" of unilateral primary osteoarthritis, left hip. The letter from Dr. White to Dr. Stortzum dated April 23, 2019 noted that Petitioner had been seen on that date and that she had been diagnosed with localized primary osteoarthritis of the left hip and arthralgia of the left pelvis/hip/femur. It was noted that Petitioner was to call after the arthrogram to report the pain relief that she experienced after the injection, that it was hoped that the injection gave her long-lasting relief but if not then she may consider total hip replacement, and that she should wait at least six weeks from the time of the injection to decrease the risk of developing an infection. (PX3).

The records of Springfield Clinic reflect that Petitioner underwent left hip x-rays on March 25, 2019, which were interpreted as revealing advanced degenerative changes about the left hip joint; no acute abnormality. It was noted that comparison was made to the June 6, 2015 exam. Petitioner was seen in the emergency room on July 9, 2018, at which time she was seen for left ear pain, dizziness, and blood in the sputum. The records reflect that Petitioner was discharged from physical therapy/work conditioning on May 2, 2018, at which time it was noted that she had been seen for six work conditioning visits since her initial evaluation on April 9, 2018, and that she had canceled five visits due to various personal and health-related issues. It was noted that Petitioner had not been formally reassessed and that she wished to be cleared for work by April 15, 2018 in order to return to bidding day for her job. (PX3).

The records of Springfield Clinic reflect that Dr. Stortzum issued a letter on June 17, 2020, in which it was noted that he had been asked to summarize Petitioner's current status with chronic left hip pain, and to give a history of his experience evaluating and managing this condition. It was noted that Petitioner was first diagnosed with left hip pain on January 26, 2018, that prior to that she had been experiencing some left lateral knee pain but that as time went on she began experiencing more discomfort in the hip, that she had previously had a left hip x-ray in January 2015 showing mild left hip osteoarthritis, and that due to worsening symptoms in 2018 they initiated a course of Meloxicam and moved forward with an evaluation and treatment course of physical therapy. It was noted that they did not improvement with this, and that a subsequent pelvis x-ray dated October 8, 2019, done in the emergency room, showed moderate to advanced osteoarthritic changes of the left hip. It was noted that at the emergency room follow-up visit to his office on October 15, 2019, Petitioner noted that on Sunday, October 8, 2019 she had a fall at work while cleaning bathrooms, that she was stepping out of a shower stall and her foot slipped, that in attempting to catch herself on a nearby sink she slid forward, and that she landed on her back and directly on her left hip. It was noted that Petitioner was transported to the emergency room at that time and that x-rays were obtained, and that there was no fracture but there was more advanced arthritic changes compared to previous imaging. (PX3).

The letter reflects that Petitioner's left hip exam at the October 15, 2019 appointment showed significant restrictive passive range of motion, particularly with internal rotation, and that this had not changed compared to a previous exam where she was noted to also have fairly restricted range of motion on March 25, 2019. It was noted that the amount of pain Petitioner was experiencing was notably increased. It was noted that in Dr. Stortzum's opinion, Petitioner had advancing osteoarthritis of the left hip, that prior to her fall on October 8, 2019 she was experiencing pain but was able to function fairly normally, that since the injury she had had worse pain and function, and that she had not responded to rest or anti-inflammatories (including Prednisone), and that he felt that the trauma from the fall had exacerbated the pain from her osteoarthritis of the left hip. It was noted that Petitioner had been unable to stand or walk for any extended period of time because of the pain, that it was also affecting her ability to rest at night, and that she had attempted to resume work but, due to the nature of her job, her pain was significantly worse at night after she returned home. It was noted that due to the persistence of pain despite conservative treatment and the

advanced nature of the arthritis on imaging, Petitioner was referred to orthopedic surgery to pursue discussion of left hip replacement. It was noted that in Petitioner's current state, her prognosis was not good in regards to pain and functional ability without more aggressive intervention, and that his hope was that with joint replacement that both of these issues could be addressed allowing her to return back to normal daily function with minimal to no pain. (PX3).

Included within the records of Springfield Clinic was an interpretive report for x-rays of the left hip and pelvis dated February 13, 2015, which noted that the films were interpreted as revealing negative for fracture; mild narrowing of the right hip joint relative to the left; subtle irregularity of the superior aspect of the left femoral head, probably degenerative, however if there is symptomatology suggest AVN then bone scan or MR would be useful; there is also slight thickening of the cortex and hypertrophic change along the left lateral femoral head. The records reflect that Petitioner was seen by Dr. Stortzum on October 15, 2019, at which time it was noted that the chief complaint was that of a fall while mopping a bathroom, that she visited the emergency room, and that now her leg, feet, and back hurt. It was noted that Petitioner was cleaning bathrooms on October 8, 2019, that she was stepping out of a woman's shower stall on the third floor and her foot slipped, that she attempted to try to catch herself on a nearby sink but slid forward, that she laid on the floor, that an ambulance was contacted, and that she was transported to the emergency room at MDH. It was noted that x-rays of the pelvis and left femur at that time unfortunately [*sic*] showed there was no fracture, that she was discharged home, and that she was not allowed to return to work until October 11th. It was noted that Petitioner went back to work on October 11th but only worked three hours due to a prior commitment, that today was her first full day back at work, and that she was having a trauma with symmetric pain in the feet, legs, and left lower back and buttock. It was noted that Petitioner was using Tylenol only without much help, that she noted that it was hurting before returning to work and that it was much worse after working, that it was affecting her ability to rest at night, and that she only got a couple of hours of sleep last night. It was noted that Petitioner's feet pain was described as a burning, tingling sensation, and that they had reviewed the March 29, 2019 left hip x-ray showing progressing of degenerative changes with marked narrowing of the superior lateral joint. The assessment was noted to be that of (1) left low back pain; (2) osteoarthritis of the left hip; (3) need for influenza vaccination. It was noted that with normal x-rays in regards to no evidence of fracture, Dr. Stortzum felt that Petitioner's activity was going to be determined by what her pain threshold was, that they were going to use Hydrocodone mainly at night to allow her some rest to see if this allowed her to continue with her job, and that they discussed that the fall did not do anything to help with her well-documented advanced arthritis of the left hip. It was further noted that Dr. Stortzum believed that it had been exacerbated from the fall, and that they discussed that at some point in the near future she needed to consider discussing a hip replacement due to the findings on x-rays as well as her ongoing pain. (PX3).

The records of Springfield Clinic reflect that Petitioner was issued a Health Status Form dated January 27, 2020, indicating that she was unable to work until further notice from her physician. At the time of the January 27, 2020 visit with Dr. Capecci, it was noted that Petitioner returned to discuss her left hip. It was noted that Petitioner last visited with his physician's assistant on December 10, 2019 and was recommended over-the-counter supplements for a diagnosis of severe arthritis of the left hip, and that she was made aware that some of her symptoms could be coming from her lumbar spine and was recommended that she visit with her internist, Dr. Stortzum, in Macomb. It was noted that Dr. Stortzum recommended an MRI of the lumbar spine, but it was never ordered. It was further noted that Petitioner continued to describe buttock pain more than groin pain, that she denied any true sciatica symptoms, that since she visited with "Ashley" she had been taking Cosamin ASU but did not report any pain relief, that she had previously had an injection into the left hip that was recommended by Dr. White, and that the first one worked for about a month and the second one only worked for two or three days. It was noted that the injections provided considerable relief, that Petitioner told him that she did have pain before the injury she sustained at work on October 8th but that after this injury she had been unable to work due to the pain which was not only in the buttock and groin but now also in the back, that her back pain developed about three days after the

injury, and that she had a history of COPD and was an active smoker. It was noted that Petitioner had irritability when Dr. Capecci attempted to move her left hip in any way, that her range of motion was unchanged from her visit with Ashley, that she had pain to palpation in the left sciatic notch but no significant pain over the lumbar spine or paraspinal musculature as when she last visited with them, and that this appeared to be improved. It was noted that it appeared that most of Petitioner's symptoms were indeed from the left hip. The assessment was noted to be that of severe primary osteoarthritis of the left hip. It was noted that Petitioner had previously received intra-articular cortisone injections in the left hip, that her most recent injection in August only provided her with three days of relief, that she previously had an injection that lasted one month, that she had an increase in her pain after an injury at work on October 8, 2019, and that she was employed as a janitor at Western Illinois University and fell while cleaning the showers in a dormitory. It was noted that Petitioner may also have concurrent lumbar spine pathology with radiation to her bilateral lower extremities. It was noted that Petitioner had exhausted nearly all conservative measures, that Dr. Capecci suggested that they pursue left hip total arthroplasty, and that she would need medical clearance with Dr. Stortzum. It was also noted that Petitioner had "bone on bone" arthritis that impacted activities of daily living and that she had suffered life altering lifestyle modifications. It was noted that Dr. Capecci also spent at least five minutes talking to Petitioner about smoking cessation and the attending consequences of wound healing and other complications related to concurrent smoking and elective surgical intervention. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on January 8, 2020 by Dr. Reeves, at which time it was noted that she was seen for symptoms of runny nose, fever, coughing, and shortness of breath on exertion. The assessment was noted to be that of COPD exacerbation. At the time of the December 10, 2019 visit with Ashley Bridges, PA-C, it was noted that Petitioner had a history of left hip pain, that Ms. Bridges was asked to see her at the request of Dr. Stortzum, that she reported history of osteoarthritis in both hips for over two years, that she stated that the left hip had always been worse than the right, and that she stated her pain was exacerbated after a fall at work on October 8, 2019. It was noted that Petitioner was employed as a janitor at Western Illinois University and stated that she slipped and fell while cleaning a shower in the dorms, that she was evaluated at the emergency department at McDonough District Hospital after the injury with x-rays of her pelvis demonstrating severe osteoarthritis of the left hip but no fractures or dislocations, that it was a worker's compensation case, and that she stated that she had received intra-articular cortisone injections in the hips by her internist, Dr. Stortzum. It was noted that Petitioner's last injection was provided in August but only resulted in relief of pain for three days, that she had not had injections since the injury, that she had pursued physical therapy in the past with no improvement, and that she stated she developed low back pain with radiating down her left hip and to her right hip after the injury. It was noted that the location of Petitioner's pain on that date was the posterior aspect of the left hip, that she had intermittent left groin pain, that she rated her pain as a 7 on a scale of 1-10, and that she was taking Hydrocodone for symptomatic relief. It was noted that Petitioner reported locking and giving way sensation of the left leg but no popping or catching, that she reported numbness and tingling in her legs, that she reported no history of lumbar spine pathology, that she denied any calf pain, chest pain, or shortness of breath, and that she had significant pain at night. It was further noted that Petitioner had difficulty walking any distance and had difficulty with stairs. The assessment was noted to be that of severe primary osteoarthritis of the left hip. It was noted that Petitioner may also have concurrent lumbar spine pathology with radiation to her bilateral lower extremities. It was noted that Petitioner had failed intra-articular injections in the left hip, physical therapy and over-the-counter pain analgesics, and that they discussed that while she did have severe arthritis of her left hip, she also demonstrated clinical findings of lumbar spine pathology. Petitioner was recommended a trial of over-the-counter supplements, including Cosamin ASU, vitamin E, and turmeric. It was noted that Petitioner may be a candidate for hip replacement surgery, but that it would be beneficial to rule out lumbar spine pathology before proceeding with surgery. It was noted that Petitioner was suggested to speak with her internist regarding further investigation of her lumbar spine, and that she was to follow-up with Dr. Capecci in six weeks for re-evaluation of her left hip. (PX3).

The records of Springfield Clinic reflect that Petitioner was issued a Health Status Form on March 30, 2020 with restrictions of no lifting over 20 pounds and no work requiring repetitive bending of the waist, as well as an indication of the need to avoid repetitive squatting, pushing, and pulling over 25 pounds. It was noted that the restrictions applied until they had completed further work-up of the back and the left hip was surgically addressed. At the time of the April 6, 2020 visit, it was noted that Petitioner was seen to discuss ongoing back and left lower extremity symptoms. It was noted that Petitioner had been limited on how much she could work, specifically standing and climbing now for several months due to worsening left knee pain, that as they further evaluated this it was found that her left hip was extremely arthritic, that she was doing well until she had to do a lot of climbing and bending which seemed to have exacerbated her pain, and that she had been seen by orthopedics who agreed that she had extremely advanced arthritic hip that would do well with replacement. It was noted that they were still waiting on worker's compensation for clearance in order to proceed, that as part of this work-up there was some concern about lower back etiology for some of Petitioner's symptoms, and that she had a history of spinal stenosis but they had not been able to move forward with evaluation at that point as they were waiting to hear back from work comp. It was noted that Petitioner was recently seen by a physician, Dr. Williams, and that Dr. Stortzum had not seen any reports from the visit, that she noted that it was her understanding that he had felt that further imaging of the back was warranted but that she had not heard anything more about getting any type of x-rays or MRI, and that she noted that there was a cursory exam done and she was told that she should be able to return to work without restriction. The assessment was noted to be that of (1) osteoarthritis of left hip; (2) low back pain. It was noted that between Petitioner's ongoing lower back pain which had not been fully evaluated, as well as her well-documented advanced as serositis [*sic*] of the left hip, Dr. Stortzum did not feel that she could return to work without restriction, and that restrictions would include a lot of climbing, bending, and squatting throughout the day. It was noted that due to the ongoing lower back pain they were going to move forward with imaging and that, pending x-ray results, they could then determine if an MRI would be warranted. It was further noted that until they had a better idea of what Petitioner's lower back anatomy looked like and if anything more needed to be done, as well as until her left hip had been repaired, Dr. Stortzum felt that working without restriction was not possible. It was noted that they were also dealing with recent coronavirus issues that were causing delays in non-emergent surgeries, and that therefore either of these conditions that may require surgical intervention were not going to be done in the next month or two. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on February 27, 2020, at which time it was noted that she was there with complaints of chills, muscles aches, nausea, and loose stools for the last 4-5 days. At the time of the February 20, 2020 visit, it was noted that Petitioner was there to discuss her lower back symptoms. It was noted that Petitioner was injured October 8, 2019 at work with a fall, that she did not return to work until the following Friday, that on the first day back while up on her feet working was when she felt pain across the lower back into the right hip region, that since that time they had uncovered advanced left hip osteoarthritis, and that there was some concern from orthopedics as to whether there may also be some radicular symptoms. It was noted that Petitioner's low back pain at that time was better unless she was standing or walking for extended periods of time and that when this occurred mostly discomfort stayed in the upper buttock region on the right, but that she was having pain around the left thigh to the knee and slightly beyond on the left. It was noted that Petitioner wanted to quit smoking, that she realized this was something she should do for her overall health but particularly if she had surgery coming up, and that she was not able to use Buproprion due to a history of seizure disorder. It was noted that Petitioner was currently smoking 7-10 cigarettes a day. The assessment was noted to be that of (1) left lumbar radiculopathy; (2) tobacco use disorder. It was noted that due to decreased strength in the left ankle on examination that day, as well as partially imaged lumbar spine findings from last year showing degenerative changes, Dr. Stortzum felt it necessary to move forward with lower back evaluation. It was noted that he wished to start with x-rays to include flexion/extension views and that pending results, they may need to move forward with MRI to further assess whether there was any mechanical neurologic impingement. It was noted that Dr. Stortzum agreed with Petitioner that she needed to quit smoking for

multiple reasons if not at least for the potential pending surgery, and that they discussed the need to pick a quit date. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on October 16, 2020, at which time it was noted that she was there for low back pain and left hip pain. It was noted that Petitioner had ongoing left hip pain with well documented osteoarthritis, that they used oral Prednisone last month and she noticed some improvement, that she was generally feeling poor and not eating as a result, and that she continued to lose weight. It was noted that Petitioner did see Dr. Pineda, who also felt that her hip pain was the driving factor for her back pain. It was noted that Petitioner's sleep was poor due to pain. The assessment was noted to be that of (1) osteoarthritis of left hip; (2) low back pain. It was noted that due to advanced arthritis that was now affecting Petitioner's ability to sleep which he also felt was also playing into her weight loss, they were going to be a little more aggressive with pain control. It was noted that Petitioner was given a prescription for Tramadol. It was noted that if they had any significant breakthrough pain, they could restart a short course of Prednisone since they knew that this gave some better relief, although it never gave full pain resolution. It was noted that Dr. Stortzum still felt that a hip replacement would ultimately improve not only Petitioner's hip pain, but other joint issues in the left knee and lower back. Included within the records of Springfield Clinic was a letter from Dr. Stortzum dated August 11, 2020, which noted that Petitioner continued to have significant limited function due to ongoing left hip and back pain, that she had consulted with orthopedics and that they agreed that a left hip replacement was necessary, that they were will waiting on determination from workman's comp as to whether they would approve the surgery, and that she was also in the process of evaluation for her lower back symptoms. It was noted that at that time Petitioner was still unable to do any prolonged standing, walking, or climbing, and that the restriction would remain in effect until they had completed the evaluation of her lower back, she had recovered from hip surgery (whenever that might occur), and had demonstrated improvement in pain and function. It was noted that Dr. Stortzum was uncertain as to when that would be. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on August 11, 2020, at which time it was noted that she was there for continued back and hip pain. It was noted that Petitioner had completed well over six weeks, actually approaching three months, of using Diclofenac to see if they could get some relief for her ongoing lower back and left hip pain. It was noted that Petitioner was continuing to suffer with significant pain, that she felt most of her pain in the mid lower back and left buttock as well as in the left groin region, that there were times that it radiated down to the left distal leg near the foot, and that activity was very restricted. It was noted that Petitioner could not find a comfortable position, particularly at night, that she had tried lying on her side, back, and abdomen, and that she was even using a pillow to bridge between the knees and still could not get relief. It was noted that Petitioner had seen no improvement with a burst of Prednisone as well as ongoing Diclofenac, and that the pain was constant at that point. The assessment was noted to be that of (1) left lumbar radiculopathy; (2) osteoarthritis of left hip. It was noted that Dr. Stortzum wanted to move forward with MRI of the lumbar spine due to the radicular component of her symptoms in the lower extremity as well as history of breast cancer, and that he still felt that Petitioner's left hip arthritis was a significant source of pain on the left side and needed to be addressed surgically regardless of what her MRI showed. It was noted that Dr. Capecci was involved with Petitioner's care in this regard. (PX3).

The records of Springfield Clinic reflect that Petitioner was seen on June 25, 2020 by Andrea Lawrence, APRN/CNP, at which time it was noted that she was seen for a generalized rash. It was noted that last night Petitioner noticed that she had a rash on her face, neck, arms, and behind her ears, and that she reported that she was picking up sticks, cutting down weeds, etc. three days ago. The assessment was noted to be that of contact dermatitis. At the time of the May 19, 2020 visit with Andrea Lawrence, APRN/CNP, it was noted that Petitioner presented to the clinic with a concerning spot on the right side of her nose. The assessment was noted to be that of actinic keratosis. (PX3).

Included within the records of Springfield Clinic was a letter dated May 28, 2020 from Illinois CancerCare, which noted that Petitioner was a 64-year-old female with carcinoma of the breast, status post lumpectomy and radiation, long disease-free interval and that she was doing very well. It was noted that Petitioner had had a good year, that there were no new issues or problems that had come up, and that she had not been seen since the fall of 2018. The assessment was noted to be that of (1) doing very well; no major difficulties or problems for the moment in terms of breast malignancy; follow-up and see back in one year with mammogram; (2) left hip pain; she is scheduled for hip surgery in September; (3) smoking; Petitioner continues to smoke, again was urged to finally stop; (4) colonoscopy; continue to monitor and see back. (PX3).

The medical records of Dr. Drake White were entered into evidence at the time of arbitration as Petitioner's Exhibit 4. The records reflect that Petitioner was seen on April 23, 2019, at which time it was noted that she was seen for a chief complaint of left hip pain. It was noted that Petitioner was referred by Dr. Stortzum, that her date of onset was 2017, that she had left hip and thigh pain, that no recent falls or injuries were noted, and that she stated that her primary care physician treated her for IT band syndrome by using ice and heat. It was noted that Petitioner had pain that radiated from the latera left knee up to her lateral hip and into her groin, that she also had low back pain, and that occasionally she had tingling in her left foot. The assessment was noted to be that of localized primary osteoarthritis of left hip; arthralgia of the left pelvis/hip/femur. Petitioner was recommended to undergo a left hip arthrogram. It was noted that Petitioner was to call after the arthrogram to report the pain relief that she experienced after the injection, that it was hoped that the injection gave her long lasting relief but if not then she may consider total hip replacement, and that she should wait at least six weeks from the time of the injection to decrease the risk of developing an infection. (PX4).

The records of Dr. White reflect that Petitioner was issued a work slip dated September 5, 2019, requesting that she be excused from work on September 4th and September 5th, and that she could return to work without restrictions on September 6th. The letter dated September 10, 2019 noted that Dr. Drake had the wrong dates on his previous note and that Petitioner was to be excused from work on September 5th and September 6th and could return to work without restriction on September 7, 2019. The records further reflect that Petitioner was given a work slip dated April 23, 2019 indicating that she was evaluated in the office that date and that she be excused from work. It was noted that Petitioner was able to return to work without restrictions. (PX4).

The transcript of the deposition of Dr. Stortzum dated October 20, 2020 was entered into evidence at the time of arbitration as Petitioner's Exhibit 5. Dr. Stortzum testified that he is a family practice physician and that he is board-certified in family medicine. He testified that he believed that Petitioner had been his patient since he came to practice in September of 2005. (PX5).

Dr. Stortzum testified that he saw Petitioner on October 15, 2019, at which time she gave a history that on October 8, 2019 she was cleaning bathrooms and stepping down out of her shower stall when her foot slipped and she tried to catch herself on a nearby sink but fell forward, and that she landed on her back and her left hip. He testified that Petitioner did not hit her head or lose consciousness, that she had to lay on the floor a little bit, that an ambulance was contacted, and that she was transported then to MDH where she received x-rays of the pelvis and femur that showed no fracture. He testified that Petitioner was discharged home, that they said she could return to work on October 11th, and that she then tried returning to work on the 11th but that after three hours she had to leave because of a prior commitment. He testified that that date, *i.e.*, October 15, 2019, was Petitioner's first full day back, that she was having a fair amount of pain, that Tylenol was not helping, and that she was also not resting well because of the pain at that time. When asked about her complaints on that date, Dr. Stortzum responded that Petitioner was describing foot pain, tingling sensations, and pain in the knee and hip on that side. He testified that on physical examination he found extremely restriction hip motion and that that was the most outstanding finding. He testified that his diagnosis of Petitioner's condition on that date was left low back pain and osteoarthritis of the left hip.

He testified that because of the pain they had started on a pain medication and that with Petitioner's history of documented arthritis of the hip, there was concern with the fall that it had exacerbated the pain from this condition. He testified that they discussed whether moving forward with a joint replacement may be necessary if they could not get Petitioner's pain under better control. When asked whether Petitioner was taken off work at that time, Dr. Stortzum responded that they were at that point going to see how she responded pain-wise before they said whether she could resume activity, and that the comment suggested that she was to remain off work for the time being. (PX5).

Dr. Stortzum testified that he next saw Petitioner for some back pain complaints in February, but that for the hip he saw her again on April 6, 2020. He testified that at that time Petitioner was not really doing any better, that she was complaining of limitations on how long she could work, and that she found prolonged standing and climbing was making her actually feel worse, particularly in the left knee. He testified that at that point Petitioner was under the care of Dr. Capecci as far as her hip was concerned, and that he had referred her to him. He agreed that Dr. Capecci was recommending a hip replacement at that point. (PX5).

Dr. Stortzum agreed that Petitioner had been under treatment for the hip previously, and that he was sure they would have done more conservative measures including therapy and anti-inflammatories. When asked whether he recalled when he had last seen Petitioner for her hip prior to October 15, 2019, Dr. Stortzum responded that it was on July 19, 2020 at which time she was having ongoing left ankle and leg swelling, and that he commented on a history of known hip and knee osteoarthritis. He testified that it was noted that it was more around the knee and Petitioner's hands at that point which were her main complaints other than the headache, and that joint-wise it was the hands and knee. He agreed that he had also seen Petitioner on April 22, 2019 for the hip as well, and that her hip was getting worse and they were in the process of consulting with Dr. White. He testified that Petitioner was having difficulty getting comfortable, and that she also seemed to notice it laying on her left side, and that her left knee was also bothering her. He testified that they asked Petitioner to be more aggressive with an anti-inflammatory and that they were using medicine to protect her stomach. He testified that he also saw Petitioner on March 25, 2019 for ongoing left hip and knee pain, and that at that point they had felt it was more IT band syndrome due to the location near the hip but a little more lateral. He testified that the iliotibial band was a tendon that runs from the outside of the pelvis down the outside of the thigh and ends over the outside of the knee. He testified that because of the location, he felt that it was more near the hip but not necessarily the hip itself. (PX5).

When asked what injury he felt that Petitioner suffered to her hip as a result of the accident, Dr. Stortzum responded that fortunately there was no fracture, but that the known underlying osteoarthritis was exacerbated. He testified that it was his opinion that Petitioner had continued to suffer from that exacerbation of arthritis on an ongoing basis, and that it was his understanding that Dr. Capecci had recommended a hip replacement for her now. When asked whether Petitioner had been unable to work since she suffered this accident, Dr. Stortzum responded that he believed so but that he could not tell as he could not see that he had ever given her a permanent restriction. When asked whether he had an opinion whether the condition that was leading to the need for the treatment recommended by Dr. Capecci was aggravated or accelerated by the fall Petitioner suffered on October 8, 2019, Dr. Stortzum responded that the trauma accelerated the underlying pain she was dealing with from her osteoarthritis. When asked whether he detected a change in Petitioner's condition between what it was with her prior hip complaints and what it was after the accident, Dr. Stortzum responded in the affirmative and testified that Petitioner had been much more persistent in complaining of pain and significant limitation to the point where he actually just saw her four days ago because she could not sleep now because of the pain. (PX5).

Dr. Stortzum testified that Petitioner had been seen in his office by his nurse practitioner a couple of times but not for her hip, that he saw her August 11th because of her left hip pain, and that he just saw

her again on October 16th for hip and back pain. He testified that Petitioner's complaints of hip pain had remained consistent since her accident of October 15, 2019. (PX5).

On cross examination, Dr. Stortzum agreed that he was not an orthopedic doctor. He agreed that if an orthopedic doctor were to express opinions about the care and treatment of Petitioner, he would defer to a board-certified orthopedic doctor. (PX5).

On cross examination, Dr. Stortzum agreed that Petitioner had prior hip treatment prior to the date of accident. He testified that the prior treatment consisted of anti-inflammatories, evaluation with rest, x-rays, and physical therapy. He testified that there was imaging done of the hip prior to the date of incident, and that in January 2015 it showed mild osteoarthritis. He testified that the imaging on October 8, 2019 showed moderate to advanced osteoarthritis. He testified that he had not seen any imaging performed on the left hip after the date of accident. He agreed that when he expressed the opinion that he believed that the trauma from this fall accelerated Petitioner's condition, it was based on her subjective complaints. (PX5).

On cross examination, Dr. Stortzum testified that on April 6th he wrote a note allowing Petitioner to return to work on March 30th with restrictions of no lifting over 20 pounds, no work requiring repetitive bending at the waist, and needing to avoid repetitive squatting, pushing, or pulling over 25 pounds. He testified that these restrictions applied until completed further work-up or surgery was performed. He further testified that he had not lifted those restrictions and that he did not know if anyone else had given Petitioner any restrictions, but that those restrictions would pertain because her left hip had not surgically been addressed. (PX5).

On cross examination when asked whether Petitioner's degenerative condition of her hip would have continued to worsen without this workplace incident, Dr. Stortzum responded "Probably. I don't know." He further testified that the arthritis probably would advance. When asked whether he believed that this was a temporary exacerbation of a preexisting condition or whether this somehow made a permanent change to Petitioner's condition, Dr. Stortzum responded that it had been a year and she was still reporting a lot of pain and limitation, so he would say at this point that it was a chronic change to her condition. He testified that the only way to know if it was permanent was to follow Petitioner out until she passed away. He testified that he did not know how to answer that in a permanent basis, but that the way it looked and the way that Petitioner was clinically presenting it was getting worse. He testified that it was looking more permanent at this time, and agreed that it was based on what Petitioner was reporting to him as far as things such as pain levels. (PX5).

On cross examination, Dr. Stortzum testified that he was not aware that in December 2019 Petitioner was awarded over $87,000 in a different worker's compensation case. He testified that he did not know whether he had patients who presented with personal injury or worker's compensation cases who had a pecuniary interest that had, on average, subjectively reported worse outcomes than those who did not have personal injury cases pending. (PX5).

On cross examination, Dr. Stortzum testified that he meant "made worse by" when he used the term exacerbated. When asked whether he meant exacerbated in a permanent sense or in a temporary sense for Petitioner, Dr. Stortzum responded that it looked to be more permanent because of the length of time they had been trying to manage it. (PX5).

On redirect, Dr. Stortzum testified that he anticipated based on Petitioner's ongoing examinations and complaints that the restrictions he had issued would continue to the present time. He testified that his expectation that Petitioner's arthritis would advance did not necessarily mean that her subjective complaints would advance. He testified that in this case he attributed Petitioner's current level of subjective complaints, at least in part, to the work accident that she described in October of 2019. He testified that Petitioner was

someone that he saw fairly frequently, and that he had no reason to doubt the veracity of her complaints. (PX5).

The transcript of the deposition of Dr. Piero Capecci dated August 28, 2020 was entered into evidence at the time of arbitration as Petitioner's Exhibit 6. Dr. Capecci testified that he is an orthopedic surgeon and that he is board-certified in orthopedic surgery. (PX6).

Dr. Capecci testified that Petitioner saw his physician's assistant on December 10, 2019. He testified that Ms. Bridges took a history wherein Petitioner described a history of left greater than right hip pain for a period of two years, and that she said that her pain was exacerbated after an injury at work on October 8, 2019. He testified that Petitioner reported that she was working at that time as a janitor at Western Illinois University, and that she slipped and fell while cleaning a shower. He testified that Petitioner also described having a pain that developed in her low back with radiation down her left leg and into her right hip after the injury from October 8th, and that the location at that time for her pain was in the posterior hip but that she also described intermittent groin pain which was pretty typical for arthritis. He testified that Petitioner gave a pain rating of 7, and that she was using Hydrocodone for symptom relief. He further testified that Petitioner's complaints on that date were predominantly pain in the left more than right hip, and limiting walking distance and difficulty with some activities of daily living. He testified that physical examination findings from his physician's assistant were that Petitioner had a lot of pain when she rotated her hip, that she actually had surprisingly good mobility but was very painful with any motion, and that her clinical assessment was that she did have arthritis in the left hip. (PX6).

Dr. Capecci testified that Petitioner did not have any x-rays on that date but that x-rays from the date of injury were reviewed, which confirmed no fracture or dislocation but severe arthritis of the left hip. He testified that his physician's assistant's assessment was that of severe arthritis of the left hip and increased pain after an injury, but that Petitioner also had some symptoms that could be consistent with lumbar radiculopathy which was in the differential diagnosis as well. He testified that his physician's assistant went over the natural history of the condition, discussed the operative as well as non-operative treatment options, and initially recommended a conservative route with nutraceuticals and other over-the-counter supplements. He testified that it was also suggested that Petitioner might benefit from further investigation of her lumbar spine, and that she suggested a follow-up with him after initiating some of these conservative measures in six weeks. (PX6).

Dr. Capecci testified that he saw Petitioner on January 27,2020, at which time he went over how she responded to some of the treatments. He testified that they also talked about what treatment she had preceding the injury, and that she said that she did not really get any response after initiating Cosamin ASU. He testified that on his assessment it did not seem like Petitioner was really describing significant sciatica symptoms, but that she was having a lot of buttock and groin pain. He testified that Petitioner also gave a history of having more back pain that developed about three days after the injury. He testified that he also performed a physical examination and that his exam findings were mostly consistent with Ms. Bridges' in that Petitioner was very irritable when he tried to move her hip. He testified that he was not terribly impressed with any sciatica, radiculopathy, or anything emanating from Petitioner's lumbar spine, and that he stated that it appeared that most of her symptoms were coming from her left hip. He testified that his assessment on that date was identical to that of Ms. Bridges. (PX6).

Dr. Capecci testified that he suggested that Petitioner had pretty much exhausted all conservative measures, that the injections were not helpful, that she had failed physical therapy and other modalities in the past, and that he suggested, based on her level of disability, her inability to work, and that the fact that she was not responding to any treatment recommendations, that they consider hip replacement. He testified that he gave Petitioner an off work slip on that date, and that it was to remain in effect until further notice with the anticipation that they would replace her hip and return her to work once she had successfully recovered from her hip replacement. (PX6).

When asked whether he had an opinion whether the condition Petitioner was in when he saw her on January 27, 2020 was causally related to the fall that she had at work, Dr. Capecci responded that based on his knowledge of her condition and the report that she gave him as well as his findings and clinical exam, he felt that she certainly seemed to have an exacerbation of her condition as a result of the injury. When posed a hypothetical and asked whether he had an opinion as to whether the fall at work was a contributing cause of her ongoing pain and disability, Dr. Capecci responded that he believed that she did exacerbate her underlying condition as a result of the fall. (PX6).

When asked whether he had an opinion whether Petitioner's need to remain off work was at least partially causally related to her fall at work, Dr. Capecci responded in the affirmative. When asked whether he had an opinion whether Petitioner's need for a hip replacement at the time that he saw her in January 2020 was causally related to her fall at work, Dr. Capecci responded in the affirmative. He testified that he believed that it was possible that Petitioner's fall accelerated her need for the hip replacement. When asked whether he believed that it was more likely than not that Petitioner's need for hip replacement surgery was accelerated by the fall she described in October 2019, Dr. Capecci responded that he believed that it was more likely than not. Dr. Capecci testified that he has not seen Petitioner since January. He testified that he assumed that Petitioner was pursuing surgery through worker's compensation rather than her primary insurance. (PX6).

On cross examination, Dr. Capecci testified that he did not have any knowledge prior to the date of the incident of any right hip treatment that Petitioner had. He agreed that his causation opinion would not incorporate any sort of prior treatment to the right hip that Petitioner may have had. He testified that Petitioner stated that she had some right hip pain after her fall, but that he did not think that they specifically evaluated the right hip. (PX6).

On cross examination when asked whether he was aware of any left hip treatment prior to the date of incident, Dr. Capecci responded that he only had the record of Ms. Bridges which indicated that Petitioner had an injection in August of 2019 that lasted for three days. He agreed that when he gave his causation opinion, he was aware of the injection given prior to the date of accident. (PX6).

On cross examination when asked what led him to believe that the fall as opposed to Petitioner's degenerative condition was the cause of her current condition of ill-being, Dr. Capecci responded that he assumed that she was not having enough symptoms to warrant orthopedic intervention in the two months from the date of accident until her first visit with his office, and that she told him that her pain was exacerbated after the fall. He testified that he was not aware if Petitioner ever saw another orthopedic physician. (PX6).

On cross examination, Dr. Capecci agreed that for someone with an arthritic condition, it would be a reasonable course of treatment to do some preliminary imaging, participate in physical therapy, get an injection, and, if none of that brought relief, refer the individual for orthopedic treatment. He testified that it was possible that, had this incident not occurred at work, Petitioner would be going down the same path. When asked whether there was anything objective that he could notice as to a change in Petitioner's condition pre-incident versus post-incident, Dr. Capecci responded that there was nothing as he did not think he had any imaging prior to the fall, that he was not aware of any, and that he did not have an opportunity to examine her prior to the fall. He agreed that, absent anything objective, he was going off of Petitioner's subjective information. (PX6).

On cross examination, Dr. Capecci agreed that a patient with a worker's compensation case pending had a pecuniary interest in the outcome of the case. He testified that he was unaware of whether Petitioner had a prior worker's compensation case. He testified that he did not have in his history that Petitioner had a prior three-level cervical fusion, and that he would normally report it if he had knowledge of it. He

testified that he was not aware that in December 2019 Petitioner was awarded over $87,000 for a three-level cervical fusion in a worker's compensation case. (PX6).

On cross examination, Dr. Capecci testified that he was not aware that Petitioner was able to return to her job as of the last time that he saw her, that at the time that he saw her she was not able to, and that he was not aware if she had since. He testified that the last time that he saw Petitioner, he suggested that she not return to work until she had her hip replaced based on her disability. He testified that if he were to assume that Petitioner had her left hip replaced and having been asked what timeframe someone would be able to return to work with a job such as hers, Dr. Capecci responded that it would be six weeks for a sit-down job but that someone with more aggressive manual labor such as Petitioner's job may entail, he would suggest at least 8-12 weeks. He agreed that after 8-12 weeks, he would anticipate that Petitioner would be able to go back to work full duty. (PX6).

On cross examination, Dr. Capecci agreed that Petitioner was currently 64 years of age. When asked whether Petitioner had any preexisting conditions that would have an effect on her left hip, Dr. Capecci responded that he was not aware of any. When asked whether Petitioner's age would be a preexisting condition, Dr. Capecci responded that he would not necessarily say so. He agreed that Petitioner's history of arthritis would be a preexisting condition, as would her history of smoking. He agreed that he was aware that Petitioner was a smoker. He testified that he encouraged Petitioner to stop smoking. He testified that he was not aware of whether Petitioner had stopped smoking because he only visited with her the one time. When asked whether the condition of COPD would decrease the blood flow to the left hip, Dr. Capecci responded that he would not think of it that way. (PX6).

On cross examination when asked whether it was fair to say that arthritis oftentimes was affected by decreased blood flow, Dr. Capecci responded that he was unaware of arthritis having that effect. He testified that cartilage was avascular, and that blood did not get to the cartilage. He testified that Petitioner's blood flow would not affect her left hip in any way. He agreed that Petitioner reported that her right hip hurt as well. He testified that Petitioner just described that she had more pain in her right hip after the fall. He testified that he was not aware of any lumbar treatment before this date of incident. He testified that lumbar treatment was a possibility, and that he would probably reexamine Petitioner if the need would arise. (PX6).

On cross examination when asked whether he viewed the incident at work to be a permanent change to Petitioner's underlying degenerative condition, Dr. Capecci responded that he did not think that he would use the word "permanent." He testified that the word that he used was the word "exacerbate." He testified that arthritis had times and opportunities when it may be quiescent and more times when it was exacerbated, and that at the time that his physician's assistant visited with Petitioner and at the time that he visited with her, it appeared that she was in an active flare stage and suffering a great deal. He testified that it would be hard to say if it was temporary. He testified that a fall could exacerbate the symptoms of arthritis, but that it may allow progression of further articular cartilage destruction and demise. When asked whether he believed that Petitioner had any permanent change, Dr. Capecci responded that he did not have any objective criteria to assess that. (PX6).

On redirect when asked whether, in deciding whether to perform a hip replacement on someone with arthritis in their hip, the extent of the pain that they had was a significant factor in making that decision, Dr. Capecci responded that it was the most important factor. He further agreed that the effect that that pain had upon their function as in their ability to work was a significant factor. He agreed that it was his opinion that the extent of pain that Petitioner had and her inability to work was causally related to her work-related accident. He agreed that that was why he was recommending the hip replacement for Petitioner. (PX6).

On redirect, Dr. Capecci testified that the timeframe for his expecting Petitioner to return to work after surgery was that of 12 weeks maximum and eight weeks minimum. He agreed that that could vary

from patient to patient. He testified that typically at the six-week mark he would assess the patient and see if they felt like they were ready to return to work, and that he would ask them to describe their work duties to him to see if it was applicable with their current state, review the physical therapy notes, and determine if the individual had graduated to that point that they could return to work prior to 12 weeks. He testified that he would expect to tell Petitioner to expect to take 12 weeks off, but that she might return sooner if she progressed very well. (PX6).

The Medical Bills Exhibit was entered into evidence at the time of arbitration as Petitioner's Exhibit 7.

The CMS Intake Packet was entered into evidence at the time of arbitration as Respondent's Exhibit 1. The Illinois Form 45: Employer's First Report of Injury noted that the date of accident was that of October 8, 2019, that Petitioner stated that she was cleaning the showers and opened the shower door and started to walk out the door and slipped and fell. It was noted that the body parts affected was that of multiple body parts including the lower left side of the body. The date of report was noted to be that of October 9, 2019. (RX1).

Included within the CMS Intake Packet was the Workers' Compensation Employee's Notice of Injury dated October 8, 2019, which noted that Petitioner was cleaning shower stalls in the women's bathroom on the 3rd floor of Olson Hall, that she was scrubbing the shower floor with a "Johnny Mop" and that as she rinsed the showers and wiped the chrome down, she started to walk towards the sink and her foot slipped in water. It was noted that Petitioner fell down on her left side, called her supervisor, and reported the incident, and that she called "OPS" and was taken to the emergency room for x-rays. The body parts affected were noted to be that of the left hip, buttock, and lower back. It was noted that there were no witnesses to the injury. It was further noted that Petitioner had not submitted any previous claims for injury/illness. The Supervisor's Report of Injury or Illness noted that Petitioner had called her at 8:27 a.m. and stated that she fell and heard her hip pop, and that she found the worker laying on the 3rd floor restroom floor flat on her back with her left leg bent with her foot on the ground and phone in her hand. It was noted that Petitioner stated that she fell and heard a popping sound in her left hip, that there was no pain, that "OPS" was there, and that she sat herself up in a sitting position waiting for the EMTs. It was further noted that Petitioner stated that she slipped while foaming showers, that she tried to catch herself with her hand on the sink but that her feet slipped out from under her, and that Tammy L. Sinnett was the first foreman on the scene. It was noted that Petitioner stated that the body part injured was that of the left hip when asked. (RX1).

The transcript of the deposition of Dr. Joseph Williams dated September 22, 2020 was entered into evidence at the time of arbitration as Respondent's Exhibit 2. Dr. Williams testified that he is an orthopedic surgeon and that he is board-certified in orthopedic surgery. He testified that he sees patients for orthopedic conditions, and that the majority were spine-related but also involved other body locations. Dr. Williams testified that in the course of his practice he treats conditions of the hip, and that he treats conservatively as well as surgically. He further testified that he performs approximately 50 hip surgeries per year, and that he averages approximately eight surgeries per week. (RX2).

Dr. Williams testified that he had an opportunity to perform an IME of Petitioner on March 9, 2020, and that in preparing for that examination, he reviewed medical records related to her care and treatment from Dr. Capecci and Dr. Stortzum. He testified that he also performed a physical examination and that Petitioner was demonstrating weakness in left hip extension, but that it was not determined whether this could be related to pain. He testified that Petitioner did not have any straight leg raise test on either the right or the left lower extremities, that she had good ankle strength in plantarflexion and dorsiflexion, and that she had some pain with internal rotation of the left hip at the groin. He testified that it was otherwise a normal examination. He testified that he reviewed films of the hip at the time of Petitioner's presentation

at the emergency room. He agreed that there were no x-rays or MRIs done of Petitioner's lumbar spine. (RX2).

When asked of the history given by Petitioner as to the alleged work-related accident, Dr. Williams responded that she reported a fall while cleaning the floors, that she slipped on the floor, and that she was working. When asked whether he obtained a history from Petitioner related to her hip prior to this fall, Dr. Williams responded that Petitioner reported that at that time of her fall she was actually planning on having a hip replacement performed, that she had been complaining of left hip pain and left upper thigh pain, and that she was complaining of left knee swelling as well as pain in the bilateral lower extremities, left greater than right. He testified that Petitioner was also complaining of pain down the lateral and posterior aspect of the lower extremities and complained of a heavy sensation in the bilateral lower extremities, that she had also been taken off work for approximately three days after her presentation to the emergency room and returned to work only to be placed back on restrictions, and that at the time that he saw her she had not worked since the new restrictions had been put in place. (RX2).

When asked of his diagnosis as to her hip, Dr. Williams responded that Petitioner had severe arthritis in the left hip. When asked whether the diagnosis would be related to the alleged work injury, Dr. Williams responded that he did not believe that it was the cause of the degeneration and therefore the diagnosis was not related to the injury. When asked whether it was fair to say that Petitioner had arthritis of the hip and that the fall elicited symptoms but did not cause any permanent change in her condition, Dr. Williams responded in the affirmative and testified that he did not feel that the arthritis was related to the fall, nor did he feel that the symptoms or need for treatment was related to the fall. He testified that he did not have any evidence that, as a result of this fall, there was a permanent change to Petitioner's condition. (RX2).

Dr. Williams testified that when he examined Petitioner, her physical ability was not limited in any way. He testified that he did not believe that Petitioner needed any additional treatment in relation to the fall. He testified that Petitioner's age would be a factor that would help explain some of her arthritis in the hip. He further testified that Petitioner was a smoker, and that it would be a factor that would negatively affect her hip arthritis condition. He testified that at the time that he saw Petitioner, he believed that she could work full duty. He testified that at the time that he saw Petitioner, it was his opinion that that she was at maximum medical improvement. (RX2).

Dr. Williams testified that if Petitioner were to have hip surgery, he would expect her to be able to go back to work in typically 3-6 months. He testified that if Petitioner were to have the hip surgery, maximum medical improvement would be at approximately 3-6 months. (RX2).

On cross examination, Dr. Williams agreed that it was fair to say that his focus was on spinal surgery. He testified that he performs hip replacements, and that he does approximately 4-8 per month. He agreed that on physical examination he noted that Petitioner may have had some weakness on her left knee extension, but that he questioned whether this could be pain related. When asked if Petitioner did have weakness on extension of her left knee and what would be the significance of that in his examination, Dr. Williams responded that it could be nerve-related or that she may have some radicular symptoms from her lumbar spine, but that he was more concerned about it being pain-related. He agreed that in his assessment he included a questionable left lower extremity radiculopathy. When asked whether that was related to the finding on knee extension, Dr. Williams responded that it was more related to Petitioner's history provided with regard to how she had chronic complaints of bilateral lower extremity pain, which was worse on the left than the right. He further testified that Petitioner complained of pain down the lateral and posterior aspect of the legs and that she complained of a heavy sensation in her legs, which was not typical for hip arthritis. (RX2).

On cross examination, Dr. Williams testified that his findings on exam regarding pain with internal rotation and external rotation of the lower extremity on the left was very much consistent with hip arthritis. When asked whether the statement that Petitioner related that she was planning to have hip surgery prior to her injury was a history that was contained within the hospital record rather than a history that she gave to him, Dr. Williams responded that he did not remember for certain and that he thought she talked about that, but that he may be wrong. (RX2).

On cross examination, Dr. Williams agreed that his examination of Petitioner was on March 9, 2020. He testified that he remembered he and Petitioner talking about Dr. Capecci and her conveying that she was going to have the hip replacement before she had this injury, but that there was a potential that he got it from the medical record. (RX2).

On cross examination, Dr. Williams agreed that from reviewing x-rays of an arthritic hip he could not tell for certain how much pain a patient was having just from looking at an x-ray. He agreed that some patients with an arthritic hip on x-ray did not have much pain and that others may have a great deal of pain. When asked whether a fall on an arthritic hip like Petitioner described to him that she suffered at work would tend to exacerbate pain from arthritis, Dr. Williams responded that it was possible. He agreed that when a doctor was deciding whether to perform a hip replacement on someone with an arthritic hip, the amount of pain that a patient was suffering from was a significant factor in deciding whether to pursue surgery. He agreed that the effect that pain may have upon the patient's function was also a factor. He agreed that pain itself could be a limiting factor in a person's ability to function or ability to work. (RX2).

On cross examination when asked whether he agreed that Petitioner described to him being off work since her date of accident, Dr. Williams responded that it appeared that she went back to work for three days but then had to come off and had not worked since. He agreed that he was assuming that she was working a full duty job up until the date of accident. (RX2).

On cross examination, Dr. Williams agreed that in his report he indicated that his prognosis was guarded in terms of Petitioner's being able to continue that kind of labor-intensive work that she was doing. He agreed that it was because of the condition of the hip that Petitioner presented with. He testified that Petitioner had severe arthritis, and that whether she was scheduled to undergo a hip replacement before her injury or if she was scheduled to undergo a hip replacement after, there were some limitations with regard to hip replacement and heavy labor-intensive work. He testified that there was never a guarantee that one was going to go back to the same line of work, although it was very much possible. (RX2).

On cross examination when asked whether he talked to Petitioner about her pain levels, Dr. Williams responded that he did not have her rate her pain and that she filled out a Spine Sheet on the day of the IME. He testified that Petitioner reported her pain severity to be moderate to severe, and that she rated her pain as a 7/10. He testified that he did not remember discussing with Petitioner the effect that her pain was having on her everyday function or activities of daily living. (RX2)

On redirect when asked whether he considered an exacerbation to be a temporary or permanent change in Petitioner's condition, Dr. Williams responded that it was "[p]retty much temporary." He testified that the typical presentation of a patient with hip arthritis like that was not after an injury, that the people came in with an insidious onset of pain, and that in all of the hip replacements he had ever done it was not an acute injury that brought it on. (RX2).

The Orthopedic Center of Illinois Spine Sheet (marked as Petitioner's Exhibit 1 as attached to the deposition transcript) as completed by Petitioner noted that, when asked to describe in her own words how and when her pain started, she indicated that she had pain on both sides together three days after her fall on October 8, 2019, and that when she returned to work full time three days later it was a couple of hours later

she was working that the pain in her lower back and left buttock started hurting and continued throughout the day. (Petitioner's Exhibit 1 as attached to RX2).

The IME Report of Dr. Williams dated May 9, 2020 was attached to the deposition transcript as Respondent's Exhibit 2. The report reflects that Petitioner reported a work-related injury that occurred on October 8, 2019, that she reported she was walking in a university bathroom when she slipped on a wet floor, that she worked as a housekeeper/janitor for the State of Illinois, that she worked at Western Illinois University, and that she had been there for 14 years. It was noted that Petitioner reported that she presented to McDonough District Hospital on the date of injury, that she presented with complaints of left hip pain, that she was seen and evaluated by Dr. Heidi Brown in the emergency room, and that during this date she was documented to be complaining of pain in the left hip, that she reported a fall while cleaning the floors and that she slipped, that she reported at that time she was planning on having a left hip replacement performed, and that she was complaining of pain in her left hip and upper left thigh. It was noted that Petitioner denied any numbness or tingling, that she denied any back pain, and that she denied any loss of consciousness. (Respondent's Exhibit 2 as attached to RX2).

The IME Report of Dr. Williams noted that Petitioner described that she had complaints of left knee swelling, that she complained of pain in her bilateral lower extremities, left greater than right, that she complained of pain down the lateral and posterior aspects of the legs, and that she complained of a heavy sensation in her bilateral legs. It was noted that Petitioner filled out the spine sheet evaluation form for the IME, that she described pain in the bilateral lower extremities, that it appeared that she had drawn circles on the anterior aspect of the right lower extremity and the posterior aspect of the left lower extremity, and that she described pain in both sides that occurred three days after her fall on October 8, 2019. It was also noted that Petitioner described her back pain as having started three days after her injury on October 8, 2019. It was noted that the assessment was that of (1) chronic low back pain; (2) questionable left lower extremity radiculopathy; (3) severe left hip arthritis as per medical records from Dr. Capecci; (4) chronic left hip pain. (Respondent's Exhibit 2 as attached to RX2).

The IME Report of Dr. Williams noted that he opined that Petitioner had obvious arthritis that was quite severe in the left hip, that it was obviously not related to a fall on a wet floor that occurred on October 8, 2019, and that the degenerative changes pre-dated any fall. It was noted that as to the lumbar spine, Dr. Williams opined that they did not have any x-rays nor did they have an MRI of the lumbar spine, and that given that Petitioner's past medical history included a long history of tobacco use, coupled with the fact that she was 64 years of age, she would likely have degenerative changes within the lumbar spine as well. It was noted that Dr. Williams further opined that he did not see any permanent or long-term injury that occurred as a result of Petitioner alleged injury and the mechanism of the injury she described occurring on October 8, 2019. (Respondent's Exhibit 2 as attached to RX2).

The IME Report of Dr. Williams noted that he opined that Petitioner's medical treatment incurred to date had been reasonable and necessary, that he did not see any need for further diagnostic tests or surgical procedures, that Petitioner had degenerative changes within the left hip joint, that she was a long-term smoker, and that it would be recommended for her to forego any surgical treatment until smoking cessation had occurred. It was noted that Dr. Williams opined that Petitioner's prognosis overall would be good, but that it was somewhat guarded in the fact that she was 64 years of age attempting to perform rather labor-intensive work working in housekeeping and janitorial at Western, and that with her medical co-morbidities, as well as her history of chronic tobacco use and age, she was at risk of injury performing this job. It was noted that Dr. Williams further opined that Petitioner's risks were obviously much higher than a person who was younger with less medical co-morbidities. (Respondent's Exhibit 2 as attached to RX2).

The IME Report of Dr. Williams noted that he opined that there was no physical exam finding nor was there any radiographic finding that would suggest that permanent work restrictions would be necessary and that it was his opinion that Petitioner had no restrictions. When asked to opine whether the October 8,

2019 incident caused, contributed or aggravated Petitioner's condition of ill-being, Dr. Williams responded that in his opinion she had degenerative arthritis in the left hip joint, that he believed that this was the source of her pain, that he believed that her arthritis pre-dated any injury that occurred on October 8, 2019, and that therefore her injury did not have any causal relationship to her need for a left total hip arthroplasty. It was further noted that Dr. Williams opined that Petitioner had reached maximum medical improvement. (Respondent's Exhibit 2 as attached to RX2).

The pre-accident medical records of McDonough District Hospital were entered into evidence at the time of arbitration as Respondent's Exhibit 3. The records reflect that Petitioner was seen on June 6, 2015, at which time it was noted that she had complaints of groin pain. It was noted that Petitioner reported pain, that it was sustained from an unknown reason, that she was able to bear her full body weight, that there was no radiation of her discomfort, and that the complaints affected the left femoral area. It was noted that the symptoms occurred acutely one week ago, that the symptoms were alleviated by nothing, and that the symptoms were aggravated by external and internal rotation. Petitioner underwent left hip and pelvis x-rays on that date, which were interpreted as revealing osteoarthritic change of the left hip, similar to prior (*i.e.*, February 13, 2015); subtle irregularity of the left femoral head as previously noted; the findings are similar to the February 13, 2015 exam. The impression was noted to be that of acute myofascial strain, malaise, and fatigue. Petitioner was given a prescription for Norco and was recommended to follow-up with Dr. Stortzum in 2-3 days. (RX3).

The records of McDonough District Hospital reflect that Petitioner underwent physical therapy for a treatment diagnosis of cervicalgia on July 19, 2013. The records reflect that Petitioner underwent x-rays of the left hip and pelvis on February 13, 2015, which were interpreted as revealing negative for fracture; mild narrowing of the right hip joint relative to the left; subtle irregularity of the superior aspect of the left femoral head, probably degenerative, however if there is symptomatology to suggest AVN then bone scan or MR would be useful; there is also slight thickening of the cortex and hypertrophic change along the left lateral femoral head. At the time of the physical therapy assessment on February 23, 2016, it was noted that Petitioner showed slight deficits with lower extremity strength. (RX3).

The pre-accident medical records of Springfield Clinic were entered into evidence at the time of arbitration as Respondent's Exhibit 4. The records reflect that Petitioner was seen on September 24, 2015, at which time her "Active Problems" were noted to include left hip pain, among other issues. The records reflect that Petitioner was seen on January 16, 2015, at which time it was noted that she had had left knee pain and swelling for at least three weeks, and that she was also experiencing pain from the hip area to the foot on her left leg. It was noted that Petitioner's pain was mainly located on the medial aspect of the left knee, that it was tender to touch, that her left lower extremity in general felt weak and occasionally as if it may give out, and that there was no trauma at the onset of symptoms. It was noted that Petitioner was using 8-10 Ibuprofen per day with uncertainty if it was giving much relief, that her symptoms woke her from sleep, that it also affected her ability to fall asleep , and that she was also having pain from the left distal leg radiating up past the knee towards the buttock and stopping there without proceeding to the back. It was further noted that Petitioner had to use her upper extremities to lift her leg off the couch because it hurt so bad. The assessment was noted to be that of cervical spinal stenosis; left hip pain; left knee pain; and hypothyroidism. Petitioner was recommended to undergo left knee and hip x-rays to further evaluate, as well as to compare to prior films from 2008. Petitioner was also recommended to initiate a 9-day tapering course of Prednisone for more intense anti-inflammatory. (RX4).

The records of Springfield Clinic reflect that Petitioner was seen on May 16, 2017, at which time it was noted that she had a three-level neck surgery with Dr. McGregor, that she had been out of work for four years, that her neck surgery was two years ago, and that Dr. McGregor left town and her job asked for a functional capacity evaluation to give her some permanent work restrictions. It was noted that Petitioner's "Active Problems" included left knee pain, left hip pain, and low back pain, among other issues. (RX4).

The Decision and Opinion on Review for IWCC Case 19 WC 709 was entered into evidence at the time of arbitration as Respondent's Exhibit 5. The Arbitrator notes that the decision pertained to a date of accident of June 26, 2013 involving a three-level cervical fusion. (RX5).

CONCLUSIONS OF LAW

The parties stipulated at the time of hearing that on October 8, 2019, Petitioner sustained an accident that arose out of and in the course of her employment with Respondent. (AX1).

With respect to disputed issue (F) pertaining to causal connection, the Arbitrator finds that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of October 8, 2019.

At the outset, the Arbitrator notes that what was perhaps the most compelling testimony elicited from Petitioner at the time of hearing was when, on cross examination, she denied, to her knowledge, having received any treatment to the left hip prior to the accident of October 8, 2019. Having considered and reviewed the entirety of the medical evidence in this matter, the Arbitrator finds this particular testimony to be wholly contrary to the pre-accident medical records that demonstrated that Petitioner had, in fact, undergone several years' worth of treatment to the left hip prior to the accident at issue, including x-rays and injections. As the Arbitrator finds it incomprehensible that Petitioner did not, to her knowledge, believe that she received any treatment to her left hip prior to the October 8, 2019, the Arbitrator places little, if any, weight up her testimony in this case.

The Arbitrator notes that the medical evidence in this case sets forth a multiple-year history of pre-accident treatment to Petitioner's left hip. For example, Dr. Stortzum in his letter dated June 17, 2020 noted that he had been asked to summarize Petitioner's current status with chronic left hip pain, and to give a history of his experience evaluating and managing this condition. Dr. Stortzum noted that Petitioner was first diagnosed with left hip pain on January 26, 2018, that prior to that she had been experiencing some left lateral knee pain but that as time went on she began experiencing more discomfort in the hip, and that she had previously had a left hip x-ray in January 2015 showing mild left hip osteoarthritis. (PX3). Of note, the Arbitrator finds it to be highly relevant that Dr. Stortum's letter reflects that Petitioner's left hip exam at the October 15, 2019 appointment showed significant restrictive passive range of motion, particularly with internal rotation, and that this had not changed compared to a previous exam where she was noted to also have fairly restricted range of motion on March 25, 2019. (PX3).

The Arbitrator further notes that the medical records of Springfield Clinic reflect that Petitioner was seen on September 9, 2019 by Dr. Stortzum – *i.e.*, some 30 days prior to the accident at issue -- at which time it was noted that she had a steroid shot in the left hip on September 4th, that the burning pain was gone but that stiffness was still present for awhile after sitting and then moving, and that after the first steroid injection it took about five days to take effect. (PX3). Additionally, the Arbitrator finds to be significant the fact that, at the time of the emergency room visit on October 8, 2019 at McDonough District Hospital, it was noted that Petitioner stated that she was planning to get a left hip replacement performed. (PX2). Additionally, at the time of the August 13, 2019 visit at Springfield Clinic Dr. Stortzum completed an FMLA form taking Petitioner off work, referencing underlying left hip and knee arthritis as the basis for doing so. (PX3).

Furthermore, the Arbitrator finds it to be significant that, Dr. Stortzum agreed that, when he expressed the opinion that he believed that the trauma from this fall accelerated Petitioner's condition, it was based on her subjective complaints. (PX5). Similarly, Dr. Capecci, when asked whether there was anything objective that he could notice as to a change in Petitioner's condition pre-incident versus post-

incident, responded that there was nothing as he did not think he had any imaging prior to the fall, that he was not aware of any, and that he did not have an opportunity to examine her prior to the fall. Dr. Capecci agreed that, absent anything objective, he was going off of Petitioner's subjective information. (PX6). This testimony from both of Petitioner's physicians, coupled with the little, if any, weight upon Petitioner's testimony in this case, leads to the Arbitrator's conclusion that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident of October 8, 2019.

Having considered and reviewed the entirety of the evidence, the Arbitrator finds that Petitioner has failed to prove that her current condition of ill-being is causally related to the accident October 8, 2019.

With respect to disputed issue (G) pertaining to Petitioner's earnings, the Arbitrator finds that Petitioner earned $39,500.33 in the 52 weeks prior to the accident, and that her average weekly wage was that of $759.62. The Arbitrator bases this finding on the earnings-related documentation as contained in Respondent's Exhibit 1. (RX1).

With respect to disputed issue (J) pertaining to reasonable and necessary medical services, the Arbitrator finds that Petitioner's care and treatment rendered on the date of accident, *i.e.*, October 8, 2019, was reasonable, necessary, and causally related to the work accident of October 8, 2019. As a result thereof, Respondent shall pay all reasonable and necessary medical services as contained in Petitioner's Exhibit 7, **for medical services rendered on October 8, 2019,** 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 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 October 8, 2019, Petitioner's request for prospective medical treatment as recommended by Dr. Capecci is hereby denied.

With respect to disputed issue (L) pertaining to temporary total disability benefits, the Arbitrator notes that Petitioner seeks temporary total disability benefits from October 8, 2019 through November 13, 2020. (AX1). 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 October 8, 2019, Petitioner's request for temporary total disability benefits 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	20WC002212
Case Name	MARTINEZ, CHARLES v. CONTINENTAL TIRE NORTH AMERICA
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0556
Number of Pages of Decision	17
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	James Keefe, Jr.

DATE FILED: 11/9/2021

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Charles Martinez,

Petitioner,

vs. NO: 20 WC 2212

Continental Tire North America,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 15, 2021, is hereby affirmed and adopted.

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

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

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.

November 9, 2021

/s/ *Marc Parker*
Marc Parker

MP:yl
o 11/4/21
68

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

MARTINEZ, CHARLES
Employee/Petitioner

Case# **20WC002212**

CONTINENTAL TIRE NORTH AMERICA
Employer/Respondent

On 1/15/2021, 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:

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

0299 KEEFE & DePAULI PC
JAMES F KEEFE JR
2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Charles Martinez
Employee/Petitioner

v.

Continental Tire North America
Employer/Respondent

Case # **20** WC **02212**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **October 9, 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 **June 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 $**43,442.46**; the average weekly wage was $**939.26**.

On the date of accident, Petitioner was **48** 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 $**11,591.73** for TTD, $**0** for TPD, $**0** for maintenance, $**6,471.36** in non-occupational indemnity disability benefits, and **$9,549.92** in PPD, for a total credit of $**27,613.01**.

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

ORDER

Respondent is ordered to pay Petitioner temporary total disability benefits pursuant to Section 8(b) of the Act for **34-3/7** weeks, for the period **8/6/18 through 8/26/18**, from **6/7/19 through 9/16/19**, and from **5/8/20 through 9/2/20**, and Respondent shall receive credit for any amounts previously paid.

Respondent is ordered to pay the medical expenses contained in Petitioner's group exhibit 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act and shall have credit for any amounts paid through its group carrier. Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which it claims credit.

Respondent shall pay Petitioner the sum of **$561.76/week** for a further period of **200** weeks, as provided in Section 8(d)2 of the Act, because the injuries sustained resulted in a combined **40%** loss of Petitioner's body, representing 25% loss of Petitioner's body as a whole as a result of injuries to his cervical spine and 15% loss of Petitioner's body as a whole as a result of injuries to his right shoulder.

Respondent shall pay Petitioner compensation that has accrued from 9/3/20 through 10/9/20, and shall pay the remainder of the award in weekly payments.

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

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

Signature of Arbitrator

1/8/21
Date

JAN 15 2021

STATE OF ILLINOIS)
) **SS**
COUNTY OF JEFFERSON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

CHARLES MARTINEZ,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-02212
	)	
CONTINENTAL TIRE NORTH AMERICA,	)	
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Mt. Vernon on October 9, 2020. The parties stipulated that Petitioner was employed by Respondent when he sustained injuries to his right shoulder and neck on June 4, 2018 while pulling 50-pound tires out of a buggy. The issues in dispute are causal connection, medical expenses, temporary total disability benefits from May 8, 2020 through September 2, 2020, and the nature and extent of Petitioner's injuries. All other issues have been stipulated.

TESTIMONY

Petitioner was 48 years old, married, with no dependent children at the time of accident. Petitioner testified he has been employed by Respondent for 16 years as a passenger press operator. He testified that on June 4, 2018 he was pulling 50-pound tires out of a buggy when he felt a pop in his right shoulder and neck area. Prior to June 4, 2018, Petitioner had not had any injuries, surgeries, or diagnostic testing to his right shoulder or cervical spine.

Petitioner sought treatment with Dr. Daniel Kitchens who ultimately performed surgery at the C6-7 level. Petitioner testified that the surgery helped him to some extent but he continued to have pain, throbbing, and numbness in his right shoulder. Dr. Paletta performed a right shoulder surgery in 2019 that Petitioner claims made his condition worse. Petitioner testified he continued to have popping and catching in his shoulder following surgery and had to use his left hand to push his right arm up above his head. He underwent physical therapy that was very painful. He testified he continued to report his symptoms to Dr. Paletta but he was discharged from care despite his ongoing complaints.

Petitioner sought a second opinion with Dr. Bradley who performed a second right shoulder surgery that involved grinding down his clavicle bone and a tear repair. He noted

significant improvement in his symptoms following the second surgery and no longer had popping or catching in his shoulder. He was released to return to full duty work and has been performing full duty work for Respondent since his release.

Petitioner testified that his cervical symptoms improved some following the cervical surgery performed by Dr. Kitchens, but he continued to have numbness and tingling in his arms and hands and neck pain. He sought a second opinion with Dr. Gornet who performed a second cervical surgery. Petitioner testified his symptoms significantly improved following his second surgery.

Petitioner testified that despite the improvement since his surgeries, he still gets pain in his neck and shoulder when he holds his head in a single position for a long period of time. He still has limited range of motion in his neck when he tries to turn his head quickly. He has some numbness and tingling in his arms and fingers and notices pain in his neck while driving. Working and staying busy help his condition and he does not take medication for his symptoms. His hobbies of fishing and playing ball with his grandchildren have been adversely affected, as well as his hunting activities because it is difficult for him to use a compound bow.

MEDICAL HISTORY

Petitioner sought treatment with Respondent's Work Fit First Clinic at the plant. Petitioner provided a history of pulling tires out of a buggy when he felt a sharp pain in the right side of his neck. He stated that after going home his shoulder began to hurt and he is experiencing numbness in his right arm. He was given ice and Ibuprofen, passed a drug test, and followed up with Work Fit First the next day. Michele Hartke, APN, noted Petitioner's pain was terrible and that he could not sleep. The diagnosis was right-sided neck and shoulder pain. Petitioner was returned to work with restrictions of no use of his right hand, was given a prescription for Prednisone, and was referred to SSM for x-rays. X-rays of Petitioner's right humerus were normal, and x-rays of his cervical spine showed mild to moderate multi-level degenerative disc changes throughout the lower cervical spine which were most advanced at C5-6 with loss of normal lordosis which was likely associated with pain or spasm.

On 6/22/18, Petitioner underwent a cervical spine MRI at SSM Health St. Mary's Hospital as ordered by Michele Hartke, APN. The MRI showed disc degeneration most notably from C4 through C6. Also present were neural foraminal narrowing and broad-based disc bulging along with disc osteophyte complexes.

On 7/12/18, Petitioner presented to Dr. Daniel Kitchens at Cardinal Neurosurgery and Spine reporting severe neck pain. Dr. Kitchens took the history of Petitioner pushing, pulling, and lifting tires. He noted Petitioner had been given anti-inflammatory medications and physical therapy that did not improve his symptoms. Petitioner reported twitching in his right biceps and forearm, persistent numbness into his right hand along with weakness and loss of dexterity. Dr. Kitchens' examination showed discomfort with range of motion in Petitioner's neck, loss of right biceps strength along with decreased tone, and mild grip weakness. Motor and sensory examinations were largely normal. Petitioner's right biceps reflex was absent. Dr. Kitchens reviewed the 6/22/18 MRI and noted it revealed degenerative changes at C5-6 along with

bilateral spurring more to the right with a right-sided disc herniation and significant foraminal stenosis. He noted Petitioner did not have a prior history of injury to his neck, right arm, or hand. Dr. Kitchens assessed right C6 radiculopathy which had been persistent since the work injury of 6/4/18, and which had been non-responsive to conservative measures. Dr. Kitchens stated that the cause of Petitioner's cervical disc herniation and cervical radiculopathy was the work incident of 6/4/18. Dr. Kitchens placed Petitioner off work and recommended surgery and sent Petitioner to Missouri Baptist Medical Center the same day for pre-surgery bloodwork.

Dr. Kitchens performed surgery on 8/3/18. Intraoperative objective findings revealed a disc herniation at C5-6 and Dr. Kitchens performed a one-level fusion using an autograft arthrodesis with plate stabilization. Petitioner followed up with Dr. Kitchens and reported continued discomfort as well as numbness and tingling into his right shoulder down his arm. These symptoms were noted to be worsening. Petitioner reported to Dr. Kitchens he was doing physical therapy and working with a 30-pound lifting restriction but was actually performing more supervisory work. Dr Kitchens recommended continuing Petitioner's restrictions and ordered an MRI.

The MRI of the cervical spine was performed on 11/13/18 at SSM Health St. Mary's Good Samaritan Hospital. Petitioner followed up with Dr. Kitchens on 11/28/18 and Dr. Kitchens reported the MRI showed the expected postsurgical changes at C5-6, with no evidence of a recurrent disc herniation or nerve impingement, but mild disc bulging C6-7. Dr. Kitchens recommended additional physical therapy. On 1/2/19, Petitioner returned to Dr. Kitchens and continued to report numbness in his right arm and discomfort in his right shoulder, particularly when using his right arm or doing overhead lifting. Dr. Kitchens believed Petitioner was progressing satisfactorily and advised him to continue physical therapy and released him to return to work without restriction.

Petitioner last saw Dr. Kitchens on 1/31/19 at which time he reported numbness into his right hand and pain with range of motion in his right shoulder while working. Despite having symptoms of chronic radiculopathy in his right upper extremity, Dr. Kitchens did not believe Petitioner would benefit from additional medical treatment and opined he had reached maximum medical improvement.

Due to Petitioner's persistent ongoing shoulder symptoms, Respondent referred him to Dr. George Paletta, whom he saw on 3/11/19. Dr. Paletta took the history of the injury and noted Petitioner had undergone cervical surgery, but had continued persistent complaints of right shoulder pain as well as numbness and tingling down his right arm. He noted that despite Petitioner's complaints of right shoulder pain and residual symptoms of chronic radiculopathy, he had been placed at maximum medical improvement by Dr. Kitchens. Dr. Paletta noted that Petitioner was not taking any prescription medications for his shoulder, and that he did not have a prior history of problems that predated June 2018. Dr. Paletta's impression was right shoulder pain of possible cervical origin versus primary shoulder pathology, and cervical radiculopathy status post C5-6 single level fusion. Given the persistence of Petitioner's cervical radiculopathy, Dr. Paletta recommended that Petitioner undergo EMG and nerve conduction studies. He also recommended an MRI of Petitioner's right shoulder. He continued to allow Petitioner to work full duty.

Petitioner underwent an EMG and nerve conduction study with Dr. Daniel Phillips on 3/18/19 that revealed bilateral carpal tunnel syndrome, left greater than right, mild ulnar neuropathy of the left cubital tunnel, and chronic cervical radiculopathy of the right greater than left at C5-6. The MRI of the right shoulder revealed a type II SLAP tear along with a partial thickness rotator cuff tear involving the supraspinatus tendon, and probable adhesive capsulitis. Dr. Paletta believed Petitioner would likely require a right shoulder arthroscopy; however, he would not recommend surgery until Petitioner was evaluated for cervical radiculopathy.

Dr. Paletta referred Petitioner to his partner, Dr. Matthew Gornet. On 4/17/19, Dr. Gornet took the history of injury and noted Petitioner already had surgery at C5-6, and while surgery initially helped his pain, it never resolved and seemed to gradually get worse over time. He noted that due to Petitioner's persistent pain, Respondent had referred him to Dr. Paletta, who diagnosed him as having a right shoulder SLAP tear and rotator cuff tear. He also noted that Dr. Phillips reported that Petitioner had chronic C5-6 radiculopathy. Physical examination showed Petitioner had pain in his neck, right trapezius, and right shoulder with decreased range of motion in the cervical spine. Motor exam showed mild decrease in triceps and wrist dorsiflexion and volar flexion on the right at 4/5 with decreased sensation in the C6/C7 dermatome on the right. X-rays revealed a solid fusion at C5-6; however, the plate was slightly rotated. Dr. Gornet reviewed the post-surgical MRI from 11/13/18, which showed Petitioner's graft at C5-6 was in good position, but he believed there was a disc fragment at C6-7. He recommended a CT scan because he was concerned that only a portion of Petitioner's structural pathology had been addressed, and that the disc herniation in Petitioner's foramen on the right side at C6-7 had been missed.

The CT scan showed some foraminal stenosis; however, Dr. Gornet believed that Petitioner was solidly fused at C5-6. The MRI showed a large fragment of disc at C6-7 which correlated with Petitioner's continued forearm numbness and weakness. Dr. Gornet recommended one steroid injection at C6-7, but told Petitioner that if he had nerve damage, it may not be rectified. On 6/7/19, Dr. Gornet performed a disc replacement at C6-7. Intraoperatively, Dr. Gornet observed a large foraminal herniation on the right at C6-7, and a moderate herniation on the left. He inserted a prosthetic disc. Petitioner returned to Dr. Gornet on 6/24/19 and reported dramatically improved symptoms. Dr. Gornet referred Petitioner back to Dr. Paletta for shoulder evaluation.

Dr. Paletta saw Petitioner on 7/22/19 and noted that despite significant improvement from cervical surgery, Petitioner's was persistently symptomatic in his right shoulder. Dr. Paletta recommended waiting about 10 weeks after his neck surgery before proceeding with shoulder surgery. On 9/3/19, Dr. Paletta performed a right shoulder arthroscopy and debridement of the SLAP tear, debridement of the supraspinatus tendon tear, subacromial decompression, bursectomy, acromioplasty, and biceps tenodesis. Dr. Paletta found a partial thickness tear of the rotator cuff, which was debrided. He detached the biceps from the superior labrum and debrided the torn portion of the labrum. He cleaned out the bursitis and bone spurs off the acromion along with a biceps tenodesis for strength and function. He specifically did not address anything relating to the AC joint at the time of surgery. Dr. Paletta believed the need for his surgery in September 2019 was causally connected to the work injury of 6/4/18. Following surgery, Dr.

Paletta recommended that Petitioner start physical therapy, which was done at Respondent's Work Fit facility. On 10/28/19, Petitioner reported to Dr. Paletta that while his pain had improved, he continued to notice a catch in his shoulder when he elevated it in one particular position. Dr. Paletta continued Petitioner's physical therapy and light duty work restrictions.

Petitioner returned to Dr. Paletta on 12/16/19 with continued symptoms of "catching or rolling over" in his right shoulder. He continued to have difficulty using his right arm in the overhead position because of snapping or catching. Dr. Paletta noted that the physical therapist tried taping in that region and that Petitioner had a slight abrasion from the taping. Dr. Paletta's examination showed good range of motion; however, Petitioner noted something catching upon getting his shoulder up to 120 degrees. Dr. Paletta's impression was persistent mechanical symptoms in Petitioner's right shoulder status post labral debridement and biceps tenodesis. He recommended a postoperative MRI before continuing therapy.

The MRI was performed on 12/19/19 that was read by the radiologist as showing postoperative changes with biceps tenodesis and labral debridement, but no recurrent labral tear. Dr. Paletta believed there was no explanation for the symptoms Petitioner was experiencing. He recommended continuing physical therapy. Petitioner returned to Dr. Paletta on 2/3/20 and reported persistent painful clicking in the right shoulder with abduction and adduction. Dr. Paletta's examination showed no tenderness at the AC joint and good range of motion with the shoulder; however, with abduction there was a reproducible palpable snap or click of the shoulder which localized at either the posterior shoulder or the AC joint. Petitioner put his finger directly over the AC joint when asked to precipitate the snapping while putting his arm through the abduction/adduction cycle. This snapping or clicking was reproducible on almost every cycle of elevation of the arm. Dr. Paletta recommended a diagnostic injection of the AC joint, which was performed, and re-examination five to ten minutes later showed no change in the painful snapping. Dr. Paletta did not believe Petitioner's symptoms were coming from the AC joint since he would expect that Petitioner's pain would have diminished even if there were a palpable snap if it was coming from his AC joint. Dr. Paletta recommended another MRI scan.

A right shoulder MRI was performed on 2/10/20 that was interpreted by Dr. Paletta as showing severe AC joint arthrosis. There was some soft tissue swelling in the area of the AC joint that corresponded to a skin marker placed by Petitioner prior to the MRI. Dr. Paletta believed this was due to advanced arthrosis and degenerative changes at the AC joints. Dr. Paletta believed that the MRI showed evidence of AC joint arthritis. Petitioner was getting some soft tissue swelling in association with the symptoms. Despite Petitioner having no prior right shoulder symptoms, Dr. Paletta believed that this was long-standing, pre-existing, chronic, and not related to his work injury in any way and that he could work full duty. Dr. Paletta recommended an injection into the AC joint, which was not done. On 3/18/20, Dr. Paletta stated Petitioner has lost faith in the treatment process and he refused to provide continued care for Petitioner's non work-related condition. Dr. Paletta recommended that Petitioner consider consultation with an outside physician such as Dr. Matthew Bradley.

Petitioner saw Dr. Bradley on 3/30/20 who noted Petitioner had persistent pain in his right shoulder which was aggravated by reaching away, overhead, and across his body. Dr. Bradley's examination revealed pain and crepitus over the AC joint as well as with cross arm

testing. He did not find any signs of a rotator cuff tear upon physical examination, nor upon on review of his MRI scan. Dr. Bradley believed there was arthrosis at Petitioner's AC joint which was causing continued pain into the area of the shoulder. Dr. Bradley also performed a dynamic ultrasound which showed evidence of moderate subacromial effusion. He recommended diagnostic arthroscopy with excision of the distal clavicle.

On 5/8/20, Dr. Bradley performed an arthroscopic labral repair, distal clavicle excision, and subacromial decompression of Petitioner's right shoulder. Dr. Bradley reported intraoperative objective findings of a recurrent labral tear going from the 12 o'clock position to the 3 o'clock position. He noted some increased anterior translation and instability to the labrum during internal external rotation, and the labrum was noted to be impinging on the glenohumeral joint. There was also some arthropathy and some inflammatory changes noted to the AC joint. Dr. Bradley described the labral tear as "very definitive."

Petitioner reported significant improvement following surgery and a course of physical therapy at Apex Physical Therapy. Petitioner returned to Dr. Bradley on 9/3/20 and reported he was doing excellent and did not have a significant amount of pain. He had occasional stiffness in his shoulder, but regained full range of motion, strength, and function of his shoulder. He was released to work full duty with no restrictions and placed at maximum medical improvement.

Dr. Paletta testified by way of evidence deposition on 6/10/20. Dr. Paletta testified consistent with his records that following the surgery, Petitioner was still having reproducible pain, popping, and clicking localized to the AC joint, and swelling which would tend to diminish during the course of the day. He testified that he was able to reproduce Petitioner's snapping or clicking, but did not believe it was coming from the AC joint. It was also his opinion that Petitioner's work injury did not cause or accelerate his arthritis and it progressed as part of his natural history. Dr. Paletta did, however, agree that if Petitioner remained symptomatic, the appropriate procedure would be a distal clavicle resection. On cross-examination, Dr. Paletta testified that he reviewed the operative photos from Dr. Bradley's second surgery and acknowledged they showed some irregularity of the superior labrum along with some fraying of the cartilage at the glenoid or the socket. He was aware of the surgical procedures performed by Dr. Bradley. He acknowledged that any scar tissue found by Dr. Bradley in the subacromial space would have been likely due to his previous surgery. He acknowledged that every time he saw Petitioner, his opposite left arm was doing fine, and Dr. Paletta did not know whether there was any arthritis in the left shoulder because there were no documented imaging studies. He acknowledged that during his examinations following surgery, there was soft tissue swelling in the area of the AC joint and Petitioner was having persistent symptoms in his shoulder. He testified that Petitioner was referred to him by Respondent, and that Respondent had paid all of his charges through its workers' compensation carrier. He believed Dr. Bradley was a good orthopedic surgeon, did a lot of good work for patients, and had a good reputation. He has referred patients to Dr. Bradley in the past and testified that the surgery performed by Dr. Bradley and the attendant physical therapy post-surgery was appropriate. Dr. Paletta testified that Petitioner's arthritis became worse between the time he saw Petitioner in March 2019 and the last MRI in 2020 and he did not have a good explanation for the progression. He acknowledged that Petitioner's clicking, popping, and snapping were objective reproducible findings.

Dr. Bradley testified by way of evidence deposition. Dr. Bradley reviewed all of Petitioner's prior records and diagnostic studies. He believed that the MRI performed on 3/18/19 showed a SLAP tear and a partial tear to the rotator cuff, both of which Dr. Paletta had addressed surgically, an extravasation of fluid into the subscapularis, and bone edema or bone inflammation on both sides of the AC joint. Dr. Bradley testified that those findings show there is some abnormal pathology, or inflammation of the AC joint. He testified that a patient with these findings would have AC joint pain. Dr. Bradley had no explanation for the arthropathy of the AC joint other than the work injury that Petitioner reported, as his physical examination findings were consistent with AC joint pain as well as his symptoms. Dr. Bradley explained that the AC joint connects the shoulder to the body, so any kind of heavy lifting, pushing and pulling of these tires will put all of the force and weight of the tires through the shoulder into that one specific joint. The acute mechanism of injury as reported by Petitioner can cause injury to the AC joint.

CONCLUSIONS OF LAW

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

The parties stipulated that an accident occurred on June 4, 2018, which arose out of and in the course of Petitioner's employment with Respondent. The Arbitrator finds that Petitioner's current condition of ill-being is causally related to the accident.

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. Industrial Commission*, 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. 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). 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). Moreover, a chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the workers' compensation claimant's injury. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, 976 N.E.2d 1 (2011) Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Industrial Comm'n*, 260 Ill.App.3d 92, 96–97, 631 N.E.2d 724, 728 (1994); *International Harvester v. Industrial Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

With regard to Petitioner's cervical spine, his complaints were documented immediately following the accident. Petitioner's cervical spine MRIs from 6/22/18 and 4/17/19 both showed objective disc pathology. These findings were confirmed intraoperatively, as Dr. Kitchens noted a disc herniation at C5-6, and Dr. Gornet noted a large foraminal herniation on the right at C6-7, and a moderate herniation on the left. Both Dr. Kitchens and Dr. Gornet noted Petitioner did not

have a prior history of any injuries or problems with his neck, and Petitioner testified to same at trial without rebuttal. Dr. Kitchens and Dr. Gornet also both noted that Petitioner's cervical symptoms had been persistent since the work injury, and both stated in their notes that Petitioner's condition was related to same.

The evidence shows that prior to the work accident, Petitioner had no cervical spine symptoms, had an immediate onset of pain following the accident, and had objective diagnostic and intraoperative pathology, and gained relief from his symptoms following his treatment. Therefore, the Arbitrator finds that Petitioner has met his burden of proof with regard to causal connection in relation to his cervical spine.

With regard to Petitioner's right shoulder, he also had complaints of pain immediately following the accident. Petitioner testified without rebuttal he had not had any injuries, surgeries, or diagnostic testing with regard to his right shoulder prior to his accident. Both Dr. Paletta and Dr. Bradley stated that Petitioner had no history of problems with the right shoulder prior to his June 4, 2018, work accident. Petitioner underwent a right shoulder arthroscopy and debridement of his SLAP tear, debridement of the supraspinatus tendon tear, subacromial decompression, bursectomy, acromioplasty, and biceps tenodesis with Dr. Paletta. Following this, however, Petitioner still had persistent complaints of catching and painful clicking in his right shoulder. Dr. Paletta testified that he could not state for certain if he performed a cross-chest on Petitioner to test for AC joint dysfunction at any of his appointments through 12/16/19, and there is no evidence in his records that same was ever performed prior to that date. Petitioner testified that he had voiced ongoing complaints of catching, popping, and pain every time he saw Dr. Paletta, and on 2/3/20 Dr. Paletta noted palpable snap or click over the AC joint.

Dr. Paletta testified that the persistent, painful clicking, popping, and snapping was an objective reproducible finding and not something that Petitioner could make up. Dr. Paletta also testified that Petitioner's arthritis became worse between the time he saw Petitioner in March 2019 and the last MRI in 2020 and he did not have a good explanation for the progression. Dr. Paletta agreed that the distal clavicle excision and subacromial decompression that was performed by Dr. Bradley on 5/8/20 were reasonable procedures to perform. This surgery also included an arthroscopic labral repair, and although Dr. Paletta did not believe that an actual labral tear was present during the 5/8/20 surgery, Dr. Bradley's operative report notes there was a "very definitive" labral tear, along with anterior translation and instability, and the labrum was impinging on the glenohumeral joint, which were clear, objective findings.

Despite the fact that Petitioner had no symptoms in his right shoulder prior to the work injury, and that Petitioner had persistent subjective complaints coupled with objective positive findings following the injury, including objective intraoperative findings on Dr. Bradley's operative report, Dr. Paletta still felt Petitioner's need for treatment with regard to the labral tear repaired by Dr. Bradley as well as any aggravation of his AC joint arthritis was in no way related to the work injury. The Arbitrator does not find Dr. Paletta's opinions to be persuasive in this regard.

Dr. Bradley testified that Petitioner reported he had consistent symptoms in the area of his AC joint that had been present since his work injury. At Petitioner's first visit, Dr. Bradley

performed a positive cross-chest test which he testified is a gold standard for testing for AC joint pain, while there is no evidence that Dr. Paletta performed this test. Dr. Bradley also explained that Petitioner's history of lifting, pulling, and pushing tires could cause injury to the AC joint, and that Petitioner's AC joint did not have the large spurs, sclerosis, and overgrowth that are typically found in non-traumatic symptomatic AC joints, but rather, looked more like an acute traumatic AC joint verses degenerative. Given Petitioner's consistent, specific AC joint complaints that had been present since the injury, Dr. Bradley's opinion was that the injury of 6/4/18 was a precipitating factor in the pain and etiology of Petitioner's AC joint, and the Arbitrator finds his opinions both credible and persuasive.

The Arbitrator finds that Petitioner has met his burden of proof with regard to causal connection for his cervical spine and right shoulder conditions, including the need for the labral repair, subacromial decompression, and distal clavicle excision which was performed on May 8, 2020.

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

The Arbitrator finds that Respondent is liable for the reasonable and necessary medical charges as outlined in Petitioner's Exhibit 1.

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).

Respondent stipulated that Petitioner sustained an accident arising out of his employment, and Petitioner has met his burden of proof with regard to causal connection for the injuries he sustained and subsequent treatment he received regarding his neck and right shoulder. Therefore, the Arbitrator orders Respondent to pay for the reasonable and necessary medical charges as outlined in Petitioner's Exhibit 1, including treatment rendered and ordered by Dr. Bradley for Petitioner's right shoulder.

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

Respondent disputes liability for temporary total disability benefits for the period May 8, 2020 through September 2, 2020, representing the time frame during which Petitioner was under the care of Dr. Bradley for treatment, including surgery, relating to his right shoulder. The Arbitrator notes that the parties stipulate that Respondent is liable for temporary total disability benefits for the claimed periods 8/6/18 through 8/26/18 and 6/7/19 through 9/16/19.

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

Comm'n, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill. App. 3d 739, 743, 467 N.E.2d 1018, 1021 (1984).

Respondent stipulated to accident, and Petitioner has met his burden of proof with regard to causal connection. Therefore, Petitioner is entitled to temporary total disability benefits for the period May 8, 2020 through September 2, 2020, representing 16-6/7 weeks and Respondent is ordered to pay same.

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

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

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

(ii) **Occupation**: Petitioner continues to work full duty as a Passenger Press Operator for Respondent. Although his treatment greatly improved his neck and right shoulder conditions and he was able to return to work full duty, without restrictions, he still experiences some pain and limited range of motion in his neck. Petitioner's job requires him to push and pull heavy tires. The Arbitrator places some weight on this factor.

(iii) **Age**: Petitioner was 48 years of age at the time of his injury. He is a younger individual and must live and work with his disability for an extended period of time. Pursuant to *Jones v. Southwest Airlines*, 16 I.W.C.C. 0137 (2016) (wherein the Commission concluded that greater weight should have been given to the fact that Petitioner was younger [46 years of age] and would have to work with his disability for an extended period of time). The Arbitrator places some weight on this factor.

(iv) **Earning Capacity**: While there is no direct evidence of reduced earning capacity contained in the record; based on the severity of Petitioner's injuries, the requisite treatment and the resulting disability, it is reasonable to conclude that such repercussions will manifest in the near future. The Arbitrator places some weight on this factor.

(v) **Disability**: As a result of his accident, Petitioner sustained injuries to his cervical spine and right shoulder. With regard to his cervical spine, Petitioner initially underwent a one-level disc fusion at C5-6 performed by Dr. Daniel Kitchens. Despite surgery, Petitioner continued to experience discomfort, numbness, and tingling down his right arm. Dr. Gornet performed a one-level disc replacement at C6-7 which significantly improved Petitioner's cervical spine symptoms.

With regard to Petitioner's right shoulder injury, Dr. George Paletta performed a right shoulder arthroscopy and debridement of the SLAP tear, debridement of the supraspinatus tendon tear, subacromial decompression, bursectomy, acromioplasty, and biceps tenodesis on September 3, 2019. Despite surgery, Petitioner had persistent right shoulder pain, catching, and clicking. Dr. Matthew Bradley performed an arthroscopic labral repair, distal clavicle excision, and subacromial decompression of Petitioner's right shoulder.

Petitioner testified that despite the improvement since his surgeries, he still has pain in his neck when he holds his head in a single position for a long period of time. He still has some limited range of motion in his neck with he tries to turn his head quickly. He has some numbness and tingling in his arms and fingers. He notes some pain in his neck while driving. Working and staying busy seems to help his condition and he does not take medication for his symptoms. His hobbies of fishing and playing ball with his grandchildren have been adversely affected, as well as his hunting activities because it is difficult for him to use a compound bow. The Arbitrator places greater weight on this factor.

Based upon the foregoing evidence and factors, the Arbitrator finds that Petitioner sustained serious and permanent injuries that resulted in a combined **40%** loss of Petitioner's body, representing 25% loss of Petitioner's body as a whole as a result of injuries to his cervical spine and 15% loss of Petitioner's body as a whole as a result of injuries to his right shoulder.

Arbitrator Linda J. Cantrell

1/8/21
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC038459
Case Name	JOHNSON, CAROLYN v. KRAFT HEINZ
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0557
Number of Pages of Decision	22
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	James Clune

DATE FILED: 11/9/2021

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CAROLYN JOHNSON,

Petitioner,

vs. NO: 18 WC 38459

KRAFT HEINZ,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under Section 19(b) of the Act having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, average weekly wage, medical expenses, and prospective medical care, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below. The Commission further remands this case to the Arbitrator for further proceedings including a determination of permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

I. FINDINGS OF FACT

A. Background

Petitioner testified that prior to her retirement, she had worked for Respondent for 29 years. She stated that she initially worked for Respondent as a CT operator. She also stated that between 2005 to 2011, she worked as a spice mixer. She further stated that between 2011 and 2019, she worked as a line operator.

Petitioner testified that her job duties included lifting and moving boxes which weighed 19 pounds, pallets which weighed 60 pounds, and "straws" (round rolls of straws on a shoulder-width spool) which weighed 30-35 pounds. She stated that she would lift boxes of pouches for Capri Sun product from overhead to waist level. Petitioner described a full pallet as 6' tall, while she was 5'3" tall. She described using a jack to lift a pallet, cut away plastic at the corners, remove the plastic, and roll the pallet from a hallway into the workspace. She later agreed that the pallet jack is motorized

with a battery, but stated that she felt shoulder pain when the jack would jerk her around.

Petitioner described photographs as depicting a pallet of pouches and a pallet of boxes. She stated that she would have to raise her arm to cut the plastic from the pallets. On cross-examination, she agreed that when cutting the plastic, her hands were overhead but her elbow was at shoulder-level.

According to Petitioner, once she had removed the plastic from the pallets, she could load the boxes into a box machine by hand, starting with the top of the pallet, which would be overhead work. She later explained that the box machine takes flats and forms them into boxes. She also testified that once the pallet was empty, she would take it back into the hallway by hand. Similarly, Petitioner stated that she would load pouches from boxes into a "filler," which has 12 lanes to fill. She estimated that the lanes of the filler were at an approximately 6' height. She added that filling the lanes would require her to reach overhead. She also estimated that she would perform these duties more than six hours out of an eight-hour shift. Petitioner testified that she worked an 8-hour shift once or twice weekly and that the remainder were 12-hour shifts performing the same duties.

Robbie Robertson, Respondent's occupational risk management coordinator (or safety coordinator), testified on behalf of Respondent. He stated that he made three video recordings of some of the job duties of a line operator or filler operator.

The first recording, which is 16 seconds long, depicts an employee removing a box from a pallet jack and placing it on a filler machine. In this first recording, the pallet generally has one level of boxes remaining, with a few stacks which are two boxes tall. The employee lifts the box from just below waist level and places it on the machine at just above waist level. It also appears that the top of the machine is below the employee's eye level. The second recording, which is 9 seconds long, depicts a different employee loading pouches into the lanes of a filler machine. In this second recording, the top of the machine appears to be at the employee's eye level and the employee reaches upward to drop stacks of pouches into two lanes of the machine. The third recording, which is 20 seconds long, depicts a third employee loading a filler machine and a box machine. In this final recording, the top of the filler machine is at the employee's shoulder level and his hand barely rises above shoulder level to fill the lane. The employee then removes some box flats from a pallet at a level just below the employee's chest, which the employee then loads into a box machine at approximately waist level.

Mr. Robertson testified that the filler machine is approximately 62" tall and that the lanes would be at approximately eye level for a person 5'3" tall. Mr. Robertson also stated that filling the filler machine and the box machine did not involve overhead work. He further stated that a pallet could be up to 6' tall. He verified that Petitioner's Exhibit 10 depicts Respondent's motorized pallet jacks. He agreed that he did not record Petitioner performing her job duties. He also agreed that the video recordings did not depict all of a line operator's job duties. He further acknowledged that he had never found Petitioner to be a difficult employee.

Petitioner testified in rebuttal that the video recordings depicted someone picking up 19-pound pouches and loading them into the filler. She stated that this task bothered her shoulders

when she would have to lift the pouches from the top of the pallet. She agreed that her arms would be outstretched a couple of feet in front of her. On cross-examination, she clarified that she was reaching straight out from her shoulders while demonstrating the motion.

Petitioner and Respondent both submitted written descriptions of Petitioner's job duties. Respondent's job description includes a section on physical abilities indicating that Petitioner could be expected to reach with her hands above shoulder level bilaterally frequently, which was defined as three to six hours per shift.

B. Prior Medical Treatment

Petitioner testified that she had a right shoulder surgery in 2008. She stated that she was off work for almost one year, but healed and was released to full-duty work. She also stated that after that surgery, she did not have to miss work or see a doctor regarding her right shoulder until December 10, 2018. On cross-examination, Petitioner agreed that he had told Dr. George Paletta that she had rotator cuff surgery on the right arm and that "they filed down some bone spurs in the right and left shoulder."

C. Accident

Petitioner testified that she initially worked for Respondent in Champaign, Illinois and had no problems with her hands or shoulders until she transferred to work at Respondent's plant in Granite City in July 2017. According to Petitioner, by October 2017, she developed shoulder pain which made it really painful to raise her arm to comb her hair or reach into cabinets. She stated that she did not report her symptoms to her supervisor at that time because she thought she had to get used to her new job duties. Petitioner added that she reached the point where she could not soothe her pain with mediation. She also stated that she was starting to drop boxes and having difficulty sleeping. She testified that she ultimately informed her supervisor on December 7, 2018 that her fingers were numb and that she was having difficulty lifting boxes off the pallets. As of December 2018, Petitioner was 55 years old.

D. Medical Treatment

On December 10, 2018, Petitioner was seen by Dr. Christopher Knapp at Gateway Regional Occupational Health Services (Gateway), who took the following history:

> "The patient works at [Respondent] on the Capri-Sun Filler Operator Machine. She has been there a little over 1 year. Previously, she worked at a different Kraft plant in Central Illinois. She is right-handed, but states her left hand is much more severe with pain up to an 8/10. It is interfering with her ability to sleep. She states that she had approximately a month of pain starting in September, but in October she was involved in a motor vehicle accident where she sustained back and neck injuries. She states that she has recovered from that, was back to work approximately 3 weeks, during which time, the pain and numbness increased. She states that it improved some over the time she was off work, but never fully resolved. She describes tingling and pins

> and needles[s] sensation in all of her fingertips with pain that radiates up to the elbows. In the filler operator position, she has to grasp and load pouches throughout her shift into the machine, which requires a fairly tight grasping bilaterally. She states that she does wake up at night if she is even able to get to sleep due to the pain. She denies any prior history of pain or numbness prior to September. No history of significant injury to either hand, wrist, or forearms. No current neck or back pain."

Following an examination, Dr. Knapp assessed Petitioner with symptoms of bilateral hand and arm pain and numbness. Petitioner was fitted with a cock-up splint for the left wrist to wear to bed. Petitioner was prescribed naproxen and Tylenol, along with ice and heat treatments. Dr. Knapp also recommended nerve conduction studies bilaterally to rule out carpal tunnel syndrome.

Petitioner returned to Gateway on December 26, 2018, with continued complaints. The prior recommendations were continued and Petitioner was released to work with a 5-pound lifting restriction and bars on forceful grasping and repetitive wrist motions.

On January 16, 2019, Petitioner was seen by Dr. George Paletta of the Orthopedic Center of St. Louis. Petitioner described her job, stating that she used her arms repetitively at about chest height. Petitioner complained of bilateral shoulder and arm pain as well as wrist pain and numbness and tingling into the fingers. She also complained of upper shoulder pain. Petitioner related her symptoms to her work duties, particularly having her arms out and using them overhead. Petitioner further reported the September 2018 motor vehicle accident, which did not involve injury to the shoulders or arms, as well as undergoing left and right shoulder arthroscopies in 2008, stating that she recovered and had no residual symptoms from those operations.

Dr. Paletta conducted an examination of the shoulders and arms which disclosed complaints of pain associated with every maneuver and positive impingement signs. Dr. Paletta also examined Petitioner's wrists finding tenderness to palpation over the carpal tunnel, a negative Tinel's sign and an equivocal Phalen's test. The doctor's impressions were of: (1) atypical radiculopathy in the bilateral upper extremities; (2) wrist pain with numbness and tingling atypical for carpal tunnel syndrome; and (3) bilateral shoulder pain without evidence of significant rotator cuff pathology. Dr. Paletta agreed with Petitioner's existing work restrictions and recommended an EMG/NCS.

On January 24, 2019, Petitioner underwent an EMG/NCS by Dr. Daniel Phillips, whose impressions were of: (1) mild-moderate demyelinative median sensory neuropathy across the right carpal tunnel and mild demyelinative median sensory neuropathy across the left; and (2) evidence for borderline demyelinative ulnar neuropathy across the left cubital tunnel.

Dr. Paletta reviewed the EMG/NCS results. His impression was of moderate carpal tunnel syndrome of the right wrist and mild carpal tunnel syndrome of the left wrist, with no evidence of significant ulnar neuropathy at the level of the elbow. The doctor noted that Petitioner would be contacted to discuss treatment options, including possible carpal tunnel

release surgeries.

On March 12, 2019, Petitioner underwent a left carpal tunnel release by Dr. Paletta at the Frontenac Surgery & Spine Care Center. On April 1, 2019, Petitioner followed up with Dr. Paletta, who discontinued use of the cock-up splint, ordered physical therapy twice weekly for three weeks, and recommended proceeding with right carpal tunnel release after several weeks of therapy on the left side to assist with activities of daily living.

On April 15, 2019, Petitioner began a course of physical therapy at SSM Health and was discharged on May 19, 2019 after five sessions.

On April 30, 2019, Petitioner underwent a right carpal tunnel release by Dr. Paletta. On May 20, 2019, Petitioner followed up with Dr. Paletta, who ordered physical therapy for the right side.

On June 3, 2019, Petitioner began another course of physical therapy at SSM Health and was discharged on June 20, 2019 after six sessions.

On July 10, 2019, Dr. Paletta determined that Petitioner could use her arms and hands as tolerated and required no restrictions or additional formal therapy. Dr. Paletta noted that Petitioner was retired and not going back to any formal work. He found Petitioner had reached MMI.

On July 23, 2019, Petitioner returned to Dr. Paletta, continuing to complain of bilateral shoulder pain. Dr. Paletta referred Petitioner to Dr. Wendell Becton, a nonoperative specialist, with the understanding that he would be happy to see Petitioner if she was found to have any shoulder pathology requiring surgery.

On January 30, 2020, Petitioner saw Dr. Becton, also of the Orthopedic Center of St. Louis. Dr. Becton noted Petitioner's April 2008 right shoulder rotator cuff repair and August 2008 left shoulder decompression bone spur removal, as well as the carpal tunnel release surgeries performed by Dr. Paletta. The doctor also noted that Petitioner retired in February 2019 due to her continuing shoulder pain performing repetitive upper extremity activities. Following an examination and review of X-rays, Dr. Becton's impression was of bilateral shoulder pain, left greater than right, indicative of bilateral rotator cuff strains/bursitis. The doctor ordered physical therapy and anti-inflammatory medication.

On February 4, 2020, Petitioner began a course of physical therapy for her shoulders at SSM Health and was discharged on March 6, 2020 after 10 sessions.

On February 12, 2020, Petitioner underwent a Section 12 examination by Dr. Shawn Kutnik at Respondent's request (see below).

On March 5, 2020, Petitioner followed up with Dr. Becton, reporting that her shoulder pain had not improved with physical therapy or anti-inflammatories. She also reported difficulty with activities of daily living, including fixing her hair and dressing herself. Dr. Becton

administered bilateral subacromial cortisone injections.

On April 2, 2020, Petitioner returned to Dr. Becton with continuing bilateral shoulder pain. Dr. Becton ordered bilateral shoulder MRIs to evaluate for bilateral rotator cuff pathology.

On April 16, 2020, Petitioner underwent a bilateral shoulder MRIs at Imaging Partners of Missouri. Regarding the left shoulder, the interpreting radiologist's impressions were of: (1) a 15mm complete tear of the supraspinatus tendon with thinning of the cuff; (2) a complete tear of the long head of the biceps with retraction; and (3) mild anterior subluxation of the humerus on the glenoid without advanced arthritic change. Regarding the right shoulder, the interpreting radiologist's impressions were of: (1) a large complete tear of the supraspinatus tendon involving the infraspinatus tendon as well, with retraction back to the acromioclavicular joint; (2) cephalad migration of the humeral head suggesting that this is chronic but without significant supraspinatus atrophy; (3) moderate degenerative change of the glenohumeral joint with severe chondral thinning, labral degeneration and some remodeling of the glenoid itself with spurring; and (4) chronic tear of the long head of the biceps.

On April 16, 2020, Petitioner also followed up with Dr. Becton by telephone to review the MRI results. Dr. Becton opined that Petitioner's bilateral shoulder rotator cuff tears represent work injury aggravations and were directly related to her previous work activities for Respondent. Given the failure of conservative treatment, Dr. Becton opined that Petitioner would require bilateral arthroscopic surgeries to fix her bilateral rotator cuff tears. Petitioner requested to have surgery on the left side first because it hurt the most. Dr. Becton referred Petitioner back to Dr. Paletta for an orthopedic surgical consultation and definitive care.

On May 5, 2020, Petitioner returned to Dr. Paletta, who noted that Dr. Becton's recommended physical therapy and injections did not result in a significant improvement in Petitioner's symptoms. He also noted that the MRIs ordered by Dr. Becton confirmed the presence of significant bilateral rotator cuff pathology. A physical examination revealed shoulder pain with the arms elevated above chest level, as well as weakness and pain on supraspinatus testing bilaterally. After reviewing Petitioner's prior X-rays and MRI scans, Dr. Paletta's impressions were of: (1) a large retracted rotator cuff tear in the right shoulder, with rotator cuff arthropathy and proximal migration of the humeral head; and (2) a small to moderate size, minimally retracted rotator cuff tear in the left shoulder. The doctor explained to Petitioner that the left-sided tear was repairable, but the right-sided tear was much larger and may not be repairable. Accordingly, Dr. Paletta recommended surgery for the left shoulder first, at the earliest convenience. Regarding the right-sided tear, the doctor wrote that it would be reasonable to consider repair surgery at Petitioner's then-current age. Dr. Paletta wrote that if the right rotator cuff was irreparable, the best option would be to consider a reverse total shoulder arthroplasty. However, given Petitioner's age, the doctor recommended that a reverse total shoulder arthroplasty be delayed for as long as possible.

Dr. Paletta opined, based on Petitioner's description of her job duties and the correlation and worsening of symptoms to her job activities, that her job activities were a contributing or causative factor to her bilateral shoulder conditions. He noted that Petitioner had a history of right rotator cuff repair in 2008, but made a full recovery and worked for eight or nine years

before developing recurrent shoulder pain.

E. Section 12 Examination by Dr. Shawn Kutnik

On February 12, 2020, Petitioner underwent a Section 12 examination by Dr. Shawn Kutnik of Archway Orthopedics and Hand Surgery at Respondent's request. Dr. Kutnik took a description of Petitioner's job duties and medical history, including Petitioner's carpal tunnel release surgeries. Petitioner also reported her 2008 shoulder surgeries, stating that her current shoulder symptoms felt different than they were in 2008. Petitioner further reported that her recent motor vehicle accident caused injury to her neck and back, and that she was off work in September through November 2018.

Following an examination and review of medical records, Dr. Kutnik opined that Petitioner's carpal tunnel syndrome was causally related to her work duties, but that her bilateral shoulder pain was not causally connected to her job. Although Dr. Kutnik noted that Petitioner's description of her job was consistent with repetitive and often heavier use regarding the carpal tunnel syndrome, he opined that Petitioner's work did not involve repetitive overhead use regarding her shoulders. Dr. Kutnik also relied generally upon Petitioner's prior shoulder surgery and September 2018 automobile accident, which he opined was a more forceful episode than any of Petitioner's work duties. He further opined that Petitioner had reached MMI regarding both conditions and no work restrictions were required.

F. Deposition Testimony by Dr. George Paletta, Jr.

On July 1, 2020, Dr. Paletta, a board-certified orthopedic surgeon with a specialty in sports medicine, provided deposition testimony by speakerphone on behalf of Petitioner. Dr. Paletta generally testified consistently with his treatment records. The doctor opined that Petitioner's job duties did not cause, but likely aggravated or increased the symptoms of the rotator cuff tears in Petitioner's shoulders. He explained that Petitioner had described having to do more forceful, heavier work with her arms that included overhead work, which correlated with the onset or worsening of Petitioner's shoulder symptoms. He also stated that overhead work is exactly the sort of activity that could increase symptoms related to the condition. Dr. Paletta specifically identified the cutting and removal of the plastic covering on the pallets, pulling the pouches, and pulling the pallet jack as examples of activities that seemed to cause or worsen Petitioner's symptoms, particularly given that Petitioner reported working 12-hour shifts three or four days in a row.

Dr. Paletta testified that he was familiar with Dr. Kutik's practice, which focuses primarily from the elbow to the fingers, while approximately half of Dr. Paletta's practice addresses shoulder conditions. Dr. Paletta explained that his difference of opinion with Dr. Kutik was based on their different understandings of Petitioner's overhead work at the time her condition worsened.

Dr. Paletta also opined that Petitioner had not reached MMI and that the treatment she had received was reasonable and causally connected to the injuries Petitioner sustained while working for Respondent. He further opined that the need for the surgeries he recommended was

related to Petitioner's work activities and that Petitioner's condition would not improve further without those procedures.

On cross-examination, Dr. Paletta agreed that Petitioner had some age-related degeneration at the AC joint, which could possibly relate to her rotator cuff tears. He acknowledged that some individuals can have rotator cuff tears which are asymptomatic. He testified that when he noted that Petitioner performed "a lot" of repetitive activity, he estimated that spending 25 to 30% on activities such as overhead activity could contribute to rotator cuff pathology. He explained that his opinions were based upon: (1) Petitioner describing activities that could cause or contribute to an underlying rotator cuff condition; (2) Petitioner correlating the onset or worsening of symptoms to those activities; and (3) Petitioner performing those activities frequently enough to be considered a contributing factor.

G. Additional Information

Petitioner testified that she worked overtime three or four times per week. She characterized the overtime work as mandatory and that she would sign up for overtime shifts in order to get the shifts she wanted. She testified that employees had to sign up for at least one overtime shift per week. She estimated that she worked an average of at least 12 to 16 hours of overtime per week.

Mr. Robertson also testified regarding Respondent's overtime policy. He gave the example of an employee going on vacation, in which case the employees from the prior and subsequent shifts would work extra half-shifts to cover for the vacationing employee. He stated that Respondent also would first ask for volunteers to work overtime, next using the seniority list to rotate from the most junior to the most senior in turns. Mr. Robertson also explained that if an employee refused to work a requested overtime shift, they would lose a "point" per shift. He added that a termination level would occur where an employee accumulated nine points within a year.

The parties stipulated that if overtime earnings were determined to be required, Petitioner's average weekly wage would be $1,147.39, whereas if the overtime earnings were not required, Petitioner's average weekly wage would be $937.70.

Regarding her current condition of ill-being, Petitioner testified that she was still having problems with her shoulders. She stated that Dr. Paletta was recommending surgery for her, beginning with the left shoulder. Petitioner also stated that she wanted the surgery to alleviate her pain and that she wanted to heal. Petitioner further testified that she was retired, though she assisted her mother with cooking and cleaning.

II. CONCLUSIONS OF LAW

A. Accident/Causal Connection

At trial, the parties stipulated to the issues of accident and causal connection for Petitioner's bilateral carpal tunnel condition but disputed accident and causal connection for the

bilateral shoulder conditions. The Arbitrator concluded that Petitioner did not sustain a repetitive trauma injury to her right and left shoulders arising out of and in the course of her employment by Respondent and that Petitioner's current condition of ill-being in regard to her right and left shoulders was not related to her job activities.

In a repetitive trauma case, issues of accident and causation are intertwined. See, *e.g.*, *Boettcher v. Spectrum Property Group and First Merit Venture*, Ill. Workers' Comp. Comm'n, 97 WC 44539, 99 IIC 0961. Nevertheless, the employee must allege and prove a single, definable accident. *White v. Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 911 (2007). The date of an accidental injury in a repetitive-trauma compensation case is the date on which the injury "manifests itself." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). The phrase "manifests itself" signifies "the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person." *Id.*

It is well-settled that there is no legal requirement that a certain percentage of the workday be spent on repetitive tasks in order to establish the repetitive nature of a claimant's job duties. *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). The Commission is allowed to consider evidence, or the lack thereof, of the repetitive "manner and method" of a claimant's job duties. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 211 (1993) (citing *Perkins Product Co. v. Industrial Comm'n*, 379 Ill. 115, 120, 39 N.E.2d 372 (1942)). The question of whether a claimant's work activities are sufficiently repetitive in nature as to establish a compensable accident under a repetitive trauma theory will be decided based upon the particular facts in each case, and it is the province of the Commission to resolve this factual issue. *Williams*, 244 Ill. App. 3d at 210-11. However, an employee alleging an injury based upon repetitive trauma must "show [] that the injury is work-related and not the result of a normal degenerative aging process." *Peoria County Bellwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Glister Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001).

In repetitive trauma cases, the employee generally relies on medical testimony to establish a causal connection between the work performed and employee's disability. *Williams v. Industrial Comm'n*, 244 Ill. App. 3d 204, 209 (1993). However, evidence of the "chain of events" may supplement expert medical testimony in a repetitive trauma case. See, *e.g.*, *Darling v. Industrial Comm'n*, 176 Ill. App. 3d 186, 192 (1988). It is the function of the Commission to resolve conflicts in medical evidence; greater weight may be attached to the opinion of treating physicians. See *ARA Services, Inc. v. Industrial Comm'n*, 226 Ill. App. 3d 225, 232 (1992) (citing *International Vermiculite Co. v. Industrial Comm'n*, 77 Ill. 2d 1, 4 (1979)).

Petitioner argues that the majority of her work may not have been overhead, but required a significant amount of reaching which weakened her shoulders and made the amount of overhead work she did much more significant. Petitioner also argues that her job duties, which required her hands to be above her head and her elbow at shoulder level, were intensive and still required her to rotate her shoulder. Petitioner further observes that she had returned to full duty without restrictions after her prior 2008 shoulder surgeries. Respondent replies that its video recordings and Petitioner's demonstration at the hearing established that her duties were

performed with arms straight out, not overhead. Respondent thus argues that Petitioner's activities did not reach Dr. Paletta's 25 to 30% threshold for overhead activity contributing to a repetitive injury.

The Commission considers the primary question to be the extent of Petitioner's repetitive overhead activity. Dr. Paletta opined that Petitioner's job duties did not cause, but likely aggravated or increased the symptoms of the rotator cuff tears in Petitioner's shoulders. He explained that Petitioner had described having to do more forceful, heavier work with her arms that included overhead work, which correlated with the onset or worsening of Petitioner's shoulder symptoms. Dr. Paletta also testified that the activities described by Petitioner were the first factor in his analysis. Petitioner told Dr. Paletta that she used her arms repetitively at about chest height, particularly having her arms out and using them overhead. She also estimated that she would perform these duties more than six hours out of an eight-hour shift. Petitioner's job description was generally consistent with Respondent's own job description, which indicated that Petitioner could be expected to reach with her hands above shoulder level between three and six hours per shift, which would translate to between 50 and 75% of an 8-hour shift, far in excess of the 25 to 30% range Dr. Paletta established in his deposition. Dr. Paletta also identified the cutting and removal of the plastic covering on the pallets, pulling the pouches, and pulling the pallet jack as examples of the activities supporting his opinions.

Petitioner's description of her job duties to Dr. Paletta finds additional support elsewhere in the record. Petitioner testified that while operating the machines, her arms would be outstretched straight out from her shoulders a couple of feet in front of her and demonstrated the motion at the hearing. Mr. Robertson, Respondent's occupational risk management coordinator, similarly testified that the filler machine is approximately 62" tall and that the lanes would be at approximately eye level for a person 5'3" tall. Petitioner stated that she would lift boxes of pouches for Capri Sun product from overhead to waist level, describing a full pallet as 6' tall, while she was 5'3" tall. Mr. Robertson also agreed that a pallet could be up to 6' tall. Respondent's video recordings do not depict Petitioner performing her job duties, but the second recording, which may come closest to depicting an employee of Petitioner's height, supports Petitioner's description and demonstration of repetitively using her arms outstretched at chest level and reaching upward to fill the lanes of the filler machine.

Respondent relied on the report by Dr. Kutnik, whose opinions rely on a definition of "overhead" which apparently differs from Dr. Paletta's definition. However, Dr. Paletta testified that he was familiar with Dr. Kutik's practice, which focuses primarily from the elbow to the fingers, while approximately half of Dr. Paletta's practice addresses shoulder conditions. In addition, Dr. Paletta personally treated Petitioner over time, rather than conduct a single examination. The Commission concludes that Dr. Paletta has greater experience with the mechanics of Petitioner's shoulder injury.

Dr. Paletta's opinions are further supported by the chain of events. Petitioner underwent shoulder surgeries in 2008, but returned to full-duty work without restrictions and worked for Respondent in different capacities for eight or nine years before beginning to experience shoulder pain working at Respondent's Granite City plant. Petitioner was involved in a motor vehicle accident in September 2018, but the record indicates that Petitioner injured her neck and back in that incident, rather than her shoulders. Dr. Kutnik's Section 12 report contains no

explanation of how the accident would cause shoulder pain. Moreover, it is undisputed that Petitioner manifested with carpal tunnel syndrome during this same period doing the same job.

In sum, the record supports Dr. Paletta's opinion that Petitioner's repetitive job duties likely aggravated the rotator cuff tears in Petitioner's shoulders. Petitioner's bilateral shoulder conditions manifested on December 7, 2018, when Petitioner began having difficulty lifting boxes off the pallets. Petitioner testified without rebuttal that she is still having problems with her shoulders. Accordingly, given the record as a whole, the Commission concludes that Petitioner established a repetitive trauma accident manifesting on December 7, 2018 and that the current condition of her right and left shoulders is causally connected to that accident.

B. Average Weekly Wage

Given that Petitioner proved an accident and causal connection, the Commission considers the issue of Petitioner's average weekly wage. The parties stipulated during the hearing that if overtime earnings were determined to be required, Petitioner's average weekly wage would be $1,147.39, whereas if the overtime earnings were not required, Petitioner's average weekly wage would be $937.70.

A claimant has the burden of proving by a preponderance of the evidence the elements of her claim, including her average weekly wage. *Zanger v. Industrial Comm'n*, 306 Ill. App. 3d 887, 890 (1999). Section 10 of the Act explicitly states that overtime is to be excluded in calculating the average weekly wage. 820 ILCS 305/10 (West 2018). However, "those hours which an employee works in excess of his regular weekly hours of employment are not considered overtime within the meaning of section 10 and are to be included in an average-weekly-wage calculation if the excess number of hours worked is consistent *or* if the employee is required to work the excess hours as a condition of his employment." (Emphasis in original.) *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011) (citing *Airborne Express Inc. v. Illinois Workers' Compensation Comm'n*, 372 Ill. App. 3d 549, 554 (2007)).

In this case, Petitioner's testimony that she consistently worked overtime is generally supported by the wage statement submitted by Respondent, though the number of hours varied from pay period to pay period. As of November 29, 2018, Petitioner's year-to-date earnings included $28,622.45 in hourly pay, $8,102.99 in overtime, and $374.40 in double time. Moreover, Mr. Roberson testified that if an employee refused to work a requested overtime shift, they would lose a "point" per shift and could face termination of employment where an employee accumulated nine points within a year. Given this record, the Commission finds that the overtime in this case was mandatory. See, *e.g.*, *Spencer v. State of Illinois, Jack Mabley Center*, Ill. Workers' Comp. Comm'n, Nos. 09 WC 24242, 09 WC 24243, 12 IWCC 756 (Jul. 13, 2012). Accordingly, the Commission concludes that Petitioner's average weekly wage is $1,147.39.

C. Medical Expenses

The Commission next considers Petitioner's claim for medical expenses. An employer is required to pay for all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of an accidental injury sustained by an employee and arising out of and in the course of his employment. 820 ILCS 305/8(a) (West 2018). An employer's liability under this section of the Act is continuous so long as the medical services are required to relieve the injured employee from the effects of the injury. *Second Judicial District Elmhurst Memorial Hospital v. Industrial Comm'n*, 323 Ill. App. 3d 758, 764 (2001) (citing *Efengee Electrical Supply Co. v. Industrial Comm'n*, 36 Ill. 2d 450, 453 (1967)). However, the employee is only entitled to recover for those medical expenses which are reasonable and causally related to his industrial accident. *Second Judicial District Elmhurst Memorial Hospital*, 323 Ill. App. 3d at 764 (citing *Zarley v. Industrial Comm'n*, 84 Ill. 2d 380, 389 (1981)). 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 Comm'n*, 409 Ill. App. 3d 258, 267 (2011). If the employer fails to introduce any evidence to suggest that services rendered were not necessary or that the charges were not reasonable, an award to a claimant who presents some evidence in support of the award will be upheld. *Max Shepard, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 893, 903 (2004); *Ingalls Memorial Hospital v. Industrial Comm'n*, 241 Ill. App. 3d 710, 718 (1993).

In this case, Dr. Paletta opined that the treatment Petitioner had received was reasonable and causally connected to the injuries Petitioner sustained while working for Respondent. Respondent raises no argument to the contrary in its response brief. Accordingly, the Commission orders Respondent to pay the medical expenses listed in Petitioner's Exhibit 1. In addition, the Request for Hearing and the transcript of hearing indicates that Respondent claims a credit under section 8(j) of the Act and that Petitioner agreed that Respondent was entitled to that credit. Respondent is therefore awarded a credit pursuant to section 8(j) of the Act for sums already paid through its group medical plan.

D. Prospective Care

Petitioner further requests that the Commission order that Respondent authorize and pay for the reasonable and necessary care recommended by Dr. Paletta, including but not limited to surgery. As noted above, section 8(a) of the Act requires employers to pay all necessary medical, surgical, and hospital services that are reasonably required to cure or relieve the effects of the work-related injury. 820 ILCS 305/8(a) (West 2018). Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of section 8(a) even if they have not been performed or paid for. *Bennett Auto Rebuilders, Inc. v. Industrial Comm'n*, 306 Ill. App. 3d 650, 655-56 (1999).

In this case, Dr. Paletta opined that the need for the surgeries he recommended was related to Petitioner's work activities and that Petitioner's condition would not improve further without those procedures. Respondent raises no argument to the contrary in its response brief. Accordingly, the Commission orders that the Respondent authorize and pay for the reasonable and necessary care recommended by Dr. Paletta, including but not limited to bilateral shoulder repair surgery and a reverse total shoulder arthroplasty in the event that the right rotator cuff is deemed irreparable.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accident on December 7, 2018 that arose out of and occurred in the course of employment.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner's current condition of ill-being is causally related to the accident.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay reasonable and necessary medical services of $68,852.59 to the medical providers as stated in Petitioner's Exhibit 1, pursuant to §§8(a) and 8.2 of the Act. Respondent shall be given a credit for group 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 §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that the Respondent shall authorize and pay for the reasonable and necessary care recommended by Dr. Paletta, including but not limited to bilateral shoulder repair surgery and a reverse total shoulder arthroplasty in the event that the right rotator cuff is deemed irreparable.

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

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

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

Bond for the removal of this cause to the Circuit Court is hereby fixed at the sum of $70,000.00. 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.

November 9, 2021

d: 11/04/21
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC038459
Case Name	JOHNSON,CAROLYN v. KRAFT HEINZ
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	8
Decision Issued By	William, R. Gallagher, Arbitrator

Petitioner Attorney	Thomas Rich
Respondent Attorney	James Clune

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)

Carolyn Johnson
Employee/Petitioner

Case # 18 WC 38459

v.

Consolidated cases: n/a

Kraft Heinz
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on February 25, 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 7, 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, in part, causally related to the accident.

In the year preceding the injury, Petitioner earned $n/a; the average weekly wage was $n/a.

On the date of accident, Petitioner was 55 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 $0.00 paid under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusion of Law attached hereto, claim for compensation in regard to Petitioner's bilateral shoulder condition is denied.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

APRIL 21, 2021

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged that as a result of "Repetitive Duties", Petitioner sustained an accidental injuries arising out of and in the course of her employment by Respondent. The Application alleged date of accident (manifestation) of December 7, 2018, and Petitioner sustained injuries to her "Bilateral Shoulders/Arms/Wrists/Hands/Body as a Whole" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and prospective medical treatment in regard to her bilateral shoulder condition. Respondent disputed liability on the basis of accident and causal relationship in regard to Petitioner's bilateral shoulder condition; however, Respondent stipulated Petitioner's bilateral carpal tunnel syndrome condition was causally related to her work activities (Arbitrator's Exhibit 1).

There was also a dispute in regard to the computation of Petitioner's average weekly wage. The basis of the dispute was whether Petitioner was required to work overtime for Respondent. Petitioner and Respondent stipulated that if overtime was required, Petitioner was entitled to an average weekly wage of $1,147.39, and if overtime was not required, Petitioner was entitled to an average weekly wage of $937.70 (Arbitrator's Exhibit 1).

Petitioner testified she worked for Respondent for approximately 29 years. Petitioner initially worked for Respondent as a CT operator. From 2005 to 2011, Petitioner worked as a spice mixer. From 2011 to 2019, Petitioner worked as a line operator. Petitioner retired in 2019. Petitioner worked at Respondent's plant in Champaign, Illinois, until she obtained a job at Respondent's plant in Granite City, Illinois, in 2017, where she continued to work until she retired.

While employed as a line operator, Petitioner worked performing various tasks involved in the production of drink packets at Capri Sun. At trial, Petitioner testified that she had to repetitively lift/move boxes which weighed 19 pounds, pallets which weighed 60 pounds and packages of packets/straws which weighed 30/35 pounds. Petitioner said that when she lifted/moved the boxes and packages, this would require the overhead use of both of her arms on a regular basis. Petitioner testified she was 5'3" tall and the boxes were stacked approximately 6’ high.

Petitioner prepared a job description which was received into evidence at trial (Petitioner's Exhibit 11). The job description was consistent with Petitioner's testimony regarding her job duties, in particular, the overhead use of her arms. Petitioner testified she would perform tasks which required the overhead use of her arms six hours out of an eight hour shift.

As aforestated, there was no dispute Petitioner's work activities caused her bilateral carpal tunnel syndrome. The primary issue was whether Petitioner's work activities, primarily the overhead use of her arms, caused or aggravated her bilateral shoulder condition.

Petitioner operated a machine which filled the drink packets with Capri Sun. When the packets were filled, they were placed into "lanes" at the end of the machine where the Petitioner was at. The lanes were approximately 62” above the floor. As aforestated, Petitioner testified she was 5'3" (63”) tall.

Accordingly, the lanes for the packets were at the approximate eye level of Petitioner. Further, loading the boxes and moving pallets were tasks usually performed at waist level. Petitioner testified she processed two pallets of boxes and two pallets of packets per shift.

Petitioner estimated the boxes at the top level of a pallet to be approximately 6' from the floor. Petitioner would grasp the box had either the middle or bottom. Petitioner would extend her arms outward at about shoulder level and then her elbows to reach boxes at the top of the pallet. Petitioner would also cut and pull plastic wrapping material which was around the boxes. Again, this would require Petitioner to extend her arms and then her elbows.

Robbie Robertson, Respondent's ORM Coordinator (occupational risk management person) testified at trial. He obtained a video of other employees performing some of the job duties of a line operator. The video was received into evidence at trial. The video was played during the trial and none of the employees observed in the video performed tasks which required overhead use of their arms (Respondent's Exhibit 1). Robertson testified that only the boxes on the pallet would be 6' high and when Petitioner reached for the box at the top, she would extend her arms and bend her elbows, but her elbows would not be above her head.

Petitioner testified she previously underwent right and left shoulder surgery sometime in 2008. The medical records regarding the prior surgeries were not tendered into evidence at trial; however, Petitioner said she fully recovered from the prior surgeries and was able to return to work without restrictions.

Petitioner stated she began having hand/arm symptoms in July, 2017, and shoulder symptoms in October, 2017. Over time, the pain got progressively worse and Petitioner said the fingers of both of her hands became numb.

Petitioner was initially seen at Gateway Regional Occupational Health on December 10, 2018, where she was seen by Dr. Christopher Knapp. At that time, Petitioner's primary complaints were bilateral hand/arm pain with numbness in the hands/elbows. Dr. Knapp ordered nerve conduction studies (Petitioner's Exhibit 3).

Petitioner was subsequently evaluated by Dr. George Paletta, an orthopedic surgeon, on January 16, 2019. At that time, Petitioner complained of bilateral shoulder/arm pain and she advised Dr. Paletta she used both arms repetitively above chest height. Petitioner also informed Dr. Paletta of her prior shoulder surgeries. Dr. Paletta opined Petitioner had carpal tunnel syndrome and bilateral shoulder pain, but no evidence of significant rotator cuff pathology. He ordered EMG/nerve conduction studies (Petitioner's Exhibit 4).

The EMG/nerve conduction studies were performed on January 24, 2019. They were positive for bilateral carpal tunnel syndrome (Petitioner's Exhibit 5).

Dr. Paletta saw Petitioner on January 24, 2019, and he reviewed the EMG/nerve conduction studies. He again opined Petitioner had bilateral carpal tunnel syndrome. Dr. Paletta

subsequently performed left and right carpal tunnel release surgeries on March 12, 2019, and April 30, 2019, respectively (Petitioner's Exhibit 4).

In regard to Petitioner's shoulder complaints, Dr. Paletta evaluated Petitioner on July 23, 2019. At that time, Dr. Paletta referred Petitioner to Dr. Wendell Becton, for an additional workup (Petitioner's Exhibit 4).

Dr. Becton initially saw Petitioner on January 30, 2020. At that time, Petitioner informed him of her prior shoulder surgeries as well as Dr. Paletta having performed carpal tunnel surgeries on both hands. Petitioner complained of bilateral shoulder pain. Dr. Becton ordered physical therapy and medication (Petitioner's Exhibit 8).

At the direction of Respondent, Petitioner was examined by Dr. Shawn Kutnik, an orthopedic surgeon, on February 12, 2020. In connection with his examination of Petitioner, Dr. Kutnik reviewed medical records and a job description provided to him by Respondent. Dr. Kutnik opined Petitioner's bilateral carpal tunnel syndrome condition was related to her work activities; however, he opined Petitioner's bilateral shoulder condition was not related to her work activities. The basis of Dr. Kutnik's opinion in regard to Petitioner's shoulder condition was the lack of any repetitive overhead use of her arms and the fact Petitioner had undergone prior surgeries to both shoulders (Respondent's Exhibit 3).

Dr. Becton continued to treat Petitioner for her bilateral shoulder condition. When he saw her on March 5, 2020, he administered injections into both shoulders. He also ordered further physical therapy, but noted that if Petitioner's pain symptoms continued, he would order MRI scans of both shoulders (Petitioner's Exhibit 8).

Dr. Becton again saw Petitioner on April 2, 2020. At that time, Petitioner continued to complain of bilateral shoulder pain. Dr. Becton ordered MRI scans of both shoulders (Petitioner's Exhibit 8).

MRIs of both shoulders were performed on April 16, 2020. According to the radiologist, the MRI of Petitioner's left shoulder revealed tears of the supraspinatus tendon and the long head of the biceps and the MRI of Petitioner's right shoulder revealed tears of the supraspinatus and infraspinatus tendons as well as the long head of the biceps (Petitioner's Exhibit 9).

Dr. Paletta again saw Petitioner on May 5, 2020, and he reviewed the MRI scans. His interpretation of the MRIs was consistent with that of the radiologist. Dr. Paletta recommended surgical repair of both shoulders, but noted the right shoulder might not be repairable. If the right shoulder rotator cuff surgery was not successful, Dr. Paletta opined Petitioner might need a reverse total shoulder arthroplasty (Petitioner's Exhibit 4).

Dr. Paletta was deposed on July 1, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Paletta's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to causality of Petitioner's bilateral shoulder condition, Dr. Paletta testified that Petitioner performing forceful and heavier work which included overhead work could cause an increase in Petitioner's shoulder symptoms.

He testified he did not cause the rotator cuff tears and the size of the tear on the right was probably an old injury, either a recurrent tear from the prior surgery or a progression of the underlying pathology (Petitioner's Exhibit 12; pp 20-21).

On cross-examination, Dr. Paletta was questioned about the statement in his report that Petitioner performed a "lot" of overhead activity and how he defined that term. In response, Dr. Paletta testified that if Petitioner spent at least 25% to 30% of her time performing overhead activities, this would contribute to her rotator cuff pathology. If Petitioner spent 10% of her time performing such overhead activities, he would not consider this to be a "lot" of overhead activity (Petitioner's Exhibit 12; p 34).

In regard to the average weekly wage issue, Petitioner testified overtime was required by Respondent for at least one shift per week. However, Petitioner did state that she was able to pick the shift in which she would work overtime.

Robbie Robertson also testified regarding overtime and stated that when overtime was offered, the employees had the option to "volunteer" for same. However, if an insufficient number of employees volunteered for overtime, it would be assigned to the employee with the lowest seniority. If that employee refused to work overtime, he/she would be "wrote up" and assign one-half point which could be detrimental to their employment.

Conclusion of Law

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

The Arbitrator concludes Petitioner did not sustain a repetitive trauma injury to her right and left shoulders arising out of and in the course of her employment by Respondent and Petitioner's current condition of ill-being in regard to her right and left shoulders is not related to her employment activities.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a repetitive trauma injury to her right and left hands which caused carpal tunnel syndrome in both hands which required surgery.

Petitioner testified she performed job tasks which required overhead use of both of her arms for approximately six hours out of an eight hour shift.

Petitioner testified she was 5'3" (63”) tall and the boxes on the pallets were stacked approximately 6’ high. When removing the box from the top of the stack, Petitioner would extend her arms outward and flex her elbows, but did not grasp the box at the top, but rather at the middle or bottom. This would mean Petitioner's arms would be extended upward, but not overhead. Further, the height of the stacked boxes would be reduced as Petitioner removed them.

The "lanes" in which Petitioner worked were approximately 62” above the floor. Because Petitioner was 63” tall, they would be at approximately eye level.

Loading boxes and moving pallets were tasks usually performed at waist level.

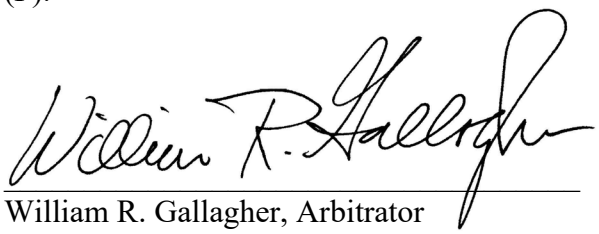
Respondent tendered into evidence a video of other employees performing some of Petitioner's job duties and there was no overhead use of the arms observed.

Petitioner previously underwent surgery on both shoulders in 2008. Petitioner's primary treating physician, Dr. Paletta, testified Petitioner's work activities did not cause the pathology in her shoulders, but the overhead work could cause an increase in her symptoms.

On cross-examination, Dr. Paletta testified that for the repetitive overhead activity to be sufficient to contribute to her shoulder condition, it would have to be at least 25% to 30% of her working activities.

The evidence presented does not support that Petitioner was required to spend 25% to 30% of her time at work performing repetitive overhead activities.

In regard to disputed issues (G), (J) and (K) the Arbitrator makes no conclusions of law as these issues are rendered moot because of the Arbitrator's conclusion of law in disputed issues (C) and (F).



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC027699
Case Name	FRANKLIN, DEANGELO v. EAST ST LOUIS POLICE DEPARTMENT
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0558
Number of Pages of Decision	31
Decision Issued By	Carolyn Doherty, Commissioner

Petitioner Attorney	Aaron Chappell
Respondent Attorney	James Keefe, Jr.

DATE FILED: 11/9/2021

/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: Prospective care, TTD	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEANGELO FRANKLIN,

Petitioner,

vs. NO: 18 WC 27699

EAST ST. LOUIS POLICE DEPARTMENT,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission modifies the Decision of the Arbitrator with respect to the award of prospective care, temporary total disability, and the hold harmless language in the order.

Regarding the issue of prospective care, the Commission observes that the Arbitrator correctly found no causal connection between the August 6, 2018 accident and the current condition of Petitioner's his right hip, based on the testimony of Petitioner's treating physicians, Dr. Matthew Bradley and Dr. David King. After diagnostic workup, Dr. Bradley opined that Petitioner experienced a non-symptomatic labral tear which was not causally connected to Petitioner's work injury. Dr. King additionally opined that if a patient had reported zero relief from the injection recommended by Dr. Bradley, it would indicate that the labrum was not symptomatic. Rather, Dr. Bradley indicated that Petitioner likely sustained a hip sprain or strain resulting from the accident which the Commission finds causally related through the last date of diagnostic treatment with Dr. Bradley, but not thereafter. Based on this evidence, the

Commission observes that the Arbitrator correctly awarded Petitioner's necessary and reasonable medical expenses related to the right hip incurred for diagnostic purposes. However, the Arbitrator's award of prospective care includes "further diagnosis and treatment of the temporary exacerbation of [Petitioner's] right hip condition[,] as recommended by Dr. Bradley until the Petitioner reaches maximum medical improvement." Given that the Arbitrator found that Petitioner failed to establish a causal connection between the accident and the right hip labral tear, and the Commission's finding that the right hip strain was causally related through the last date of diagnostic treatment with Dr. Bradley, an award of prospective care for any condition of the right hip is not warranted. Accordingly, the Commission modifies the Decision of the Arbitrator to deny the claim for prospective care regarding Petitioner's right hip.

Regarding the issue of temporary total disability, the Arbitrator concluded that Petitioner had refused light duty work offered by Respondent. However, Petitioner was being held off work by Dr. George Paletta during this period for his causally related back and knee conditions. Accordingly, the Commission modifies the Decision of the Arbitrator to award to Petitioner temporary total disability benefits for the period from August 7, 2018 through the hearing date of February 9, 2021.

Lastly, the Commission observes that the Decision of the Arbitrator ordered that Respondent shall indemnify and hold Petitioner harmless from claims made by any health providers or third parties arising from the expenses for which it claims credit. However, no credit under Section 8(j) was claimed. Therefore, the Commission strikes the "hold harmless" language from 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 the Decision of the Arbitrator dated April 6, 2021 is modified as stated herein. The Commission otherwise affirms and adopts the Decision of the Arbitrator.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall authorize and pay for lumbar spine surgery, physical therapy, and any testing and follow-up treatment as recommended by Dr. Matthew Gornet, as well as follow-up care of the left knee with Dr. George Paletta. Prospective care of the right hip is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $933.33 per week for the period August 7, 2018 through February 9, 2021, a period of 131 and 1/7ths weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent is awarded a credit of $4,002.00 for temporary total disability benefits already paid.

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

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

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent 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.

November 9, 2021

o: 11/04/21
CMD/kcb
045

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

/s/ *Marc Parker*
Marc Parker

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0558
NOTICE OF 19(b) ARBITRATOR DECISION

FRANKLIN, DEANGELO Case# **18WC027699**

Employee/Petitioner

ESTL POLICE DEPT

Employer/Respondent

On 4/6/2021, 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 0.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0299 KEEFE & DePAULI PC
JIM KEEFE
#2 EXECUTIVE DR
FAIRVIEW HTS, IL 62208

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DEANGELO FRANKLIN
Employee/Petitioner

v.

ESTL POLICE DEPT.
Employer/Respondent

Case # **18** WC **27699**

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 **February 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 6, 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 **$72,800.00**; the average weekly wage was **$1,400.00**.

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 **$4,002.00** for TTD, $- for TPD, $- for maintenance, and $- for other benefits, for a total credit of **$4,002.00**.

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

ORDER

Respondent shall pay the reasonable and necessary medical services from Memorial Hospital East, Dr. Paletta, MRI Partners of Chesterfield, Dr. Gornet, Dr. Bradley, St. Joseph's Hospital, Mid America Radiology, Dr. Blake (and Dr. Thomas Lee), Orthopedic Ambulatory Surgery Center of Chesterfield, St. Luke's Hospital, Diagnostic Imaging Associates, Metro West Anesthesia, Frontenac Surgery and Spine Care Center, SSM Health Physical Therapy, Anderson Hospital, Uptown Emergency Physicians, Premier Anesthesia, CT Partners of Chesterfield, K&S Medical, Athletico, Goldsmith MediCenter Pharmacy and Walgreens (except for the July 2, 2020, prescription), as provided in § 8(a) and § 8.2 of the Act.

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

Respondent shall authorize and pay for lumbar spine surgery, physical therapy and any testing and follow-up treatment as recommended by Dr. Gornet, follow-up care for the left knee with Dr. Paletta and further diagnosis and treatment of the temporary exacerbation of his right hip condition.as recommended by Dr. Bradley until the Petitioner reaches maximum medical improvement.

Respondent shall pay Petitioner temporary total disability benefits of **$933.33**/week for **1 2/7** weeks, from August 7, 2018, through August 16, 2018, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

4/2/21
Date

ICArbDec19(b)

APR 6 - 2021

PROCEDURAL HISTORY

This matter proceeded to trial on February 9, 2021, pursuant to Sections 19(b) and 8(a) of the Illinois Workers' Compensation Act (hereinafter "the Act"). The issues in dispute are: 1) the causal connection between the accident and the Petitioner's left knee, right hip and back conditions; 2) payment of past medical bills; 3) entitlement to prospective medical care to the Petitioner's hips and back; and 4) entitlement to TTD benefits from August 7, 2018 through January 9, 2021. The Petitioner is not pursuing a claim regarding his cervical spine, so that issue will not be addressed herein.

FINDINGS OF FACT

At the time of the accident, the Petitioner was 46 years old and employed by the Respondent as a police lieutenant. (T. 12-13) On August 6, 2018, he was pursuing a suspect on foot when he tackled the suspect and fell to the ground. (T. 17-19) He then experienced pain in his left knee, hips and back. (T. 19). This testimony was consistent with the injury and incident reports the Petitioner prepared near the time of the incident. (PX20)

Jason Boyd, a patrolman with the East St. Louis Police Department, participated in the arrest of the suspect on August 6, 2018. (T. 79-80) Patrolman Boyd said he got to the suspect first and put handcuffs on him while the suspect was resisting him. (T. 80-81) The Petitioner tackled the suspect and fell. (Id.)

The Petitioner has a complex medical history. He had prior injuries that included his low back, left knee and hips. (T. 21, 71, RX8) At arbitration, the Respondent sought to enter into evidence a Commission decision (RX1) and an Appellate Court decision (RX2) regarding prior work injuries from 2013 and 2014. The Respondent also offered into evidence printouts of other

prior worker's compensation claims (RX3). The Petitioner objected to admission of these exhibits on the basis of relevancy.

All three exhibits may be relevant to the extent that they show the Petitioner had preexisting conditions to the same body parts that are at issue in this claim. This is true of Respondent's Exhibits 1 and 2 as they relate to prior injuries to the Petitioner's hips, lower back and left knee. The relevancy of these exhibits is further limited as to how much of the details of the Petitioner's injuries contained therein compare with the Petitioner's current condition. For those purposes, Respondent's Exhibits 1 and 2 are admitted.

Respondent's Exhibit 3 contains no details as to the nature of the injuries that were the subjects of those claims that would in any way aid the Arbitrator in determining whether this most recent incident caused the Petitioner's current conditions or aggravated his preexisting conditions. Therefore, Respondent's Exhibit 3 will not be admitted.

Prior Left Knee Injuries

In August 2008, the Petitioner began seeing Dr. George Paletta, an orthopedic surgeon at The Orthopedic Center of St. Louis, in connection with his left knee. (RX2) In February 2009, an MRI arthrogram was completed that did not show evidence of an ACL tear. (Id.) In May 2009, there was a re-aggravation of the knee injury, and Dr. Paletta performed a diagnostic arthroscopy and lateral release in January 2011. (Id.) There was no reference to an ACL tear in Respondent's Exhibit 2 related to the 2008 and 2009 injuries. (Id.) Dr. Paletta released the Petitioner to full duty with no restrictions in April 2011. (Id.)

On September 3, 2013, orthopedic surgeon Dr. Nathan Mall, who then practiced at Regeneration Orthopedics, saw the Petitioner for left knee pain and instability stemming from an incident that occurred on March 23, 2013. (RX8) He diagnosed the Petitioner with an ACL tear

and recommended ACL reconstruction. (Id.) Dr. Mall refers to the ACL tear as partial in his report of February 4, 2014, and in a deposition taken ten days later. (Id., RX2) Respondent's Exhibit 2 also refers to a Section 12 examination by Dr. Christopher Rothrock, an orthopedic surgeon, that noted no difference in the Petitioner's ACL from 2009 to 2013. (RX2) Dr. Paletta testified by deposition on May 24, 2019, that the Petitioner reported to him that after seeing Dr. Mall, he was able to get back to work full duty and was doing well until the incident in 2018. (PX26)

Prior Low Back Injuries

In August 2008, the Petitioner began seeing Dr. Matthew Gornet, an orthopedic surgeon at The Orthopedic Center of St. Louis, for low back pain. (RX2) Dr. Gornet performed anterior decompression and lumbar fusion at L5-S1 and released the Petitioner to work full duty with no restrictions in May 2012. (Id.) In September 2012, Dr. Gornet checked new MRIs and found some mild changes at L3-4 and L-4-5. (Id.) The new MRI showed some narrowing posteriorly and mild facet arthropathy but no herniation, stenosis or root impingement at L3-4. (RX10) At L4-5, there was a minimal disc bulge but no herniation or stenosis. (Id.)

The Petitioner returned to Dr. Gornet in May 2013 complaining of low back pain. (RX9) An MRI and a CT discogram showed an annular tear and some disc pathology at L3-4. (Id.) MRIs taken in June 2013 showed a broad-based herniation increased at L3-4 since the September 2012 study and measured up to 4.5 mm. (RX10) There was persistent ventral dural displacement, mild central canal stenosis and moderate bilateral foraminal stenosis that had worsened since the prior exam. (Id.) As of May 2015, Dr. Gornet did not believe the injuries warranted surgery. (RX9)

Prior Hip Injuries

In September 2009, the Petitioner underwent surgery for left hip femoroacetabular impingement, left hip labral tear and bursitis by Dr. David King, an orthopedic surgeon currently practicing at Motion Orthopaedics. (RX12) The Petitioner affirmed that a couple of years after that surgery he still had sharp pain in his hip but also stated that over the years, his hip did well. (T. 58-59)

The Petitioner saw Dr. Mall in July 2014 for left hip pain. (RX8) Dr. Mall diagnosed a left-sided trochanteric contusion with resultant bursitis and hip abductor weakness. (Id.) In October 2014, the Petitioner complained of new right hip pain and was diagnosed with bursitis there too. (Id.)

In November 2014, the Petitioner went to Dr. James Walentynowicz, an orthopedic surgeon at Bone & Joint Specialists of Chesterfield, for right hip pain. (RX11) He conducted an MRI arthrogram in February 2015, and diagnosed a possible labral tear in the Petitioner's right hip. (RX8, RX10)

The Petitioner also saw Dr. King in April 2015 for his right hip. (PX25) Dr. King diagnosed the labral tear as well. (Id.) After a steroid injection and a diagnostic arthrogram on the right hip in March 2015, Dr. Mall characterized the labral tear as "extensive." (RX8) From April 2015 through April 2016, Dr. Mall was recommending labral repair on the right hip. (Id.) In July 2015, he added left hip labral repair and psoas release and a possible psoas release to the right hip. (Id.)

Although the Petitioner did not undergo the recommended surgeries to his left knee and hips, he testified that he went on with his normal life and was doing fine prior to the incident on August 6, 2018, and was working full duty with no restrictions for 28 months. (T. 22-23, 50) However, he admitted that for five months during that time, he was either off work or under

restrictions for an unrelated elbow injury. (T. 52-54) He said he worked four full shifts between the time of his release for the elbow injury and the incident on August 6, 2018. (T. 55) But he also stated that during 28 months, he was not receiving any treatment for his low back, hip or knee. (T. 75)

Current Injuries

Immediately after the incident on August 6, 2018, the Petitioner went to the emergency room at Memorial Hospital complaining of low back, left knee and left hip pain. (T. 24, PX3) He underwent a physical examination and X-rays of his left hip, lumbar spine and left knee. (PX3) He was diagnosed with a knee sprain and referred for follow-up with a family medicine physician. (Id.)

The Petitioner then saw Dr. Paletta, on August 13, 2018, having left knee pain and instability, bilateral hip pain and back complaints. (Id.) Dr. Paletta ordered MRI scans on the knee and right hip and an MRI arthrogram on the left hip that were performed by MRI Partners of Chesterfield on August 23, 2018. (Id., PX5) He opined that the knee and hip conditions were causally related to the recent work injury, noting that the Petitioner made a full recovery after prior surgeries. (Id.) He also recommended that the Petitioner remain off work and referred him to Dr. Gornet to address his back complaints. (Id.)

The scans that Dr. Paletta ordered revealed an ACL tear in the left knee, a labral tear in the right hip and a normal left hip. (Id.) Dr. Paletta recommended ACL reconstruction on the knee. (Id.) After consultations with Dr. Gornet and Dr. Matthew Bradley, an orthopedic surgeon at Midwest Bone and Joint to whom Dr. Paletta referred the Petitioner for his hip issues, it was determined that Dr. Paletta would operate on the Petitioner's left knee first. (Id.)

On April 9, 2019, Dr. Paletta performed an exam under anesthesia, diagnostic arthroscopy and the ACL reconstruction. (PX26) He testified that the objective tests performed in the exam demonstrated instability or increased laxity of the knee. (Id.) The diagnostic arthroscopy revealed a complete tear of the ACL, which Dr. Paletta repaired. (Id.)

On May 4, 2019, the Petitioner went to the emergency room at Anderson Hospital complaining of left knee pain and instability. (PX14) He was instructed to wear his knee brace, use crutches, ice and elevate his knee and follow up with Dr. Paletta. (Id.) The Petitioner underwent physical therapy on his knee at SSM Health from April 12, 2019, through June 14, 2019, at which time he was discharged until after he had hip surgery. (PX13)

After follow-up visits, Dr. Paletta allowed the Petitioner to return to work on May 31, 2019, with restrictions of no squatting, kneeling, ladders, climbing or pushing, pulling or lifting more than 25 pounds. (PX5)

On August 9, 2019, the Petitioner was experiencing swelling in his left knee, and Dr. Paletta performed an aspiration and an injection. (Id.) The swelling continued, and Dr. Paletta ordered another MRI. (Id.) Dr. Paletta performed another aspiration and an injection on October 23, 2019. (Id.) At Dr. Paletta's instruction, the Petitioner underwent another MRI arthrogram on his left knee on December 2, 2019. (PX5) Part of the ACL graft Dr. Paletta performed was disrupted, and a cyclops lesion was present. (PX4) On January 28, 2020, Dr. Paletta performed an arthroscopy with debridement of the lesion. (PX12) The Petitioner returned to SSM Health for more physical therapy on his knee from February 17, 2020, through October 2, 2020. (PX13)

Dr. Paletta referred the Petitioner to Athletico Physical Therapy for Biodex testing, which occurred on June 8, 2020, July 27, 2020, and September 30, 2020. (PX19)

In his testimony at a deposition on May 22, 2019, Dr. Paletta stated that his opinion that the mechanism of injury (the Petitioner tackling a suspect) would be appropriate for causing an ACL tear. (PX26) However, he added that the Petitioner had no prior history of ACL issues. (Id.) Dr. Paletta stated that he did not review the MRI studies conducted in 2013. (Id.) He testified that although he knew Dr. Mall had treated the Petitioner for his knee approximately 18 months before the August 6, 2018, accident, the Petitioner did not tell him that Dr. Mall previously diagnosed him with an ACL tear and recommended surgery. (Id.) The Petitioner did not dispute that he failed to tell Dr. Paletta of Dr. Mall's surgery recommendation at his initial visit to Dr. Paletta on August 13, 2018. (T-42-43) He initially disputed that he failed to mention this at his second visit with Dr. Paletta but then said he did not disagree with Respondent's counsel's representation that the Petitioner did not make this disclosure to Dr. Paletta. (T. 44-45)

Dr. Ryan Pitts, an orthopedic surgeon at Orthopedic Associates, performed a Section 12 examination on the Petitioner on February 22, 2019. (RX4, Deposition Exhibit 2) He reviewed records from Dr. Mall from 2013 through 2016 and from Dr. Paletta from August 13, 2018, through January 19, 2019. (Id.) He also reviewed both the 2013 and 2018 MRIs. (Id.) He found that the symptoms the Petitioner reported in 2018 were the same as those he reported from 2013 through 2016 and said there was no evidence to suggest the August 6, 2018, event caused or aggravated the preexisting problems to any measurably increased level. (Id.) He also stated in his report that his review of the MRI scans showed no changes from 2013 to 2018 regarding bone contusion, tear progression/increase in size or new presence of secondary ACL signs that would suggest any progression of the ACL tear. (Id.) Dr. Pitts testified consistently with his report. (RX4)

He admitted on cross-examination that a person with a partial ACL tear could be asymptomatic and that the last recorded evidence of the Petitioner experiencing any knee symptoms was April 19, 2016. (Id.)

In his deposition, Dr. Paletta disagreed with Dr. Pitts' opinions on diagnosis and causation. (PX2) He said it was clear that the Petitioner had a complete ACL tear, rather than a partial one, and that he believes it was related to the accident. (Id.) However, under cross-examination, he admitted that the Petitioner's description of the accident did not describe a typical mechanism for an accident that would cause an ACL tear. (Id.) To bolster his opinions regarding causation, Dr. Paletta pointed out that there was evidence of trauma or an obvious incident that occurred, followed by the Petitioner's report of pain and instability. (Id.) He also stated that if the Petitioner was having significant knee instability before the 2018 incident that would have made it hard for the Petitioner to function as a police officer. (Id.) Dr. Paletta characterized the Petitioner's level of knee instability "intolerable" from after the accident until Dr. Paletta performed surgery eight months later. (Id.)

Dr. Pitts performed another records review and prepared another report on July 30, 2019. (RX5, Deposition Exhibit 1) He changed his finding regarding the Petitioner's left knee to state that the ACL tear was a complete tear, rather than a partial tear. (Id.) However, he did not change his findings regarding causation, stating that he could not state with certainty when the full tear occurred. (Id.) He also reported that it was impossible for him to find beyond a reasonable degree of medical certainty that the August 6, 2018 injury was the primary or prevailing factor in any definitive exacerbation or worsening of the Petitioner's left knee condition. (Id.) However, he did state that the Petitioner's current condition would indicate a need for ACL reconstruction. (Id.) In his deposition, Dr. Pitts agreed that the procedures Dr. Paletta performed were medically

reasonable and necessary. (RX5) However, Dr. Pitts was emphatic that the August 2018 incident had "zero percent" of being a factor in the Petitioner's current condition. (Id.)

The Petitioner testified that he did not believe Dr. Pitts asked him about Dr. Mall's surgery recommendation. (T. 45) Then he testified that he was not sure of that statement but said he knew Dr. Pitts had those records (T. 57-58) But he added he did tell Dr. Pitts that he had a prior left knee injury. (T. 45-46)

The Petitioner criticized Dr. Pitts's examination in several aspects. First, he stated that Dr. Pitts did not note that when the Petitioner bent his knee for an X-ray, he yelled out in pain. (T. 32). The Petitioner said Dr. Pitts' description of the incident was inaccurate. (T. 33) The Petitioner also testified that although Dr. Pitts noted that the Petitioner's left knee was negative for swelling, Dr. Pitts did not measure both knees. (T. 34)

As to the Petitioner's lower back injury, Dr. Gornet saw the Petitioner on January 29, 2019. (PX6). He ordered an X-ray of the lumbar spine, which was unremarkable. (Id.) He opined that the incident as described by the Petitioner, "could potentially aggravate" the Petitioner's prior conditions. (Id.) Dr. Gornet noted that a CT discogram from 2015 revealed non-provocative discs at 3-4 and 4-5 with an anterior annular tear at L3-4. (Id.) Dr. Gornet prescribed an anti-inflammatory and a muscle relaxer, ordered MRIs of the spine and placed the Petitioner on light duty with a 10-pound lifting limit related to the lumbar spine. (Id., PX23) The MRI of the lumbar spine on February 2, 2019, revealed disc pathology adjacent to the existing fusion at L5-S1, herniation and facet changes at L4-5 and L3-4 and a fluid sign in the facet joint at L4-5. (PX6) Dr. Gornet testified that he believed the incident aggravated the Petitioner's underlying condition. (PX23) At that time, Dr. Gornet recommended steroid injections, medial branch blocks and facet rhizotomies. (PX6. PX23)

Dr. Helen Blake, a pain management specialist at Pain and Rehabilitation Specialists of St. Louis, performed a steroid injection at L4-5 on February 19, 2019; a steroid injection at L3-4 on March 5, 2019; medial branch blocks at L3-4 and L4-5 on March 12, 2019; and radiofrequency ablations at the L3-4 and L4-5 facet joint nerves on June 4, 2019. (PX10)

Dr. Gornet testified in September 2019 that although the injections did not provide complete relief to the Petitioner's lumbar spine complaints, he wanted to wait until after the Petitioner completed treatment on his knee and hip before pursuing further treatment on the Petitioner's lumbar spine. (PX23) Dr. Gornet noted that gait changes from the knee and hip injuries can alter and affect someone's low back. (Id.) On cross-examination, Dr. Gornet stated that testing from before and after the 2018 accident showed differences in the Petitioner's lumbar spine consisting of more of a disc protrusion and annular tear at the level above L4-5 and more fluid in the joint. (Id.)

Dr. Gornet next had a CT scan performed on November 14, 2019, and found air in the joints above the prior fusion at L5-S1, which he testified was consistent with irritation of the Petitioner's facet joints. (PX6, P24)

Dr. Blake again performed ablations to the same areas on February 11, 2020, and February 18, 2020. (PX10) She explained in her deposition testimony that ablations only provide temporary relief for six months to a year because the ablated nerves regrow. (PX21) Although Dr. Blake did not see the Petitioner after the last ablation, she stated that it would not surprise her if the Petitioner ended up requiring surgical treatment. (Id.) Dr. Blake testified that upon review of the history of the accident, she felt that within a reasonable degree of medical certainty that the type of injury the Petitioner sustained could either cause his current condition or aggravate a pre-existing back condition. (Id.) On cross-examination, Dr. Blake testified that patients who have had prior lumbar

spinal fusions develop changes and pain from the levels adjacent to where the fusions occurred. (Id.)

Following the conservative treatment, Dr. Gornet recommended a fusion at L4-5 and a disc replacement at L3-4. (PX6)

On April 18, 2019, Dr. David Robson, an orthopedic spine surgeon at Advanced Spine Institute, performed a Section 12 examination of the Petitioner. (RX6, Deposition Exhibit 2) He reviewed records from Memorial Hospital, Dr. Paletta and Dr. Gornet. (Id.) He also reviewed various imaging studies from 2010 through February 2019. (Id.) He diagnosed the Petitioner with lumbar strain and preexisting degenerative disc disease at L3-4 and L4-5, saying he felt that the Petitioner obtained a temporary exacerbation of his underlying degenerative disease. (Id.) His recommended treatment was for the Petitioner to accept his condition. (Id.) He felt that the injections recommended by Dr. Gornet were reasonable but ongoing treatment would not be necessary. (Id.)

In his deposition on December 12, 2019, Dr. Robson testified that he did not see any significant structural changes in reviewing an MRI from January 6, 2015, and one from February 2, 2019. (RX6) He did not feel that the pathology rose to the level of requiring a surgical intervention. (Id.)

During his testimony at a second deposition on September 17, 2020, Dr. Gornet reiterated his opinion that the 2018 accident aggravated the Petitioner's underlying degenerative condition, produced disc injuries at L3-4 and L4-5 and aggravated his facet joints at L4-5. (PX24) It was his hope that the fusion and disc replacement would improve the quality of the Petitioner's life and allow him to potentially function in some gainful way, although he did not believe the Petitioner could go back to work as a police officer. (Id.) On October 8, 2020, Dr. Gornet increased work

restrictions to include no repetitive bending or lifting and alternating between sitting and standing as needed. (PX6)

Dr. Robson conducted a second Section 12 examination on February 26, 2020, and reviewed additional records and a CT scan. (RX7, Deposition Exhibit) His opinions were unchanged. (Id.) Again, he agreed that Dr. Gornet's and Dr. Blake's treatment up to that time was appropriate to treat what he described as a temporary exacerbation of the Petitioner's lower spine condition. (Id.) He conceded that a treating physician with a decade of experience with a patient would be in a better position to observe the patient, assess his condition and decide what conditions are related to an incident. (Id.)

Dr. Gornet testified that he did not agree with Dr. Robson's recommendation that the Petitioner receive no further treatment for his low back. (PX23) He said that based on his treatment of the Petitioner for more than 11 years, he did not believe the Petitioner's condition had returned to baseline nor that he was at maximum medical improvement. (Id.) In his second deposition, Dr. Gornet reiterated this sentiment and disagreed with Dr. Robson's assessment that the Petitioner sustained a temporary aggravation of a preexisting condition and that the Petitioner should accept his condition. (PX24) He believed that aside from the recommended surgery, the Petitioner's only other course of treatment would be long-term pain management – specifically the use of narcotics, which he apparently was not keen on recommending. (Id.) Under cross-examination, Dr. Gornet admitted that a prior fusion can accelerate or cause increased disc degeneration to the discs adjoining the fusion but stated that he believed the changes to the Petitioner's lumbar spine that he noted on the more recent MRI were probably caused by a new injury. (Id.)

Regarding the Petitioner's most recent hip complaints, Dr. Bradley first saw the Petitioner on January 30, 2019, at which time he performed X-rays and a diagnostic ultrasound. (PX7) He also reviewed the August 23, 2018, right hip MRI and found a labral tear from the 9 to 10 o'clock positions. (Id.) In his deposition, Dr. Bradley stated that the tear was at approximately the 8 or 9 o'clock position. (PX22) He described the tear as "very, very small." (Id.) The Petitioner received a steroid injection to his right hip on February 18, 2019, at St. Joseph's Hospital Highland. (PX8) Dr. Bradley testified that the Petitioner had no significant pain relief from the injection. (PX22) Because of this, Dr. Bradley opined that the Petitioner's hip pain was very likely due to his poor gait from his knee injuries. (Id.) He recommended that the Petitioner return to Dr. Paletta for continued treatment on his knees. (Id.)

Dr. Bradley testified in his deposition on April 12, 2019, that although he did not believe the labral tear was causally related to the accident, a sprain or strain to the hip would have been causally connected and perhaps caused by the Respondent's poor gait from his knee injury. (PX22) He also recommended that after his knee treatment, the Petitioner should undergo strengthening of his hip, stabilizing muscles and gait training. (Id.) Dr. Bradley believed his treatment was necessary to rule out significant trauma from the accident. (Id.)

The Petitioner saw Dr. Bradley again on April 22, 2019. (PX7) At that time he informed Dr. Bradley that he "originally" injured his labrum in 2016 and was treated by Dr. Mall. (Id.) The Petitioner said he received an injection and was told he needed surgery. (Id.) He stated that the injection lasted four to six weeks. Dr. Bradley's notes state: "The recent injury re-aggravated his hip pain." (Id.) However, it was not clear if that statement was attributed to Dr. Bradley or the Petitioner.

On May 30, 2019, the Petitioner returned to Dr. King, who reviewed X-rays and MRI scans of the Petitioner's right hip. (PX15) Dr. King noted the Petitioner's prior left hip surgery and stated that the Petitioner informed Dr. King of the labral tear in his right hip in 2015. (Id.) Dr. King testified that the injection performed by Dr. Bradley provided several days of relief of the Petitioner's right hip pain. (PX25)

Dr. King diagnosed the Petitioner with aggravation of a right hip labral tear and aggravation of pre-existing femoroacetabular impingement with mild to moderate arthritis. (Id.) Under cross-examination, Dr. King stated that other than some mild arthritis, he did not see any significant change in the right hip labrum between 2015 and 2018. (Id.)

On June 24, 2019, Dr. King performed a right hip arthroscopic labral repair and a right hip arthroscopic osteochondroplasty at the femoral head-neck junction to remove Cam femoroacetabular impingement. (PX16) Dr. King testified that the results of the surgery were similar to the results of the prior left hip surgery – the Petitioner's condition improved, but there were some residual symptoms.

The Petitioner underwent physical therapy on his right hip at SSM Health from June 25, 2019, through November 11, 2019. (PX13) On August 22, 2019, the Petitioner returned to Dr. King complaining that his left hip was bothering him, so Dr. King took X-rays of the left hip and found heterotopic ossification with mild degenerative joint disease. (Id.) Dr. King gave the Petitioner steroid injections in his left hip on that day and again on February 3, 2020, May 15, 2020, August 21, 2020, and November 23, 2020. (Id) In his continuing treatment of the Petitioner's right hip, Dr. King gave him steroid injections on September 23, 2019, November 14, 2019, February 21, 2020, June 12, 2020, September 4, 2020, and December 9, 2020. (Id.)

In his deposition, Dr. King testified that he believed the August 6, 2018, accident "contributed to an aggravation and change of the natural history" of the Petitioner's prior right hip injury. (PX25) However, he admitted that if the Petitioner experienced "zero relief" from the injection Dr. Bradley performed, that would lead to a conclusion that the right hip labrum tear was not symptomatic. (Id.)

The Petitioner testified that he was not sure if he told Dr. King that Dr. Mall previously recommended right hip surgery for a labral tear. (T. 57) Dr. King testified that the Petitioner did not. (PX25) However, Dr. King said that would not change his opinions. (Id.)

Dr. King also agreed that the Petitioner gave differing accounts to him and the Section 12 examiner as to the results from the left hip surgery he performed in 2010 – telling Dr. King he continued to have problems with that hip while telling the examiner that he had no issues after the surgery. (Id.)

As he did regarding the Petitioner's left knee, Dr. Pitts performed a Section 12 examination on the Petitioner's right hip on February 22, 2019. (RX4, Deposition Exhibit 2) He reviewed records from Dr. Mall, Dr. Walentynowicz and Dr. Paletta in addition to the MRI of October 21, 2014, MRI arthrogram of February 19, 2015, and MRI arthrogram of August 23, 2018. (Id.) He stated in his report that the findings of the 2018 MRI arthrogram are identical to the MRI arthrogram in 2015 and that the Petitioner's current right hip condition is not causally connected, via cause or aggravation, to the August 6, 2018 accident. (Id.) He testified consistently with his report. (RX4)

Dr. Pitts performed an additional records review on July 30, 2019. (RX5, Deposition Exhibit 1) He did not materially change his findings from the earlier exam but did state that it was

conceivable that the August 2018 incident could have caused an acute "flare up" to the pre-existing labral tear. (Id.) He testified consistently with his report at the deposition on October 9, 2019.

The Petitioner testified that his left knee is still numb, swollen and painful and that his range of motion is restricted. (T. 36-37) He has pain in his groin due to his hip injury, and his back is "horrible." (T. 37) The Petitioner wants to undergo the surgery recommended by Dr. Gornet. (T. 27, 36)

Under cross examination, the Petitioner said he is able to walk down his street – six houses down and six houses back. (T. 67) He admitted that when applying for taking additional college classes in the past year, he reported that he walks in the park, takes drives to neighboring towns to sightsee and dine and completes home-improvement projects with his son. (T. 67-68) He said those statements were not true but were written by a friend. (T. 68-69)

The Petitioner contends that he attempted to return to work within the restrictions placed on him by Dr. Gornet, but then-Chief Jerry Simon informed him that he could not return to work unless he was free of restrictions, and that the city was not offering light-duty work. (T. 28, 72) The Petitioner has been using his accumulated vacation, personal and sick time. (T. 31) Under cross-examination, the Petitioner stated that when he had previous injuries, the city accommodated his restrictions. (T. 54, 74)

Former Chief Simon, who now works for the U.S. Marshalls Service, testified that he offered the Petitioner light-duty work after the August 6, 2018, accident, but the Petitioner refused, stating that he would let his attorney take care of it. (T. 87, 96)

The Respondent offered as evidence a letter dated December 21, 2018, from Monica Granberry, human resources administrator for the City of East Louis, stating that former Chief Simon had offered the Petitioner light duty on August 16, 2018, until he was released to full duty.

(RX16) She wrote that the Petitioner's worker's compensation claim was denied on September 18, 2018, and he was placed on medical leave (FMLA) on October 5, 2018. (Id.) As of December 21, 2018, the Petitioner had used 420 hours of FMLA. (Id.) She stated that once he reached 480 hours, the Petitioner's leave would expire and he "must return to work." (Id.)

The Respondent maintained that he was not offered light duty. (T. 73-74) He said that at a meeting with former Chief Simon and other city personnel after his workers' compensation claim was denied, he was not offered light-duty work but was placed on FMLA. (T. 100-101) He said he took the December 21, 2018, letter to mean that he was to return to work at full duty. (T. 101)

The Respondent also offered into evidence the Petitioner's 2017 and 2018 work calendars. (RX15) Aside from taking the sick days, personal days and vacation time that he was allotted, it appeared that he worked a normal schedule until the incident in August 2018. (Id.)

CONCLUSIONS OF LAW

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

Issue (F): Is Petitioner's current condition of ill-being, specifically his left knee, lower back and right hip injuries experienced after August 6, 2018, causally related to the accident?

An accident need not be the sole or primary cause so long as employment is a cause of a claimant's condition. *Sisbro, Inc. v. Industrial Comm'n,* 207 Ill. 2d 193, 205 (2003). An employer takes its employees as it finds them. *St. Elizabeth's Hospital v. Illinois Workers' Compensation Comm'n,* 371 ILL. App. 3d 882, 888 (2007). A claimant with a preexisting condition may recover where employment aggravates or accelerates that condition. *Caterpillar Tractor Co. v. Industrial Comm'n,* 92 Ill. 2d 30, 36 (1982).

The Petitioner did sustain injuries to his knee, lower back and hips before the accident on August 6, 2018. The question is whether the more recent incident was a cause of his current conditions or an aggravation of his prior conditions. More specifically, were there differences between Petitioner's conditions before the 2018 incident and after the incident that are connected to the incident itself?

It makes little sense that during his Section 12 examinations, the Petitioner would have denied having any prior claims, injuries or accidents. He has been around the workers' compensation block a few times and would have known that these doctors would have his full medical history. But it also makes little sense that the doctors would fabricate denials of previous injuries.

Similarly, there is the issue of whether the Petitioner informed his treating physicians of his prior injuries. After some vacillation, the Petitioner did not dispute Dr. Paletta's testimony that at his first visit, the Petitioner did not inform him of Dr. Mall's prior recommendation for surgery on an ACL tear. The Petitioner also said he did not disagree with Dr. Paletta's statement that at the Petitioner's second visit a month later, he again did not inform Dr. Paletta of Dr. Mall's prior recommendation for surgery for an ACL tear. But at the same time, he maintained that he did inform Dr. Paletta of Dr. Mall's recommendation.

The Petitioner's credibility is at issue in this case. There were several inconsistencies in the Petitioner's testimony outlined above. In observing the Petitioner's demeanor during the arbitration hearing, it is noted that he was trying very hard to make his case – to the extent that he was not answering the questions that were asked but was answering questions he wanted to be asked. Similarly, what the Petitioner told his doctors gives the appearance of more case building

and resulted in inconsistent reports to the doctors and telling them what he thought they wanted to hear.

Another issue that was made of the credibility of the Petitioner appears to be his actions in tackling a suspect who may have already been subdued by Patrolman Boyd. However, whether the Petitioner's actions were objectively or subjectively reasonable has little bearing in a worker's compensation case. The basic facts are undisputed – the Petitioner fell while tackling a suspect.

However, this claim does not rise nor fall on the Petitioner's credibility. There are more objective means to determine causation – specifically the medical evidence. The Petitioner's lack of credibility not only affects his testimony in this cause but also taints the conclusions reached by his doctors based on his statements to them. Therefore, the Arbitrator will rely on the more objective aspects of the doctors' opinions.

Regarding the Petitioner's left knee, both Dr. Paletta and Dr. Pitts agreed that the Petitioner had a complete ACL tear that was apparent in 2018. They disagreed as to whether the incident was a cause or aggravating factor for the Petitioner's condition.

Dr. Paletta's opinion has its weak point in that he relies on the Petitioner's statements to him regarding pain and knee instability he was experiencing. However, he has his interpretation of objective testing and uncontradicted medical history to back up his opinion. Dr. Paletta also had an advantage that Dr. Pitts did not – a long history of treating the Petitioner, which leads to him having a broader basis for his opinions. In addition, there was no evidence presented that from 2016 until the accident in 2018, the Petitioner was having knee problems nor that he was unable to function in his normal duties as a police officer. Dr. Pitts admitted that the Petitioner could have been asymptomatic during that time. Dr. Paletta connected the dots and found that based on all the available evidence that the August 2018 accident was at a minimum an

exacerbation of his knee condition. For all these reasons, the Arbitrator gives more weight to Dr. Paletta's opinions.

Regarding the Petitioner's lower back injuries, Dr. Gornet's testimony also deserves greater weight due to the length of time Dr. Gornet had treated the Petitioner, his familiarity with the Petitioner and his ability to make objective findings based on that continued treatment. As outlined above, Dr. Gornet noted specific changes in the Petitioner's lumbar spine from before and after the 2018 accident. Dr. Gornet tried conservative treatment several times with no success, leading him to believe that the Petitioner's only options for improvement would be the recommended surgery or narcotic intervention – the latter of which risks narcotic dependency.

The opinion testimony supporting injury and causation of the Petitioner's right hip is not as persuasive. Although Dr. King treated the Petitioner over a long period of time, he could not identify any specific differences between the conditions of the Petitioner's right hip before and after the August 2018 incident. On the other hand, Dr. Bradley's opinion that injury to the labrum in the right hip was not causally connected to the 2018 accident is well-reasoned and backed up by the objective testing. The lack of relief experienced by the Petitioner after the injection Dr. Bradley performed further backs up Dr. Bradley's opinion that the Petitioner suffered a sprain or strain to his hip that would necessitate strengthening of the hip rather than surgery.

Therefore, the Arbitrator finds that the Petitioner's current left knee condition and his low back condition are causally related to the accident of August 6, 2018. However, the Arbitrator finds that the Petitioner has failed to prove by a preponderance of the evidence that the Petitioner's right hip condition was caused or aggravated by the August 6, 2018 incident.

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

The right to be compensated for medical costs associated with work-related injuries is at the very heart of the Workers' Compensation Act. *Hagene v. Derek Polling Const.*, 388 Ill. App. 3d 380, 383, 902 N.E.2d 1269, 1273 (2009).

In light of the findings above and review of the medical records, the medical costs for the evaluation, diagnosis and treatment of the Petitioner's left knee and lower back were reasonable and necessary. In addition, Dr. Bradley's diagnosis and treatment of the Petitioner's right hip were reasonable and necessary to determine the extent of the injury.

The Arbitrator orders the Respondent to pay the medical expenses contained in Petitioner's Exhibit 11 pursuant to Section 8(a) of the Act and in accordance with medical fee schedules as they pertain to Memorial Hospital East, Dr. Paletta, MRI Partners of Chesterfield, Dr. Gornet, Dr. Bradley, St. Joseph's Hospital, Mid America Radiology, Dr. Blake (and Dr. Thomas Lee), Orthopedic Ambulatory Surgery Center of Chesterfield, St. Luke's Hospital, Diagnostic Imaging Associates, Metro West Anesthesia, Frontenac Surgery and Spine Care Center, SSM Health Physical Therapy, Anderson Hospital, Uptown Emergency Physicians, Premier Anesthesia, CT Partners of Chesterfield, K&S Medical, Athletico, Goldsmith MediCenter Pharmacy and Walgreens (except for the July 2, 2020, prescription). The Respondent shall indemnify and hold Petitioner harmless from any claims arising out of the expenses for which a third party, such as the Petitioner's health insurance carrier, claims credit.

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

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

N.E.2d. 13 (1997). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 325 Ill. App. 3d 527, 758 N.E.2d 18 (2001).

Based on the findings above, the Arbitrator finds that the Petitioner is entitled to prospective medical care, specifically lumbar spine surgery, physical therapy and any follow-up treatment as recommended by Dr. Gornet. In addition, the Petitioner is entitled to prospective medical care for his left knee as a follow-up from his surgery with Dr. Paletta and for further diagnosis and treatment of the temporary exacerbation of his right hip condition. The Respondent shall authorize and pay for such.

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

According to the Request for Hearing (AX1), the parties dispute temporary total disability benefits for the period of August 7, 2018 through January 9, 2021.

"The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force." *Interstate Scaffolding, Inc., v. Illinois Workers' Compensation Comm'n,* 236 Ill.2d 132, 146, 923 N.E.2d 266, 337 Ill.Dec. 707 (2010). "Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." *Id.* "The Act provides incentive for the injured employee to strive toward recovery and the goal of returning to gainful employment by providing that TTD benefits may be suspended or terminated if the employee refuses" medical services or fails to cooperate in good faith with rehabilitation efforts. *Id.* "Benefits may also be suspended or terminated if the employee refuses work falling within the physical restrictions prescribed by his doctor." *Id.*

Due to the Petitioner's credibility issues as described above, the Arbitrator puts more weight on the testimony of former Chief Simon, who stated that on August 16, 2018, he offered the Petitioner light duty work that was declined. There is no reason to doubt former Chief Simon's testimony, especially in light of the Petitioner admitting that he worked light duty while recovering from previous injuries. Therefore, the Petitioner is entitled to temporary total disability benefits pursuant to Section 8(b) of the Act for 1 and 2/7 weeks, from August 7, 2018, through August 16, 2018. Furthermore, the Respondent is entitled to a credit of $4,002.00 previously paid in temporary total disability payments.

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	17WC034692
Case Name	DEHEVE, DAWN v. CAPITAL HEALTHCARE
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0559
Number of Pages of Decision	22
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Ryan Meikamp
Respondent Attorney	MALLORY ZIMET

DATE FILED: 11/12/2021

/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	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Dawn Deheve,

Petitioner,

vs. No. 17 WC 34692

Capitol Healthcare,

Respondent.

DECISION AND OPINION ON REVIEW PURSUANT TO §19(B) AND §8(A)

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

Petitioner alleged on the Request for Hearing sheet that §19(k) Penalties, §19(l) Penalties, and §16 Attorney's Fees were at issue and offered her Petition for Penalties and Attorney's fees as an exhibit. The Arbitrator confirmed on the record that penalties and fees were an issue and admitted Petitioner's petition into evidence. There is no indication in the record that the Petition for Penalties and Attorney's Fees was ever withdrawn. However, the Arbitrator's decision did not address the issue.

Petitioner did not file a Petition for Review. Therefore, the Commission finds that any issue related to the Arbitrator's failure to address Petitioner's Petition for Penalties and Attorney's fees has been waived.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 21, 2021, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that the issue of §19(k) Penalties, §19(l) Penalties, and §16 Attorney's Fees has been waived.

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 $58,600.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 12, 2021

MP/mcp
o-11/4/21
068

/s/ *Marc Parker*
Marc Parker

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	17WC034692
Case Name	DEHEVE,DAWN v. CAPITAL HEALTHCARE
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	19
Decision Issued By	Dennis O'Brien, Arbitrator

Petitioner Attorney	Ryan Meikamp
Respondent Attorney	Mallory Zimet

DATE FILED: 5/21/2021

INTEREST RATE FOR THE WEEK OF MAY 18, 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)
- ☒ None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

DAWN DEHEVE
Employee/Petitioner

v.

CAPITOL HEALTHCARE
Employer/Respondent

Case # **17** WC **34692**

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 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, **October 12, 2017**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**14,245.58**; the average weekly wage was $**284.91**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **no** dependent children.

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

Respondent shall be given a credit of $**42,177.14** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**42,177.14**.

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

ORDER

Petitioner's medical conditions, right ankle sprain and complex regional pain syndrome involving the right foot, ankle, and leg, are causally related to the accident of October 12, 2017.

All of the medical bills introduced into evidence In Petitioner Exhibit 13 are related to Petitioner's right foot, ankle, and leg injury, and are reasonable and were necessary to treat or cure Petitioner's injuries suffered in this accident, with the exception of the unrelated treatments and prescription bills identified in the body of this decision, and are to be paid pursuant to the Medical Fee Schedule. Respondent is to be given credit for all payments previously made on said bills pursuant to Sections 8(a) and 8(j) of the Act.

Petitioner is entitled to prospective medical treatment as recommended by Dr. Lubenow, to wit a dorsal root ganglion stimulator trial at the L3, L4, L5 and S1 levels, and, if resulting in a 50% or greater reduction in pain, a dorsal root ganglion stimulator implantation at those same levels.

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.

_____ **MAY 21, 2021**

Signature of Arbitrator

ICArbDec19(b)

Dawn Deheve vs. Capitol Helthcare 17 WC 34692

FINDINGS OF FACT:

TESTIMONY AT ARBITRATION

Petitioner

Petitioner testified that she had been employed as a CNA tech for Respondent, having started with them in 2014. She said that on October 12, 2017 she started work at 3 o'clock and a half hour later an emergency call light went off. She moved quickly to answer it and as she came around the main desk she slipped in water and fell hard. She went all the way to the ground and her right foot twisted behind her body and she landed hard on her bottom. Her right leg and foot hurt, and with the help of a couple of co-workers she got up. She continued working and it was hard for her to put her full weight on the leg. She moved slower when taking care of residents so she went to the floor evening nurse and she was sent to the emergency room at Memorial Medical Center, where x-rays were taken.

A few days later Petitioner said she followed up with her family physician at SIU Medicine and was taken off work. She said she was on crutches and an MRI was ordered. That was when she saw the foot doctor, Dr. Idusuyi, at the Orthopedic Center of Illinois. She said at that point she had a boot on her foot and she received six to eight weeks of physical therapy at the Orthopedic Center. Petitioner said the therapy did not help, her symptoms just became worse. She underwent a CT scan and then nerve tests were conducted.

Dr. Idusuyi then sent her to Dr. Lubenow at Rush in Chicago. She saw him in April of 2019 and he talked to her about injections and a stimulator. She said the insurance company wanted the injections tried first, even though Petitioner did not think they would work for her. She underwent lumbar sympathetic blocks but said there were not helpful for her, she actually ended up with more issues. She then returned to Dr. Lubenow and he recommended a DRG stimulator. She said her doctor and even the IME doctor she saw a couple of times were leaning towards a chronic regional pain syndrome (CRPS) diagnosis.

Petitioner said her current symptoms are worse than what they have been before. She said symptoms she had now that she did not have prior to the accident were constant pain, sensitivity to touch, inability to wear many shoes as they put too much pressure on her foot, even putting socks on can trigger it, it feels like there is electricity going through her foot. She said the foot swells if she is on it too long or does not have the foot up enough. She said she could not carry out her daily activities, that just walking around the grocery store was a challenge.

Petitioner said she regularly used a cane, that one of her therapy goals had been to get away from using the cane, but that did not occur. She said she did not use a cane prior to 2017. Petitioner said she did not have any problems with her right lower extremity prior to October 12, 2017, nor had she received any medical care for her right lower extremity prior to that date.

Petitioner said Dr. Lubenow sent her to aquatherapy at St. John's Hospital and she completed that treatment, which gave her temporary relief, but it did not last very long. It was the same when it came back as it had been previously.

As of the date of arbitration Petitioner said she was willing to go forward with the DRG stimulator trial as recommended by Dr. Lubenow as she has tried everything and she felt there was a chance it would help her get back to a normal productive life.

Petitioner said her foot is often discolored if she is up on it too long or doesn't have it elevated very long. She said it was very cold to the touch and extra sensitive to touch, even the water in a shower would be too much. She said she had none of these problems prior to her injury.

On cross-examination Petitioner could not remember the date when she last saw Dr. Lubenow, but that she had not seen him since the pandemic started in March of 2020. She said she did not have any appointments scheduled with him . When asked if she was taking any medication Petitioner said she was using Lidocaine patches which had been prescribed by Dr. Lubenow. She said she takes Ibuprofen from time to time to help with inflammation.

Petitioner agreed that Respondent had continued to pay her medical bills up to the point of arbitration, but she wasn't certain if all bills had been paid, she did not know what had been covered.

Petitioner said she had not worked anywhere since the date of this accident, nor had she applied for Social Security disability. She said she was never on Medicare, which is for the elderly, but had Medicaid health insurance

On re-direct examination Petitioner said her symptoms had not gotten any better since seeing Dr. Lubenow, and neither Dr. Lubenow nor any other doctor had released her to return to work. She said at the time of her injury she had been working without any restrictions from a doctor and had been able to perform her duties. She said she had never had any prior problems with her right lower leg.

MEDICAL EVIDENCE

Petitioner was treated at the emergency room of Memorial Medical Center on October 12, 2017. X-Rays were taken of her left big toe, her right foot and her right knee and all were interpreted as being negative. She was discharged with a diagnosis of knee pain and foot pain and was to see her primary care physician. PX 3

On October 19, 2017 Petitioner was seen by Nurse Practitioner (NP) Lindsey Wright. Examination at that time did not reveal any swelling or discoloration of the foot, but Petitioner said she had pain even with light weight being placed on the foot, and said she was unable to even have a shoe on due to the pain. Petitioner returned to see Physicians Assistant (PA) Becky Jo Hanna on October 26, 2017. She had tried to go back to work the previous Tuesday, she told them, but said the pain had been horrendous. She said the pain was getting worse, not better, it was over the dorsum of the right foot and was going up her leg. She said it hurt to put even light pressure on the foot. Petitioners saw PA Hannah again on November 8, 2017 again complaining that her whole foot hurt and that she had a pins and needles feeling into her ankle. She described his pain as being 8/10. Physical examination showed mild swelling over the dorsum of the right foot and found her to be extremely tender to any touch, even light touch. PX 4

An MRI of the right ankle was performed on November 15, 2017 and revealed tears of the anterior talofibular and calcaneofibular ligaments as well as mild posterior tenosynovitis. PX 3

On December 27, 2017 Petitioner was seen by Dr. Idusuyi. His physical examination showed mild swelling of the dorsal medial aspect of the ankle, moderate to severe pain with palpation anywhere on the foot, and the remainder of his examination was objectively normal. After giving her a local anesthetic he tested her ankle ligaments and found them to be stable. His assessment was that of chronic right ankle strain, paresthesias dorsal foot, and global right ankle, etiology unknown. He felt her symptoms were out of proportion to the physical findings but ordered a CT scan and asked her to wean off her Bledsoe boot into an aircast . He also told her to begin weight bearing as tolerated, using a cane and he prescribed physical therapy. On that date he injected her ankle with painkiller and steroid. PX 5 p.2-4

Petitioner received physical therapy from Midwest Rehab from January 4, 2018 through February 8, 2018. They, too, found Petitioner to be very sensitive to all touch of the right foot, with pain with all motions. PX 5

Petitioner was again seen by Dr. Idusuyi on February 14, 2018. She had undergone six weeks of physical therapy but had not improved at all. She was still experiencing extreme pain and swelling in her right ankle. The CT scan he had ordered had not been performed as it had not been approved by the insurance carrier. Dr. Idusuyi's physical examination showed Petitioner to have global tenderness and he found the entire foot

appeared to be cold compared to the left foot. He also saw that she had color changes which he felt were worrisome for early reflex sympathetic dystrophy. He noted she had pain to light touch. His assessment on that date was paresthesia of the right leg as well as neuropathic right foot pain, rule out reflex sympathetic dystrophy. He again ordered a CT scan as well as an EMG. He referred her to Dr. Watson to rule out reflex sympathetic dystrophy. PX 5 p.7

Respondent had Petitioner attend an IME with Dr. Brian Mulshine on April 5, 2018. He noted that her complaints at that time were that over time her pain had gotten worse rather than better, that she was having difficulty ambulating, often using a cane and sometimes even crutches, and that at times it hurt so much she could not get out of bed. She said she was having pain in the foot and ankle all of the time. She said her foot felt cold and often turned purple. The anterior ankle and the dorsum of her midfoot were the most painful areas. She noted she had not had prior problems with this foot. During his physical examination of Petitioner he found that she was using an aircast and ambulating with a limp and had mild diffuse swelling through the right foot and ankle. He noted some purplish discoloration of the right foot, with mottling. He said it was difficult to examine her as she was tender to even very light touch. His diagnosis for Petitioner was that she was six months post apparent right lateral ankle sprain and probable complex regional pain syndrome of the right foot and ankle secondary to the right ankle sprain. He did note that there was objective evidence of the ankle sprain both of the emergency room and in the MRI which demonstrated tears of two ligaments. He said that the objective evidence of CRPS was the continued swelling in the right foot and ankle, the purplish discoloration of the skin, the feeling of coldness to palpation of the right foot and a hypersensitivity to palpation of the right foot. He stated, "I believe that her right ankle sprain was a direct result of her slip and fall at work on October 12, 2017. Her subsequent development of chronic regional pain syndrome was secondary to her initial injury and, therefore, would be regarded as caused by this work-related injury." RX 1

On April 16, 2018, Dr. Trudeau performed an EMG/NCV upon Petitioner. During the physical examination portion of his examination he noted soft tissue fullness or swelling diffusely over the dorsal surface and digits of her right foot when compared to the left. He saw a reddish discoloration and mottling over the dorsal surface of the right foot. He felt she had weakness of the right great toe flexors and extensors and hypoesthesia over both the dorsal and plantar surfaces of the right foot. His EMG was normal but the NCV showed right superficial peroneal neuropathy, moderately severe and right sural neuropathy, moderately severe. PX 8

A June 14, 2018 CT scan of the right foot was interpreted as negative other than for showing mild tissue swelling. PX 5 p.26,27

Dr. Watson saw Petitioner on June 27, 2018. His physical examination showed hyperesthesia's throughout the right foot . He said she would not allow him to really palpate the foot very much at all. He felt there was possibly mild swelling of the right foot compared to the left but he did not see any discoloration of the right foot on that date. He noted that the EMG and NCV have been totally normal he said, "patient has symptoms consistent with CRPS and I would recommend consultation with either Dr. Bender or an anesthesiologist to consider a lumbar sympathetic block." PX 5 p.29

When Dr. Idusuyi saw Petitioner on July 3, 2018 his physical examination remained essentially the same as on February 14, 2018. His assessment on that date was CRPS type 1 of the right leg and reflex sympathetic dystrophy of the right leg. He referred petition to Dr. Bender for a possible lumbar sympathetic block. PX 5 p.11,12

Petitioner was seen by Dr. Frank Bender on July 24, 2018. At that time she rated her pain as 8/10 and constant. His physical examination showed right foot hyperpathia, right foot being cooler than the left, positive straight leg raising test on the left but negative on the right, the right foot having mottling on the right dorsum, and he noted that simple light touch caused her excruciating pain in the right foot. He, too, felt she had CRPS type 1 of the right leg as well as left lumbar radiculopathy. He felt she was compensating so much that she had caused her left leg to be in pain as well as the right foot. He said she might have irritated the nerve in her back causing this acute onset of left lumbar radicular pain. He ordered an MRI of the lumbar spine and felt that she should have a sympathetic block for treatment of the CRPS. PX 5 p.16

On October 5, 2018 Dr. Tabatha Wells gave Petitioner a referral to see Dr. Lubenow. PX 6

On January 23, 2019 Dr. Richard Noren performed an IME of Petitioner for Respondent. His physical examination revealed her to have allodynia and hyperalgesia in the right foot, increased vibratory sensation in the right foot, motor strength diminished to varying degrees throughout the right leg, her foot having turned red during sensory testing, swelling in the dorsal surface of the right foot which was intermittent and seemed to increase at times when she was complaining of pain, and a dorsal right foot which was 2.4 degrees Fahrenheit cooler than the left. His diagnosis was CRPS and he said she had objective findings during the examination as well as subjective complaints for that diagnosis. He said his examination met the Budapest criteria for the CRPS diagnosis. He wrote, "Her current findings as related to her right foot would be related to the injury of October 12, 2017." He felt further care including physical therapy and pain management were warranted. Dep. Exh. 2 to RX 2

Petitioner saw Dr. Timothy Lubenow for the first time on April 18, 2019. He noted that Petitioner had two conflicting EMGs. One had shown a peripheral nerve injury while the other was normal. His physical examination on that date showed allodynia on the whole right foot, both dorsal and planter surfaces, diminished

vibratory sensation in the right foot, temperature asymmetry between sides of 2.8 degrees Fahrenheit, right cooler than left, mild dusky discoloration of the right foot, trace edema of the right foot and decreased range of motion of the right foot. He diagnosed complex regional pain syndrome type one of the right leg, also. He prescribed medication and recommended lumbar sympathetic blocks. He stated that if she did not sufficiently improve after that treatment a dorsal root ganglion stimulator (DRG) might be considered. He ordered a psychological evaluation by Dr. Merriman. PX 9 p.3,4

Dr. Merriman performed her psychological evaluation, including an MMPI-2-RF on April 18, 2019. She found Petitioner suitable for a DRG stimulator. PX 9

Dr. Lubenow had a series of six lumbarthoracic sympathetic blocks performed between May 10, 2019 and August 23, 2019. Dr. Lubenow noted during his June 27, 2019 office visit with Petitioner that after the third injection he felt Petitioner had noticed a 10% - 20% relief in overall symptoms but said that while she had a good reaction to the second injection she was not as good following the third. He said most of her symptoms had not changed and that she had gotten no benefit from a medication he had prescribed for her. He said her physical examination on that date included allodynia to gauze, hyperalgesia , hyperpathia and sudomotor/ edema. He assessed her to have myofascial pain syndrome as well as CRPS. He ordered physical therapy for desensitizing and ultrasound massage of her lower back. He discussed DRG stimulation with her at that time. PX 9 p.10

Petitioner attended aquatherapy at St. John's Hospital from August 5, 2019 through October 30, 2019. The discharge summary for that therapy notes that Petitioner's symptoms actually got worse during the time they treated her. They noted that her pain and hypersensitivity had progressed all the way up the right leg toward the right hip and the groin. Their physical examination showed palpation caused extreme hypersensitivity and pain to light touch for the right foot, ankle and lower leg. They said she would jump with light palpation. Their assessment was that she had demonstrated a decline in many objective measures since initiating physical therapy. Her range of motion, strength and pain had not improved and in some areas had worsened during that period of time. They felt she was significantly limited by pain and hypersensitivity in the entire right leg, hip and back. Most of their goals have not been met and further physical therapy was not recommended. PX 7 p.25

Dr. Lubenow saw petitioner on September 11, 2019 and noted that she had not gotten a response from her last injection and continued to have significant right lower extremity pain which was constant every day. By that time she was reporting her pain to be a 10/10. He noted it was also starting to radiate from her left foot up her left thigh. He felt she was barely able to walk due to the pain at that point. His physical examination findings really had not changed although she did have decreased range of motion of her right foot. He continued

to diagnose her with CRPS and myofascial pain syndrome. He noted, "She continues to meet the Budapest criteria for CRPS type 1 of RLE. She has failed to improve with PT and injections. She now requires a trial of DRG stimulation. Assuming she has 50% of (sic) greater relief, a permanent implant would be recommended. Given her pain topography, she will require L3, L4, L5 and S1 lead implant." PX 9 p.15,16

Dr. Noren performed his second IME of Petitioner on October 24, 2019. His physical exam was essentially the same as his first, though he noted the right dorsal foot was now 4.4 degrees Fahrenheit cooler than the left, a greater difference in temperature. His diagnosis did not change and his objective findings were the same, except on this occasion he did not see a color change in the right foot. He did not believe that the six lumbarthoracic sympathetic block injections were necessary, that three would have sufficed and would have even been preferable. He still felt Petitioner's problems were work related. He wrote, "DRG stimulation has been shown to be effective along with spinal cord stimulation in reducing patient's perceived symptoms. Unfortunately, spinal cord stimulation has not resulted in any physiologic improvement or functional improvement." He noted that unless Petitioner obtained functional improvement or reduction in subjective pain with a dorsal ganglion stimulator trial, she was likely at maximum medical improvement. Dep Exh. 5 go RX 2

Dr. Moshe Lewis performed a utilization review for Respondent on July 28, 2020. While Dr. Lewis certified a spinal cord stimulator, a dorsal root ganglion stimulator was not certified. Dr. Lewis did note that the DRG stimulator was FDA approved and cited a trial (the ACCURATE trial) which found it to be effective, but criticized the trial as only being a 12 month trial. Dr. Lewis noted that Petitioner met all of the criteria for a stimulator, including the Budapest criteria and a psychological evaluation, but still denied the treatment. RX 3

DEPOSITION TESTIMONY OF DR. TIMOTHY LUBENOW

Dr. Lubenow testified on behalf of Petitioner. His examination and test findings were consistent with the summary above. Dr. Lubenow is a board-certified anesthesiologist with a subspecialty board in pain management. He first saw Petitioner on April 18, 2019. After his examinations and conservative treatment he performed 6 lumbar thoracic sympathetic block injections upon Petitioner. After she did not improve with those blocks he recommended a trial of DRG stimulation and stated that if she had 50% or more pain relief, his recommendation would be a permanent implant of the stimulator. He noted that the trial is to confirm if it would be helpful and is less invasive than a permanent implant. Petitioner has already passed the psychological evaluation to move forward with a trial stimulator according to Dr. Lubenow. He noted that his

recommendation has not changed since the time he first made it through the date of his deposition. PX 11 p.7,16,17

Dr. Lubenow also stated that Petitioner's CRPS is causally related to her accident of October 12, 2017. He noted that all of the treatment rendered thus far had been reasonable and necessary. PX 11 p.17,18

On cross-examination Dr. Lubenow testified that his records indicated that Petitioner's referral was from Strong Law Office. He noted he had treated between 1,000 and 2,000 CRPS patients. He said that DRG had been on the market since 2016. He also treats patients with persistent back pain, lumbar spinal stenosis or disc herniations of lumbar and cervical spine, as well as headache conditions, cancer pain and other non-CRPS nerve conditions. About half of his patients have CRPS, and about 35% of his overall patients have work injuries, but not all of those have CRPS. PX 11 p.18,21,22

Dr. Lubenow testified that "Generally speaking, 86% of patients who have DRG stimulation, who have CRPS, will experience 50% or greater pain relief." He said the purpose of the psychological evaluation was to identify the presence of any premorbid psychopathology that might mitigate the potential for full functional recovery, such as severe anxiety or depression. The psychologist is instructed to identify any potential issues of substance abuse that may not be readily apparent from the medical evaluation. the full six page psychological evaluation would not have been provided to the attorneys unless the subpoena request was sent to Dr. Merriman directly because there are separate rules that psychologists have for releasing psychological evaluations. Both Petitioner and Respondent counsel stated on the record that they did not have copies of the full evaluation report. Dr. Lubenow stated that he did have the full evaluation report, and that there was nothing in it that contraindicated Petitioner undergoing the DRG. He did quote this section of the evaluation report into the record: "Recommendations and treatment plan: Number one, based on this assessment, Ms. Deheve appears to be a food candidate for spinal cord stimulation. If this is recommended, no additional psychological services are indicated." PX 11 p.23,27-29

Dr. Lubenow said that Petitioner wanted the DRG procedure. He said while he had not seen her since September 11, 2019, she had called and said her attorney was trying to get the procedure approved. He said he was recommending four levels undergo the procedure, L3, L4, L5, and S1. He said L4, L5, and S1 cover the foot and ankle, but that the condition was starting to come up the leg and was encroaching on the L3 level. PX 11 p.31,32

Dr. Lubenow said the trial period was usually five to ten days, at which point the temporary electrodes would be removed. The permanent implantation would take place one to two weeks after the temporary electrodes had been removed. The patient would be seen two weeks post implantation, which time the

stimulator would be reprogrammed if necessary. The patient would receive six weeks of physical therapy starting one to two weeks after the implantation, and 12 weeks post-op would be seen and would be anticipated to be at MMI, at which point a functional capacity evaluation would be done to delineate long term activity restrictions. PX 11 p.32,33

On re-direct examination Dr. Lubenow explained that his preference for DRG over traditional spinal stimulation was due to studies that showed 55% of traditional stimulation patients got 50% or better pain relief, while 86% of DGR stimulator patients got that amount of relief. PX 11 p.374

DEPOSITION TESTIMONY OF DR. RICHARD NOREN

Dr. Noren testified on behalf of Respondent. His examination and test findings were consistent with the summary above. Dr. Noren is a board-certified anesthesiologist with a subspecialty board in pain management. Dr. Noren said his first IME of Petitioner was on January 23, 2019. After examining her he concluded she met the Budapest criteria of complex regional pain disorder, which was drawn up at a conference about 15 years earlier to attempt to create a diagnostic criteria to more accurately diagnose CRPS. CRPS is a constellation of symptoms, usually in the extremities, associated with pain, burning pain, hot/cold sensation, and discomfort to touch. There are often color changes, measurable temperature changes, severe swelling, but the main symptom is usually pain with no other diagnostic explanation. RX 2 p.6,7,12,13

He explained several of the phrases used in describing the symptoms, such as allodynia, pain to a nonpainful stimulus, for example merely touching a person causing pain, and hyperalgesia, increased pain to a painful stimulus, extreme pain experienced by a person when touched with a slightly sharp object, like a toothpick. RX 2 p.13

Dr. Noren stated that Petitioner's CRPS diagnosis was causally related to the October 12, 2017 accident. He also said that all past treatment of Petitioner had been reasonable and that she needed additional treatment. RX 2 p.14

Dr. Noren performed a second IME of Petitioner on October 24, 2019. He said the pain drawing Petitioner filled out this time showed pain in not only the right foot but in the whole right leg to the groin and hip. Dr. Noren said his physical examination showed Petitioner continued to have allodynia and hyperalgesia, but he said it was not present in the thigh and hip. He said there were no color changes at this examination. He said his previously voiced opinions had not changed due to the second examination. RX 2 p.16,17,20

Dr. Noren said Petitioner's pain symptoms had worsened with her six lumbar sympathetic plexus blocks, but that was also the period that she stopped taking Lyrica. He said these types of procedures had gone out of favor as they were an older treatment technique. He said that dorsal root ganglion stimulation was a type of spinal cord stimulation which was more selective, meant to block signal pain from reaching the spinal cord and the brain. RX 2 p.21-23

He felt the stimulator should only be performed at the L5 and S1 levels, for the foot and ankle, not the L3 and L4 levels for the thigh and hip, as he did not believe she had CRPS above the knee. RX 2 p.24

Dr. Noren said, "The use of DRG stimulation like spinal cord stimulation is indicated in the current pain management protocols. It is often a treatment of last resort often used to treat patients with complex regional pain syndrome who haven't responded to medication or conservative treatment like therapy." He said that within pain management protocols the placement of this stimulator would be what a lot of pain management physicians might do, with the expectation that it will provide no long-term benefit. He did note that a study showed that patients subjectively reported that they had less pain. RX 2 p.25,26,29,30

Dr. Noren refused to say he disagreed with DRG stimulators in general, saying that "if we're going to try a DRG, it would make most sense to try it in the most severe two symptoms, and if she had significant improvement but continued to have symptoms higher in her leg, then he can always go back and try at the other levels." RX 2 p.31,32

On cross-examination Dr. Noren agreed that in his report he wrote, "a trial of DRG or spinal cord stimulation may be indicated upon current protocols." He testified that he still agreed that a trial would be reasonable, and, "if she was my patient, I would at least offer her the option and explain that long term it probably won't make a huge difference, but it's worth a try." RX 2 p.35

ARBITATOR'S CREDIBILITY ASSESSMENT

Petitioner's testimony at arbitration was consistent with the medical records in regard to history of accident, history of complaints and physical findings. She did not appear to be exaggerating her complaints. The Arbitrator finds that Petitioner was a credible witness.

Dr. Lubenow's testimony was consistent with his medical records and he did not appear to be making any attempt to expand on his previously stated opinions or evade questions put to him on cross-examination. His physical examination findings were consistent with those of the other physicians who had examined or treated Petitioner. The Arbitrator finds that Dr. Lubenow was a credible witness.

Dr. Noren's testimony was consistent with his report and he made no attempt to evade questions put to him on cross-examination. He appeared to be inconsistent with his own answers, however, appearing to be critical of DRG stimulation while at the same time noting that the use of it for Petitioner met the criteria for its use and his noting that if Petitioner were his patient he would offer her the option of DRG, though telling her it probably would not make a huge difference. Despite his inconsistencies, he did not appear to have a bias for or against any party, just against the test itself. The Arbitrator finds Dr. Noren to be a credible, if not terribly persuasive, witness.

CONCLUSIONS OF LAW:

In support of the Arbitrator's decision relating to whether Petitioner's current conditions of ill-being, right ankle sprain and complex regional pain syndrome involving the right foot, ankle, and leg, are causally related to the accident of October 12, 2017, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

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

The medical records from Memorial Medical Center, NP Wright, PA Hanna and Dr. Idusuyi on the day of the accident and the weeks and months immediately after the accident evidence consistent complaints in regard to the right foot and ankle and an early onset of symptoms compatible with CRPS. An MRI of November 15, 2017 revealed tears of the anterior talofibular and calcaneofibular ligaments in the right ankle as well as mild posterior tenosynovitis. Petitioner's failure to improve following six weeks of physical therapy was also consistent with the CRPS diagnosis. Respondent's first examining physician, Dr. Mulshine, felt Petitioner had an ankle sprain and probable complex regional pain syndrome of the right foot and ankle secondary to the right ankle sprain. He stated in his report that "her right ankle sprain was a direct result of her slip and fall at work on October 12, 2017. Her subsequent development of chronic regional pain syndrome was secondary to her initial injury and, therefore, would be regarded as caused by this work-related injury." Dr. Watson found Petitioner's EMG/NCV to be normal, but felt her symptoms were consistent with CRPS. Dr. Idusuyi also diagnosed CRPS type 1 and reflex sympathetic dystrophy when he saw her on July 3, 2018. Dr. Noren, Respondent's second IME physician, diagnosed CRPS on January 23, 2019 and said she met the Budapest criteria for that diagnosis, and, "Her current findings are related to her right foot would be related to the injury

of October 12, 2017." Dr. Lubenow testified that Petitioner's CRPS is related to her accident of October 12, 2017.

The Arbitrator finds that Petitioner's medical conditions, right ankle sprain and complex regional pain syndrome involving the right foot, ankle, and leg are causally related to the accident of October 12, 2017. This finding is based upon the findings and opinions of Dr. Idusuy, Dr. Mulshine, Dr. Noren and Dr. Lubenow.

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 October 12, 2017, the Arbitrator makes the following findings:

The findings of fact, above, are incorporated herein.

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

The findings in regard to causal connection, above, are incorporated herein.

Nearly all of the medical bills introduced can be traced to medical treatment included in the medical evidence summary, above. The Arbitrator finds that the medical bills included in Petitioner Exhibit #13 are reasonable, were necessary for the treatment and cure of Petitioner causally connected injuries and are to be paid pursuant to the Medical Fee schedule, except for the following bills for which there is no medical evidence introduced to support said bills:

1. The bill for medical services rendered on November 15, 2017 by Memorial Medical Center (PX 13 p.7,8) which is for an MRI of the cervical spine, as no medical evidence was introduced in support of treatment for that date and Petitioner's cervical spine is not one of the areas of her body which has been found to be causally connected.
2. The bill for medical services rendered on March 16, 2018 by Memorial Medical Center (PX 13 p.49) which is for an ultrasound of veins, as no medical evidence was introduced in support of treatment for that date and Petitioner's circulatory system is not one of the areas of her body which has been found to be causally connected.
3. The bill for medical services rendered on May 14, 2018 by Memorial Medical Center (PX 13 p.52) which is for an ultra-doppler study of veins, as no medical evidence was introduced in support of treatment for that date and Petitioner's circulatory system is not one of the areas of her body which has been found to be causally connected.

4. Because of no medical records to support causal connection, all of the prescription bills in the Walgreens bill are not awarded with the exceptions of the November 17, 2017 prescription of PA Hanna, the December 1, 2017 prescription of Dr. Lopp, the December 27, 2017, January 11, 2018, January 31, 2018, February 23, 2018, March 25, 2018, April 24, 2018, May 24, 2018 and June 21, 2018, July 3, 2018, and October 16, 2018 prescriptions of Dr. Idusuyi, the January 17, 2019, October 11, 2018, November 29, 2018, and December 19, 2018 prescriptions of Dr. Roxboough, the December 19, 2018 prescription of Dr. Wells, and the May 17, 2019 prescription of Dr. Lubenow, which are found to be causally connected, reasonable and necessary and which are to be paid pursuant to the Medical Fee Schedule.

The Arbitrator finds that all of the bills introduced into evidence are related to Petitioner's right foot, ankle, and leg injury, are reasonable and were necessitated to treat or cure Petitioner's injuries suffered in this accident with the exception of the unrelated treatments and prescription bills identified above. This finding is based upon the medical records introduced into evidence and the testimony of Petitioner, Dr. Noren and Dr. Lubenow.

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 causal connection and medical, above, are incorporated herein.

Dr. Lubenow testified that with the failure of conservative treatment, physical therapy, medication and lumbar thoracic sympathetic blocks, he recommended a trial of DRG stimulation with permanent implantation if Petitioner had 50% or more pain relief from the temporary stimulation. He noted Petitioner had already passed the psychological examination required to perform this procedure. Dr. Lubenow is a board-certified anesthesiologist with a subspecialty board certification in pain management. He testified that he has treated between 1,000 and 2,000 CRPS patients. He said DRG stimulators had been found to have greater incidence of 50% or greater pain relief in patients, 86%, compared to standard spinal stimulators, where only 55% of the patients got that degree of relief. He recommended four levels be treated, L3, L4, L5 and S1, as Petitioner's problem was progressing up the right leg and was now affecting the right groin and hip.

Dr. Noren's opinions seemed to support performing the DRG trial and implant, if successful, but on a more limited basis that Dr. Lubenow was suggesting. He agreed that the DRG stimulator was a type of stimulator which was more selective and was meant to block signal pain from reaching the spinal cord and the brain, but felt it should only be done at the L5 and S1 levels as Petitioner, as he, while acknowledging Petitioner having symptoms and complaints above the knee, did not believe she had CRPS above the knee. He said DRG stimulation was indicated in the current pain management protocols, "often as a treatment of last resort often used to treat patients with complex regional pain syndrome who haven't responded to medication or conservative treatment like therapy." He did not believe it would result in functional (work) improvement, or physiologic (physical examination findings) improvement. While acknowledging that it might reduce Petitioner's perceived pain, he did not seem to place much value to whether it reduced her pain, a value Dr. Lubenow cited repeatedly. Dr. Noren went on to note that "if she was my patient, I would at least offer her the option and explain that long term it probably won't make a huge difference, but it's worth a try." He went on to say that if the DRG stimulation did not reduce Petitioner's pain sufficiently then she would be considered at maximum improvement, thus indicating that this was a case where it was a treatment of last resort and that Petitioner was a CRPS patient who had not responded to medication or conservative treatment.

Dr. Moshe Lewis performed a utilization review for Respondent on July 28, 2020. While Dr. Lewis certified a spinal cord stimulator, a dorsal root ganglion stimulator was not certified. Dr. Lewis did note that the DRG stimulator was FDA approved and cited a trial (the ACCURATE trial) which found it to be effective, but criticized the trial as only being a 12 month trial. Dr. Lewis noted that Petitioner met all of the criteria for a stimulator, including the Budapest criteria and a psychological evaluation, but still denied the treatment. Dr. Lewis's credentials in regard to pain management are largely unknown. At the end of his utilization review report he noted he was licensed in seven states and instead of listing his board certification(s), noting in what field(s) he might be board certified in, he stated, "I attest to having a scope of licensure or certification that typically manages the medical condition, procedure, treatment, or issue under review, and that I have current, relevant experience and/or knowledge to render a determination for the case under review." Certainly that does not indicate he is board certified in pain management or that he treats CRPS patients or performs either spinal stimulator or DRG trials or implantations. The Arbitrator gives lesser weight to the opinions of Dr. Lewis. While there was no appeal of the utilization review and a rebuttable presumption therefore exists that the treatment was not reasonable and necessary, **the Arbitrator finds that the presumption was rebutted by the opinions of Dr. Noren and Dr. Lubenow that Petitioner met the criteria for a DRG trial and, if receiving 50% or more reduction in pain, for a DRG implantation. The Arbitrator gives greater weight to the**

opinions of Dr. Noren than those of Dr. Lewis, based in part on Dr. Noren's being board-certified in pain management, and the Arbitrator gives greater weight to the opinions of Dr. Lubenow than those of Dr. Noren or Dr. Lewis, based in part on his board-certification in pain management and because of his stated experience in treating between 1,000 and 2,000 CRPS patients. The Arbitrator also finds that the reduction in perceived pain is a major justification for performing the DRG trial/implantation.

The Arbitrator finds that Petitioner is entitled to prospective medical treatment as recommended by Dr. Lubenow, to wit a DRG stimulator trial at the L3, L4, L5 and S1 levels, and, if resulting in a 50% or greater reduction in pain, a DRG stimulator implantation at those same levels. This finding is based upon the medical records of Dr. Lubenow, the opinions of Dr. Noren in regard to this basically being a treatment of last resort Petitioner, and the opinions of Dr. Lubenow.

The Arbitrator further finds that based upon the above findings Petitioner has not reached maximum medical improvement.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC023398
Case Name	VELAZQUEZ, MARIA v. KIMPTON HOTEL ALLEGRO
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0560
Number of Pages of Decision	24
Decision Issued By	Kathryn Doerries, Commissioner

Petitioner Attorney	Al Koritsaris
Respondent Attorney	Natalie Bagley

DATE FILED: 11/10/2021

/s/Kathryn Doerries, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MARIA VELAZQUEZ,

Petitioner,

vs. NO: 19 WC 23398

KIMPTON HOTEL ALLEGRO,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2020 is hereby affirmed and adopted.

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

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

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

November 10, 2021

o- 11/9/21
KAD/jsf

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

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

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

VELAZQUEZ, MARIA Case# **19WC023398**
Employee/Petitioner

KIMPTON HOTEL ALLEGRO
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

4564 ARGIONIS & ASSOCIATES LLC
ZACHARY A JORDAN
180 N LASALLE ST SUITE 2105
CHICAGO, IL 60601

0766 HENNESSY & ROACH PC
NATALIE BAGLEY
140 S DEARBORN ST SUITE 700
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

MARIA VELAZQUEZ
Employee/Petitioner

v.

KIMPTON HOTEL ALLEGRO
Employer/Respondent

Case # **19** WC **23398**

Consolidated cases: **n/a**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **DOUGLAS S. STEFFENSON**, Arbitrator of the Commission, in the city of **CHICAGO**, on **NOVEMBER 2, 2020**. After reviewing all the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **JULY 6, 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 $**42,009.20**; the average weekly wage was $**809.60**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **1** dependent child.

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

Respondent shall be given a credit of $**6,047.28** for TTD, $**0.00** for TPD, $**0.00** for maintenance, and $**0.00** for other benefits, for a total credit of $**6,047.28**.

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

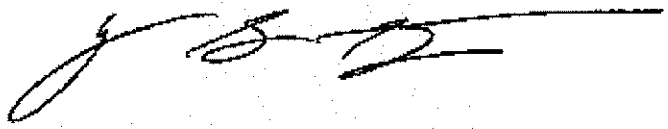
ORDER

As detailed in the attached memorandum discussing the *Findings of Fact and Conclusions of Law*:

- The Arbitrator finds Petitioner reached MMI on August 9, 2019 and no further medical treatment after this date is warranted.; and,
- The medical bills for AMITA Health Saints Mary and Elizabeth ($200.00) and Suburban Orthopedics ($892.00) are denied.; and,
- Respondent is not entitled to a Section 8(j) credit for the AMITA Health Saints Mary and Elizabeth medical bills paid by its group medical plan as these bills are not related to the accident and, therefore, not owed under the Act.; and,
- The Arbitrator finds Petitioner is entitled to TTD benefits from July 7, 2019 through August 9, 2019 (4 6/7th weeks) at a rate of $539.73 totaling $2,621.55.; and,
- Respondent shall be given credit of $6,047.28 for TTD benefits paid with Respondent also entitled to a credit of $3,425,73 for future benefits owed, if any.; and,
- Petitioner's claim for prospective medical treatment is denied.; and,
- In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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



Signature of Arbitrator

DECEMBER 17, 2020
Date

ICArbDec19(b)

DEC 28 2020

MARIA VELAZQUEZ v. KIMPTON HOTEL ALLEGRO

19 WC 23398

FINDINGS OF FACT AND CONCLUSIONS OF LAW

INTRODUCTION

This matter was tried pursuant to Petitioner's Section 19(b) Petition before Arbitrator Steffenson on November 2, 2020. [1] The issues in dispute were causal connection, medical bills, prospective medical care, Temporary Total Disability (TTD) benefits, and Respondent's credit, if any. (Arbitrator's Exhibit 1). The parties requested a written decision, including findings of fact and conclusions of law, pursuant to Section 19(b) of the Act, and agreed to receipt of this Arbitration Decision via e-mail. (Arbitrator's Exhibit (*hereinafter*, AX) 1 and Transcript at 5).

FINDINGS OF FACT

Petitioner has been employed by Respondent as a housekeeper for approximately 17 years. Her job duties consist of cleaning hotel rooms and bathrooms. On July 6, 2019, she was hanging up a wet shower curtain on the rod when she slipped, falling into a seated position. She hit her lumbar spine and her hip on the bathtub as she fell. She felt pain in her right hip and right hand immediately afterward and finished cleaning the occupied room to the best of her ability. She then reported the accident to her supervisor and completed a report on July 6, 2019. (Transcript (*hereinafter*, T.) at 11-14). Petitioner has not returned to work since the accident.

After the accident, Petitioner saw Dr. Aleman, a chiropractor, at Midway Pain on July 8, 2019. (T. at 15-16).

Petitioner was contacted by Respondent and instructed to present to Concentra, the company clinic, where she was first seen on July 26, 2019. (T. at 17). She complained of pain on the right side of the scapula down to her right arm and sometimes to the right leg. She complained of pain in the right trapezius region and right elbow and wrist region status post fall

[1] This matter moved to trial under the Illinois Workers' Compensation Commission (IWCC) "Special Circumstance Arbitration Procedures" that were implemented due to the 2020 COVID-19 pandemic.

on July 6, 2019. She fell while cleaning the bathroom at work and when she fell, she put her right arm out to stop her fall by grabbing the toilet and smacked her right elbow on the tub and fell to the floor. She told the security officer at her work and was given the decision to continue work or go home. She cleaned two more rooms at work and then went home. She did not go back to work the next day and applied a lot of ice to her right wrist and elbow and followed up with a chiropractor that had been treating her since the incident happened with massage and PT. She did feel better but still had not worked since her job did not offer light duty. She had one more week of PT and then she believed her chiropractor might release her to full duty. Her current pain level was a zero out of 10 and there was no radiation. She was diagnosed with a fall, contusion of right elbow and forearm, right wrist sprain, strain of the trapezius muscle. She was referred to physical therapy. She was returned to work with restrictions, which the employer could not accommodate. On July 29, 2019, Petitioner returned to Concentra and she had a right upper extremity injury. She still had pain mainly in the posterior shoulder region, but she was able to move her right arm in every direction and she felt that physical therapy did help her. (Petitioner's Exhibit 1 at 1-16).

On August 2, 2019, Petitioner was seen in the emergency room at St. Mary and Elizabeth Hospital. She was diagnosed with a UTI three days ago. Her chief complaint was abdominal pain. She complained of abdominal pain and right shoulder pain for the past month after suffering a mechanical fall, landing on her right side. She reported mild to moderate intensity shoulder pain with radiation toward the lower back and tingling sensation in the left leg. She also reported mild to moderate intensity diffuse abdominal pain associated with distention. She had a hard time moving her bowels. Her final diagnosis was constipation. (Petitioner's Exhibit (*hereinafter*, PX) 2).

On August 4, 2019, Petitioner returned to the emergency room at St. Mary and Elizabeth Hospital. Her arrival complaint was flank pain. She was seen in the emergency room a couple of days ago with similar complaints. She was back because she was still having some of her abdominal pain and feeling bloated. She stated that she had a fall about a month ago where she landed on her right side. The main complaint this date was that her abdomen felt very bloated and large. She was not having normal bowel movements. She was also having acid taste in her mouth and some epigastric pain. She was prescribed sennosides and Miralax, but she had only been taking this for a day and it did not work yet. Her current pain was generalized abdominal pain. She was not really having too much right-sided back pain at that moment. Her neck had normal range of motion and full passive range of motion without pain. (PX 2).

On August 5, 2019, Petitioner returned to Concentra. She noted shoulder pain in the right posterior shoulder radiating to the right scapula. She believed she would feel better to work at the end of this week after a few more PT sessions. She demonstrated functional

improvement. Roughly 75% of anticipated healing had taken place. She was diagnosed with a fall, contusion of right elbow and forearm, right wrist sprain, sprain of the trapezius muscle. (PX 1 at 24-27).

On August 9, 2019, Petitioner returned to Concentra and complained of pain in the right side of the body starting from the back of the neck radiating down to her toes for the past month. She had been discharged from physical therapy. She was diagnosed with a contusion of right elbow and forearm, fall, right wrist sprain, strain of trapezius muscle. She was at a functional goal, not at end of healing. The doctor discussed that objectively he believed she was healed enough to return to work full duty and that she could follow up with her personal care physician (PCP) if she chose but she should continue her home exercise program (HEP) to continue strengthening her injured body areas. She was released from care at maximum medical improvement (MMI). She was returned to work full duty. She was released from care. (PX 1 at 32-35).

Petitioner attended physical therapy at Concentra from July 29, 2019 through August 9, 2019 for the right upper back and shoulder blade region. She also had pain in the back of the elbow and forearm in both sides of the hand and the middle finger. She had no tingling or numbness. She had relief with medication and the chiropractor. On July 31, 2019, she complained of pain in the right shoulder but also complained of pain from the buttock down the right thigh to the leg. On August 5, 2019, Petitioner attended her fourth visit. She was slowly getting better and had slightly less pain in the elbow and the right side of the neck. On August 7, 2019, Petitioner reported the entire right side of her body hurt. She complained of constant pain on the right side of her body, pointing from the top of her head all the way down to the heel of her foot. She constantly stated that she needed an MRI to figure out what was going on with her. On August 9, 2019, Petitioner attended her sixth visit of physical therapy. She still had pain in the right side of her neck, but also complained of pain in the right side of her body and traveling down to her right foot. She felt she needed an MRI. She had subjective complaints of pain not consistent with objective findings. (PX 1 at 7-12, 17-23, 28-31).

On August 9, 2019, Petitioner retained Attorney Ian Elfenbaum to represent her and she signed the Application for Adjustment of Claim (AAC). (Respondent's Exhibit 3). Her attorney then referred her to Suburban Orthopedics. (T. at 57).

On September 3, 2019, Petitioner saw Dr. Chhadia at Suburban Orthopedics. She complained of neck and back pain from the work accident. She denied any previous injuries to the neck or back prior to the date of injury. She stated her pain was constant in the neck and back, but the lower back was slightly more painful than the neck. She stated it was all on the right side of her body. The pain started on the right side of the neck and radiated down to the right arm, down her lower back and down the back of her right leg down to the heel. She was

diagnosed with a lumbar strain and possible disc bulges, and a cervical sprain with possible disc bulges. Dr. Chhadia took Petitioner off work. (PX 3 at 83-86).

On September 17, 2019, Petitioner returned to Dr. Chhadia. An MRI dated September 11. 2019 revealed disc bulging at C4-5 and C5-6 as well as C6-7 and she was diagnosed with lumbar sprain and possible disc bulges and cervical sprain and possible disc bulges. (PX 3 at 79-82).

On October 2, 2019, Petitioner underwent an MRI of the lumbar spine which revealed dehydrated bulging disc at L3-4 and L5-S1. No frank stenosis or nerve root compression was noted. On October 10, 2019, the petitioner underwent an MRI of the cervical spine and it was compared with the September 11, 2019 MRI. It revealed T3-4 right paramedian disc herniation impinging the subarachnoid space with slight cord flattening. There was abnormal cervical lordosis. (PX 3 at 87-90).

On October 15, 2019, Petitioner returned to Dr. Chhadia. She had no interval change since the last office visit. She was diagnosed with sprain and disc bulges. Therapy was recommended and ordered. They discussed surgery as a current option, and she was referred to spine surgery for an evaluation. She was off work. (PX 3 at 74-78).

On October 25, 2019, Petitioner saw Dr. Pelinkovic of Suburban Orthopedics as a referral from Dr. Chhadia. She presented for an evaluation of her neck and back. She indicated that she was pain free and working full duty prior to the accident. She was diagnosed with a right L5-S1 disc herniation with correlating radiculopathy, right thoracic T3-4 herniation with pain symptoms, neck strain. She was referred to pain management for consultation for the thoracic and lumbar spine and for injections. She was still symptomatic and would be off work. Dr. Pelinkovic noted, "to a reasonable degree of medical and surgical certainty, it is more likely than not that the patient's current condition is causally related to the injury of 7/6/19. We believe that the treatment the patient has received for their injury-related conditions so far has been medically necessary and appropriate." (PX 3 at 68-73).

On November 13, 2019, Petitioner saw Dr. Novoseletsky. She complained of neck and back pain. She denied any past trauma to her neck and back. She had been experiencing constant sharp pain and stiffness on the right side of her head and neck. Her neck pain radiated down her bilateral shoulders and continuously traveled down her right arm. She had some weakness of the right shoulder and the pain shot down the right side of her body. Regarding her back, she had been having a sharp stabbing pain on the right side of her lower back that shot down her right glut and down her right leg into her foot. She had a hard time being on her feet for too long. Her pain was a five out of ten. She did not require an interpreter. She was diagnosed with thoracic back pain, facet syndrome and disc bulging. She was diagnosed with

low back pain, sacroiliac, facet syndrome, IDD. Therapy aggravated her symptoms. She had positive multiple sacroiliac joint (SIJ) tests. She was off work and had failed physical therapy. She was to undergo a right SIJ injection. (PX 3 at 61-66).

Petitioner, pursuant to Respondent's Section 12 request, met with Dr. Graf on November 25, 2019. Petitioner stated that on July 6, 2019 she was putting up a bathroom shower curtain and she stepped on something and slipped. She fell on the side of the bathtub and struck her right arm and landed on her buttock. Petitioner denied any prior related injury, care or treatment. She rated her pain a 10 out of 10 in the neck and low back. She noted her pain a seven out of 10 in the neck to the mid back to the low back to the right buttock to the right leg and sole of the right foot. She was noted to be 4'9" tall and weighed 170.6 pounds. Her body habitus was noted to be overweight. She was noted to have nonorganic pain signs and demonstrated the following nonorganic pain signs on evaluation: 1) nonanatomic distribution of symptoms; 2) pain out of proportion to the evaluation; 3) pain to light, one finger touch; 4) pain improvement with distraction. (Respondent's Exhibit (*hereinafter*, RX) 1).

During the Section 12 appointment, Petitioner filled out a Pain Disability Questionnaire (PDQ) from the American Medical Association Guides to the Evaluation of Permanent Impairment, Sixth Edition. Her total score was 124, which placed her into the "severe disability" self-rating category. However, she stated that she took only naproxen which would not be consistent with such severe reports of pain. Regarding a diagnosis, it was possible that Petitioner suffered a cervical, thoracic and lumbar strain at work on July 6, 2019 though she currently had vague complaints of near maximum levels of reported pain throughout the entire right side of the body from the head to the toes. Dr. Graf was unable to objectively substantiate her current subjective complaints of pain given the lack of objective findings. Regarding causation, it was possible that Petitioner suffered a cervical, thoracic and lumbar strain, though he was not able to causally connect her ongoing vague complaints of pain throughout the entire right side of her body from her head to her toes as being causally related to the claimed injury in question. Petitioner was at MMI. No further care or treatment was reasonable or medically necessary. Regarding work, there was no objective reason why Petitioner could not return to full duty job as described. There was no need for pain management injections, regardless of causation. (RX 1).

On December 13, 2019, Petitioner saw Dr. Pelinkovic. She was following up on her neck and back after a pain management consult. Her symptoms had not changed since the last visit. Dr. Novoseletsky recommended a sacroiliac joint injection which was yet to be approved. Her neck pain came and went, and the neck and back pain became aggressive at night. She experienced weakness in her bilateral hands and pain radiating down both arms, right greater than left and extending into her hands. Her back pain was constant, and it radiated from her

back down to the posterior aspect of her right leg extending to the right foot. She had numbness in the right foot. Her pain was a six out of ten. She was diagnosed with right L5-S1 disc herniation and correlating radiculopathy, right thoracic T3-4 herniation with pain symptoms, neck strain. She was to continue with Dr. Novoseletsky for pain management/injections and consider an L5-S1 LESI. She was to continue her medications per Dr. Novoseletsky. She was off work and to follow-up in eight weeks. (PX 3 at 56-60).

On January 22, 2020, Petitioner saw Dr. Novoseletsky. Her symptoms had gotten worse since her last visit and the pain was more aggressive. She had constant neck pain radiating into her right arm and right hand. They had yet to obtain approval for the injection. The back pain radiated down to her right leg. She had numbness in her right hand that came and went. Her diagnosis remained the same. She was to undergo a right SIJ. (PX 3 at 48-55).

On February 26, 2020, Petitioner returned to Dr. Novoseletsky. There had been no changes in her symptoms. Her pain had been more aggressive. It was a six out of ten. She was off work and was to undergo a right SIJ injection. (PX 3 at 41-47).

On April 8, 2020, Petitioner met with Dr. Novoseletsky. Her neck and back were getting worse. She was not sleeping well due to the pain. It was constant in the neck and when she lied down at night. The low back pain with constant as well. Most of the pain was on the right side of her body. There was numbness in her right arm and right hand and down her right leg. Her pain was eight out of ten. She was to undergo a right SIJ and she was off work. (PX 3 at 34-40). One month later, on May 13, 2020, Petitioner returned to Dr. Novoseletsky. For the last month, the pain had been getting worse in her neck and right arm. She wanted to try an injection in her neck before her low back due to the increase in pain. Her pain was an eight out of ten. She was to undergo a right SIJ. (PX 3 at 27-33).

On June 10, 2020, Petitioner again saw Dr. Novoseletsky for her neck and low back pain and right arm pain. She was off work and the SIJ was recommended. (PX 3 at 26, 91-95). Thereafter, on July 8, 2020, Petitioner met with Dr. Novoseletsky. She continued with the same symptoms since her last visit. She continued having frequent pain and stiffness in her neck and back radiating down bilateral arms and legs. She was awaiting approval of the procedure. Her pain was an eight out of ten. She was to undergo a right SIJ. (PX 3 at 20-25).

On August 12, 2020, Petitioner returned to Dr. Novoseletsky. Her symptoms were the same as her last visit. She continued with pain in the neck and back radiating to her right shoulder/arm and down her right leg. Her pain was an eight out of 10. She was to undergo a right SIJ. She was off work. (PX 3 at 13-19). Subsequently, on September 9, 2020, Petitioner returned to Dr. Novoseletsky for her neck and low back pain. Her pain was an eight out of 10 and the SIJ was still recommended. She was off work. (PX 3 at 8-12).

On September 30, 2020, Petitioner returned to Dr. Graf for a follow-up Section 12 examination at the request of Respondent. Petitioner noted pain in the right side of the head and neck and the entire right side of the body including the right arm, the right thoracic spine and the right low back. In addition, she had pain in the right lateral right flank, chest and abdomen. She had pain incorporating the entire right arm and the entire right leg. Dr. Graf noted Petitioner continued to treat with pain management and her diagnoses included facet syndrome, disc bulging, sacroiliitis, and intervertebral disc degeneration as well as thoracic and low back pain.

Dr. Graf's physical examination of Petitioner demonstrated no significant neurologic findings with nearly every possible inconsistency. She rated her pain at near maximum levels though while stating such she took only an anti-inflammatory which would not be consistent with such severe pain. His opinions were unchanged from the previous Section 12 report. He was unable to objectively substantiate Petitioner's ongoing subjective complaints of pain given the lack of objective findings. He opined Petitioner was at MMI as of her last evaluation and no further care or treatment was necessary nor warranted as it related to the claimed injury in question. There was no objective reason why she could not return to her full duty level job. Dr. Graf noted it was possible the petitioner suffered a cervical, thoracic and lumbar strain though he was currently unable to causally connect her ongoing and vague complaints of diffuse pain throughout the entire right side of her body. Her current diagnosis was unsubstantiated complaints of ongoing pain. The work injury was not a cause or contributed to the current diagnosis. There was no aggravation of any pre-existing condition. He opined that an initial course of physical therapy (2-3 times a week for four weeks) would be considered reasonable. (RX 2).

On October 14, 2020, Petitioner met with Dr. Novoseletsky. She followed up for her neck and back pain. She stated she went to the ER last week with severe pain in the low back, neck and radiation into the head. She was off work and the SIJ was recommended. (PX 3 at 1-7).

CONCLUSIONS OF LAW

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

Issue F: *Causal connection*

The Arbitrator finds that Petitioner reached MMI on August 9, 2019 and that her current condition of ill being not related to the accident of July 6, 2019.

Petitioner sustained an accident on July 6, 2019 when she slipped cleaning a bathroom. When she was first seen at Concentra on July 26, 2019, she complained of pain on the right side of the scapula down to her right arm and sometimes to the right leg. She complained of pain in the right trapezius region and right elbow and wrist region. At that time, her current pain level was a zero out of 10 and there was no radiation. She was diagnosed with a fall, contusion of right elbow and forearm, right wrist sprain, strain of the trapezius muscle. (PX 1).

On July 29, 2019, the Concentra record indicates Petitioner still had pain mainly in the posterior shoulder region, but she was able to move her right arm in every direction and she felt that physical therapy did help her. (PX 1).

On August 4, 2019, Petitioner told the emergency room doctor that she was not really having too much right-sided back pain at that moment. Her neck had normal range of motion and full passive range of motion without pain. (PX 2 at 56).

On August 5, 2019, Petitioner returned to Concentra and indicated that she believed she would feel better to work at the end of this week after a few more PT sessions. (PX 1 at 24-27). On August 9, 2019, the Concentra physician noted Petitioner had been discharged from physical therapy. She was diagnosed with a contusion of right elbow and forearm, fall, right wrist sprain, strain of trapezius muscle. She was at a functional goal, not at end of healing. The doctor discussed that objectively he believed she was healed enough to return to work full duty and that she could follow up with her PCP if she chose but she should continue her HEP to continue strengthening her injured body areas. She was released from care at MMI. She was returned to work full duty. (PX 1 at 32-35).

The Arbitrator also notes that prior to being seen at Concentra, Petitioner saw a chiropractor, but those records were not offered into evidence at trial. (T. at 15-17). Per the Concentra records, Petitioner had seen the chiropractor since the accident and underwent massage and physical therapy. Petitioner told the Concentra physician on July 26, 2019 that she did feel better from the chiropractic treatment but still had not worked since her job did not offer light duty. She had one more week of physical therapy with the chiropractor and then she believed her chiropractor might release her to full duty. (PX 1 at 2).

The Arbitrator finds Petitioner reached MMI as a result of the accident on August 9, 2019 when she was discharged from Concentra and returned to work full duty. Petitioner also performed physical therapy with the chiropractor and did not feel she needed to return.

The Arbitrator notes Petitioner's longstanding history of treatment and pain complaints to her spine and right shoulder prior to the accident of July 6, 2019 and does not find the Petitioner to be a credible witness in support of her claim. Petitioner was asked at trial whether prior to the accident she had ever injured her back before and her answer was, "no." (T. at 17). Petitioner next was asked whether prior to the accident she had ever injured her neck before and her answer was, "no." (T. at 18). Petitioner then was asked whether prior to the accident she had ever injured her right arm before and her answer was, "no." (T. at 18).[2] This testimony is in direct contradiction with the evidence presented at trial and discussed in greater detail below.

Petitioner settled 99 WC 40871 against Congress Hotel with an accident date of July 4, 1999 for 5% loss of use of a man-as-a-whole for a back injury. While this is a 21-year-old accident, the Arbitrator notes that at trial Petitioner denied having ever had a prior workers' compensation accident, but then did admit that she sustained the accident on July 4, 1999. At trial, Petitioner denied having ever received compensation for that workers' compensation case but then admitted that she had previously worked at Congress Hotel and had received compensation for that accident. (T. at 47-51). The Arbitrator also notes that Petitioner's date of birth on her current AAC is August 5, 1972, the same date of birth listed for the 99 WC 40871 AAC. The Arbitrator finds Petitioner's testimony to be troubling and adverse to her credibility as a witness for her claim. Similarly, the Arbitrator finds Petitioner's testimony regarding her signature on her current AAC (19 WC 23398) to further damage her credibility. (T. at 42-45).

Aside from the 1999 back injury, the Arbitrator also notes that Petitioner has a long history of prior treatment to her cervical and lumbar spine and right shoulder with Dr. Alex Lima, her primary care physician, dating back to 2014. On December 22, 2014 Petitioner complained of joint pain and was diagnosed with osteoarthrosis. (RX 4).

In 2015, Petitioner saw Dr. Lima for cervical and lumbar spine issues. On January 8, 2015 and April 6, 2015, Petitioner was diagnosed with osteoarthritis. On September 3, 2015, Petitioner noted a neck issue, a lumbar sprain, parasthesia of the skin and indicated that she fell two weeks prior landing over her back. (RX 4).

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[2] Petitioner also testified that she had never injured her right leg, but a right leg injury currently is not in question. (*Id.*)

In 2017, Petitioner saw Dr. Lima for her right shoulder, cervical spine, and lumbar spine conditions. On August 4, 2017, complained of right shoulder pain and denied trauma. She was diagnosed with right shoulder tendinitis and was given a shoulder injection. On October 16, 2017, Petitioner followed up for her chronic conditions and neck pain. She had neck pain for the past week with no previous history of arthritis, affecting cervical region, pain traveling to upper back, trapezius muscles and causing headaches. She was diagnosed with neck pain and generalized acute body pains and other unrelated issues. On November 6, 2017, Petitioner had a follow-up appointment at the emergency room for waist pain. She had been seen in the hospital with a chief complaint of low back pain and was discharged with a diagnosis of sciatica and UTI. She was diagnosed with neck pain resolved, low back pain, sciatica. (RX 4).

In 2018, Petitioner also saw Dr. Lima for her lumbar spine, shoulder and cervical spine. On January 6, 2018, Petitioner had tenderness over the paravertebral muscle of lumbar spine, decreased flexion due to pain, SLR test negative. On January 8, 2018, Petitioner was noted to be tender over the paravertebral muscle of the lumbar spine, decreased flexion due to pain, SLR negative. On January 13, 2018, Petitioner was noted to have tenderness over the paravertebral muscle of the lumbar spine and decreased flexion due to pain. On August 14, 2018, Petitioner complained of back pain and arm pain. She had chronic development of joint pain. She had pain that followed use of a joint, especially shoulders, back and wrists. She was diagnosed with poly arthralgia. On August 27, 2018, Petitioner was diagnosed with poly arthralgia, neck pain, spasm of back muscle. On October 30, 2018, Petitioner was seen for chronic conditions including osteoarthritis. She had recurrent pain over the neck radiating to the upper back. She was diagnosed with poly arthralgia, neck pain, spasm of back muscles. On December 21, 2018, Petitioner was seen for back pain. She was positive for chronic back pain exacerbating for the past month affecting daily activities with no recent trauma. She had tenderness over the low back and limited flexion due to pain. She was diagnosed with spasm of back muscles. (RX 4).

In 2019, Petitioner continued to see Dr. Lima for her cervical and lumbar condition prior to her July 6, 2019 incident. On April 29, 2019, Petitioner was seen for back pain, joint pain and following up with chronic conditions. She had been having upper back pain radiating to the scapular area for the past two weeks. Her history was positive for chronic back pain exacerbated for the past month, affecting daily activities, no recent trauma. She was diagnosed with spasm of back muscle, neck pain, polyarthralgia. On May 17, 2019, Petitioner was diagnosed with polyarthralgia. (RX 4).

Despite this longstanding history of treatment, Petitioner denied that she had sought treatment for these body parts with Dr. Lima for five (5) years prior to the accident and she denied that she had any prior treatment for her inured body parts. In fact, Petitioner testified at trial that prior to the accident on July 6, 2019, she was pain free. (T. at 11). She testified that

she had never injured her back, neck, right arm, right shoulder, or right leg. (T. at 17). However, Dr. Lima's records note a fall in 2015 and she testified at trial she had a fall in 2017. (RX 4 and T. at 54). Petitioner refused to admit she had sought prior treatment to her right shoulder, cervical spine and lumbar spine despite being presented with Dr. Lima's medical records at trial. (T. at 53-55).

Petitioner also told her treating physicians at Concentra and Suburban Orthopedics as well as the Section 12 physician that she had never had a prior injury or treatment to her injured body parts, which is incorrect. She had been seen less than two months prior for treatment to the injured body parts. The Arbitrator finds that Petitioner was not a credible witness and that Petitioner's testimony regarding her prior treatment is inaccurate, disingenuous and self-serving.

On July 26, 2019, Petitioner's history in "Past Medical History Review" was listed as "non-contributory based on review with patient and / or comprehensive questionnaire." Petitioner failed to mention her prior injuries and treatment. This lack of information is also noted in the three subsequent Concentra visits. (PX 1 at 1, 13, 24, 32).

On September 3, 2019, Petitioner saw Dr. Chhadia for the first time and denied any previous injuries to the neck or back prior to the date of injury. (PX 3 at 83). Petitioner also denied a prior history at the September 17, 2019 and the October 15, 2019 visits with Dr. Chhadia. (PX 3 at 74, 79).

On October 25, 2019, Petitioner saw Dr. Pelinkovic and indicated that she was pain free prior to the accident. Dr. Pelinkovic reviewed Petitioner's prior medical history given to Dr. Chhadia which was the denial of any previous injuries to the neck or back prior to the date of injury. (PX 3 at 68-69). At the visit with Dr. Pelinkovic on December 13, 2019, Petitioner's history that she was pain free prior to the accident and that she denied having a previous history of spinal symptoms is also noted. (PX 3 at 57).

On November 13, 2019, Petitioner saw Dr. Novoseletsky and denied any past trauma to her neck and back. Dr. Novoseletsky noted the history Petitioner gave Dr. Pelinkovic on October 25, 2019 that she was pain free prior to the accident and that in the "Pertinent Past History" it was noted that she denied having a previous history of spinal symptoms. In the "Past Medical History" section only treatment since the date of the accident was noted. (PX 3 at 61-62).

At each of the nine (9) subsequent visits with Dr. Novoseletsky, Petitioner's history that she was pain free prior to the accident and that she denied having a previous history of spinal symptoms is also noted. (PX 3 at 2, 9, 14, 21, 28, 37, 42, 49, 92).

As discussed above, on November 25, 2019, Petitioner saw Dr. Graf for a Section 12 examination at Respondent's request and she denied any prior related injury, care or treatment. (RX 1). Thereafter, on September 30, 2020, she returned to Dr. Graf for re-examination and he noted her past medical history was significant for diabetes, but she made no mention of any prior treatment to the body parts in question. (RX 2).

Petitioner's assertions that she has never had prior treatment to the injured body parts or prior injuries is simply not true. Petitioner's was not truthful in the history given to her physicians. Additionally, Petitioner also was not accurate in her representations of pain and the efficacy of treatment after the accident to the physicians at Suburban Orthopedics. Petitioner told Dr. Pelinkovic on October 25, 2019 that she was given five sessions of physical therapy which did not help her symptoms and that she was sent back to work but was unable to do so. (PX 3 at 68). However, on July 29, 2019, Petitioner indicated at Concentra that she felt that the physical therapy did help her. Petitioner told the physical therapist at Concentra that she had relief with medication and the chiropractor. (PX 1 at 7, 13).

Drs. Chhadia, Pelinkovic, and Novoseletsky treatment recommendations are based upon Petitioner's subjective complaints of pain, but they were unaware of Petitioner's prior treatment history. Petitioner has proven that she is not a credible witness and her subjective complaints cannot be relied upon. It is readily apparent that Petitioner modifies her subjective pain complaints to suit her needs, which is currently to remain off work and undergo future medical treatment.

Dr. Pelinkovic noted, *"to a reasonable degree of medical and surgical certainty, it is more likely than not that the patient's current condition is causally related to the injury of 7/6/19. We believe that the treatment the patient has received for their injury-related conditions so far has been medically necessary and appropriate."* (PX 3 at 68-73) (emphasis added). However, Dr. Pelinkovic was not aware of Petitioner's long-standing prior history nor did he have any reason to doubt Petitioner's subjective complaints at the time they were given. When taking all the facts in evidence into consideration, the Arbitrator gives no weight to this opinion as it is based upon Petitioner's duplicitous treatment history and questionable complaints of pain.

The Arbitrator also notes that Concentra physical therapist indicated on August 9, 2019 that Petitioner's subjective complaints of pain were not consistent with objective findings. (PX 1 at 28-31). The Arbitrator also notes that at each of the Section 12 appointments with Dr. Graf, there also were issues with the consistency of Petitioner's subjective complaints and their consistency with the objective findings.

At the re-examination with Dr. Graf on November 25, 2019, Petitioner rated her pain a 10 out of 10 in the neck and low back. She noted her pain a seven (7) out of 10 in the neck to the mid back to the low back to the right buttock to the right leg and sole of the right foot. She was noted to have nonorganic pain signs and demonstrated the following nonorganic pain signs on evaluation:

1. Nonanatomic distribution of symptoms.
2. Pain out of proportion to the evaluation.
3. Pain to light, one finger touch.
4. Pain improvement with distraction.

She also rated her pain in the "severe disability" self-rating category. However, she stated that she took only naproxen which would not be consistent with such severe reports of pain. Dr. Graf noted her vague complaints of near maximum levels of reported pain throughout the entire right side of the body from the head to the toes. Dr. Graf was unable to objectively substantiate her current subjective complaints of pain given the lack of objective findings. Regarding causation, it was possible that Petitioner suffered a cervical, thoracic and lumbar strain, though he was not able to causally connect her ongoing vague complaints of pain throughout the entire right side of her body from her head to her toes as being causally related to the claimed injury in question. (RX 1).

During the original examination with Dr. Graf on September 30, 2020, Petitioner complained of pain in the right side of the head and neck and the entire right side of the body including the right arm, the right thoracic spine and the right low back plus pain in the right lateral right flank, chest and abdomen. She had pain incorporating the entire right arm and the entire right leg. Physical examination demonstrated no significant neurologic findings with nearly every possible inconsistency. Dr. Graf performed a physical examination of Petitioner and noted that Petitioner demonstrated the following non-organic pain signs on evaluation:

1. Pain out of proportion to the evaluation.
2. Pain to light, one finger touch throughout the entire right upper extremity following no specific nerve root distribution.
3. Non-anatomic distribution of weakness throughout the entire right upper extremity.
4. Pain to light, one finger touch throughout the thoracic spine.
5. Pain to light, one finger touch throughout the lumbar spine.
6. Pain in the low back to stimulated axial compression.
7. Pain in the low back simulated axial rotation.
8. Palpation of the thoracic spine produces low back pain.

9. Non-anatomic distribution of weakness throughout the right lower extremity.
10. Motor strength improvement with distraction.
11. Non-anatomic distribution of numbness throughout the entire right lower extremity.
12. Pain improvement with distraction.

Petitioner rated her pain at near maximum levels though while stating such she took only an anti-inflammatory which would not be consistent with such severe pain. Dr. Graf was unable to objectively substantiate Petitioner's ongoing subjective complaints of pain given the lack of objective findings. (RX 2).

After a review and assessment of Petitioner's prior medical records, the medical and physical therapy records after the accident, the Section 12 reports, and Petitioner's testimony at trial, the Arbitrator finds that Petitioner's current condition of ill being is not causally related to the July 6, 2019 accident.

Issue J: *Medical bills*

As noted above, Petitioner reached MMI on August 9, 2019 when she was discharged from care from Concentra. No treatment after this date is warranted as it relates to the accident of July 6, 2019. Additionally, the two emergency room visits of August 2, 2019 and August 5, 2019 are not reasonable, related, or necessary to the accident of July 6, 2019 and are denied.

On August 2, 2019, Petitioner was seen in the emergency room at AMITA Saints Mary and Elizabeth Hospital. She had been diagnosed with a urinary tract infection (UTI) three days ago and she presented with dysuria and abdominal pain. Petitioner also complained of right shoulder pain, but the main issue was the abdominal pain. Prior to admission she was already noted to be taking omeprazole and polyethylene glycol prescribed by Agnes G. Nawrot, NP. Her final diagnosis was "Constipation, unspecified." (PX 2 at 2, 6, 11, 45). This nurse practitioner's records were not been offered into evidence at trial. The Arbitrator finds that this ER visit is unrelated to the accident. The main reason for the ER visit and the treatment rendered was for abdominal pain with a diagnosis of UTI three days prior.

On August 4, 2019, Petitioner returned to the emergency room at AMITA Saints Mary and Elizabeth Hospital. She was noted to have been seen in the emergency room a couple of days ago with similar complaints. She was back because she was still having some of her abdominal pain and feeling bloated. Testing showed that she was very constipated. She was

prescribed sennosides and Miralax, but she had only been taking this for a day and it did not work yet. The ER doctor noted, *"I feel patient's symptoms are all related to obstipation / constipation."* (emphasis added). The doctor indicated that she would need some time for the medicines that were prescribed to her to work. Her discharge diagnosis was "[Principal] Fecal Impaction" and "Constipation, unspecified." (PX 2 at 53, 56, 59).

The Arbitrator notes that the August 4, 2019 emergency room visit was due to a continuation of the abdominal pain from the first August 2, 2019 visit and the doctor indicated that Petitioner needed to give the medication prescribed time to work. The ER doctor noted that Petitioner ate lot of acidic foods like onions and limes and *"this is likely exacerbating her gastritis symptoms."* (emphasis added). She was already on PPI for that problem. He indicated, *"When I started mentioning foods like bread and cheese and milk she seemed embarrassed and I feel like her diet is really full with this and this is likely leading to her constipation symptoms. She is not on any medications that are causing her to be constipated."* (emphasis added). In fact, Petitioner noted that she was not really having too much right-sided back pain at that moment. Her neck had normal range of motion and full passive range of motion without pain. (PX 2 at 59-60).

No physician at either emergency room visit related Petitioner's diagnosis of fecal impaction and constipation to the work accident and the ER doctor opined her condition was not from her medications. Petitioner testified that she felt her inflammation and constipation was due to the medication prescribed from the work accident, but Petitioner, who already lacks credibility before the Arbitrator as discussed above, is not qualified to provide such a medical opinion. (T. at 20). Petitioner testified that Dr. Novoseletsky noted she had stomach issues from the medication, but this is not supported by the medical records, Dr. Novoseletsky did not know Petitioner's prior medical history, and he did not provide a causal connection opinion. (T. at 31). The Arbitrator also notes Petitioner's long-standing history of gastritis and abdominal issues with hospitalizations per Dr. Lima's records dating back to 2016 with hematuria, UTI, dysuria, gastritis, acid reflux, renal stone, and dyspepsia, as well. Plus, Petitioner had been seeking treatment with a nurse practitioner prior to the ER visits who had prescribed her with omeprazole and polyethylene glycol, but these records were not offered into evidence. (RX 4).

The Arbitrator finds that neither the August 2, 2019 emergency room visit, nor the August 4, 2019 emergency room visit are related to the July 6, 2019 accident but rather to an unrelated condition and this treatment is denied.

Additionally, as to the treatment at Suburban Orthopedics, the Arbitrator finds that this treatment is not reasonable, necessary, or related to the accident as Petitioner reached MMI on August 9, 2019.

The Arbitrator relies on the Concentra records in reaching this finding and gives greater weight to the opinions of Dr. Graf than Dr. Pelinkovic's opinions. Petitioner had already had a series of chiropractic treatment and physical therapy prior to her first visit at Concentra and she indicated that the treatment was helping and that the chiropractor would likely return her to work full duty in early August 2019. The Arbitrator finds it telling that Petitioner did not submit the chiropractic records into evidence at trial. Petitioner was placed at MMI at Concentra on August 9, 2019 and they returned her to work full duty. She was also discharged from physical therapy at that time. However, Petitioner then sought legal representation the same day and her attorney referred her to Suburban Orthopedics. This behavior is suspect given Petitioner's credibility issues. (RX 3).

Additionally, as indicated above, Drs. Chhadia, Pelinkovic, and Novoseletsky were unaware of Petitioner's prior medical history and they did not have a reason to doubt Petitioner's subjective complaints of pain. But the treatment recommendations are based upon Petitioner's complaints of pain which Petitioner manipulated for personal gain. Petitioner's testimony and demeanor at trial are proof of this.

Dr. Novoseletsky is recommending a SIJ injection based upon Petitioner's complaints of radiation of pain into the right leg and into the right foot with right foot numbness. Petitioner also complains of right upper extremity pain leading to her cervical spine diagnosis but again, this diagnosis is based on Petitioner's subjective complaints of pain. But Petitioner has proven that she is not trustworthy and clearly exhibits secondary gain behavior.

Dr. Graf opined that Petitioner had 12 nonorganic pain findings at his examination on September 30, 2020 and he opined that Petitioner was not in need of any further medical treatment as a result of the accident and that there was no need for pain management injections, regardless of causation. No further care or treatment was reasonable nor medically necessary. (RX 1).

Dr. Graf is credible as he reviewed all MRI films including the cervical spine MRI of September 11, 2019, the MRI scan of the lumbar spine dated October 2, 2019 and the MRI of the cervical spine dated October 10, 2019. He noted that the cervical spine MRI of September 11, 2019, demonstrated no evidence of a disc herniation, nerve root compression or otherwise. There was a disc bulge noted in the upper thoracic spine at T3-4 on the right side, though there did not appear to be any nerve root or spinal cord compression. As to the October 2, 2019 MRI of the lumbar spine, it demonstrated disc desiccation at L5-S1 with a small right paracentral disc bulge. There was no notable nerve root impingement. The radiologist noted, "there was no impingement of the dural sac or adjacent S1 nerve roots. The foramen appeared maintained." Regarding the MRI of the cervical spine of October 10, 2019, Dr. Graf noted it demonstrated to be an age-appropriate MRI of the cervical spine demonstrating no evidence of a disc herniation,

nerve root compression or otherwise. There was a disc bulge noted in the upper thoracic spine at T3-4 on the right side, though there did not appear to be any nerve root or spinal cord compression. (RX 1).

The Arbitrator finds that Petitioner reached MMI on August 9, 2019 and no further treatment after this date is reasonable or necessary.

Issue K: *Prospective medical care*

Based upon the foregoing, the Arbitrator finds Petitioner is not entitled to prospective medical care as a result of the July 6, 2019 accident as Petitioner reached MMI on August 9, 2019. Any further treatment, specifically the SIJ recommended by Dr. Novoseletsky, is denied based upon the full duty release from Concentra of August 9, 2019, Dr. Graf's Section 12 opinions, and Petitioner's credibility issues and testimony at trial.

Issue L: *TTD*

The Arbitrator finds Petitioner is entitled to TTD benefits from July 7, 2019 through August 9, 2019.

The chiropractor from Midway Pain Center opined Petitioner was totally incapacitated from July 7, 2019 through July 19, 2019. (RX 1). Petitioner was then seen at Concentra on July 26, 2019 and returned to work with light duty restrictions which could not be accommodated. Petitioner was then returned to work full duty by Concentra on August 9, 2019 and discharged from care. (PX 1 at 5-6, 34).

The Arbitrator notes that Dr. Chhadia took Petitioner of work on September 3, 2019. (PX 3 at 83-86). However, as noted above, the Arbitrator finds that Petitioner was able to return to work full duty on August 9, 2019 and that her current condition of ill being after this date is not related to the work accident. The Arbitrator also notes that Petitioner did not attempt to return to work after her release from Concentra on August 9, 2019. The Arbitrator relies on Dr. Graf's opinions on November 25, 2019 and September 30, 2020 that Petitioner is capable of working full duty and notes that Drs. Chhadia, Pelinkovic, and Novoseletsky relied upon Petitioner's subjective complaints of pain in providing their opinions regarding the off-work status, but these complaints are not reliable. Finally, the Arbitrator notes that by Petitioner's own account, she was scheduled to be released to return to work full duty by the chiropractor in early August of 2019 but she either chose not to return to the chiropractor or she did return and was

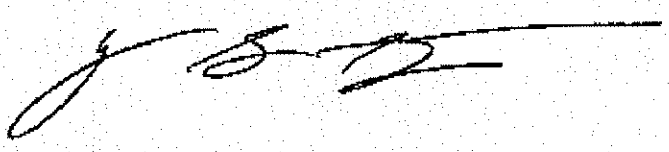
released to return to work full duty because she failed to submit those records into evidence at trial.

As such, the Arbitrator finds Petitioner is entitled to TTD from July 7, 2019 through August 9, 2019 totaling 4 6/7th weeks. All further TTD benefits are denied.

Issue N: *Respondent's credit*

The Arbitrator finds that a Section 8(j) credit for the AMITA Saints Mary and Elizabeth Hospital emergency room visits of August 2, 2019 and August 4, 2019 is not at issue as these bills are not reasonable, necessary, or related to the accident of July 7, 2019, as discussed above.

The Arbitrator also finds that Respondent is entitled to a credit for TTD paid prior to trial. Petitioner and Respondent stipulated that $6,047.28 was paid in TTD benefits and Respondent is entitles to a credit. (AX 1). Petitioner is entitled to 4 6/7th weeks of TTD benefits from July 7, 2019 through August 9, 2019 at a rate of $539.73 totaling $2,621.55. After deducting this owed TTD ($2,621.55) from Respondent's gross TTD credit ($6,047.28), Respondent also is entitled to a net credit of $3,425,73 for future benefits owed, if any.



Signature of Arbitrator

DECEMBER 17, 2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC007222
Case Name	MATHIS, CHESTER L v. LAKESIDE TRANSPORTATION
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0561
Number of Pages of Decision	15
Decision Issued By	Stephen Mathis, Commissioner, Deborah Baker, Commissioner

Petitioner Attorney	Jason Marks
Respondent Attorney	Robert Cozzi

DATE FILED: 11/10/2021

/s/Stephen Mathis, Commissioner

Signature

DISSENT

/s/Deborah Baker, Commissioner

Signature

21IWCC0561

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

CHESTER MATHIS,

Petitioner,

vs. NO: 15 WC 007222

LAKESIDE TRANSPORTATION,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, temporary partial disability, and permanent partial disability, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms with correction the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission hereby corrects the clerical error in the first paragraph on page 3 of the Decision to reflect October 2, 2014 as the date of accident.

Permanent Disability

The Commission views the evidence differently with respect to the Section 8.1(b) factors (iii) and (v).

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

Petitioner was 60 years of age at the time he sustained the work accident on October 2, 2014. As such he would be expected to work a lesser number of years in a physically challenging job. The Commission finds this factor weighs in favor of decreased permanent disability.

(v) evidence of disability corroborated by the medical records

On February 9, 2015 Petitioner presented to the VA Rehabilitation Clinic and reported that he had normal range of motion in in his left arm and that his pain was 95% gone. On March 29, 2015 the VA Rehabilitation Clinic progress notes document that Petitioner had function within normal limits for activities of daily living. Neither Dr. Magnes nor Dr. Simmons restricted Petitioner from work but recommended against heavy lifting. The Commission finds that this factor weighs in favor of decreased disability.

Having weighed the evidence and analyzed the Section 8.1 b(b) factors, the Commission finds that Petitioner sustained a 35% loss of use of the person as a whole.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $576.43 per week for a period of 12 4/7 weeks, commencing December 20, 2014 through March 17, 2015 that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner the sum of $323.10 per week for a total of 9 5/7 weeks, commencing October 13, 2014 through December 19, 2014, that being the period of temporary partial disability for work under Section 8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $518.75 per week for a period of 175 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the loss of use of 35% of the person as a whole

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $11,130.01 for medical expenses under §8(a) and 8.2 of the Act.

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

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

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.

November 10, 2021
o-9/29/21
SM/msb
44

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

/s/*Deborah Simpson*
Deborah Simpson

DISSENT

While I agree with the majority's decision to affirm the Arbitrator with respect to the following findings: Petitioner sustained a compensable work accident on October 2, 2014 that arose out of and in the course of his employment with Respondent; Petitioner's left shoulder condition of ill-being is causally related to the work accident; and Petitioner is entitled to medical expenses and temporary benefits as outlined in the Decision of the Arbitrator. However, I disagree with the majority's decision to decrease the Petitioner's permanent partial disability award.

The Arbitrator's analysis of the factors enumerated in Section 8.1b(b) is thorough, well-reasoned, and supported by the evidence. Of note, the Arbitrator found:

> Dr. Simmons opined that the Petitioner aggravated a pre-existing condition in his left shoulder at the time of the work accident and that, given the findings on MRI [sic] and his inability to lift heavy weights or perform overhead lifting, the Petitioner was unable to return to his job as a Mechanic. The Arbitrator notes that the Petitioner's current condition prevents him from returning to work as a mechanic.

Likewise, with respect to subsection (ii) of section 8.1b(b), the Arbitrator found that "Petitioner was employed as a Mechanic at the time of the Accident and that he is not able to return to work in his prior capacity as a result of said injury due to his inability to perform any heavy lifting or overhead lifting." The Arbitrator gave "greater weight" to this factor. With respect to subsection (v) of section 8.1b(b), the Arbitrator found that "on March 23, 2015, at the conclusion of physical therapy [] Petitioner continued to demonstrate weakness which limited his ability to lift greater than 10 pounds overhead." The Arbitrator gave "greater weight" to this factor as well.

Further, the March 17, 2015 note from Dr. Simmons states: "He is going to apply for social security disability which I agree in regards to his inability to return back to his job as a mechanic because of the lifting. I have discouraged him from overhead activity involving a lot of weight."

I find that the Arbitrator's analysis supported a finding of a loss of trade and an award of 40% loss of use of the person-as-a-whole was reasonable and appropriate based on the evidence. For the above reasons, I respectfully dissent in part.

/s/ *Deborah Baker*

Deborah Baker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0561

MATHIS, CHESTER
Employee/Petitioner

Case# **15WC007222**

LAKESIDE TRANSPORTATION
Employer/Respondent

On 11/4/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 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:

5278 MARKS INJURY LAW
JASON S MARKS
495 N RIVERSIDE DR SUITE 213
GURNEE, IL 60031

0208 GALLIANI DOELL & COZZI LTD
ROBERT J COZZI
77 W WASHINGTON ST SUITE 1601
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Chester Mathis
Employee/Petitioner

v.

Lakeside Transportation
Employer/Respondent

Case # **15** WC **7222**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **Rockford**, on **September 21, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **October 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 $**44,961.80**; the average weekly wage was $**864.65**.

On the date of accident, Petitioner was **60** years of age, ***married*** with **1** dependent child.

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

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

Respondent shall be given a credit of $**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 $11,130.01 as outlined in Petitioner's Exhibit 5, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall pay Petitioner temporary partial disability benefits of $323.10/week for 9 5/7 weeks, commencing 10/13/14 through 12/19/14, as provided in Section 8(a) of the Act.

Respondent shall pay Petitioner temporary total disability benefits of $576.43/week for 12 4/7 weeks, commencing 12/20/14 through 3/17/15, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $518.75/week for 200 weeks, because the injuries sustained caused the 40% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Arbitrator Anthony C. Erbacci

NOV 4 - 2020

October 26, 2020
Date

FACTS:

On October 2, 2015, the Petitioner was a 60-year-old employee of the Respondent working as a mechanic. The Petitioner testified that his highest level of education was high school, and he then attended technical school where he learned to be a heavy equipment mechanic. The Petitioner also served in the Navy for sixteen years and then worked as a railroad mechanic for ten years. The Petitioner began working for the Respondent in July of 2007 and was initially hired as a bus driver. After one year, his job title was changed to mechanic. The Petitioner testified that he worked for the Respondent for approximately seven and a half years prior to his injury and that he is currently not employed.

The Petitioner testified that he worked for the Respondent eight hours per day, five days per week, and his job duties required him to work on diesel engines, operate tow trucks, replace batteries and alternators, fix brakes and perform maintenance on the parking lot, among other things. The Petitioner testified that he was required to lift 75 to 100 pounds which included overhead lifting.

The Petitioner testified that on October 2, 2014, he removed an alternator and bracket from a school bus and, while he was carrying the alternator, it slipped out of his hands. Petitioner testified that he reached out quickly to grab the alternator before it hit the floor at which time he felt a crunch in his left shoulder. The Petitioner estimated that the alternator weighed 40 pounds. The Petitioner testified that while his arm "popped", he did not initially feel any pain, and he continued working the rest of the day and the following day which was a Friday. The Petitioner testified that on that Saturday night, he started to experience pain in his left shoulder which increased over the next day. On Monday, October 6, 2014, Petitioner reported the accident to his supervisor. An incident report was completed, and the Petitioner was directed to Lake Forest Occupational Health.

On October 6, 2014 the Petitioner was seen at Lake Forest Occupational Health, where he complained of left shoulder pain. An x-ray of his left shoulder was performed. He was referred to Dr. Dugan and provided light-duty work restrictions. On October 7, 2014, the Petitioner was seen by his primary care physician at the VA. He advised the doctor regarding an injury at work involving his left shoulder. He was again referred to Dr. Dugan for an orthopedic consultation. The Petitioner testified that he had seen Dr. Dougan previously in 2003 and had undergone left shoulder surgery but that he was unable to see Dr. Dougan following this injury because it was not authorized by the Respondent's workers' compensation insurance carrier.

With regard to the Petitioner's prior treatment with Dr. Dougan, the Petitioner testified that he had treated with Dr. Dugan at Illinois Bone and Joint for issues with his shoulders. He underwent left shoulder rotator cuff surgery on July 15, 2003, and right shoulder rotator cuff surgery on February 6, 2004. He followed up with Dr. Dugan after those surgeries and underwent physical therapy and work hardening. The Petitioner saw Dr. Dugan on February 14, 2005, at which time he was found to be at maximum medical improvement and was released with permanent restrictions. The Petitioner testified that, at that time, he was working for the railroad and the restrictions prevented him from going back to his regular job. The Petitioner last saw Dr. Dugan on March 13, 2007, after an acute onset of left shoulder pain. Dr. Dugan recommended that he perform a home exercise program and return in six weeks. The Petitioner testified that he did not return to see Dr. Dugan.

On December 8, 2014, the Petitioner returned to his primary care physician at the VA with ongoing complaints of left shoulder pain. An x-ray of the left shoulder was performed. Petitioner was referred to an orthopedic surgeon and a course of physical therapy was recommended.

On December 15, 2014, the Petitioner was seen by Dr. Magnes, an orthopedic surgeon at the VA. He advised Dr. Magnes about the injury to his left shoulder that occurred on October 2, 2014, and also regarding his history of left shoulder rotator cuff surgery in 2003. Dr. Magnes recommended an MRI of the left shoulder and concurred with the recommendation for physical therapy. He also provided the Petitioner with an injection into his left shoulder.

Petitioner was seen by a physical medicine and rehabilitation specialist at the VA on December 23, 2014. He underwent a left shoulder MRI on December 31, 2014 and began a course of physical therapy on January 8, 2015. On February 9, 2015, Petitioner returned to see Dr. Magnes to discuss the results of his MRI. Dr. Magnes recommended continued physical therapy and to avoid any heavy lifting. Petitioner again met with Dr. Magnes on February 23, 2015, and March 2, 2015.

Petitioner was discharged from physical therapy on March 10, 2015. The Petitioner testified that the physical therapy helped reduce the pain and increase the range of motion in his left shoulder. The Petitioner testified that he continued to have pain with heavy lifting, overhead lifting and increased activity levels.

On March 17, 2015, the Petitioner was seen by Dr. Scott Simmons for a second opinion. Dr. Simmons took a history from Petitioner and examined him as well as reviewed his MRI. He recommended continued conservative treatment. Dr. Simmons advised Petitioner to avoid heavy lifting and overhead lifting and indicated that he was not able to return back to work as a mechanic.

Petitioner was seen by a physical medicine and rehabilitation specialist at the VA on March 23, 2015, after having completed his course of physical therapy. He advised the doctor regarding the ongoing problems in his left shoulder at that time. He was counseled to avoid heavy lifting and continue a home exercise program.

On April 8, 2015, Petitioner saw Dr. Magnes and indicated that he had fallen off his motorcycle going about 10 to 15 mph and experienced some increase in left shoulder pain around that time. Dr. Magnes did not recommend any specific treatment and the Petitioner testified that the increased pain eventually subsided. The Petitioner again saw Dr. Magnes on May 4, 2015, and July 27, 2015. He continued to report pain in his left shoulder with increased activity and heavy lifting. He also had some weakness in the left shoulder.

The Petitioner testified that he had a baseline level of pain in his left shoulder prior to the work accident that occurred on October 2, 2014. He testified that prior to that injury, the pain was intermittent and would come and go with his level of activity. The Petitioner testified that prior to the October 2, 2014 injury he was always able to perform his job duties as a mechanic. The Petitioner testified that after he concluded his physical therapy in March of 2015, his baseline pain level was similar to what it was before the work accident, but he was unable to perform any heavy lifting or overhead lifting without significant pain in his left shoulder.

The Petitioner testified that he currently continues to have intermittent pain in his left shoulder and he still does a home exercise program. The Petitioner testified that he is currently unable to perform any heavy lifting or overhead lifting with the left arm.

Denise Quezada, the Respondent's Operations Manager testified that in 2007, when te Petitoner was hired, employees were given training regarding the reporting of accidents. The Employee Handbook was given to all employee and the Petitioner signed an acknowledgement that he read it and would comply with the rules set forth in the handbook. The Employee Handbook

specifically reflects that "All accidents must be reported immediately to your supervisor." Ms. Quezada testified that the Petitioner's report of injury was not made until October 6, 2014 and the accident allegedly occurred on October 2, 2014. Ms. Quezada also testified that the Petitioner did not disclose that he had permanent light duty restrictions from his prior shoulder surgery when he completed his application for employment with the Respondent. She testified that the Respondent first learned of the Petitioner's permanent light duty restrictions following the alleged injury of October 2, 2014 and that the Petitioner was then terminated due to falsification of his application.

Dr. Prasant Atluri, a board certified orthopedic surgeon specializing in treatment of the upper extremity, examined the Petitioner at the request of the Respondent on January 29, 2015. Dr. Atluri's deposition testimony was admitted into the record as Respondent's Exhibit 6. Petitioner provided a history of having injured his left shoulder on October 2, 2014, describing having experienced a crunch in his left shoulder while he reached out with his left hand to grab a falling alternator while he was working on a school bus. Petitioner told Dr. Atluri that his shoulder felt pretty good and his range of motion was not bad but he did still have a little bit of pain in the shoulder and it was painful at night. The Petitioner also advised Dr. Atluri of his prior left shoulder injury and treatment with Dr. Dugan.

Dr. Atluri examined Petitioner's left shoulder and found atrophy of the supraspinatus as well as tenderness over the AC joint, subacromial space and bicipital groove. There was crepitus and snapping of the left shoulder with range of motion. Petitioner's left shoulder range of motion was similar to the right side with abnormal external rotation. He had less internal rotation with his arm in abduction on the left side as compared to the right. Petitioner reported pain with end range flexion as well as abduction in the left. Petitioner also had relative preservation of strength in his shoulder.

Dr. Atluri reviewed the x-rays of Petitioner's left shoulder taken on October 6, 2014 noting that they revealed superior migration of the humeral head, which indicates a chronic massive rotator cuff tear.

Dr. Atluri reviewed the MRI film of the left shoulder that was taken on December 31, 2014, which revealed a chronic retracted rotator cuff tear as well as atrophy in the supraspinatus and infraspinatus and indicated that the rotator cuff tear had been present for years.

Dr. Atluri reviewed medical records from Dr. Magnes, Northwestern Corporate Health Services, Dr. Dugan, medical exam reports from Commercial Driver Fitness as well as an MRI report of the left shoulder from December 31, 2014, and electrodiagnostic studies dated November 17, 2005. He also reviewed "a document dated 8/9/04 with the recommended work restrictions" and an operative report from Dr. Dugan dated July 15, 2003, regarding a left shoulder scope with open rotator cuff repair. Dr. Atluri noted that, according to the records, the patient did have significant ongoing symptoms involving his left shoulder following his treatment for the prior shoulder injury and he had permanent restrictions assigned. Dr. Atluri also noted that there were records from 2005 and 2007 which reflected persistent shoulder pain and weakness involving the Petitioner's left upper extremity. Petitioner told Dr. Atluri he had undergone no additional treatment and experienced no symptoms involving his left shoulder between 2004 and the reported injury of 2014.

Dr. Atluri diagnosed the Petitioner with severe arthritic changes along with a chronic rotator cuff tear in his left shoulder resulting in a rotator cuff arthropathy. Dr. Atluri opined that the Petitioner's left shoulder condition was chronic and was not caused or aggravated by the reported work injury of October of 2014. Dr. Atluri noted that the Petitioner clearly had pre-existing significant mechanical problems in his left shoulder, and while the sudden onset of symptoms suggested that there may have been an aggravation of the condition, the symptoms had returned to a baseline level for

Petitioner, and thus, there was no permanent aggravation.

CONCLUSIONS:

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

The Petitioner testified that on October 2, 2014, he removed an alternator and bracket from a school bus and, while carrying the alternator, it slipped from his hands. Petitioner reached down quickly to grab the 40 pound alternator before it hit the ground at which time he felt a crunch in his left shoulder. Petitioner continued working and experienced minimal pain on the date of the accident as well as the following day. His pain significantly increased over the weekend and he immediately reported the accident when he returned to work on October 6, 2014. Petitioner provided a consistent history regarding the accident to his medical providers at the VA as well as Dr. Simmons. This history was also provided to Dr. Atluri at the time of his examination of the Petitioner. The Arbitrator notes that Dr. Atluri did not question the occurrence of a work accident on October 2, 2014 and indicated that the mechanism of injury the Petitioner described would be a competent cause to aggravate his condition.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner sustained an accident on October 2, 2014, that arose out of and in the course of his employment with Respondent.

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

It is clear from the evidence that the Petitioner had a pre-existing condition in his left shoulder prior to the work accident that occurred on October 2, 2014. Petitioner underwent a left shoulder arthroscopy with mini open rotator cuff repair on July 15, 2003, performed by Dr. Dugan. Dr. Dugan noted that an "excellent" repair of the rotator cuff was achieved following that surgery. Dr. Dugan found Petitioner to be at maximum medical improvement as of February 14, 2005, and released him to return to work with permanent restrictions. Petitioner saw Dr. Dugan a few times thereafter and it was specifically noted he had greater weakness and problems with the right shoulder compared to the left shoulder. When last seen by Dr. Dugan on March 13, 2007, Petitioner had "no evidence of any atrophy" of the left shoulder with full extension with abduction and elevation with limitations only in internal rotation.

The Petitioner began working for Respondent in July of 2007. He started as a Bus Driver and, approximately a year later, began working as a Mechanic. The job of Mechanic was described as physical in nature. Petitioner's permanent work restrictions did not prevent him from performing his job as a Mechanic for Respondent. The Petitioner testified that, while heer had ongoing, intermittent shoulder pain, he did not have any issues performing the heavy lifting and overhead lifting required by his job with the Respondent. He sought no additional medical treatment for his left shoulder after being seen by Dr. Dugan in March of 2007 until after the work accident in October of 2014, a period of over seven and a half years.

Dr. Magnes, Petitioner's treating orthopedic surgeon at the VA, examined the Petitioner on

December 15, 2014, and specifically noted tenderness over the left trapezius and biceps musculature laterally with mild bruising. With active range of motion Petitioner had only 120° of abduction with pain in the left shoulder as compared to 180° for the right shoulder. Additionally, with passive range of motion with his arm in 90° of abduction, Petitioner had only 30° of internal rotation on the left versus 75° on the right and 45° of external rotation versus 90° on the right. Further, when seen on December 23, 2014, by the physical medicine and rehabilitation specialist at the VA, the Petitioner described a "bulge" in the proximal anterior left arm since the injury. The doctor's physical examination noted bunching of the left biceps muscle.

Dr. Simmons saw Petitioner for a second opinion. He also noted a Popeye muscle in Petitioner's left upper extremity. He stated Petitioner had dramatic function for the findings on MRI and that he "compensated well." According to Dr. Simmons, Petitioner aggravated a pre-existing condition in his left shoulder at the time of the work accident that occurred on October 2, 2014. Given the findings on MRI and his inability to lift heavy weights or perform overhead lifting, Dr. Simmons opined that the Petitioner is unable to return to his job as a Mechanic.

Dr. Atluri, the Respondent's examining physician, diagnosed the Petitioner with severe arthritic changes along with a chronic rotator cuff tear in his left shoulder resulting in a rotator cuff arthropathy. While Dr. Atluri opined that the Petitioner's left shoulder condition was chronic and was not caused or aggravated by the reported work injury of October of 2014, Dr. Atluri testified that the traumatic incident described by the Petitioner was a competent cause to aggravate his degenerative condition.

The Arbitrator notes that while the Petitioner clearly had a pre-existing condition of ill-being in his left shoulder, the Petitioner was able to perform the duties of his employment by the Respondent for a period of over seven years prior to the work injury of October 2014. Following that injury, the Petitioner began a course of medical care and treatment for his shoulder which included injection and physical therapy. The Petitioner testified that while his pain level returned to baseline, he could no longer perform the heavier aspects of his job as a mechanic.

Dr. Simmons, the physician who provided the Petitioner with a "second opinion", opined that the Petitioner aggravated a pre-existing condition in his left shoulder at the time of the work accident that occurred on October 2, 2014 and that, given the findings on MRI and his inability to lift heavy weights or perform overhead lifting, the Petitioner was unable to return to his job as a Mechanic. While the Arbitrator notes the opinions of Dr. Atluri, the Arbitrator finds the opinion of Dr. Simmons to be sufficiently reliable, credible, and persuasive so as to satisfy the Petitioner's burden of proof.

Based upon the foregoing and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that the Petitioner aggravated the pre-existing condition of his left shoulder at the time of the work accident that occurred on October 2, 2014 and that the Petitioner's current left shoulder condition of ill-being is causally related to that injury.

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

In light of the Arbitrator's findings and conclusions relating to the issues of Accident and Casual Connection, which are adopted and incorporated herein, the Arbitrator finds that the Respondent is liable for payment of reasonable and necessary medical services, pursuant to the Fee

Schedule, as outlined in Petitioner's Exhibit 5.

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

The Petitioner claimed entitlement to Temporary Partial Disability benefits from October 13, 2014 through December 19, 2014 and Temporary Total Disability benefits from December 20, 2014 through March 17, 2015. The Petitioner testified that, subsequent to his work injury of October 2, 2014, he continued to work for the Respondent at his regular rate of pay through October 13, 2014, when he began working with light duty restrictions at a lower rate of pay, $9.50 per hour. The Petitioner testified that he worked light duty at the lower rate of pay through December 19, 2014. The Petitioner testified that he did not return to work after December 19, 2014, because the Respondent could not accommodate his restrictions. On March 17, 2015, the Petitioner saw Dr. Simmons for a second opinion regarding his left shoulder condition. The Petitioner's employment with the Respondent was terminated on June 9, 2015.

Petitioner testified he worked from October 13, 2014, through December 19, 2014, with light duty restrictions and was paid $9.50 per hour during that time period. Petitioner testified he regularly worked 40 hours per week. Therefore, Petitioner earned $380 per week from October 13, 2014, through December 19, 2014. Petitioner's average weekly wage is $864.65. The Arbitrator finds Petitioner is entitled to payment of temporary partial disability benefits of $323.10 per week from October 13, 2014, through December 19, 2014, or a period of 9 5/7 weeks.

Petitioner last worked on December 19, 2014, after which Respondent was unable to accommodate his light-duty restrictions. Dr. Simmons opined on March 17, 2015, that the Petitioner was unable to return to work as a Mechanic. The Arbitrator does hereby find Petitioner is entitled to payment of temporary total disability benefits for the period December 20, 2014, through March 17, 2015, a period of 12 4/7 weeks.

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

The Arbitrator notes that the Petitioner has a long history of left shoulder problems for which he treated with Dr. Dugan through 2007. Following that treatment, Dr. Dugan had provided the Petitioner with permanent light duty restrictions and those restrictions were never changed or removed by Dr. Dugan. In June of 2007, the Petitioner began working for the Respondent, apparently without restrictions. The Petitioner continued working for the Respondent without apparent restrictions through October 2, 2014 when he again injured his left shoulder.

Following the work injury of October 2, 2014, the Petitioner underwent an MRI which showed a torn rotator cuff. Both Dr. Atluri and Dr. Simmons indicated that the rotator cuff was torn prior to the work injury of October 2, 2014. Dr. Atluri acknowledged that the mechanism of injury described by the Petitioner was a competent cause of an aggravation of the pre-existing condition but opined that there was no permanent aggravation of that condition. Dr. Simmons opined that the Petitioner aggravated a pre-existing condition in his left shoulder at the time of the work accident and that, given the findings on MRI and his inability to lift heavy weights or perform overhead lifting, the Petitioner was unable to return to his job as a Mechanic. The Arbitrator notes that the Petitioner's current condition prevents him from returning to work as a mechanic.

The Petitioner testified that prior to the work injury of October 2, 2014, he was able to do his job as a Mechanic. He testified that he currently continues to experience pain in his left shoulder "just about every day", and that he cannot lift any weight with his left arm without experiencing "popping and pain" in his left upper extremity. The Petitioner testified that he can no longer perform the heavy work of a mechanic.

As the Petitioner's injury occurred subsequent to September 1 of 2011, consideration of the factors enumerated in Section8.1b(b) is required.

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

With regard to subsection (ii) of §8.1 b(b), the occupation of the employee, the Arbitrator notes that the record reveals the Petitioner was employed as a Mechanic at the time of the accident and that he is not able to return to work in his prior capacity as a result of said injury due to his inability to perform any heavy lifting or overhead lifting. The Arbitrator therefore gives greater weight to this factor.

With regard to subsection (iii) of §8.1 b(b), the Arbitrator notes that Petitioner was 60 years old at the time of the accident and thus his work life expectancy was limited. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (iv) of §8.1 b(b), Petitioner's future earnings capacity, the Arbitrator notes Petitioner is unable to return to his job as a Mechanic due to his restrictions. The Arbitrator notes there was no additional testimony regarding Petitioner's future earnings capacity. The Arbitrator therefore gives some weight to this factor.

With regard to subsection (v) of §8.1 b(b), evidence of disability corroborated by the treating medical records, the Arbitrator notes both Dr. Magnes and Dr. Simmons indicated that, given the massive rotator cuff tear noted on the MRI as well as Petitioner's clinical examination, he is unable to perform any heavy lifting or overhead lifting. The findings of both Dr. Magnes and Dr. Simmons are corroborated by the physical medicine and rehabilitation consultation performed on March 23, 2015, at the conclusion of physical therapy where Petitioner continued to demonstrate weakness which limited his ability to lift greater than 10 pounds overhead. 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 40% loss of use of a person as a whole pursuant to Section 8(d)2 of the Act.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC003629
Case Name	RUSHING, STEVEN M SR v. PRAIRIE FARMS DAIRY
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0562
Number of Pages of Decision	17
Decision Issued By	Stephen Mathis, Commissioner

Petitioner Attorney	david bone
Respondent Attorney	Ethan Willenborg

DATE FILED: 11/10/2021

/s/Stephen Mathis, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

STEVEN M. RUSHING,Sr.,

Petitioner,

vs. NO: 15 WC 03629

PRAIRIE FARMS DAIRY,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability (TTD), medical expenses, and permanent partial disability, and being advised of the facts and applicable law, hereby reverses the Decision of the Arbitrator and finds that Petitioner sustained accidental injuries arising out of and in the course of his employment manifesting on December 1, 2014.

The Commission finds that Petitioner's work duties were repetitive in nature. His left shoulder condition is causally related to his work duties. Having found accident and causal connection, the Commission finds Petitioner is entitled to TTD from December 17, 2014 through March 29, 2015, and from March 23, 2016 through July 17, 2016 representing 31 3/7 weeks. Petitioner's medical bills were paid for by Blue Cross/Blue Shield, Respondent's group medical insurance carrier and Respondent is entitled to a credit under Section 8(j) of the Act. The Commission finds that Petitioner sustained ten percent loss of use the left shoulder pursuant to Section 8(d)(2) of the Act.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. Mr. Rushing has been employed with Prairie Farms Dairy for 20 years. He has worked

in a variety of positions during his employment that required heavy lifting and pulling at and above shoulder level. He performed these tasks every day from July 2008 to December 2014. T 22. He denied any history of injury to his left shoulder or prior medical care. T 23. Mr. Rushing is 49 years of age. He is 5'10" and right hand dominant. T 32. Outside of his employment at Respondent Mr. Rushing did not do any type of heavy lifting either recreationally or through work around the house. T 23.

2. Mr. Rushing admitted into evidence and testified to the following job history:

    a) From July 2008 (for the past 12 years) he worked as a mix maker. T 15. The bags of mix weigh 50 pounds. He grabs the bags of mix, lifts them, and deposits the contents into the mix machine. He has performed this task every day from July 2008 to December 2014. T 24. Mr. Rushing worked 45 weeks per year. T 30.

    b) The bags of mix are on pallets that are on a platform. T 25. The platform is 15 inches high. The bags of mix may be above head-high. On average he lifts bags off the pallets that are shoulder level or higher three days per week. T 29.

    c) The photos marked and admitted as RX5 fail to depict the bags of whey on the platform. The height of the bags of whey are measured at 48" height in RX5 and they are actually at 54" due to the height of the platform. T 36.

3. Mr. Kenneth Felty testified for the Respondent. He has been employed by Respondent since 2005. He is currently the production manager. T 53. He measured the height of the bags of whey when they were on the warehouse floor not on the platform. He measured the height at 48". T 54. If a pallet is full of bags the product would be 58" to 60" tall when you are pulling the bags off the pallet. Mr. Felty admitted that the photo identified as RX5 does not represent the height of the of the top two levels of product. T 59.

4. Mr. Rushing underwent an MRI of his left shoulder on November 24, 2014 that was ordered by his primary care physician Dr. Shenouda. The MRI revealed a small partial thickness, articular surface tear of the insertional fibers of the supraspinatus tendon on a background of supraspinatus tendinosis, and mild acromioclavicular degeneration. PX6

5. Petitioner consulted Dr. Donald Weimer, M.D. on December 1, 2014 for left shoulder pain of several month's duration. T 15. He was experiencing sharp pain in his left shoulder when he lifted his arm. The pain occurred only while he was working. T 16. Dr. Weimer had previously performed surgery on Mr. Rushing's right shoulder in 2010. Dr. Weimer performed an examination of the left shoulder and noted deep pain with elevation activities, positive Jobe's, cross arm, and impingement tests, and crepitus in the subacromial space. He noted that Mr. Rushing continued to work at Prairie Farms Dairy as a mix maker. Dr. Weimer recommended a left shoulder decompression, distal clavicle excision, and debridement vs. repair of the partial tear. PX5.

6. The problems Mr. Rushing was experiencing in his left shoulder were similar to the problems he experienced with his right shoulder in 2010. T 17. Dr. Weimer performed arthroscopic surgery the left shoulder on December 17, 2014. The post-operative diagnosis was left shoulder partial-thickness articular sided subscapularis rotator cuff tear, subacromial impingement, acromioclavicular joint osteoarthritis, and bursal surface rotator cuff tendinosis. PX8.

7. Mr. Rushing was seen by Dr. Weimer on March 2, 2015. He was 10 weeks post left shoulder surgery. His recovery was complicated by adhesive capsulitis and he was continued in physical therapy. On March 30, 2015 Dr. Weimer released Petitioner to return to work with no restrictions. PX8.

8. On August 18, 2015, when he was 8 months post-op Mr. Rushing returned to Dr. Weimer and reported that he had been doing well until 2-3 weeks prior when he developed superior left shoulder pain when lifting something but suffered no specific injury to his left shoulder. During the 5-month interval following his full-duty release Petitioner was performing his regular duties as a mix maker. Dr. Weimer administered a cortisone injection which gave short term relief. T 20.

9. Petitioner underwent a second MRI arthrogram of the left shoulder on December 30, 2015 which revealed a post-operative AC joint decompression with subacromial/subdeltoid bursitis that was a new finding compared to the November 24,2014 MRI. A distal supraspinatus distal thickness/undersurface articular defect was also described but no full thickness tear or tendon retraction was identified. PX9.

10. On March 23, 2016 Petitioner underwent a second left shoulder arthroscopy with repair of a partial articular-sided subscapularis rotator cuff tear, a medial subacromial decompression, debridement of a Type II superior labrum anterior and posterior lesion, and an open subpectoral biceps tendinosis performed by Dr. Weimer. PX10.

11. Mr. Rushing had physical therapy and was returned to full-duty work without restrictions on July 18, 2016. PX5. Petitioner was last seen by Dr. Weimer for his left shoulder in March 2017. T 47.

12. At Respondent's request Petitioner underwent a Section 12 examination by Dr. Christopher Kostman on December 2, 2015. He diagnosed Mr. Rushing with a left shoulder partial thickness articular sided rotator cuff tear, subacromial impingement, acromioclavicular osteoarthritis and rotator cuff tendinitis. He opined that Mr. Rushing's employment did not specifically cause his left shoulder condition nor did his repetitive work activities accelerate or aggravate his left shoulder condition. RX2.

13. Dr. Kostman was deposed on September 11, 2019. He is board certified in orthopedic surgery. He expressed the opinion that Petitioner has a type III acromion which has a downslope and predisposed Mr. Rushing to outlet stenosis or impingement of the rotator cuff. RX2-15.

14. Dr. Kostman reviewed Mr. Rushing's medical records and determined that the medical treatment was reasonable and necessary. This included both the surgery performed by Dr. Weimer on December 17, 2014 and the second surgery performed on March 23, 2016. RX2 (IME Report of Dr. Kostman December 2, 2015 and Addendum Report February 23, 2017.)

15. Dr. Donald Weimer was deposed on August 23, 2019. He is board certified in orthopedic surgery. He testified that he saw Mr. Rushing on December 1, 2014. He reported left shoulder pain of three to four months duration without history of injury. PX2-6. Petitioner described experiencing a catching sensation, pain at the acromioclavicular joint and deep pain in the left shoulder with elevation. *Id.* On physical examination Dr. Weimer made clinical findings indicative of problems with the AC joint. *Id.* Dr. Weimer reviewed the MRI of November 24, 2014 and found that Petitioner appeared to have a partial tear of the undersurface of the supraspinatus rotator cuff tendon and that there was impingement at the arthritic left shoulder joint. *Id.*

16. Dr. Weimer testified that the clinical findings and diagnosis that he made on Petitioner's left shoulder on December 1, 2014 were very similar the findings he made on Petitioner's right shoulder when he treated him previously in April 2010. PX2-10. Dr. Weimer performed surgery on Mr. Rushing's left shoulder on December 17, 2014. Id. He kept him off work from December 17, 2014 to March 29, 2015. *Id.* Dr. Weimer opined that considering the history of work activities provided to him by Petitioner, and the care and treatment he rendered that more likely than not his job duties and the length of time he had performed them were the cause of the development of the left shoulder problems that necessitated Dr. Weimer's treatment. *Id.*

17. Petitioner returned to Dr. Weimer on August 18, 2015. He reported that he had been doing well until two or three weeks prior when he developed superior pain at the shoulder when lifting. Petitioner reported no specific injury. Dr. Weimer injected the left shoulder with cortisone. PX5. A second MRI arthrogram was performed on December 30, 2015 which revealed a distal supraspinatus distal thickness/undersurface articular defect. PX9. Dr. Weimer performed an arthroscopic repair of the left rotator cuff, a medial subacromial decompression, and debridement of a type 2 SLAP lesion with open subpectoral biceps tendinosis. PX10. Petitioner underwent a course of physical therapy and was released to full duty work by Dr. Weimer on July 18, 2016. PX5.

18. Dr. Weimer opined based upon his knowledge of Mr. Rushing's labor intensive job at Prairie Farms Dairy, and his medical history which included prior surgery performed on his right shoulder, that his job duties at Respondent more likely than not were a contributing cause of the left bicep injury. PX2-28. Dr. Weimer testified that people who have labor intensive jobs who do a lot of lifting at or above the chest and shoulder level are more likely to display the problems evidenced by Petitioner. *Id.*

19. On cross examination, Dr. Weimer noted that he made no acute findings at the time of the December 2014 surgery on the left shoulder and that with age and activities people develop Type III acromion as a response to stress on the shoulder. The intra-operative findings on the left shoulder were chronic and would take years to develop. Impingement syndrome can come from normal aging or activities performed. EX2-37.

20. Petitioner has returned to his full-duty employment with Respondent following both surgeries on his left shoulder. He continues to have pain in the left shoulder which is most pronounced when he sleeps.

21. Petitioner returned to full-time employment following both surgeries. He continues to have some pain in his left shoulder which is most pronounced when he sleeps on his left side.

Conclusions of Law

There is no legal requirement that a certain percentage of the workday be spent on a task to support a finding of repetitive trauma. The Commission often categorizes compensable injuries into two types--those arising from a single identifiable event and those caused by repetitive trauma. See *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530, 505 N.E.2d 1026, 1028, 106 Ill. Dec. 235 (1987). An employee who alleges injury from repetitive trauma must still meet the same standard of proof as other claimants alleging

accidental injury. *Three "D" Discount Store v. Industrial Comm'n*, 198 Ill. App. 3d 43, 47, 556 N.E.2d 261, 264, 144 Ill. Dec. 794 (1989). The employee must still show that the injury is work-related and not the result of a normal degenerative aging process. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182, 759 N.E.2d 979, 983, 259 Ill. Dec. 918 (2001).

It is for the Commission to determine, as a matter of fact, whether a pre-existing condition has been aggravated, and that determination will not be overturned unless it is against the manifest weight of the evidence. *General Electric v. Industrial Comm'n*, 89 Ill. 2d 432, 438, 433 N.E.2d 671, 60 Ill. Dec. 629 (1982). Even under a repetitive trauma concept, the petitioner must establish that the injury was related to his employment. *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 476, 510 N.E.2d 502, 109 Ill. Dec. 634 (1987). Repetitive trauma claims generally rely upon medical testimony to establish the causal connection between the work performed and the claimant's disability. *Nunn*, 157 Ill. App. 3d at 477.

The Commission notes that the evidence establishes that Mr. Rushing had a degenerative condition in his left shoulder that required surgery. The surgery revealed a partial thickness articular sided subscapularis rotator cuff tear, subacromial impingement, acromioclavicular joint osteoarthritis, and bursal surface rotator cuff tendinosis.

During Petitioner's 20 years of employment with Respondent he was working a variety of jobs for the Respondent. His job duties as a mix maker from July 2008 to December 2014 required lifting 50 pound bags many times a day. The Commission finds that Petitioner's job duties were repetitive in nature. Also, there is no evidence that any of Petitioner's non work-related activities contributed to his left shoulder condition. Therefore, the Petitioner proved that his left shoulder condition was aggravated or accelerated by his repetitive work duties and that his condition is causally related to his job duties.

The Commission further finds the opinion of Dr. Weimer more persuasive than the opinion of Section 12 examiner Dr.Kostman. Dr. Weimer is Mr. Rushing's longtime treating orthopedic surgeon who performed rotator cuff surgery on his right shoulder in April of 2010. Dr. Weimer testified that his findings and diagnosis of December 1, 2014 were very similar to his findings on Petitioner's right shoulder in April of 2010. He opined that Mr. Rushing's left shoulder condition was work-related given his job required manual labor, was repetitive in nature and he performed it for a lengthy period of time. Dr. Kostman's opinion is that it is likely genetic in nature. However, his opinion ignores the fact that Petitioner's job duties were repetitive in nature and did require overhead lifting of heavy bags. All of which can contribute to Petitioner's condition.

The Commission finds the Petitioner is entitled to TTD from December 17, 2014 through March 29, 2015 and from March 23, 2016 to July 17, 2016 in the amount of $626.37 per week for a total of 31 and 3/7 weeks for a total of $19,686.81. The Commission finds that Respondent is entitled to credit for the medical bills (PX11) Respondent's group medical plan, Blue Cross/Blue Shield paid on Petitioner's behalf relative to the work accident of December 1, 2014

provided Respondent holds Petitioner harmless from any claims and demands by Blue Cross/Blue Shield.

Having weighed the evidence and analyzed the Section 8.1b(b) factors, the Commission finds that the Mr. Rushing sustained 10% loss of use of the left shoulder pursuant to Section 8(d)(2) of the Act. The Commission finds that Petitioner's relatively young age, 44 years and his expected working life performing a physically demanding job weighs in favor of increased permanent disability under Section 8.1b(b) (ii) and iii) of the Act. No loss of future earning capacity has been shown pursuant to Section 8.1b(b)(iv) the Commission finds this factor weighs in favor of deceased permanent disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on October 26,2020 is hereby reversed for the reasons stated above.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $626.37 per week for a period of 31 3/7 weeks, from December 17, 2014 through March 29, 2015 and March 23, 2016 through July 17, 2016 that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $569.43 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 use of 10% of the person-as-a-whole.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit for the medical bills Blue Cross/Blue Shield paid on Petitioner's behalf on account of the said accidental injuries, provided that to the extent Respondent claims credit under Section 8(j) 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 $ 46,000.00. 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.

November 10, 2021

o-9/15/21
SM/msb
44

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

/s/ *Deborah Baker*
Deborah Baker

/s/ *Deborah Simpson*
Deborah Simpson

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0562
NOTICE OF ARBITRATOR DECISION

RUSHING SR, STEVEN M Case# **15WC003629**
Employee/Petitioner

PRAIRIE FARMS DAIRY
Employer/Respondent

On 10/26/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.11% 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:

5218 DAVID H BONE LLC
3201 W MAIN ST
BELLEVILLE, IL 62226

2396 KNAPP OHL & GREEN
ETHAN J WILLENBORG
6100 CENTER GROVE RD
EDWARDSVILLE, IL 62025

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

Steven M. Rushing, Sr.
Employee/Petitioner

v.

Prairie Farms Dairy
Employer/Respondent

Case # 15 WC 03629

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable William R. Gallagher, Arbitrator of the Commission, in the city of Collinsville, on August 28, 2020. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On December 1, 2014, Respondent was operating under and subject to the provisions of the Act.

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

On this date, Petitioner did 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 $49,350.60; the average weekly wage was $949.05.

On the date of accident, Petitioner was 44 years of age, married with 0 dependent child(ren).

Petitioner has received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of $61,843.56 under Section 8(j) of the Act.

ORDER

Based upon the Arbitrator's Conclusions of Law attached hereto, claim for compensation is denied.

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

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

William R. Gallagher, Arbitrator

October 23, 2020
Date

OCT 26 2020

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged he sustained a repetitive trauma injury arising out of and in the course of his employment by Respondent. The Application alleged that Petitioner sustained "repetitive trauma" which caused an injury to his "left shoulder" (Arbitrator's Exhibit 2). Respondent disputed liability on the basis of accident, causal relationship and intervening accident (Arbitrator's Exhibit 1).

Petitioner had a prior workers' compensation claim involving an injury to his right shoulder which was also a repetitive trauma claim. The right shoulder case was tried before the Arbitrator who filed his Decision with the Commission on August 30, 2013. The Arbitrator ruled in favor of Respondent and found Petitioner did not sustain a repetitive trauma injury to his right shoulder. Petitioner filed a review of the Arbitrator's Decision to the Commission. In a Decision and Opinion on Review entered on May 30, 2014, the Commission reversed the Arbitrator's Decision and awarded medical bills, temporary total disability benefits and permanent partial disability benefits to Petitioner. The Commission's Decision was entered into evidence at trial (Petitioner's Exhibit 12).

Petitioner testified he became employed by Respondent in July, 2008, and worked as a mix maker. Petitioner's job duties included lifting bags of whey powder, cocoa powder and stabilizers and emptying their contents into a blender. Most of the bags of powder weighed approximately 50 pounds. The bags of powder were stacked on a pallet adjacent to Petitioner's work area.

Petitioner stated the top two rows of bags on the pallets would be at shoulder height or higher. The top two rows contained a total of 10 bags of powder. Petitioner testified he lifted/moved bags of powder from three pallets a day, for three days a week during the time he worked as a mix maker. There were five bags in a row and 10 bags high on a pallet.

Petitioner testified the pallets were on a platform and Petitioner was between the pallets and blender. Petitioner estimated the height of the platform to be approximately 15". Petitioner would grab a bag of powder, open it, and dump its contents into the blender. Petitioner said the majority of the bags he pulled off of the pallets were below shoulder level. When Petitioner removed the bags, he would not lift them upward. Petitioner said he was 5'10" tall (70").

Ken Felty, Petitioner's supervisor, testified on behalf of Respondent. At the request of Respondent, Felty took photographs of the bags of powder stacked on the pallet with a measuring tape to determine how high they were stacked. The photographs were tendered into evidence at trial. The stack of stabilizer was 43", the stack of whey powder was 46", and the stack of cocoa powder was 68" (Respondent's Exhibit 5).

Felty testified that when he took the photographs, the bags of powder were not on the platform. He estimated the height of the platform to be approximately 12". He did not know why he was not requested to have the stacks of powders on the platform when he obtained the photographs. Felty testified he was 5'11" tall (71") and he had worked as a mix maker in the past. He said the only stacks of powders which would be above shoulder level would have been the cocoa powder and, it would only be two rows of cocoa powder.

Petitioner testified the stack of stabilizer powder would be shorter than the other stacks and was not at shoulder level. Petitioner agreed the pallet of cocoa powder could be 68" tall; however, he also stated that only one pallet of cocoa powder would be used per week in the mix making department.

In regard to his left shoulder symptoms, Petitioner was initially seen by Dr. Mounir Shenouda, his family physician, on August 22, 2014. At that time, Petitioner complained of left shoulder pain with movement that had been present for one month. There was no reference to Petitioner's work activities in the medical record of that date (Respondent's Exhibit 2).

On December 1, 2014 (the date of manifestation alleged in the Application), Petitioner was evaluated by Dr. Donald Weimer, an orthopedic surgeon, who previously treated Petitioner for his right shoulder condition. At that time, Petitioner complained of left shoulder pain with elevation activities and a catching sensation with overhead activity. Petitioner did not make any reference to his work activities and did not provide a history of an injury. Dr. Weimer reviewed an MRI scan (which had been performed on November 24, 2014, and opined it revealed impingement of the AC joint and a tear of the supraspinatus. Dr. Weimer recommended Petitioner undergo arthroscopic surgery with decompression, distal clavicle excision and debridement versus repair of the tear of the supraspinatus (Petitioner's Exhibit 5).

On December 17, 2014, Dr. Weimer performed arthroscopic surgery on Petitioner's left shoulder. The surgical procedure consisted of subacromial decompression, distal clavicle excision and debridement of the tear of the supraspinatus and bursal surface rotator cuff tendinosis (Petitioner's Exhibit 8).

Following surgery, Dr. Weimer ordered physical therapy. Petitioner's condition improved and Dr. Weimer authorized Petitioner to return to work without restrictions on March 30, 2015 (Petitioner's Exhibit 5).

Petitioner was again seen by Dr. Weimer on August 18, 2015. At that time, Petitioner advised he experienced left shoulder pain approximately two to three weeks prior when he was lifting something. Dr. Weimer noted some inflammation at the AC joint resection site. He administered a cortisone injection (Petitioner's Exhibit 5).

At the direction of Respondent, Petitioner was examined by Dr. Christopher Kostman, an orthopedic surgeon, on December 2, 2015. In connection with his examination of Petitioner, Dr. Kostman obtained information from Petitioner in regard to his job duties. Petitioner informed Dr. Kostman that his overhead activities at work consisted of cleaning containers and reaching for hoses attached to the containers. The hoses weighed two to 15 pounds and Petitioner cleaned the tanks two to three times per week. In regard to his moving bags of product into a mixer, Petitioner informed Dr. Kostman he would remove the bags from a pallet, cut them open and then dump the products into a mixer. The products were stacked from chest to head high and the mixer was at approximately waist level. Dr. Kostman reviewed a detailed job description of Petitioner's position which had been provided to him by Respondent. Dr. Kostman also reviewed medical records provided to him by Respondent (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Kostman agreed with the diagnosis of Dr. Weimer and that the treatment Petitioner had received for his left shoulder condition was reasonable and necessary. In regard to causality, Dr. Kostman opined Petitioner's left shoulder condition was not caused, accelerated or aggravated by Petitioner's work activities. He noted the shoulder level work performed by Petitioner was with lesser weight and performed on an infrequent basis (Respondent's Exhibit 1; Deposition Exhibit 2).

Dr. Weimer saw Petitioner on December 24, 2015. At that time, Petitioner advised the cortisone shots gave him relief from the symptoms until about two to three weeks prior to the appointment. Dr. Weimer opined Petitioner may have had pathology in regard to the biceps tendon. He ordered an MRI arthrogram (Petitioner's Exhibit 5).

The MRI arthrogram was performed on December 30, 2015. According to the radiologist, the MRI arthrogram revealed the prior surgical changes with subacromial/subdeltoid bursitis, no further tearing of the supraspinatus and normal glenohumeral articulation (Petitioner's Exhibit 9).

Dr. Weimer saw Petitioner on January 7, 2016, and reviewed the MRI arthrogram. He opined it revealed thickening of the long biceps tendon and fluid around it. Dr. Weimer also noted Petitioner had a labor intensive job. He advised Petitioner that if he continued to have pain, surgery on the long biceps tendon might be indicated (Petitioner's Exhibit 5).

On March 23, 2016, Dr. Weimer performed arthroscopic surgery on Petitioner's left shoulder. The procedure consisted of a repair of a subscapularis tear, subacromial decompression, debridement of the superior labrum and bursal surface rotator cuff tendinosis and a subpectoral biceps tenodesis (Petitioner's Exhibit 10).

Following surgery, Dr. Weimer continued to see Petitioner and ordered physical therapy. Petitioner's condition improved and Dr. Weimer authorized Petitioner to return to work on July 18, 2016. Dr. Weimer again saw Petitioner on March 16, 2017. At that time, Petitioner complained of some deep pain in the left shoulder. Dr. Weimer opined Petitioner had glenohumeral chondromalacia and suggested Petitioner take over-the-counter medication (Petitioner's Exhibit 5).

At the direction of Respondent, Dr. Kostman reviewed additional medical records, including the report of the surgery performed on March 23, 2016. Dr. Kostman prepared an addendum report dated February 23, 2017. In regard to causality, Dr. Kostman's opinion remained the same (Respondent's Exhibit 1; Deposition Exhibit 3).

Dr. Weimer was deposed on August 23, 2019, and his deposition testimony was received into evidence at trial. In regard to his diagnosis and treatment of Petitioner's left shoulder condition, Dr. Weimer's testimony was consistent with his medical records and he reaffirmed the opinions contained therein. In regard to causality, in response to a hypothetical question, Dr. Weimer testified Petitioner's job activities would have been a "contributing cause" for Petitioner to develop the rotator cuff condition for which he treated Petitioner (Petitioner's Exhibit 2; pp 16, 28).

On cross-examination, Dr. Weimer was questioned about what above shoulder lifting activities Petitioner performed at work. Dr. Weimer responded that he did not "specifically" understand what Petitioner did other than the fact Petitioner did "heavy repetitive lifting." When questioned how many of Petitioner's work activities involved above shoulder lifting, Dr. Weimer responded that he did not know (Petitioner's Exhibit 2; pp 36-37).

Dr. Kostman was deposed on September 11, 2019, and his deposition testimony was received into evidence at trial. On direct examination, Dr. Kostman's testimony was consistent with his medical reports and he reaffirmed the opinions contained therein. In regard to causality, Dr. Kostman testified Petitioner's description of his work activities and the job description revealed Petitioner did some above chest lifting with cleaning of the tanks, but this involved lesser weight and that Petitioner did perform some lifting above shoulder level on occasion. Based on the preceding, Dr. Kostman testified Petitioner's job activities did not cause, aggravate or accelerate Petitioner's left shoulder condition (Respondent's Exhibit 1; pp 16-17).

On cross-examination, Dr. Kostman agreed that overhead lifting and pulling could contribute to left shoulder problems. However, in regard to Petitioner's removing bags of powder from pallets, Dr. Kostman testified the pallets were stacked at a maximum height of eye level or head level so that the majority of the work performed by Petitioner was not eye or shoulder level because Petitioner would work down the pallet (Respondent's Exhibit 1; pp 24, 27).

At trial, Petitioner testified he was able to return to work to his regular job following both surgeries. Petitioner still has complaints in regard to his left shoulder, primarily when he is sleeping.

Conclusions of Law

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

The Arbitrator concludes Petitioner did not sustain a repetitive trauma injury arising out of and in the course of his employment by Respondent which manifested itself on December 1, 2014, and his current condition of ill-being is not causally related to his work activities.

In support of this conclusion the Arbitrator notes the following:

The primary factual basis of Petitioner's repetitive trauma claim was that he had to repetitively lift/move bags of powder from pallets which were either at or higher than shoulder level.

Petitioner testified he was 5'10" tall or 70". Photographs of the three types of powders Petitioner would lift/move were tendered into evidence. The photographs revealed the stack of stabilizer was 43" tall, the stack of whey powder was 46" tall, and the stack of cocoa was 68" tall. However, none of the stacks of powder were on the platform which Petitioner estimated to be 15" tall. Ken Felty estimated the height of the platform to be 12" tall.

If the Arbitrator uses Petitioner's estimate of the height of the platform, the stack of stabilizer would be 58" tall, the stack of whey powder would be 61" tall and the stack of cocoa powder would be 83" tall.

Based on the preceding, Petitioner's lifting/moving of stabilizer would not involve any lifting/moving at or above shoulder level. The lifting/moving of the whey powder may involve some lifting/moving at or above shoulder level, but it would be limited because the height of the stack of whey powder would be gradually reduced during the workday. The stack of cocoa powder would involve lifting/moving at or above shoulder level but this would likewise be gradually reduced during the workday. Further, only one pallet of cocoa powder would be used per week.

Based on the preceding, the Arbitrator is not able to approximate the extent of the lifting/moving Petitioner performed at or above shoulder level, but it was not continuous.

Petitioner's treating physician, Dr. Weimer, did not know the details of Petitioner's job duties, only that Petitioner performed "heavy repetitive lifting." Dr. Weimer did not know how many of Petitioner's work activities involved above shoulder lifting.

Respondent's Section 12 examiner, Dr. Kostman, had detailed information regarding Petitioner's work activities which he obtained from Petitioner and Respondent. This was the primary basis of Dr. Kostman's opinion that Petitioner's work activities did not cause, aggravate or accelerate Petitioner's left shoulder condition.

Based upon the preceding, the Arbitrator finds the opinion of Dr. Kostman to be more persuasive than that of Dr. Weimer in regard to causality.

In regard to disputed issues (J), (K) and (L) the Arbitrator makes no conclusions of law because these issues are rendered moot because the Arbitrator's conclusion of law in disputed issues (C) and (F).

William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC003107
Case Name	HUPP, CHAD v. LD MECHANICAL CONTRACTORS INC
Consolidated Cases	13WC029387
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0563
Number of Pages of Decision	53
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	David Moss
Respondent Attorney	Daniel Gaumer

DATE FILED: 11/10/2021

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund
☐ 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

CHAD HUPP,

Petitioner,

vs. NO: 13 WC 3107

LD MECHANICAL CONTRACTORS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

I. Findings of Fact

Petitioner, a plumbing and heating worker, filed two consolidated claims alleging cervical injuries with the first accident occurring on December 16, 2011 from moving a wood burning furnace. This accident is the subject of the present Decision. Petitioner then claimed additional cervical injuries after pulling an air handler on February 21, 2012. The February 21, 2012 accident is addressed by the Commission in a separate Decision under 13 WC 29387.

Petitioner's job duties included performing furnace and attic duct installations. While tearing out a wood burning furnace on December 16, 2011, Petitioner moved the furnace on a cart with the help of two other employees, whom he identified as Keith Robinson and "Scott." Petitioner testified that he had to put his head and shoulder up against the furnace when they tipped it forward on the cart, which caused his head to be pushed over. When he then got up, Petitioner noticed a cramp-like sensation in his neck.

Petitioner continued to work after the incident, but when he drove back to the shop and exited his work truck, he felt stiff and had to walk around to loosen up. Petitioner testified that he waited to see if Scott or someone else would show up back at the shop so he could let them know, but everyone had already gone. Petitioner testified that the next morning, he then took two steps out of bed before collapsing to the floor with severe left arm pain up into his neck. Petitioner testified that shortly thereafter on December 19, 2011, he called Kent Babbs, one of his bosses, and informed Mr. Babbs that he had hurt his arm moving the furnace and would not be into work.

Mr. Babbs, who co-owned Respondent's company with John Dallas, testified that he recalled speaking with Petitioner on December 19, 2011. Mr. Babbs testified that Petitioner informed him that he could hardly get out of bed that morning and would not be coming into work; however, Petitioner did not state that he had injured himself at work. Mr. Babbs testified that Petitioner was thereafter on and off work for the next several months, but he never said anything to suggest that his symptoms were caused by an injury at work. Mr. Dallas also recalled Petitioner calling off work on December 19, 2011. Mr. Dallas testified that he was aware Petitioner was having back pain, but he did not ask what had happened and thought it was just general back pain.

Treatment records show that Petitioner also presented for treatment on December 19, 2011 at Sarah Bush Lincoln Hospital and reported waking up Saturday morning with left shoulder pain shooting into his neck and left arm. Petitioner denied any known injury or trauma but noted that he had been moving a wood burning furnace the day before his pain began. NP Jodi Morrisey diagnosed Petitioner with a musculoskeletal strain at the left shoulder and neck. She prescribed medication and restricted Petitioner to no activity with the left arm, heavy lifting, or strenuous activity. NP Morrisey also released Petitioner from work until he saw his primary care provider.

Petitioner presented to Dr. Cornelius Whalen on December 20, 2011. Dr. Whalen indicated that Petitioner had no injury and woke up Saturday with shoulder and neck pain. He diagnosed Petitioner with shoulder pain, took him off work, and ordered X-rays, which were obtained the same day. The left shoulder X-rays revealed mild AC joint narrowing without significant superimposed degenerative changes, and the cervical X-rays showed straightening to partial reversal of the normal cervical lordosis suggestive of muscle spasm.

Petitioner testified that he was then off work from December 22 through December 27, 2011 and returned to work from December 28 to December 30, 2011, during which time, he informed Mr. Babbs that he was having trouble with his left arm. Petitioner testified that he told Mr. Babbs he had hurt his arm while moving the wood burning furnace the prior Friday.

However, Mr. Babbs testified that he did not receive notice that Petitioner was claiming a work-related injury until November 2012 when Petitioner came to his house and told him about the December 16, 2011 accident. Mr. Dallas also testified that the first time he heard of Petitioner's claims was when Mr. Babbs informed him of them in November 2012 after Petitioner had gone to Mr. Babbs' home. Mr. Dallas testified that he was aware Petitioner had pain, but Petitioner never told him that his problems were due to work-related injuries. Mr. Dallas testified that he had a conversation with Petitioner about his pain sometime between December 19, 2011 and when Petitioner first saw Dr. Hutti on January 3, 2012. Mr. Dallas testified that he did not recommend that Petitioner go to Dr. Hutti specifically, but he did recommend that Petitioner see a chiropractor.

Petitioner received chiropractic treatment from Hutti Chiropractic Center from January 3, 2012 through February 2012. During that time, Petitioner testified that he was taken off work by Dr. Hutti from January 3 to January 6, 2012 and returned to work on January 9, 2012. He then went off work again on January 30, 2012 and returned on February 6, 2012. However, Petitioner testified that he continued to have trouble with his left arm and took off work again on February17, 2012 before returning again on February 20, 2012.

While receiving chiropractic care from Dr. Hutti, Petitioner also continued to follow up with Dr. Whalen. On January 30, 2012, Dr. Whalen diagnosed Petitioner with shoulder pain and paresthesia that appeared to be in the C6-C7 nerve roots. He prescribed Flexeril with a Medrol Dosepak and provided a note excusing Petitioner from work on January 30, 2012.

Shortly thereafter, on February 1, 2012, Petitioner filled out a Notice of Disability Claim form for Financial American Life Insurance Company. When asked on this form if his disability was caused by an accident, Petitioner wrote that he did not know and he had woken up that way. The same day, Petitioner also filled out an Accidental Injury Claim form for Aflac. When prompted to describe how his accident occurred, Petitioner wrote that he had sat up in the middle of the night quickly with leg cramps. He marked the location of the accident as his home.

The following day, Respondent's office manager, Michelle Carlen, filled out an employer's statement with Financial American Life Insurance Company and noted that Petitioner was on medical leave with his last day worked on January 27, 2012. Ms. Carlen indicated that Petitioner was not eligible for workers' compensation and had not filed a workers' compensation claim. No information was provided regarding Petitioner's alleged accident. Ms. Carlen filled out another employer's statement for Aflac on February 9, 2012. Although Ms. Carlen's handwriting is difficult to read where she listed Petitioner's first date of disability, she indicated that it was December 17 or December 19, 2011. This form did not otherwise detail the alleged accident. Ms. Carlen thereafter completed numerous other disability forms for Aflac reiterating the same information and identifying Petitioner's first date of disability as December 17, 2011.

Petitioner testified that then, on February 21, 2012, he was on his knees pulling a 150 to 200-pound air handler across an attic with another employee named Chad Alexander when his neck popped and he felt pain down his left arm. Petitioner testified that he immediately told Mr. Alexander that they had to stop. At the hearing, Mr. Babbs testified that he did not know about the alleged second injury on February 21, 2012 until Respondent's attorney told him about it.

On February 22, 2012, Petitioner told Dr. Whalen that his left elbow and shoulder bothered him after working in an attic and hearing a pop the day prior. Dr. Whalen diagnosed Petitioner with shoulder pain and apparent neck pain with paresthesia that could be a radicular problem. He referred Petitioner to a spine clinic and excused him from work until February 24. Dr. Whalen also obtained cervical X-rays, which revealed mild degenerative endplate and degenerative bony foraminal narrowing on the left at C3-C4 apparently related to mild facet joint degeneration.

Petitioner then presented to Dr. Victoria Johnson of Carle Spine Institute on February 24, 2012 and reported that his symptoms had developed on or around December 17, 2011. Petitioner did not recall any particular event or injury associated with his immediate onset of discomfort, but he noted moving a large furnace the day before. Petitioner complained of left-sided arm pain radiating to his elbow and below with numbness and tingling in the first and second digits. Dr. Johnson diagnosed Petitioner with rotator cuff syndrome and probable cervical radiculopathy. She administered a left shoulder injection and took Petitioner off work until February 29, 2012. Petitioner testified that he returned to work on February 29, 2012, but he continued to have trouble with his left arm and spoke to both Mr. Babbs and Mr. Dallas regarding it.

On March 5, 2012, Petitioner filled out another Aflac disability form and listed the accident date as December 17, 2011. Petitioner wrote that he had moved a wood burning stove, and then the morning after, he woke up, took two steps, and felt his symptoms begin. Petitioner also noted that the day before moving the stove, he experienced charley horses/leg cramps in both legs.

On March 13, 2012, a cervical MRI revealed: broad-based disc/osteophyte with a probable left C6-C7 disc protrusion producing moderate to severe thecal sac narrowing, significantly narrowing the left anterolateral recess and probably producing severe left foraminal narrowing; multilevel disc and facet degenerative findings; and severe left foraminal narrowing at C4-C5. On March 14, 2012, Dr. Johnson found that the MRI showed degenerative disc disease at C3 through C6 and a broad-based left-sided disc protrusion at C6-C7. Dr. Johnson believed the disc protrusion was causing Petitioner's symptoms. She recommended an epidural steroid injection.

On March 15, 2012, Petitioner filled out another Aflac form referencing only his December 2011 accident. Shortly thereafter, on March 19, 2012, Dr. Hutti filled out a physician's statement for Aflac that also listed an incident date of December 17, 2011. Petitioner then underwent a left C6-C7 epidural injection on March 21, 2012. Dr. Johnson also filled out two physician's statements on March 28, 2012 indicating that Petitioner was unable to work at that time.

Upon Dr. Johnson's referral, Petitioner next presented to Dr. James Harms of Carle Spine Institute on April 4, 2012 for a surgical consultation. Dr. Harms noted that Petitioner's pain began on December 17, 2011 when he awoke with it after having moved a heavy furnace the day prior. Dr. Harms believed that Petitioner's pain generator was his C6-C7 herniated disc. As such, he indicated that surgery was a reasonable option. Petitioner then underwent a C6-C7 anterior discectomy and fusion on April 17, 2012. Dr. Harms kept Petitioner off work post-surgery until May 11, 2012, at which time he switched to light duty restrictions of no lifting above the shoulders more than 20 pounds, no aggressive twisting, and no flexion or extension of the neck.

On July 2, 2012, Dr. Harms reported that Petitioner was 50% better with continued symptoms that were likely coming from his nerves still being sensitive. Dr. Harms also believed that some of Petitioner's other degenerative discs could possibly be causing some symptoms. He recommended continued light duty and physical therapy, which Petitioner began on July 11, 2012. The physical therapist listed Petitioner's onset date as December 16, 2011 from when he moved a wood furnace at work.

Sometime after August 1, 2012, Carle Hospital sent an undated letter informing Petitioner that Health Alliance was not paying for his August 1, 2012 service date. The letter indicated that a workers' compensation denial letter was needed before Petitioner's claim could be further processed. Although undated, it is presumable that the letter was sent after August 1, 2012, since it references that service date. In another undated letter, Mr. Babbs wrote back to Health Alliance and also referenced an August 1, 2012 service date. Mr. Babbs stated that Petitioner was not involved in a workers' compensation matter and that his claims needed to be paid by Health Alliance without further delay. At the hearing, Mr. Babbs testified that he sent this letter in response to Petitioner showing him the letter from Carle Hospital and asking him to write to Health Alliance to inform them that it was not a workers' compensation matter so his insurance would pay the bill. Mr. Babbs did not recall the exact date he prepared the letter; however, he testified

that it was before Petitioner came to his house in November 2012 and reported his workers' compensation claim to him for the first time.

On August 13, 2012, Dr. Harms ordered a cervical CT after noting that Petitioner's neck and left arm pain had not resolved. On August 14, 2012, the CT revealed straightening of the normal cervical lordosis, a spinal canal that was at the lower limits of normal or slightly congenitally small, and moderate to severe left foraminal narrowing at C3-C4. A cervical MRI was also obtained on August 24, 2012 and showed stable C3-C4 and C4-C5 severe left foraminal stenosis and C5-C6 moderate bilateral foraminal stenosis. The same day, Dr. Harms opined that they might have overestimated how much of Petitioner's problem was coming from one level, and instead, other levels in his neck were contributing to the ongoing problems. Dr. Harms now believed that the problem area was C5-C6. Before pursuing surgery at this level, Dr. Harms wanted Petitioner to visit a neurologist or demonstrate a good response to an injection. Petitioner then underwent a left C5-C6 transforaminal epidural injection on August 29, 2012.

Petitioner returned to Carle Spine Institute on September 17, 2012 and reported feeling the same after the injection. NP Glenett Barrett then recommended a neurology consultation and EMG. On October 23, 2012, the EMG revealed minimal left carpal tunnel syndrome with no cervical radiculopathy or polyneuropathy. The same day, Petitioner had his neurology consultation with Dr. Kenneth Aronson of Carle Neurology Department. Dr. Aronson indicated that Petitioner's pain began the day after moving a furnace in December 2011. Dr. Aronson found that Petitioner had ongoing left C6 symptoms with pain along his neck and shoulder. He also suspected that Petitioner had more foraminal narrowing at C5-C6 that was causing ongoing difficulties. Dr. Aronson recommended a nerve root block or further surgical intervention.

On October 29, 2012, Dr. Harms indicated that Petitioner had probable foraminal stenosis at C5-C6, although the symptoms were not classic. He recommended that Petitioner see a pain doctor, such as Dr. Brian Ogan. On November 5, 2012, Petitioner presented to Dr. Ogan and reported radiating cervical pain that began in December 2011 after lifting a heavy object. Dr. Ogan found Petitioner's examination to be consistent with cervical nerve root irritation at C5-C6. His diagnoses included cervical intervertebral disc displacement without myelopathy, spondylosis without myelopathy, brachial neuritis or radiculitis, and cervicalgia. Dr. Ogan then discussed proceeding with a series of cervical injections, and Petitioner underwent the first cervical epidural steroid injection November 6, 2012.

The next day, on November 7, 2012, Petitioner presented to Carle Sleep Clinic with a history and examination concerning for obstructive sleep apnea. It was noted that Petitioner also had chronic insomnia in the setting of chronic pain and restless leg syndrome. Petitioner thereafter continued to treat for his sleep disorders with medications, a CPAP machine, and ongoing sleep clinic visits.

On December 18, 2012, Petitioner then gave a recorded statement to Marla Howard of Respondent's insurance company. Petitioner told Ms. Howard that he had neck and shoulder pain after moving a wood burning furnace on December 16, 2011. He stated that at the time of the accident, he was with Scott Siberly and Keith Roberson, but he did not say anything to either man about what had happened. Petitioner indicated that he did not tell anyone on the Friday it

happened, but on the following Monday, he reported the accident to Mr. Babbs. Petitioner stated that he also told Mr. Dallas after he went to the doctor, because he was making a workers' compensation claim. On January 15, 2013, Petitioner then filled out his Application for Adjustment of Claim stating that he had sustained cervical injuries on December 16, 2011 from moving a wood burning furnace.

On January 30, 2013, Petitioner returned to the Carle Spine Institute with complaints of cracking and popping in his cervical region, low back pain, and leg cramping. NP Barrett told Petitioner that surgery would not help the cracking and popping, since that involved arthritis. She noted that Petitioner not being as active as normal had caused some of his arthritic-type pain. NP Barrett diagnosed Petitioner with likely degenerative disc disease of the lumbar spine and C5-C6 along with left foraminal stenosis. NP Barrett recommended that Petitioner get more active, do neck exercises, and continue nonoperative interventions for his neck. For his low back, she recommended that Petitioner see a physical medicine and rehabilitation doctor, as it was likely a nonsurgical problem. She also recommended continued light duty restrictions.

Petitioner then presented to Dr. Zeeshan Ahmad on February 18, 2013 for his back pain. Petitioner told Dr. Ahmad that his back pain had been going on for years, and since he was now off work for his neck, he believed it to be a good time to get his back pain evaluated. Dr. Ahmad's impression was mild lumbar degenerative discs with chronic low back pain and no significant radiological evidence of lumbar pathology. Petitioner then saw Dr. Ogan on April 1, 2013 and reported that his lumbar pain had begun a few years prior without an initiating event. Dr. Ogan's assessment was low back pain with right lower extremity radiating pain, as well as posterior cervical pain with left upper extremity radiating pain post-industrial injury. Upon Dr. Ogan's recommendation, Petitioner then underwent L4-L5 and L5-S1 injections on April 11, 2013.

Thereafter, on April 25, 2013, Petitioner underwent a second cervical surgery, specifically the removal of Synthes plates and screws at C6-C7 along with an anterior discectomy and fusion at C5-C6. After the surgery, Petitioner was kept on light duty restrictions by Dr. Harms. Then, on June 12, 2013, Petitioner told Dr. Whalen that the surgery had helped him dramatically, although he was still not back to normal. Petitioner's light duty restriction of no lifting over 20 pounds was subsequently continued by NP Barrett on June 26, 2013.

On July 3, 2013, Ms. Carlen filled out another Aflac disability form and listed Petitioner's first date of disability as December 17, 2011. When asked if the disability was caused by an accident at the workplace, Ms. Carlen answered affirmatively.

Petitioner next returned to Dr. Ogan on July 24, 2013 for reevaluation of his lumbar pain. Dr. Ogan diagnosed Petitioner with right sacroiliitis and lumbar degenerative disc disease. He recommended a right sacroiliac joint injection, which Petitioner underwent on August 8, 2013. Shortly before the injection, Petitioner also started another round of physical therapy on August 5, 2013. He was subsequently discharged from physical therapy due to a lack of progress on September 12, 2013. Upon Dr. Ogan's further recommendation, Petitioner then underwent L3-L4, L4-L5, and L5-S1 facet joint injections on October 3, 2013.

On October 7, 2013, a repeat cervical MRI showed C3-C4 severe left foraminal stenosis

and C4-C5 moderate to severe left foraminal stenosis. On the same day, Dr. Harms found that the MRI showed no spinal cord problems. Dr. Harms stated that although the MRI showed narrowing at the nerve exits at C4-C5, it did not explain Petitioner's symptoms. He thought that Petitioner had residual problems with pressure on his nerves, which could improve in up to two years. Dr. Harms did not believe there was anything more a surgeon could do to help Petitioner and instead recommended anti-inflammatory medication, neck exercises, and a neurologist consultation. After Petitioner told Dr. Harms that he could not go back to work without being 100%, Dr. Harms stated that Petitioner may need to change jobs to one that involved less muscles in his back or neck.

On November 20, 2013, Dr. Ogan opined that Petitioner's MRI and examination were consistent with nerve root irritation on the left at C4-C5. He recommended a C4-C5 epidural steroid injection, which Petitioner then underwent on November 21, 2013. When Petitioner returned on January 22, 2014, Dr. Ogan suspected that cervical facet arthropathy was possibly contributing to Petitioner's chronic cervical pain. Upon Dr. Ogan's recommendation, Petitioner underwent left C2-C3, C3-C4, and C4-C5 facet joint injections on January 23, 2014 and an additional cervical epidural steroid injection on February 27, 2014.

Upon Dr. Whalen's referral, Petitioner then presented to Dr. Mark Stern at the Springfield Clinic on April 28, 2014. Dr. Stern's impression included osteoarthritis, cervical and lumbar pain with radiculopathy, fibromyalgia, and sleep apnea. He believed that Petitioner could benefit from selective cervical nerve root injections. Dr. Stern also recommended additional physical therapy and a trial of dexamethasone, as well as anti-inflammatories and medication adjustments.

Petitioner then underwent a C7-T1 interlaminar epidural steroid injection on May 27, 2014. Nevertheless, on June 9, 2014, Dr. Whalen found that Petitioner had not improved substantially, and if anything, he had more problems arise. Dr. Whalen continued Petitioner's medication and again refilled the prescriptions at Petitioner's follow-up visits on June 30, 2014 and July 29, 2014. At the latter visit, Petitioner complained of left arm tremors and sudden jerking in addition to his ongoing neck, left upper back, and shoulder problems. Thereafter, on August 28, 2014, Dr. Whalen filled out a physical capacity questionnaire and indicated that Petitioner was not able to work in conditions that required standing or walking for up to two hours, sitting six or more hours, lifting and carrying up to 10 pounds occasionally, or lifting and carrying up to a few pounds frequently.

Petitioner then presented to Dr. James Turner of Cork Medical Center on September 4, 2014 for treatment of his unrelated ADD diagnosis. Petitioner wanted to discuss Adderall, as he thought that it had helped him with his pain and movement. Petitioner reported generalized stiffness and all-over pain as well as a left arm tremor with numbness in his arms and hands. Petitioner's problem list at that time included resting tremor and ADD. Dr. Turner recommended following up with Petitioner's neurologist.

Also in September 2014, Sue Cunningham claimed that she bought firewood off Petitioner on two separate occasions. Ms. Cunningham testified that she did not know Petitioner, but she called his phone number on a sign that was advertising firewood. Ms. Cunningham identified RX 16 as the two checks she issued to purchase the wood from Petitioner. RX 16 contains one check dated September 17, 2014 from Ms. Cunningham to Bridget Duncan in the amount of $60.00 and another check dated September 25, 2014 from Ms. Cunningham to Ms. Duncan in the amount of

$120.00. Both checks note that they were for "FW." Ms. Cunningham testified that she made the checks out to Ms. Duncan upon Petitioner's instruction. Ms. Cunningham further testified that when Petitioner dropped off the wood, he had a pickup truck with a trailer full of wood and physically unloaded it for her. Ms. Cunningham described the wood as regular firewood with a triangle top that was about 18 inches wide and cut or split. She testified that she told Petitioner where she wanted the wood unloaded and he unloaded it, although she did not stand there watching him do so. Ms. Cunningham further testified that Mr. Babbs was her brother, but when she purchased the firewood, she was not aware that Petitioner had worked for Respondent or had a workers' compensation claim against Respondent.

However, Petitioner testified that he did not recall selling firewood to Ms. Cunningham and had never met her before. Petitioner also testified that he never took a check as payment for the sale of firewood, because he did not want to mess with people writing bad checks. Nevertheless, Petitioner identified Ms. Duncan as the mother of his children and his former live-in girlfriend of many years.

After this alleged firewood sale, Petitioner returned to Dr. Whalen on September 26, 2014. Dr. Whalen observed that Petitioner appeared to have more problems now than he did pre-surgery. He renewed Petitioner's prescriptions but stated that he personally had nothing more to recommend. Instead, Dr. Whalen advised Petitioner to see a specialist. Nevertheless, Petitioner returned to Dr. Whalen on October 27, 2014. At that time, Petitioner reported that his right arm was numb and tingly, whereas his problem was previously more left-sided. Petitioner mentioned that he had tripped and fallen on October 25, 2014, and since that time, his right shoulder was hard to abduct. Still, Petitioner indicated that most of his pain remained in his neck and shoulder area on the left side. Dr. Whalen prescribed medication and referred Petitioner to Dr. Robert Cranston.

Petitioner saw Dr. Cranston of Carle Department of Neurology on October 31, 2014. Dr. Cranston noted that in 2011, Petitioner had moved a heavy furnace and felt as though he had ruptured a disc. On examination, Dr. Cranston found that Petitioner shook his left hand in a small tremorous way that appeared voluntary. Dr. Cranston thought that Petitioner might be doing it to help decrease some of the pain and irrigation in the arm. He did not interpret it as malingering, although he also did not believe it to be an involuntary tremor. Dr. Cranston diagnosed Petitioner with possible radiculopathy and recommended a repeat cervical MRI and EMG. On November 24, 2014, the MRI showed small new right paracentral disc extrusion with inferior migration at C7-T1 effacing the right anterior thecal sac. The EMG was later obtained on December 3, 2014 and suggested mild bilateral right greater than left carpal tunnel syndrome.

On December 5, 2014, Petitioner reported anxiety to Dr. Whalen after having issues with his girlfriend. Petitioner told Dr. Whalen that he needed something to help him relax, as it had been a stressful situation on top of all his other issues with his neck, shoulder, and arm. He also stated that being unable to work was getting to him. Dr. Whalen diagnosed Petitioner with anxiety and prescribed clonazepam.

Thereafter, on January 28, 2015, Dr. Cranston noted that Dr. Harms had retired and referred Petitioner to Dr. Arash Farahvar. Dr. Cranston then opined that Petitioner did not fit the pattern of fibromyalgia. Nevertheless, he stated that it was reasonable that Petitioner's condition was

caused by his accident. Based on the time course of Petitioner's history, he suspected that Petitioner's current situation was directly related to the accident.

On February 16, 2015, Petitioner presented to Dr. Farahvar at Carle Department of Neurology. Upon review of Petitioner's MRI, Dr. Farahvar noted severe foraminal stenosis at C4-C5 and mild stenosis at C3-C4, C5-C6, and C7-T1. He found that Petitioner also had a right paracentral disc herniation, but it was not effacing the nerve. On the following day, February 17, 2015, Petitioner underwent a repeat C7-T1 interlaminar epidural steroid injection. When he returned to Dr. Ogan on March 9, 2015, Petitioner reported 40% pain improvement post-injection. Petitioner then underwent cervical foraminotomies at C3-C4, C4-C5, and C5-C6, as well as a left carpal tunnel release, on March 10, 2015. At the hearing, Petitioner clarified that he was not claiming a carpal tunnel injury and was only claiming a neck injury from his work accident.

Petitioner then presented for a psychiatry consultation at Carle Neurology Department on March 12, 2015. Dr. Jason Ourada found that Petitioner had a history of depression, anxiety, and suicidal idealization. He recommended outpatient mental health services. On March 23, 2015, Dr. Farahvar also referred Petitioner to a counselor for his psychological issues. Then, on March 25, 2015, Petitioner reported to Dr. Whalen that he was going through a lot after splitting up with his girlfriend. Petitioner also told Dr. Whalen that there had been slight improvement in his neck, but nothing dramatic. Nevertheless, Dr. Whalen noted that Petitioner's arm had quit shaking. His assessment was a C7-T1 herniation and neuralgia-type left arm pain. Dr. Whalen then provided Petitioner with a psychology referral, and Petitioner presented for a psychiatric diagnostic evaluation with Paula McNitt on April 3, 2015. Dr. McNitt indicated that Petitioner's depression had emerged in the past three years as he dealt with back pain and restricted movement stemming from a neck injury sustained at work. She indicated that his low mood, grouchiness, and feelings of despair only worsened following the breakup with his partner. Dr. McNitt diagnosed Petitioner with recurrent major depression and recommended psychiatric consultation and therapy.

On May 5, 2015, Dr. Whalen indicated that Petitioner's neck and arm pain represented chronic pain syndromes. When he returned on May 8, 2015, Petitioner requested pain shots; however, Dr. Whalen told him that he needed to first be evaluated by a pain specialist. At his follow-up visit on July 3, 2015, Dr. Whalen then noted that Petitioner was unable to work, had various problems at home, and was feeling down. He kept Petitioner on his prescription medication regimen and recommended Petitioner see a psychiatrist in addition to his psychologist, Dr. McNitt.

On August 3, 2015, Petitioner returned to Dr. Farahvar with continued complaints of neck, arm, and shoulder pain. Dr. Farahvar thought Petitioner probably had a nerve injury or reflexive sympathetic dystrophy. Petitioner then saw Dr. Ogan on August 31, 2015, at which time Dr. Ogan stated that Petitioner had been referred for consideration of a neuromodulation trial. However, Dr. Ogan was concerned with the ability to place cervical leads given Petitioner's prior procedures. Dr. Farahvar also referred Petitioner to Carle's pain department on September 21, 2015 to see if he was a candidate for a spinal cord stimulator.

On October 6, 2015, Petitioner reported having charley horses to Dr. Whalen and said that he needed a letter for public aid stating that he was unable to work. In response, Dr. Whalen wrote a "To Whom It May Concern" letter on October 8, 2015 noting that Petitioner had radicular neck

pain and three prior neck surgeries. Dr. Whalen stated that Petitioner had not improved to the point where he could work and it was very unlikely that he would ever be able to work again.

On October 16, 2015, Dr. Hyunchul Jung saw Petitioner at the Carle Department of Interventional Pain Center upon Dr. Farahvar's referral. Dr. Jung noted that Petitioner had injured himself lifting in December 2011. Following his examination, Dr. Jung did not believe that a spinal cord stimulator was a good option for Petitioner. He also explained that Petitioner was not a candidate for pain medication management, because he had sleep apnea, was not using his CPAP machine, and smoked marijuana daily. Dr. Jung stated that this fit the exclusion criteria for chronic narcotic treatment. Dr. Jung indicated that he had no other treatment options to offer Petitioner.

On November 5, 2015, Dr. McNitt authored a "To Whom It May Concern" letter stating that Petitioner's recurrent major depression was in partial remission. She noted that Petitioner's mood fluctuated in response to his life problems, chronic severe pain, and physical impairment. Shortly thereafter, on November 12, 2015, Dr. Farahvar found that Petitioner's pain appeared disproportionate to his imaging, which indicated a neuropathic pain process. On November 25, 2015, Dr. Farahvar ordered a repeat MRI to see if anything else could be done. The cervical MRI was obtained on December 29, 2015 and showed slight interval increased size of a right paracentral disc protrusion/extrusion with inferior migration at C7-T1, new minimal anterolisthesis at C3-C4, and multilevel degenerative findings. When Petitioner returned to Dr. Farahvar on February 1, 2016, Dr. Farahvar opined that surgery would not be helpful and determined that Petitioner was disabled in terms of his left arm strength and neck pain. He believed Petitioner was going to need chronic pain management and continued to recommend light duty restrictions.

Petitioner then returned to Dr. Whalen on March 4, 2016. At that time, Dr. Whalen noted that although Petitioner still had great pain, he no longer had the intermittent ballismus-type movements he had in the past. Dr. Whalen again renewed Petitioner's medications. A few days later, on March 9, 2016, Dr. Whalen wrote a "To Whom It May Concern" letter stating that Petitioner did not have use of his left upper extremity and remained in constant discomfort. Dr. Whalen opined that Petitioner was not able to do any meaningful work for the foreseeable future. Dr. Whalen noted that Petitioner had requested this letter in response to the Illinois Department of Human Services wanting to cancel his financial assistance. Dr. Farahvar also authored a "To Whom It May Concern" letter on March 9, 2016 indicating that Petitioner was not able to perform any appropriate work activity secondary to pain.

Then, on May 17, 2016, Judge Daniel Mages issued a Social Security Administrative Decision finding that Petitioner had been disabled since February 29, 2012 with severe impairments of degenerative disc disease and plantar fasciitis. Judge Mages noted that the degenerative disc disease was lumbar as well as cervical affecting Petitioner's neck and left upper extremity. Judge Mages found that Petitioner was unable to perform his past work and that there were no other jobs that existed in significant numbers in the national economy that Petitioner could perform. At the hearing, Petitioner testified that he did not return to work for Respondent after February 29, 2012, the date of disability he alleged for Social Security, and subsequently received Aflac benefits for a year. Petitioner testified that after receiving Social Security benefits, he did not thereafter perform or seek any work. Petitioner testified that although he did not try to perform any work in 2016, he sold a few loads of firewood before that.

After the favorable Social Security Decision, Petitioner continued to have his medications renewed during his regular follow-up visits with Dr. Whalen from June 15, 2016 to February 22, 2017. Then, at his March 29, 2017 visit, Petitioner told Dr. Whalen that he was physically the same but emotionally worse. Petitioner explained that he had some home issues, including construction that was being done. Dr. Whalen restarted Petitioner on Cymbalta to treat his depression, fibromyalgia, and neuropathy. At his next visit on May 2, 2017, Petitioner told Dr. Whalen that everything hurt. Petitioner felt that he could not use his left side and left upper extremity at all secondary to pain. Dr. Whalen again renewed Petitioner's medication at that time.

On May 5, 2017, Petitioner presented to the Carle Sleep Clinic and reported that he had recently been overdoing it by moving items while remodeling. Due to this, Petitioner reported that he was in more pain and had not slept much in the last three days. His diagnoses at that time included chronic insomnia in the setting of chronic neck pain and bilateral arm numbness, mild obstructive sleep apnea, and possible restless leg syndrome versus restlessness due to chronic pain.

Petitioner thereafter continued to have his medications renewed by Dr. Whalen at his regular follow-up visits from July 7, 2017 to February 20, 2018. When Petitioner next returned to Dr. Whalen on July 10, 2018, he reported hurting his right shoulder after having been jumped by two people. Dr. Whalen renewed Petitioner's medication and ordered right upper extremity X-rays, which were obtained that same day. The X-rays revealed a suspected old shoulder injury with attention to the glenoid labrum as well as possible chronic impingement of the rotator cuff resulting in degenerative subchondral cystic findings in the humeral head.

At Dr. Whalen's request, Petitioner then presented to AMB Consult Carle Therapy Services on July 31, 2018 for his right shoulder pain. PA Brian Cummings represented that Petitioner's right shoulder pain had developed gradually over months. He noted that Petitioner had no singular specific injury; however, Petitioner had a heavy-duty heating and cooling repair and installation job for many years that involved physical labor. PA Cummings also reported that Petitioner had been assaulted a couple weeks ago, but he did not think that his shoulder was injured in that situation. PA Cummings diagnosed Petitioner with right shoulder bursitis and impingement syndrome. At the hearing, Petitioner testified that he was not alleging that he had hurt his right shoulder in his accidents, and instead, his right shoulder injury was from wear and tear.

Thereafter, on May 6, 2019, the parties deposed Dr. Harms, Petitioner's treating orthopedic surgeon. At the deposition, Petitioner's counsel represented that Petitioner was not alleging that his carpal tunnel syndrome and low back condition were part of his claim. As for Petitioner's cervical condition, Petitioner's counsel asked Dr. Harms to assume some facts regarding the alleged accidents on December 16, 2011 and February 21, 2012. Based on those facts, which were consistent with Petitioner's testimony at hearing, Dr. Harms testified that the history was classic for someone who suffered a symptomatic tear at C6-C7 on December 16 and then herniated a disc at C6-C7 on February 21. Dr. Harms acknowledged that Petitioner had underlying arthritis and disc degeneration predating the accident. Nevertheless, he opined that Petitioner's work injury was a contributing factor, although not the cause, of his neck problems.

Dr. Harms further testified that it was easy to connect Petitioner's first surgery to his

accident but harder to connect the second surgery. He explained that the more remote in time, the more likely there were other factors in play. As such, Dr. Harms testified that the 2012 surgery was causally related and the 2013 surgery was possibly causally related. However, Dr. Harms testified that he could not say that there was a causal connection between Petitioner's accidents and his subsequent 2015 surgery. He testified that since Petitioner did not get better after the March 2015 surgery, it suggested that pressure on his nerves was not the cause of his symptoms. Instead, Dr. Harms testified that it could very well be that Petitioner's underlying disc degeneration and arthritis had progressed and caused a lot of his symptoms at that time. He testified that he did not know what the cause of Petitioner's symptoms were at the time of 2015.

Dr. Harms further testified that Petitioner could be employed in some fashion, even if he could not get into good enough shape to perform his original job. He testified that Petitioner might have to live more by his brains and less by his muscles now. Nevertheless, Dr. Harms testified that if Petitioner had asked to return to work months after his second surgery, there was a 100% chance that he would have agreed to allow Petitioner to go back to regular duty work. He explained that a patient's comments weigh heavily on the restrictions being offered or removed. Dr. Harms further testified that if the evidence showed that Petitioner was able to cut and sell firewood after his injury, it would indicate that he was capable of more physical work. Regardless, Dr. Harms testified that almost everyone was capable of some gainful employment, including Petitioner.

After Dr. Harms' deposition, Petitioner presented to Dr. Whalen on June 21, 2019. At that time, Dr. Whalen indicated that he found it strange that Petitioner had not been to his office in 11 months and said he had also not been seeing other doctors. Petitioner also told Dr. Whalen that he had to do community service, but he did not feel physically able to do so. Petitioner requested medical marijuana and asked Dr. Whalen to contact someone to get him out of the community service. Dr. Whalen prescribed metoprolol but did not want to renew any other medication for Petitioner. Dr. Whalen believed that it was peculiar for Petitioner to be interested in medical marijuana, because Petitioner had been a monthly visitor to him and said he had no follow-up appointments with anyone else, yet he still had enough blood pressure medicine. Dr. Whalen stated that he would have to give the medical marijuana some thought, as he was not sure that Petitioner qualified. Dr. Whalen thereafter spoke to a woman, who he did not identify, regarding Petitioner's community service. Dr. Whalen reported that he told this woman that he had not seen Petitioner for almost a year, but he could say that Petitioner had three prior surgeries and still complained of discomfort. He noted that the woman then asked if Petitioner could do something like shredding paper, to which Dr. Whalen responded that Petitioner could easily do that.

At the hearing, Petitioner testified that he was required to perform community service the year before the trial. When questioned as to whether he asked Dr. Whalen to get him out of doing the community service, Petitioner testified that he had asked Dr. Whalen for a letter disclosing his restrictions.

Petitioner also testified that he was in a four-wheeler accident less than a year before the hearing, but he was not still treating for any injuries related to it. The treatment records show that Petitioner presented to Sarah Bush Lincoln Hospital on July 7, 2019 after this accident. Although Petitioner could not recall what had happened, his mother was present to provide a history. It was reported that Petitioner had attempted to do a wheelie and fell off the four-wheeler, hitting his head

on concrete. Although Petitioner did not remember the accident, he did recall playing basketball earlier that day. He complained of head, neck, and right rib pain. A cervical CT was obtained and showed post-surgical changes but no acute abnormality. Petitioner was diagnosed with a closed head injury with concussion, neck pain, and multiple abrasions. He was given head injury instructions and local wound care for the abrasions. After the ER visit, Petitioner followed-up with Dr. Whalen on July 17, 2019. Dr. Whalen's diagnoses included a concussion, hypertension, and neck pain. However, the plan section of this treatment note was left empty.

The visit with Dr. Whalen on July 17, 2019 is Petitioner's last post-accident treatment note included in the record. However, prior to the alleged accidents, Petitioner also treated with Dr. Whalen for another four-wheeler incident. Treatment records show that Petitioner presented to Dr. Whalen on March 7, 2007 seeking a chiropractic referral for his non-radiating low back pain from lifting a four-wheeler. Dr. Whalen diagnosed Petitioner with low back pain with right lumbar paraspinal muscle spasm. Petitioner then went on to treat his pre-accident back pain with chiropractic treatments at Hutti Chiropractic Center from March 13, 2007 to April 4, 2007.

At the time of the hearing, Petitioner testified that his surgeries had left him with severe chronic pain all over. He testified that his strength was weak and he continued to have neck pain, pain down his arms, and chronic pain all over. Petitioner also testified that he had difficulty sleeping and hanging on to things, since his hands went numb. For the ongoing symptoms, Petitioner took tramadol and blood pressure medicine. Once in a while, he also took pain medication left over from his surgeries, including methocarbamol and pronate. Petitioner also testified that over the last five years, he shot a little basketball with his three-year-old grandson.

Petitioner further testified that he was not working regularly nor looking for work. However, previously in the fall of 2011, Petitioner had a sign on his truck advertising that he sold firewood. Petitioner testified that the firewood was given to him by a friend who cut it down and came in logs of varying size from six inches to three feet across and two to three feet long. He testified that the logs were lifted into his trailer using a crane. Petitioner testified that he then cut the logs down with a chainsaw or log splitter. When asked if he considered chain-sawing or splitting the firewood manual labor, Petitioner responded that it was done so that he could eat. Petitioner testified that he did a good deal of this work since his two injuries. He testified that his truck had a sign that said to call his phone number for firewood and he sold it to anyone who called him to order it. Petitioner further testified that when he sold the firewood, he would take it to the customer's home, unload it, and pile it up. He testified that the wood pieces were under 20 pounds and he was able to lift them. Additionally, Petitioner testified that the pieces he cut beforehand that were over 20 pounds were lifted by a crane.

Petitioner testified that he did not have any income since February 2012 other than the money he made selling firewood, which he claimed was not a lot. Petitioner then clarified that he sold the firewood before he received his Social Security award in 2016. Petitioner further testified that the chainsaw he used while cutting the firewood was less than 20 pounds and he did not lift, push, or carry the log splitter. He also testified that he stacked the firewood using his right arm. Petitioner explained that he had this train with logging tongs on it that would lift the pieces. Petitioner testified that when performing this activity, he tried to stay within his restrictions.

II. Conclusions of Law

Following a careful review of the entire record, the Commission finds that Petitioner proved that he sustained a compensable accident arising out of and in the course of his employment on December 16, 2011 and that the condition of his cervical spine was causally related to said accident through September 25, 2014.

Although the Commission acknowledges some discrepancies in Petitioner's retelling of the accident, the Commission finds that these discrepancies are minor and failed to rise to the level of diminishing Petitioner's credibility. Instead, Petitioner's testimony and the treatment records taken as a whole corroborate Petitioner's claim that he injured his cervical spine after moving a wood burning furnace on or around December 16, 2011. Whether Petitioner first experienced the associated pain immediately at the time of the accident or woke up with the pain the next day at his home, Petitioner credibly indicated that he felt the pain in connection with moving the wood burning furnace. When Petitioner first sought emergency treatment on December 19, 2011, he reported that he had been moving a wood burning furnace the day before he woke up with pain. Even though he initially denied any known injury or trauma, he associated his pain with moving the furnace immediately at the time of this first treatment visit. Petitioner thereafter mentioned moving the furnace in association with his neck condition in numerous medical records, even if he did not label it as an "accident," "injury," or "trauma." The disputed issue in this matter regarding Petitioner's alleged accident is only whether it occurred. In finding Petitioner to be credible, the Commission determines that the accident occurred as Petitioner claimed on December 16, 2011.

The Decision of the Arbitrator noted that Respondent presented no evidence from the employees that were working alongside Petitioner on the accident dates to rebut Petitioner's testimony. Respondent contends that the Arbitrator erred in drawing a negative inference against Respondent based on its failure to call Petitioner's coworkers as witnesses. However, the Commission believes that no negative inference was made, and even if it was, it amounted to harmless error. The three witnesses that Respondent did call to testify, Mr. Babbs, Mr. Dallas, and Ms. Cunningham, all failed to sufficiently rebut Petitioner's credible testimony as to the December 16, 2011 accident. The two other coworkers that Petitioner was with at the time of the accident would also be unlikely to rebut Petitioner's testimony, given that in both Petitioner's testimony and his recorded statement on December 18, 2012, Petitioner conceded that he did not inform these coworkers of his accident or injury on the accident date.

The Commission also affirms the Arbitrator's finding that sufficient notice was established. Petitioner claimed that on December 19, 2011, he called Mr. Babbs and told him that he would not be into work after hurting his arm moving a furnace. Although Mr. Babbs testified that he was not notified of Petitioner's claim until November 2012, he recalled Petitioner calling off work on December 19, 2011 and thereafter being on and off work for the next several months. Both Mr. Babbs and Mr. Dallas acknowledged that they knew Petitioner was calling off work for pain, although they testified that they did not know Petitioner was claiming that the pain was work-related until November 2012. Even if notice was defective for not specifying the injury's work-related origin, Respondent was not prejudiced since it had knowledge that Petitioner was suffering from a medical ailment and received ongoing correspondence regarding Petitioner's condition in the form of both Petitioner's verbal disclosures and the disability paperwork sent to Ms. Carlen.

The Commission further finds that Petitioner established a causal connection for his cervical condition through September 25, 2014. The treatment records show that prior to the accident, Petitioner was treated for back pain with chiropractic care in March 2007 to April 2007 following a four-wheeler incident. However, this pre-accident treatment ceased on April 4, 2007, which is over four-and-a-half years before the December 16, 2011 accident. There is no documented pre-accident history of Petitioner thereafter requiring treatment for any ongoing or substantial prior cervical problems in the years leading up to his work accident. However, after the December 16, 2011 accident, Petitioner consistently complained of cervical problems and required ongoing cervical care, including surgeries. This chain of events establishes a causal connection between Petitioner's cervical condition and the work accident.

The Commission also relies on the opinions of Dr. Harms in making its causal finding. Dr. Harms found that Petitioner's work injury was a contributing factor in his cervical problems. The facts regarding Petitioner's accidents that Dr. Harms was asked to assume at his deposition were consistent with Petitioner's credible testimony of his accidents at the hearing. Based on those facts, Dr. Harms opined that Petitioner's history was classic for someone who suffered a symptomatic tear at C6-C7 on December 16, 2011 and a herniated disc at C6-C7 on February 21, 2012. No §12 opinions were offered to rebut Dr. Harms' causation opinion.

However, Dr. Harms' finding of a causal connection did not reach into 2015. Dr. Harms indicated that the more time that passed after the accident, the more likely it was that other factors were in play. As such, he testified that he could not say that there remained a causal connection between Petitioner's accident and his March 2015 surgery. He further testified that Petitioner's failure to get better after the 2015 surgery suggested that pressure on his nerves was not the cause of his symptoms. Instead, Dr. Harms believed that it could very well be that Petitioner's underlying disc degeneration and arthritis had progressed and caused his symptoms at that time. Dr. Harms conceded that he did not know what the cause of Petitioner's symptoms was in 2015.

The Commission finds it further significant that Petitioner was able to deliver and unload firewood in September 2014. Ms. Cunningham's testimony that she purchased firewood from Petitioner on two occasions is corroborated by the checks in RX 16, which indicate that Ms. Cunningham paid for firewood on September 17, 2014 and September 25, 2014. Ms. Cunningham testified that she issued the checks to Ms. Duncan upon Petitioner's instruction, and although Petitioner did not recall ever meeting Ms. Cunningham, he conceded that Ms. Duncan was his former live-in girlfriend. Ms. Cunningham further testified that Petitioner physically unloaded a trailer full of wood for her. Petitioner testified that when delivering the wood, he also cut down logs using a chainsaw or log splitter. When asked if this constituted manual labor, Petitioner responded that it was done so he could eat. Petitioner also testified that he would take the firewood to the customer's home, unload it, and pile it up. The Commission finds Petitioner's delivery, unloading, chain-sawing, splitting, and piling of firewood to be a labor-intensive task. At his deposition, Dr. Harms also testified that if the evidence showed that Petitioner was able to cut and sell firewood after his injury, it would indicate that he was capable of more physical work.

The Commission thus finds that Petitioner's causally related cervical condition had resolved as of September 25, 2014, the date he completed his second sale of firewood to Ms.

Cunningham. This finding is consistent with Dr. Harms' opinion that ongoing causation could not be clearly established into 2015. In so finding, the Commission awards all reasonable and necessary medical expenses related to the treatment of Petitioner's cervical condition through September 25, 2014. Any medical expenses related to Petitioner's lumbar spine or carpal tunnel syndrome are denied, as Petitioner represented that he was not including these conditions as part of his claim and there is also insufficient evidence to establish a causal connection for these conditions. Consistent with its causal findings, the Commission further affirms the Arbitrator's award of temporary total disability benefits up through September 25, 2014 only. Temporary total disability benefits after September 25, 2014 are denied.

The Commission further modifies the Arbitrator's award of permanent partial disability to find that Petitioner's cervical injury resulted in a loss of 25% PAW. In reviewing permanent partial disability for accidents occurring after September 1, 2011, the Commission must consider the §8.1(b) enumerated criteria, including (i) the reported level of impairment pursuant to (a) [AMA "Guides to Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability as corroborated by treating medical records. 820 ILCS 305/8.1b(b). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id*. § 305/8.1b(b)(v).

Regarding criterion (i), no AMA impairment rating was provided. As such, the Commission assigns no weight to this factor.

Regarding criterion (ii), Petitioner worked at a plumbing and heating business on the accident date. On May 17, 2016, Petitioner received a favorable Social Security Administrative Decision in which Judge Mages found that he had been disabled since February 29, 2012 with severe impairments from lumbar and cervical degenerative disc disease as well as plantar fasciitis. Judge Mages further found that there was no job that existed in significant numbers in the national economy that Petitioner could perform.

However, Dr. Harms testified that Petitioner was employable in some fashion, even if he could not perform his original job. Dr. Harms further testified that if Petitioner had asked to go back to work months after his second surgery, there was a 100% chance that he would have agreed to allow Petitioner to return to his regular duty position. Dr. Harms believed that almost everyone was capable of some gainful employment, including Petitioner.

Petitioner did not return to work for Respondent after February 29, 2012 and received Aflac benefits for one year. Petitioner testified that after receiving the Social Security benefits, he did not perform or seek any work. At the time of the hearing, Petitioner was still not working or looking for work. Nevertheless, Petitioner conceded that he sold firewood for a period of time after his accident. Petitioner testified that he tried to stay within his restrictions when selling the firewood, but when asked if he considered using a chainsaw or splitting the firewood to be manual labor, Petitioner responded that it was done so that he could eat. Petitioner testified that he did not have any income since February 2012 other than the money he made from selling firewood, which he characterized as not a lot. Petitioner testified that he sold the firewood before he received his Social Security benefits in 2016. The Commission assigns significant weight to this factor.

Regarding criterion (iii), Petitioner was 38 years old on his alleged accident dates. There was no direct testimony as to how Petitioner's age affected his disability. The Commission assigns some weight to this factor.

Regarding criterion (iv), Petitioner sold firewood after his accidents, but there was no calculation provided as to how much Petitioner earned selling the firewood. Dr. Harms and the Social Security Administration Decision both suggested that Petitioner could no longer perform his regular pre-accident job. However, there was no direct testimony specifically quantifying Petitioner's future earning capacity, and no labor market survey was provided. The Commission thus assigns some weight to this factor.

Regarding criterion (v), Petitioner treated his cervical injuries with surgical procedures, a substantial number of injections, physical therapy, prescription medication, and work restrictions. Petitioner testified that today, his strength was weak and he had a lot of neck pain, pain down his arms, and chronic pain all over. He testified that his surgeries left him with the severe chronic pain all over. Petitioner further testified that he had trouble sleeping and holding on to things, since his hands went numb. The treatment records show that Petitioner's sleep problems, although not all related to the accident, included chronic insomnia in the setting of chronic pain. At the time of the hearing, Petitioner took tramadol and blood pressure medicine for his ongoing symptoms. Once in a while, he also took pain medication left over from his surgeries, including methocarbamol and pronate. The Commission assigns significant weight to this factor.

In consideration of the above, it is evident that Petitioner required significant cervical treatment and continues to complain of ongoing symptoms. However, Dr. Harms opined that Petitioner remained capable of some form of gainful employment, and Petitioner demonstrated his capability to perform outside work through his sale of firewood, which could be considered manual labor. Moreover, Dr. Harms indicated that he would have allowed Petitioner to return to his regular physically intensive job if he had so requested. The Commission finds that the evidence does not indicate that Petitioner's condition rendered him incapable of being gainfully employed or even performing more physical job tasks, such as cutting and delivering firewood. Based on these above factors, the Commission thus modifies the permanent partial disability award to reflect a loss of 25% PAW. The Commission modifies the Decision of the Arbitrator accordingly.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 6, 2021 is modified as stated herein. For all other issues not specifically modified herein, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained a compensable accident arising out of and in the course of his employment on December 16, 2011 and that the condition of his cervical spine was causally related to said accident through September 25, 2014.

IT IS FURTHER FOUND BY THE COMMISSION that no negative inference was made against Respondent for its failure to call Petitioner's coworkers as witnesses, and even if such negative inference was made, it would amount to harmless error.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable for all reasonable and necessary medical expenses related to Petitioner's cervical condition incurred from the accident date through September 25, 2014, pursuant to §8(a) and §8.2 of the Illinois Workers' Compensation Act. All medical expenses incurred after September 25, 2014 are denied. Likewise, any medical expenses related to Petitioner's lumbar condition and carpal tunnel syndrome are further denied.

IT IS FURTHER ORDERED BY THE COMMISSION that the Arbitrator's award of temporary total disability benefits is modified to end on September 25, 2014. As such, Respondent shall pay temporary total disability benefits of $466.62 per week from December 19, 2011 through December 20, 2011, December 22, 2011 through December 27, 2011, January 3, 2012 through January 8, 2012, January 30, 2012 through February 5, 2012, February 17, 2012 through February 19, 2012, and February 22, 2012 through September 25, 2014, which represents a total period of 138 5/7 weeks, in accordance with §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner permanent partial disability benefits of $420.00 per week for 125 weeks, as the cervical injuries sustained caused a loss of 25% PAW pursuant to §8(d)2 of the Act.

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

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

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

November 10, 2021

DLS/met
O- 9/15/21
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
NOTICE OF ARBITRATOR DECISION
CORRECTED

HUPP, CHAD
Employee/Petitioner

Case# **13WC029387**

13WC003107

LD MECHANICAL CONTRACTORS INC
Employer/Respondent

On 1/6/2021, 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 0.90% 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:

1608 MOSS & MOSS PC
DAVID M MOSS
122 WARNER CY PO BOX 655
CLINTON, IL 61727

0771 FEATHERSTUN GAUMER POSTLEWAIT
DAN GAUMER
225 N WATER ST SUITE 200
DECATUR, IL 62523

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
CORRECTED ARBITRATION DECISION

CHAD HUPP
Employee/Petitioner

v.

LD MECHANICAL CONTRACTORS, INC.
Employer/Respondent

Case # **13 WC 29387**

Consolidated cases: **13 WC 03107**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Edward Lee**, Arbitrator of the Commission, in the city of **Springfield**, on **October 1, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 16, 2011 and February 21, 2012**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

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

On the date of accident, Petitioner was **38** years of age, ***single*** with **2** children under 18.

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

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

Respondent shall be given a credit of **$-0-** for TTD, **$-0-** for TPD, **$-0-** for maintenance.

ORDER

Temporary Total Disability
Respondent shall pay Petitioner temporary total disability benefits of $466.62/week for 2 5/7 weeks, commencing various dates through February 20, 2012, as provided in Section 8(b) of the Act and,

Respondent shall pay Petitioner temporary total disability benefits of $466.62/week for 211 weeks, commencing February 22, 2012 through February 28, 2012 and February 29, 2012 through March 9, 2016, as provided in Section 8(b) of the Act.

Respondent shall be given a credit of $-0- for temporary total disability benefits that have been paid.

Medical Benefits
Respondent shall pay reasonable and necessary medical services of $358,387.27, as provided in Sections 8(a) and 8.2 of the Act.

Permanent Partial Disability: Person as a whole
Respondent shall pay Petitioner permanent partial disability benefits of $420/week for 175 weeks, because the injuries sustained caused the 35% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Edward Lee
Signature of Arbitrator

12/16/20
Date

ICArbDec p. 2

JAN 6 - 2021

STATE OF ILLINOIS]
] SS
COUNTY OF SANGAMON]

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATOR'S DECISION

CHAD HUPP
Employee/Petitioner

v.

LD MECHANICAL CONTRACTORS, INC.
Employer/Respondent

Case # **13 WC 29387**

Consolidated cases: **13 WC 03107**

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Chad Hupp, was employed by Respondent, LD Mechanical Contractors, Inc. Petitioner had been employed by Respondent for 15 years prior to the initial injury, which occurred on December 16, 2011 (13 WC 03107). Petitioner testified as to the job duties in which he was involved in the course of his employment with Respondent. Respondent is engaged in the general duties of plumbing and heating installation. Petitioner testified that his work duties on December 16, 2011, involved the moving of a wood burning furnace. Petitioner, together with other employees of Respondent, moved the wood burning furnace three times. Petitioner testified he felt a tension and sensation in his neck.

Petitioner continued to work that day. At the end of the work day, Petitioner testified that he experienced tightening and stiffness in his shoulders and neck. Petitioner testified the next morning, Saturday, December 17, 2011, he awoke to severe pain. Petitioner testified that he contacted his employer, Kent Babbs to let him know he would not be working that day. Petitioner contacted his personal care physician, Dr. Whalen. Petitioner was advised by Dr. Whalen's office the doctor was

unable to see him and it was recommended that Petitioner present to the emergency room.

Petitioner was seen at Sarah Bush Lincoln Health Center emergency room on December 19, 2011. At that visit, Petitioner presented with a history of his present illness as:

> "The patient states that Saturday morning he woke up complaining of left shoulder pain that shoots up into his neck area and down into his left arm. He states it started Saturday."
> "He denies any known injury or trauma to it. He does note some overuse with it, they were moving a wood burning furnace the day before he started having pain into his left shoulder area." (PX 1/RX 1)

At that visit, Petitioner was offered x-rays of the neck and the shoulder. Petitioner reported that he was feeling better at that time. Petitioner declined x-rays and opted to return home with medication and wait for a follow up with his primary care provider. Petitioner was given a work note to release him from work until he followed up with his primary care physician (PX 1, RX 1).

Petitioner testified he did not work December 19, 2011, and December 20, 2011. On December 20, 2011, Petitioner was seen by Dr. Whalen (PX 2, RX 3). In that visit, it is reported:

> "This gentleman woke up Saturday morning with shoulder and neck pain. He had had no prior problem at all. He had had no injury. He said he had gone to the emergency room yesterday and they mentioned that they thought he had a pulled muscle. No x-ray had been taken..."

Dr. Whalen prescribed x-rays of the cervical spine and the left shoulder. Petitioner was prescribed medication and given a note taking him off work for that week.

Petitioner testified, in fact, he returned to work on December 21, 2011. Petitioner testified at that time he was having trouble with his arm and was off work December 22, 2011, through December 27, 2011.

On December 28, 2011, Petitioner returned to work and worked December 29, 2011, and December 30, 2011. Petitioner testified that Respondent recommended that he seek treatment from a chiropractor.

On January 3, 2012, Petitioner was seen by Hutti Chiropractic Center (PX 3, RX 2). Petitioner underwent chiropractic treatment from January 3, 2012, through February 22, 2012. Petitioner testified that he was unable to work until returning to work January 9, 2012 (PX 3, RX 2).

Petitioner worked until January 30, 2012. Petitioner was seen by Dr. Whalen. Petitioner was complaining of left shoulder pain at that visit. Petitioner was prescribed medication and was given a note keeping him off of work.

Petitioner testified that he returned to work on February 6, 2012, and that he worked until February 17, 2012, at which time he took off work because of arm pain. Petitioner testified he returned to work on February 20, 2012.

Petitioner testified that he was in an attic working for Respondent with another employee on February 21, 2012 (13 WC 29387). Petitioner testified that he was pulling an air handler/furnace across the attic floor. Petitioner was pulling backwards while on his hands and knees. Petitioner testified at that time he felt a pop in his neck and felt his left arm pain become worse. Petitioner continued to work. Petitioner's pain increased and Petitioner ceased his work activities.

On February 22, 2012, Petitioner returned to Dr. Whalen (PX 2, RX 3). There, it was stated:

> "This gentleman was in saying that the left side had been ok for a couple of weeks and then he was in the

> attic working yesterday and said that he had heard a pop."

Petitioner was given a note to be off work. Petitioner was prescribed a cervical x-ray. Petitioner was referred to Carle Spine Clinic.

On February 24, 2012, Petitioner was seen by Dr. Victoria Johnson at Carle Clinic Spine Institute (PX 4). There, Petitioner presented a history of:

> "Mr. Hupp developed these symptoms on or about December 17, 2011. He awoke without pain and after taking two steps, his symptoms began. He does not recall any particular event or injury associated with the immediate onset of discomfort; however, he does note that he moved a very large furnace the day before."

Petitioner was prescribed injections and was given an off work slip until Wednesday, February 29, 2012. It is further documented that Petitioner was referred to the care of Dr. Harms.

Petitioner testified that he returned to work on February 29, 2012, and that he worked that day. Petitioner testified that he experienced arm pain. It is Petitioner's recollection that his bosses told him to call his doctors. Petitioner called The Spine Institute on March 1, 2012. Petitioner was prescribed medications, an MRI, and continued off work.

An MRI was performed on March 13, 2012.

On March 14, 2012, Petitioner returned to Dr. Johnson. The doctor reviewed the MRI reporting degenerative disc disease at C3-C4, C4-C5, and C5-C6. There was reported a disc protrusion/herniation at C6-C7. Dr. Johnson prescribed a course of epidural steroid injections and referral to the surgeon. Petitioner's first epidural steroid injection was performed at that time. Petitioner's second epidural steroid injection was performed March 21, 2012.

On April 4, 2012, Petitioner had his initial consultation with Dr. Harms. Dr. Harms indicated that surgery was an option and proposed an ACDF at C6-C7.

On April 17, 2012, Petitioner underwent surgery consisting of an anterior discectomy and fusion at C6-C7. Petitioner was discharged from the hospital on April 18, 2012.

On May 11, 2012, Petitioner was seen in a postoperative follow up and placed on restrictions and prescribed medication.

Petitioner was seen June 8, 2020 and again prescribed restrictions and medications. Petitioner was seen July 2, 2012. X-rays were performed at that time. Petitioner was prescribed formal rehabilitation and allowed to return to work with modified work duties on July 3, 2012. Petitioner commenced physical therapy at Carle Clinic on July 11, 2012.

Petitioner was seen on August 13, 2012. Petitioner was seen by Dr. Harms for complaints of neck and left arm pain which were reported as "not resolved". Dr. Harms reviewed the July 2, 2012, x-rays and the March 13, 2012, MRI. A CT scan was prescribed and was performed on August 14, 2012. A repeat MRI was prescribed and performed on August 24, 2012. Physical therapy was continued. Petitioner returned to Dr. Harms on August 24, 2012. At that time additional surgery was considered. An epidural steroid injection was prescribed. The epidural steroid injection was performed August 29, 2012. Petitioner returned on September 17, 2012 and was prescribed a neurology consultation and an EMG.

On October 23, 2012, Petitioner was seen in a neurosurgical consultation with Dr. Aronson. An EMG was performed on October 23, 2012.

On October 29, 2012, Petitioner was seen in follow up by Dr. Harms. Dr. Harms suggested pain management and made referral of Petitioner to Dr. Ogan for pain management. Physical therapy was discontinued.

On April 17, 2013, Petitioner was seen by Dr. Harms. Dr. Harms reported Petitioner had a C5-C6 herniated disc into the left hole where the nerve exits the spine. Dr. Harms indicated surgery was a reasonable option.

On April 25, 2013, Petitioner underwent a second surgery. This surgery involved the removal of the synthes plate and screws at C6-C7, anterior discectomy and fusion at C5-C6 with bone and GSO plate and screws. The surgery was performed by Dr. Harms (PX 4).

Petitioner was seen in follow up on May 24, 2013. That visit noted as being Petitioner's first follow up after undergoing an ACDF (C5-6) with instrumentation removal at C6-C7. Dr. Harms indicated Petitioner could do most light activities using commonsense but was to avoid lifting more than 20 pounds overhead. Petitioner was scheduled for a return visit.

On June 26, 2013, Petitioner was seen for his second follow up visit after undergoing ACDF. Petitioner was reported as walking 2½ to 4½ miles a day. Petitioner's restrictions were continued.

On September 24, 2013, Petitioner was again seen by Dr. Harms. Dr. Harms prescribed physical therapy. Dr. Harms indicated if Petitioner's employer had something where he could sit, stand, walk around, change positions frequently and carry 20 pounds or so, he could do that anytime. It was reported by Petitioner it was unlikely his employer had any such thing available.

On September 25, 2013, Petitioner returned to Dr. Harms. Dr. Harms noted that Petitioner was status post ACDF at C5-C6 without as good of results as one would expect.

On October 7, 2013, Petitioner returned to Dr. Harms. Petitioner had returned to Dr. Harms with his new MRI. Dr. Harms reported that Petitioner's spinal cord had no problems. There was some narrowing of the hole where the nerve exits the spine at

C4-C5, but Dr. Harms did not believe that explained Petitioner's symptoms. Dr. Harms opined that Petitioner had a bad problem with pressure on his nerves and there is some residual. Dr. Harms did not believe there is anything more a surgeon can help. Dr. Harms did not believe additional surgery was warranted.

Petitioner reported that he could not go back to work without being 100%. It was suggested Petitioner needed to change jobs.

Petitioner continued to treat with Dr. Ogan. On November 21, 2013, Petitioner underwent a cervical epidural steroid injection (PX 5).

On April 28, 2014, Petitioner was seen in consultation with Dr. Mark Stern (PX 6). Petitioner was referred to Dr. Stern by Dr. Whalen for assessment and evaluation. Dr. Stern set forth a proposal for treatment of what was classified as fibromyalgia. Petitioner continued treatment with Dr. Ogan. Another epidural steroid injection was performed May 27, 2014.

On October 31, 2014, Dr. Whalen made referral of Petitioner to Dr. Cranston with the Department of Neurology at Carle. Dr. Cranston reviewed the course of Petitioner's medical treatment with Dr. Whalen, Dr. Harms, and Dr. Johnson. Dr. Cranston prescribed an MRI of the neck and an EMG, together with laboratory testing. An MRI was performed on November 24, 2014. An EMG was performed on December 3, 2014. Petitioner returned to Dr. Cranston on January 28, 2015. Before seeing Dr. Cranston, Petitioner was seen by Dr. Ogan on November 17, 2014. Dr. Ogan noted Petitioner's visit with Dr. Cranston and pending testing and concluded that Petitioner should wait for further work up pending Dr. Cranston's review. The MRI of November 24, 2014, reported a small, new right paracentral disc extrusion with inferior migration at C7-T1 effacing the right anterior thecal sac. The EMG study on December 3, 2014, suggested mild bilateral right greater than left carpal tunnel syndrome.

Petitioner returned to Dr. Cranston on January 28, 2015. Dr. Cranston compared the MRI to earlier MRIs. Dr. Cranston noted that Dr. Harms had recently retired from active surgical practice and was doing only office consultations.

Dr. Cranston proposed having Dr. Farahvar review Petitioner for a second opinion. Dr. Cranston notes that he did not feel Petitioner's symptomatology was a result of fibromyalgia. Dr. Cranston noted that Petitioner's "current situation" is directly related to his work accident. Dr. Cranston made referral of Petitioner to Dr. Farahvar (PX 4).

On February 11, 2015, Petitioner returned to Dr. Ogan. Dr. Ogan reviewed the MRI findings and discussed a C7-T1 epidural steroid injection. Petitioner underwent a C7-T1 interlaminar epidural injection at that time.

On February 16, 2015, Petitioner was seen in consultation by Dr. Farahvar. Dr. Farahvar reviewed MRIs and EMG testing. Dr. Farahvar did confirm that the EMG showed carpal tunnel syndrome, but not cervical radiculopathy. Based on the MRI, Dr. Farahvar found Petitioner did have a right paracentral disc herniation. Dr. Farahvar recommended a cervical exploration of the C4-C5 foramen together with treatment of the carpal tunnel.

On March 10, 2015, Petitioner underwent his third cervical surgical procedure. At that time, Dr. Farahvar performed a central Foraminotomies at the left side of C3-C4, C4-C5, and C5-C6. In addition, Dr. Farahvar performed at left carpal tunnel release. Petitioner was discharged from the hospital on March 13, 2015.

Petitioner was seen by Dr. Farahvar on March 23, 2015. Petitioner was noted as being prescribed a counselor for psychological issues. Dr. Farahvar found that Petitioner was doing well and could follow up in three to four weeks.

On April 20, 2015, Petitioner was seen by Dr. Farahvar. At that time, pain complaints were present. Dr. Farahvar put Petitioner on steroids and prescribed

physical therapy. On August 3, 2015, Petitioner was seen by Dr. Farahvar. Petitioner reported still having quite a bit of neck pain, arm pain, and shoulder pain. It was suspected Petitioner had some kind of nerve injury and perhaps some reflex sympathetic dystrophy. It was recommended that Petitioner return to Dr. Ogan for consideration of a spinal cord stimulator.

Petitioner was seen by Dr. Ogan on August 31, 2015. Petitioner reported back pain as well as neck pain and left arm pain. It was noted that Petitioner was being seen for an evaluation of persistent posterior cervical pain with intermittent radiating pain to the left upper extremity. At that visit a neuromodulation trial was discussed.

Dr. Farahvar made referral of Petitioner to Dr. Hyunchul Jung, M.D. of Carle Department of Interventional Pain Center (PX 4). On October 16, 2015, Petitioner was being seen in consultation with Dr. Jung for Petitioner's neck and left-sided arm pain. Dr. Jung did not recommend Petitioner have a cervical spinal stimulator. Dr. Jung did not believe Petitioner was a candidate for pain medication management. Dr. Jung did not have any other treatment options to offer Petitioner.

Petitioner was seen by Dr. Paula McNett, Ph.D. regarding Petitioner's ongoing psychiatric treatment.

On November 12, 2015, Dr. Farahvar issued a report. Dr. Farahvar suggested Petitioner might be a possible candidate for a spinal cord stimulator. Dr. Farahvar indicated the pain seemed to be disproportionate to what he was seeing on imaging, which would indicated that there is some sort of neuropathic pain process going on. Dr. Farahvar suggested a functional capacity evaluation.

On November 25, 2015, Petitioner returned to Dr. Farahvar. Dr. Farahvar noted Dr. Jung's indication that Petitioner was not a candidate for spinal cord stimulator and that Dr. Jung did not favor long term narcotic pain management given Petitioner's sleep apnea. Dr. Farahvar prescribed an MRI.

It is noted from medical records that Petitioner was also treating at Carle for pulmonary complaints consisting of sleep apnea and restless leg syndrome.

On December 29, 2015, Petitioner underwent an MRI. Petitioner returned to Dr. Farahvar on February 1, 2016. In that visit, Dr. Farahvar indicated that he did not think surgery in the future would help Petitioner. Dr. Farahvar indicated Petitioner would need chronic pain management. Dr. Farahvar thought, "…. He would definitely have severe restrictions in terms of lifting nothing greater than 10 to 15 pounds. No excessive bending, lifting, or straining." Dr. Farahvar indicated he would try to find a physician to perform chronic pain management.

On March 9, 2016, Dr. Farahvar issued a note. Dr. Farahvar indicated, "At this point, I do not think that patient is able to perform any appropriate work activity due to the pain in his arm and persistent pain that is refractory to pain management or surgeries. This limits the performance of lifting anything greater than 5 to 10 pounds without severe pain. He cannot do any excessive bending, lifting, straining, which cause severe neck and arm pain. This condition is serious enough to prevent him from participating in any kind of work or training."

Petitioner testified that with the medical providers indicating no further treatment would be beneficial, Petitioner ceased returning to Dr. Farahvar and Dr. Ogan.

Petitioner received a fully favorable decision from the Office of Disability Adjudication and Review in regard to a claim for Social Security Disability. Petitioner's Favorable Decision is dated May 17, 2016. The Administrative Law Judge found Petitioner to be disabled as of February 29, 2012 (PX 8).

Petitioner testified that he did not return to work for Respondent after February 29, 2012. Petitioner did continue to receive treatment from his personal care physician, Dr. Whalen. Petitioner continues to see Dr. Turner for ADD.

CONCLUSIONS OF LAW

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF PETITIONER'S EMPLOYMENT BY RESPONDENT? THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

Petitioner alleges two cervical injuries. Petitioner has testified that on December 16, 2011, he was moving a wood burning furnace with other employees of Respondent. Petitioner has testified that as a result of his having to move the wood burning furnace, he experienced pain in his neck and shoulders. Respondent denies that Petitioner sustained an accident arising out of and in the course of his employment on December 16, 2011. The Arbitrator notes that Petitioner specifically testified that, at the time of that injury, he was working with other employees of Respondent. No evidence from other employees was presented to rebut Petitioner's testimony that he sustained an accident on December 16, 2011.

Following a course of conservative treatment, Petitioner returned to work for Respondent. On February 21, 2012, Petitioner testified that while in an attic and pulling an air handler/furnace across the attic floor together with another employee of Respondent, Petitioner felt a pop in his neck and experienced a worsening of symptoms in his left arm and neck. Respondent denies that Petitioner sustained an accident arising out of and in the course of his employment on February 21, 2012. Again, the Arbitrator notes that Petitioner specifically testified that he was working with other employees of Respondent at the time of his accident on February 21, 2012. Respondent has presented no evidence rebutting Petitioner's testimony regarding that accident.

The Arbitrator relies on Petitioner's initial visit to Sarah Bush Lincoln Hospital on December 19, 2011, wherein it is indicated that Petitioner was moving a wood burning furnace the day before he started having pain into his left shoulder (PX 1/RX 1).

The Arbitrator relies on the notes of Dr. Whalen who, on February 22, 2011, indicated: "He was in the attic working yesterday and said that he had heard a pop. He had some pain today."

The Arbitrator finds that Petitioner credibly testified as to the two incidents which resulted in Petitioner's cervical and left arm pain.

The Arbitrator finds the allegations of accident on those two dates have not been rebutted by Respondent.

The manifest weight of the evidence supports Petitioner's contention that while engaged in his regular work duties, he sustained injury to his neck and left arm on December 16, 2011, and again on February 21, 2012.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (E), WAS TIMELY NOTICE OF THE ACCIDENT GIVEN TO RESPONDENT? THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

Petitioner has testified that he told Respondent of his injury to his neck, which occurred on December 16, 2011 and February 21, 2012. Respondent denies that he received notice of either of these incidents. Respondent testified that he was unaware of work injuries until November of 2012. Petitioner has testified that he contacted his employer December 19, 2011. Petitioner testified that he spoke to Kent Babbs to let him know that he would not be working that day. Petitioner recalls that he advised Kent Babbs that he believed he hurt his arm on the previous Friday moving a wood burning furnace. Kent Babbs testified and specifically denied having been informed of the work injury on December 16, 2011. Kent Babbs specifically testified that Petitioner told him on Monday (December 19, 2011) that he (Petitioner) got up that morning and could not get out of bed. Respondent testified Petitioner did not say he had a work injury.

Petitioner testified that after a course of conservative treatment that he returned to work on December 28, 2011, and worked December 28, 2011, December 29, 2011, and December 30, 2011. Petitioner testified that during that time, he experienced increased pain in his arms. Petitioner testified that Respondent told him to seek treatment from a chiropractor. Petitioner sought treatment from a chiropractor beginning January 3, 2012. John Dallas testified that he did recommend chiropractic treatment to Petitioner and that he did discuss this with Petitioner and would have discussed this with Petitioner prior to him having seen the chiropractor on January 3, 2012.

Petitioner has submitted as Petitioner's Exhibit 10 consisting of Employer's Disability Statements. The earliest statement enclosed in that group exhibit is dated February 2, 2012, and signed by Michelle Carlin. Michelle Carlin is identified by Respondent as an office manager authorized to sign business documents. The Employer's Disability Statement dated February 2, 2012, does not contain a date of disability or a statement that Petitioner's injury is work related. A separate disability statement dated February 9, 2012, does identify the first date of disability as December 17, 2011. Further, disability statements dated March 28, 2012 through July 3, 2013, signed by Respondent are part of Petitioner's Exhibit 10.

Given Respondent's testimony that he spoke with Petitioner about his cervical pain and left shoulder pain prior to Petitioner having seen the chiropractor on January 3, 2012, and given Respondent's submission of disability reports as early as February 2, 2012, the Arbitrator finds that Respondent had notice of Petitioner's accidents. Section 6(c) of the Act provides: "Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." Additionally, as long as some notice is given, "No defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration .... Unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." 820 ILCS 305/6(c)

In regard to Petitioner's alleged injury of February 21, 2012, Petitioner testified that he returned to work on February 29, 2012. Petitioner testified that he still had extreme arm pain. Petitioner testified that due to the pain, he was told by his bosses to call his doctors. Petitioner testified that he did not return to work again for Respondent after February 29, 2012. Petitioner's Exhibit 10, consisting of employer's disability statements reflects submissions March 28, 2012, April 11, 2012, and May 4, 2012,

through July 3, 2013. The form dated July 3, 2013, specifically asks whether the accident was work related in which Respondent indicates yes.

It is clear Respondent was aware that Petitioner was seeking medical treatment. It is clear Respondent was aware that Petitioner was taking time from work. There is evidence in the records to support that Petitioner provided the employer notice of his injuries within 45 days of those injuries. Although Respondent contends that Petitioner never stated that his injuries arose from a work related accident, the nature of Petitioner's injuries allows the employer to infer that it was work related.

"...where the employer is put on notice that the Claimant suffered an injury and the nature of the injury allows the employer to infer that the injury arose from a work related accident, this qualifies as some notice under Section C. See *H & S Floor Covering, Inc. v Workers' Compensation Commission*, 373 Ill. App 3d 259, 265-66 (2007) (The employer could infer from the nature of the Claimant's knee injury and his position as a flooring installer that the Claimant's reported injury was work related)." *Mid City Plaza, LLC v IWCC 218 IL App (1st) 18025WC-U*

Based on the manifest weight of the evidence, the Arbitrator finds that Petitioner gave notice of his work related injury on December 16, 2012.

The Arbitrator further finds that Petitioner gave notice of his February 21, 2012, work injury.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (K), WHETHER PETITIONER IS ENTITLED TO TEMPORARY TOTAL DISABILITY BENEFITS, THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

Petitioner testified in regard to the time that he lost from work. Respondent acknowledges that Petitioner was unable to work, but denies that these claims are compensable and disputes Petitioner's entitlement to any temporary total disability. The Arbitrator refers to the documentary evidence.

In regard to case number 13 WC 03107, Petitioner claims that he is entitled to temporary total disability for the period December 19, 2011, through December 20, 2011, for a period of 2/7 weeks, December 22, 2011, through December 27, 2011 for a period of 6/7 weeks, January 3, 2012, through January 8, 2012, for a period 6/7 weeks, January 30, 2012, through February 5, 2012, for a period 1 week, February 17, 2012, through February 19, 2012, for a period of 3/7 weeks.

The Arbitrator notes Petitioner's Exhibit 1/Respondent's Exhibit 1, an emergency room visit at Sarah Bush Lincoln Health Center, indicates Petitioner was given a work note to release him until he follows up with his primary care provider regarding his shoulder and blood pressure.

Petitioner's Exhibit 2, medical records of Petitioner's personal care physician, Dr. Whalen, reflect a visit on December 20, 2011. There, Dr. Whalen states that Petitioner was given a note for no work that week.

Petitioner testified that, in fact, he returned to work on December 21, 2011. Petitioner testified that due to pain he was unable to work December 22, 2011, through December 27, 2011.

Petitioner testified that he returned to work December 28, 2011. Petitioner testified that Respondent recommended he see a chiropractor. Petitioner was seen by Hutti Chiropractic January 3, 2012 (PX 3). The Arbitrator notes that Dr. Hutti

issued a note indicating that Petitioner was unable to work from December 19, 2011, to December 23, 2011, and from January 3, 2012, to January 6, 2012, and from January 30, 2012, to February 5, 2012 (RX 2).

Petitioner testified that he returned to work February 6, 2012, and worked until February 17, 2012, at which time he took off February 17, 2012, February 18, 2012, February 19, 2012, due to arm pain, returning to work on February 20, 2012.

In regard to case number 13 WC 03107, the Arbitrator finds that Petitioner has substantiated his claim to temporary total disability benefits for the claimed periods, that documentation through Petitioner's unrebutted testimony and medical records.

The Arbitrator therefore awards Petitioner 2 5/7 weeks.

In regard to case number 13 WC 029387, Petitioner testified as to his work injury, which occurred February 21, 2012. Following that injury, Petitioner was seen by his personal care physician, Dr. Whalen. Petitioner was first seen after that injury on February 22, 2012, according to Dr. Whalen's records. Dr. Whalen indicates a note for work was given.

Upon seeing Dr. Johnson on February 24, 2012, Dr. Johnson reports that she issued an off work slip that would extend Petitioner's off work to February 29, 2012. As noted, Petitioner testified that he attempted to return to work on February 29, 2012. On that day he still had extreme arm pain. Petitioner testified that he called Dr. Johnson on March 1, 2012, at which time Petitioner was continued off work. Petitioner's Exhibit 4 reflects a phone note on March 1, 2012, in which Dr. Johnson continued Petitioner off work.

On March 14, 2012, Petitioner returned to Dr. Johnson.

Beginning in February of 2012 and continuing in March of 2012 Respondent was executing disability claim forms on behalf of Petitioner (PX 10).

Dr. Harms testified that he performed surgery on April 17, 2012. Petitioner was seen in follow up from that surgery on May 11, 2012. Dr. Harms testified Petitioner was encouraged to gradually increase activities using commonsense at that point and particularly to keep walking. Dr. Harms imposed restrictions of no lifting over 20 pounds above the shoulders (PX 7, P. 13). Petitioner's Exhibit 10 reflects a disability form submitted by Petitioner's employer dated May 4, 2012.

On June 8, 2012, Dr. Harms suggested Petitioner keep walking and to minimize his lifting to 20 pounds.

On July 2, 2012, Petitioner was seen by Dr. Harms. At that time, Dr. Harms indicted Petitioner could lift 20 pounds any time. Dr. Harms testified he was told by Petitioner that Respondent probably wouldn't take him back with restrictions. Petitioner's Exhibit 10 reflects a disability form submitted by Respondent dated July 5, 2012.

Dr. Harms testified that on August 15, 2012, he felt Petitioner could be employed in some fashion, but that he wasn't good enough to go back to unlimited activities (PX 7, P. 12). Petitioner's Exhibit 10 reflects that Respondent submitted a disability form on behalf of Petitioner dated August 15, 2012.

Dr. Harms testified that by January 2013 he had limited Petitioner to 10/20 pounds, avoid bending and twisting of the neck and avoid overhead work and change positions frequently (PX 7, P. 23).

On April 25, 2013, Dr. Harms performed a second surgical treatment in which he removed the plate and screws at C6-C7, cleaning out the disc space and making room for the nerves, putting in bone and plate and screws, similar to what was done at the previous level. That surgery was performed at C5/6 (PX 7, P. 24, 25). Following surgery, Dr. Harms testified that Petitioner was placed on restrictions of lifting below 20 pounds and recommendation to stay active and keep walking (PX 7, P. 26). Dr. Harms

testified his last visit with Petitioner was on October 7, 2013. At that time, Dr. Harms thought Petitioner could be employed in some fashion, even if he couldn't get into good enough shape to do his original job.

Petitioner further continued to treat with his personal care physician, Dr. Whalen.

On July 31, 2014, Dr. Whalen issued a report. Therein, Petitioner was noted as having surgery for neck and left arm pain. It was noted by Dr. Whalen Petitioner had not been working for well over a year and that Petitioner had not been able to return to work and continued to see specialists periodically. (PX 2)

On August 28, 2014, Dr. Whalen issued a physical capacity questionnaire indicating Petitioner was unable to stand or walk up to two hours of an eight hour day, nor sit six or more hours of an eight hour day, nor could Petitioner lift or carry up to 10 pounds occasionally or lift or carry up to a few pounds frequently (PX 2).

Following Petitioner's second surgery with Dr. Harms it is noted Petitioner continued treatment with Carle for pulmonary conditions, sleep apnea, restless leg syndrome, and foot and ankle complaints.

On September 26, 2014, Petitioner requested a hearing before an Administrative Law Judge in support of his claim for Social Security Disability benefits (PX 8).

On October 31, 2014, Petitioner was seen by Dr. Cranston. This referral was at the request of Dr. Whalen.

On December 2, 2014, Dr. Whalen issued a report (PX 2, Physical Capacities Evaluation).

Petitioner returned to Dr. Cranston on January 28, 2015. At that time, Dr. Cranston referred Petitioner to Dr. Farahvar.

On March 10, 2015, Dr. Farahvar performed a third cervical surgery. On March 9, 2016, Dr. Farahvar issued a report indicating that at that point, the doctor did not think patient was able to perform any appropriate work activity due to the pain in his arm and persistent pain that is refractory to pain management or surgeries. Dr. Farahvar suggested Petitioner's performance would be of no lifting anything greater than five to ten pounds without severe pain. Petitioner could not do any excessive bending, lifting, straining, which cause severe neck and arm pain. The condition was serious enough to present Petitioner from participating in any kind of work or training (PX 7).

Petitioner received a fully favorable award of Social Security Disability on May 17, 2016. That award found Petitioner disabled as of February 29, 2012.

At issue is Petitioner's entitlement to temporary total disability pursuant to the Illinois Workers' Compensation Act.

In regard to case number 13 WC 29387, Petitioner has claimed 448 1/7 weeks of temporary total disability, that period addressing February 22, 2012, to February 28, 2012, and February 29, 2012, to the present (October 1, 2020).

A claimant's entitlement to temporary total disability is governed by Section 8(b) of the Act. The Act provides that weekly compensation shall be paid as long as the total temporary incapacity lasts. Once an injured employee's physical condition stabilizes, he is no longer eligible for temporary total disability benefits.

The time during which a worker is temporarily and totally disabled is a question of fact to be determined by the Commission.

Here, Dr. Harms, who last saw Petitioner on October 7, 2012, testified, "It was my hope that he could go back to his regular job, but not necessarily my expectation, since he had a heavy physical job (PX 7, P. 53).

The record indicates that after treating with Dr. Harms, Petitioner filed for Social Security Disability.

The record indicates Petitioner was capable of cutting and selling fire wood, at least by September 2014 (RX 16). Petitioner testified that that activity fell within his restrictions.

Petitioner's final visit with Dr. Farahvar was noted to be on March 9, 2016.

The Arbitrator finds that by March 9, 2016, Petitioner was no longer temporarily disabled and had reached the maximum level of physical improvement given Petitioner's ongoing disability.

Petitioner is entitled to temporary total disability from February 22, 2012, through February 28, 2012 and February 29, 2012, through March 9, 2016 for a total of 211 weeks of temporary total disability.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (F), IS PETITIONER'S CURRENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY? THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

Petitioner contends that his condition of ill-being is causally connected to a work injury which he sustained on December 16, 2011, and an injury he sustained at work on February 21, 2012.

Respondent disputes that Petitioner's current condition of ill-being is in any way causally connected to a work injury.

The Arbitrator relies on the opinions rendered by Dr. Harms. Dr. Harms was called to testify by Petitioner. Petitioner presented with a history of waking up in December 2011, with neck pain, left shoulder blade pain, pain going down to the elbow and pain going to the thumb and the next two fingers (PX 7, P. 9). Dr. Harms indicated that Petitioner mentioned "he just woke up with it although the day before he was moving a heavy furnace".

In the course of his testimony, Dr. Harms was asked a hypothetical question setting forth the facts alleged by Petitioner to constitute his work injury on December 16, 2011, and his work injury on February 21, 2012. Respondent objected to the hypothetical question on the basis that those hypothetical facts were not presented into evidence.

The Arbitrator finds that the facts set forth in the hypothetical question were the same facts as testified to by Petitioner at the time of hearing. Following the presentation of those hypothetical facts, Dr. Harms testified that the history that was given is classic for a patient who, on December 16 got a tear in the disc at C6-7 and had symptoms. Dr. Harms testified, "It is classic for actually pushing on a piece of disc

or getting a herniated disc at C6-C7 on February 21st of the next year." Dr. Harms stated that there is no question that there is underlying arthritis and disc degeneration that predated such things (PX 7, P. 34).

Dr. Harms testified, "It is easy to connect the first surgery with the incident. It is harder to connect the second surgery with the incident". Dr. Harms conditioned his statement by saying, "The further one is from the incident in question, the more remote in time the more likelihood there are other factors coming into play. So the answer is yes to the 2012 surgery and possibly from the 2013 surgery" (PX 7, P. 34).
Dr. Harms could not state within a reasonable degree of medical certainty that there is a causal connection between the two incidents and Petitioner's surgery in 2015 (PX 7, P. 34).

Respondent presented medical records from Petitioner's personal care physician and chiropractor. Specifically, Respondent had Dr. Harms review records from Dr. Whalen dated December 20, 2011. Respondent quoted this note as stating: "This gentleman woke up Saturday morning with shoulder and neck pain. He had had no prior problem at all. He had had no injury." The Arbitrator notes that Petitioner testified as to this history, indicating he woke up Saturday morning after lifting a wood burning furnace on the previous Friday. Dr. Harms responded by stating: "The work injury according to what I have testified so far is not the cause, it is a contributing factor." Dr. Harms conceded that the December 20, 2011, note of Dr. Whalen calls into question the history that he was given by patient. However, the history as given to Dr. Whalen conforms with the testimony of Petitioner at hearing.

In regard to records presented by Respondent from Petitioner's chiropractor, the Arbitrator would agree with Respondent that those records are difficult to read.
Following treatment with Dr. Harms, Petitioner was referred to Dr. Cranston, also of Carle, by his personal care physician.

Dr. Cranston's January 28, 2015, notes state, "Was this caused by the accident? I say the answer is reasonably so to a reasonable degree of medical certainty. Based on the time course of the history I suspect that his current situation is directly related to that accident (PX 4)."

Finally, the Arbitrator makes note of the Employer's Disability Reports, Petitioner's Exhibit 10, specifically the report dated July 3, 2013, in which it is asked on that form: "Was this disability caused by an accident that occurred at the workplace?" to which Respondent has checked yes.

The Arbitrator is forced by the manifest weight of the evidence to conclude that Petitioner's condition of ill-being is causally connected to his work injuries of December 16, 2011, and February 21, 2012.

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY? HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES? THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

Petitioner has submitted as Petitioner's Exhibit 9 medical bills associated with Petitioner's treatment. Medical bills submitted total $358,387.27. Of that figure, it is noted that Illinois Healthcare and Family Services has paid $477.42. Health Alliance has paid $117,610.78. Petitioner is shown as having paid $1,584.11. There is shown $4,208.93 unpaid.

Respondent has not objected to the reasonableness and necessity of the bills, but has asserted objection to the Exhibit on the basis of liability.

The Arbitrator notes the testimony of Dr. Harms to indicate that medical bills incurred in Petitioner's treatment up through his last visit with Dr. Harms on October 7, 2013, were reasonable and necessary (PX 7, P. 38, 39).

As previously noted, Dr. Cranston did opine that Petitioner's complaints when seen by him on January 28, 2015, that he suspected Petitioner's current situation as directly related to his accident.

Based on Petitioner's testimony and based on the treating medical doctors' statements, the Arbitrator finds that Petitioner's medical bills as they relate to treatment for his cervical surgeries and left arm pain are reasonable and were necessary to cure Petitioner of the condition of ill-being as presented to his medical providers.

To the extent that Petitioner's Exhibit 9 contains medical bills related for other conditions, i.e., low back pain, carpal tunnel syndrome, restless leg syndrome, feet and

ankle complaints, pulmonary conditions or any other bills not solely related to Petitioner's cervical spine, those bills are specifically and categorically denied. Respondent shall pay reasonable and necessary medical services of $358,387.27 as provided in Sections 8(a) and 8.2 of the Act.

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

IN SUPPORT OF THE ARBITRATOR'S DECISION RELATING TO (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY? THE ARBITRATOR MAKES THE FOLLOWING FINDINGS OF FACT AND CONCLUSION OF LAW:

Petitioner contends that based on the manifest weight of the medical evidence, that he is totally and permanently disabled. In response to this contention, Respondent has presented evidence that Petitioner has engaged in physical activity which would preclude a finding of total permanent disability. Respondent's position is that assuming Petitioner's claims are compensable Petitioner has not presented evidence of total and permanent disability pursuant to Section 8(d) (820 ILCS 305/8.1(b)).

Petitioner points to reports generated by treating physicians that suggest the opposite. Specifically, Petitioner points to a report from Dr. Whalen dated March 9, 2016, stating Dr. Whalen's belief that Petitioner's ability to work is extremely unlikely in the foreseeable future (PX 2).

Petitioner further points to a report written by Dr. Farahvar dated March 9, 2016, stating, "at this point I do not think that the patient is able to perform any appropriate work activity due to the pain in his arm and persistent pain that is refractory to pain management or surgeries."

Dr. Farahvar goes on to state, "This limits the performance of lifting anything greater than 5-10 pounds without severe pain. He cannot do any excessive bending, lifting, straining, which cause severe neck and arm pain. This condition is serious enough to prevent him from participating in any kind of work or training" (PX 4).

These opinions are in contrast to Dr. Harms opinions where Dr. Harms opines that Petitioner is capable of engaging in some form of work but not his former job.

Petitioner testified that he has not resumed any employment and has not looked for work. The Arbitrator cannot conclude that the manifest weight of the evidence demonstrates that Petitioner has been rendered totally and permanently incapable of work. The Arbitrator again notes the opinions of Dr. Harms that he could not state within in a reasonable degree of medical certainty that there is a causal connection between Petitioner's two work injuries and Petitioner's cervical surgery in 2015. Moreover, the Arbitrator has reviewed Petitioner's Exhibit 4 consisting of medical records from Carle Clinic and Carle Hospital from December 20, 2011, through January 30, 2017. The Arbitrator notes that Petitioner treated for other conditions during this time; those other conditions including low back pain, carpal tunnel syndrome, restless leg syndrome, foot and ankle complaints, and sleep apnea. The Arbitrator also notes Petitioner was diagnosed with attention deficient disorder. Petitioner received psychiatric treatment.

While the Arbitrator has concluded that Petitioner's claims are compensable, the Arbitrator notes the opinions of Petitioner's treating physician to conclude that Petitioner is not totally and permanently disabled within the meaning of the Illinois Workers' Compensation Act.

Specifically, the Arbitrator relies on the opinions of Dr. Harms in regard to Petitioner's functionality. Dr. Harms noted that, "it was my hope that Petitioner could go back to his regular job, but not necessarily my expectation since he had a heavy physical job" (PX 7, P. 53). Dr. Harms testified that he did discuss a return to work and work restrictions with Petitioner. Dr. Harms expressed his philosophy by stating, "Almost everyone is capable of some gainful employment...". (PX 7, P. 55).

Moreover, Dr. Harms testified that he thought Petitioner could be employed in some fashion, even if he couldn't get into good enough shape to do his original job (PX 7, P. 36).

While Petitioner is not totally and permanently disabled, Petitioner has sustained partial permanent disability to the extent that it has resulted in the loss of his occupation. Based on the manifest weight of the evidence, the Arbitrator awards Petitioner 35% loss of the man as a whole.

The Arbitrator notes Petitioner's work injuries occurred on December 16, 2011 (13 WC 003107) and February 21, 2012 (13 WC 029387).

The analysis of the nature and extent of Petitioner's injuries are subject to analysis pursuant to 820 ILCS 305/8.1(b).

In determining the level of permanent partial disability for injuries incurred on or after September 1, 2011, the Commission shall base its determination on the following factors:

(i) The reported level of impairment pursuant to the most current addition of the AMAs "Guides to the Evaluation of Permanent Impairment";
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of injury;
(iv) The employee's future earning capacity; and
(v) The evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1(b).

No single enumerated factor shall be the sole determinate 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. (820 ILCS 305/8.1(b))

Pursuant to Section 8.1(b) 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 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 injuries; and any other measurements that establish the nature and extent of the impairment. (b) also, the Commission shall base its determination on the following factors:

(i) The reported level of impairment;
(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of injury;
(iv) The employee's future earning capacity; and
(v) The evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1(b).

With regard to Section 8.1(b)(i) of the Act, the reported level of impairment, the Arbitrator finds neither party presented an AMA Impairment Rating. Therefore, the Arbitrator gives no weight to this factor.

In regard to 8.1(b)(ii), Petitioner testified as to his job duties. Petitioner testified that he did not return to work after February 29, 2012. Petitioner testified that his work duties were such that they equated to a heavy demand work level. The Arbitrator gives great weight to these factors.

With regard to Section 8.1(b)(iii) of the Act, the age of the injured employee at the time of the injury was 38 years of age. As such is a younger individual and will live with disability for a longer period of time. The Arbitrator gives great weight to this factor.

With regard to Section 8.1(b)(iv) of the Act, the employee's future earning capacity, the Arbitrator finds that no evidence was submitted regarding Petitioner's future earning capacity. The Arbitrator notes Petitioner was awarded Social Security Disability on May 17, 2016, which awarded full disability as of February 29, 2012. The Arbitrator gives some weight to this factor.

With regard to Section 8.1(b)(v) of the Act, evidence of disability corroborated by the treating medical records, the Arbitrator notes the Petitioner credibly testified as to his current limitations of motion and soreness which is well corroborated by the medical

and surgical records. The Arbitrator notes the opinions of Dr. Harms, Dr. Whalen, Dr. Cranston, and Dr. Farahvar. The Arbitrator gives these findings great weight.

Based on the totality of the manifest weight of the medical evidence, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of $420.00 a week for 175 weeks because the injuries sustained caused 35% loss of the man as a whole as provided in Section 8(d)2 of the Act.

12/16/20
Dated

Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	13WC029387
Case Name	HUPP, CHAD v. LD MECHANICAL CONTRACTORS INC
Consolidated Cases	13WC003107
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0564
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	David Moss
Respondent Attorney	Daniel Gaumer

DATE FILED: 11/10/2021

/s/ Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

☐ Affirm and adopt (no changes)	☐ Injured Workers' Benefit Fund
☐ 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

CHAD HUPP,

Petitioner,

vs. NO: 13 WC 29387

LD MECHANICAL CONTRACTORS, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

I. Findings of Fact

Petitioner, a plumbing and heating worker, filed two consolidated claims alleging cervical injuries. Petitioner first sustained cervical injuries after moving a wood burning furnace on December 16, 2011. This 2011 accident is addressed by the Commission in a separate Decision under 13 WC 3107. Petitioner then claimed additional cervical injuries after pulling an air handler on February 21, 2012. The February 21, 2012 accident is the subject of the present Decision.

Petitioner's job duties included performing furnace and attic duct installations. While tearing out a wood burning furnace on December 16, 2011, Petitioner moved the furnace on a cart with the help of two other employees, whom he identified as Keith Robinson and "Scott." Petitioner testified that he had to put his head and shoulder up against the furnace when they tipped it forward on the cart, which caused his head to be pushed over. When he then got up, Petitioner noticed a cramp-like sensation in his neck.

Petitioner continued to work after the incident, but when he drove back to the shop and exited his work truck, he felt stiff and had to walk around to loosen up. Petitioner testified that he waited to see if Scott or someone else would show up back at the shop so he could let them know, but everyone had already gone. Petitioner testified that the next morning, he then took two steps out of bed before collapsing to the floor with severe left arm pain up into his neck. Petitioner testified that shortly thereafter on December 19, 2011, he called Kent Babbs, one of his bosses, and informed Mr. Babbs that he had hurt his arm moving the furnace and would not be into work.

Mr. Babbs, who co-owned Respondent's company with John Dallas, testified that he

recalled speaking with Petitioner on December 19, 2011. Mr. Babbs testified that Petitioner informed him that he could hardly get out of bed that morning and would not be coming into work; however, Petitioner did not state that he had injured himself at work. Mr. Babbs testified that Petitioner was thereafter on and off work for the next several months, but he never said anything to suggest that his symptoms were caused by an injury at work. Mr. Dallas also recalled Petitioner calling off work on December 19, 2011. Mr. Dallas testified that he was aware Petitioner was having back pain, but he did not ask what had happened and thought it was just general back pain.

Treatment records show that Petitioner also presented for treatment on December 19, 2011 at Sarah Bush Lincoln Hospital and reported waking up Saturday morning with left shoulder pain shooting into his neck and left arm. Petitioner denied any known injury or trauma but noted that he had been moving a wood burning furnace the day before his pain began. NP Jodi Morrisey diagnosed Petitioner with a musculoskeletal strain at the left shoulder and neck. She prescribed medication and restricted Petitioner to no activity with the left arm, heavy lifting, or strenuous activity. NP Morrisey also released Petitioner from work until he saw his primary care provider.

Petitioner presented to Dr. Cornelius Whalen on December 20, 2011. Dr. Whalen indicated that Petitioner had no injury and woke up Saturday with shoulder and neck pain. He diagnosed Petitioner with shoulder pain, took him off work, and ordered X-rays, which were obtained the same day. The left shoulder X-rays revealed mild AC joint narrowing without significant superimposed degenerative changes, and the cervical X-rays showed straightening to partial reversal of the normal cervical lordosis suggestive of muscle spasm.

Petitioner testified that he was then off work from December 22 through December 27, 2011 and returned to work from December 28 to December 30, 2011, during which time, he informed Mr. Babbs that he was having trouble with his left arm. Petitioner testified that he told Mr. Babbs he had hurt his arm while moving the wood burning furnace the prior Friday.

However, Mr. Babbs testified that he did not receive notice that Petitioner was claiming a work-related injury until November 2012 when Petitioner came to his house and told him about the December 16, 2011 accident. Mr. Dallas also testified that the first time he heard of Petitioner's claims was when Mr. Babbs informed him of them in November 2012 after Petitioner had gone to Mr. Babbs' home. Mr. Dallas testified that he was aware Petitioner had pain, but Petitioner never told him that his problems were due to work-related injuries. Mr. Dallas testified that he had a conversation with Petitioner about his pain sometime between December 19, 2011 and when Petitioner first saw Dr. Hutti on January 3, 2012. Mr. Dallas testified that he did not recommend that Petitioner go to Dr. Hutti specifically, but he did recommend that Petitioner see a chiropractor.

Petitioner received chiropractic treatment from Hutti Chiropractic Center from January 3, 2012 through February 2012. During that time, Petitioner testified that he was taken off work by Dr. Hutti from January 3 to January 6, 2012 and returned to work on January 9, 2012. He then went off work again on January 30, 2012 and returned on February 6, 2012. However, Petitioner testified that he continued to have trouble with his left arm and took off work again on February17, 2012 before returning again on February 20, 2012.

While receiving chiropractic care from Dr. Hutti, Petitioner also continued to follow up with Dr. Whalen. On January 30, 2012, Dr. Whalen diagnosed Petitioner with shoulder pain and paresthesia that appeared to be in the C6-C7 nerve roots. He prescribed Flexeril with a Medrol

Dosepak and provided a note excusing Petitioner from work on January 30, 2012.

Shortly thereafter, on February 1, 2012, Petitioner filled out a Notice of Disability Claim form for Financial American Life Insurance Company. When asked on this form if his disability was caused by an accident, Petitioner wrote that he did not know and he had woken up that way. The same day, Petitioner also filled out an Accidental Injury Claim form for Aflac. When prompted to describe how his accident occurred, Petitioner wrote that he had sat up in the middle of the night quickly with leg cramps. He marked the location of the accident as his home.

The following day, Respondent's office manager, Michelle Carlen, filled out an employer's statement with Financial American Life Insurance Company and noted that Petitioner was on medical leave with his last day worked on January 27, 2012. Ms. Carlen indicated that Petitioner was not eligible for workers' compensation and had not filed a workers' compensation claim. No information was provided regarding Petitioner's alleged accident. Ms. Carlen filled out another employer's statement for Aflac on February 9, 2012. Although Ms. Carlen's handwriting is difficult to read where she listed Petitioner's first date of disability, she indicated that it was December 17 or December 19, 2011. This form did not otherwise detail the alleged accident. Ms. Carlen thereafter completed numerous other disability forms for Aflac reiterating the same information and identifying Petitioner's first date of disability as December 17, 2011.

Petitioner testified that then, on February 21, 2012, he was on his knees pulling a 150 to 200-pound air handler across an attic with another employee named Chad Alexander when his neck popped and he felt pain down his left arm. Petitioner testified that he immediately told Mr. Alexander that they had to stop. At the hearing, Mr. Babbs testified that he did not know about the alleged second injury on February 21, 2012 until Respondent's attorney told him about it.

On February 22, 2012, Petitioner told Dr. Whalen that his left elbow and shoulder bothered him after working in an attic and hearing a pop the day prior. Dr. Whalen diagnosed Petitioner with shoulder pain and apparent neck pain with paresthesia that could be a radicular problem. He referred Petitioner to a spine clinic and excused him from work until February 24. Dr. Whalen also obtained cervical X-rays, which revealed mild degenerative endplate and degenerative bony foraminal narrowing on the left at C3-C4 apparently related to mild facet joint degeneration.

Petitioner then presented to Dr. Victoria Johnson of Carle Spine Institute on February 24, 2012 and reported that his symptoms had developed on or around December 17, 2011. Petitioner did not recall any particular event or injury associated with his immediate onset of discomfort, but he noted moving a large furnace the day before. Petitioner complained of left-sided arm pain radiating to his elbow and below with numbness and tingling in the first and second digits. Dr. Johnson diagnosed Petitioner with rotator cuff syndrome and probable cervical radiculopathy. She administered a left shoulder injection and took Petitioner off work until February 29, 2012. Petitioner testified that he returned to work on February 29, 2012, but he continued to have trouble with his left arm and spoke to both Mr. Babbs and Mr. Dallas regarding it.

On March 5, 2012, Petitioner filled out another Aflac disability form and listed the accident date as December 17, 2011. Petitioner wrote that he had moved a wood burning stove, and then the morning after, he woke up, took two steps, and felt his symptoms begin. Petitioner also noted that the day before moving the stove, he experienced charley horses/leg cramps in both legs.

On March 13, 2012, a cervical MRI revealed: broad-based disc/osteophyte with a probable left C6-C7 disc protrusion producing moderate to severe thecal sac narrowing, significantly narrowing the left anterolateral recess and probably producing severe left foraminal narrowing; multilevel disc and facet degenerative findings; and severe left foraminal narrowing at C4-C5. On March 14, 2012, Dr. Johnson found that the MRI showed degenerative disc disease at C3 through C6 and a broad-based left-sided disc protrusion at C6-C7. Dr. Johnson believed the disc protrusion was causing Petitioner's symptoms. She recommended an epidural steroid injection.

On March 15, 2012, Petitioner filled out another Aflac form referencing only his December 2011 accident. Shortly thereafter, on March 19, 2012, Dr. Hutti filled out a physician's statement for Aflac that also listed an incident date of December 17, 2011. Petitioner then underwent a left C6-C7 epidural injection on March 21, 2012. Dr. Johnson also filled out two physician's statements on March 28, 2012 indicating that Petitioner was unable to work at that time.

Upon Dr. Johnson's referral, Petitioner next presented to Dr. James Harms of Carle Spine Institute on April 4, 2012 for a surgical consultation. Dr. Harms noted that Petitioner's pain began on December 17, 2011 when he awoke with it after having moved a heavy furnace the day prior. Dr. Harms believed that Petitioner's pain generator was his C6-C7 herniated disc. As such, he indicated that surgery was a reasonable option. Petitioner then underwent a C6-C7 anterior discectomy and fusion on April 17, 2012. Dr. Harms kept Petitioner off work post-surgery until May 11, 2012, at which time he switched to light duty restrictions of no lifting above the shoulders more than 20 pounds, no aggressive twisting, and no flexion or extension of the neck.

On July 2, 2012, Dr. Harms reported that Petitioner was 50% better with continued symptoms that were likely coming from his nerves still being sensitive. Dr. Harms also believed that some of Petitioner's other degenerative discs could possibly be causing some symptoms. He recommended continued light duty and physical therapy, which Petitioner began on July 11, 2012. The physical therapist listed Petitioner's onset date as December 16, 2011 from when he moved a wood furnace at work.

Sometime after August 1, 2012, Carle Hospital sent an undated letter informing Petitioner that Health Alliance was not paying for his August 1, 2012 service date. The letter indicated that a workers' compensation denial letter was needed before Petitioner's claim could be further processed. Although undated, it is presumable that the letter was sent after August 1, 2012, since it references that service date. In another undated letter, Mr. Babbs wrote back to Health Alliance and also referenced an August 1, 2012 service date. Mr. Babbs stated that Petitioner was not involved in a workers' compensation matter and that his claims needed to be paid by Health Alliance without further delay. At the hearing, Mr. Babbs testified that he sent this letter in response to Petitioner showing him the letter from Carle Hospital and asking him to write to Health Alliance to inform them that it was not a workers' compensation matter so his insurance would pay the bill. Mr. Babbs did not recall the exact date he prepared the letter; however, he testified that it was before Petitioner came to his house in November 2012 and reported his workers' compensation claim to him for the first time.

On August 13, 2012, Dr. Harms ordered a cervical CT after noting that Petitioner's neck and left arm pain had not resolved. On August 14, 2012, the CT revealed straightening of the normal cervical lordosis, a spinal canal that was at the lower limits of normal or slightly congenitally small, and moderate to severe left foraminal narrowing at C3-C4. A cervical MRI

was also obtained on August 24, 2012 and showed stable C3-C4 and C4-C5 severe left foraminal stenosis and C5-C6 moderate bilateral foraminal stenosis. The same day, Dr. Harms opined that they might have overestimated how much of Petitioner's problem was coming from one level, and instead, other levels in his neck were contributing to the ongoing problems. Dr. Harms now believed that the problem area was C5-C6. Before pursuing surgery at this level, Dr. Harms wanted Petitioner to visit a neurologist or demonstrate a good response to an injection. Petitioner then underwent a left C5-C6 transforaminal epidural injection on August 29, 2012.

Petitioner returned to Carle Spine Institute on September 17, 2012 and reported feeling the same after the injection. NP Glenett Barrett then recommended a neurology consultation and EMG. On October 23, 2012, the EMG revealed minimal left carpal tunnel syndrome with no cervical radiculopathy or polyneuropathy. The same day, Petitioner had his neurology consultation with Dr. Kenneth Aronson of Carle Neurology Department. Dr. Aronson indicated that Petitioner's pain began the day after moving a furnace in December 2011. Dr. Aronson found that Petitioner had ongoing left C6 symptoms with pain along his neck and shoulder. He also suspected that Petitioner had more foraminal narrowing at C5-C6 that was causing ongoing difficulties. Dr. Aronson recommended a nerve root block or further surgical intervention.

On October 29, 2012, Dr. Harms indicated that Petitioner had probable foraminal stenosis at C5-C6, although the symptoms were not classic. He recommended that Petitioner see a pain doctor, such as Dr. Brian Ogan. On November 5, 2012, Petitioner presented to Dr. Ogan and reported radiating cervical pain that began in December 2011 after lifting a heavy object. Dr. Ogan found Petitioner's examination to be consistent with cervical nerve root irritation at C5-C6. His diagnoses included cervical intervertebral disc displacement without myelopathy, spondylosis without myelopathy, brachial neuritis or radiculitis, and cervicalgia. Dr. Ogan then discussed proceeding with a series of cervical injections, and Petitioner underwent the first cervical epidural steroid injection November 6, 2012.

The next day, on November 7, 2012, Petitioner presented to Carle Sleep Clinic with a history and examination concerning for obstructive sleep apnea. It was noted that Petitioner also had chronic insomnia in the setting of chronic pain and restless leg syndrome. Petitioner thereafter continued to treat for his sleep disorders with medications, a CPAP machine, and ongoing sleep clinic visits.

On December 18, 2012, Petitioner then gave a recorded statement to Marla Howard of Respondent's insurance company. Petitioner told Ms. Howard that he had neck and shoulder pain after moving a wood burning furnace on December 16, 2011. He stated that at the time of the accident, he was with Scott Siberly and Keith Roberson, but he did not say anything to either man about what had happened. Petitioner indicated that he did not tell anyone on the Friday it happened, but on the following Monday, he reported the accident to Mr. Babbs. Petitioner stated that he also told Mr. Dallas after he went to the doctor, because he was making a workers' compensation claim. On January 15, 2013, Petitioner then filled out his Application for Adjustment of Claim stating that he had sustained cervical injuries on December 16, 2011 from moving a wood burning furnace.

On January 30, 2013, Petitioner returned to the Carle Spine Institute with complaints of cracking and popping in his cervical region, low back pain, and leg cramping. NP Barrett told Petitioner that surgery would not help the cracking and popping, since that involved arthritis. She

noted that Petitioner not being as active as normal had caused some of his arthritic-type pain. NP Barrett diagnosed Petitioner with likely degenerative disc disease of the lumbar spine and C5-C6 along with left foraminal stenosis. NP Barrett recommended that Petitioner get more active, do neck exercises, and continue nonoperative interventions for his neck. For his low back, she recommended that Petitioner see a physical medicine and rehabilitation doctor, as it was likely a nonsurgical problem. She also recommended continued light duty restrictions.

Petitioner then presented to Dr. Zeeshan Ahmad on February 18, 2013 for his back pain. Petitioner told Dr. Ahmad that his back pain had been going on for years, and since he was now off work for his neck, he believed it to be a good time to get his back pain evaluated. Dr. Ahmad's impression was mild lumbar degenerative discs with chronic low back pain and no significant radiological evidence of lumbar pathology. Petitioner then saw Dr. Ogan on April 1, 2013 and reported that his lumbar pain had begun a few years prior without an initiating event. Dr. Ogan's assessment was low back pain with right lower extremity radiating pain, as well as posterior cervical pain with left upper extremity radiating pain post-industrial injury. Upon Dr. Ogan's recommendation, Petitioner then underwent L4-L5 and L5-S1 injections on April 11, 2013.

Thereafter, on April 25, 2013, Petitioner underwent a second cervical surgery, specifically the removal of Synthes plates and screws at C6-C7 along with an anterior discectomy and fusion at C5-C6. After the surgery, Petitioner was kept on light duty restrictions by Dr. Harms. Then, on June 12, 2013, Petitioner told Dr. Whalen that the surgery had helped him dramatically, although he was still not back to normal. Petitioner's light duty restriction of no lifting over 20 pounds was subsequently continued by NP Barrett on June 26, 2013.

On July 3, 2013, Ms. Carlen filled out another Aflac disability form and listed Petitioner's first date of disability as December 17, 2011. When asked if the disability was caused by an accident at the workplace, Ms. Carlen answered affirmatively.

Petitioner next returned to Dr. Ogan on July 24, 2013 for reevaluation of his lumbar pain. Dr. Ogan diagnosed Petitioner with right sacroiliitis and lumbar degenerative disc disease. He recommended a right sacroiliac joint injection, which Petitioner underwent on August 8, 2013. Shortly before the injection, Petitioner also started another round of physical therapy on August 5, 2013. He was subsequently discharged from physical therapy due to a lack of progress on September 12, 2013. Upon Dr. Ogan's further recommendation, Petitioner then underwent L3-L4, L4-L5, and L5-S1 facet joint injections on October 3, 2013.

On October 7, 2013, a repeat cervical MRI showed C3-C4 severe left foraminal stenosis and C4-C5 moderate to severe left foraminal stenosis. On the same day, Dr. Harms found that the MRI showed no spinal cord problems. Dr. Harms stated that although the MRI showed narrowing at the nerve exits at C4-C5, it did not explain Petitioner's symptoms. He thought that Petitioner had residual problems with pressure on his nerves, which could improve in up to two years. Dr. Harms did not believe there was anything more a surgeon could do to help Petitioner and instead recommended anti-inflammatory medication, neck exercises, and a neurologist consultation. After Petitioner told Dr. Harms that he could not go back to work without being 100%, Dr. Harms stated that Petitioner may need to change jobs to one that involved less muscles in his back or neck.

On November 20, 2013, Dr. Ogan opined that Petitioner's MRI and examination were consistent with nerve root irritation on the left at C4-C5. He recommended a C4-C5 epidural

steroid injection, which Petitioner then underwent on November 21, 2013. When Petitioner returned on January 22, 2014, Dr. Ogan suspected that cervical facet arthropathy was possibly contributing to Petitioner's chronic cervical pain. Upon Dr. Ogan's recommendation, Petitioner underwent left C2-C3, C3-C4, and C4-C5 facet joint injections on January 23, 2014 and an additional cervical epidural steroid injection on February 27, 2014.

Upon Dr. Whalen's referral, Petitioner then presented to Dr. Mark Stern at the Springfield Clinic on April 28, 2014. Dr. Stern's impression included osteoarthritis, cervical and lumbar pain with radiculopathy, fibromyalgia, and sleep apnea. He believed that Petitioner could benefit from selective cervical nerve root injections. Dr. Stern also recommended additional physical therapy and a trial of dexamethasone, as well as anti-inflammatories and medication adjustments.

Petitioner then underwent a C7-T1 interlaminar epidural steroid injection on May 27, 2014. Nevertheless, on June 9, 2014, Dr. Whalen found that Petitioner had not improved substantially, and if anything, he had more problems arise. Dr. Whalen continued Petitioner's medication and again refilled the prescriptions at Petitioner's follow-up visits on June 30, 2014 and July 29, 2014. At the latter visit, Petitioner complained of left arm tremors and sudden jerking in addition to his ongoing neck, left upper back, and shoulder problems. Thereafter, on August 28, 2014, Dr. Whalen filled out a physical capacity questionnaire and indicated that Petitioner was not able to work in conditions that required standing or walking for up to two hours, sitting six or more hours, lifting and carrying up to 10 pounds occasionally, or lifting and carrying up to a few pounds frequently.

Petitioner then presented to Dr. James Turner of Cork Medical Center on September 4, 2014 for treatment of his unrelated ADD diagnosis. Petitioner wanted to discuss Adderall, as he thought that it had helped him with his pain and movement. Petitioner reported generalized stiffness and all-over pain as well as a left arm tremor with numbness in his arms and hands. Petitioner's problem list at that time included resting tremor and ADD. Dr. Turner recommended following up with Petitioner's neurologist.

Also in September 2014, Sue Cunningham claimed that she bought firewood off Petitioner on two separate occasions. Ms. Cunningham testified that she did not know Petitioner, but she called his phone number on a sign that was advertising firewood. Ms. Cunningham identified RX 16 as the two checks she issued to purchase the wood from Petitioner. RX 16 contains one check dated September 17, 2014 from Ms. Cunningham to Bridget Duncan in the amount of $60.00 and another check dated September 25, 2014 from Ms. Cunningham to Ms. Duncan in the amount of $120.00. Both checks note that they were for "FW." Ms. Cunningham testified that she made the checks out to Ms. Duncan upon Petitioner's instruction. Ms. Cunningham further testified that when Petitioner dropped off the wood, he had a pickup truck with a trailer full of wood and physically unloaded it for her. Ms. Cunningham described the wood as regular firewood with a triangle top that was about 18 inches wide and cut or split. She testified that she told Petitioner where she wanted the wood unloaded and he unloaded it, although she did not stand there watching him do so. Ms. Cunningham further testified that Mr. Babbs was her brother, but when she purchased the firewood, she was not aware that Petitioner had worked for Respondent or had a workers' compensation claim against Respondent.

However, Petitioner testified that he did not recall selling firewood to Ms. Cunningham and had never met her before. Petitioner also testified that he never took a check as payment for the sale of firewood, because he did not want to mess with people writing bad checks.

Nevertheless, Petitioner identified Ms. Duncan as the mother of his children and his former live-in girlfriend of many years.

After this alleged firewood sale, Petitioner returned to Dr. Whalen on September 26, 2014. Dr. Whalen observed that Petitioner appeared to have more problems now than he did pre-surgery. He renewed Petitioner's prescriptions but stated that he personally had nothing more to recommend. Instead, Dr. Whalen advised Petitioner to see a specialist. Nevertheless, Petitioner returned to Dr. Whalen on October 27, 2014. At that time, Petitioner reported that his right arm was numb and tingly, whereas his problem was previously more left-sided. Petitioner mentioned that he had tripped and fallen on October 25, 2014, and since that time, his right shoulder was hard to abduct. Still, Petitioner indicated that most of his pain remained in his neck and shoulder area on the left side. Dr. Whalen prescribed medication and referred Petitioner to Dr. Robert Cranston.

Petitioner saw Dr. Cranston of Carle Department of Neurology on October 31, 2014. Dr. Cranston noted that in 2011, Petitioner had moved a heavy furnace and felt as though he had ruptured a disc. On examination, Dr. Cranston found that Petitioner shook his left hand in a small tremorous way that appeared voluntary. Dr. Cranston thought that Petitioner might be doing it to help decrease some of the pain and irrigation in the arm. He did not interpret it as malingering, although he also did not believe it to be an involuntary tremor. Dr. Cranston diagnosed Petitioner with possible radiculopathy and recommended a repeat cervical MRI and EMG. On November 24, 2014, the MRI showed small new right paracentral disc extrusion with inferior migration at C7-T1 effacing the right anterior thecal sac. The EMG was later obtained on December 3, 2014 and suggested mild bilateral right greater than left carpal tunnel syndrome.

On December 5, 2014, Petitioner reported anxiety to Dr. Whalen after having issues with his girlfriend. Petitioner told Dr. Whalen that he needed something to help him relax, as it had been a stressful situation on top of all his other issues with his neck, shoulder, and arm. He also stated that being unable to work was getting to him. Dr. Whalen diagnosed Petitioner with anxiety and prescribed clonazepam.

Thereafter, on January 28, 2015, Dr. Cranston noted that Dr. Harms had retired and referred Petitioner to Dr. Arash Farahvar. Dr. Cranston then opined that Petitioner did not fit the pattern of fibromyalgia. Nevertheless, he stated that it was reasonable that Petitioner's condition was caused by his accident. Based on the time course of Petitioner's history, he suspected that Petitioner's current situation was directly related to the accident.

On February 16, 2015, Petitioner presented to Dr. Farahvar at Carle Department of Neurology. Upon review of Petitioner's MRI, Dr. Farahvar noted severe foraminal stenosis at C4-C5 and mild stenosis at C3-C4, C5-C6, and C7-T1. He found that Petitioner also had a right paracentral disc herniation, but it was not effacing the nerve. On the following day, February 17, 2015, Petitioner underwent a repeat C7-T1 interlaminar epidural steroid injection. When he returned to Dr. Ogan on March 9, 2015, Petitioner reported 40% pain improvement post-injection. Petitioner then underwent cervical foraminotomies at C3-C4, C4-C5, and C5-C6, as well as a left carpal tunnel release, on March 10, 2015. At the hearing, Petitioner clarified that he was not claiming a carpal tunnel injury and was only claiming a neck injury from his work accident.

Petitioner then presented for a psychiatry consultation at Carle Neurology Department on March 12, 2015. Dr. Jason Ourada found that Petitioner had a history of depression, anxiety, and

suicidal idealization. He recommended outpatient mental health services. On March 23, 2015, Dr. Farahvar also referred Petitioner to a counselor for his psychological issues. Then, on March 25, 2015, Petitioner reported to Dr. Whalen that he was going through a lot after splitting up with his girlfriend. Petitioner also told Dr. Whalen that there had been slight improvement in his neck, but nothing dramatic. Nevertheless, Dr. Whalen noted that Petitioner's arm had quit shaking. His assessment was a C7-T1 herniation and neuralgia-type left arm pain. Dr. Whalen then provided Petitioner with a psychology referral, and Petitioner presented for a psychiatric diagnostic evaluation with Paula McNitt on April 3, 2015. Dr. McNitt indicated that Petitioner's depression had emerged in the past three years as he dealt with back pain and restricted movement stemming from a neck injury sustained at work. She indicated that his low mood, grouchiness, and feelings of despair only worsened following the breakup with his partner. Dr. McNitt diagnosed Petitioner with recurrent major depression and recommended psychiatric consultation and therapy.

On May 5, 2015, Dr. Whalen indicated that Petitioner's neck and arm pain represented chronic pain syndromes. When he returned on May 8, 2015, Petitioner requested pain shots; however, Dr. Whalen told him that he needed to first be evaluated by a pain specialist. At his follow-up visit on July 3, 2015, Dr. Whalen then noted that Petitioner was unable to work, had various problems at home, and was feeling down. He kept Petitioner on his prescription medication regimen and recommended Petitioner see a psychiatrist in addition to his psychologist, Dr. McNitt.

On August 3, 2015, Petitioner returned to Dr. Farahvar with continued complaints of neck, arm, and shoulder pain. Dr. Farahvar thought Petitioner probably had a nerve injury or reflexive sympathetic dystrophy. Petitioner then saw Dr. Ogan on August 31, 2015, at which time Dr. Ogan stated that Petitioner had been referred for consideration of a neuromodulation trial. However, Dr. Ogan was concerned with the ability to place cervical leads given Petitioner's prior procedures. Dr. Farahvar also referred Petitioner to Carle's pain department on September 21, 2015 to see if he was a candidate for a spinal cord stimulator.

On October 6, 2015, Petitioner reported having charley horses to Dr. Whalen and said that he needed a letter for public aid stating that he was unable to work. In response, Dr. Whalen wrote a "To Whom It May Concern" letter on October 8, 2015 noting that Petitioner had radicular neck pain and three prior neck surgeries. Dr. Whalen stated that Petitioner had not improved to the point where he could work and it was very unlikely that he would ever be able to work again.

On October 16, 2015, Dr. Hyunchul Jung saw Petitioner at the Carle Department of Interventional Pain Center upon Dr. Farahvar's referral. Dr. Jung noted that Petitioner had injured himself lifting in December 2011. Following his examination, Dr. Jung did not believe that a spinal cord stimulator was a good option for Petitioner. He also explained that Petitioner was not a candidate for pain medication management, because he had sleep apnea, was not using his CPAP machine, and smoked marijuana daily. Dr. Jung stated that this fit the exclusion criteria for chronic narcotic treatment. Dr. Jung indicated that he had no other treatment options to offer Petitioner.

On November 5, 2015, Dr. McNitt authored a "To Whom It May Concern" letter stating that Petitioner's recurrent major depression was in partial remission. She noted that Petitioner's mood fluctuated in response to his life problems, chronic severe pain, and physical impairment. Shortly thereafter, on November 12, 2015, Dr. Farahvar found that Petitioner's pain appeared disproportionate to his imaging, which indicated a neuropathic pain process. On November 25, 2015, Dr. Farahvar ordered a repeat MRI to see if anything else could be done. The cervical MRI

was obtained on December 29, 2015 and showed slight interval increased size of a right paracentral disc protrusion/extrusion with inferior migration at C7-T1, new minimal anterolisthesis at C3-C4, and multilevel degenerative findings. When Petitioner returned to Dr. Farahvar on February 1, 2016, Dr. Farahvar opined that surgery would not be helpful and determined that Petitioner was disabled in terms of his left arm strength and neck pain. He believed Petitioner was going to need chronic pain management and continued to recommend light duty restrictions.

Petitioner then returned to Dr. Whalen on March 4, 2016. At that time, Dr. Whalen noted that although Petitioner still had great pain, he no longer had the intermittent ballismus-type movements he had in the past. Dr. Whalen again renewed Petitioner's medications. A few days later, on March 9, 2016, Dr. Whalen wrote a "To Whom It May Concern" letter stating that Petitioner did not have use of his left upper extremity and remained in constant discomfort. Dr. Whalen opined that Petitioner was not able to do any meaningful work for the foreseeable future. Dr. Whalen noted that Petitioner had requested this letter in response to the Illinois Department of Human Services wanting to cancel his financial assistance. Dr. Farahvar also authored a "To Whom It May Concern" letter on March 9, 2016 indicating that Petitioner was not able to perform any appropriate work activity secondary to pain.

Then, on May 17, 2016, Judge Daniel Mages issued a Social Security Administrative Decision finding that Petitioner had been disabled since February 29, 2012 with severe impairments of degenerative disc disease and plantar fasciitis. Judge Mages noted that the degenerative disc disease was lumbar as well as cervical affecting Petitioner's neck and left upper extremity. Judge Mages found that Petitioner was unable to perform his past work and that there were no other jobs that existed in significant numbers in the national economy that Petitioner could perform. At the hearing, Petitioner testified that he did not return to work for Respondent after February 29, 2012, the date of disability he alleged for Social Security, and subsequently received Aflac benefits for a year. Petitioner testified that after receiving Social Security benefits, he did not thereafter perform or seek any work. Petitioner testified that although he did not try to perform any work in 2016, he sold a few loads of firewood before that.

After the favorable Social Security Decision, Petitioner continued to have his medications renewed during his regular follow-up visits with Dr. Whalen from June 15, 2016 to February 22, 2017. Then, at his March 29, 2017 visit, Petitioner told Dr. Whalen that he was physically the same but emotionally worse. Petitioner explained that he had some home issues, including construction that was being done. Dr. Whalen restarted Petitioner on Cymbalta to treat his depression, fibromyalgia, and neuropathy. At his next visit on May 2, 2017, Petitioner told Dr. Whalen that everything hurt. Petitioner felt that he could not use his left side and left upper extremity at all secondary to pain. Dr. Whalen again renewed Petitioner's medication at that time.

On May 5, 2017, Petitioner presented to the Carle Sleep Clinic and reported that he had recently been overdoing it by moving items while remodeling. Due to this, Petitioner reported that he was in more pain and had not slept much in the last three days. His diagnoses at that time included chronic insomnia in the setting of chronic neck pain and bilateral arm numbness, mild obstructive sleep apnea, and possible restless leg syndrome versus restlessness due to chronic pain.

Petitioner thereafter continued to have his medications renewed by Dr. Whalen at his regular follow-up visits from July 7, 2017 to February 20, 2018. When Petitioner next returned to Dr. Whalen on July 10, 2018, he reported hurting his right shoulder after having been jumped by

two people. Dr. Whalen renewed Petitioner's medication and ordered right upper extremity X-rays, which were obtained that same day. The X-rays revealed a suspected old shoulder injury with attention to the glenoid labrum as well as possible chronic impingement of the rotator cuff resulting in degenerative subchondral cystic findings in the humeral head.

At Dr. Whalen's request, Petitioner then presented to AMB Consult Carle Therapy Services on July 31, 2018 for his right shoulder pain. PA Brian Cummings represented that Petitioner's right shoulder pain had developed gradually over months. He noted that Petitioner had no singular specific injury; however, Petitioner had a heavy-duty heating and cooling repair and installation job for many years that involved physical labor. PA Cummings also reported that Petitioner had been assaulted a couple weeks ago, but he did not think that his shoulder was injured in that situation. PA Cummings diagnosed Petitioner with right shoulder bursitis and impingement syndrome. At the hearing, Petitioner testified that he was not alleging that he had hurt his right shoulder in his accidents, and instead, his right shoulder injury was from wear and tear.

Thereafter, on May 6, 2019, the parties deposed Dr. Harms, Petitioner's treating orthopedic surgeon. At the deposition, Petitioner's counsel represented that Petitioner was not alleging that his carpal tunnel syndrome and low back condition were part of his claim. As for Petitioner's cervical condition, Petitioner's counsel asked Dr. Harms to assume some facts regarding the alleged accidents on December 16, 2011 and February 21, 2012. Based on those facts, which were consistent with Petitioner's testimony at hearing, Dr. Harms testified that the history was classic for someone who suffered a symptomatic tear at C6-C7 on December 16 and then herniated a disc at C6-C7 on February 21. Dr. Harms acknowledged that Petitioner had underlying arthritis and disc degeneration predating the accident. Nevertheless, he opined that Petitioner's work injury was a contributing factor, although not the cause, of his neck problems.

Dr. Harms further testified that it was easy to connect Petitioner's first surgery to his accident but harder to connect the second surgery. He explained that the more remote in time, the more likely there were other factors in play. As such, Dr. Harms testified that the 2012 surgery was causally related and the 2013 surgery was possibly causally related. However, Dr. Harms testified that he could not say that there was a causal connection between Petitioner's accidents and his subsequent 2015 surgery. He testified that since Petitioner did not get better after the March 2015 surgery, it suggested that pressure on his nerves was not the cause of his symptoms. Instead, Dr. Harms testified that it could very well be that Petitioner's underlying disc degeneration and arthritis had progressed and caused a lot of his symptoms at that time. He testified that he did not know what the cause of Petitioner's symptoms were at the time of 2015.

Dr. Harms further testified that Petitioner could be employed in some fashion, even if he could not get into good enough shape to perform his original job. He testified that Petitioner might have to live more by his brains and less by his muscles now. Nevertheless, Dr. Harms testified that if Petitioner had asked to return to work months after his second surgery, there was a 100% chance that he would have agreed to allow Petitioner to go back to regular duty work. He explained that a patient's comments weigh heavily on the restrictions being offered or removed. Dr. Harms further testified that if the evidence showed that Petitioner was able to cut and sell firewood after his injury, it would indicate that he was capable of more physical work. Regardless, Dr. Harms testified that almost everyone was capable of some gainful employment, including Petitioner.

After Dr. Harms' deposition, Petitioner presented to Dr. Whalen on June 21, 2019. At that

time, Dr. Whalen indicated that he found it strange that Petitioner had not been to his office in 11 months and said he had also not been seeing other doctors. Petitioner also told Dr. Whalen that he had to do community service, but he did not feel physically able to do so. Petitioner requested medical marijuana and asked Dr. Whalen to contact someone to get him out of the community service. Dr. Whalen prescribed metoprolol but did not want to renew any other medication for Petitioner. Dr. Whalen believed that it was peculiar for Petitioner to be interested in medical marijuana, because Petitioner had been a monthly visitor to him and said he had no follow-up appointments with anyone else, yet he still had enough blood pressure medicine. Dr. Whalen stated that he would have to give the medical marijuana some thought, as he was not sure that Petitioner qualified. Dr. Whalen thereafter spoke to a woman, who he did not identify, regarding Petitioner's community service. Dr. Whalen reported that he told this woman that he had not seen Petitioner for almost a year, but he could say that Petitioner had three prior surgeries and still complained of discomfort. He noted that the woman then asked if Petitioner could do something like shredding paper, to which Dr. Whalen responded that Petitioner could easily do that.

At the hearing, Petitioner testified that he was required to perform community service the year before the trial. When questioned as to whether he asked Dr. Whalen to get him out of doing the community service, Petitioner testified that he had asked Dr. Whalen for a letter disclosing his restrictions.

Petitioner also testified that he was in a four-wheeler accident less than a year before the hearing, but he was not still treating for any injuries related to it. The treatment records show that Petitioner presented to Sarah Bush Lincoln Hospital on July 7, 2019 after this accident. Although Petitioner could not recall what had happened, his mother was present to provide a history. It was reported that Petitioner had attempted to do a wheelie and fell off the four-wheeler, hitting his head on concrete. Although Petitioner did not remember the accident, he did recall playing basketball earlier that day. He complained of head, neck, and right rib pain. A cervical CT was obtained and showed post-surgical changes but no acute abnormality. Petitioner was diagnosed with a closed head injury with concussion, neck pain, and multiple abrasions. He was given head injury instructions and local wound care for the abrasions. After the ER visit, Petitioner followed-up with Dr. Whalen on July 17, 2019. Dr. Whalen's diagnoses included a concussion, hypertension, and neck pain. However, the plan section of this treatment note was left empty.

The visit with Dr. Whalen on July 17, 2019 is Petitioner's last post-accident treatment note included in the record. However, prior to the alleged accidents, Petitioner also treated with Dr. Whalen for another four-wheeler incident. Treatment records show that Petitioner presented to Dr. Whalen on March 7, 2007 seeking a chiropractic referral for his non-radiating low back pain from lifting a four-wheeler. Dr. Whalen diagnosed Petitioner with low back pain with right lumbar paraspinal muscle spasm. Petitioner then went on to treat his pre-accident back pain with chiropractic treatments at Hutti Chiropractic Center from March 13, 2007 to April 4, 2007.

At the time of the hearing, Petitioner testified that his surgeries had left him with severe chronic pain all over. He testified that his strength was weak and he continued to have neck pain, pain down his arms, and chronic pain all over. Petitioner also testified that he had difficulty sleeping and hanging on to things, since his hands went numb. For the ongoing symptoms, Petitioner took tramadol and blood pressure medicine. Once in a while, he also took pain medication left over from his surgeries, including methocarbamol and pronate. Petitioner also testified that over the last five years, he shot a little basketball with his three-year-old grandson.

Petitioner further testified that he was not working regularly nor looking for work. However, previously in the fall of 2011, Petitioner had a sign on his truck advertising that he sold firewood. Petitioner testified that the firewood was given to him by a friend who cut it down and came in logs of varying size from six inches to three feet across and two to three feet long. He testified that the logs were lifted into his trailer using a crane. Petitioner testified that he then cut the logs down with a chainsaw or log splitter. When asked if he considered chain-sawing or splitting the firewood manual labor, Petitioner responded that it was done so that he could eat. Petitioner testified that he did a good deal of this work since his two injuries. He testified that his truck had a sign that said to call his phone number for firewood and he sold it to anyone who called him to order it. Petitioner further testified that when he sold the firewood, he would take it to the customer's home, unload it, and pile it up. He testified that the wood pieces were under 20 pounds and he was able to lift them. Additionally, Petitioner testified that the pieces he cut beforehand that were over 20 pounds were lifted by a crane.

Petitioner testified that he did not have any income since February 2012 other than the money he made selling firewood, which he claimed was not a lot. Petitioner then clarified that he sold the firewood before he received his Social Security award in 2016. Petitioner further testified that the chainsaw he used while cutting the firewood was less than 20 pounds and he did not lift, push, or carry the log splitter. He also testified that he stacked the firewood using his right arm. Petitioner explained that he had this train with logging tongs on it that would lift the pieces. Petitioner testified that when performing this activity, he tried to stay within his restrictions.

II. Conclusions of Law

Following a careful review of the entire record, the Commission reverses the Decision of the Arbitrator as to 13 WC 29387 and finds that Petitioner failed to prove that he sustained a compensable accident arising out of and in the course of his employment on February 21, 2012.

Petitioner testified that on February 21, 2012, he felt his neck pop and pain go down his left arm while pulling an air handler across an attic with a coworker. On the day after this accident, February 22, 2012, Petitioner told Dr. Whalen that his left elbow and shoulder bothered him after working in an attic and hearing a pop the day prior. However, in the numerous treatment records that followed, Petitioner did not otherwise report or consistently discuss with his treating doctors any alleged accident on February 21, 2012. Instead, the focus in the treatment records and disability forms was thereafter solely on Petitioner's earlier December 16, 2011 accident. For instance, when Petitioner presented to Dr. Johnson on February 24, 2012 only three days after the alleged accident on February 21, 2012, he reported that his symptoms had developed on or around December 17, 2011 after moving a large furnace the day before. Petitioner thereafter consistently reported the December 2011 accident while failing to mention the February 2012 accident.

As such, the record fails to corroborate Petitioner's testimony that he sustained a second accident on February 21, 2012. Petitioner was already undergoing treatment for his cervical spine for the December 2011 accident at the time of the February 2012 accident, and thereafter, he continued to treat while telling his doctors about the December 2011 accident only. Likewise, Mr. Babbs testified that when Petitioner came to his house in November 2012, he reported the December 16, 2011 accident only.

The Commission thus finds that Petitioner failed to meet his burden of proving that he sustained a second accident arising out of and in the course of his employment on February 21, 2012. Accordingly, the Commission denies all benefits under the Illinois Workers' Compensation Act as it relates to the alleged February 21, 2012 accident. Petitioner's earlier December 16, 2011 accident is otherwise addressed by the Commission in a separate Decision in 13 WC 3107.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator dated January 6, 2021, is hereby reversed as stated herein.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to prove he sustained an accident that arose out of and in the course of his employment on February 21, 2012.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is denied all benefits under the Illinois Workers' Compensation Act related to the February 21, 2012 alleged accident.

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

November 10, 2021

DLS/met
O- 9/15/21
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	19WC012157
Case Name	PLOTT, ERIC v. STATE OF ILLINOIS BIG MUDDY RIVER C.C.
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0565
Number of Pages of Decision	16
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 11/10/2021

/s/Thomas Tyrrell, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ERIC PLOTT,

Petitioner,

vs. NO: 19 WC 12157

STATE OF ILLINOIS/BIG MUDDY RIVER CORRECTIONAL CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed September 10, 2020 is hereby affirmed and adopted.

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

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

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

November 10, 2021
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TJT/ldm
051

Thomas J. Tyrrell
/s/Thomas J. Tyrrell

Maria E. Portela
/s/Maria E. Portela

Kathryn A. Doerries
/s/ Kathryn A. Doerries

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

21IWCC0565

PLOTT, ERIC
Employee/Petitioner

Case# **19WC012157**

ST OF IL/BIG MUDDY RIVER CORRECTIONAL CENTER
Employer/Respondent

On 9/10/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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0502 STATE EMPLOYEES RETIREMENT
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SPRINGFIELD, IL 6270

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

SEP 10 2020

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

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Eric Plott
Employee/Petitioner

v.

State of Illinois/Big Muddy River Correctional Center
Employer/Respondent

Case # **19** WC **12157**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville, Illinois**, on **July 9, 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? (proposed right knee surgery)
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 20, 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 **$102,338.19**; the average weekly wage was **$1,968.04**.

On the date of accident, Petitioner was **43** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit No. 1, as provided in §8(a) and §8.2 of the Act. Respondent shall have credit for any amounts 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 shall authorize and pay for the treatment recommended by Dr. Paletta and Dr. Bradley, including, but not limited to, a partial knee replacement and/or resurfacing of the right knee.

Respondent shall pay Petitioner temporary total disability benefits of **$1,312.03**/week for **98 weeks**, commencing **8/24/18 through 7/9/20**, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator — 9/8/20 Date

ICArbDec19(b)

SEP 10 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ERIC PLOTT,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 19-WC-12157
	)	
STATE OF ILLINOIS/BIG MUDDY RIVER CORRECTIONAL CENTER,	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on July 9, 2020. The parties agree Petitioner was employed as a Shift Supervisor at Big Muddy River Correctional Center when he sustained injuries to his right knee on August 20, 2018. The issues in dispute are causal connection with regard to a partial knee replacement and/or resurfacing of Petitioner's right knee, medical expenses, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 44 years old at the time of arbitration. He is employed at Respondent's Big Muddy River Correctional Center as a Major/Shift Supervisor. Petitioner began working for Respondent in February 1996 and has been so employed with the State for over twenty-four years.

Petitioner testified that on August 20, 2018 he went to an inmate's cell to transport him to the segregation unit. While attempting to place restraints on the inmate he spun around and struck Petitioner in the face. An altercation occurred and Petitioner struck both elbows on the wall, toilet, and bed, and he struck his back and right knee against the toilet. Petitioner testified that his elbows and low back have recovered fully, however, his right knee remains symptomatic.

Petitioner sought medical care and treatment at Respondent's healthcare unit and saw the nursing staff. On August 24, 2018, Petitioner followed up with his family physician, Dr. Jane Gelfand, who ordered x-rays and an MRI and administered Euflexxa injections. Petitioner testified the injections provided only temporary relief. Petitioner was referred to Dr. Paletta who

performed PRP injections which provided only temporary relief. Petitioner testified he underwent arthroscopic surgery on his right knee that provided only temporary relief. Petitioner underwent a Synvisc injection post-operatively that provided only temporary relief. Dr. Paletta ordered a second MRI and referred Petitioner to Dr. Bradley. Dr. Bradley recommended a partial knee replacement.

Petitioner testified that prior to the injury of August 20, 2018, he had no injuries or treatment with regard to his right knee. Petitioner testified he reviewed the Section 12 report authored by Dr. Nogalski and noted several discrepancies. Petitioner disagreed with Dr. Nogalski's testimony that he had no apparent gait or limp while he was in his office. Petitioner also disagreed with Dr. Nogalski that he received treatment for his right knee prior to 8/20/18. Petitioner testified he is currently on work restrictions of no inmate contact, no kneeling, stooping, limited walking, and no climbing ladders. He testified he has taken Fentanyl in the past related to back surgery in 2017 but has not taken Fentanyl for or after his 8/20/18 injury.

On cross-examination, Petitioner testified his right knee symptoms returned within a couple of months following his June 4, 2019 arthroscopic surgery. Petitioner testified he fell a couple of times following surgery when his knee would give way. He testified he did not fall on his right knee but to the left side. Petitioner testified he did not suffer any injury to his right knee following his arthroscopic surgery.

Petitioner's wife, Amy Plott, was called as a witness. Mrs. Plott testified she has been married to Petitioner for 13 years and is a retired nurse of 24 years with the Illinois and Kentucky Department of Corrections. Mrs. Plott testified Petitioner stopped taking Fentanyl for his low back prior to his 8/20/18 accident. Mrs. Plott testified her husband's life is sedentary and he does not spend more than 30 minutes on his leg. He cannot make it through the grocery store longer than 30 minutes. He is not able to perform household chores. They have had to hire out lawn mowing and weed eating. Mrs. Plott testified she drove Petitioner to the arbitration hearing and Petitioner does not drive because his knee pain has affected his reflexes and the ability to move his foot from the gas to the brake pedal.

MEDICAL HISTORY

Following the accident, Petitioner sought medical care and treatment at Respondent's healthcare unit and was treated by the nursing staff. He followed up with his primary care physician, Dr. Jane Gelfand, on August 24, 2018 and provided a history of twisting his right knee as a result of a fight inside a jail cell at work. His symptoms included medial joint line tenderness while walking up and down stairs and difficulty moving in the morning. Dr. Gelfand's examination was significant for a positive McMurray sign and maximal flexion test. Her impression was a possible medial meniscus tear. Petitioner was taken off work and given a right knee injection, with consideration given for an MRI if there was no improvement.

Petitioner underwent an MRI on September 6, 2018 that revealed moderately severe medial and patellofemoral compartment osteoarthrosis, small joint effusion, intrasubstance degeneration of the medial meniscus without surfacing meniscal tear, mucoid degeneration versus sprain of an ACL, and quadriceps tendinosis without a tendon tear. On September 13,

2018, Petitioner returned to Dr. Gelfand with significant knee pain and instability and reported he started wearing a brace. Dr. Gelfand prescribed physical therapy and Euflexxa (hyaluronic acid) injections.

On December 17, 2018, Petitioner was examined by Section 12 examiner Dr. Joseph Ritchie. Dr. Ritchie noted the history of injury, reviewed the MRI and previous treatment, and acknowledged Petitioner continued to have right knee pain after his injury. Dr. Ritchie also noted Petitioner had not been able to work for months because Respondent did not offer light duty work. Dr. Ritchie stated Petitioner continues to have pain and swelling in his knee since the twisting injury, he denies prior issues with his knee, and there was no history of prior issues in the records accompanying him. Dr. Ritchie stated Petitioner had been treated appropriately and has failed conservative treatment. Dr. Ritchie opined that Petitioner exacerbated an underlying arthritic condition, with probable loose articular cartilage and some flap tears. Dr. Ritchie did not rule out a meniscus tear and opined arthroscopic surgery was appropriate.

On March 22, 2019, Petitioner was examined by Dr. George Paletta who noted Petitioner's treatment included oral medications, physical therapy, knee bracing, and viscosupplementation injections, none of which alleviated his symptoms. Dr. Paletta's examination showed limited flexion with medial joint line tenderness, but an otherwise normal examination. He reviewed the MRI and believed it showed evidence of significant patellofemoral chondrosis with areas of high-grade chondral loss and probable focal thickness chondral loss, involving both the patella and the trochlear articular surfaces. He also noted some intrasubstance signal abnormality involving the body of the meniscus, but no evidence of obvious tear. Dr. Paletta gave Petitioner the option of PRP injections versus surgery. If that failed then he recommended consultation with Dr. Bradley for possible arthritis care as opposed to sports medicine care. A PRP injection was administered that resulted in no benefit.

Petitioner returned to Dr. Paletta on May 29, 2019 with continued complaints of pain despite using a brace and medication. Dr. Paletta believed Petitioner had exhausted all non-surgical options and recommended contacting Dr. Ritchie's office for surgery. Dr. Paletta performed the surgery himself on June 4, 2019. Intraoperative objective findings revealed lateral tilt of the patella, minimal reciprocal changes of the trochlea, chondral changes of Grade I and II, and chondral changes of the femoral condyle and tibial plateau. Dr. Paletta also noted a large thickened medial plica, as well as Grade II and III chondrosis involving the patella articular surfaces. Dr. Paletta performed extensive debridement of the abnormal articular cartilages of the patellofemoral compartment, a lateral release of the lateral retinaculum, and debrided and resected the medial patella plica.

Dr. Paletta recommended post-operative physical therapy, a Medrol Dosepak, and aggressive icing to reduce the swelling and inflammation. He allowed Petitioner to return to work with limitations of no squatting, kneeling, ladders or climbing, and no inmate contact. Respondent did not offer a light duty position to Petitioner. Petitioner returned to Dr. Paletta on October 2, 2019 with symptoms of popping and pain while climbing stairs and squatting. Dr. Paletta believed that additional physical therapy would not be beneficial and opined that Petitioner's aggravated underlying patellofemoral chondrosis was resulting in residual chronic

patellofemoral pain. He recommended a viscosupplementation injection that was performed on October 30, 2019. The injection provided only temporary relief.

Petitioner returned to Dr. Paletta on December 30, 2019 without significant improvement in his symptoms. Petitioner continued to experience anterior knee pain, particularly on the medial aspect of the patella radiating down the front of the knee. Dr. Paletta believed that Petitioner had persistent patellofemoral pain in the setting of known patellofemoral chondrosis. He recommended a repeat MRI to evaluate for any progression of the articular cartilage breakdown or other abnormalities. An arthrogram was performed on January 3, 2020 that demonstrated advanced patellofemoral chondrosis, with Grade III changes involving the medial and lateral facets of the patella and the central trochlear groove. There was also evidence of Grade III and Grade IV chondrosis involving the posterior aspect of the medial femoral condyle. Dr. Paletta referred Petitioner to his partner, Dr. Gross, for possible patellofemoral resurfacing.

Respondent did not approve treatment with Dr. Gross and Petitioner was referred to Dr. Matthew Bradley. In the interim, Respondent had Petitioner examined by Dr. Michael Nogalski on January 29, 2020 pursuant to Section 12 of the Act. Dr. Nogalski took a history of the injury, noted the prior care and treatment, and reviewed the MRI report but not the actual MRI. He noted that Petitioner had pain predominately over the anterior medial knee and that his knee would give way. He also noted that Dr. Paletta had discussed Petitioner's clinical suggestion with Dr. Gross, who recommended considering a resurfacing procedure. Dr. Nogalski's examination showed tenderness along the medial lateral joint lines and a slow gait. Dr. Nogalski took x-rays that revealed relatively preserved medial and lateral joint spaces and minimal medial compartment degenerative change. The patellofemoral region shows neutral alignment of the sunrise view, and mild degenerative change in the patellofemoral joint on the lateral view with a small inferior patella osteophyte. Dr. Nogalski believed Petitioner had pre-existing conditions of chondromalacia patella, as well as chondromalacia of the medial compartment and lateral compartment, as identified on arthroscopic assessment and MRI. Dr. Nogalski also believed Petitioner had pre-existing spinal stenosis which was causing neuropathic pain which was generating issues in the knee region and causing knee symptoms. He believed Petitioner's medical treatment to date was reasonable and necessary with respect to the subject of complaints of pain, that the August 20, 2018 event may have a caused a knee strain, and that "most likely" Petitioner's underlying symptomatic issues were neurogenic problems from the lumbar spine resulting in muscle weakness, exacerbated by Petitioner's hamstring tightness.

Dr. Bradley saw Petitioner on March 5, 2020 and reviewed the MRI dated January 3, 2020. Dr. Bradley agreed with the diagnosis of Grade III chondral fissuring of the central and posterior medial femoral condylar surfaces, likely approaching Grade IV at the posterior non-weight bearing medial condyle junction. Petitioner also had Grade III chondral fissuring of both the medial and lateral patellar facets and the central trochlear groove. Dr. Bradley performed a diagnostic ultrasound on Petitioner's right knee which showed an intact quadriceps tendon with the muscle fibers showing normal striations, along with normal tendon fibrillar pattern. He noted some mild swelling and a normal medial meniscal examination. Dr. Bradley diagnosed knee orthosis resulting from a traumatic injury causing pressure on the pathologic compartment of the right knee. Dr. Bradley recommended an adjustable hinged knee brace to unload the pathologic compartment where Petitioner is having the most pain. The knee brace was also recommended to

decrease the swelling associated with inflammation resulting from excessive loading of the pathologic compartment which Dr. Bradley stated was characteristic of traumatic injury.

Dr. Bradley opined Petitioner's mechanism of injury is consistent with a traumatic patellar chondromalacia. He noted the multiple treatments including surgery, which provided little relief or restoration of function. He believed the accident of August 20, 2018 was a precipitating factor in Petitioner's ongoing pain and need for ongoing evaluation and treatment. Dr. Bradley completed a CMS Physician's Statement on May 5, 2020 placing Petitioner in the Class 5 physical impairment category, denoting "Severe limitation of functional capacity; incapable of minimal (sedentary) activity (75%-100%)." Dr. Bradley further indicated Petitioner had limitations on standing, lifting, climbing, bending, and stooping, and opined Petitioner was temporarily and totally disabled.

Dr. Michael Nogalski testified by way of evidence deposition on June 22, 2020. Dr. Nogalski testified he is a board-certified orthopedic surgeon specializing in the knee and shoulder. Dr. Nogalski detailed the findings in his report and his review of Petitioner's medical records. He stated that the diagnostic films taken in his office showed relatively normal medial and lateral joint spaces with minimal degenerative changes on the inside, or medial part of the knee. He did, however, note an inferior patellar osteophyte. Dr. Nogalski testified that Petitioner initially did relatively well following his debridement and only complained of swelling and discomfort with active extension on July 29, 2019. But as of December 30, 2019, following physical therapy, Petitioner reported a sense of instability in his knee. Although Petitioner had some chondromalacia and ongoing weakness, he suspected Petitioner's weakness and pain was possibly the result of spinal stenosis. He stated, "I did not find anything that would be reasonably causally connected to the claimed work injury with respect to his chondromalacia or spinal condition."

Dr. Nogalski opined Petitioner required no additional treatment outside of therapy to optimize his knee strength and reduce his symptoms. When asked about his opinion that there was a "paucity of correlating findings" in terms of comparison between the objective findings and the notion that Petitioner's patellofemoral joint was responsible for his pain symptom complex, he stated that Petitioner's findings on physical examination and his intraoperative findings "don't add up to something that would indicate that his kneecap, or the joint between the kneecap and the groove that it rides in, would be the sole source or even really a significant source of his complaints." He believed Petitioner had a good prognosis with additional physical therapy, save the "extrinsic factors which may create a more guarded prognosis outside of his knee condition."

On cross-examination, Dr. Nogalski testified he was not aware of any MRIs performed of Petitioner's right knee prior to the August 2018 altercation, and was not provided with any prior diagnostic studies of Petitioner's right knee dated prior to the accident. Dr. Nogalski also testified he was aware that Petitioner had prior back surgery, which he believed occurred sometime in 2017; however, he was not provided any records with regard to Petitioner's low back treatment in 2017 and 2018. Dr. Nogalski declined to comment on the reasonableness and necessity of Petitioner's first surgery. He testified he had not reviewed any records from Dr.

Bradley. He also did not receive for review the MRI study performed on January 3, 2020 which he requested in his report.

Dr. Matthew Bradley testified by way of evidence deposition on May 21, 2020. He testified he is a board-certified orthopedic surgeon specializing in joint replacement and trauma intervention outside of the spine. Dr. Bradley testified he reviewed Petitioner's records from multiple providers, including Chesterfield Medical Center, Cape Radiology Group, Rehab Unlimited, Dr. George Paletta, The Orthopedic and Ambulatory Surgery Center of Chesterfield, and MRI Partners of Chesterfield, in addition to his own diagnostic studies. He also reviewed Petitioner's intraoperative photos, the IME report of Dr. Joseph Ritchie, the IME report of Dr. Michael Nogalski, and the incident reports related to Petitioner's accident.

Dr. Bradley testified that after examining Petitioner and taking an oral history he noted Petitioner's ultrasound showed persistent effusion of the knee. He also found it significant that Petitioner's MRI with contrast completed on January 3, 2020 showed Grade 3 fissuring or cracking of Petitioner's right knee cartilage and kneecap with Grade 4 cracking of the back of his knee. He testified that these findings were consistent with Petitioner's reported symptoms. He explained that anytime there is damage to cartilage it leaves the bone underneath to have some increased force or trauma to it. Sometimes fluid can get underneath the cartilage and cause the bone to be irritated and cause pain. Patients that have pain at the front of the knee similar to Petitioner evidence some damage to the cartilage, as evidenced by Petitioner's MRI.

Dr. Bradley agreed with Dr. Paletta's recommendation for surgery, namely the failure of conservative care to provide relief for Petitioner's symptoms. He testified that the indications for surgery were very consistent with Petitioner's injury and Dr. Paletta's findings and treatment. Dr. Bradley stated that Petitioner was referred to him only after he did not make lasting progress following his first surgery. He was referred for consultation and consideration of resurfacing and/or arthroplasty. Dr. Bradley recommended a patellofemoral knee replacement based, in large part, the intraoperative images of Dr. Paletta which demonstrated the majority of Petitioner's damage was on the undersurface of his kneecap. The examination findings and reports were consistent with that of kneecap pain and problems. Dr. Bradley testified that Petitioner does have some noted arthritis in other areas of his knee, but these really did not seem to bother him during the course of treatment. Dr. Bradley testified that Petitioner's right knee condition is causally related to the inmate altercation that occurred on August 20, 2018 and he has not reached maximum medical improvement. Dr. Bradley testified that surgical intervention could and most likely will improve Petitioner's pain and function. That without surgery, Petitioner condition has plateaued and although his symptoms would wax and wane depending on his level of activity and the weather, he would not get significantly better without additional surgical intervention.

Dr. Bradley noted that Dr. Ritchie's Section 12 reported appeared to causally relate Petitioner's right knee condition to the inmate altercation, as he observed that he recommended arthroscopy to eliminate loose cartilage and debris and stated Petitioner had not reached maximum medical improvement. Dr. Bradley testified he agreed with Dr. Ritchie's initial recommendations. Dr. Bradley also reviewed the Section 12 report of Dr. Nogalski and he disagreed with Dr. Nogalski's behavioral assessment of Petitioner. He testified that he did not find any indication of an enhanced description of pain, but instead found Petitioner "to be very

straightforward, very open and honest." He stated that Petitioner answered his questions appropriately and did not have any behavioral pain characteristics that he found unusual. He also noted that he did not find that any other physician documented unusual pain behaviors during his review of Petitioner's medical records. Dr. Bradley also disagreed with Dr. Nogalski's supposition that Petitioner's ability to recover following surgery would be limited, nor did he find such an opinion in any of the other treating providers' records. He testified that if there was any indication that Petitioner suffered from a radiculopathic condition emanating from his spine, both Dr. Paletta and Dr. Ritchie would have referred Petitioner for a spinal evaluation prior to recommending surgery. He testified that Dr. Nogalski documented Petitioner had pain on the front of his knee and over the anteromedial knee with resisted. He testified that Dr. Nogalski's physical examination does not coincide with his conclusions.

Dr. Bradley further testified that the intraoperative photos, which clearly show fissuring or breaking apart of the cartilage of Petitioner's kneecap, supported his opinion. He testified that all the treatment rendered to date was appropriate and that the prospective surgery would mostly if not entirely relieve Petitioner's symptoms and enable him to go up and down stairs and perform some kneeling and squatting. Dr. Bradley testified Petitioner would be able to return to full unrestricted duty following the kneecap replacement surgery. He also opined that the implant should be a lifetime implant that would not need replacing, unlike other knee component replacements or total knee replacements.

On cross-examination, Dr. Braldey clarified his diagnostic findings of unstable cartilage where the cartilage is not attached to the underlying bone. Dr. Bradley likened the force of the impact to Petitioner's kneecap to "a rock hitting the windshield of a car" and causing it to crack. He further noted that Petitioner did not suffer from a bone-on-bone condition until the debridement surgery prompted by his work injury. That once you get cracks in the kneecap, the fluid inside the knee gets into those cracks and starts delaminating or pulling the cartilage off the bone. In Petitioner's case, the intraoperative photos show a piece of the unstable cartilage which Dr. Paletta debrided and post-debridement shows bone-on-bone or full-thickness cartilage loss.

CONCLUSIONS OF LAW

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

In addition to or aside from expert medical testimony, circumstantial evidence may also be used to prove a causal nexus between an accident and the resulting injury. *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 631 N.E.2d 724 (4th Dist. 1994); *Int'l Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982). 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); *Int'l Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 442 N.E.2d 908 (1982).

The Arbitrator finds that the uncontroverted chain of events establishes Petitioner's current condition of ill-being in his right knee is causally connected to his undisputed accidental work injury. The record is clear that Petitioner was working full duty before the accident. He has not, however, been able to return to his position with Respondent as a result of his disability.

All physicians agree that, to some extent, Petitioner's right knee symptoms are causally related to the accident. Dr. Paletta, Dr. Ritchie, and Dr. Bradley agree Petitioner suffered an injury that resulted in the need for surgical intervention. Dr. Nogalski also agreed that Petitioner suffered injury that reasonably necessitated the arthroscopic surgery, as he stated "Medical treatment incurred to date with respect to the right knee appears to have been reasonable and necessary with respect to his subjective complaints of pain." The remainder of his opinion, however, is inconsistent and unsupported by the evidence.

Although Dr. Nogalski agreed Petitioner required surgery, his assessment was, "[T]he 8/20/18 event may have caused a knee strain. There are no objective findings that support there was significant injury to the patellofemoral joint nor knee." Yet his own review of Petitioner's x-rays reflect there existed an "inferior patellar osteophyte." This, notwithstanding his endorsement of surgical intervention, belies his opinion that there was no objective evidence to support the belief that Petitioner's complaints were patellofemoral in origin. Additionally, as is clear from his deposition testimony, he did not receive the records of Dr. Bradley. He did not obtain the January 2020 MRI films which he requested for review. He also did not possess the initial March 2019 treatment note of Dr. Paletta, as he could only surmise that the "5/29/19 evaluation by Dr. Paletta was apparently not the first visit for [Petitioner's] right knee problems," but was the first summarized in his review of records. Dr. Nogalski also possessed no clear evidence upon which to implicate Petitioner's back as the source of his complaints given the objective evidence of right knee injury, as he did not have any evidence with regard to Petitioner's low back treatment in 2017 and 2018. As a result, the Arbitrator does not find Dr. Nogalski's opinion persuasive with regard to whether Petitioner's condition of ill-being following his arthroscopic surgery remains causally related to the accidental work injury.

The Arbitrator is persuaded by the opinion of Dr. Bradley, and the records of Dr. Paletta and Dr. Ritchie. All three physicians had the opportunity to examine Petitioner and review all of the salient medical records with regard to Petitioner's right knee condition. In addition to noting objective evidence of patellofemoral injury through the MRI and intraoperative studies, Dr. Bradley observed that Petitioner developed a bone-on-bone condition as a result of the debridement that occurred during the arthroscopy. "Every natural consequence that flows from an injury that arose out of and in the course of the claimant's employment is compensable unless caused by an independent intervening accident that breaks the chain of causation between a work-related injury and an ensuing disability or injury." *Vogel v. Indus. Comm'n*, 354 Ill. App. 3d 780, 786, 821 N.E.2d 807, 812 (2005). Where the second injury occurs due to treatment for the first, there is no break in the causal chain. *Int'l Harvester Co. v. Indus. Comm'n*, 46 Ill.2d 238, 263 N.E.2d 49 (1970).

Based on the aforementioned evidence and law, the Arbitrator concludes Petitioner's current condition of ill-being is causally related to his undisputed accidental work accident that occurred on August 20, 2018.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13 (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 above evidence establishing causal connection, the Arbitrator herein awards medical expenses and prospective medical care. The evidence shows that Petitioner tried but failed to improve through all other means of conservative care. Petitioner attempted therapy, medication, injections, and minimally invasive arthroscopic surgery prior to the recommendation of a partial knee replacement. Dr. Bradley's prognosis for Petitioner following the recommended patellar arthroplasty and/or resurfacing is that he will be able to return to full-duty employment. Respondent shall authorize and pay for the necessary treatment recommended by both Dr. Paletta and Dr. Bradley, including, but not limited, to a partial knee replacement and/or resurfacing of the right knee.

All physicians agree Petitioner's medical treatment was reasonable and necessary. Respondent shall therefore pay all reasonable and necessary expenses as outlined in Petitioner's group exhibit No. 1, as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit.

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

To be entitled to TTD benefits, it is a claimant's burden to prove not only that he did not work, but also that he was unable to work. *Shafer v. Illinois Workers' Comp. Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45, 976 N.E.2d 1, 13.

Respondent agrees Petitioner is entitled to temporary total disability benefits from 8/24/18 through 1/29/20. Dr. Bradley completed a CMS Physician's Statement on May 5, 2020 placing Petitioner in the Class 5 physical impairment category, denoting "Severe limitation of functional capacity; incapable of minimal (sedentary) activity (75%-100%)." Dr. Bradley further indicated Petitioner had limitations on standing, lifting, climbing, bending, and stooping, and opined Petitioner was temporarily and totally disabled. Dr. Bradley testified that the prospective surgery would mostly if not entirely relieve Petitioner's symptoms and enable him to go up and down stairs and perform some kneeling and squatting. Dr. Bradley testified that Petitioner would be able to return to full unrestricted duty following the kneecap replacement surgery. Respondent

has not offered a light duty position to Petitioner and Petitioner has remained off work since the date of accident.

The record reflects Petitioner is currently under physical restrictions and has not reached maximum medical improvement. As such, Petitioner is entitled to temporary total disability benefits from 8/24/18 through 7/9/20, the date of arbitration. Respondent shall therefore pay temporary total disability benefits of $1,312.03/week for 98 weeks, commencing 8/24/18 through 7/9/20, as provided in Section 8(b) of the Act.

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

9/8/20

DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	20WC006334
Case Name	CADY, GREGORY v. ST OF IL/ CHESTER MENTAL
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0566
Number of Pages of Decision	11
Decision Issued By	Thomas Tyrrell, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Aaron Wright

DATE FILED: 11/10/2021

/s/ Thomas Tyrrell, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF MADISON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

GREGORY CADY,

Petitioner,

vs. NO: 20 WC 6334

STATE OF ILLINOIS/CHESTER MENTAL HEALTH CENTER,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 19, 2020 is hereby affirmed and adopted.

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

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

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

November 10, 2021

o110921
TJT/ldm
051

Thomas J. Tyrrell
/s/Thomas J. Tyrrell

Maria E. Portela
/s/Maria E. Portela

Kathryn A. Doerries
/s/Kathryn A. Doerries

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

21IWCC0566

CADY, GREGORY
Employee/Petitioner

Case# **20WC006334**

ST OF IL/ CHESTER MENTAL HEALTH CENTER
Employer/Respondent

On 11/19/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.10% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

0558 ASSISTANT ATTORNEY GENERAL
AARON WRIGHT
601 S UNIVERSITY AVE SUITE 102
CARBONDALE, IL 62901

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

1745 DEPT OF HUMAN SERVICES
BUREAU OF RISK MANAGEMENT
801 S 7TH ST
SPRINGFIELD, IL 62794

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

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

NOV 19 2020

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

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

GREGORY CADY
Employee/Petitioner

v.

STATE OF ILLINOIS/CHESTER MENTAL HEALTH CENTER
Employer/Respondent

Case # 20 WC 6334

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Linda J. Cantrell**, Arbitrator of the Commission, in the city of **Collinsville,** on **September 22, 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, **January 16, 2020**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$65,390.80**; the average weekly wage was **$1,257.51**.

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

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

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

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

ORDER

Respondent shall pay the reasonable and necessary medical services outlined in Petitioner's group exhibit 1, as provided in §8(a) and §8.2 of the Act. Respondent shall have credit for any amounts 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 shall authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, medical branch blocks and facet rhizotomies at L4-5 and L5-S1 bilaterally.

Respondent shall pay Petitioner temporary total disability benefits of **$838.34**/week for the period **1/29/20 through the date of arbitration, 9/22/20**, representing **34** weeks, as provided in Section 8(b) of the Act.

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

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

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

Signature of Arbitrator

11/2/20
Date

ICArbDec19(b)

NOV 19 2020

STATE OF ILLINOIS)
) SS
COUNTY OF MADISON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

GREGORY CADY,	)	
	)	
Employee/Petitioner,	)	
	)	
v.	)	Case No.: 20-WC-6334
	)	
STATE OF ILLINOIS/CHESTER MENTAL HEALTH CENTER,	)	
	)	
	)	
Employer/Respondent.	)	

FINDINGS OF FACT

This claim came before Arbitrator Linda J. Cantrell for trial in Collinsville on September 22, 2020 pursuant to Sections 19(b) and 8(a) of the Act. The issues in dispute are accident, causal connection, medical bills, temporary total disability benefits, and prospective medical care. All other issues have been stipulated.

TESTIMONY

Petitioner was 57 years old, married, with no dependent children at the time of accident. Petitioner is employed as a Security Therapy Aide II and has worked for Respondent for ten years. Petitioner testified that on January 16, 2020 he was chasing a patient who ran out of his module. While in pursuit of the patient, a coworker, who was running after the patient from another direction, collided with Petitioner, throwing him into a desk. Petitioner testified he reviewed video surveillance of the accident and it accurately depicted the accident. (PX 8). Petitioner testified he completed an accident report but did not mention sustaining any injuries because he did not hurt at the time. However, that evening after his shift his "whole back" started hurting. Petitioner had the next two days off and noticed his back pain increased as the days progressed. He limited his activities and took Ibuprofen. He did not have any new accidents or injuries during his two days off work.

Petitioner testified he returned to work and his back pain progressively got worse by the end of his shift. He testified he was waking up with back pain and thought he needed to seek treatment. On 1/27/20, Petitioner reported his symptoms to a supervisor and filled out a new accident report and a workers' compensation packet. Respondent sent Petitioner to the emergency room where x-rays were performed and he followed up with Dr. Matthew Gornet. Petitioner testified he underwent physical therapy that did not alleviate his symptoms. Dr. Gornet

performed an MRI, CT scan, and myelogram and recommended injections and radiofrequency ablations. Petitioner takes Ibuprofen for pain.

Petitioner testified he underwent lumbar surgery performed by Dr. Gornet prior to this incident, which was a result of a work-related accident during his employment with Respondent. Petitioner testified Dr. Gornet currently has him off work.

MEDICAL HISTORY

Petitioner, as well as three additional Therapy Aides involved in the incident, filled out Incident Reports on 1/16/20 that were consistent with Petitioner's testimony. The reports indicate the incident was witnessed by T. Roberts, R.N. On 1/27/20, Petitioner filled out a Notice of Injury stating he did not experience pain the day of the accident and did not think he was injured. Petitioner reported low back pain as the days progressed. Petitioner disclosed having two lumbar discs replaced in October 2017.

On 1/27/20, Petitioner was examined at Chester Memorial Hospital for complaints of low back pain. It was noted that his pain started after he was pushed at work on 1/16/20. His pain waxed and waned for several days and became constant and progressively worse, radiating into his right buttock. It was noted he had a history of a two-level lumbar disc replacement surgery three years ago. Upon physical examination, Petitioner had decreased range of motion, mild to moderate tenderness in the lumbosacral region, mild paraspinous muscle tenderness, and a 3-4 cm subcutaneous mass overlying the thoracic spine. X-rays revealed multilevel spondylosis and mild scoliosis. He was prescribed a muscle relaxer and referred to his family physician.

On 1/29/20, Petitioner was seen by board-certified orthopedic spine surgeon, Dr. Matthew Gornet. Petitioner was an established patient of Dr. Gornet's, having undergone a two-level disc replacement at L3-4 and L5-S1 in October 2017. Petitioner reported low back pain to the right side, right buttock, and hip. He reported a consistent history of injury. Dr. Gornet noted Petitioner was working full duty and was running after a patient, when he collided with a co-worker, twisted and landed on his right side on top of a desk. His pain began over the next several days and progressively worsened. Dr. Gornet noted that the last time he saw Petitioner was for a long term post-operative follow up on 10/3/19 at which time he was "doing very well," had no problems, and was working full duty. Dr. Gornet believed Petitioner's current symptoms and requirement for treatment were causally related to his work accident on 1/16/20. He placed Petitioner off work, prescribed a nonsteroidal anti-inflammatory and muscle relaxer, and ordered physical therapy.

Petitioner participated in physical therapy from 2/4/20 through 3/12/20. On 4/20/20, Petitioner was experiencing low back pain going into his left leg and called Dr. Gornet's office to discuss his symptoms. Dr. Gornet's physician's assistant prescribed a brief course of Indomethacin, a nonsteroidal anti-inflammatory, to calm down his symptoms. On 6/18/20, Petitioner followed up with Dr. Gornet complaining of increased symptoms in his right and left legs. Petitioner reported that physical therapy did not provide any sustained relief. Dr. Gornet ordered an MRI of the lumbar spine that was compared to Petitioner's last MRI from 2017. Dr. Gornet noted no significant disc changes, but observed a possible annular tear. A CT myelogram

was further recommended because of the limitations of obtaining a clear image of Petitioner's lumbar spine due to his prior disc replacement surgery. According to the radiologist's interpretation, the CT myelogram revealed stable disc replacements at L3-4 and L5-S1, a central protrusion with facet arthropathy at L4-5, mild bilateral foraminal stenosis, and progressing SI joint ankylosis bilaterally.

Dr. Gornet noted a central protrusion at L4-5 and mild facet changes at L4-5 and L5-S1 on the CT myelogram. These findings were not significantly present on the prior scans from before the accident and appeared to be new findings. Dr. Gornet opined the findings were consistent with Petitioner's structural back pain to both sides. He referred Petitioner to Dr. Helen Blake for medial branch blocks and facet rhizotomies at L4-5 and L5-S1 bilaterally. He kept Petitioner off work.

CONCLUSIONS OF LAW

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

Petitioner testified without rebuttal that he suffered an accidental injury to his low back on 1/16/20, when a coworker collided with him, throwing him into a desk, while they were chasing a patient. The incident is corroborated by surveillance video of the incident and consistent accounts of the incident throughout his medical records. The unrebutted evidence shows Petitioner was working full duty with no evidence of low back pain prior to 1/16/20. Petitioner developed low back pain the evening of the accident, which he hoped would resolve with rest. Petitioner's back pain progressed over the subsequent days requiring him to seek medical treatment. Dr. Gornet noted that when he last saw Petitioner in October 2019, two years following his two-level discectomy, he was doing "very well" and working full duty. However, due to the onset of symptoms as a result of the 1/16/20 work accident, Dr. Gornet took Petitioner off work. The history of the accident was consistently conveyed to all of Petitioner's medical providers and there is no alternative accident history or explanation for Petitioner's lumbar spine symptoms.

Based on the credible testimony of Petitioner, who provided the sole testimony at arbitration, and treating records, the Arbitrator finds that Petitioner sustained his burden of proof in establishing that he suffered an accident that arose out of and in the course of his employment with Respondent on January 16, 2020.

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

Circumstantial evidence, especially when entirely in favor of the Petitioner, is sufficient to prove a causal nexus between an accident and the resulting injury, such as a chain of events showing a claimant's ability to perform manual duties before accident but decreased ability to still perform immediately after accident. *Pulliam Masonry v. Indus. Comm'n*, 77 Ill. 2d 469, 397 N.E.2d 834 (1979); *Gano Electric Contracting v. Indus. Comm'n*, 260 Ill.App.3d 92, 96–97, 197 Ill.Dec. 502, 631 N.E.2d 724 (1994); *International Harvester v. Indus. Comm'n*, 93 Ill.2d 59, 66 Ill.Dec. 347, 442 N.E.2d 908 (1982).

The record shows Petitioner was working full duty without incident prior to his accidental work injury on 1/16/20. Although Respondent posits that Petitioner did not suffer an accident because he did not seek medical treatment until 1/27/20, there was no evidence offered other than evidence of the work accident that could reasonably explain Petitioner's onset of low back symptoms and his inability to work. Respondent provided no witness testimony to refute or rebut Petitioner's testimony. In fact, Respondent's own evidence corroborated Petitioner's description of the accident. Petitioner also consistently denied any injury outside of work in his treating records and at arbitration. Petitioner's symptoms have not resolved since the injury as reflected in Dr. Gornet's treating records.

Although Petitioner has a history of back problems, the record demonstrates he had not treated for back symptoms for months prior to 1/16/20. His last visit with Dr. Gornet was in October 2019 which was solely a two-year postsurgical follow up from his disc replacement surgery in October 2017. Dr. Gornet noted Petitioner was doing "very well" up to the time of the accident in January 2020 and Petitioner was working full duty. Given those facts, Dr. Gornet believed Petitioner's condition of ill-being was related to the work incident. Dr. Gornet also compared Petitioner's recent imaging studies to those taken in 2017 and noted an interval change secondary to the accident. The Arbitrator finds Dr. Gornet's opinions credible in light of the chain of events and the objective medical evidence.

Respondent did not obtain a Section 12 examination and did not offer any contrary medical evidence. Therefore, the Arbitrator finds Petitioner has met his burden of proof that his current condition of ill-being is causally related to the injury.

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

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

Upon establishing causal connection and the reasonableness and the necessity of recommended medical treatment, employers are responsible for necessary prospective medical care required by their employees. *Plantation Mfg. Co. v. Indus. Comm'n*, 294 Ill.App.3d 705, 691 N.E.2d. 13, 229 Ill.Dec. 77 (Ill. 2000). This includes treatment required to diagnose, relieve, or cure the effects of claimant's injury. *F & B Mfg. Co. v. Indus. Comm'n*, 758 N.E.2d 18 (1st Dist. 2001). Specific procedures or treatments that have been prescribed by a medical service provider are "incurred" within the meaning of section 8(a) even if they have not been performed or paid for. *Dye v. Illinois Workers' Comp. Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10, 981 N.E.2d 1193, 1198.

Based upon the above findings as to causal connection, the Arbitrator finds that Petitioner is entitled to medical benefits. Respondent shall therefore pay the expenses contained in Petitioner's group exhibit 1 as provided in Section 8(a) and Section 8.2 of the Act. Respondent shall be given a credit for any amounts previously paid under Section 8(a) of the Act for medical benefits and Respondent shall hold Petitioner harmless from claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Further, Petitioner has exhausted all conservative means to relieve the effects of his injury without lasting relief and has not reached maximum medical improvement pursuant to the medical records and Dr. Gornet's opinion. Respondent shall authorize and pay for the treatment recommended by Dr. Matthew Gornet, including, but not limited to, medical branch blocks and facet rhizotomies at L4-5 and L5-S1 bilaterally.

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

The law in Illinois holds that "[a]n employee is temporarily totally incapacitated from the time an injury incapacitates him for work until such time as he is as far recovered or restored as the permanent character of his injury will permit." *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill. 1990). The ability to do light or restricted work does not preclude a finding of temporary total disability. *Archer Daniels Midland Co. v. Indus. Comm'n*, 138 Ill.2d 107, 561 N.E.2d 623 (Ill., 1990) citing *Ford Motor Co. v. Industrial Comm'n*, 126 Ill.App.3d 739, 743, 467 N.E.2d 1018, 81 Ill.Dec. 896 (1984).

The record shows that Petitioner has not reached maximum medical improvement and remains under the care of Dr. Gornet, who opined that he remains temporarily and totally disabled. He was first taken off work by Dr. Gornet on 1/29/20. Based upon the above findings as to accident and causation, the Arbitrator finds Petitioner is entitled to temporary total disability benefits of **$838.34**/week for the period 1/29/20 through the date of arbitration, 9/22/20, representing **34** weeks. Respondent shall be given a credit of $0.00 in TTD benefits.

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

Linda J. Cantrell, Arbitrator

11/2/20
DATE

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	14WC039381
Case Name	WILSON-STANSLAWSKI, DEBRA v. NIPPERSINK SCHOOL DISTRICT 2
Consolidated Cases	No Consolidated Cases
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0567
Number of Pages of Decision	5
Decision Issued By	Stephen Mathis, Commissioner, Deborah Simpson, Commissioner

Petitioner Attorney	Jason Esmond
Respondent Attorney	Amy Bilton

DATE FILED: 11/10/2021

/s/Stephen Mathis, Commissioner

Signature

DISSENT

/s/Deborah Simpson, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF McHENRY)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DEBRA WILSON-STANISLAWSKI,

Petitioner,

vs. NO: 14 WC 39381

NIPPERSINK MIDDLE SCHOOL,

Respondent.

DECISION AND ORDER ON REVIEW

Petitioner filed a timely Petition for Review seeking reversal of the Decision and Order entered by Arbitrator Erbacci on November 6, 2020 denying Petitioner's Motion to Reinstate Case. The denial was based upon a finding that the Petition for Reinstatement was not filed within 60 days of receiving the dismissal order entered by Arbitrator Hegarty on November 7, 2019 and therefore he did not have jurisdiction. The Commission being advised of the facts and law, reverses the Decision of the Arbitrator entered on November 6, 2020 for the reasons set forth below.

The plain language of Section 9020.90 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission combined with the language on the Notice of Case Dismissal show that the 60 day period to file a Petition for Reinstatement begins to run on receipt of the dismissal order. Section 9020.90 mandates that Notices of Dismissal shall be sent to the parties. 50 Ill. Administrative Code 9020.90(a).

The parties dispute whether a copy of the Notice of Case Dismissal was provided to Petitioner's counsel by Respondent's counsel at the time of hearing. The evidence shows the Notice of Case Dismissal was sent by the Commission on November 18, 2019, at which time it

was electronically sent to both parties. The Commission finds that Petitioner had until January 14, 2020 in which to file a Petition for Reinstatement. For the foregoing reasons the January 14, 2020 filing was timely, and the Decision of the Arbitrator is reversed.

IT IS THEREFORE ORDERED BY THE COMMISSION that Petitioner's Motion to Reinstate Case filed on January 14, 2020 is hereby granted.

November 10, 2021
o- 9/29/21
SM/msb
44

/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 Commission reversed the Decision of the Arbitrator who denied Petitioner's Petition to Reinstate his claim. The Arbitrator found that the Petition to Reinstate was not filed within the 60-day period after receipt of the Order of Dismissal and therefore he did not have jurisdiction to entertain Petitioner's Petition.

The Majority reversed the Arbitrator and found that Petitioner filed his Petition on the 60th day after receipt of the Order of Dismissal. I agree with the Majority that Commission Rule 9020.20 requires a Petitioner to file a Petition to Reinstate a claim dismissed for want of prosecution within 60 days of receipt of the order. The Majority based its decision on its interpretation that the term "receipt" in Commission Rule 9020.20 refers to the date that Petitioner received the order through the official channels of service used by the Commission. However, in this matter the record indicates that the lawyers were personally provided copies of the Order of Dismissal at the time the order was actually entered.

In my opinion the personal service of the order by the Arbitrator to the lawyers of record constituted their "receipt" of the order under the clear and unambiguous language of the rule. The Rule does not provide any requirements necessary for an Order of Dismissal to be considered

"received" to start the 60-day filing requirement. I agree with the Arbitrator that the filing time limit started upon the actual receipt of the Order of Dismissal by the parties on November 6, 2019 and not when the Commission sent out the Notice of the Order of Dismissal on November 18, 2019. Therefore, I agree with the Arbitrator that Petitioner actually received the Order of Dismissal on November 6, 2019, that his Petition to Reinstate filed on January 14, 2020 was untimely, and the Arbitrator did not then have jurisdiction to reinstate the claim.

For the reasons stated above, I would have found that the Arbitrator properly denied Petitioner's Petition to Reinstate his claim. Therefore, I respectfully dissent from the majority opinion.

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

STATE OF ILLINOIS)
)
COUNTY OF MC HENRY)

☐ 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
DECISION

Debra Wilson Stanislawski
Employee/Petitioner

v.

Nippersink Middle School
Employer/Respondent

Case # **14** WC **39381**

The **Petitioner** filed a petition or motion for **Reinstatement** on **January 14, 2020**, and properly served all parties. The matter came before me on **November 6, 2020** in the city of **Woodstock**. After hearing the parties' arguments and due deliberations, I hereby **deny** the petition.

A record of the hearing **was** made.

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Pursuant to Respondent's Motion to Dismiss for Want of Prosecution, a hearing was held before Arbitrator Jessica Hegarty on November 7, 2019. Both parties were represented by counsel at that hearing. Arbitrator Hegarty granted Respondent's motion and dismissed Petitioner's claim. The Arbitrator finds Micaela Cassidy, a witness for Respondent and attorney for Respondent on November 7, 2019, credibly testified that Arbitrator Hegarty provided a copy of the dismissal order to each counsel representing the respective parties on November 7, 2020. A letter admitted into evidence from Ms. Cassidy, directed to Petitioner's counsel, dated November 15, 2019 also supports this finding. Subsequently, on November 18, 2019 counsel for Petitioner received a computer-generated Notice of Case Dismissal from the Workers' Compensation Commission by mail. The Arbitrator finds Petitioner had 60 days from November 7, 2019 to file a Petition for Reinstatement of Case because Arbitrator Hegarty's order was personally tendered to Petitioner's counsel, formally providing Counsel with notice of the dismissal, on November 7, 2019. Petitioner's counsel, therefore, had until January 5, 2019 to file a Petition for Reinstatement of Case. Petitioner's Petition for Reinstatement of Case was not filed until January 14, 2020. "[A] claimant's failure to timely file a petition for reinstatment following a dismissal for want of prosecution results in a final judgment with respect to the claimant's rights to recover workers' compensation benefits arising from the claim." See, e.g., TTC Illinois, Inc./Tom Via Trucking v. Illinois Workers' Compensation Commission, 396 Ill.App.3d 344, 354, 918 N.E.2d 570, 579, 335 Ill.Dec.225 (2009). This timeframe is jurisdictional in nature. Since Petitioner failed to file a Petition for Reinstatement of case within 60 days of receiving the Arbitrator's decision, the Arbitrator has no jurisdction to reinstate the case. Petitioner's Petition for Reinstatement of Case is therefore DENIED.

Unless a *Petition for Review* is filed within 30 days from the date of receipt of this order, and a review perfected in accordance with the Act and the Rules, this order will be entered as the decision of the Workers' Compensation Commission.

Arbitrator Anthony C. Erbacci

DEC 28 2020

November 16,2020
Date

DEC 2 - 2020

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC004941
Case Name	AGUILAR, SALVADOR v. EL MILAGRO, INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0568
Number of Pages of Decision	17
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Osvaldo Rodriguez
Respondent Attorney	Justin Schooley

DATE FILED: 11/16/2021

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

SALVADOR AGUILAR,

Petitioner,

vs. NO: 18 WC 4941

EL MILAGRO, 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, causal connection, medical expenses, prospective treatment, temporary total disability (TTD) benefits, and evidence, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Indus. Comm'n*, 78 Ill. 2d 327 (1980).

The Commission is not bound by the Arbitrator's findings. Our Supreme Court has long held that it is the Commission's province "to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *City of Springfield v. Indus. Comm'n*, 291 Ill. App. 3d 734, 740 (1997) (citing *Kirkwood v. Indus. Comm'n*, 84 Ill. 2d 14, 20 (1981)). Interpretation of medical testimony is particularly within the province of the Commission. *A.O. Smith Corp. v. Indus. Comm'n*, 51 Ill. 2d 533, 536-37 (1972).

The Commission has considered all the testimony, exhibits, pleadings, and arguments submitted by the parties in its entirety. The Commission affirms the Arbitrator's Decision with respect to the issues of accident and notice, but reverses the Arbitrator's finding that Petitioner's

current condition of ill-being is not causally related to the December 3, 2017 work injury. The Commission finds instead that Petitioner's current right shoulder condition is causally related to the December 3, 2017 work accident and workers' compensation benefits are awarded accordingly.

The Arbitrator had found significant Petitioner's admission during cross-examination that he had been involved in a motor vehicle accident on December 20, 2017. The Arbitrator determined that Petitioner's current condition, specifically the sternoclavicular (SC) and acromioclavicular (AC) joint injuries, appeared more in line with and related to the December 20, 2017 motor vehicle accident than the December 3, 2017 work injury. The Commission finds that the Arbitrator's conclusions as to any alleged injury from a motor vehicle collision are not supported by the record. The medical evidence is completely void of any mention related to a December 20, 2017 motor vehicle accident and there is no corresponding documentation in the arbitration record. The Commission only notes Petitioner's testimony during cross-examination which was limited to the fact that he had been the restrained driver of the vehicle that was involved in an accident on December 20, 2017, and that his car had to be towed from the accident scene. There were no further questions or testimony regarding any injury, worsening condition or sequelae issue as it may relate to the December 20, 2017 motor vehicle collision.

Respondent further argued that Petitioner's condition had worsened after the December 20, 2017 collision, and that findings of collar bone pain, asymmetry of the clavicles, an SC joint subluxation, decreased range of motion, and clavicular deformity did not appear in the record until January 10, 2018 – after the collision date. However, the medical records demonstrated that Petitioner had complained of the following:

(1) On 12/6/17, the Concentra record noted tenderness in the AC joint, in the distal clavicle, in the anterior shoulder and in the superior shoulder. (PX2);

(2) On 12/13/17, Physician Assistant Kacey Dayton noted the same complaints as indicated on 12/6/17 as well as moderate to severe tenderness in the right SC joint and pec region. The physical therapist at Concentra further indicated that Petitioner had reported pain in the right anterior shoulder/pec region around the collarbone and that the right SC joint was more protruded compared to the left. (PX2);

(3) On 12/15/17, Petitioner complained of pain around the collarbone region. The right SC joint was again noted as more protruded compared to the left and Petitioner had tenderness in the right AC/SC joints and right pecs region. (PX2); and,

(4) On 12/18/17, Petitioner continued to have the same complaints that he had on 12/15/17. (PX2).

Respondent's argument with respect to the timeline of complaints is contradicted by the medical evidence. The medical records indicated that Petitioner had symptoms and complaints in the AC and SC joint area prior to the December 20, 2017 motor vehicle accident – a date that Respondent fixed at the arbitration hearing. Given the lack of evidence demonstrating a collision which resulted in injuries, the Commission finds no intervening accident or injury that would sever the chain of causation.

Upon further review of the testimony, medical evidence and chain of events in the arbitration record, the Commission finds that Petitioner's current right shoulder condition is causally related to the December 3, 2017 work accident. Petitioner admitted seeking treatment at Concentra prior to the December 3, 2017 date of accident. The Concentra medical records indicated that Petitioner was a bus boy who presented to the facility on January 31, 2017 with right shoulder pain after carrying meat on his right shoulder or above shoulder height. Petitioner had felt pain in the front of his chest on the right side and his shoulder. Petitioner's pain level was a seven out of 10 and localized to the anterior aspect of the shoulder and chest region. Petitioner was diagnosed with a right shoulder strain. Petitioner was prescribed medication, physical therapy was ordered, and he was given work restrictions. Petitioner completed seven sessions of physical therapy at Concentra. By February 16, 2017, Petitioner's joint mobility was normal and pain-free, and he was released from care and returned to work without restrictions. Petitioner did not return to Concentra until December 4, 2017.

Following the December 3, 2017 work accident, Petitioner sought immediate treatment for his right shoulder complaints at Respondent's company clinic, Concentra. The medical providers at Concentra noted Petitioner's symptoms as detailed above. Petitioner was prescribed medication, physical therapy was ordered, and he was given work restrictions. As Petitioner's complaints persisted, Concentra referred Petitioner to a specialist for further care. Petitioner consulted with Dr. Christos Giannoulias at Concentra on January 24, 2018 and later with Dr. Scott Rubinstein at Illinois Bone and Joint Institute on February 14, 2018.

Both physicians noted that Petitioner had injured his right shoulder after lifting a tray of meat at work. Specifically, Dr. Rubinstein indicated that Petitioner had been lifting a tray of meat weighing up to 70-80 pounds "and this got caught and as he was lifting it, it pulled on his right shoulder." Petitioner reported immediate pain in his shoulder and SC area on the right side. (PX4; PX6, pg. 8). Dr. Giannoulias' physical examination and diagnostic imaging revealed discomfort, swelling and tenderness over the SC joint. He diagnosed Petitioner with an SC joint strain, stating that x-rays revealed SC joint subluxation. Dr. Rubinstein's examination indicated a prominence at the right SC joint that was not present on the left which was tender and somewhat swollen. Petitioner also had pain with palpation along the clavicle. There was a large bump at the AC joint on the right side compared to the left side and it was tender. Dr. Rubinstein stated: "[T]o my feeling it was his distal clavicle which was elevated up and the joint was partially subluxated." (PX4; PX6, pgs. 8-9). Petitioner reported pain with movement of the AC joint and he had positive impingement sign in the right shoulder.

Petitioner completed additional x-rays on February 14, 2018. The right shoulder impression indicated a normal shoulder joint with some upward motion at the AC joint suggestive of a grade I AC separation. X-rays of the SC joint suggested subluxation of the left SC joint, although the

radiologist indicated that the studies were difficult to interpret and further work-up was required. X-rays of the AC joint showed some osteophytes on the superior end of the clavicle, "but more significantly evidence of upward mobility of the clavicle without weights showing a grade II AC separation." (PX4; PX6, pgs. 9-10). Dr. Rubinstein diagnosed Petitioner with possible rotator cuff tendinitis or a small tear, but the more significant diagnoses according to Dr. Rubinstein were the AC joint separation and SC joint subluxation, "which appeared to be a direct result of the traumatic incident lifting the tray of meat . . ." (PX4; PX6, pg. 10).

Petitioner's work restrictions were extended and he underwent injections to the SC and AC joints, as well as additional physical therapy. By July 11, 2018, Dr. Rubinstein indicated that Petitioner had seen no further improvement in his shoulder discomfort at the AC joint. The SC joint had settled down and was now minimally painful. Dr. Rubinstein did not believe that the SC joint needed any further intervention other than an occasional injection, but he did recommend surgery for the AC joint. Dr. Rubinstein requested insurance approval for a distal clavicle resection.

Dr. Rubinstein testified that he did not observe any signs of symptom magnification. "He had complaints and findings that were consistent with his injury and with his findings . . ." (PX6, pgs. 19-20). Dr. Rubinstein added: "Mr. Aguilar's complaints were consistent throughout the time I treated him, consistent with the physical exam and consistent with the X-ray findings and the injury that he had." (PX6, pg. 20). Dr. Rubinstein opined that Petitioner's current condition of ill-being as it pertained to the right shoulder was related to the work injury.

Respondent's Section 12 examiner, Dr. Ajay Balaram, evaluated Petitioner on May 30, 2018. He also did not observe any malingering or symptom magnification in Petitioner. Dr. Balaram noted a similar mechanism of injury that Petitioner was lifting and swinging a tray of meat across his body when he felt pain in his shoulder. Examination revealed tenderness to palpation over the right paracervical muscles, tenderness to palpation over the SC joint and pain associated with the pressing down of this joint. Petitioner also had some hypertrophy or abnormal growth at the AC joint. Petitioner exhibited slight decreased range of motion in the right shoulder compared to the left. There was also evidence of Neer's and Hawkins signs, "which are associated with some impingement of the rotator cuff, as well as positive cross-body testing, which would indicate some pathology associated with the acromioclavicular joint." (RX1, pg. 12). Dr. Balaram reviewed x-rays dated January 10, 2018 which showed evidence of AC joint degeneration or arthritis. He also reviewed x-rays of the right shoulder dated May 30, 2018. He noted AC joint degenerative changes with mild superior spurring at the distal clavicle. Dr. Balaram diagnosed Petitioner with a right SC joint sprain as well as right AC joint arthrosis, but did not believe that Petitioner's right shoulder condition was related because his diagnoses were not consistent with the reported mechanism of injury.

Respondent had relied on the testimonies of Dr. Rubinstein and Dr. Balaram in support of its position that the motor vehicle accident constituted an intervening accident. The physicians had indicated that a motor vehicle accident was one possible cause for SC and AC joint injuries. Dr. Rubinstein testified that overloading the joint, a fall, trauma or strange lifting were all competent causes for AC joint separation. As to an SC joint subluxation, Dr. Rubinstein stated that although a motor vehicle accident was a more competent cause, a direct blow to the chest, lifting and pulling

something across your body, or a forceful change in lifting were also competent causes. Dr. Balaram similarly testified that SC and AC joint injuries could occur from high energy mechanisms, such as a motor vehicle accident, as well as falling. However, neither physician, in fact no physician who had examined Petitioner, was aware that Petitioner had been involved in a motor vehicle accident. Thus, Dr. Rubinstein's and Dr. Balaram's opinions with respect to motor vehicle accidents carries little weight as their opinions do not contemplate or explain how the December 20, 2017 collision may have affected, if at all, Petitioner's right shoulder. "The Commission's decision must be supported by the record and not based on mere speculation or conjecture." *Sisbro, Inc. v. Indus. Comm'n*, 207 Ill. 2d 193, 215 (2003).

The other competent causes for AC and SC joint injuries as testified to by the physicians do not foreclose a finding of causation. While the Commission acknowledges, as did the Arbitrator, that the mechanism of injury varied throughout the medical records, Petitioner testified and the medical records demonstrated that Petitioner's right shoulder injury occurred while performing some type of employment-related lifting activity while making pork rinds for the Respondent on December 3, 2017. Petitioner did deny that the items he was lifting became caught on something and did not testify that the items he was lifting began to fall. However, there is no evidence that undercuts Dr. Rubinstein's, and even Dr. Balaram's opinions, that competent causes for AC and SC joint injuries also included overloading the joint, trauma or strange lifting, lifting and pulling something across your body, or a forceful change in lifting. The Commission notes by the record and Petitioner's unrebutted testimony that he was required to lift a tray of meat weighing between 45 to 80 pounds and had to lift them up approximately two-and-a-half meters high. The Commission may draw reasonable inferences from the evidence.

The Commission also notes that Dr. Balaram diagnosed Petitioner with a right SC joint sprain as well as right AC joint arthrosis. He based his diagnoses on the medical records, his physical examination and the x-rays he reviewed. The Commission, however, finds no indication that Dr. Balaram reviewed the x-rays that Petitioner completed on February 14, 2018. Dr. Balaram testified that an "AC joint separation is an elevation of the clavicle in relation to the shoulder blade." (RX1, pg. 16). The February 14, 2018 x-rays of the right shoulder and AC joint revealed just that – some upward motion of the clavicle at the AC joint suggestive of an AC separation. Dr. Rubinstein had also testified that once an SC joint is subluxated, there would be a palpable bump. All these findings, as described, were noted clinically and by imaging within a reasonable time after the December 3, 2017 work injury, and indicated a more involved condition than simply a strain or arthritis.

In light of the foregoing, the Commission finds that Petitioner's current condition of ill-being is causally related to the December 3, 2017 work accident. The Commission finds that the preponderance of the evidence demonstrated a reasonable mechanism of injury that is consistent with the relevant physician opinions herein. The chain of events, the timeline of symptoms and complaints, the evidence of immediate and continuous treatment, the x-ray findings, as well as no evidence of an intervening accident resulting in injury, supports Petitioner's position. As such, the Commission reverses the Arbitrator's Decision on the issue of causal connection and reverses the Arbitrator's denial of an award for medical expenses and prospective treatment. Both Drs. Rubinstein and Balaram stated that the treatment provided to Petitioner had been reasonable and necessary, and both agreed that Petitioner required treatment. Notwithstanding causation, Dr.

Balaram testified that the SC joint did not require surgical intervention, but that arthroscopy or a distal clavicle excision could be considered for the AC joint.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 15, 2020 is hereby modified as stated above and otherwise affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable, necessary, and related medical bill of Illinois Bone & Joint Institute, from 7/11/2018 through 5/22/2019, in the amount of $1,304.62, as evidenced in Petitioner's Exhibit 4, and as provided under Sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner is entitled to prospective treatment as recommended by Dr. Scott Rubinstein including, but not limited to, the proposed distal clavicle resection.

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

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,400.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in the Circuit Court.

November 16, 2021

Christopher A. Harris
Christopher A. Harris

CAH/pm
O: 10/21/2021
052

Carolyn M. Doherty
Carolyn M. Doherty

Marc Parker
Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0568
NOTICE OF 19(b) ARBITRATOR DECISION

AGUILAR, SALVADOR
Employee/Petitioner

Case# **18WC004941**

EL MILAGRO
Employer/Respondent

On 6/15/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.18% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1042 OSVALDO RODRIGUEZ LAW OFFICES
7704 W NORTH AVE
ELMWOOD PARK, IL 60707

0560 WIEDNER & McAULIFFE LTD
JUSTIN T SCHOOLEY
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Salvador Aguilar
Employee/Petitioner

v.

El Milagro
Employer/Respondent

Case # **18** WC **04941**

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 **Tiffany Kay**, Arbitrator of the Commission, in the city of **Chicago**, on **2/18/2020**. 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 _____

FINDINGS

On the date of accident, **12/3/17**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**24,648.00**; the average weekly wage was **$474.00**.

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

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

Respondent shall be given a credit of $**0.00** 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 established an accident arising out of and in the course of his employment with respondent on December 3, 2017 and timely notice of the same.

However, petitioner failed to establish that his current condition of ill-being is causally related to his alleged work accident.

As petitioner failed to establish that his current condition of ill-being is causally related to his alleged work accident, liability for medical bills for treatment at Illinois Bone & Joint Institute from 7/11/18-5/22/19 is denied.

As petitioner failed to establish that his current condition of ill-being is causally related to his alleged work accident, petitioner's request for prospective medical care is denied.

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

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

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

Signature of Arbitrator

5/29/2020
Date

ICArbDec19(b)

JUN 15 2020

PROCEDURAL HISTORY

This matter was heard before Arbitrator Tiffany Kay (hereinafter "Arbitrator Kay") on February 18, 2020 in Chicago, Illinois. The parties went to hearing with the following issues in dispute: whether Mr. Salvador Aguilar's (hereinafter "Petitioner") accident arose out of and during the course of his employment with El Milagro (hereinafter "Respondent"), whether Petitioner provided Respondent with notice of his accident within the time period required by the Illinois Workers' Compensation Act (hereinafter "Act"), whether Petitioner's current condition of ill-being is causally related to his injury, and whether the medical services provided to Petitioner were necessary and reasonable and whether Respondent paid all the appropriate charges for them. (Arb.X1) In addition, whether Petitioner is entitled to prospective medical care. (Arb.X1)

STATEMENT OF FACTS AND EVIDENCE

On the alleged date of injury, petitioner was a 57-year-old married male with no dependents under the age of 18. (Arb. Ex. 1). He alleges that on December 3, 2017, he sustained an accident arising out of and in the course of his employment with respondent.

Prior to December 3, 2017, petitioner presented to Concentra Medical Center on January 31, 2017, complaining of right shoulder pain which developed as he was carrying a tray of meat on January 26, 2017. (P. Ex. 1, p. 1). Dr. Ayala diagnosed a right shoulder strain, recommended x-rays, prescribed medication, referred petitioner to physical therapy, and released petitioner to modified work. (Id. at 3).

Therapy began at Concentra on January 31, 2017, (Id. at 5), and during follow up with Dr. Ayala on February 2, 2017, (Id. at 12-14), petitioner's diagnosis remained a right shoulder strain. He was to continue medication, therapy, and modified work.

Petitioner continued physical therapy at Concentra, (Id. at 15-23) and returned to Dr. Ayala on February 9, 2017. (Id. at 24-27). He reported improved range of motion and decreased pain. Pain was noted to radiate to the right "peck" region. Petitioner was to continue therapy and modified work.

Through February 16, 2017, Petitioner had attended a total of 7 physical therapy sessions, at which time he reported "feeling a lot better." (Id. at 32). On February 16, 2017, Petitioner informed Dr. Ayala that his pain was 0/10 and advised that symptoms had resolved. (Id. at 35). Dr. Ayala diagnosed a resolved right shoulder strain; released Petitioner to full duty work; and released Petitioner from care. (Id. at 36-37).

Petitioner next presented to Concentra on December 4, 2017. (P. Ex. 2, p. 32). He reported that he performs repetitive work with his hands and began to feel pain in the right wrist and 2nd MCP joint yesterday at work. Petitioner reported that he also began to feel pain in his right anterior shoulder for which he previously treated at Concentra. (Id.).

On February 18, 2020, petitioner testified that his job duties at El Milagro included making chicharrón, which was described as pork rinds/skins. Petitioner reported that this required lifting a tray of meat and cooking the meat as well. Petitioner testified that additional job duties included bringing food to tables, cleaning tables, and taking out the garbage. Petitioner testified that after his medical care in early 2017 at Concentra, symptoms subsided until the December 3, 2017. Petitioner tested that while making pork rinds on December 3, 2017, he

experienced pain in the right hand that extended up to the right shoulder and neck region. Petitioner testified that he reported his symptoms to Rocio Garcia at El Milagro.

Physical examination on December 4, 2017 revealed a normal appearance, but tenderness over the right shoulder anterior region, superior region, and posterior aspect. (P. Ex. 2, p. 33). Physical examination of the right wrist showed tenderness in the dorsal aspect. (Id. at 34). Petitioner was diagnosed with a right shoulder strain and right wrist strain. Medications, physical therapy, a wrist brace, and x-rays were prescribed. Petitioner was released to modified work. (Id. at 34-36).

During a follow up on December 6, 2017, Petitioner reported ongoing pain in the anterior right shoulder, dorsal right wrist, and right MCP joint of the index finger. (Id. at 37). Inspection of the right shoulder again showed a normal appearance. (Id. at 38). There was tenderness over the AC joint, distal clavicle, and in the anterior shoulder/superior regions. (Id.). Physical examination of the right wrist was essentially normal. Diagnosis remained a strain of the right wrist and strain of the right shoulder. (Id.). Additional medications were dispensed, and Petitioner was authorized to continue working on light duty. (Id. at 39-40).

Petitioner returned to Concentra on December 13, 2017 and reported no change in symptoms. (Id. at 41). His shoulder appearance remained normal. (Id. at 42). In addition, his diagnosis remained the same. (Id.).

Petitioner began physical therapy at Concentra on December 13, 2017 and reported that his symptoms began when frying pork skins for 2 hours straight. (Id. at 44). Therapy continued at Concentra through December 18, 2017. (Id. at 45-52).

During cross-examination on February 18, 2020, Petitioner was asked whether he was involved in any accidents outside of work after December 3, 2017. Upon initial questioning, Petitioner denied being in any additional accidents. However, when subsequently questioned about the make and model of car that Petitioner drove in December 2017, he conceded that on December 20, 2017, he was involved in a motor vehicle accident, during which he was restrained and wearing his seatbelt. Petitioner further agreed that the accident was severe enough that his car could not be driven afterwards.

Petitioner then presented to Dr. Peter Sorokin of Concentra on January 10, 2018, and reported no improvement. Symptoms were at this time reported in the right anterior shoulder and sterno-clavicular joint. (P. Ex. 2 at 55). Right shoulder examination revealed a clavicular deformity. (Id. at 56). Forward flexion AROM had decreased from 90 degrees on December 13, 2017 to 45 degrees on January 10, 2018 (Id. at 42, 56). Petitioner's diagnosis now included collar bone pain and asymmetry of the clavicles. (Id. at 57). Petitioner was referred to orthopedics and released to modified work (Id.).

On January 24, 2018, Petitioner presented to Dr. Christos Giannoulias (hereinafter "Dr. Giannoulias") and reported right shoulder pain due to an injury at work when lifting meat. (P. Ex. 2, p.1). Dr. Giannoulias diagnosed an SC joint strain and noted that x-rays revealed an SC joint subluxation. Physical examination of the right shoulder showed swelling and tenderness over the SC joint, but no pain over the AC joint. Dr. Giannoulias explained that there was no cure for SC joint subluxation and that surgical intervention would not be beneficial. He recommended a course of physical therapy. (Id.).

Petitioner continued therapy at Concentra through February 12, 2018. (P. Ex. 2, 59-69).

On February 14, 2018, Petitioner then transitioned care to Dr. Rubinstein at Illinois Bone and Joint Institute. (P. Ex. 4, p. 19). Dr. Rubinstein's record reflects that Petitioner was lifting a tray of meat weighing up to 70-80 pounds, which became caught, and as he was lifting it, it pulled on his right shoulder. Petitioner

could not recall the exact date of accident. (Id.). In contrast to this record, at trial, Petitioner testified that the trays weighed 45-60 pounds. Furthermore, at trial, Petitioner testified that the tray of meat never became caught on anything.

Physical examination on February 14, 2018 showed prominence in the right sternoclavicular joint which was not present on the left side. Dr. Rubinstein also noted a large bump over the AC joint, not present on the left side. (Id.). Per Dr. Rubinstein, X-rays of the right shoulder showed a relatively normal shoulder joint despite some evidence of AC joint arthritis and a grade II AC separation with the clavicle riding high in relation to the acromion in both shoulders. (Id.). Dr. Rubinstein diagnosed possible rotator cuff tendonitis or a small tear, AC joint separation, and SC joint subluxation. (Id. at 20). An injection was administered into the right shoulder AC and SC joints. Petitioner was authorized to continue light duty work.

Petitioner subsequently continued follow up with Dr. Rubinstein, and on February 28, 2018, reported 60%-70% relief in his right shoulder pain after injections. Petitioner requested a full duty return to work for "financial reasons" despite pain and discomfort. Recommendations also included physical therapy. (Id. at 21).

Petitioner began a round of physical therapy at ATI on March 19, 2018. Petitioner advised that he did not recall the exact date of injury, but in December 2017, was lifting a tray of meat and large box of pork skin each weighing 35-40 pounds. (P. Ex. 5, p. 80).

During follow up with Dr. Rubinstein on March 28, 2018, Petitioner reported that his AC joint was improving, but the SC joint was quite uncomfortable. (P. Ex. 4, p. 22). A second injection was administered to the sternoclavicular joint. Dr. Rubenstein outlined that surgical procedures could be considered for repair the SC joint, though they may not result in complete resolution of petitioner's symptoms. Petitioner reported difficulty with full duty work, so Dr. Rubinstein released him to work with restrictions. (Id. at 22-23).

On April 25, 2018, Dr. Rubinstein noted that petitioner's SC joint was now settling down nicely, but the AC side was still "a little bit painful with activity." (Id. at 24). An AC joint injection was administered, and Petitioner was to continue therapy. (Id at 24-25).

On May 4, 2018, Petitioner was discharged from ATI Phyiscal therapy. (P. Ex. 5, p. 28).

On May 23, 2018, Dr. Rubinstein outlined that healing may take six to eight months, and noted that there was a possibility that surgery could be required for the AC joint, but it was premature to move forward with surgery. Petitioner was released to modified work. (P. Ex. 4, p. 26).

During follow up with Dr. Rubinstein on July 11, 2018, Petitioner reported incomplete pain relief with injection at the AC joint, but reported that the SC joint was minimally painful. Dr. Rubinstein outlined that other than an occasional injection, Petitioner did not require additional treatment for his SC joint. With respect to the AC joint, he recommended surgery. (Id. at 28).

On August 8, 2018, Dr. Rubinstein reviewed Dr. Balaram's IME report and acknowledged preexisting arthritis in the right shoulder, but opined that Petitioner's alleged work accident aggravated Petitioner's condition. (Id. at 17-18).

On September 28, 2018, Dr. Rubinstein noted that Petitioner's SC symptoms were "pretty much settled down," but the AC joint remained painful. Dr. Rubinstein continued to recommend surgery for the AC joint. (Id. at 15-16).

On November 28, 2018, Petitioner reported worsening symptoms in the AC joint. Another injection was administered. Dr. Rubinstein recommended surgery as well. (Id. at 13-14).

On January 16, 2019, an additional injection was administered to the AC joint by Dr. Rubinstein, (Id. at 11-12), and on February 27, 2019, recommendations for the AC joint again included surgery. (Id. at 9-10).

On April 10, 2019, Dr. Rubinstein outlined that although Petitioner had a "first injury," he believed that Petitioner's condition was "primarily related to his second injury," "where he was lifting a 60-80 pound bucket of meat above his head, and it got caught and caused him to have discomfort in the shoulder." (Id. at 7). He continued to recommend surgery.

When presenting to Dr. Rubinstein most recently on May 22, 2019, Petitioner reported ongoing shoulder pain and a new onset of wrist pain. (Id. at 5). Dr. Rubinstein opined that the wrist pain was probably not related to Petitioner's alleged workplace injuries. Dr. Rubinstein noted that Petitioner's SC joint was not causing him any symptoms. Dr. Rubinstein again outlined that when lifting a 60-80 pound tray of meat above his head, "it got caught causing to sort of forcefully jerk should shoulder." (Id.). The Arbitrator again notes that at trial, Petitioner denied that the tray of meat ever became caught, and Petitioner did not testify to a "forceful jerk" as noted by Dr. Rubinstein.

On September 25, 2019, the parties proceeded with the evidence deposition of Dr. Rubinstein. (P. Ex. 6). On direct examination, Dr. Rubinstein testified that an AC separation typically results from a traumatic cause, but testified that lifting a tray of meat could be a competent cause. (Id. at 17). On cross examination, however, Dr. Rubinstein acknowledged that "straight lifting" would usually not cause an AC joint separation or subluxation, or be a competent cause of an SC subluxation. (Id. at 27, 24-25). Rather, it would require the item being lifted to get caught on something or start to fall. (Id.). Dr. Rubinstein also identified direct blows and motor vehicle accidents as being a cause of both SC and AC joint subluxations/separations. (Id. at 25, 27). Additional causes per Dr. Rubinstein included overloading of the joint in some way, a fall, trauma, or "strange" lifting injury. (Id. at 18). Dr. Rubinstein further testified that he did not believe the SC joint was where petitioner's problem lies (Id. at 25), and that petitioner's right wrist pain was not related to his workplace injuries. (Id. at 28).

On November 19, 2019, the parties then proceeded with the evidence deposition of Dr. Ajay Balaram, who performed an independent medical examination of petitioner on June 7, 2018. (R. Ex. 1). Dr. Balaram testified that petitioner reported that on December 3, 2017, he was lifting a 45 pound try of meat and felt pain his in right shoulder. Petitioner did not remember whether he hurt his hand. (Id. at 8). Dr. Balaram testified that x-rays obtained on January 10, 2018 showed acromioclavicular joint degeneration or arthritis with repeat x-rays on June 7, 2018 showing AC joint degenerative changes as well. (Id. at 12-13). Dr. Balaram testified that his diagnosis included a right sternoclavicular joint sprain and AC joint arthrosis. (Id. at 15). Dr. Balaram testified that he did not see a separation associated with the AC joint. (Id. at 17, 22, 30, 32).

Dr. Balaram testified that he did not believe that Petitioner's right shoulder injury was related to his alleged work accident, as he found that stirring of pork skins would not be a sufficient mechanism to develop a right shoulder AC joint arthritis or right shoulder sternoclavicular joint sprain. (Id. at 15-16). Dr. Balaram testified that an AC joint separation as diagnosed by Dr. Rubinstein is usually brought on by a high energy mechanism of injury such as a fall or trauma to the shoulder. (Id. at 16). He testified that an SC joint subluxation would also indicate a high energy accident that would pop the collar bone out of the joint; is a rare injury; and occurs from high energy trauma, including car accidents from a restrained seat belt or falls from height. (Id. at 16-17). Dr. Balaram testified that stirring pork skins would not cause an SC joint subluxation, SC joint arthritis, or separation of the AC joint. (Id. at 17). He further testified that the mechanism of injury as

demonstrated by Petitioner during the IME would not cause an SC joint subluxation or AC joint arthrosis. (Id.). He further testified that he did not see below the shoulder lifting as a competent mechanism to separate the AC joint, which was more of a traumatic type of injury as opposed to a lifting injury. (Id. at 31). Dr. Balaram did testify that if the Petitioner was lifting the tray above his shoulder, and there was some sort of fall associated with the tray or something to cause the sufficient high energy mechanism, it would be a competent mechanism for a AC joint separation. (Id. at 31-32). However, Dr. Balaram testified that that was not the mechanism as reported by Petitioner. (Id. at 32). The Arbitrator notes that Petitioner did not testify to such a mechanism at trial.

Notwithstanding issues of causation, Dr. Balaram testified that additional treatment for the AC joint could include arthroscopy and distal clavicle excision. He testified that the SC joint did not require surgical intervention. (Id. at 18). Dr. Balaram testified that if Petitioner did have an AC joint separation or sprain, the surgery would be repair of those ligaments rather than the proposed resection of the joint, which is performed for arthritis. (Id. 32).

CONCLUSIONS OF LAW

With regard to issues (C) accident and (E) notice , the Arbitrator finds as follows:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. It is a well-settled principle that the petitioner has the burden of proving the elements of his claim by a preponderance of the evidence. See Baldwin Assoc. vs. Industrial Commission, 232Ill.App.3d 928 (Fourth Dist. 1992). Here, petitioner testified that while performing job duties for respondent associated with making pork rinds on December 3, 2017, he experienced pain in the right hand that extended up to the right shoulder and neck region. Petitioner further testified that he reported his symptoms to Rocio Garcia at El Milagro.

Although the Arbitrator notes various inconsistencies in the medical records about the specific mechanism of injury, the Arbitrator finds that petitioner's unrebutted testimony has met his burden of establishing an accident arising out of and in the course of his employment with respondent on December 3, 2017 and timely notice of the same.

With regard to issue (F) whether Petitioner's injury is casually connected to his injury while working for respondent:

The Arbitrator adopts the above findings of fact in support of the conclusions of law and set forth below. Although the Arbitrator finds that petitioner met his burden of proof with respect to accident and notice, the Arbitrator finds that petitioner has failed to establish that his current condition of ill-being is causally related to his alleged work accident.

In so finding, the Arbitrator notes that to establish entitlement to benefits under the Act, a claimant must show that the doctor rendering a causation opinion had a valid foundation upon which to base his causation opinion. In Moore vs. St. Elizabeth Hospital, 05 IWCC 427 (2005), the Commission found that the claimant did not meet her burden of proof, as the causation opinion given was based on inaccurate and insufficient information. Here, the causation opinion of Dr. Rubinstein is similarly based on inaccurate and incomplete information, and as such, cannot support a finding of causation.

First, Dr. Rubinstein's record reflects that on the alleged date of accident, petitioner was lifting a tray of meat weighing 70-80 pounds. However, petitioner's therapy records reflect that the items petitioner allegedly lifted weighed only 30-45 pounds; and at trial, petitioner testified that the items were limited to 60 pounds.

In addition, Dr. Rubinstein testified that "straight lifting" would usually not cause an AC joint separation or subluxation, or be a competent cause of an SC subluxation. Rather, Dr. Rubinstein testified that the mechanism of injury would require the item being lifted to get caught on something or start to fall.

At trial, petitioner explicitly denied that the items he was lifting ever became caught on anything, and did not testify that the items he was lifting began to fall. As such, the mechanism of injury testified to by petitioner does not comport with the mechanism of injury, which per his own treating physician would be required to cause an AC joint separation or SC subluxation.

Dr. Balaram also testified that he did not see below the shoulder lifting as being a competent mechanism to separate the AC joint. He acknowledged that if petitioner was lifting a tray above his shoulder, and there was some sort of fall associated with the tray, or something to cause the sufficient high energy mechanism, it could be a competent mechanism for an AC joint separation. However, Dr. Balaram testified that that was not the mechanism as reported by petitioner, and the Arbitrator again notes that petitioner did not testify to such a mechanism of injury at trial.

Dr. Balaram further testified that stirring of pork skins, an additional mechanism of injury testified to by petitioner at trial, would not be a sufficient mechanism to cause shoulder AC joint arthritis, an AC joint separation, an SC joint subluxation, or a sternoclavicular joint sprain.

Dr. Balaram further testified that the mechanism of injury as demonstrated by petitioner during his IME would not cause an SC joint subluxation, or AC joint arthrosis.

In finding that Petitioner failed to establish causation, the Arbitrator further notes that Dr. Rubinstein and Dr. Balaram testified that alternative causes of AC and SC joint separations and subluxations could include a fall, trauma, direct blow, high energy accident, and a motor vehicle accident.

Here, Petitioner's medical records fail to reflect that Petitioner informed his medical providers that he was involved in a motor vehicle accident on December 20, 2017, and it was only until cross-examined on the specific make and model of his car that Petitioner acknowledged such accident.

In reviewing the medical records, the Arbitrator notes that it was not until January 10, 2018, and after the motor vehicle accident that petitioner failed to disclose to his medical providers, that his diagnosis included collar bone pain, asymmetry of the clavicles, and an SC joint subluxation.

Furthermore, during Petitioner's first medical presentation on January 10, 2018, after the December 20, 2017 motor vehicle accident, his range of motion findings had noticeably decreased, at which time examination findings also noted a clavicular deformity.

As such, Petitioner's medical records, in conjunction with the testimony of both Dr. Rubinstein and Dr. Balaram, more readily support that Petitioner's condition of ill-being is related to the December 20, 2017 motor vehicle accident.

With respect to the conflicting diagnoses between Dr. Rubinstein and Dr. Balaram of a AC joint separation versus AC joint arthrosis, the Arbitrator also finds the opinions of Dr. Balaram more credible. First, as outlined above, Dr. Rubinstein's opinions were based on an incorrect mechanism of injury.

Furthermore, while petitioner's medical records from Concentra include an SC joint subluxation, they do not contain a diagnosis of an AC joint separation. In addition, Dr. Balaram testified that if petitioner did have an AC joint separation, the surgery would be repair of those ligaments rather than the proposed resection of the joint, which is performed for arthritis.

Based on the aforementioned, the Arbitrator finds that petitioner has failed to establish that his AC and SC conditions of ill-being are causally related to his alleged work accident. As Dr. Rubinstein himself testified that petitioner's current right wrist condition is not related to his alleged work accident, the Arbitrator further finds that said condition not related to his alleged work accident.

With regard to issue (J) whether Respondent has paid all appropriate charges for all reasonable and necessary medical services prospective medical treatment ("J"), the Arbitrator finds the following:

As Petitioner failed to establish that his current condition of ill-being is causally related to his alleged work accident, liability for medical bills for treatment at Illinois Bone & Joint Institute from 7/11/18-5/22/19 is denied.

With regard to issue (K) relating to prospective medical treatment ("K"), the Arbitrator finds the following:

As Petitioner failed to establish that his current condition of ill-being is causally related to his alleged work accident, petitioner's request for prospective medical is denied.

Signature of Arbitrator

5/29/2020
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC028926
Case Name	MARTINO, MICHAEL A v. ACCURATE LOGISTICS INC.
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0569
Number of Pages of Decision	29
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Michael Higgins
Respondent Attorney	Jennifer Kiesewetter

DATE FILED: 11/17/2021

/s/ Deborah Baker, Commissioner

Signature

0STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

MICHAEL MARTINO,

Petitioner,

vs. NO: 15 WC 28926

ACCURATE LOGISTICS,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of whether Petitioner's cervical spine, lumbar spine, concussion, left shoulder, right shoulder, and right arm conditions of ill-being are causally related to his undisputed accident; entitlement to medical expenses; entitlement to temporary total disability benefits; entitlement to permanent partial disability benefits; and whether Respondent proved its refusal to pay benefits was reasonable such that §19(l) and §19(k) penalties and §16 attorney's fees are not warranted, and being advised of the facts and law, corrects the Decision of the Arbitrator and provides additional analysis as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

I. Corrections

The Commission corrects the "Findings" on the Order page to reflect Petitioner's date of accident is July 20, 2015.

The Commission strikes the footnote on page 4 as Dr. Levin's December 2, 2015 report was placed into evidence by Respondent as part of Dr. Levin's evidence deposition. Resp.'s Ex. 5, Dep. Ex. 2.

II. §19(l) and §19(k) penalties and §16 attorney's fees

The Commission, like the Arbitrator, finds that an award of penalties and fees is not warranted in this case. The purpose of sections 16, 19(k), and 19(l) is to further the Act's goal of expediting the compensation of workers and penalizing employers who unreasonably, or in bad faith, delay or withhold compensation due an employee. *Avon Products, Inc. v. Industrial Commission*, 82 Ill. 2d 297, 301, 412 N.E.2d 468, 470 (1980). The employer has the burden of justifying the delay, and the employer's justification for the delay is sufficient only if a reasonable person in the employer's position would have believed that the delay was justified. *Jacobo v. Illinois Workers' Compensation Commission*, 2011 IL App (3d) 100807WC, ¶ 20, 959 N.E.2d 772, 777-78. The standard for determining whether an employer has good and just cause for a delay in payment is defined in terms of reasonableness. *Id*.

Respondent argues it reasonably relied on Dr. Levin's December 2, 2015 §12 report in initially terminating benefits, and thereafter relied on the surveillance video as well as Dr. Cherf's conclusions in continuing to believe no benefits were due. While the Commission finds Dr. Levin's opinions are ultimately unavailing, we do not find it was unreasonable for Respondent to rely on the doctor's conclusions. We further find Respondent's reliance on Dr. Cherf's opinions and the surveillance video to be reasonable, particularly when considered in conjunction with Dr. Tu's December 8, 2015 determination that there was nothing of import going on with Petitioner's right shoulder. The Commission observes, though, that Respondent's payment log reflects benefits were terminated as of November 16, 2015, which is approximately two weeks prior to Dr. Levin's §12 examination. Resp.'s Ex. 3. Certainly the termination of benefits prior to obtaining a conflicting medical opinion is troubling. However, based on the record before us, we are unable to determine whether the statutory pre-requisites for imposition of §19(l) penalties were met. We nonetheless caution Respondent against such premature terminations in the future.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 9, 2020, as amended above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's current cervical spine condition, lumbar spine sprain, concussion, left shoulder strain, and right shoulder contusion are causally related to his undisputed July 20, 2015 work accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $1,085.21 per week for a period of 67 weeks, representing July 21, 2015 through November 1, 2016, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the reasonable and necessary medical expenses incurred for treatment of Petitioner's cervical spine as set forth in Petitioner's Exhibits 1, 2, 5, 6, 7, 8, 9, 10, and 11, limited to charges for treatment rendered through October 31, 2016, as provided in §8(a), subject to §8.2 of the Act. Respondent

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

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

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

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

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

November 17, 2021

/s/ *Deborah J. Baker*

DJB/mck

O: 9/29/21

/s/ *Stephen Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0569
NOTICE OF ARBITRATOR DECISION

MARTINO, MICHAEL Case# **15WC028926**

Employee/Petitioner

ACCURATE LOGISTICS

Employer/Respondent

On 1/9/2020, 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 1,52% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5327 MICHAEL HIGGINS
ATTORNEY AT LAW
1333 BURR RIDGE PKWY SUITE 200
BURR RIDGE, IL 60527

5074 QUINTAIROS PRIETO WOOD & BOYER
JENNIFER KIESEWETTER
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

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

Michael Martino
Employee/Petitioner

v.

Accurate Logistics
Employer/Respondent

Case # **15** WC **28926**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on **10/17/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **7/20/19**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**84604.00**; the average weekly wage was $**1627.00**.

On the date of accident, Petitioner was **59** years of age, ***married*** with **0** dependent children.

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

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

Respondent shall be given a credit of $**17,076.03** for TTD, $ for TPD, $ for maintenance, and $**6,618.33** for other benefits, for a total credit of $**23,694.36**.

Respondent is entitled to a credit of $**see RX 3** under Section 8(j) of the Act.

ORDER

Petitioner has proven by the preponderance of the evidence that his current cervical spine condition, lumber spine sprain, concussion, left shoulder strain and right shoulder contusion were causally related to his work accident of July 20, 2015. Petitioner failed to prove by the preponderance of the evidence that his Petitioner failed to prove by the preponderance of the evidence that his current right shoulder and right arm conditions (*i.e.* right rotator cuff tear and right bicep subluxation), right carpal tunnel syndrome are causally related to his accident of July 20, 2015, as set forth in the Conclusions of Law attached hereto;

Medical benefits

Respondent shall pay to Petitioner the outstanding medical expenses for Petitioner's cervical condition through that date Petitioner was released by Dr. Singh on October 31, 2016, as identified in Petitioner's Exhibits 1, 2, 5, 6, & 8, 9, 10 and 11, pursuant to the attached Conclusions of Law, as provide in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall receive a credit for any related medical expenses Respondent paid and/or is claiming a credit pursuant to Section 8(J). Respondent shall hold Petitioner safe and harmless for any and all liabilities of which Respondent claims a credit, pursuant to Section 8(j) of the Act, as set forth in the Conclusions of Law attached hereto;

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $1,085.21/week for 67 weeks, commencing 7/21/15 through 11/1/16, as provided in Section 8(b) of the Act, as set forth in the Conclusions of Law attached hereto;

Permanent Partial Disability with 8.1b language (For injuries after 9/1/11)

Respondent shall pay Petitioner permanent partial disability benefits of $755.22/week for 175 weeks, because the injuries sustained caused the 35% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Penalties

The Petition for Penalties is denied as set forth in the Conclusions of Law attached hereto;

Respondent shall pay Petitioner compensation that has accrued from July 20, 2015 through October 17, 2019 and shall pay the remainder of the award, if any, in weekly payments.

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

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

Signature of Arbitrator

1/8/2020
Date

JAN 9 - 2020

Procedural History

This matter was tried on July 20, 2015. The issues in dispute are whether Petitioner's current condition of ill-being is causally connected to his injury, whether Respondent is liable for unpaid medical bills, whether Petitioner is entitled to TTD benefits, the nature and extend of Petitioner's injury. Additional issues include a determination of maximum medical improvement and whether Petitioner exceeded his choice of physicians. Petitioner is also seeking penalties pursuant to Sections 19(k), 19(l) and 16 of the Act.

Findings of Fact

Michael Martino (hereinafter "Petitioner") testified that he has been a truck driver for 40 years. Petitioner did not graduate from high school and did not obtain his GED. Petitioner was in the Marines. Petitioner testified that for the past 15 years he has worked for Accurate Logistics (hereinafter referred to as "Respondent). Petitioner testified that he drove a truck and hulls stone, asphalt and other materials. Petitioner was a member of a union, Local 731.

Petitioner testified that his job involved heavy intensive labor. As part of his job duties, Petitioner would use jackhammers, picks, shovels and scrapers to clean the asphalt and rock from the trailer. Petitioner testified that truck trailer was twelve feet tall and he had to climb up the side of truck to clean out the trailer. Petitioner testified that he was required to perform overhead tasks such as holding up the back gate, cranking the tarp to cover the materials in the trailer. Petitioner testified that he was also required to drag chains weighing up to 200 pounds, move blocks weighing several hundred-pound and lift conveyors.

Petitioner testified that, on July 20, 2015, he was involved in a motor vehicle accident while driving his truck. Petitioner testified that he was making a left had turn when the truck flipped over on its right side. Petitioner testified that after the accident he was hanging in the air by his seatbelt. Petitioner testified that upon releasing his seatbelt, he fell to the passenger side of the truck. Petitioner was taken out of the truck through the front window by the paramedics. Petitioner testified that he was taken to the emergency room at Edward Hospital. Petitioner testified that he was subsequently released from the emergency room and told to follow up with a doctor. Petitioner testified that night he was experiencing pain in his right upper back, neck, and shoulder.

On July 20, 2015, was treated at the Edward Hospital emergency room. The medical records state that Petitioner, a 59-year-old male, was involved in a motor vehicle accident. The

medical records show that Petitioner reported pain, a seatbelt abrasion, on his left shoulder, left scapular pain, cervical pain with occasional tingling into the fingertips of the right hand. X-rays were taken of the cervical spine hand left clavicle which were negative. Petitioner was assessed with a cervical strain, contusion to the left scapular region, left shoulder abrasion and whiplash injury. Petitioner was proscribed medication and told to follow up with a doctor. (PX 8).

On July 23, 2015, Petitioner started treating with Dr. Krishna Chunduri, of Illinois Orthopedic Network. At that visit, Petitioner reported neck pain radiating into his left shoulder, low back pain and headaches. The examination noted cervical tenderness to palpation from C3-to C7, left trapezia tenderness to palpation, positive Spurling's sign, diffused thoracic and lumbar spine tenderness. Dr. Chunduri assessed cervicalgia, cervical strain, lumbago, lumbar strain, and post-concussion headaches. Dr. Chunduri proscribed physical therapy, ibuprofen, Meloxicam, Tylenol and he took Petitioner off work. (PX 5).

Petitioner began physical therapy at ATI Physical Therapy on July 27, 2015. At that time, Petitioner's primary complaints were left side neck stiffness and pain, ringing in the ears, and tingling into his right first 3 fingers at night. (PX 1)

Petitioner returned to Dr. Chunduri on August 6, 2015. At that time, Dr. Chunduri noted that Petitioner's neck pain level lowered to 5/10. Petitioner reported left ear pain and continued headaches. Petitioner also reported that his low back pain had improved. Petitioner was diagnosed with a cervical strain, lumbar strain, left ear pain, and post-concussion headaches. Dr. Chundri recommended a cervical spine MRI. (PX 5).

Petitioner underwent a cervical MRI at Molecular Imaging Advantage MRI on August 17, 2015. The MRI found: (1) straighten of the cervical spine; (2) early disc desiccation at C2-3 and C-5-6; (3) grade 1 retrolisthesis of C5 over C6; (4) osteophytes in association with hypertrophy of facet joints and neural foraminal narrowing on both sides without significant spinal compromise at C3-4 and C4-5, (5) a 2 mm diffused protrusion effacing the thecal sac having osteophytic complex at the lateral aspects compromising the spinal canal C5-6. The MRI noted that the disc material and facet hypertrophy caused bilateral neural foraminal stenosis and encroached on the left and right C6 exiting nerve root; and (6) 1-2 mm diffused disc protrusion effacing the thecal sac having osteophytic complex at the lateral aspect at C6-7. The MRI further noted that the disc material and facet hypertrophy caused bilateral neural foraminal stenosis which encroached on the left and right at the C7 exiting nerve root. (PX 5).

Petitioner continued with physical therapy at ATI for his cervical strain. The August 26, 2015 progress note stated that Petitioner was complaining of left sided neck pain with prolonged sitting. (PX 1).

On August 27, 2015, Petitioner returned to Dr. Chunduri to discuss the MRI findings. At that time, Petitioner reported his pain level was at 6/10 primarily in the right side of the neck. Dr. Chunduri diagnosis of cervical spondylosis and cervicalgia and a lumbar strain and recommended right sided C4-5 and C5-6 facet joint steroid injections, which Petitioner underwent on September 17, 2015. (PX 5).

Petitioner returned to Dr. Chunduri on October 8, 2015. Dr. Chunduri noted that Petitioner reported 50% improvement after the facet injection. Petitioner indicated that his pain levels decreased to 3/10 which increased to 5/10 at night. Dr. Chunduri recommended repeat injection, continued therapy and use of medications which Petitioner underwent on October 15, 2015. (PX 5).

On October 29, 2015, Petitioner returned to Dr. Chunduri. At that visit, Petitioner reported that the second facet injection did not provide any relief and that he was experiencing a warm sensation down towards his right shoulder blade and into the top of his right upper extremity just above his elbow. Dr. Chunduri diagnosed cervical spondylosis with right radiculitis, cervicalgia and a lumbar strain. In his records Dr. Chunduri noted that Petitioner's symptoms were either radicular or discogenic. Dr. Chunduri recommended a cervical epidural injection to treat the remainder of his symptoms. Petitioner underwent a C6-7 epidural steroid injection under fluoroscopic guidance on November 11, 2015. (PX 5).

At the trial, Petitioner testified that he underwent two injections with Dr. Chunduri but that they had a problem with the second one. Petitioner testified that he was scheduled for a third injection, but it was canceled.

On November 19, 2015, Petitioner returned to Dr. Chunduri and reported a near complete resolution of his neck pain from the midline to the left shoulder. Petitioner continued to complain of pain on the right side of his neck that radiated into his right shoulder and burning that radiated down to the top of the bicep. Dr. Chunduri noted there was a resolution of pain from the middle to the left side of the neck area, but Petitioner continued to experience significant pain throughout the right shoulder girdle as well as burning radiating into the bicep. In is records, Dr. Chunduri indicated that he was concerned Petitioner was suffering from a shoulder injury which

may be causing the pain radiating toward neck, shoulder girdle and into the bicep rather than a nerve root injury. Dr. Chunduri also noted that the right shoulder had a decreased range of motion. Dr. Chunduri further indicated that a different pain generator could be causing Petitioner's right shoulder and neck symptoms. Dr. Chunduri ordered an MRI of the right shoulder. (PX 5).

On December 2, 2015, Petitioner underwent an independent medical examination with Dr. Jay Levin, pursuant to Section 12 of the Act. (RX 4).

On December 3, 2015, Petitioner returned to Dr. Chunduri. At that time, Petitioner continued to report right shoulder and right neck pain. Dr. Chunduri determined that the MRI showed a subchondral bone cyst/erosion in the humeral head, AC joint hypertrophy at the insertion of the supraspinatus tendon, biceps tenosynovitis, and mild glenohumeral joint effusion. Dr. Chunduri diagnosed right shoulder pain and sprain, cervical spondylosis with right radiculitis and cervicalgia, and a lumbar strain. Dr. Chunduri recommended an orthopedic consultation for right shoulder. In the records, Dr. Chunduri stated that the right shoulder inflammation was likely due to the injury. Dr. Chunduri continued to kept Petitioner off work. (RX 5).

On December 8, 2015, Petitioner was seen by Dr. Kevin Tu, orthopedic surgeon with Illinois Orthopedic Network. Dr. Tu reviewed the right shoulder MRI imaging and determined that the MRI showed a bone contusion. Dr. Tu examined Petitioner's right shoulder and concluded that there was no evidence of rotator cuff tear. Dr. Tu diagnosed a right shoulder contusion and cervical radiculopathy. In his records, Dr. Tu indicated that Petitioner did not have much in terms of positive physical exam findings. Dr. Tu concluded that it was unlikely that Petitioner's shoulder was the source of his current symptoms. Dr. Tu referred Petitioner back to Dr. Chunduri to continue treating the cervical condition. (PX 5).

On December 17, 2015, Petitioner retuned to Dr. Chunduri who noted that Petitioner showed improvement after the facet joint injections and the cervical epidural injection which resolved most of Petitioner's neck pain. Dr. Chunduri also noted that Petitioner's pain was located in the neck and over the right anterior deltoid bicep. Dr. Chunduri recommend an EMG of the right upper extremity. In his records, Dr. Chunduri indicated that he reviewed and disagreed with portions of an IME report.[1] (PX 5).

[1] The report authored by Dr. Jay Levin, dated December 2, 2015, was not placed into evidence by Respondent. The report was contained in the Illinois Orthopedic Network records which Petitioner placed into evidence as PX 5.

On January 26, 2016, Petitioner underwent an EMG which showed: (1) chronic right C6 cervical radiculopathy, (2) mild-moderate and moderate-medium sensorimotor neuropathies at the wrist consistent with carpal tunnel syndrome, and (3) isolated findings that may indicate but provide no definite evidence of mild right ulnar sensory neuropathy at the wrist. (PX 5).

On February 4, 2016, Petitioner returned to Dr. Chunduri who examined Petitioner. The examination continued to show a positive Spurling's sign to the right upper extremity. Petitioner's hand grip strength was 3/5 for the right and 5/5 for the left hand. The elbow extension and flexion were 3/5 on the right and 5/5 on the left. Dr. Chunduri determined that Petitioner was suffering from C6 radiculopathy. At that time, Dr. Chunduri recommended a C6 transforaminal epidural injection and a surgical consultation. Dr. Chunduri continued to kept Petitioner off work. (PX 5).

On February 25, 2016, Petitioner underwent a surgical consult with Dr. Kern Singh, of Midwest Orthopaedics at Rush. Dr. Singh noted that Petitioner was ambidextrous. At that visit, Petitioner reported neck pain with upper extremity radiating into his first, second and third digits. Petitioner reported constant, stabbing burning pain at the base of the neck into the scapular region. Petitioner also reported right biceps pain with numbness and tingling into the first, second and third fingers. Dr. Singh noted that Petitioner underwent an EMG which revealed right C6 chronic radiculopathy. (PX 2)

Dr. Singh indicated that the MRI dated August 14, 2015, showed a decreased disc signal intensity and height at C5-6, retrolisthesis at C5-6 and bilateral foraminal narrowing right greater than left. Dr. Singh also indicated that the EMG dated January 26, 2016 showed a right-sided chronic C6 cervical radiculopathy. His examination noted a positive Spurling's sign on the right. Dr. Singh diagnosed degenerate disk disease at C5-6, cervical spinal stenosis at C5-6 and right sided C6 radiculopathy. Dr. Singh recommend surgery consisting of an anterior cervical discectomy and fusion at C5-6. In his records, Dr. Singh noted that Petitioner pain correlated with the positive Spurling's sign, wrist extensor weakness in a C6 distribution, EMG, that confirmed C6 radiculopathy, and MRI, that showed foraminal stenosis and disk height loss at C5-6. (PX 2).

Petitioner underwent surgery at Gold Coast Surgery Center. The postoperative diagnosis was cervical spinal stenosis at C5-6 and herniated nucleus pulposus at C5-6. The procedure consisted of an anterior cervical discectomy and fusion at C5-6, with intervertebral PEEK cage at

C5-6, anterior spinal instrumentation and bone graft. The operative findings noted disk space collapse at C5-6 with a central disk herniation resulting in bilateral foraminal stenosis. (PX 9).

On April 28, 2016, Petitioner followed up with Dr. Singh. At that visit, Petitioner reported an improvement of symptoms. Petitioner indicated that his pain level decreased to 5-7 out of 10 and that his upper extremity radiating symptoms resolved. Dr. Singh recommended physical therapy and issued work restrictions of no lifting greater than 10-pound, no pushing or pulling and minimal bending and stooping. Dr. Sigh's records show that Petitioner's work restrictions were sent to the insurance adjuster. (PX 2).

On May 26, 2016, Petitioner returned to Dr. Singh. At this visit, Petitioner reported significant improvement of his preoperative symptoms and that his upper extremity arm pain resolved. Petitioner continued to report a patch of persistent right shoulder and upper arm numbness. Dr. Singh recommended additional physical therapy. On June 23, 2016, Petitioner followed up with Dr. Singh and reported numbness and tingling along the right upper arm into the scapular region. Dr. Singh recommended additional physical therapy and he issued new work restrictions of lifting/pulling/pushing up to 15-pounds with no bending, kneeling, stooping, squatting or twisting. Dr. Sigh's records indicate that Petitioner's work restrictions were sent to the insurance adjuster. (PX 2).

On July 28, 2016, followed up with Dr. Singh. At this visit, Petitioner reported intermittent pain at the base of the neck into the right shoulder with occasional right upper biceps numbness and tingling. Additional physical therapy was ordered. On September 8, 2016, Petitioner returned to Dr. Singh who noted that the majority of Petitioner's neck pain and right shoulder discomfort was brought on with overhead lifting and during sleep. Dr. Singh's examination revealed pain in the right shoulder with internal and external rotation and mild tenderness over the AC joint. Dr. Singh ordered an CT of the cervical spine. (PX 2).

On September 8, 2016, Petitioner followed up with Dr. Singh. At that time, Petitioner reported neck stiffness, intermittent right shoulder pain. Petitioner denied radiating arm pain, numbness, tingling, weakness and any difficulty with fine motor function. Petitioner reported that the majority of his neck pain and right shoulder discomfort was brought on with overhead lifting and during sleep. Dr. Singh ordered a CT scan of the cervical spine. (PX 2).

Per a Discharge Summary from ATI dated September 10, 2016, Petitioner continued to experience difficulty lifting his arm up, unable to weight on his left arm for long periods of time, and continued numbness and tingling in his right hand with lifting activities. (PX 1).

Petitioner returned to Dr. Singh on September 16, 2016. At this visit, Petitioner reported intermittent neck stiffness at the base of the neck across both shoulders and intermittent right upper extremity numbness with tingling into the hand. Dr. Singh reviewed the CT scan and noted that the fusion was solid. Dr. Singh recommended an FCE after 2 to 4 weeks of work conditioning. (PX 2).

On September 21, 2016, Petitioner underwent an FCE at ATI Physical Therapy. The results were found to be valid. The FCE indicated that Petitioner tested at the medium physical demand level but he does not meet the physical demand of his occupation which is a medium to heavy physical demand level occupation. (PX 1).

Dr. Singh testified via evidence deposition on October 12, 2016. Dr. Singh testified that he reviewed the diagnostic testing which showed a loss of disk signal intensity or retrolisthesis at C5-6 and compression of the c6 nerve root. Dr. Singh testified that the EMG of January 26, 2016 showed right sided chronic C6 cervical radiculopathy, which was consistent with Petitioner's subjective complaints. Dr. Singh testified that the EMG correlated with Petitioner's subjective complaints and to the positive Spurling sign, an objective finding, and to Petitioner's strength weakness on the right side, which all correlate with the C6 nerve root as reflected in the EMG. (PX 3, at 9). Dr. Singh testified that the MRI showed right sided more than left sided C6 nerve root compression which manifested in Petitioner's wrist extensor weakness and Spurling's sign. (PX 3, at 10).

Dr. Singh opined that Petitioner had a pre-existing degenerative condition that was aggravated by his work-related event. Dr. Singh further opined that Petitioner's work-related event rendered Petitioner not only clinically symptomatic by his pain complaints but also objectively with motor weakness in the C6 nerve root pattern which was confirmed by the MRI and EMG. Dr. Singh recommended an anterior cervical discectomy and fusion. (PX 3, at 13-14).

Dr. Singh testified that during the surgery he found a disk space collapse at C5-6 with foraminal stenosis, bilateral in nature which was consistent with the MRI. Dr. Singh testified that as of February 25, 2016, the date of his initial evaluation, he recommended that Petitioner should

be off work until his surgical intervention and, after surgery, he recommended that Petitioner could returned to work light duty with 10-pound lifting restrictions and avoid bending and stooping. Dr. Singh testified that he increased Petitioner's lifting restrictions to 15 pounds as recommended by the FCE. (PX 3, at 16).

Dr. Singh testified that he disagreed with the IME regarding Petitioner's primary diagnosis and that Petitioner's complaints were inconsistent the diagnosis and imaging. Dr. Singh testified that Petitioner's EMG documented C6 radiculopathy and that Petitioner also had motor weakness in the C6 distribution which was consistent with the MRI findings of retrolisthesis which caused Petitioner's nerve root compression. (PX 3, at 17 and 18).

Dr. Singh opined that Petitioner had C6 radiculopathy that was causally related to his work accident. Dr. Singh also opined that Petitioner's treatment for his cervical condition was reasonable including the EMG, MRI, six weeks of physical therapy, epidural injections and medications. (PX 3, at 18).

On cross-examination, Dr. Singh testified that he does not believe the facet injections were indicated for cervical radiculopathy. (RX 3, at 21).

Dr. Singh also testified that his opinions were related to his intervention involving Petitioner's cervical complaints and that he does not render any opinions regarding any other treatment. (RX 3).

On October 31, 2016, Petitioner returned to Dr. Singh who noted that put forth a valid effort with the FCE testing. Dr. Singh determined that Petitioner was at MMI for his cervical condition and he issued work restrictions consistent with the September 21, 2016 FCE. Dr. Singh referred Petitioner to Dr. Romeo for right shoulder treatment and evaluation. Dr. Singh's records indicate that this information was sent to the insurance adjuster. (PX 2).

Petitioner testified that he tried to see Dr. Romeo who would not see him because the insurance company would not approve the treatment. Petitioner testified that he did not have private insurance because he could not afford the COBRA costs. Petitioner testified that he sought treatment at the VA which took six months to a year to receive his VA benefits.

Surveillance of Petitioner taken on December 16, 2016 and December 28, 2016, admitted into evidence without objection, showed walking, driving a car, opening and closing car doors, and moving trash cans. (RX 6).

On January 9, 2017, Petitioner was treated at Hines Illinois VA Medical Clinic. Petitioner was seen at Neurology for an EMG Consult. At that visit, Petitioner reported right shoulder pain, weakness, numbness and tingling in the first 3 fingers of the right hand. The EMG demonstrated moderate carpal tunnel syndrome. (PX 4).

On January 20, 2017, Petitioner saw Dr. Awais Butts who ordered a right shoulder MRI and referred Petitioner for an orthopedic consultation. (PX 4).

On February 12, 2017, Petitioner underwent a right shoulder MRI which showed severe supraspinatus tendinosis with small high-grade partial-thickness tear, mild infraspinatus and subscapularis degenerative interstitial tearing, advanced biceps tendinosis with tenosynovitis, and moderate glenohumeral osteoarthritis with chondral loss, degenerative labral tear, and joint effusion. (PX 4).

Dr. Jay Levin testified via evidence deposition on February 14, 2017. Dr. Levin testified that he had not reviewed Petitioner's treatment records prior to examining Petitioner on December 2, 2015. Dr. Levin testified that his examination showed upper midline cervical tenderness, right superomedial trapezial tenderness, Spurling Test, on the right side, elicited pain in the neck and head, no AC joint tenderness, active elevation range of motion of 140 degrees on the right and 175 degrees on the left active abduction range of motion for the right shoulder of 105 degrees on the right and 165 degrees on the left. Dr. Levin also noted lateral deltoid discomfort with crossed chest abduction movement on the right none on the left, and Petitioner's grip strength was 65.2 psi on the right and 84.5 on the left. (RX 5).

Dr. Levin opined that Petitioner sustained a cervical myofascial strain. Dr. Lavin testified that Petitioner's subjective complaints were consistent with his initial diagnosis of cervical myofascial strain. Dr. Lavin opined that between July 20, 2015 and December 2, 2015 Petitioner's subjective cervical complaints should have resolved. Dr. Lavin testified that the medical treatment and MRI were appropriate and reasonable. Dr. Lavin opined that 10 days after the accident, Petitioner could have returned to work without restrictions and that Petitioner was at MMI at the time of his examination on December 2, 2015. (RX 5, at 19).

Regarding the right shoulder, Dr. Levin opined that Petitioner's medical records did not support that Petitioner sustained an injury to his right shoulder from the July 20, 2015 accident. (RX 5, at 20) Dr. Levin performed an impairment rating which resulted in a total impairment rating of 1% for the cervical spine condition and no impairment contribution for the lumbar

spine. (RX 5 at 22). Dr. Levin testified that at the time he saw Petitioner on December 2, 2015 he did not believe that he was a candidate for a cervical fusion. (RX 5 at 28).

On February 16, 2017, Petitioner returned to Hines VA Orthopedic Surgery Clinic. The records indicate that Petitioner underwent an EMG which showed moderate carpal tunnel syndrome in the right wrist. An MRI was ordered for the shoulder. A right shoulder SA injection was administered, and Petitioner was referred to a hand orthopedic physician for the carpal tunnel syndrome. Petitioner underwent an MRI of the right shoulder o February 12, 2017. (PX 4).

On February 12, 2017, Petitioner returned to Hines VA to review the MRI findings. The MRI impression showed, (1) severe supraspinatus with small high-grade partial thickness tear; (2) mild infraspinatus and subscapularis degenerative tears; (3) advanced biceps tendinosis with tenosynovitis. (PX 4).

Surveillance video of Petitioner's activities on February 23, 2017 showed Petitioner fixing an unknown object, raising his arms, performed some overhead movement with his right hand. (RX 6).

On February 28, 2017, Petitioner underwent an orthopedic consult at Hines VA. The records state that Petitioner suffers from chronic right shoulder pain for two years following a truck flipping accident. A right shoulder SA injection was administered. (PX 4).

On March 7, 2017, Petitioner contacted Dr. Butts via telephone and reported that he met with an ortho and his shoulder and arm pain improved after CSI. He also reported starting physical therapy last week. (PX 4).

Surveillance of Petitioner's activities on March 7, 2017 shows Petitioner moving trash cans using his right arm, bending over to pick up something, driving, opening the hatchback of a vehicle, carrying objects, opening and closing doors, carrying a ladder and other items such as painting equipment, containers and plastic bags. Surveillance on March 9, 2017 and March 10, 2017 shows Petitioner driving, moving around a garage, cleaning his car, loading and unloading materials, and lifting a ladder with both hands. Surveillance on March 21, 2017 shows Petitioner driving a car, lifting a toolbox, hammer, and masks. Surveillance of June 29, 2017, shows Petitioner driving and using an outdoor vacuum. Surveillance of July 4, 2017, showed Petitioner pushing a lawn mower and using his right arm to pull start the mower. On July 13, 2017,

Petitioner was seen using a leaf blower with his right hand, lifting and boxes, lifting cables, and operating an ATV. (RX 6).

On August 31, 2017, Petitioner returned to Hines VA Orthopedic Surgery. In the records it was noted that an EMG showed moderate carpal tunnel syndrome and that Petitioner did not follow up with orthopedic physician for his hand. At that time, a right shoulder SA and biceps tendon injections were administered. (PX 4).

On September 5, 2017, Dr. Jay Levin authored a report entered into evidence, without objection. (RX 4). Dr. Levin's report refers to the examination he performed on December 2, 2015. In his report, Dr. Levin indicated that he reviewed the records from the date of the accident. Dr. Levin indicated that his opinions regarding the right shoulder and the basis for his opinions had not changed. Dr. Levin stated that Petitioner's EMG findings of January 26, 2016, which identified right cervical radiculopathy, were inconsistent with Petitioner's post-injury records of July 23, 2015 and Dr. Chunduri records of July and August 2015 which did not describe any right shoulder injury or diagnosis related to the right shoulder. Dr Levin did not agree with the right shoulder treatment because he did not believe the right shoulder was relate to the July 20, 2015 accident. In the report, Dr. Levin also disagreed with the need for a cervical fusion surgery, performed by Dr. Singh, and the work restrictions issued by Dr. Singh. Dr. Levin opined that Petitioner reached maximum medical improvement and required no work restrictions as of December 2, 2015. (RX 4).

On September 8, 2017, Petitioner returned to Hines VA. The records note that based upon the February MRI, Petitioner has right shoulder rotator cuff tendinopathy due to partial thickness tear, supraspinatous and a suspected labral tear. (PX 4).

At the request of respondent, Dr. Cherf, of Medical Systems, performed a records review of Petitioner's treatment as it related to the right shoulder. The report was entered into evidence, without objection. (RX 1). In the report, Dr. Cherf wrote that it was possible that Petitioner sustained a right shoulder contusion as a result if his work injury of July 20, 2015. The accident caused a temporary exacerbation of the degenerative pathology. He opined that while it was possible that Petitioner incurred a right shoulder contusion from the work-related injury, all early medical records were focused on Petitioner's left upper extremity. He stated that the degenerative shoulder pathology revealed on the MRIs was independent of the work-related injury. He also opined that if Petitioner had a right shoulder contusion he was at maximum

medical improvement for that contusion no later than November 20, 2015. Dr. Cherf concluded that it was unlikely that this injury caused a permanent aggravation or accelerated degenerative pathology of the right shoulder beyond its normal progression. He also pointed out that there was no documentation of right shoulder symptoms or evaluations of the right shoulder in the early medical records. Dr. Cherf further opined that Petitioner was capable of full-time full duty work and required no right shoulder restrictions. (RX 1).

On December 5, 2017, Dr. Cherf authored an addendum report after reviewing the three hours and fifteen minutes of video surveillance. In his addendum report, Dr. Cherf indicated that his review of the video surveillance supported his original records review opinions. Dr. Cherf noted that after reviewing the video surveillance he did not identify any obvious abnormalities of the right shoulder nor did he see any favoritism of the right upper shoulder. (RX 1).

Petitioner testified that he returned to Dr. Singh who referred him to Dr. Verma. On March 14, 2018, Petitioner was examined by Dr. Nikhil Verma, of Midwest Orthopaedics at Rush. At that time, Petitioner reported experiencing right shoulder pain that started in 2015 after being in a rollover accident while driving a semi. Petitioner reported that after the accident he had right shoulder and neck pain. Petitioner said that his neck pain and numbness resolved after undergoing surgery with Dr. Singh, but he continued to experience right shoulder pain. (PX 2).

Dr. Verma's records state that the MRI shows a large anterior greater tuberosity cyst, and a full-thickness rotator cuff tear with minimal retraction of the anterior portion of the supraspinatus. Dr. Verma also noted that there appears to be a lift off of the subscapularis in the upper portion of the tendon with subluxation and a significant edema of the bicep tendon along the sheath. Dr. Verma assessed a full thickness rotator cuff tear. Dr. Verma also assessed a bicep subluxation. Dr. Verma recommended upper subscapularis and a supraspinatus rotator cuff repair and a biceps tenodesis. (PX 2).

Petitioner underwent surgery on May 1, 2018 at Gold Coast Surgery Center. The post-operate diagnoses was right shoulder rotator cuff tearing including subscapularis and supraspinatus, right shoulder impingement and right shoulder biceps tenodesis. The surgical report noted a high-grade tear of the supraspinatus. (PX 2).

On May 15, 2018, Petitioner returned to Midwest Orthopedics. At that time, it was noted that Petitioner was doing well, and physical therapy was recommended. (PX 2).

Petitioner returned to Dr. Verma on July 27, 2018. At that time, Petitioner reported that he was doing well with some occasional stiffness and some pain and night. Dr. Verma recommended additional physical therapy, anti-inflammatories, and he issued work restrictions. (PX 2).

On September 14, 2018, Petitioner returned to Dr. Verma who prescribed additional physical therapy. (PX 2).

Petitioner was discharged from physical therapy on October 12, 2018. Per the ATI Discharge Summary of October 12, 2018, Petitioner had continued right GH pain complaints with reaching in abduction. (PX 1).

On November 20, 2018, Petitioner returned to Dr. Verma who noted that Petitioner failed to improvement with post-operative physical therapy and work conditioning. Dr. Verma recommended a right shoulder MRI to rule out recurrent structural injury.

On November 30, 2018, Dr. Verma performed a cortisone injection into the glenohumeral joint space to reduce inflammation. (PX 2).

On November 13, 2018, Petitioner underwent a Functional Capacity Assessment at ATI. The test was found to be valid. The FCE placed Petitioner's occupation as a dump truck driver as a medium physical demand level occupation. Petitioner was found to be at a light duty physical demand level below the DOT level. (PX 1 and PX 2).

On December 7, 2018, Petitioner returned to Dr. Verma who noted that Petitioner was seven months post large rotator cuff repair with arthroscopic biceps tenodesis and that Petitioner completed work conditioning and an FCE. Dr. Verm examined Petitioner and noted that Petitioner had full overhead range of motion. Petitioner's right shoulder strength was 4+/5. Dr. Verma ordered an MRI. (PX 2).

On December 7, 2018, Dr. Verma issued work restrictions consistent with the FCE and released Petitioner from care. (PX 2).

On January 4, 2019, Petitioner returned to Midwest Orthopedics at Rush. At that time, Petitioner reported that he had retired and that the function of his shoulder did not feel 100%. Petitioner was released to return to work per the FCE results and released from care. (PX 2).

Petitioner testified that he was on Social Security Disability but did not know when he started to receive it. Petitioner testified that he did not receive temporary total disability during the time of his neck treatment. Petitioner testified this accident has affected his life dramatically.

Due to the Respondent's denial of TTD benefits, Petitioner has been destroyed financially. Petitioner testified that he was not paid TTD benefits since November of 2015. Petitioner feels he has no purpose in life after the accident. Petitioner solely wanted to be fixed medically and return to work. Due to the accident and lack disability benefits, Petitioner was forced to withdraw his pension early. This early withdrawal costs him $1,000 per month of pension benefits. Petitioner testified that he is unable to perform simple physical activities due to this injury, he cannot pick up his grand kids or play with them like he desires, and his sleep has been greatly affected.

The Arbitrator found the testimony of Petitioner to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

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

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

Causal connection between work duties and an injured condition may be established by a claim of events including claimant's ability to perform duties before the date of an accident and inability to perform same duties following date of accident. *Darling v. Industrial Commission*, 176 Ill.App.3d 186, 530 N.E.2d 1135 (First Dist. 1988). A claimant's prior condition need not be a of good health prior to the accident, if a claimant is in a certain condition, an accident occurs, and

following the accident, the claimant's condition has deteriorated, it is plainly inferable that the intervening accident caused the deterioration. The salient factor is not the precise previous condition, it is the resulting deterioration from whatever the previous condition had been. *Schroeder v. Illinois Worker's Compensation Comm'n*, 4-16-0192WC (Fourth Dist. 2017).

The Arbitrator has carefully reviewed and considered all medical evidence along with the testimony. The Arbitrator finds that Petitioner has proven by the preponderance of the evidence that his current cervical spine condition, lumber spine sprain, concussion, left shoulder strain and right shoulder contusion were causally related to his work accident of July 20, 2015.

It is undisputed that Petitioner was involved in a work-related motor vehicle accident when the truck he was driving rolled over. Petitioner was taken by ambulance to Edward Hospital where he reported neck, arm, and scapular pain. On July 23, 2015, Petitioner started treating with Dr. Krishna Chunduri, of Illinois Orthopedic Network. At that visit, Petitioner reported neck pain radiating into his left shoulder, low back pain and headaches. The examination noted cervical tenderness to palpation from C3- to C7, left trapezia tenderness to palpation, positive Spurling's Compression test, and diffused thoracic and lumbar spine tenderness. Dr. Chunduri assessed cervicalgia, cervical strain, lumbago, lumbar strain, and post-concussion headaches. Dr. Chunduri proscribed physical therapy, ibuprofen, Meloxicam, Tylenol and took Petitioner off work. (PX 5). Petitioner never returned to work for respondent.

The Arbitrator also notes that, on August 6, 2015, Dr. Chunduri ordered an MRI of the cervical spine which showed a grade 1 retrolisthesis of C5 over C6 and a 2 mm diffused protrusion compromising the spinal canal at C5-6. The MRI noted that facet hypertrophy caused bilateral neural foraminal stenosis which encroached on the left and right C6 exiting nerve root. (PX 5). On January 26, 2016, Petitioner underwent an EMG which showed right C6 cervical radiculopathy. (PX 5).

Dr. Singh testified that he reviewed the diagnostic testing which showed a loss of disk signal intensity or retrolisthesis at C5-6 and compression of the C6 nerve root. Dr. Singh also testified that the EMG of January 26, 2016 showed right sided chronic C6 cervical radiculopathy, which was consistent with Petitioner's subjective complaints. Dr. Singh further testified that the EMG correlated with Petitioner's subjective complaints and the positive Spurling sign and strength weakness on the right side which all correlate with the C6 nerve root, as reflected in the EMG. (PX 3, at 9). Dr. Singh opined that Petitioner had a pre-existing degenerative condition

that was aggravated by his work-related event. Dr. Singh further testified that Petitioner's work-related event rendered Petitioner not only clinically symptomatic by his pain complaints but also objectively with motor weakness in the C6 nerve root pattern which was confirmed by the MRI and EMG and Dr. Singh recommended an anterior cervical discectomy and fusion. (PX 3, at 13-14).

The Arbitrator finds the opinions of Dr. Singh more persuasive than the opinions of Dr. Levin. The Arbitrator further finds the opinions and findings of Dr. Singh were collaborated by Dr. Chunduri's records. The Arbrator notes that Dr. Levin rendered his opinions prior to reviewing Petitioner's prior treatment records. The Arbitrator further notes that Dr. Levin failed to address Petitioner's objective findings or render an opinion regarding whether or not the July 20, 2015 accident aggravated or accelerated Petitioner's preexisting degenerative condition.

Regarding Petitioner's right shoulder and right arm (*i.e.* right rotator cuff tear and right bicep subluxation) and right carpal tunnel syndrome, the Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that these conditions are casually related to his July 20, 2015 accident. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

Immediately after the accident, Petitioner complained of left shoulder pain. Petitioner did not report any symptoms involving his right shoulder and right arm until October 29, 2015 or November 19, 2015. On October 29, 2015, Petitioner described experiencing a warm sensation in his right shoulder and in his right arm. On October 29, 2015, Petitioner reported right shoulder pain. The Arbitrator notes that when Petitioner reported his initial right shoulder complaints, Petitioner did not indicate that he had been experiencing these symptoms since the July 20, 2015 accident. Petitioner's first report of right shoulder and arm symptoms occurred approximately four to five months after the accident. The courts presume that when a person seeks treatment for an injury, he will not falsify statements to a physician from whom he expects to receive medical aid. *Shell Oil Co. v. Industrial Comm'n*, 2 Ill.2d 590, 592, 119 N.E.2d. 224 224, 226 (1954).

At trial, Petitioner did not testify as to any mechanism of injury for either his right shoulder or arm from the accident. Petitioner did not proffer any opinions that Petitioner's right shoulder rotator cuff tear and bicep subluxation was casually related to the July 20, 2015 accident. Petitioner provided no medical support to explain the discrepancy in the November

2015 MRI findings, which revealed no signs of tearing, and the March 14, 2018 diagnosis by Dr. Verma of a large rotator cuff tear and bicep subluxation. The Arbitrator notes that, on December 8, 2015, Petitioner was seen by Dr. Kevin Tu, orthopedic surgeon. Dr. Tu reviewed the right shoulder MRI imaging and noted that the MRI revealed findings consistent with a bone contusion. Dr. Tu did not find any evidence of a right rotator cuff tear. Dr. Tue diagnosed a right shoulder contusion. In his records, Dr. Tu found that Petitioner did not show much of any positive physical exam findings. Dr. Tu indicated that it was unlikely Petitioner's right shoulder was the source of his symptoms.

The Arbitrator further notes that Petitioner did not provide a medical opinion that his right rotator cuff tear and bicep subluxation was caused by his accident of July 20, 2019. Dr. Verma, who performed the surgery, did not proffer an opinion that Petitioner's preexisting degenerative condition was aggravated or accelerated by the July 20, 2019 accident. Dr. Verma's records only the history, provided by Petitioner, claiming that the onset of symptoms occurred immediately after the accident. As stated above, the Arbitrator found that Petitioner did not report experiencing any right shoulder symptoms until four to five months after the accident. Internal inconsistencies in a claimant's testimony, as well as conflicts between the claimant's testimony and the medical records may be taken to indicate unreliability. *Gilbert v. Martin & Bayler/Hucks,* 08 IL.WC.004187 (Ill. Indus. Comm'n 2010). The Arbitrator's finding regarding the inconsistence in the records involving the onset of Petitioner's right shoulder and arm symptoms does not conflict with the Arbitrator's finding of credibility. The Arbitrator believes the discrepancy was not intentional and merely reflects difficulty remembering what had occurred years earlier.

The Arbitrator notes that significant degenerative condition and given the delay in onset of symptoms, the issue of whether Petitioner's July 20, 2015 accident aggravated or accelerated his preexisting condition is within the purview of an expert opinion. Petitioner did not proffer such an opinion. When the question is one specifically within the purview of experts, expert medical testimony is mandatory to show the claimant's work activities caused the condition of which the employee complains. *Nunn v. Industrial Comm'n*, 157 Ill.App.3d 470, 478 (4th Dist. 1987) citing *Westinghouse Electric Co. v. Industrial Comm'n*, 64 Ill.2d 257 (1796).

With respect to issues "J"; Whether the medical services provided were reasonable, the Arbitrator concludes the following:

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n,* 409 Ill.App.3d 463, 470 (4th Dist. 2011).

The Arbitrator finds that all of the treatment regarding the Petitioner's cervical condition was causally related to the accident and was necessary to diagnose, relive or cure the effects of the Petitioner's injury. As such, the Arbitrator finds that Respondent shall pay to Petitioner the outstanding medical expenses for Petitioner's cervical condition through that date Petitioner was released by Dr. Singh on October 31, 2016, and outstanding medical expenses for the lumbar spine sprain, left shoulder strain and right shoulder contusion through and including December 8, 2015, the date Petitioner saw Dr. Kevin Tu, as well as expenses for EMG's, MRIs, epidural injections and medications through February 25, 2016, the date Petitioner started treating with Dr. Singh, as identified in Petitioner's Exhibits 1, 2, 5, 6, & 8, 9, 10 and 11, and as provide in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent shall receive a credit for any related medical expenses Respondent paid and/or is claiming a credit pursuant to Section 8(J). Respondent shall hold Petitioner safe and harmless for any and all liabilities of which Respondent claims a credit, pursuant to Section 8(j) of the Act.

The Arbitrator finds that Petitioner failed to prove by the preponderance of the evidence that his current right shoulder and right arm conditions (*i.e.* right rotator cuff tear and right bicep subluxation) were causally related to his accident of July 20, 2015. As such, the Arbitrator finds that Respondent is not liable for treatment involving Petitioner's right rotator cuff tear and right bicep subluxation. The Arbitrator further finds that Respondent is not liable for the facet injections and treatment. Dr. Singh testified that facet injections were not indicated for cervical radiculopathy.

With respect to issue "K" whether Petitioner is entitled to TTD benefits or maintenance benefits and "O" MMI determination, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, "*i.e.*, until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, i.e., reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

Petitioner claims to be entitled to TTD benefits from July 21, 2015 through January 4, 2019, for a total of 180 and (3/7) weeks.

The Arbitrator finds that Petitioner's condition stabilized at the time he was released from treatment for his cervical condition. On October 31, 2016, Dr. Singh found that Petitioner reached MMI and he released Petitioner to return to work with the restrictions identified in the FCE. (PX 2). As such the Arbitrator awards Petitioner TTD benefits from July 21, 2015 through November 1, 2016.

With respect to issue "L", the nature and extend of Petitioner's injury, the Arbitrator finds as follows:

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

> For accidental injuries that occur on or after September 1, 2011, permanent partial disability shall be established using the following criteria:
>
> (a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall report the level of impairment in writing. The report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue

> mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment. The most current edition of the American Medical Association's "Guides to the Evaluation of Permanent Impairment" shall be used by the physician in determining the level of impairment.
>
> (b) In determining the level of permanent partial disability, the Commission shall base its determination on the following factors:
>
> (i) the reported level of impairment pursuant to subsection (a);
> (ii) the occupation of the injured employee;
> (iii) the age of the employee at the time of the injury;
> (iv) the employee's future earning capacity; and
> (v) evidence of disability corroborated by the treating medical records.

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

With regard to subsection (i) of Section 8.1b(b), the reported level of impairment pursuant to Section 8.1b(a), Dr. Levin also performed an impairment rating which resulted in a total impairment rating of 1% for the cervical spine condition and no impairment contribution for the lumbar spine. The Arbitrator gives this factor some weight in in determining the extent of permanent partial disability;

With regard to subsection (ii) of Section 8.1b(b), the occupation of the injured employee, the evidence established that Petitioner was a dump truck driver. Petitioner testified that his job was physically demanding and required the use of a jackhammer and pick to clean out the back of the trailer. The FCE placed Petitioner's occupation as a medium to heavy physical demand occupation and found Petitioner to be at a medium physical demand level which included no lifting greater than 15 pounds. The Arbitrator finds that it was unlikely that Petitioner would have been able to perform his duties as a truck driver. As such, the Arbitrator gives this factor significant weight in in determining the extent of permanent partial disability;

With regard to subsection (iii) of Section 8.1b(b), the age of the employee at the time of the injury. Petitioner was 59 years old at the time of his injury. At the age of 59, Petitioner is nearing the end of his work life. The Arbitrator notes that it tends to be more difficult for people nearing the end of their work life to recover and work with the effects of their injuries. As such,

the Arbitrator gives this factor some weight in determining the extent of permanent partial disability;

With regards to subsection (iv) of Section 8.1b(b), employee's future earing capacity. Petitioner testified that he retired early due to his injuries and, as such, incurred a significant loss in income and reduced pension amount. As such, the Arbitrator gives this factor significant weight in determining the extent of permanent partial disability;

With regards to subsection (v) of Section 8.1b(b), evidence of disability corroborated by the treating medical records. Petitioner testified that this accident has affected his life dramatically. The FCE indicated that Petitioner tested at the medium physical demand level and Dr. Singh issued work restrictions as outlined in the FCE, dated On September 21, 2016, which included restrictions of no lifting greater than 15 pounds. The FCE was found to be valid. The FCE corroborated Petitioner's treating medical records. As such the Arbitrator gives this factor significant weight in determining the extent of permanent partial disability.

In consideration of the factors enumerated in Section 8.1b, which does not simply require a calculation, but rather a measured evaluation of all five factors of which no single factor is conclusive on the issue of permanency, the Arbitrator finds that Petitioner suffered permanent partial disability to the extent of 35% of man as a whole pursuant to § 8(d)2 of the Act, which contemplates a loss of trade value.

With respect to issue "M", Penalties, the Arbitrator finds as follows:

Having reviewed the record as a whole, the Arbitrator concludes that Petitioner failed to prove that Respondent acted in bad faith in this case and, as such, Petitioner's claim for penalties and attorney fees is denied.

With respect to issue (O), chain of referrals, the Arbitrator finds as follows:

Based upon the Arbitrator's finding that Petitioner's right shoulder and arm conditions were not causally related to his work accident, the issue regarding the chain of referrals is moot and need not addressed because the issue involved the right arm and right shoulder treatment.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC005677
Case Name	BOYDEN,RICHARD v. MECHANICAL INC
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0570
Number of Pages of Decision	28
Decision Issued By	Thomas Tyrrell, Commissioner, Thomas Tyrrell, Commissioner

Petitioner Attorney	Tracy Jones
Respondent Attorney	Stuart Pellish

DATE FILED: 11/18/2021

/s/ Thomas Tyrrell, Commissioner

Signature

DISSENT

/s/ Thomas Tyrrell, Commissioner

Signature

21IWCC0570

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Richard Boyden,

Petitioner,

vs. NO: 19 WC 5677

Mechanical Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

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

Findings of Fact

Petitioner works as a union plumber and pipefitter. Prior to this work accident, Petitioner was a member of Local 23 in Rockford for two years. Before that, he was a member of Local 597 in Chicago for four years. Petitioner began working for Respondent in November 2016. He testified that one week after he was laid off from a job he obtained through Local 597, his friend, Justin Lindeman, asked if he would be interested in working for Respondent. Petitioner testified that he met with Mr. Lindeman at Local 23's hall in Rockford the next day. Petitioner testified that Mr. Lindeman told him where he was to report the next day to begin work. Mr. Lindeman also directed Petitioner to undergo a mandatory drug test at a clinic in Dixon. Petitioner testified that they did not discuss Petitioner's specific job tasks because as a member of a union representing the pipe trades, the job is self-explanatory. He testified that he reports to a foreman and the foreman then explains the specifics of the job. He began work the next day in Stockton at Pearl Valley Eggs.

Petitioner is only required to bring items such as a pencil, tape measure, and torpedo level to job sites. Respondent provided any other tools at the job site. When asked whether he solely worked at Pearl Valley Eggs, he testified:

> "No, I probably worked there roughly three, four weeks, and then I had to go to a Chrysler plant in Belvidere, Illinois for orientation.

> They were going to start a shut down there. So we went there a day for orientation, went back to Pearl Valley Eggs and then…I think it was Christmas Eve I think it was my start date on the Belvidere Chrysler Plant. And then I was probably there for couple months. And then I kind of bounced all over the place. I worked at a bank in Rockford, Illinois, for a couple days and then they had another different plant for Chrysler, and then jeez, I think I went to Berner Foods."

(Tr. at 16-17). Petitioner did not always have to check in with the project foreman each day if it was clear that his work was still needed at the job site. He testified that if his current job was coming to an end, he would discuss his next day's assignment with the foreman. The foreman at each site worked for Respondent.

Petitioner was exclusively employed by Respondent. He transferred to Local 23 in March 2017 so that his work assignments were closer to his home. He testified that all of Respondent's job sites were in the area covered by Local 23. Petitioner testified that Respondent has a "shop"; however, he has never visited it. Each day Petitioner drove directly from his home to that day's job site. He testified that Respondent did not tell him how to drive to any job site. Petitioner drove his personal vehicle and carried his few personal items to work each day. He testified that he was never assigned work at two separate job sites in a single day. He testified that there was always a possibility that someone could call him and say that he was to report to a different location the next day. He testified that the project foreman told Petitioner the time to report to work. He testified that if he told the foreman he did not want to go to a new assignment, Respondent would essentially lay him off and say the company did not have any other available work.

On May 8, 2018, Petitioner was involved in a serious motor vehicle accident while driving to work. He testified that he had to report to Berner Foods at 6 a.m. that day, so he left home at approximately 5 a.m. Petitioner testified Berner Foods is located in Dakota and is approximately one hour away from his house. Petitioner testified that he had worked at the Berner Food site for approximately two weeks before the accident. He also had worked at the site a few times previously. He testified that it was still a little dark that early in the morning. As he drove over a hill, he saw headlights approaching in his lane from the opposite direction. Petitioner testified he only had a split second to try to swerve and avoid the approaching vehicle. The car crashed into his vehicle. The driver of the other vehicle died at the scene.

Petitioner was flown from the accident scene to the hospital where he remained for several weeks. On May 8, 2018, Petitioner underwent an ORIF of the transverse acetabulum. On May 9, 2018, the following procedures were performed: 1) removal of traction pin, left femur; 2) left femur intramedullary nail; 3) left radius ulna open reduction internal fixation; and, 4) right tibial plateau open reduction internal fixation. The postoperative diagnoses were left segmental femur fracture, right comminuted bicondylar tibial plateau fracture, and left forearm fractures. On May 16, 2018, Petitioner underwent an ORIF left acetabular repair. In late May 2018, he was released to a rehabilitation facility to continue recuperating. Petitioner's discharge diagnoses were: 1) multisystem trauma secondary to MVA; 2) nasal bone fracture; 3) right periorbital hematoma; 4) C6-C7 endplate deformities; 5) right rib fractures; 6) left pulmonary contusion; 7) left scapular

body fracture; 8) transverse colon contusion; 9) mesenteric bleed; 10) left acetabular fracture; 11) right pubic rami superior and inferior fractures; 12) left radius and ulna fractures; 13) left distal and proximal femur fractures; 14) right tibial plateau fracture; and, 15) right tibia fracture. Petitioner was also diagnosed with multiple fractures of the right foot. On June 5, 2018, Petitioner was re-admitted to the hospital and was diagnosed with an acute pulmonary embolism.

In December 2018, Petitioner had hardware in the right proximal tibia removed due to a possible infection. He then underwent a debridement of right tibial osteomyelitis with corticotomy in April 2019. The postoperative diagnosis was right tibial osteomyelitis. In late May 2019, Petitioner underwent a right tibia corticotomy and insertion of antibiotic beads. The postoperative diagnosis was again right tibial osteomyelitis.

In June 2019, Petitioner sought a second opinion and began treatment with Dr. Goodspeed. Dr. Goodspeed determined that Petitioner presents a complex case with known infection requiring a complex revision with multiple surgeries. On July 2, 2019, Dr. Goodspeed performed a right complex tibia bone debridement, sinus excision, and removal of antibiotic beads. The postoperative diagnosis was again right tibia osteomyelitis. In September 2019 Dr. Goodspeed wrote that in addition to chronic right tibia osteomyelitis, Petitioner had other issues that would need to be addressed: 1) heterotopic ossification to the left hip limiting motion; 2) left knee flexion contracture; 3) malalignment across the right tibia and left femur; and, 4) an acute right tibia fracture. Petitioner then underwent left hip surgery to resect heterotopic ossification with the removal of hardware.

Petitioner testified that on the date of accident, he was driving directly from his home to Berner Foods. He testified that he first worked at the Berner Foods site in approximately May 2017. He testified that he began working on the most recent project at Berner Foods on February 21, 2018. Respondent assigned Petitioner to a different job site from April 24, 2018, through April 25, 2018. He then returned to the Berner Foods site until the date of accident. Petitioner testified that he is familiar with the roads he traveled between his house and Berner Foods. Petitioner was driving his personal car and testified that he was not compensated or reimbursed in any way for travel expenses associated with his commute from his house to Berner Foods. He testified that he was never compensated for any travel time from his home to any job site. Petitioner's workday began when he arrived at the job site and reported to either the foreman or another manager. He did not carry a company cell phone or laptop with him during his commute. He did not carry any company tools during his commute to the job site. Petitioner testified that no one told him which route to take to any job site. His normal work hours were 6 a.m. - 2:30 p.m. Petitioner testified that this work schedule is controlled by the collective bargaining agreement.

Petitioner testified that he has never worked on a project from start to finish. He testified that at times he has been told by Respondent to report to another site in the middle of a project or even two days after starting a project. Petitioner identified Petitioner's Exhibit 11 as the governing labor agreement. He agreed Section 2.8 of the agreement says that portal to portal rate of pay starts at an employee's residence or a 25-mile radius of the contractor's shop, whichever is closer. However, Petitioner testified that despite its language, he was never eligible to receive portal to portal pay. He admitted that he did not know what was meant by the phrase "portal to portal" in the labor agreement.

Petitioner attended the hearing in a wheelchair. He testified that he is unable to walk without assistance. Petitioner testified that his arm fractures have healed; however, his left arm does not feel the same as his right arm. Petitioner continues to attend physical therapy.

Christopher Loring testified on behalf of Respondent. He has worked for Respondent for over 12 years. In May 2018 he was Respondent's corporate safety director. He testified that he is familiar with the compensation workers such as Petitioner receive. After reviewing Petitioner's Exhibit 11, Mr. Loring testified that he was familiar with and understood the meaning of Section 2.8 of the agreement. He testified:

> "It is referencing if somebody, one of our employees is a service employee perhaps, and is traveling from job to job on off time hours, that portal to portal pay would be a part of their pay."

(Tr. at 57-58). Mr. Loring agreed that an on-call service person would qualify for this type of pay. He testified that Petitioner's position is not an on-call service position and he was not eligible for portal to portal pay. He testified that Respondent never told Petitioner where to live, told him what vehicle to drive, or designated a route for him to travel to any job site.

Mr. Loring agreed that Petitioner was not hired to work exclusively at Berner Foods. He agreed that Petitioner was sent to multiple job sites during his employment with Respondent. He agreed that Petitioner never worked at Respondent's main office. He agreed that the foreman on each job site tells employees where to report the next day for work, and that employees could be sent to a different job site each day. He testified that employees could refuse to go to a job site and could possibly be written up; however, he would not agree that Respondent would then discipline an employee who refused to report to an assigned job site.

Justin Lindeman also testified on behalf of Respondent. He has worked for Respondent since the fall of 2006. At the time of Petitioner's injury, he was Regional Operation Manager for Respondent. His job duties included managing the day-to-day operations and the supervision of superintendents and foremen. Mr. Lindeman testified that Petitioner was paid as a journeyman pipefitter to install pipe, fittings, and equipment. He testified that Petitioner received no compensation for the time he spent commuting to and from work each day. Mr. Lindeman testified that Petitioner would have been required to arrive 10 minutes before his designated start time. He testified that pursuant to the labor agreement, a worker would receive portal to portal pay if he was called into work after his working hours. He testified that the pay would compensate Petitioner for the time spent driving from his home to the job site and back. Mr. Lindeman testified that he was unaware of Petitioner ever qualifying for or receiving portal to portal pay. He agreed that Petitioner did not bring tools or supplies to the job site. He testified that Respondent had no control over where Petitioner lived and did not tell Petitioner what vehicle to drive. He further testified that Respondent did not supervise or designate the route Petitioner took to travel to and from any job site.

Mr. Lindeman agreed that Petitioner never worked at a property owned and operated by Respondent. He agreed that Respondent controlled Petitioner's daily job site assignments. He testified that Petitioner could refuse any job assignment; however, he testified that Petitioner could

be disciplined if he refused to report to the job site. He agreed that the foreman told Petitioner where to report for work each day. He also agreed that Petitioner was assigned to several job sites other than Berner Foods during his employment with Respondent. Mr. Lindeman was unaware of Petitioner ever having to report to more than one job site in a single day.

Conclusions of Law

Petitioner bears the burden of proving each element of his case by a preponderance of the evidence. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). He must show by a preponderance of the evidence that he suffered a disabling injury which both arose out of and in the course of his employment. *Id*. The compensability of Petitioner's claim rests on the determination of whether Petitioner was a traveling employee at the time of his injury. After carefully considering the totality of the evidence and the relevant legal precedent, the Commission finds Petitioner did not meet his burden of proving he sustained a work-related injury that arose out of and in the course of his employment on May 8, 2018.

The Arbitrator provided an in-depth analysis of case law regarding the question of when an employee qualifies as a traveling employee. After considering the evidence and relevant case law, the Arbitrator determined that Petitioner was a traveling employee at the time of his injury. The Arbitrator further concluded that Petitioner's injuries arose out of and in the course of his employment. The Commission respectfully disagrees with the Arbitrator's conclusions.

Generally, an injury sustained by an employee while going to or returning from his place of employment neither arises out of nor is in the course of the employee's employment. *See Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n*, 2013 IL 115728, ¶ 16. However, Illinois courts recognize an exception to this general rule when an employee qualifies as a traveling employee. *Id*. at ¶ 17. A traveling employee is an employee whose work duties require them to travel away from their employer's premises. *Id*. In making this determination, Illinois courts have considered whether travel is an essential element of the employee's employment. *See e.g., Purcell v. Ill. Workers' Comp. Comm'n*, 2021 IL App (4th) 200359WC, ¶ 26. In particular, the courts consider whether travel away from the employer's premises is required for the employee to perform his job. However, the work-related travel must be more than the regular commute from the employee's home to the employer's premises. *See Pryor v Ill. Workers' Comp. Comm'n*, 2015 IL App (2d) 130874WC, ¶ 22. Courts have noted that traveling employees must expose themselves to the hazards of the roads and vehicles much more than the general public. *See e.g., Mlynarczyk v Ill. Workers' Comp. Comm'n (Obrochta)*, 2013 IL App (3d) 120411WC, ¶ 19. If an employee qualifies as a traveling employee, he is considered to be in the course of his employment from the time he leaves his home until he returns home. *See United Airlines, Inc. v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 151693WC, ¶ 20. Generally, an injury sustained by a traveling employee arises out of his employment if it occurred while the employee engaged in reasonable and foreseeable conduct. *Id*.

After reviewing relevant Illinois case law, the Commission is unable to identify a published appellate decision that directly addresses the facts presented in this matter.[1] However, a plethora

1 The Commission notes that the Illinois Appellate Court determined an employee did not qualify as a traveling employee in circumstances very similar to those presented in this matter in *Jones v. Moreman*, 2019 IL App (4th)

of appellate decisions that address the issue of determining whether an employee qualifies as a traveling employee reveal certain key factors courts consider. In conducting this analysis, courts consider whether the employee's position requires that he travel to multiple locations in a single workday. Another key factor courts consider is whether the employer provided a vehicle for the employee's use when traveling to the job sites. Courts also consider whether the employee received any compensation for the time and/or expenses he spent commuting from his home to the job site.

In this matter, it is undisputed that Petitioner never worked at Respondent's home office or its "shop." In fact, it is undisputed that Petitioner never worked or reported to any premises owned by Respondent. Instead, Petitioner reported each day to a job site assigned by Respondent. Respondent does not dispute that Petitioner could work at one site for only one day and be assigned to a different site the next day. Likewise, Petitioner could spend weeks or months working at the same job site. Prior to the date of accident, Petitioner worked regularly at the Berner Foods job site for a few months. There is no evidence that Petitioner's job duties regularly required him to travel to multiple job sites in a single day. In fact, Petitioner testified to only a single instance that occurred when his employment first began with Respondent where he attended mandatory training in one location for part of the work day and traveled to his assigned job site for the duration of his work shift. Petitioner does not dispute that Respondent never compensated him for his daily commute to his various assigned job sites. It is also undisputed that Respondent never provided Petitioner a company vehicle to use during his daily commute from his home to the designated job site. It is undisputed that Respondent did not control any aspect of Petitioner's daily commute. Furthermore, Petitioner was not responsible for transporting any tools or equipment owned by Respondent to his job sites.

The Commission finds that Petitioner does not qualify as a traveling employee. Instead, he sustained his significant injuries while engaging in his normal commute to work. While Petitioner never visited any property owned by Respondent, the Commission finds the job sites operated by Respondent for practical purposes qualify as Respondent's premises. The credible evidence shows that Respondent managed its various job sites and appeared to make decisions regarding the projects and job sites. From the evidence, it appears that Respondent made the decisions regarding when and how work would occur on each job site. Furthermore, Respondent determined which workers were needed each day on its project sites. While the nature of Respondent's work necessitates that the company operates various projects and job sites, that does not mean travel is an essential part of Petitioner's job. After all, Petitioner's only travel occurred during his daily commute from his home to the assigned job site and from the job site to his home. As such, Petitioner was not exposed to the hazards of the roads and vehicles any more than the general public. Additionally, Petitioner's daily commute to Respondent's job sites was not performed for Respondent's benefit. Instead, Petitioner was in the same position as the average worker who commutes each day to his job. While Petitioner sustained significant injuries on the date of accident, those injuries occurred during his normal daily commute to work.

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

180525WC-U. However, this is an unpublished decision and thus has no precedential value pursuant to Supreme Court Rule 23.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 9, 2020, is reversed in its entirety and all benefits are denied.

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

November 18, 2021

o: 9/21/21
TJT/jds
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/s/ *Maria E. Portela*
Maria E. Portela

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

DISSENT

I respectfully dissent from the opinion of the majority and would affirm and adopt the Arbitrator Decision. After considering the totality of the evidence, I believe Petitioner met his burden of proving by a preponderance of the evidence that the numerous and severe injuries he sustained on May 8, 2018, arose out of and in the course of his employment.

On the date of accident, Petitioner was a 45-year-old plumber and pipefitter. He worked solely for Respondent for over a year before sustaining his injuries. It is undisputed that during that entire period, Petitioner never worked at Respondent's home office or its "shop." It is also undisputed that Petitioner was consistently assigned to work at different project locations. Petitioner testified that he worked at an assigned job site until the foreman told him to report to a different site. It is undisputed that the foreman is an employee of Respondent. It is also undisputed that Petitioner was unable to select at which job site he would work. Petitioner had absolutely no control over the location of Respondent's project sites. The evidence clearly shows that Petitioner spent every single day he worked for Respondent away from Respondent's premises.

On the date of accident, Petitioner was on his way to his assigned job site at Berner Foods. Unfortunately, he was involved in a horrific motor vehicle accident and was severely injured. Petitioner has undergone several surgical procedures since the accident and has participated in ongoing physical therapy. While he is still not back to his pre-accident condition, he appears to be well on the road to recovery. However, he still requires ongoing medical treatment and has not been cleared to return to work in any capacity. As of the date of hearing, Petitioner had received no compensation or benefits from Respondent relating to this accident.

Given the undisputed facts regarding Petitioner's lack of a set work location, I respectfully

disagree with the opinion of the majority. The majority correctly states the applicable law; however, I believe the majority has incorrectly applied the law to the current facts. I believe the Arbitrator correctly interpreted and applied the relevant caselaw when concluding that Petitioner qualifies as a traveling employee. It is axiomatic that Illinois courts consider a traveling employee to be a worker whose job duties require him to travel away from the employer's premises. Here, Petitioner never set foot on premises owned, rented, or managed by Respondent. Instead, each workday he left his home to drive to that day's designated job site. Petitioner credibly testified that he could work one day at a site and then be assigned to a completely different site the next day. The majority admittedly is unable to cite to any published decision that supports its conclusion that a traveling employee's job must require the employee to travel to multiple locations in a single day. Likewise, the majority is unable to cite to any published decision supporting its determination that Respondent's job sites qualify as its premises. I believe the majority's reasoning creates a slippery slope that may ultimately disqualify countless employees as traveling employees despite the undisputed evidence that these employees must travel regularly away from the premises of their employers. These employees will continue to sustain injuries while driving to their ever-changing work sites.

It is abundantly clear that a key element of Petitioner's job as a union plumber and pipefitter is work and travel away from Respondent's premises. Thus, Petitioner clearly qualifies as a traveling employee. After carefully considering the evidence, I also believe that Petitioner's injuries on the date of accident unquestionably arose out of and in the course of his employment. The majority correctly states that courts generally consider a traveling employee to be in the course of his employment from the moment he leaves home until he returns home. Furthermore, when a traveling employee is injured, the injury is compensable if the activity performed by the employee falls within one of the following three categories: 1) acts the employer instructs the employee to perform; 2) acts which the employee has a common law or statutory duty to perform while performing duties for his employer; and 3) acts which the employee might be reasonably expected to perform incident to his assigned duties. *See Venture-Newburg-Perini v. Ill. Workers' Comp. Comm'n*, 2013 IL 115728 at ¶18. It is certainly reasonable and foreseeable that Petitioner would drive directly from his home to the assigned job site each day. After all, Petitioner could only perform his duties as a plumber and pipefitter after he traveled to each job site.

After weighing the totality of the evidence, I believe Petitioner met his burden of proving he sustained an injury arising out of and in the course of his employment on May 8, 2018. For the forgoing reasons, I would affirm and adopt the Arbitrator Decision in its entirety.

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

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

21IWCC0570

BOYDEN, RICHARD
Employee/Petitioner

Case# **19WC005677**

MECHANICAL INC
Employer/Respondent

On 3/9/2020, 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 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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STATE OF ILLINOIS)
)SS.
COUNTY OF Lake)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Richard Boyden
Employee/Petitioner
v.
Mechanical Inc.
Employer/Respondent

Case # 19 WC 5677

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 **Waukegan**, on **11/19/19**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **5/8/18**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$99,840.00**; the average weekly wage was **$1,920.00**.

On the date of accident, Petitioner was **45** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of **$5,120.00** for TTD, **$0** for TPD, **$0** for maintenance, and **$0** for other benefits, for a total credit of **$5,120.00**.

Respondent is entitled to a credit of **$312,116.37** under Section 8(j) of the Act.

ORDER

Arbitrator finds that the petitioner is a traveling employee and suffered an accidental injury on 5/8/18 while traveling to a job site which is causally related to several medical conditions.

Arbitrator orders Respondent to pay temporary total disability benefits from 5/9/18 to 11/19/19 for 79 6/7 weeks at a weekly rate of $1,280.00 for a total to trial date of $102,217.14.

Arbitrator orders Respondent to pay for medical bills pursuant to Section 8(a) and the Illinois Medical Fee Schedule as outlined in Petitioner's exhibit 15 in the amount of $583,383.49 and orders Respondent to hold Petitioner harmless for payments made by Plumbers and Pipefitters Local 23 UA Health and Welfare Fund pursuant to Petitioner's Exhibit 10.

Arbitrator orders Respondent to authorize and pay for prospective ongoing medical treatment with Dr. Goodspeed and Petitioner's other treating physicians.

Petitioner's Motion for Penalties and Attorney Fees is denied.

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

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

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

Signature of Arbitrator

March 6, 2020
Date

ICArbDec19(b)

MAR 9 - 2020

STATEMENT OF FACTS

The facts are undisputed in this case. The crucial issue was whether the Petitioner was a traveling employee at the time of the motor vehicle accident or not. If he was, then the claim is compensable. If not, then it is not compensable.

Petitioner is a member journeyman for the Plumbers and Pipefitters Union. He originally worked out of Local 597 in Chicago. While working out of Local 597, he was approached by Justin Lindeman asking if he wanted to work for Respondent, Mechanical Inc. out of Local 23's jurisdiction which is the Northwestern Illinois area. Petitioner then met with Justin at Local 23's office in Rockford, IL to discuss the job and fill out employment paperwork. TR 13.

They discussed that he would be working solely for Respondent Mechanical Inc. but that he would not be working at Respondent's physical location or premise. In fact, Petitioner testified that during the 19 months he worked there, Petitioner never went to Respondent's office location. Petitioner testified that he understood that the job would involve Respondent sending him to different job sites where Respondent was contracted to do work. He would go directly to each job site and would not first report to Respondent's location. He was not hired to work solely at one or two specific job sites but, instead, would be sent to any job site Respondent directed him to. TR 19. The nature of the work is such that Petitioner would be sent to whatever job site Respondent needed him to go to day to day. He would be told by a foreman each day what job site to report to the next morning and that he may spend several days or a couple weeks at each or he could go to a different site every day. TR 14.

At the meeting with Justin, Petitioner was directed to report for work November 21, 2016, at a job site in Stockton, IL called Pearl Valley Eggs. TR 15. Respondent had a contract to perform work at Pearl Valley Eggs. Petitioner testified he reported to Pearl Valley Eggs for work. From that point forward, he was told by a foreman at the end of each workday what job site he was to report to the next day. TR 16-18. In March of 2017, Petitioner transferred from Local 597 to Local 23 at the request of Respondent. Respondent had Petitioner working at job sites only within Local 23's jurisdiction. Petitioner testified

that between November 21, 2016 and May 8, 2018, he never once reported to or went to Respondent's business location. He reported directly to job sites directed by Respondent.

Petitioner testified that he drove his personal vehicle from his home, to the job site directed by the foreman, and back to his home. TR 21. He chose the safest and quickest route to each job site. TR 28. He was not compensated for travel to the job sites. TR 21. Petitioner testified that he had no control over where he was sent for work. He testified that if he refused work, he would have been laid off or terminated. TR 23. This was confirmed by Respondent's witness Justin Lindeman.

On May 8, 2018, Petitioner was on his way in his personal vehicle from his home to a job site at Berner Foods in Stockton, IL when he was involved in a head-on collision after another vehicle crossed the center lane hitting him. TD 28. PX 1, 2. He was alone in the vehicle. He lived about an hour from this job site. TR 29. This was not the first time he had reported to Berner Foods job site. See RX 1 and PX 16, 17. However, he was not working permanently at that location and he did not report to Respondent's location first. The driver who hit him died at the scene. Petitioner had to be extricated from the vehicle which took over an hour. He was then flown by Lifeline to Rockford Memorial Hospital. PX 2.

Petitioner suffered significant physical injuries which resulted in multiple surgeries. He has been limited to a wheelchair since the accident and has been unable to work. Respondent did not dispute the significance of the medical injuries, the reasonableness and necessity of treatment, the need for ongoing treatment, nor even his inability to work. Dr. Bryan Neal did a Section 12 exam and his report was admitted as RX 2. Briefly, Petitioner suffered right femur impaction and comminuted fracture of the tibial plateau, fracture of the right superior pubic ramus, right lateral meniscal tear, L1 vertebra fracture, C6-7 end plate fracture, nasal bone fractures, right rib fractures, multiple internal lacerations, intubation, left arm comminuted fracture to the proximal to mid-shaft of the radius and ulna with rotation and displacement of the distal fragment, right foot metatarsal fracture, left scapula fracture, left femur comminuted fracture of the shaft with angulation, impaction fracture to the midportion of the left

acetabulum, and comminuted fracture of the distal shaft of the left femur with displacement. He has undergone several surgeries to both legs, his arm, right hip, and left hip. He has been through extensive rehabilitation and has been hospitalized with pulmonary embolisms and severe infections with long term IV antibiotics. At the time of trial, he was still undergoing treatment and had a surgery to his left hip scheduled to take place.

Respondent denied benefits claiming Petitioner was not a traveling employee at the time of accident as he was traveling in his personal vehicle directly from his home to a job site. Petitioner argues he was a traveling employee from the moment he left his door because he was required by Respondent to travel to different job sites that are not Respondent's location, he was required to travel to different job sites each day, he never reported to work at the Respondent's location, he had no control where he was sent day to day, and he was not hired to work at only one location permanently. Both parties rely on the same undisputed facts.

CONCLUSIONS OF LAW

A. DID PETITIONER SUSTAIN AN ACCIDENTAL INJURY THAT AROSE OUT OF AND IN THE COURSE OF HIS EMPLOYMENT WITH RESPONDENT ON MAY 8, 2018?

The crucial issue in this case is whether Petitioner was a traveling employee when driving from his residence to a job site not owned or operated by Respondent, as directed, when he was involved in a motor vehicle accident. "The general rule is that an injury incurred by an employee in going to or returning from the place of employment does not arise out of or in the course of the employment and, hence, is not compensable." Commonwealth Edison Co. v. Industrial Comm'n, 86 Ill. 3d 534, 537 (1981). This is because an "employee's trip to and from work is the product of *his own decision* as to where he wants to live, a matter in which his employer ordinarily has no interest." Sjostrom v. Sproule, 33 Ill. 2d 40, 43 (1981).

An exception to the general rule applies, however, if the employee is a traveling employee. "Courts generally regard employees whose duties require them to travel away from their employer's premises

(traveling employees) differently from other employees when considering whether an injury arose out of and in the course of employment." Wright v. Industrial Comm'n., 62 Ill. 2d 65, 68 (1985). If a traveling employee is injured, the court then considers whether the employee's activity was compensable. Id. at 69. An injury to a traveling employee is compensable if 1) he is performing an act the employer instructs him to, 2) he is performing an act that he has a common law or statutory duty to perform while performing duties for the employer, or 3) he is performing acts which might be reasonably expected incident to his assigned duties. Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n, 2013 IL 115728; 1 N.E.3d 535, 540 (2013).

The first issue to be decided in the instant case is whether Petitioner was a traveling employee when he was driving from his home to Berner Foods in Stockton, IL to perform contract work for Respondent, Mechanical Inc., at the Berner Foods job site. Respondent argues that Petitioner was not a traveling employee because he was on his way to a job site where he had been before and knew he would be returning to at various times but concedes that the job site was not owned or maintained by the Respondent and was not a permanent job site. Petitioner argues that since he was not traveling to Respondent's location but was instead driving to a customer's location to perform work for Respondent, he was a traveling employee from the time he left his home until he returned home. There are several cases that are instructive on this issue and will be set forth below.

The primary case Respondent relies on is Venture-Newberg-Perini v. Ill. Workers' Comp. Comm'n [hereinafter referred to as "Venture-Newberg"]. Id. In Venture-Newberg, the Supreme Court held that the claimant was not a traveling employee. Claimant was a member of the Plumber and Pipefitter Union Local 137. Due to lack of work, claimant accepted a position outside of Local 137's territory at a job site 200 miles away for Venture-Newberg at the Cordova Nuclear plant. Id. at 537. Claimant voluntarily chose to relocate to a motel near the job site. Claimant and Venture-Newberg were clear that the work Venture-Newberg would have him do would take place solely at the Cordova Nuclear plant and that he was not going to be working at any other job sites. Id. at 538. While commuting from the motel to the

Cordova Plant, claimant was in a motor vehicle accident and injured. The Supreme Court in Venture-Newberg analyzed several cases addressing the traveling employee doctrine. After analyzing the case law and after careful consideration, the Supreme Court held that claimant was not a traveling employee. The primary reasons they found him to not be a traveling employee were:

> 1. Claimant took a position with Venture-Newberg at a single job site in Cordova, IL more than 200 miles from his home. Id at 538.
> 2. Claimant's "position with the Cordova plant was to be temporary"...and he would be "terminated at the completion of the job." Id. at 538.
> 3. Claimant was not working for Venture-Newberg on a long-term exclusive basis. Id. at 541.
> 4. Claimant was not required to take the job at the Cordova Plant for Venture-Newberg. Id. at 541.
> 5. Claimant had worked on four short term projects for Venture-Newberg in 2004 and 2006 and was laid off after each individual project and not considered an employee of Venture-Newberg between projects. Id. at 541.
> 6. Claimant was not directed to travel to different locations during each employment by Venture-Newburg. Id. at 541. In fact, Claimant worked only at a specific location and was not directed by Venture-Newberg to travel away from that work site to another location. Id. at 541.

Petitioner in the instant case argues that the facts here are distinguishable from Venture-Newberg. In the instant case, Petitioner did not voluntarily take a job assignment from Respondent to work in only one location hundreds of miles away. More significantly, Petitioner did not take a job where he worked at only one location nor could he choose where to live relative to that single location. None of the 28 job sites that Petitioner was sent to were permanent jobs lasting several months or year. Petitioner was never to be working at one single address or location like the employee in Venture-Newberg did. Furthermore, all witnesses confirmed that Petitioner could have been sent to different job sites throughout the day occasionally, but that he was in fact directed on what job site to which he had to report on a day by day basis. This is extremely different from the facts in Venture-Newberg where claimant was agreeing to work at only one location day after day. Petitioner relies on a multitude of other Supreme Court, Appellate Court, and Illinois Workers' Compensation Commission decisions in support of his position that he was a traveling employee from the time he left his home to travel to a job site that was not the Respondent's business location until such time as he returned home. What follows is a lengthy review of several of those cases.

In Wright v. Industrial Comm'n., the Supreme Court found claimant to be a traveling employee. 62 Ill. 2d 65 (1985). Claimant was a field erection supervisor who traveled out of state where he would stay for months at a time. The Court found claimant was a traveling employee because he was a permanent employee of and worked exclusively for the employer. Id. at 541. Furthermore, claimant had no choice as to where he was sent for work by the employer. He had to go where the employer directed him to. Id. Wright was distinguished from Venture-Newberg because Wright was a permanent employee and was required by the employer to travel to other locations; it was not voluntary to take the assignments. The instant case is similar because Petitioner worked exclusively for Respondent from November of 2016 until the accident. Petitioner never reported to Respondent's work location. Instead, Petitioner was told on a day by day basis what remote job site for customers that he was to report to. Respondent's witness confirmed that Petitioner could be disciplined or terminated if he refused to go to a location directed. There was nothing voluntary about Petitioner's agreement to report to the job sites. If he refused, he would likely have had to find work for another employer.

Similarly, in Chicago Bridge, the 5th District Appellate Court found claimant to be a traveling employee. 248 Ill. App. 3d at 688 (5th Dist. 1993). Claimant worked exclusively for employer for 19 years despite not being a permanent employee. He was required to travel to various job sites out of state where he would work for a period of time, staying in a motel, at a single location that was not owned by the employer. Claimant would be terminated upon completion of each job and then was rehired when a new job assignment from employer would come available. It was not voluntary as to whether Claimant traveled to various job sites. If he turned them down, he did not work for the employer. Additionally, he was compensated for mileage when traveling to job sites. The instant case is similar with the exception of the reimbursement for travel expenses. The evidence at trial suggested Petitioner was compensated only for 10 minutes before the start of the workday to 10 minutes after. He was not paid for travel to and from job sites. However, that is not the deciding factor. The courts clearly put more emphasis on 1) was the location owned by the employer and therefore their work premise, 2) did the employee work exclusively

for employer or could he work elsewhere as well, and 3) was it voluntary on where employee traveled for the work. These factors all point to the conclusion that Petitioner was a traveling employee from when he left his home until he returned.

The Supreme Court found a traveling salesman was to be a traveling employee in Urban v. Indust. Comm'n, 34 Ill. 2d 159 (1996). In that case, the court found it significant that claimant was regularly employed with the employer and he was directed to and required by his employer to travel to remote locations. Therefore, he was found to be a traveling employee. Again, this is the same as in the instant case.

The Supreme Court discussed in detail in the Venture-Newberg decision several other cases where they found claimants were traveling employees where they worked regularly for the employer and were required to or directed by the employer to travel to remote locations, sometimes daily or multiple times a day and sometimes for days, week, or even months at a time.. A field mechanic who traveled daily to work on equipment at customer's locations was a traveling employee in Howell Tractor & Equipment Co. v Indust. Comm'n. 78 Ill 3d 567 (1980). A union representative who traveled to meetings and hearings was a traveling employee in District 141 Int'l Ass'n of Machinists & Aerospace Workers v. Indust. Comm'n. 79 Ill. 2d 544 (1980). An employee of health services who traveled to different schools each day was a traveling employee in Hoffman v. Indust. Comm'n. 109 Ill. 3d 194 (1985). The 2nd District Appellate Court held that a bank manager who traveled to different bank branches daily was a traveling employee in Kertis v Ill. Workers' Comp. Comm'n, 2013 IL App. 2d 120252WC (2nd Dist. 2013). A truck driver was also found to be a traveling employee by the 1st Dist. Appellate Court in Potenzo v. Ill. Workers' Comp. Comm'n, 378 Ill. App. 3d 113 (1st Dist. 2007).

A further review of case law finds other relevant cases on point. Although the Arbitrator finds no case with the exact same factual scenario, the Arbitrator finds the following cases important to compare or distinguish from the instant case.

The 3rd Dist. Appellate Court found an employee was not a traveling employee in Allenbaugh v Ill. Workers' Comp. Comm'n. 2016 IL App. 3d 150284WC (3rd Sit. 2016). That case involved a police officer who, rather than being on patrol in his district, had to report to the police headquarters for mandatory training. On his way to the station, he was in an accident. The Court correctly stated that the "work related trip at issue must be more than a regular commute from the employee's home to the employer's premises." Id. at 15. At the time of the accident, claimant was driving to the employer's premises, police headquarters. Since he was traveling to employer's location and not a remote location, he was not a traveling employee. It is true that he was supposed to later travel to a remote location and had the accident happened on his way there, the result would have been different. However, this was nothing more than a regular commute to employer's premise. Allenbaugh is distinguishable from the instant case because Petitioner was not on his way to Respondent's premises or location. He was on his way to a job site for a customer of Respondent. Yes, he was going from his home to the job site, but that isn't the most important factor. The most important factor is where he was directed to go by the Respondent, and that was a remote location. Therefore, Allenbaugh supports the conclusion that Petitioner was a traveling employee.

Another case Respondent would try to rely upon is United Airlines Inc. v Ill. Workers' Comp. Comm'n. 2016 Ill App. (1st) 151693WC (1st Dist. 2016). That case involved a flight attendant who operated out of United Airline's domicile located in New York. The flight attendant chose to reside in Colorado and could have transferred her work domicile to Denver. However, the employee chose to keep working out of the New York work site. Therefore, when she reported to work, she had to travel to the employer's work location or work premises or work domicile in New York before she began her work assignment. As such, her voluntary choice to reside in Colorado and travel to New York to report for work meant that she was not a traveling employee until she reached her work location in New York. Once she arrived in New York and reported for work, she became a traveling employee wherever she was sent until she returned to New York. But the trip to New York was considered no different than a

police officer commuting to police headquarters. Id. 24, 32. This case is distinguishable from the instant matter because Petitioner never reported to the employer's location for work. He went from his home to a different job site which was not the employer's location each day. For the same reasons as stated in Allenbaugh above, United Airlines is distinguishable from the instant case.

The 2nd District Appellate Court considered the issue of door to door extensively in Pryor v Ill. Workers' Comp. Comm'n. 2015 IL. App. 2d (2nd) 130874WC (2nd Dist. 2015). Pryor involved a truck driver who drove over the road for work. He left his home (with his suitcase in hand) and fell getting into his car in his own driveway. Normally he would leave his home and drive to the employer's premises where he would get into the truck he was assigned and then travel to various locations delivering and picking up vehicles. Id. at 5, 22. The Appellate Court held he was not a traveling employee when he left his home because he first had to report to the employer's premises before he began work. He was not paid for the drive from his home to the employer's location. He also had to return after each trip to the employer's location before he could get into his personal vehicle and commute home. The court found it significant that he had to start and end at the employer's location, not at his home. Therefore, the court found that he was not a traveling employee until he got to the employer's location. Id. at 29. Pryor is very distinguishable from the instant case. In the instant case, Petitioner did not report each day to Respondent's location or business. He drove directly from his home to the job site and that job site could and did change daily. Therefore, he was a traveling employee from his door until he returned to his door after work.

In the Pryor decision, the Court took a hard look at the 3rd Dist. Appellate Court's decision in Mlynarczyk v. Ill. Workers' Comp. Comm'n. 2013 IL App. (3d) 120411WC (3rd Dist. 2013). That case also involved a claimant who had an injury leaving their home and getting into a company vehicle on their property. Claimant went home on lunch and when she went to leave, she slipped on the sidewalk getting into her work van. Id. at 6. The Court found that claimant did not work at a fixed job site but was required to travel to various locations. Therefore, the court found that she was a traveling employee from

the time she left her home until she returned. Id. at 16. This is identical to the instant case. Petitioner did not have a central job location. Petitioner's work for Respondent required him to travel to various job sites. Petitioner was injured while traveling to one of those job sites. Therefore, Mlynarczyk supports a finding that Petitioner was a traveling employee. As a side note, an important thing to note in this case is the Court's mention in a footnote that "Respondent concedes that claimant does not have a central job location and that claimant's work for respondent requires her to travel to various job sites. Respondent contends, however, that claimant's travel "is analogous to that of a "construction worker" and that "construction workers routinely travel to and from work sites and injuries that occur in that travel are not compensable because construction workers are not traveling employees. Respondent cites no authority for this proposition and we therefore do not address it." Id. at 16. As it is a footnote, it is not precedential. However, the Arbitrator notes that a thorough review of the case law shows no support for that position at all. In so far as Respondent, Mechanical Inc. argues a similar position, the Arbitrator finds there is no case law to support such a position and there are several other cases which would tend to draw the opposite conclusion to that position. Therefore, the Arbitrator finds there is no such legal preclusion of the application of the traveling employee doctrine to construction workers.

The Arbitrator also did a thorough review of IWCC decisions to see if there are any similar cases on point already decided by our Commission. The Arbitrator finds no case directly on point, but there are several that are persuasive that must be considered. In Masters v IL Dept. of Healthcare and Family Services, in addition to some time spent in her office on employer's premises, claimant was required to travel to different courthouses and circuit clerk's offices for research. 2018 Ill. Wrk. Comp. LEXIS 835 at 2 (2018). She did not travel away from her office every day, but on at least 11 days a month she would travel to courthouses or circuit clerks' offices. When going to a courthouse, she tripped on grass walking to her car. Id. at 3. The IWCC found that she was a traveling employee. Id. at 12. The IWCC held that since her duties required travel "away from her employer's premises to various locations...travel was an essential element of [her] employment and [she] is a traveling employee." Id. at 13. This case is

analogous to the instant matter. Petitioner in the instant case was required to travel away from Respondent's office to various locations. Therefore, travel was an essential element of his employment. This case supports a finding that Petitioner was a traveling employee when involved in the accident on the way to a job site.

This is contrasted against the IWCC's decision in Brustin v Brustin & Lundblad, LTD. 2019 Ill. Wrk. Comp. LEXIS 417 (2019). In that case, an attorney was called by his office about an early appointment he had forgotten. He was rushing to get ready at home and get to the office for that meeting when he was injured. The Commission found that he was not a traveling employee as he was traveling to the employer's location or premises. It doesn't matter if he was rushing to get there because of a work related emergent situation. Since he was going to the employer's office, he was just in his normal commute to work and was not a traveling employee. Again, this case is different than the instant matter. In the instant case, Petitioner was not traveling to the employer's location. He never went to the Respondent's location. He was traveling to a job site as required by the Respondent that was not their location. This case supports a finding that Petitioner was a traveling employee.

Another IWCC decision that supports a finding in favor of Petitioner is Rivera v County of Lake, 2015 Ill. Wrk. Comp. LEXIS 480 (2015). In Rivera, the IWCC found the employee to be a traveling employee. He worked as a special investigator for the state's attorney's office. He drove a state owned vehicle and was loading state owned equipment into the vehicle at his home when he slipped on ice. Since his job required him to spend the day traveling to various places to serve warrants and summons on individuals and, on that day, he was going to travel from his home to a location away from the employer's location, he was a traveling employee from the time he left the door of his home until he returned. This case is also similar to the instant case. Petitioner was driving to other locations and not to the Respondent's location from his home. The only difference is that he was driving to only one location and not several like the claimant in Rivera. But that difference, in light of the cases cited above, is not important. Petitioner was clearly a traveling employee.

One IWCC decision deals with a union plumber who worked for a single employer for several years just as the Petitioner in the instant case. In Dileonardi v City of Chicago, the claimant worked for the city but his job required him to, normally, report first to Respondent's office each day. 2017 Ill. Wrk. Comp. LEXIS 598 (2017). From there he would go out into the field where he would supervise and direct 5 or 6 work crews at various job sites throughout the area. Id. at 2. He would spend about 6 hours a day away from the office driving between locations. He was injured when he slipped on a curb at one such location away from the office. The IWCC found that from the time he left the office until he returned, he was a traveling employee. Id. at 45, 50.

In his thorough review of the case law, the Arbitrator did find a 1st District Appellate Court case that is almost directly on point to the instant case. Kenaga v. Ill. Workers' Comp. Comm'n, RULE 23, 2017 IL App. (1st) 161859WC (1st Dist. 2017). However, the case is a Rule 23 decision. The Arbitrator recognizes that Rule 23 decisions are not binding as precedential and the Arbitrator reviewed it with that understanding. However, it is important in so far as understanding that the IWCC's decision, which he can cite to and rely on, in the earlier proceeding was reversed and remanded for a finding that the employee was a traveling employee. The Appellate Court found that a police officer having to drive his personal vehicle to a courthouse on his day off for a mandatory court appearance associated with his work was a traveling employee since he was not on his way to his employer's location. Because of the Appellate Court's reversal, any citation to or reliance on the IWCC's original decision would be inaccurate. The Commission, on several occasions in the past, has acknowledged affirmations and reversals of their holdings where those decisions were Rule 23 holdings. See: Esposito v. Fleetwood Systems, Inc. 2000 Ill. Wrk. Comp. LEXIS 87 (2000); Bays v. Bermingham Steel Corp., 2001 Ill. Wrk. Comp. LEXIS 415 (2001); Kapanowski v Village of Merrionette Park Police Department, 2019 Ill. Wrk. Comp. LEXIS 366 (2019); Matlock v AMR-American Airlines, 1999 Ill. Wrk. Comp. LEXIS 18 (1999); Crackel v SIH Memorial Hospital of Carbondale, 2017 Ill. Wrk. Comp. LEXIS 309 (2017). Given that the Rule 23 decision of Kenega v. Ill. Wrk. Comp Comm'n so closely parallels the facts in the instant

case, the Arbitrator would be remiss to not acknowledge that the Commission's finding that claimant was not a traveling employee was reversed for sound reasoning. This just further supports the conclusion the Arbitrator had already reached that Petitioner, Michael Boyden, was a traveling employee at the time of the motor vehicle accident.

After the extensive review of case law, the Arbitrator finds that Petitioner was a traveling employee from the time he left his home traveling to the remote job site on 5/8/18. Petitioner was exclusively employed by Respondent. Petitioner did not report to Respondent's location or premises before going to a job site. Respondent did not hire Petitioner to work at only one location. It was understood by both Respondent and Petitioner that Petitioner would be sent to different locations, not owned or maintained by Respondent, each day. Respondent directed Petitioner what job site to report for work each day and that location changed daily. It was understood that although he may be told to report to one location for several days in a row, at the end of each and every workday, the location he was to report to the next day could change. Respondent had exclusive control over where Petitioner worked. Respondent could have had Petitioner work at a single location, but they did not. Although it was Petitioner's choice where to reside, he had no control day to day where he would be driving to for work. That was exclusively in the control of the Respondent. The day of the accident, Petitioner was driving the most direct route to the Berner Foods job site. Petitioner had been on that job site at various times during his employment but was not at that site exclusively. In fact, Petitioner testified he never started a job site and then worked exclusively on it until finished for Respondent. He was always moved around from one place to another day to day. Petitioner worked at a total of 29 different job sites between November of 2016 and May 8, 2018 all for Respondent. Petitioner was never guaranteed to work the same site day after day; therefore, he was unable to make plans based on specific locations since he never knew where he would be sent day after day. Petitioner was not able to make a personal choice on where his residence is located based on a location he would be working unlike the claimant in Venture-Newberg. Petitioner was sent to more than one location in a single day at times. If he refused to report to a specific job site, he would be disciplined

or terminated. The Berner Foods job site was not the closest job site to Petitioner's home and his home address did not change during the time he worked for Respondent. All of these facts support overwhelmingly that Petitioner was a traveling employee at the time of the accident on 5/8/18.

The second issue to be analyzed in determining whether the accident arose out of and in the course of the employment is whether the activity the employee was engaged in at the time of the injury was reasonable and foreseeable. Wright at 62 Ill. 2d 65 at 69. Only those which arise out of acts which the employee is instructed to perform, acts which he has a common law or statutory duty to perform, or acts which the employee might be reasonably expected to perform incident to his duties are compensable. Id. It is entirely reasonable and foreseeable that Petitioner would be driving from his home to the job site on the most direct route available. It is entirely reasonable and foreseeable that he may be in a motor vehicle accident on his way which was caused by the negligence of another party. The Supreme Court found in Wright that a motor vehicle accident while driving to a job site is both reasonable and foreseeable. Id. at 67.

As such, the arbitrator finds that the petitioner was engaged in an activity that was reasonable and foreseeable while traveling to a job site. Therefore, the Arbitrator finds that Petitioner suffered an accidental injury that arose out of and in the course of his traveling employment for Respondent on May 8, 2018 and awards benefits consistent therewith.

B. DID PETITIONER GIVE NOTICE TO RESPONDENT OF THE ACCIDENT?

The facts regarding notice are not in dispute. Petitioner was in a motor vehicle accident on May 8, 2018 on his way to a job site at Berner Foods at the direction of the Respondent. Respondent was made aware of the accident the same day as confirmed by Respondent's witness Chris Loring. Petitioner was not able to come into work nor return to work after the accident due to the injuries. Respondent was aware of the accident and injuries on May 8, 2018. Respondent argues that it was not notified that petitioner was alleging it was a work-related injury until January of 2019 when one of the supervisors, Steve Peterson, mentioned it to Chris Loring. It is undisputed that Petitioner filed an Application for

Adjustment of Claim on February 25, 2019. Arb. X 2. Respondent argues that actual notice of the accident, without indicating that he intended on pursuing it as a work-related injury within 45 days of May 8, 2018 does not meet the requirements of statutory notice. The Arbitrator disagrees. Section 6 of the Act requires notice of an injury within 45 days of the accident but Section 6(c)(2) mandates a liberal construction of the issue of notice. Atl. & Pac. Tea Co. v Indus. Comm'n, 67 Ill. 3d 137 (1977). "Where there was no evidence that a claim was fraudulent, nor was there any indication that the alleged insufficiency of notice prejudiced the employer by preventing disclosure of facts which might otherwise have been discovered or by causing aggravation of the claimant's injury due to lack of proper medical treatment, under these circumstances a liberal construction of the statutory notice provision was justified." United States Steel Corp. v. Industrial Comm'n, 32 Ill. 2d 68 (1964). This section does not require the notice to an employer of injury to an employee be in any precise or technical form. A. T. Willett Co. v. Industrial Comm'n, 287 Ill. 487, (1919).

It is undisputed that Respondent knew about the accident the day it happened. And Petitioner filed the Application for Adjustment of Claim well within the 3-year statute of limitations. Respondent failed to present any evidence at all to suggest they were prejudiced in any way by the delayed filing of the Application for 8 months. Furthermore, the Arbitrator notes Petitioner was unresponsive and intubated in the ICU followed by a lengthy stay at the hospital and then in a rehab facility for several months which would prevent him going to the Respondent to discuss it. Therefore, the Arbitrator finds that Petitioner gave timely notice of the accident as required by section 6 of the Act.

C. IS PETITIONER ENTITLED TO BENEFITS INCLUDING MEDICAL BILLS, PROSPECTIVE MEDICAL TREATMENT, AND TTD BENEFITS?

Respondent disputed causal connection, payment of medical bills, approval of prospective treatment, and payment of temporary total disability benefits based on liability for accident and notice only. Having found that Petitioner sustained a compensable injury at work on May 8, 2018, the Arbitrator finds that Petitioner is entitled to such benefits.

The Arbitrator orders Respondent to pay TTD benefits of $1,280.00 a week for 79 6/7 weeks for a total through the date of trial owed of $102,217.14. Respondent is entitled to a credit for $5,120.00 in TTD paid prior to trial.

The Arbitrator orders Respondent to pay for medical bills pursuant to Section 8(a) and the Illinois Medical Fee Schedule as outlined in PX 15 in the amount of $583,383.49 and orders Respondent to hold Petitioner harmless for payments made by Plumbers and Pipefitters Local 23 UA Health and Welfare Fund pursuant to Petitioner's Exhibit 10.

Arbitrator orders Respondent to authorize and pay for prospective and/or ongoing medical care with Dr. Goodspeed and Petitioner's other treating physicians for reasonable and necessary medical treatment causally related to the May 18, 2018 accident.

D. SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT?

After careful consideration of the facts and case law, the Arbitrator finds that Respondent had a reasonable legal basis in disputing the compensability of this claim. Specifically, the Arbitrator finds that both parties tendered strong legal arguments in support of their respective legal positions on the issue of whether the petitioner was a travelling employee. Therefore, the petitioner's attorney Motion for Penalties and Attorney's Fees is denied.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016821
Case Name	DAVILA, ISMAEL v. INTERNATIONAL DECORATORS, INC
Consolidated Cases	18WC016822
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0571
Number of Pages of Decision	21
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Steven Saks
Respondent Attorney	Joseph Garofalo

DATE FILED: 11/18/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ISMAEL DAVILA,

Petitioner,

vs. NO: 18 WC 16821

INTERNATIONAL DECORATORS, 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, notice, temporary total disability benefits, medical expenses 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 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 reverses the Arbitrator's decision regarding accident. Moreover, the Commission finds that the Petitioner met his burden in proving a causal connection between the work accident of October 26, 2017 and his current condition of ill-being regarding the right shoulder and awards temporary total disability benefits and medical expenses.

In considering the totality of the evidence, the Commission finds that Petitioner sustained an acute accident arising out of and in the course of his employment on October 26, 2017. The Petitioner credibly testified that on October 26, 2017 he was mixing Durabond by hand and taping, scraping, and manually sanding. (Px9, pp. 9-10) The Petitioner testified that he was doing everything by hand as he was working in a hospital setting where dust and noise must be kept to a minimum. (Px9, p. 10) Whilst performing this work, Petitioner sustained increased pain in his wrist and right shoulder. The

pain reached a point that Petitioner called his doctor and reported the problem to his employer. (Px9, pp. 12-13)

On October 31, 2017, Petitioner was seen at Advocate Occupational Health at which time he complained of pain to his right shoulder and right wrist. He also complained of numbness to his right thumb, index and middle fingers. (Px1) Petitioner was diagnosed with right carpal tunnel syndrome and was placed on light duty. (Px9, pp. 14-15, Px1) On December 5, 2017, Petitioner was released at full duty. (Px1) Petitioner continued to work full duty without incident but testified as to an increase in pain that occurred on April 5, 2018. (T. 29) On May 1, 2018, Petitioner saw his primary care physician with continued complaints of right shoulder pain. (Px2) Petitioner was given an orthopedic referral.

On May 7, 2018, Petitioner first saw Dr. Ho. Dr. Ho ordered an MRI which Petitioner underwent on May 11, 2018. On May 14, 2018, Dr. Ho diagnosed Petitioner with a full-thickness rotator cuff tear, recommended arthroscopic rotator cuff repair and placed Petitioner on light duty restrictions. (Px4)

On February 26, 2019, Petitioner underwent surgery consisting of a right rotator cuff repair which was performed by Dr. Ho. (Px4) Following surgery, Dr. Ho took Petitioner off work indefinitely. Post surgery, Petitioner had continuing struggles with shoulder stiffness despite attending therapy. On September 30, 2019, Dr. Ho released Petitioner to light duty work beginning October 7, 2019. (Px4) When Petitioner returned to Dr. Ho on November 27, 2019, he continued to complain of stiffness and reported he was off of work because his restrictions could not be accommodated. (Px4)

On March 4, 2020, Petitioner returned to Dr. Ho with continued complaints of persistent stiffness and mild persistent discomfort. Dr. Ho continued the light duty restrictions and ordered an MRI of the right shoulder. (Px4) On March 23, 2020 Dr. Ho's office called Petitioner to discuss the results of the MRI and to recommend surgery consisting of manipulation under sedation to the right shoulder. Dr. Ho advised that surgery could not be scheduled at that time because of Covid. (Px4)

On May 1, 2020, Dr. Ho again examined Petitioner and scheduled surgery on June 30, 2020. He again released Petitioner to light duty work until the date of the surgery. (Px4) On June 30, 2020, Petitioner underwent surgery for frozen shoulder. On August 26, 2020, Dr. Ho saw Petitioner for a follow up visit and felt Petitioner was improving. Dr. Ho released Petitioner to light duty work and again Petitioner's restrictions were not accommodated. (Px4) On October 21, 2020, Petitioner returned to Dr. Ho with continued improvement and Dr. Ho increased the weight limit for Petitioner's lifting restrictions from 10 pounds to 25 pounds, and again released him to light duty work. (Px4)

On April 23, 2018, Petitioner attended an independent medical examination (IME) with Dr. Balaram. On June 12, 2018, Dr. Balaram prepared an IME addendum after review of the May 11, 2018, MRI. On February 24, 2020, Dr. Balaram conducted an additional IME examination of Petitioner. Dr. Balaram opined that Petitioner's condition was a result of the medications Petitioner was taking for his rheumatoid arthritis, that the rotator cuff tear was a result of the degenerative condition secondary to the rheumatoid arthritis and that Petitioner did not suffer a work injury. Dr. Balaram placed Petitioner at MMI as of March 2, 2020.

The Commission finds Dr. Ho's opinions to be more persuasive than those of Dr. Balaram regarding the need for the February 26, 2019 surgery, June 30, 2020 surgery and additional physical therapy. Dr. Balaram's opinion that Petitioner was at MMI as of March 2, 2020 is contradicted in Dr. Balaram's own notes. Dr. Balaram noted that Petitioner continued to have right shoulder pain through all ranges of motion, as well as right-sided neck pain, shoulder pain, arm pain, forearm pain, hand and wrist pain and right-sided back pain. Further, Dr. Balaram noted that Petitioner only had nearly full *passive* range of motion. (RxA, 3/2/20 report) When Dr. Ho saw the Petitioner on March 4, 2020, he still noted Petitioner's ongoing stiffness in the right shoulder. (Px4)

The Commission also finds Dr. Balaram's opinions to be flawed. First, Dr. Balaram mistakenly believed Petitioner did not report shoulder pain until his visit to Dr. Trauscht on November 9, 2017. (RxA, p. 19, 58 and 4/27/18 report) However, Dr. Trauscht's records indicated Petitioner reported shoulder pain to him at the time of his initial visit on October 31, 2017. (Px1) Petitioner also reported right shoulder pain during his recorded statement to the insurance carrier for his employer on November 3, 2017. (Px3)

Additionally, the Commission finds Dr. Balaram's opinion to be internally inconsistent. On the one hand, Dr. Balaram attributed the rotator cuff tear solely to Petitioner's rheumatoid arthritis. (RxA, 4/27/18 report) He opined there was no specific accident and that Petitioner's current condition of ill-being was attributable to the rheumatoid arthritis rather than being caused by the repetitive work activities. (RxA, p. 22)

On the other hand, Dr. Balaram testified that the rheumatoid arthritis is a contributory cause but that use of the arm in general would be a factor in the development of rotator cuff pathology. (RxA, p. 86) Dr. Balaram agreed that "someone who performs overhead actions on a daily basis like a drywall taper, who also has rheumatoid arthritis, that he's going to be more likely than a member of the general public to sustain a rotator cuff tear as a consequence of the repetitive work, if there was an accident or an injury, absolutely, I would say that that's the case." (RxA, p. 94) Lastly, Dr. Balaram also opined that Petitioner's diabetic condition was a contributory factor in his development of rotator cuff pathology. (RxA, p. 86) However, there is no indication in the medical records that Petitioner had diabetes. As highlighted herein, Dr. Balaram's opinions are not convincing.

The Commission finds Dr. Ho's opinions persuasive in that he acknowledged Petitioner's history of rheumatoid arthritis yet opined that the Petitioner's work was probably a contributing factor to Petitioner's development of the rotator cuff tear. (Px10, pp. 9-10, 22) Although rheumatoid arthritis can make Petitioner more susceptible to having a rotator cuff tear, Dr. Ho testified that overhead work could accelerate or bring about a rotator cuff tear. (Px10, pp. 9-10, 36)

Based on the foregoing, the Commission finds that Petitioner met his burden that his work accident, at a minimum, was a contributory cause of the right shoulder condition. The Commission awards Petitioner temporary total disability benefits from February 26, 2019 through October 28, 2020. Although the Petitioner was released to light duty work, he never returned to work following the February 26, 2019 surgery as no work was available within his restrictions. The Commission gives Respondent a credit for $60,454.19 for temporary total disability benefits already paid.

Moreover, the Commission awards Petitioner reasonable and necessary medical expenses subject to the fee schedule. Petitioner did not submit evidence of outstanding bills at the time of the

hearing on Arbitration as his group health plan covered his medical bills after the Respondent denied his claim. The Commission finds that, pursuant to the parties' stipulation, Respondent shall reimburse the insurance carrier for the reasonable and necessary expenses related to the right shoulder, and shall also be responsible for payment of reasonable and necessary expenses causally related to the right shoulder that were not covered by Petitioner's group health plan, pursuant to the fee schedule.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $1,185.87 per week for a period of 87 2/7 weeks, from February 26, 2019 through October 28, 2020, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any. Respondent shall receive a credit in the amount of $60,454.19 for TTD paid.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent reimburse the group insurance carrier for the amounts they paid for the reasonable and necessary medical expenses the Petitioner incurred for this injury and otherwise pay all unpaid reasonable and necessary medical expenses under §8(a) of the Act subject to the fee schedule in §8.2 of the Act.

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

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

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

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

November 18, 2021

/s/ *Maria E. Portela*

MEP/dmm
O: 09/21/21
49

/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

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

21IWCC0571

DAVILA, ISMAEL
Employee/Petitioner

Case# **18WC016821**
18WC016822

INTERNATIONAL DECORATORS INC
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0696 SAKS ROBINSON & RITTENBERG
STEVEN R SAKS
162 N FRANKLIN ST SUITE 300
CHICAGO, IL 60606

1109 GAROFALO SCHREIBER STORM
JOSEPH A GAROFALO
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ismael Davila,
Employee/Petitioner,

v.

International Decorators, Inc.,
Employer/Respondent.

Case # **18** WC **016821**

Consolidated cases: **18 WC 016822**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah J. Baker**, Arbitrator of the Commission, in the city of **Chicago**, on **October 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **October 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 $**92,498.12**; the average weekly wage was $**1,778.81**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

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

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

ORDER

The Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of employment on October 26, 2017 and the Petitioner's right shoulder condition of ill-being is not causally related to the October 26, 2017 injury.

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

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

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

Signature of Arbitrator

December 28, 2020
Date

ICArbDec19(b)

DEC 28 2020

FINDINGS OF FACT

This matter proceeded to arbitration on October 28, 2020. In light of the Covid-19 pandemic, the parties agreed to obtain the testimony of the Petitioner, Ismael Davila, via a video evidence deposition through Zoom. The arbitrator was provided with a transcript of the Petitioner's testimony, as well as the video recording of the proceeding.

With respect to both case nos. 18WC016821 (October 26, 2017) and 18WC016822 (April 5, 2018), the parties are in dispute as to whether an accident occurred on both October 26, 2017 and April 5, 2018, whether the current right shoulder condition is related to one or both of the alleged accident dates, whether Respondent is liable for medical expenses, whether the petitioner is entitled to temporary total disability benefits (TTD), and whether Respondent is liable for prospective medical care. The parties agree that if the case is found to be compensable, the Respondent will reimburse the group health insurance carrier for the reasonable and necessary medical expenses the Petitioner incurred for this injury and otherwise pay all unpaid reasonable and necessary medical bills pursuant to the fee schedule.

TESTIMONY

Testimony of Ismael Davila, Petitioner

At the time of both disputed accidents, Petitioner, Ismael Davila was 50 years old, married, and with no dependent children. Petitioner testified that he has an elementary level education from Mexico. (PX4, p. 213). He testified through a Spanish interpreter and speaks little English. (PX9, p. 13). He worked full time for Respondent, International Decorators Inc., and was a member of the Union. (PX9, p. 6). He worked 40 hours per week and his shift was typically from 7:00am – 3:00pm. (PX9, p. 6). He was a "taper" and his job was to finish drywall in preparation for painting. (PX9, p. 7). He had begun performing this job for this company in 2002. (PX9, p. 6). He has been a drywall taper since 1998. (PX9, p. 7).

Petitioner testified that he had been diagnosed with rheumatoid arthritis 22 years ago. (PX9, p. 8). When his rheumatoid arthritis flares up, he feels swelling in his ankles and knees and also feels it in his lower back. (PX9, p. 8). He takes prescribed medicine for his rheumatoid arthritis which he has taken for the past 22 years. (PX9, p. 34). The medicine helps him, and at no time prior to October 26, 2017 had he ever missed work due to his rheumatoid arthritis. (PX9, p. 9). After his shoulder began hurting on October 26, 2017, he noticed no simultaneously elevated symptoms of his rheumatoid arthritis. (PX9, p. 36).

Petitioner testified that his job includes using a tool called a "bazooka." A "bazooka" is a tool loaded with materials such as tape and drywall compound and weighs about 20 to 25 pounds when loaded with material. (PX9, p. 19). The user has to pump the bazooka full of materials for every 20-25 feet of tape that is applied. (PX9, p. 19). A "bazooka" is used to apply flat tape and angled tape to seams of drywall, both on the walls and on the ceiling. (PX9, p. 17). A video demonstrating the use of a "bazooka" is included in the record. (CD-ROM-Davila Dep Ex. 8) He mainly uses his right hand and arm to perform his work duties, however, he holds the bazooka in his left hand and uses both hands to use the angle box. (PX9, p. 7). Additionally, Petitioner performs hand sanding and pole sanding of the walls and occasionally ceilings. Petitioner also operates scissor lifts and works on baker scaffolds." (PX3, p. 148). The job requires intermittent lifting, carrying, pushing and pulling over 50 pounds. (PX3, p. 148). When not at work, he does not go to the gym or play any sports or do any side jobs. (PX9, p. 7).

Petitioner testified that on October 26, 2017, Petitioner was working at a hospital. (PX9, p. 5-6). His tasks included taping the rooms where patients recuperate in the hospital. (PX9, p. 9). His job included taping the walls and manually sanding. (PX9, p. 9). He also manually mixed Durabond powder (drywall mud) with water in a pail. (PX9, p. 9). He was manually sanding, instead of using power tools, in order to reduce dust and noise because the hospital was open and patients were present. (PX9, p. 10). Normally, he would use power tools to mix the Durabond, but he could not do so at the hospital. (PX9, p. 10). While mixing the Durabond, Petitioner felt pain in his wrist and then his right shoulder. (PX9, p. 10). Petitioner is right-handed. He had previously felt pain in his hand and wrist for about 6-7 months prior, which would resolve with rest, but his shoulder pain started on October 26, 2017, while mixing Durabond drywall mud. (PX9, p. 29). Petitioner continued working that day. (PX9, p. 12). The pain got better over the weekend, but he was still experiencing pain, so he called Dr. Garcia, his primary doctor on Monday, October 30, 2017. He told Dr. Garcia about the tingling in his hands and about the pain in his right shoulder. (PX9, p. 12-13).

Petitioner testified he called his employer and spoke to Peter Graham, the Safety person for Respondent. (PX9, p. 13). Peter Graham directed Petitioner to stop seeing Dr. Garcia and to start seeing Dr. Ann Trauscht at Advocate Occupational Health. (PX9, p. 14). Petitioner testified that he stopped seeing Dr. Garcia and started seeing Dr. Trauscht because Peter Graham sent him there. (PX9, p. 16-17).

Petitioner testified he treated with Dr. Trauscht on October 31, 2017. When he arrived, Peter Graham was already at the appointment. (PX9, p. 14). Peter Graham then spoke privately with Dr. Trauscht after Petitioner was examined. (PX9, p. 14). Petitioner testified that he informed Dr. Trauscht about his shoulder pain, but Dr. Trauscht only focused on Petitioner's hand and fingers. (PX9, p. 14).

Petitioner testified that on December 5, 2017, after being examined, Peter Graham had another private visit with Dr. Trauscht. (PX9, p. 16). Dr. Trauscht then released Petitioner to full duty work effective December 5, 2017. (PX9, p. 16).

Petitioner testified that Respondent's insurance carrier transcribed a translated phone interview with Petitioner on November 3, 2020. (PX3, p. 211-235). During the phone interview, Petitioner noted that he is right-handed (PX3, p. 213). He stated that he did not have a second job. (PX3, p. 215). He stated that he had previously had some occasional pain in his fingers and wrist. (PX3, p. 219). However, Petitioner noted that he had recently begun feeling pain close to the shoulder, "between the arm and the elbow." (PX3, p. 220). He reported that the pain had started on October 26, 2017. He stated that he had tried to tell Dr. Trauscht about this pain in "the top part of [his] shoulder" but she did not pay attention to it. (PX3, p. 221). Petitioner admitted having high blood pressure and rheumatoid arthritis but denied having diabetes. (PX3, p. 234).

Petitioner testified he returned to Dr. Trauscht on November 9, 2017. Petitioner was again given a 25-pound lifting restriction by Dr. Trauscht. (PX4, p. 17). Petitioner continued working with restrictions for several days until he went to Mexico for three weeks because his mother had died. (PX9, p. 16).

Petitioner testified that upon his return, he visited Dr. Trauscht on December 5, 2017. After being examined, Peter Graham had another private visit with Dr. Trauscht. (PX9, p. 16). Dr. Trauscht then released Petitioner to full duty work effective December 5, 2017. (PX9, p. 16). Petitioner resumed working full duty for Respondent after that. (PX9, p. 17). His right shoulder still hurt, but he continued to work as a drywall taper. (PX9, p. 17). Petitioner testified that he continued to have pain in his right shoulder but that he continued working. (PX9, p. 17). Petitioner worked uneventfully until April 5, 2018. (PX9, p. 17).

Petitioner testified that on April 5, 2018, Petitioner performed work at Palos Hospital. (PX9, p. 17). That morning, he used a "Bazooka" tool and then after lunch he worked with an "angle box." (PX9, p. 17). An "angle box" is a pole mounted tool used to smooth the tape in the corners of the walls and between the walls and the ceiling. (PX9, p. 19-20). A picture of this tool was introduced into evidence as an exhibit to Ismael Davila's testimony. While working with the "angle box" after lunch, he felt stronger pain in his right shoulder. (PX9, p. 20). His right shoulder felt "very bad." (PX9, p. 21). He reported this increased pain to his foreman "Julian" but he continued working. (PX9, p. 21).

Petitioner testified he attended a Section 12 examination with Dr. Balaram. After that examination, Respondent moved Petitioner to another jobsite where he had to work by himself. (PX9, p. 23). Petitioner was feeling increased shoulder pain while working by himself, and reported this to the superintendent. (PX9, p, 23).

The superintendent sent a worker named Marcelo to help Petitioner with his work. (PX9, p. 23).

Petitioner testified that he returned to Dr. Garcia on May 1, 2018 and advised him of the right shoulder pain. Dr. Garcia referred Petitioner to Dr. Erling Ho, a shoulder specialist. He continued working at restricted duty until he had surgery on February 26, 2019. He has been off work since that surgery.

Petitioner testified his first rotator cuff surgery with Dr. Ho took place on February 26, 2019. The delay between the surgical recommendation and the actual surgery was due to coordinating insurance coverage due to Respondent's denial, and the surgery was paid for by Petitioner's own health insurance. (PX9, p. 26). Petitioner continued to work for Respondent in a light duty capacity until the date of the surgery. After the surgery, Dr. Ho ordered Petitioner to remain off work after the surgery. (PX9, p. 26). Despite the physical therapy, Petitioner continued to have functional deficits. (PX9, p. 27). Eventually, Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction, but the employer would no longer accommodate any restrictions. (PX9, p. 43).

Petitioner testified that he underwent physical therapy until Dr. Ho performed a second surgery on June 30, 2020. Dr. Ho ordered Petitioner to remain off work after the surgery. On October 21, 2020, Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction. The Respondent has not accommodated these restrictions and Petitioner remains off work. His group insurance paid his medical expenses. He has received no payment since February 2020. Petitioner's right arm and shoulder movement and strength have improved, but he is still weak and has limited movement. (PX9, p. 28). Petitioner's left shoulder felt fine as of the day of the arbitration hearing and he testified that he has never had medical treatment for the left shoulder. (PX9, p. 28) Although Petitioner testified that his left hand has been hurting, he has never had medical treatment for the left hand. (PX9, p. 28) Petitioner would like to obtain additional treatment from Dr. Ho. (PX9, p. 28-29) If released to return to work at full duty by Dr. Ho, he intends to return to work. (PX9, p. 43). He hopes to be released when he sees Dr. Ho at the end of October 2020. (PX9, p. 43).

On cross-examination, Petitioner reiterated that he was first diagnosed with rheumatoid arthritis over 22 years ago. Petitioner testified that at that time, he went to Cook County Hospital due to swelling in both ankles and knees. He took Prednisone until 5 to 6 years ago when Azathioprine replaced the Prednisone. He has also treated during the entire 22 years with Cimzia injections, which he gives to himself every 15 days. He had been using the injections of Cimzia until 3 to 4 months ago. Both medications are to treat his condition of rheumatoid arthritis. The condition of his ankles and knees has been stable over the years. Since October 2017, through

the present, the condition in his ankles and knees has not changed: they are no better and no worse. He denied ever being diagnosed with diabetes.

Petitioner testified that in he uses a bazooka between 30 minutes to two hours in a day. However, Petitioner testified that he does not use a bazooka every day. (PX9, p. 32). Petitioner testified that he performed work above his shoulders all day except when working on the low corners of walls. (PX9, p. 33).

Petitioner testified that when Dr. Garcia first saw him on October 30, 2017, he gave a history of tingling symptoms, numbness in his right thumb, index, ring fingers, and right shoulder. He told Dr. Garcia that he had these symptoms for one year. The Petitioner noted that he had been treated previously with Dr. Garcia over the years for other unrelated medical problems. Petitioner testified that on October 31, 2017, when he saw Dr. Trauscht, he told her that he experienced these symptoms for 6-7 months. He also testified that he experienced these symptoms at night while sleeping and with repetitive work. Petitioner testified that his symptoms were minimal after not working while in Mexico from November 11, 2017 to December 3, 2017. On December 5, 2017, he advised Dr. Trauscht that the level of his pain had lessened and was minimal. He was discharged from treatment and released to return to work performing regular work duties at that time. Finally, Petitioner testified that on May 7, 2018, when he first saw Dr. Ho, he told him that he had these symptoms for about one year.

Petitioner denied ever having any symptoms in his left shoulder. Over the years, doctors at the clinic at Cook County Hospital prescribed most of his medications for rheumatoid arthritis. During the past few years, Dr. Garcia prescribed all medications he takes except Cimzia, which continues to be prescribed by the clinic at Cook County Hospital. He expects to be released from treatment by Dr. Ho when he sees him at the end of October 2020, and if released to return to work performing full duty, he intends to do so.

MEDICAL RECORDS

On October 30, 2017, Petitioner presented to Dr. Bernardino Garcia, Petitioner's primary care physician. Dr. Garcia's note states that Petitioner reported "one year of tingling and numbness of the right thumb index finger and partially the ring finger." Dr. Garcia also noted that the pain was made worse with repetitive motion at work and Petitioner's symptoms improved with rest. Dr. Garcia diagnosed Petitioner with right hand carpal tunnel syndrome, hypertension, hyperlipidemia, and rheumatoid arthritis. Dr. Garcia prescribed medication. (PX2)

On October 31, 2017, Petitioner treated with Dr. Trauscht at Advocate Occupational Health. The note indicates that Petitioner reported an October 26, 2017 date of injury. On the "Work Comp Initial Progress Note," it indicates that

Petitioner complained of right-hand numbness and tingling in addition to pain to the right shoulder and wrist. A handwritten "Worker's Statement of Initial Injury Report" states "numbness to Rt thumb, Index, and middle finger from repetitive motion – Per Peter Graham." Dr. Trauscht recommended that Petitioner wear a splint, avoid excessive flexion and extension and follow up with a rheumatologist or primary care physician. Dr. Trauscht released Petitioner to work with 25-pound lifting restrictions. The typewritten office note (Invoice # 675798) does not mention Petitioner's right shoulder pain. The typewritten office note states that Petitioner's primary problem was tingling and loss of sensation in the right thumb, right index finger and right middle finger that began 6 to 7 months before. Petitioner's symptoms worsened while sleeping and with repetitive use. Dr. Trauscht released Petitioner to work with a 25-pound lifting restriction, and Petitioner worked within these restrictions. (PX1, PX9, p. 15).

On November 9, 2017, Petitioner returned to Dr. Trauscht at Advocate Occupational Health. On the "Work Comp Follow-Up Progress Note," it states that Petitioner "Feels a little better. Has a little less numbness. Has more feeling to thumb, and less numbness to 2nd & 3rd digit. Still has pain by shoulder." Dr. Trauscht diagnosed Petitioner with CTS and right shoulder strain and released Petitioner to work with 25-pound lifting restriction noting that Petitioner should "avoid repet R wrist motion." (PX1, PX4, p. 17).

On December 5, 2017, upon returning from Mexico, Petitioner followed-up with Dr. Trauscht. The handwritten work status discharge instructions state that Petitioner's diagnoses were right shoulder and right wrist strain. The typed note (Invoice # 676890) states that Petitioner's chief complaint was numbness to fingers and right hand and Petitioner reported that his hand numbness had improved. The note also states: "now complains of pain anterior right shoulder with elevation in the anterior plane and work above shoulder." Dr. Trauscht discharged Petitioner to a home exercise program and released him to full duty work. (PX1, PX4, p. 17).

On April 23, 2018, Dr. Balaram examined Petitioner pursuant to Section 12 of the Act at Respondent's request and issued a report on April 27, 2018. He opined that the Petitioner was not magnifying his symptoms. (RX1, p. 17). On exam, he noted a positive Hawkins, Neer, Speed, and O'Brien's tests, and reduced strength in the infraspinatus and supraspinatus. (PX3, p. 12). He opined that the Petitioner had some a right shoulder impingement and degenerative rotator cuff tendinopathy. (RX1, p. 17). However, he opined that the Petitioner's condition was degenerative and that it was secondary to his rheumatoid arthritis rather than any work activities. (RX1, p. 22). This opinion was based on his understanding that there was no accident, trauma, or injury reported by the Petitioner that led to development of shoulder pain. (RX1, p. 22). Dr. Balaram opined that the Petitioner should be limited to working with a 5-pound overhead lifting restriction "until his inflammatory response had subsided." (RX1, p. 22).

On May 1, 2018, Petitioner treated with Dr. Garcia, his primary care physician. Dr. Garcia referred Petitioner to Dr. Erling Ho, an orthopedic surgeon.

On May 7, 2018, Petitioner sought treatment from Dr. Ho, an orthopedic surgeon at Orthopaedic Associates of Riverside. Dr. Ho's letter to Dr. Garcia states that Petitioner had right shoulder pain that had been troubling him for about one year. Dr. Ho noted that Petitioner worked as a taper/drywall finisher and Petitioner's ongoing discomfort in his right shoulder was "probably due to repetitive work." In his note from the visit, Dr. Ho indicated that Petitioner was not injured at work. Dr. Ho also noted that Petitioner had a history of rheumatoid arthritis. Dr. Ho recommended that Petitioner undergo an MRI of the right shoulder. (PX4, PX10.3)

On May 11, 2018, Petitioner underwent the MRI, which showed a full thickness rotator cuff tear of Petitioner's right shoulder. (PX10, p. 7); (PX4, p. 348-349).

On May 14, 2018, Petitioner returned to Dr. Ho to follow-up after the MRI. Dr. Ho reviewed the MRI and opined that it showed a full-thickness rotator cuff tear. Dr. Ho diagnosed Petitioner with right shoulder pain secondary to a full-thickness rotator cuff tear "which has been symptomatic for about a year, probably due to repetitive work as a result of his job as a drywall finisher in a construction company." Dr. Ho recommended that Petitioner undergo arthroscopic rotator cuff repair and released Petitioner to work with a 25-pound lifting restriction.

On June 12, 2018, Dr. Balaram generated a supplemental Section 12 report following the MRI and opined that the MRI showed evidence of a full thickness tear of the supraspinatus with tendinosis, which was consistent with his diagnosis of rotator cuff tendinopathy. Dr. Balaram opined that the diagnosis appeared to be chronic in nature as noted in his April 23, 2018 Section 12 Examination report and the MRI did not change his opinions.

On February 26, 2019, Petitioner underwent rotator cuff surgery with Dr. Ho. Petitioner underwent a course of physical therapy starting about 2 weeks after the surgery. (PX10, p. 14). Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction. (PX9, p. 43).

On February 24, 2020, Dr. Balaram examined Petitioner again and issued a Section 12 Examination report dated March 2, 2020. Dr. Balaram, expressed no disagreement with the reasonableness or necessity of the rotator cuff repair surgery and the subsequent physical therapy. (RX1, p. 100). Dr. Balaram noted that Petitioner continued to have shoulder pain through all ranges of motion. Dr. Balaram reiterated his opinion that the injury was not work-related, and noted that

there was nothing in the operative report that would point to an acute injury. (RX1, p. 35). Dr. Balaram restated his opinion that the torn rotator cuff was secondary to Petitioner's rheumatoid arthritis as opposed to any repetitive work activity. (RX1, p. 35). Dr. Balaram noted pains in other areas of Petitioner's body, such as the left shoulder, left arm and hand, indicated some sort of systemic process as opposed to an acute process secondary to injury. (RX1, p. 36). Dr. Balaram noted diabetes as a precipitating factor for Petitioner's adhesive capsulitis. (RX1, p. 35-36). Dr. Balaram believed that Petitioner did not require any additional medical treatment and that he could return to work full duty. (RX1, p. 37).

On March 21, 2020, a second MRI was performed on Petitioner's right shoulder. On May 1, 2020, Dr. Ho reviewed the MRI and noted that the rotator cuff was intact, but scar tissue and adhesions had developed. (PX10, p. 17); (PX4, p. 351-352). Dr. Ho recommended a second surgical procedure because Petitioner had developed stiffness secondary to scar tissue in his shoulder after the surgery. (PX10, p. 14).

On June 30, 2020, Dr. Ho performed a second surgery, the date having been slightly delayed due to the Covid-19 pandemic. (PX10, p. 16.) (PX4, p. 233-234). Dr. Ho performed a manipulation under anesthesia accompanied by "small pops" with a slow stretch which then allowed full passive range of motion of Petitioner's arm. (PX4, p. 233-234). A diagnostic arthroscopy was performed, and Dr. Ho noted some minor fraying of the rotator cuff and debrided this tissue. (PX4, p. 233-234). The anterior capsule was noted to be fibrotic and dense requiring the use of a Radio Frequency Ablator to resect these adhesions. (PX4, p. 233-234). Dr. Ho then used a shaver to arthroscopically resect adhesions in the glenohumeral joint. (PX4, p. 233-234). Significant adhesions were excised with the shaver and the RF wand. (PX4, p. 233-234). Dr. Ho ordered Petitioner to remain off work after the surgery.

On October 21, 2020, Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction, with the hope that Petitioner would be able to make a full duty return to work in two months. (PX4, p. 228).

USUAL AND CUSTOMARY JOB DESCRIPTION

A one-page, handwritten job description for the job of "Taper/Drywall Finisher" dated November 10, 2017 indicates states:

> "Applies taping mud on walls – uses a tool called a bazooka, 10" box, 12" box. The 10" box + 12" box has a 4' pole on it. Up & down motion to apply the mud on walls. Does hand sanding & pole sanding of walls + occasionally ceilings. Pole sander – 4' to 6' pole. Operates scissor lifts + works on baker scaffolds."

The job description also lists the following occasional job duties: Lifting boxes of taping mud – approximately 40 pounds; lifting and handling a bazooka taping tool weighing 30-40 pounds; carrying miscellaneous materials, tools, equipment; and using a sanding pole to sand walls & ceilings. The job description notes that "work activities vary day to day." (PX3, p. 148)

DEPOSITION TESTIMONY

Dr. Erling Ho Deposition

At the September 16, 2020 deposition, Dr. Ho testified that he is a board-certified orthopedic surgeon. Dr. Ho testified that he remembered the Petitioner vaguely but for specifics, he would need to refer to his records. Dr. Ho testified that he believed Petitioner's shoulder injury arose out of his work as a drywall finisher. (PX10, p. 7). Dr. Ho testified that doing this type of work every day caused or contributed to his development of a rotator cuff tear. (PX10, p. 8). In his opinion, to a reasonable degree of medical certainty, the torn rotator cuff was caused by Petitioner's work activities, and the pain in Mr. Davila's shoulder was caused by the torn rotator cuff. (PX10, p. 10). Dr. Ho believed that surgery was necessary to fix the torn rotator cuff. (PX10, p. 10-11).

Dr. Ho opined further that Petitioner's pre-existing rheumatoid arthritis made him more susceptible to having a rotator cuff tear. (PX10, p. 8). Rheumatoid arthritis weakens soft tissue, so as the tendon gets weaker, repetitive use, or an accident or an injury or similar incident can cause a rotator cuff tear. (PX10, p. 8).

Dr. Ho testified that the surgery confirmed his presurgical impressions of the pathology in Petitioner's shoulder. (PX10, p. 12-13). Dr. Ho testified that what he found in Petitioner's shoulder was certainly more than just rheumatoid arthritis. (PX10, p. 13). Ho recommended a second surgical procedure because Petitioner had developed stiffness secondary to scar tissue in his shoulder after the surgery. (PX10, p. 14). Dr. Ho testified that this "post-operative arthrofibrosis" is a known complication of rotator cuff surgery. (PX10, p. 15).

During his testimony, a video was shown of someone using a bazooka while plastering drywall. Dr. Ho testified that the actions depicted were the kind of activities that performed repetitively could cause the Petitioner to suffer the rotator cuff tear that occurred and which he surgically repaired. Dr. Ho also testified that the Petitioner is currently unable to work and that this condition is causally related to the repetitive work duties that are the subject of this case. He noted that the Petitioner remains in therapy and could be a candidate for a third surgery in the future. (PX10)

On cross examination, Dr. Ho testified that he is not board certified in rheumatology and he treats patients with rheumatoid arthritis occasionally. Dr. Ho testified that rheumatoid arthritis is a progressive disease that erodes soft tissue and bone and creates an underlying condition whereby an individual can suffer a rotator cuff tear. Dr. Ho testified that when he first saw the Petitioner on May 7, 2018, he noted that the Petitioner had no injury at work but did state that he had problems with his shoulder for about a year. At that time, the Petitioner advised him of his occupation, and that is when he opined that the shoulder condition was "probably" related to his repetitive work activities. Dr. Ho testified that when he examined Petitioner on May 7, 2018, Petitioner did not indicate that he had a "work injury," which is why he noted that there was no history of a work injury, however, Petitioner did mention "repetitive work." (PX10)

Dr. Ajay K. Balaram Deposition

At the October 6, 2020 deposition, Dr. Balaram testified that he is a board-certified orthopedic surgeon. Dr. Balaram testified that he treats patients with rheumatoid arthritis daily. Dr. Balaram testified that he did not have an independent recollection of Petitioner and he needed to refer to his reports. (RXA)

Dr. Belaram testified within a reasonable degree of medical and surgical certainty that, in his opinion, the right shoulder condition was not related to Petitioner's work activities but rather was the result of the progression of his underlying disease of rheumatoid arthritis. The basis for his opinion was that Petitioner had been treated for rheumatoid arthritis for ten years and had a long history of having this underlying condition. Further, the disease was sufficiently severe to require treatment with Cimzia for many years (via injection) and a long history of taking both Prednisone and Azathioprine, both of which reduce inflammation caused by rheumatoid arthritis and slow down the disease. He opined the findings on the May 11, 2018, MRI were typical of the degenerative results found in patients who suffered from rheumatoid arthritis, as were the findings noted during the February 26, 2019 surgery. None of the findings appeared to be traumatic in origin but instead appeared to be long-standing conditions, tendonosis, impingement, and rotator cuff tendinopathy.

Dr. Balaram testified further that although Petitioner had a full-thickness rotator cuff tear, it seemed to be chronic in nature and not the result of trauma. He also noted that the Petitioner did not report any trauma as the source of his discomfort and merely recited his symptoms while working as a Taper. While he admitted that the Petitioner performed physical labor as his regular job, he opined that the rotator cuff tear resulted from the ligaments' deteriorating condition and tendonitis in his shoulder caused by the inflammation from his underlying rheumatoid arthritis versus the work activities he performed as a Taper.

Dr. Balaram testified that during the March 2, 2020 Section 12 examination, he examined both of Petitioner's shoulders and Petitioner had pain and decreased range of motion on the left shoulder. Dr. Belaram testified that Petitioner's pain being in multiple different areas of the body was further indicative of a systemic process or a whole-body process as opposed to an acute process secondary to an injury.

On cross-examination, Dr. Belaram testified that he did not think Petitioner performed the same maneuvers at work over and over throughout the day, however, he did not know how many hours per day that Petitioner used a bazooka or how many hours per day that Petitioner used an angle box or other tools, or the position of Petitioner's arms when he used these tools. Dr. Belaram testified further that when he saw Petitioner on April 23, 2018, Petitioner denied any left upper extremity symptoms. Dr. Balaram testified that Petitioner did not report or write down on his questionnaire that he had left shoulder pain. Dr. Balaram testified that he did not see any mention of left shoulder pain in the medical notes that he reviewed. Dr. Balaram testified that if Petitioner's condition was entirely caused by a systemic inflammatory response, he would expect to see symptoms on both sides.

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 causally related to the injury?

With respect to both case nos. 18WC016821 (October 26, 2017) and 18WC016822 (April 5, 2018), the Arbitrator finds that Petitioner has failed to prove that he sustained repetitive trauma injuries to his right shoulder which manifested on either October 26, 2017 or April 5, 2018.

"The phrase 'repetitive trauma' was developed in order to establish a date of accidental injury for purposes of determining when limitations statutes, and notice requirements, begin to run." *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2d Dist. 2005). "The categorization of an injury as due to repetitive trauma and the corresponding establishment of an injury date are necessary to fulfill the purpose of the Act to compensate workers who have been injured as a result of their employment." *Edward Hines*, 356 Ill. App. 3d at 194. The recognition of an injury date allows an employee to be compensated for injuries that develop gradually, without requiring an employee to push his body to the point of collapse. *Edward Hines*, 356 Ill. App. 3d at 194. An employee who suffers from a repetitive-trauma injury must meet the same standard

of proof as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006).

An employee suffering from a repetitive-trauma injury must point to a date on which both the injury and its causal link to his employment would have become plainly apparent (would have manifest itself) to a reasonable person. *Durand*, 224 Ill. 2d at 65. "Manifests itself" signifies the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). However, this does not mean, necessarily the date the employee became aware of the physical condition and its clear relationship to his employment. *See Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610 (4th Dist. 1988).

The Arbitrator finds that Petitioner's testimony was credible, however, Petitioner failed to prove that he sustained repetitive trauma injuries (overuse injuries) that manifested on October 26, 2017 and April 5, 2018. The Arbitrator finds that the record lacks sufficient detail regarding Petitioner's alleged repetitive job duties. Petitioner primarily testified as to the job duties that he performed on the two manifestation dates of October 26, 2017 and April 5, 2018 and explained that he worked with a bazooka and an angle box on those days. However, Petitioner also testified that he did not use a bazooka everyday and when he did, he only used a bazooka between 30 minutes and two hours. Petitioner did not testify as to the frequency with which he used an angle box. The only other evidence as to Petitioner's job duties is the "Usual and Customary Job Description" that appears to have been completed by Respondent. The job description, which states that using a bazooka would be done occasionally, is consistent with Petitioner's testimony that he would only use a bazooka up to 2 hours every other day. The Arbitrator also finds that Dr. Ho's opinions are not persuasive as Dr. Ho did not offer an opinion as to the Usual and Customary Job Description or a complete description of the job duties of a Taper, but only opined as to discrete job duties shown via video.

Further, with respect to both case nos. 18WC016821 (October 26, 2017) and 18WC016822 (April 5, 2018), the Arbitrator finds that Petitioner failed to prove that he sustained specific injuries on either October 26, 2017 or April 5, 2018. There is no evidence that Petitioner reported a specific injury to the right shoulder to any of his physicians. Dr. Garcia's October 30, 2017 note indicates that Petitioner reported tingling and numbness to the right-hand fingers only. There is no mention of the right shoulder. While, the October 31, 2017 note from Advocate Occupational Health indicates that Petitioner reported right shoulder pain, there is no description of the mechanism of injury and the right shoulder pain is listed with the complaints of right hand and finger pain and numbness which are attributed to repetitive work activities. The subsequent medical records show that Petitioner complained of right shoulder pain but never described or reported a specific injury.

Dr. Ho's May 7, 2018 note indicates that Petitioner was not injured at work. When asked about this during his deposition, Dr. Ho testified that Petitioner only mentioned "repetitive work" during the May 7, 2018 visit.

Based on the above findings of fact and conclusions of law, the Arbitrator finds that neither the October 26, 2017 injury, nor the April 5, 2018 injury are compensable.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC016822
Case Name	DAVILA, ISMAEL v. INTERNATIONAL DECORATORS, INC
Consolidated Cases	18WC016821
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0572
Number of Pages of Decision	19
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Steven Saks
Respondent Attorney	Joseph Garofalo

DATE FILED: 11/18/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ismael Davila,

Petitioner,

vs. NO: 18WC 016822

International Decorators, 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, causation, medical, temporary total disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2020 is hereby affirmed and adopted.

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

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

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

November 18, 2021

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MEP/ypv
049

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

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

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

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

21IWCC0572

DAVILA, ISMAEL
Employee/Petitioner

Case# **18WC016822**
18WC016821

INTERNATIONAL DECORATORS INC
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0696 SAKS ROBINSON & RITTENBERG
STEVEN R SAKS
162 N FRANKLIN ST SUITE 300
CHICAGO, IL 60606

1109 GAROFALO SCHREIBER STORM
JOSEPH A GAROFALO
55 W WACKER DR 10TH FL
CHICAGO, IL 60601

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Ismael Davila,
Employee/Petitioner,

v.

International Decorators, Inc.,
Employer/Respondent.

Case # **18** WC **016822**

Consolidated cases: **18 WC 016821**

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Deborah J. Baker**, Arbitrator of the Commission, in the city of **Chicago**, on **October 28, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

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

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

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

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

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

In the year preceding the injury, Petitioner earned $**92,498.12**; the average weekly wage was $**1,778.81**.

On the date of accident, Petitioner was **50** years of age, ***married*** with **0** dependent children.

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

Respondent shall be given a credit of $**60,454.19** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**60,454.19**.

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

ORDER

The Arbitrator finds that Petitioner did not sustain an accident that arose out of and in the course of employment on April 5, 2018 and the Petitioner's right shoulder condition of ill-being is not causally related to the April 5, 2018 work injury.

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

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

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

Signature of Arbitrator

December 28, 2020
Date

ICArbDec19(b)

FINDINGS OF FACT

This matter proceeded to arbitration on October 28, 2020. In light of the Covid-19 pandemic, the parties agreed to obtain the testimony of the Petitioner, Ismael Davila, via a video evidence deposition through Zoom. The arbitrator was provided with a transcript of the Petitioner's testimony, as well as the video recording of the proceeding.

With respect to both case nos. 18WC016821 (October 26, 2017) and 18WC016822 (April 5, 2018), the parties are in dispute as to whether an accident occurred on both October 26, 2017 and April 5, 2018, whether the current right shoulder condition is related to one or both of the alleged accident dates, whether Respondent is liable for medical expenses, whether the petitioner is entitled to temporary total disability benefits (TTD), and whether Respondent is liable for prospective medical care. The parties agree that if the case is found to be compensable, the Respondent will reimburse the group health insurance carrier for the reasonable and necessary medical expenses the Petitioner incurred for this injury and otherwise pay all unpaid reasonable and necessary medical bills pursuant to the fee schedule.

TESTIMONY

Testimony of Ismael Davila, Petitioner

At the time of both disputed accidents, Petitioner, Ismael Davila was 50 years old, married, and with no dependent children. Petitioner testified that he has an elementary level education from Mexico. (PX4, p. 213). He testified through a Spanish interpreter and speaks little English. (PX9, p. 13). He worked full time for Respondent, International Decorators Inc., and was a member of the Union. (PX9, p. 6). He worked 40 hours per week and his shift was typically from 7:00am – 3:00pm. (PX9, p. 6). He was a "taper" and his job was to finish drywall in preparation for painting. (PX9, p. 7). He had begun performing this job for this company in 2002. (PX9, p. 6). He has been a drywall taper since 1998. (PX9, p. 7).

Petitioner testified that he had been diagnosed with rheumatoid arthritis 22 years ago. (PX9, p. 8). When his rheumatoid arthritis flares up, he feels swelling in his ankles and knees and also feels it in his lower back. (PX9, p. 8). He takes prescribed medicine for his rheumatoid arthritis which he has taken for the past 22 years. (PX9, p. 34). The medicine helps him, and at no time prior to October 26, 2017 had he ever missed work due to his rheumatoid arthritis. (PX9, p. 9). After his shoulder began hurting on October 26, 2017, he noticed no simultaneously elevated symptoms of his rheumatoid arthritis. (PX9, p. 36).

Petitioner testified that his job includes using a tool called a "bazooka." A "bazooka" is a tool loaded with materials such as tape and drywall compound and weighs about 20 to 25 pounds when loaded with material. (PX9, p. 19). The user has to pump the bazooka full of materials for every 20-25 feet of tape that is applied. (PX9, p. 19). A "bazooka" is used to apply flat tape and angled tape to seams of drywall, both on the walls and on the ceiling. (PX9, p. 17). A video demonstrating the use of a "bazooka" is included in the record. (CD-ROM-Davila Dep Ex. 8) He mainly uses his right hand and arm to perform his work duties, however, he holds the bazooka in his left hand and uses both hands to use the angle box. (PX9, p. 7). Additionally, Petitioner performs hand sanding and pole sanding of the walls and occasionally ceilings. Petitioner also operates scissor lifts and works on baker scaffolds." (PX3, p. 148). The job requires intermittent lifting, carrying, pushing and pulling over 50 pounds. (PX3, p. 148). When not at work, he does not go to the gym or play any sports or do any side jobs. (PX9, p. 7).

Petitioner testified that on October 26, 2017, Petitioner was working at a hospital. (PX9, p. 5-6). His tasks included taping the rooms where patients recuperate in the hospital. (PX9, p. 9). His job included taping the walls and manually sanding. (PX9, p. 9). He also manually mixed Durabond powder (drywall mud) with water in a pail. (PX9, p. 9). He was manually sanding, instead of using power tools, in order to reduce dust and noise because the hospital was open and patients were present. (PX9, p. 10). Normally, he would use power tools to mix the Durabond, but he could not do so at the hospital. (PX9, p. 10). While mixing the Durabond, Petitioner felt pain in his wrist and then his right shoulder. (PX9, p. 10). Petitioner is right-handed. He had previously felt pain in his hand and wrist for about 6-7 months prior, which would resolve with rest, but his shoulder pain started on October 26, 2017, while mixing Durabond drywall mud. (PX9, p. 29). Petitioner continued working that day. (PX9, p. 12). The pain got better over the weekend, but he was still experiencing pain, so he called Dr. Garcia, his primary doctor on Monday, October 30, 2017. He told Dr. Garcia about the tingling in his hands and about the pain in his right shoulder. (PX9, p. 12-13).

Petitioner testified he called his employer and spoke to Peter Graham, the Safety person for Respondent. (PX9, p. 13). Peter Graham directed Petitioner to stop seeing Dr. Garcia and to start seeing Dr. Ann Trauscht at Advocate Occupational Health. (PX9, p. 14). Petitioner testified that he stopped seeing Dr. Garcia and started seeing Dr. Trauscht because Peter Graham sent him there. (PX9, p. 16-17).

Petitioner testified he treated with Dr. Trauscht on October 31, 2017. When he arrived, Peter Graham was already at the appointment. (PX9, p. 14). Peter Graham then spoke privately with Dr. Trauscht after Petitioner was examined. (PX9, p. 14). Petitioner testified that he informed Dr. Trauscht about his shoulder pain, but Dr. Trauscht only focused on Petitioner's hand and fingers. (PX9, p. 14).

Petitioner testified that on December 5, 2017, after being examined, Peter Graham had another private visit with Dr. Trauscht. (PX9, p. 16). Dr. Trauscht then released Petitioner to full duty work effective December 5, 2017. (PX9, p. 16).

Petitioner testified that Respondent's insurance carrier transcribed a translated phone interview with Petitioner on November 3, 2020. (PX3, p. 211-235). During the phone interview, Petitioner noted that he is right-handed (PX3, p. 213). He stated that he did not have a second job. (PX3, p. 215). He stated that he had previously had some occasional pain in his fingers and wrist. (PX3, p. 219). However, Petitioner noted that he had recently begun feeling pain close to the shoulder, "between the arm and the elbow." (PX3, p. 220). He reported that the pain had started on October 26, 2017. He stated that he had tried to tell Dr. Trauscht about this pain in "the top part of [his] shoulder" but she did not pay attention to it. (PX3, p. 221). Petitioner admitted having high blood pressure and rheumatoid arthritis but denied having diabetes. (PX3, p. 234).

Petitioner testified he returned to Dr. Trauscht on November 9, 2017. Petitioner was again given a 25-pound lifting restriction by Dr. Trauscht. (PX4, p. 17). Petitioner continued working with restrictions for several days until he went to Mexico for three weeks because his mother had died. (PX9, p. 16).

Petitioner testified that upon his return, he visited Dr. Trauscht on December 5, 2017. After being examined, Peter Graham had another private visit with Dr. Trauscht. (PX9, p. 16). Dr. Trauscht then released Petitioner to full duty work effective December 5, 2017. (PX9, p. 16). Petitioner resumed working full duty for Respondent after that. (PX9, p. 17). His right shoulder still hurt, but he continued to work as a drywall taper. (PX9, p. 17). Petitioner testified that he continued to have pain in his right shoulder but that he continued working. (PX9, p. 17). Petitioner worked uneventfully until April 5, 2018. (PX9, p. 17).

Petitioner testified that on April 5, 2018, Petitioner performed work at Palos Hospital. (PX9, p. 17). That morning, he used a "Bazooka" tool and then after lunch he worked with an "angle box." (PX9, p. 17). An "angle box" is a pole mounted tool used to smooth the tape in the corners of the walls and between the walls and the ceiling. (PX9, p. 19-20). A picture of this tool was introduced into evidence as an exhibit to Ismael Davila's testimony. While working with the "angle box" after lunch, he felt stronger pain in his right shoulder. (PX9, p. 20). His right shoulder felt "very bad." (PX9, p. 21). He reported this increased pain to his foreman "Julian" but he continued working. (PX9, p. 21).

Petitioner testified he attended a Section 12 examination with Dr. Balaram. After that examination, Respondent moved Petitioner to another jobsite where he had to work by himself. (PX9, p. 23). Petitioner was feeling increased shoulder pain while working by himself, and reported this to the superintendent. (PX9, p, 23).

The superintendent sent a worker named Marcelo to help Petitioner with his work. (PX9, p. 23).

Petitioner testified that he returned to Dr. Garcia on May 1, 2018 and advised him of the right shoulder pain. Dr. Garcia referred Petitioner to Dr. Erling Ho, a shoulder specialist. He continued working at restricted duty until he had surgery on February 26, 2019. He has been off work since that surgery.

Petitioner testified his first rotator cuff surgery with Dr. Ho took place on February 26, 2019. The delay between the surgical recommendation and the actual surgery was due to coordinating insurance coverage due to Respondent's denial, and the surgery was paid for by Petitioner's own health insurance. (PX9, p. 26). Petitioner continued to work for Respondent in a light duty capacity until the date of the surgery. After the surgery, Dr. Ho ordered Petitioner to remain off work after the surgery. (PX9, p. 26). Despite the physical therapy, Petitioner continued to have functional deficits. (PX9, p. 27). Eventually, Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction, but the employer would no longer accommodate any restrictions. (PX9, p. 43).

Petitioner testified that he underwent physical therapy until Dr. Ho performed a second surgery on June 30, 2020. Dr. Ho ordered Petitioner to remain off work after the surgery. On October 21, 2020, Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction. The Respondent has not accommodated these restrictions and Petitioner remains off work. His group insurance paid his medical expenses. He has received no payment since February 2020. Petitioner's right arm and shoulder movement and strength have improved, but he is still weak and has limited movement. (PX9, p. 28). Petitioner's left shoulder felt fine as of the day of the arbitration hearing and he testified that he has never had medical treatment for the left shoulder. (PX9, p. 28) Although Petitioner testified that his left hand has been hurting, he has never had medical treatment for the left hand. (PX9, p. 28) Petitioner would like to obtain additional treatment from Dr. Ho. (PX9, p. 28-29) If released to return to work at full duty by Dr. Ho, he intends to return to work. (PX9, p. 43). He hopes to be released when he sees Dr. Ho at the end of October 2020. (PX9, p. 43).

On cross-examination, Petitioner reiterated that he was first diagnosed with rheumatoid arthritis over 22 years ago. Petitioner testified that at that time, he went to Cook County Hospital due to swelling in both ankles and knees. He took Prednisone until 5 to 6 years ago when Azathioprine replaced the Prednisone. He has also treated during the entire 22 years with Cimzia injections, which he gives to himself every 15 days. He had been using the injections of Cimzia until 3 to 4 months ago. Both medications are to treat his condition of rheumatoid arthritis. The condition of his ankles and knees has been stable over the years. Since October 2017, through

the present, the condition in his ankles and knees has not changed: they are no better and no worse. He denied ever being diagnosed with diabetes.

Petitioner testified that in he uses a bazooka between 30 minutes to two hours in a day. However, Petitioner testified that he does not use a bazooka every day. (PX9, p. 32). Petitioner testified that he performed work above his shoulders all day except when working on the low corners of walls. (PX9, p. 33).

Petitioner testified that when Dr. Garcia first saw him on October 30, 2017, he gave a history of tingling symptoms, numbness in his right thumb, index, ring fingers, and right shoulder. He told Dr. Garcia that he had these symptoms for one year. The Petitioner noted that he had been treated previously with Dr. Garcia over the years for other unrelated medical problems. Petitioner testified that on October 31, 2017, when he saw Dr. Trauscht, he told her that he experienced these symptoms for 6-7 months. He also testified that he experienced these symptoms at night while sleeping and with repetitive work. Petitioner testified that his symptoms were minimal after not working while in Mexico from November 11, 2017 to December 3, 2017. On December 5, 2017, he advised Dr. Trauscht that the level of his pain had lessened and was minimal. He was discharged from treatment and released to return to work performing regular work duties at that time. Finally, Petitioner testified that on May 7, 2018, when he first saw Dr. Ho, he told him that he had these symptoms for about one year.

Petitioner denied ever having any symptoms in his left shoulder. Over the years, doctors at the clinic at Cook County Hospital prescribed most of his medications for rheumatoid arthritis. During the past few years, Dr. Garcia prescribed all medications he takes except Cimzia, which continues to be prescribed by the clinic at Cook County Hospital. He expects to be released from treatment by Dr. Ho when he sees him at the end of October 2020, and if released to return to work performing full duty, he intends to do so.

MEDICAL RECORDS

On October 30, 2017, Petitioner presented to Dr. Bernardino Garcia, Petitioner's primary care physician. Dr. Garcia's note states that Petitioner reported "one year of tingling and numbness of the right thumb index finger and partially the ring finger." Dr. Garcia also noted that the pain was made worse with repetitive motion at work and Petitioner's symptoms improved with rest. Dr. Garcia diagnosed Petitioner with right hand carpal tunnel syndrome, hypertension, hyperlipidemia, and rheumatoid arthritis. Dr. Garcia prescribed medication. (PX2)

On October 31, 2017, Petitioner treated with Dr. Trauscht at Advocate Occupational Health. The note indicates that Petitioner reported an October 26, 2017 date of injury. On the "Work Comp Initial Progress Note," it indicates that

Petitioner complained of right-hand numbness and tingling in addition to pain to the right shoulder and wrist. A handwritten "Worker's Statement of Initial Injury Report" states "numbness to Rt thumb, Index, and middle finger from repetitive motion – Per Peter Graham." Dr. Trauscht recommended that Petitioner wear a splint, avoid excessive flexion and extension and follow up with a rheumatologist or primary care physician. Dr. Trauscht released Petitioner to work with 25-pound lifting restrictions. The typewritten office note (Invoice # 675798) does not mention Petitioner's right shoulder pain. The typewritten office note states that Petitioner's primary problem was tingling and loss of sensation in the right thumb, right index finger and right middle finger that began 6 to 7 months before. Petitioner's symptoms worsened while sleeping and with repetitive use. Dr. Trauscht released Petitioner to work with a 25-pound lifting restriction, and Petitioner worked within these restrictions. (PX1, PX9, p. 15).

On November 9, 2017, Petitioner returned to Dr. Trauscht at Advocate Occupational Health. On the "Work Comp Follow-Up Progress Note," it states that Petitioner "Feels a little better. Has a little less numbness. Has more feeling to thumb, and less numbness to 2nd & 3rd digit. Still has pain by shoulder." Dr. Trauscht diagnosed Petitioner with CTS and right shoulder strain and released Petitioner to work with 25-pound lifting restriction noting that Petitioner should "avoid repet R wrist motion." (PX1, PX4, p. 17).

On December 5, 2017, upon returning from Mexico, Petitioner followed-up with Dr. Trauscht. The handwritten work status discharge instructions state that Petitioner's diagnoses were right shoulder and right wrist strain. The typed note (Invoice # 676890) states that Petitioner's chief complaint was numbness to fingers and right hand and Petitioner reported that his hand numbness had improved. The note also states: "now complains of pain anterior right shoulder with elevation in the anterior plane and work above shoulder." Dr. Trauscht discharged Petitioner to a home exercise program and released him to full duty work. (PX1, PX4, p. 17).

On April 23, 2018, Dr. Balaram examined Petitioner pursuant to Section 12 of the Act at Respondent's request and issued a report on April 27, 2018. He opined that the Petitioner was not magnifying his symptoms. (RX1, p. 17). On exam, he noted a positive Hawkins, Neer, Speed, and O'Brien's tests, and reduced strength in the infraspinatus and supraspinatus. (PX3, p. 12). He opined that the Petitioner had some a right shoulder impingement and degenerative rotator cuff tendinopathy. (RX1, p. 17). However, he opined that the Petitioner's condition was degenerative and that it was secondary to his rheumatoid arthritis rather than any work activities. (RX1, p. 22). This opinion was based on his understanding that there was no accident, trauma, or injury reported by the Petitioner that led to development of shoulder pain. (RX1, p. 22). Dr. Balaram opined that the Petitioner should be limited to working with a 5-pound overhead lifting restriction "until his inflammatory response had subsided." (RX1, p. 22).

On May 1, 2018, Petitioner treated with Dr. Garcia, his primary care physician. Dr. Garcia referred Petitioner to Dr. Erling Ho, an orthopedic surgeon.

On May 7, 2018, Petitioner sought treatment from Dr. Ho, an orthopedic surgeon at Orthopaedic Associates of Riverside. Dr. Ho's letter to Dr. Garcia states that Petitioner had right shoulder pain that had been troubling him for about one year. Dr. Ho noted that Petitioner worked as a taper/drywall finisher and Petitioner's ongoing discomfort in his right shoulder was "probably due to repetitive work." In his note from the visit, Dr. Ho indicated that Petitioner was not injured at work. Dr. Ho also noted that Petitioner had a history of rheumatoid arthritis. Dr. Ho recommended that Petitioner undergo an MRI of the right shoulder. (PX4, PX10.3)

On May 11, 2018, Petitioner underwent the MRI, which showed a full thickness rotator cuff tear of Petitioner's right shoulder. (PX10, p. 7); (PX4, p. 348-349).

On May 14, 2018, Petitioner returned to Dr. Ho to follow-up after the MRI. Dr. Ho reviewed the MRI and opined that it showed a full-thickness rotator cuff tear. Dr. Ho diagnosed Petitioner with right shoulder pain secondary to a full-thickness rotator cuff tear "which has been symptomatic for about a year, probably due to repetitive work as a result of his job as a drywall finisher in a construction company." Dr. Ho recommended that Petitioner undergo arthroscopic rotator cuff repair and released Petitioner to work with a 25-pound lifting restriction.

On June 12, 2018, Dr. Balaram generated a supplemental Section 12 report following the MRI and opined that the MRI showed evidence of a full thickness tear of the supraspinatus with tendinosis, which was consistent with his diagnosis of rotator cuff tendinopathy. Dr. Balaram opined that the diagnosis appeared to be chronic in nature as noted in his April 23, 2018 Section 12 Examination report and the MRI did not change his opinions.

On February 26, 2019, Petitioner underwent rotator cuff surgery with Dr. Ho. Petitioner underwent a course of physical therapy starting about 2 weeks after the surgery. (PX10, p. 14). Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction. (PX9, p. 43).

On February 24, 2020, Dr. Balaram examined Petitioner again and issued a Section 12 Examination report dated March 2, 2020. Dr. Balaram, expressed no disagreement with the reasonableness or necessity of the rotator cuff repair surgery and the subsequent physical therapy. (RX1, p. 100). Dr. Balaram noted that Petitioner continued to have shoulder pain through all ranges of motion. Dr. Balaram reiterated his opinion that the injury was not work-related, and noted that

there was nothing in the operative report that would point to an acute injury. (RX1, p. 35). Dr. Balaram restated his opinion that the torn rotator cuff was secondary to Petitioner's rheumatoid arthritis as opposed to any repetitive work activity. (RX1, p. 35). Dr. Balaram noted pains in other areas of Petitioner's body, such as the left shoulder, left arm and hand, indicated some sort of systemic process as opposed to an acute process secondary to injury. (RX1, p. 36). Dr. Balaram noted diabetes as a precipitating factor for Petitioner's adhesive capsulitis. (RX1, p. 35-36). Dr. Balaram believed that Petitioner did not require any additional medical treatment and that he could return to work full duty. (RX1, p. 37).

On March 21, 2020, a second MRI was performed on Petitioner's right shoulder. On May 1, 2020, Dr. Ho reviewed the MRI and noted that the rotator cuff was intact, but scar tissue and adhesions had developed. (PX10, p. 17); (PX4, p. 351-352). Dr. Ho recommended a second surgical procedure because Petitioner had developed stiffness secondary to scar tissue in his shoulder after the surgery. (PX10, p. 14).

On June 30, 2020, Dr. Ho performed a second surgery, the date having been slightly delayed due to the Covid-19 pandemic. (PX10, p. 16.) (PX4, p. 233-234). Dr. Ho performed a manipulation under anesthesia accompanied by "small pops" with a slow stretch which then allowed full passive range of motion of Petitioner's arm. (PX4, p. 233-234). A diagnostic arthroscopy was performed, and Dr. Ho noted some minor fraying of the rotator cuff and debrided this tissue. (PX4, p. 233-234). The anterior capsule was noted to be fibrotic and dense requiring the use of a Radio Frequency Ablator to resect these adhesions. (PX4, p. 233-234). Dr. Ho then used a shaver to arthroscopically resect adhesions in the glenohumeral joint. (PX4, p. 233-234). Significant adhesions were excised with the shaver and the RF wand. (PX4, p. 233-234). Dr. Ho ordered Petitioner to remain off work after the surgery.

On October 21, 2020, Dr. Ho released Petitioner to return to work with a 25-pound lifting restriction, with the hope that Petitioner would be able to make a full duty return to work in two months. (PX4, p. 228).

USUAL AND CUSTOMARY JOB DESCRIPTION

A one-page, handwritten job description for the job of "Taper/Drywall Finisher" dated November 10, 2017 indicates states:

> "Applies taping mud on walls – uses a tool called a bazooka, 10" box, 12" box. The 10" box + 12" box has a 4' pole on it. Up & down motion to apply the mud on walls. Does hand sanding & pole sanding of walls + occasionally ceilings. Pole sander – 4' to 6' pole. Operates scissor lifts + works on baker scaffolds."

The job description also lists the following occasional job duties: Lifting boxes of taping mud – approximately 40 pounds; lifting and handling a bazooka taping tool weighing 30-40 pounds; carrying miscellaneous materials, tools, equipment; and using a sanding pole to sand walls & ceilings. The job description notes that "work activities vary day to day." (PX3, p. 148)

DEPOSITION TESTIMONY

Dr. Erling Ho Deposition

At the September 16, 2020 deposition, Dr. Ho testified that he is a board-certified orthopedic surgeon. Dr. Ho testified that he remembered the Petitioner vaguely but for specifics, he would need to refer to his records. Dr. Ho testified that he believed Petitioner's shoulder injury arose out of his work as a drywall finisher. (PX10, p. 7). Dr. Ho testified that doing this type of work every day caused or contributed to his development of a rotator cuff tear. (PX10, p. 8). In his opinion, to a reasonable degree of medical certainty, the torn rotator cuff was caused by Petitioner's work activities, and the pain in Mr. Davila's shoulder was caused by the torn rotator cuff. (PX10, p. 10). Dr. Ho believed that surgery was necessary to fix the torn rotator cuff. (PX10, p. 10-11).

Dr. Ho opined further that Petitioner's pre-existing rheumatoid arthritis made him more susceptible to having a rotator cuff tear. (PX10, p. 8). Rheumatoid arthritis weakens soft tissue, so as the tendon gets weaker, repetitive use, or an accident or an injury or similar incident can cause a rotator cuff tear. (PX10, p. 8).

Dr. Ho testified that the surgery confirmed his presurgical impressions of the pathology in Petitioner's shoulder. (PX10, p. 12-13). Dr. Ho testified that what he found in Petitioner's shoulder was certainly more than just rheumatoid arthritis. (PX10, p. 13). Ho recommended a second surgical procedure because Petitioner had developed stiffness secondary to scar tissue in his shoulder after the surgery. (PX10, p. 14). Dr. Ho testified that this "post-operative arthrofibrosis" is a known complication of rotator cuff surgery. (PX10, p. 15).

During his testimony, a video was shown of someone using a bazooka while plastering drywall. Dr. Ho testified that the actions depicted were the kind of activities that performed repetitively could cause the Petitioner to suffer the rotator cuff tear that occurred and which he surgically repaired. Dr. Ho also testified that the Petitioner is currently unable to work and that this condition is causally related to the repetitive work duties that are the subject of this case. He noted that the Petitioner remains in therapy and could be a candidate for a third surgery in the future. (PX10)

On cross examination, Dr. Ho testified that he is not board certified in rheumatology and he treats patients with rheumatoid arthritis occasionally. Dr. Ho testified that rheumatoid arthritis is a progressive disease that erodes soft tissue and bone and creates an underlying condition whereby an individual can suffer a rotator cuff tear. Dr. Ho testified that when he first saw the Petitioner on May 7, 2018, he noted that the Petitioner had no injury at work but did state that he had problems with his shoulder for about a year. At that time, the Petitioner advised him of his occupation, and that is when he opined that the shoulder condition was "probably" related to his repetitive work activities. Dr. Ho testified that when he examined Petitioner on May 7, 2018, Petitioner did not indicate that he had a "work injury," which is why he noted that there was no history of a work injury, however, Petitioner did mention "repetitive work." (PX10)

Dr. Ajay K. Balaram Deposition

At the October 6, 2020 deposition, Dr. Balaram testified that he is a board-certified orthopedic surgeon. Dr. Balaram testified that he treats patients with rheumatoid arthritis daily. Dr. Balaram testified that he did not have an independent recollection of Petitioner and he needed to refer to his reports. (RXA)

Dr. Belaram testified within a reasonable degree of medical and surgical certainty that, in his opinion, the right shoulder condition was not related to Petitioner's work activities but rather was the result of the progression of his underlying disease of rheumatoid arthritis. The basis for his opinion was that Petitioner had been treated for rheumatoid arthritis for ten years and had a long history of having this underlying condition. Further, the disease was sufficiently severe to require treatment with Cimzia for many years (via injection) and a long history of taking both Prednisone and Azathioprine, both of which reduce inflammation caused by rheumatoid arthritis and slow down the disease. He opined the findings on the May 11, 2018, MRI were typical of the degenerative results found in patients who suffered from rheumatoid arthritis, as were the findings noted during the February 26, 2019 surgery. None of the findings appeared to be traumatic in origin but instead appeared to be long-standing conditions, tendonosis, impingement, and rotator cuff tendinopathy.

Dr. Balaram testified further that although Petitioner had a full-thickness rotator cuff tear, it seemed to be chronic in nature and not the result of trauma. He also noted that the Petitioner did not report any trauma as the source of his discomfort and merely recited his symptoms while working as a Taper. While he admitted that the Petitioner performed physical labor as his regular job, he opined that the rotator cuff tear resulted from the ligaments' deteriorating condition and tendonitis in his shoulder caused by the inflammation from his underlying rheumatoid arthritis versus the work activities he performed as a Taper.

Dr. Balaram testified that during the March 2, 2020 Section 12 examination, he examined both of Petitioner's shoulders and Petitioner had pain and decreased range of motion on the left shoulder. Dr. Belaram testified that Petitioner's pain being in multiple different areas of the body was further indicative of a systemic process or a whole-body process as opposed to an acute process secondary to an injury.

On cross-examination, Dr. Belaram testified that he did not think Petitioner performed the same maneuvers at work over and over throughout the day, however, he did not know how many hours per day that Petitioner used a bazooka or how many hours per day that Petitioner used an angle box or other tools, or the position of Petitioner's arms when he used these tools. Dr. Belaram testified further that when he saw Petitioner on April 23, 2018, Petitioner denied any left upper extremity symptoms. Dr. Balaram testified that Petitioner did not report or write down on his questionnaire that he had left shoulder pain. Dr. Balaram testified that he did not see any mention of left shoulder pain in the medical notes that he reviewed. Dr. Balaram testified that if Petitioner's condition was entirely caused by a systemic inflammatory response, he would expect to see symptoms on both sides.

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 causally related to the injury?

With respect to both case nos. 18WC016821 (October 26, 2017) and 18WC016822 (April 5, 2018), the Arbitrator finds that Petitioner has failed to prove that he sustained repetitive trauma injuries to his right shoulder which manifested on either October 26, 2017 or April 5, 2018.

"The phrase 'repetitive trauma' was developed in order to establish a date of accidental injury for purposes of determining when limitations statutes, and notice requirements, begin to run." *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2d Dist. 2005). "The categorization of an injury as due to repetitive trauma and the corresponding establishment of an injury date are necessary to fulfill the purpose of the Act to compensate workers who have been injured as a result of their employment." *Edward Hines*, 356 Ill. App. 3d at 194. The recognition of an injury date allows an employee to be compensated for injuries that develop gradually, without requiring an employee to push his body to the point of collapse. *Edward Hines*, 356 Ill. App. 3d at 194. An employee who suffers from a repetitive-trauma injury must meet the same standard

of proof as an employee who suffers a sudden injury. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006).

An employee suffering from a repetitive-trauma injury must point to a date on which both the injury and its causal link to his employment would have become plainly apparent (would have manifest itself) to a reasonable person. *Durand*, 224 Ill. 2d at 65. "Manifests itself" signifies the date on which both the fact of the injury and the causal relationship of the injury to the claimant's employment would have become plainly apparent to a reasonable person. *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 531 (1987). However, this does not mean, necessarily the date the employee became aware of the physical condition and its clear relationship to his employment. *See Oscar Mayer & Co. v. Industrial Comm'n*, 176 Ill. App. 3d 607, 610 (4th Dist. 1988).

The Arbitrator finds that Petitioner's testimony was credible, however, Petitioner failed to prove that he sustained repetitive trauma injuries (overuse injuries) that manifested on October 26, 2017 and April 5, 2018. The Arbitrator finds that the record lacks sufficient detail regarding Petitioner's alleged repetitive job duties. Petitioner primarily testified as to the job duties that he performed on the two manifestation dates of October 26, 2017 and April 5, 2018 and explained that he worked with a bazooka and an angle box on those days. However, Petitioner also testified that he did not use a bazooka everyday and when he did, he only used a bazooka between 30 minutes and two hours. Petitioner did not testify as to the frequency with which he used an angle box. The only other evidence as to Petitioner's job duties is the "Usual and Customary Job Description" that appears to have been completed by Respondent. The job description, which states that using a bazooka would be done occasionally, is consistent with Petitioner's testimony that he would only use a bazooka up to 2 hours every other day. The Arbitrator also finds that Dr. Ho's opinions are not persuasive as Dr. Ho did not offer an opinion as to the Usual and Customary Job Description or a complete description of the job duties of a Taper, but only opined as to discrete job duties shown via video.

Further, with respect to both case nos. 18WC016821 (October 26, 2017) and 18WC016822 (April 5, 2018), the Arbitrator finds that Petitioner failed to prove that he sustained specific injuries on either October 26, 2017 or April 5, 2018. There is no evidence that Petitioner reported a specific injury to the right shoulder to any of his physicians. Dr. Garcia's October 30, 2017 note indicates that Petitioner reported tingling and numbness to the right-hand fingers only. There is no mention of the right shoulder. While, the October 31, 2017 note from Advocate Occupational Health indicates that Petitioner reported right shoulder pain, there is no description of the mechanism of injury and the right shoulder pain is listed with the complaints of right hand and finger pain and numbness which are attributed to repetitive work activities. The subsequent medical records show that Petitioner complained of right shoulder pain but never described or reported a specific injury.

Dr. Ho's May 7, 2018 note indicates that Petitioner was not injured at work. When asked about this during his deposition, Dr. Ho testified that Petitioner only mentioned "repetitive work" during the May 7, 2018 visit.

Based on the above findings of fact and conclusions of law, the Arbitrator finds that neither the October 26, 2017 injury, nor the April 5, 2018 injury are compensable.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	16WC038002
Case Name	GUERRERO, ENRIQUE v. GA PAVING
Consolidated Cases	
Proceeding Type	Remand - Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0573
Number of Pages of Decision	4
Decision Issued By	Deborah Baker, Commissioner

Petitioner Attorney	Randall Sladek
Respondent Attorney	Kisa Sthankiya

DATE FILED: 11/18/2021

/s/ Deborah Baker, Commissioner

Signature

21IWCC0573

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

ENRIQUE GUERRERO,

Petitioner,

vs. NO: 16 WC 38002

GA PAVING,

Respondent.

DECISION AND OPINION ON REMAND

This matter comes before the Commission pursuant to an order from the Circuit Court of Cook County entered on January 16, 2020. Therein, the court struck the Commission's July 1, 2019 Decision and Opinion on Review and remanded the matter.

This matter proceeded to arbitration before Arbitrator Brian Cronin on the following issues: 1) whether an employer-employee relationship existed, 2) whether Petitioner sustained accidental injuries arising out of and occurring in the course of his employment, 3) whether timely notice was provided, 4) whether Petitioner's condition of ill-being is causally related to the work accident, 5) entitlement to temporary disability benefits, 6) entitlement to medical expenses, and 7) whether the imposition of penalties and attorney's fees was warranted. Arbitrator Cronin issued his decision on March 1, 2018. Therein, the Arbitrator found an employer-employee relationship existed between GA Paving and Petitioner; Petitioner sustained an accidental injury arising out of and occurring in the course of his employment on December 1, 2016; timely notice was given; and Petitioner's current condition of ill-being is related to his accidental injury. The Arbitrator awarded 37 4/7 weeks of Temporary Total Disability benefits as well as $273,407.93 in medical expenses but declined to impose penalties and attorney's fees.

Both parties timely filed Petitions for Review before the Commission. On July 1, 2019, the Commission entered its Decision and Opinion on Review. Therein, the Commission *sua sponte* added Power Paving as a party-respondent and found Respondent GA Paving and Respondent

Power Paving jointly and severally liable as provided in §1(a)4 of the Act, and otherwise affirmed and adopted the Decision of the Arbitrator..

Petitioner thereafter filed a timely review before the Circuit Court of Cook County. Power Paving subsequently filed a motion to strike and dismiss under Section 2-619 of the Code of Civil Procedure and a petition under Section 2-1401 of the Code to vacate the Commission's July 1, 2019 Decision adding it as a respondent. On January 16, 2020, the circuit court entered an order striking the Commission's decision adding Power Paving as a respondent and remanding the matter for issuance of a decision consistent with its resolution of Power Paving's motions.

Pursuant to the January 16, 2020 order of the Circuit Court of Cook County, the Commission, being advised of the facts and law, provides additional analysis as set forth below but otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

The Commission observes Respondent limited its argument on Review to the threshold issue of employer-employee relationship. Specifically, Respondent claims Petitioner failed to prove he was an employee of GA Paving and that failure precludes a finding that Petitioner sustained a compensable accidental injury. The Commission is not persuaded by Respondent's employment relationship argument.

Petitioner is a member of Union Local 1 and was working as a construction laborer on a paving job on December 1, 2016. T. 10. His assignment was directing the construction traffic. T. 11. As Petitioner was directing the trucks, he was struck by a GA Paving steamroller, sustaining significant injuries to his left leg and pelvis. The Commission affirms the finding that an employer-employee relationship existed between GA Paving and Petitioner. In so doing, we emphasize Petitioner and George Angelillo, co-owner of GA Paving, both testified Petitioner first worked for the company in 2012, and his current stretch of employment with GA Paving dates back to 2014. While Angelillo testified Petitioner was laid off as of November 28, 2016, the Commission does not find this testimony credible as it is contradicted by GA Paving's own records. Emily Ultsch is GA Paving's bookkeeper and she is charged with completing the company's monthly union reporting. The December 2016 report reflects Petitioner worked 37 hours. Ultsch testified those hours were actually worked in November: she explained Petitioner was issued checks on December 2, 2016 and December 9, 2016; the December 2 check covering Petitioner's work from November 20 through 27, and the December 9 check covering hours worked after November 28. The Commission observes, however, the very existence of a paycheck issued to Petitioner on December 9, 2016 establishes Petitioner worked for GA Paving between November 28, 2016 and December 2, 2016. In sum, there is no credible evidence Petitioner's employment with GA Paving terminated prior to his accidental injury.

All else is affirmed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 1, 2018, as modified above, is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $800.00 per week for a period of 37 4/7 weeks, representing December 2, 2016 through August 21, 2017, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay the sum of $273,407.93 for medical expenses, as provided in §8(a), subject to §8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's request for penalties and attorney's fees is denied.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of 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.

November 18, 2021

/s/ *Deborah J. Baker*

DJB/mck

D: 11/10/21

/s/ *Stephen Mathis*

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/s/ *Deborah L. Simpson*

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC001302
Case Name	ANDERSON, EUREKA v. WAL-MART STORES INC
Consolidated Cases	
Proceeding Type	Petition for Review
Decision Type	Commission Decision
Commission Decision Number	21IWCC0574
Number of Pages of Decision	17
Decision Issued By	Maria Portela, Commissioner

Petitioner Attorney	Anita DeCarlo
Respondent Attorney	Michael Scully

DATE FILED: 11/19/2021

/s/Maria Portela, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

EUREKA ANDERSON,

Petitioner,

vs. NO: 18 WC 1302

WALMART, INC.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causation, temporary total disability, medical expenses, nature and extent and "Credit for medical benefits paid; credit for TTD paid," and being advised of the facts and law, affirms and adopts, with the following changes, the Decision of the Arbitrator, which is attached hereto and made a part hereof.

Although we affirm the Arbitrator's conclusion, that Petitioner proved she sustained accidental injuries arising out of and in the course of her employment, we modify the Arbitrator's rationale and the risk analysis applied. The Arbitrator found:

> Petitioner was returning from her mandated break, within respondent's vestibule, when she slipped and fell. It was clear from the video it was snowing. There were no matts [sic] on respondent's tile floor. The Arbitrator finds that the fact that there were no matts [sic] at the entrance of respondent's store created an increased risk. Thus, the Arbitrator finds petitioner sustained injuries in an accident that arose out of and in the course of her employment…." *Dec. 4*.

It is unclear from the Arbitrator's decision what risk analysis was used. Although the decision referenced that it was snowing outside and Petitioner slipped and fell, the Arbitrator did not use the term "hazardous condition" nor did the Arbitrator explicitly find that Petitioner was exposed to a hazardous condition on Respondent's premises, which would be an employment-

related risk. The only thing the Arbitrator found was that the lack of mats on the floor "created an increased risk." Normally, this language would imply that a neutral-risk analysis was used but the Arbitrator did not specifically find Petitioner was exposed to a neutral risk which was increased, either quantitatively or qualitatively, to a degree greater than that encountered by the general public. In the analysis denying penalties and fees, the Arbitrator wrote:

> Although the Arbitrator determined petitioner proved she was exposed to an increased risk due to the lack of matts [sic] at respondent's entrance, the Arbitrator noted the video showed customers were coming and going without difficulty. Although these factors were insufficient to defeat petitioner's claim, it is sufficient to show respondent was not acting vexatious[ly] or unreasonab[ly] by questioning this claim. *Dec. 6*.

This does not clarify whether the Arbitrator found that Petitioner was exposed to an "employment" risk or an increased "neutral risk." It only reiterated the Arbitrator's finding that the increased risk was due to a lack of mats on the floor, which is significant and will be discussed later.

"In the Course Of" Employment

Although Respondent checked this issue on its Petition for Review, it made no arguments in its brief regarding this prong of the accident analysis. There is no evidence to contradict Petitioner's testimony that she slipped and fell on Respondent's premises upon returning from her mandated break. "Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing her duties, and while a claimant is at work, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment." *Litchfield Healthcare Center v. IC*, 349 Ill. App. 3d 486, 490 (5th Dist. 2004) (Citation omitted). Therefore, Petitioner was clearly "in the course of" her employment at the time of her accident.

"Arising Out Of" Employment

> In *Dukich v. IWCC*, the Appellate Court wrote:
>
> We acknowledge that both our supreme court and our appellate court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises. [Citations omitted.] **The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment**; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. [Citations omitted.] In other words, **such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment.**

2017 IL App (2d) 160351WC, ¶ 40, 86 N.E.3d 1161, 1172-73 (Emphases added).

Therefore, Petitioner is only required to prove that her injuries were caused by 1) a hazardous condition 2) on Respondent's premises, which makes it an employment risk and renders a neutral-risk analysis unnecessary.

Accident Occurred on Respondent's Premises

Respondent admits, "In this case, Petitioner's testimony and the video footage establish that Petitioner slipped and fell while entering her employer's premises." *R-brief at 8*. Therefore, Petitioner has proven that she was injured on Respondent's premises.

Did a Hazardous Condition Exist?

Although the Arbitrator mentioned in her Statement of Facts that it was snowing and Petitioner "slipped and fell on the tile floor," the decision did not include Petitioner's testimony on cross-examination that "the public entrance that I came in was wet because of snow." *T.31*. Nor did the Arbitrator mention Petitioner's testimony on redirect:

Q: Do you actually remember seeing water on the ground on the entrance?
A: Yes.
Q: On the tile floor?
A: Correct. *T.38*.

In contrast, Respondent argues, "the video evidence entered by Respondent does not show that the floor is wet or that snow had accumulated…." *R-brief at 10*.

From our viewing, the video (Rx1) does not show the floor in sufficient detail to be able to identify whether it is wet in spots or not. What the video does show is that it was snowing, and the snow was accumulating outside. People are regularly seen entering the store from the outside wearing coats, boots, and other inclement weather apparel. It defies logic for Respondent to claim that customers entering the store did not track in any water on their coats and shoes that collected on the floor of the vestibule.

We therefore modify the decision to find that Petitioner's testimony is supported by the logical inference that there was at least some water from the outside on the vestibule floor that had been tracked in by the people entering the store.

Does "Water" Constitute a Hazardous Condition?

The Court in *McAllister v IWCC* wrote, "Examples of employment-related risks include 'tripping on a defect at the employer's premises, **falling on uneven or slippery ground at the work site**, or performing some work-related task which contributes to the risk of falling.' [Citation omitted]. 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. [Citation omitted]. 2020 IL 124848, ¶ 40 (Emphasis added).

Respondent cites *Dukich v IWCC*, 2017 IL App (2d) 160351WC, ¶ 41, 86 N.E.3d 1161, for the proposition that:

> the dangers created by rainfall are dangers to which all members of the public are exposed to on a regular basis. These dangers of exposure to natural elements, unlike defects or particular hazardous conditions located at a particular worksite, are not risks distinctly associated with one's employment. Accordingly, Petitioner's claim in this matter should be analyzed under neutral risk principles and recovery should only be allowed if Petitioner can establish that she was exposed to the risks of injury from a wet surface to a greater degree than the general public by the virtue of her employment. *R-brief at 8-9*.

However, as Petitioner correctly highlights, *Dukich* found that wet *pavement* from rainfall *outside* on the employer's premises does not constitute a hazardous condition. The *Dukich* court distinguished between "an accumulation of *snow and/or ice* in a parking lot or other outdoor space owned or controlled by the employer" (emphasis in original) and mere rainfall on pavement. *Id. at ¶ 40-43*. Therefore, *Dukich* is inapplicable to the case at bar where the evidence shows that Petitioner slipped on water *inside* Respondent's premises. In fact, the *Dukich* court specifically noted, "Other cases have ruled that injuries may be deemed to arise out of the employment if they are caused by defects or slippery *indoor* surfaces at the worksite." *Dukich at ¶ 41 (Emphasis in original, citation omitted)*.

Nevertheless, as mentioned previously, *Dukich* is instructive as to the analysis required when a hazardous condition exists on the employer's premises:

> The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. [Citations omitted.] In other words, such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment.

Dukich v. Illinois Workers' Compensation Comm'n, 2017 IL App (2d) 160351WC, ¶ 40, 86 N.E.3d 1161

We therefore modify the decision to explicitly find that Petitioner slipped and fell due to the hazardous condition of water on a tile floor inside Respondent's premises.

Was Petitioner Exposed to the Hazardous Condition to a Greater Degree than the General Public?

Many of Respondent's arguments are irrelevant since Petitioner's injury was caused by an employment-related risk and not a neutral risk. However, we do want to emphasize how the Appellate Court case of *Chicago Tribune Co. v. IC*, 136 Ill. App. 3d 260 (1st Dist. 1985), applies to the case at bar. *Chicago Tribune* involved an accident that "arose out of a slip and fall on respondent's premises." Id. at 261. Similarly, in the case at bar, Respondent admits that

Petitioner's testimony and the video footage establish that Petitioner slipped and fell while entering her employer's premises. *R-brief at 8*.

In *Chicago Tribune*, "[t]he floor was of linoleum, and claimant did not recall whether it was wet or dry. She stated she did not know what caused her to fall, but she did not faint nor trip over her feet." *Chicago Tribune at 328*. In other words, the claimant in that case experienced an unexplained fall. Nevertheless, the Court noted:

> Two security officers employed by respondent on the day of the accident also testified. Michael Abston stated that he observed claimant fall and went to her assistance, that the floor was level and clear of debris, and that there was no ice, snow, nor water on the floor. He also stated that he could not recall the weather conditions on that morning, but when it was snowy and wet outside, people would track the snow and water in and onto the floor. He recalled that the claimant was wearing shoes with narrow heels about 2 or 3 inches high."

Chicago Tribune at 263. The Court found that "from the evidence the Commission could have drawn the inference that there might have been ice and water on the floor, although this was denied by the security officer." *Chicago Tribune at* 264.

In contrast to the unexplained fall that was held compensable in *Chicago Tribune*, Petitioner affirmatively testified that the tile floor in Respondent's vestibule was "wet with snow" and she actually saw the water. *T.31, 38*. There was no testimony to the contrary and the video depicts that it was snowing outside. Therefore, in the case at bar, we have evidence as to what the hazardous condition was based on Petitioner's testimony and the reasonable inference that it was water from the snow. Again, as discussed above, water from melted snow on the *inside* of Respondent's premises is much different than mere rainfall on the pavement outside.

Nevertheless, we want to address Respondent's multiple arguments that Petitioner was not exposed to an increased risk greater than the general public including, for example:

- "[t]he entrance where Petitioner fell is no different from any other entrance to any building Petitioner could be entering during the course of her day." *R-brief at 10.*

- In the 30 minutes *prior* to Petitioner's slip and fall, 46 people were "exposed to the snowfall outside the store as well as the condition of the floor inside of the vestibule" but Petitioner was the only one who fell. *Id.*

- In the 30 minutes *after* Petitioner's slip and fall, 38 people "were at some point exposed to the snowfall outside the store as well as the condition of the floor inside of the vestibule" but Petitioner was the only one who fell. *Id.*

Respondent's argument that "recovery should only be allowed if Petitioner can establish that she was exposed to the risks of injury from a wet surface to a greater degree than the general public by the virtue of her employment" (*R-brief at 9*) was specifically rejected by the *Chicago Tribune* Court:

> Respondent argues that since the fall occurred in a gallery open to the public, the risk was one common to the public and therefore did not arise out of claimant's employment. **It is difficult to see how the respondent can escape liability by exposing the public to the same risks encountered by its employees**. The short answer is that **claimant was required to be in the area in order to get to her work station. No such onus lay upon the public**.
>
> This was clearly a case of an unexplained fall on the respondent's premises. It therefore arose out of and in the course of claimant's employment.

Chicago Tribune at 264 (Emphasis added).

Therefore, in the case at bar, just because 84 members of the general public traversed the vestibule around the same time as Petitioner, and none of them fell, that does not mean a hazardous condition did not exist on Respondent's premises. Since the evidence supports a finding that there was water on the tile floor inside Respondent's vestibule, which constitutes a hazardous condition, it does not matter how many members of the general public Respondent also exposed to that hazard. In short, a neutral-but-increased-risk analysis is inapplicable since Petitioner's injuries were caused by a distinctly employment related risk.

Did the Lack of Mats Create an "Increased Risk?"

The Commission agrees with Respondent's argument that the Arbitrator's finding that the lack of mats was an increased risk introduced an element of negligence (i.e., a duty to provide mats), which is irrelevant in the context of a workers' compensation claim. The determinative question in the case at bar is whether Petitioner's injuries were caused by a hazardous condition on Respondent's premises.

As discussed above, we find that the hazardous condition Petitioner faced was the water on the tile floor, which caused her to slip and all. It was NOT the lack of mats. In other words, although Respondent could have mitigated the hazardous condition by using mats (as Petitioner testified they normally do when the weather is bad), the lack of mats would not normally be a "hazardous condition" but for the fact that the hazardous condition of water on the tile floor existed. In fact, the use of mats themselves could also *cause* a hazardous condition if they become folded over at the edge, buckled in the middle, etc. Therefore, we clarify that the water on the floor was the hazardous condition.

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed August 5, 2019, is hereby affirmed and adopted with the changes noted above.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $59,000.00. 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.

November 19, 2021

/s/ *Maria E. Portela*

SE/
O: 10/5/21
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/s/ *Thomas J. Tyrrell*

/s/ *Kathryn A. Doerries*

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANDERSON, EUREKA
Employee/Petitioner

Case# **18WC001302**

WALMART INC
Employer/Respondent

On 8/5/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.03% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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

5074 QUINTAIROS PRIETO WOOD & BOYER
RACHEL L BECICH
233 S WACKER DR 70TH FL
CHICAGO, IL 60606

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

Eureka Anderson
Employee/Petitioner

v.

Walmart, Inc.
Employer/Respondent

Case # **18** WC **1302**

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 **Wheaton**, on **January 9, 2019.** After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 9, 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 (of osteoarthritis) ***is not,*** causally related to a work accident.

Petitioner's average weekly wage was **$459.38**

On the date of accident, Petitioner was **38** years of age, ***single*** with **1** dependent child.

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

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

To date, Respondent has paid $**1,028.55** in TTD and/or for maintenance benefits, and is entitled to a credit for any and all amounts paid.

Respondent shall be given a credit of $**1,028.55** for TTD and TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**1,028.55.**

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

ORDER

Medical Benefits

Respondent shall pay the sum of $**45,021.40** for medical bills (in addition to those bills respondent has already paid) in accordance with the fee schedule, §8 and §8.2 of the Act, with credit to be given for any payments made by respondent.

Temporary Total Disability

Respondent shall pay temporary total disability benefits from **December 15, 2017 to April 30, 2018,** which is **19-4/7 weeks** at the rate of **$306.25 per week**.

Permanent Disability

Petitioner is entitled to **32.25** weeks' permanent partial disability, at **$275.63** per week, as petitioner's permanent disability has resulted in **15% loss of use of the left leg under §8 (e) 12 of the Act**.

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

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

Signature of Arbitrator

August 3, 2019
Date

ICArbDec p. 2

AUG 5 - 2019

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Eureka Anderson	)	
Petitioner,	)	
vs.	)	**No. 18 WC 1302**
Walmart, Inc.	)	
Respondent.	)	
	)	

ADDENDUM TO ARBITRATOR'S DECISION
FINDINGS OF FACTS AND CONCLUSIONS OF LAW

This matter proceeded to hearing in Wheaton on January 9, 2019. The parties agree that on December 9, 2017, petitioner and respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act, that their relationship was one of employee and employer and that petitioner gave timely notice of the claimed accident. The parties agree petitioner's average weekly wage was $459.38.

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 with respondent.
2. Whether petitioner's current condition of ill-being is causally connected to the claimed injury.
3. Whether respondent is liable for medical bills.
4. Whether petitioner is entitled to temporary total disability.
5. The nature and extent of petitioner's injury.
6. Whether penalties and attorneys' fees should be imposed upon respondent.
7. Whether respondent should be allowed credit for payments.
8. Whether petitioner should reimburse respondent for the payments made.

STATEMENT OF FACTS

Petitioner, age 39, a high school and college graduate, was hired by respondent on September 25, 2015 as a customer service supervisor. Her job requires her to maintain the front end; which required her to change payments, fill registers and other things. She worked forty hours a week, Monday through Friday. She was paid $14.50 per hour.

On December 9, 2017, she stepped outside to take her mandated break. It was snowing. As she returned back [inside], she slipped and fell. She had walked outside to the right of the store, where there was an ashtray cylinder, in order for her to have a cigarette. She was in the store vestibule when she slipped and fell on the tile floor. Her right foot went forward and she slipped landing on her right hand; something pop in her knee. There were no matts down in the vestibule area. Normally when the weather is bad, respondent puts down matts in this area.

She felt pain in her lower abdomen, right hand and left knee. She got up and reported the incident to the assistant manager of overnight, Charles Moore. He made a report of the accident the next morning at 8 A.M. The accident took place between midnight and one A.M. Petitioner finished the shift, which ended at 7:00 A.M. She continued to feel pain in her right hand and left

knee. She then went to Elmhurst Hospital for treatment. She did not work the weekend. She returned to worked two days after, but was in a lot of pain.

She returned to Elmhurst Hospital on December 15, 2017 with continued pain in her right hand and left knee. She was taken off work. She was told to go to occupational health, but elected to go to Dr. Catalina Grija, whom she saw on December 19, 2017. Dr. Grija recommended a MRI for her left knee and took petitioner off work. She obtained the MRI on December 26, 2017. She also had her right hand x-rayed. Dr. Grija referred her to orthopedist, Dr. Victor Romano.

She saw Dr. Romano initially on January 9, 2018. Dr. Romano diagnosed a meniscus tear in the left knee and sprain of the right hand. She had surgery for the meniscus tear on March 6, 2018. Post-surgery she received physical therapy and was kept off work during therapy. She was discharged from therapy on April 25, 2018 and followed up with Dr. Romano on the same day. She was released to return to work on May 1, 2018 without restrictions. She returned to Dr. Romano in July, 2018, due to ongoing pain. She received a shot in the knee. Dr. Romano believed the issue was arthritis at that point. She has not received treatment since she last saw Dr. Romano in July, 2018.

Petitioner continued to have pain in her knee for which she takes Naproxen, as prescribed by Dr. Grija.

She stopped working for respondent on May 14, 2018 and went to work for J.C. Penney at $10 per hour. She was working in customer service; cashier. She is no longer working at J.C. Penney due to pain in her knee.

Initially her surgery was accepted by the workers' compensation carrier and then later denied. She received one check for $1,028.55 from respondent. Some of her medical bills have been paid; the rest are outstanding.

She continues to have pain in her knee. She is unable to walk up and down stairs or keep up with her son; she also has problems cleaning her house.

On cross-examination petitioner agreed she told the emergency room personnel that her knee hurt when she put pressure on it to stand up.

Medical Bills (PX.1)

Petitioner claims the following bills are for treatment of her work injury:

$3,782.03 – West Suburban Hospital (12/26/2017-MRI)
$2,181.74 – West Suburban Hospital (01/18/2018- Pre Op Tests)
$27,367.66 – West Suburban Hospital (03/06/2018-Surgery)
$2,499.87 – West Suburban Hospital (07/11/2018-Knee Pain due to osteoarthritis)
$12,195.00 – Romano Orthopaedics (01/09/2018-07/12/2018)

Elmhurst Hospital Records (PX.2)

Petitioner reported to the emergency room on December 9, 2017 after slipping on water at work and falling. She reported she hurt her right hand in the fall and her left knee while trying to get up from the fall. X-rays were taken of the right hand and left knee. The diagnosis was contusion of right hand and left knee.

She returned to the ER on December 15, 2017 as she was having difficulty walking. She was instructed to go to the occupational health department.

Petitioner was admitted to the hospital on February 1, 2018 to February 2, 2018 due to chest pain, knee pain and migraine headache.

Dr. Catalina Grija Records (PX.3)

Petitioner was seen by Dr. Grija on December 19, 2017 due to the fall at work. She had pain in her right hand and left knee. A left knee MRI and X-ray of right hand were ordered; she was given a note for work.

The records contain a note from Elmhurst Memorial dated December 15, 2017 which indicates petitioner should not return to work until December 18, 2017.

The December 26, 2017 MRI from River Forest Campus reportedly showed medial meniscus posterior root radial tear extending to the posterior horn free edge with age advanced medial compartment cartilage loss/reactive bone change.

She was seen by Dr. Grija on January 29, 2018 for follow-up of knee pain.

She was seen on January 16, 2018 by cardiologist, Dr. Katherine Heretis, for the pre-op visit before meniscus surgery.

Romano Orthopaedic Center Records (PX.4)

Petitioner as seen by PA-C Morgan Crandall on January 9, 2018 due to left knee and right hand injury after fall at work. The diagnosis was complex tear of the medial meniscus of the left knee, sprain of the right wrist, unilateral primary osteoarthritis left knee and chondromalacia patellar of the left knee.

On March 1, 2018, Dr. Romano proposed scheduling surgery. Dr. Romano performed arthroscopic partial medial meniscus of the left knee on March 6, 2018. She was seen in follow up on March 20, 2018. On April 25, 2018, she was released by PA Morgan Crandell to return to full duty work as of May 1, 2018 and to return prn.

She received physical therapy from March 12, 2018 to April 25, 2018.

She returned to Dr. Romano on July 12, 2018 with unbearable pain in her left knee. The diagnosis was unilateral primary osteoarthritis of the left knee. She was given an injection and advised to return prn.

Chicago Cardiology Institute Records (PX.5)

Including in these records are the pre-op cardiology exam of January 16, 2018, which petitioner had before meniscus surgery.

Metropolitan Advance Radiological Records (PX.6)

Records of the X-rays of wrist, leg and chest, as well as MRI of left knee.

West Suburban Medical Center (PX.7)

Records include the operative report of March 6, 2018.

She was seen on July 11, 2018 due to extreme left knee pain. The diagnosis was osteoarthritis.

She was seen on December 6, 2018 due to abdominal and knee pain.

Surveillance Video (RX.1)

The video shows the area where petitioner slipped and fell in the vestibule of respondent's store. The video shows petitioner stepping back into the store and slipping and falling.

Respondent's Payment (RX.2)

Petitioner's was paid TTD from December 20, 2017 to January 9, 2018. Respondent also paid Metropolitan Advanced Radiology, Elmhurst Memorial Hospital for services rendered on December 9, 2017 and December 15, 2017, and Encore Unlimited for Medical Rehab from January 13, 2018 to January 17, 2018.

CONCLUSIONS OF LAW

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

The Arbitrator found petitioner to be pleasant and straight-forward.

C. With respect to the issue of whether an accident occurred that arose out of and in the course of Petitioner's employment by respondent, the Arbitrator makes the following conclusions of law:

Petitioner was returning from her mandated break, within respondent's vestibule, when she slipped and fell. It was clear from the video it was snowing. There were no matts on respondent's tile floor. The Arbitrator finds that the fact that there were no matts at the entrance of respondent's store created an increased risk. Thus, the Arbitrator finds petitioner sustained injuries in an accident that arose out of and in the course of her employment with respondent on December 9, 2017.

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:

There is no evidence petitioner had problems with, or received any treatment to, her left knee before the December 9, 2017 accident. The records of Dr. Victor Romano support the fact that petitioner's sprain of her right wrist and torn medial meniscus of the left knee were caused by the work accident of December 9, 2017. Dr. Romano performed arthroscopic surgery to the medial meniscus on March 6, 2018. Petitioner was released from Dr. Romano's care due to the work injury on April 25, 2018.

Based upon the foregoing, the Arbitrator finds petitioner's torn medial meniscus of her left knee and right wrist sprain was the result of the work accident of December 9, 2017.

Although petitioner was seen in the emergency room of West Suburban Medical Center on July 11, 2018 and by Dr. Romano on July 12, 2018, due to pain in her left knee, petitioner testified, and the records reflect, it was due to osteoarthritis. There was no opinion tying the osteoarthritis condition to petitioner's work injury. Accordingly, the Arbitrator specifically finds petitioner's osteoarthritis was not caused by the work accident.

J. With respect to the issue regarding medical bills, the Arbitrator makes the following conclusions of law:

The Arbitrator finds the following bills were for treatment of petitioner's work injury and awards same in accordance with the fee schedule, §8 and §8.2 of the Act, with credit to be given for any payment made by respondent:

$3,782.03 – West Suburban Hospital (12/26/2017-MRI)
$2,181.74 – West Suburban Hospital (01/18/2018- Pre Op Tests)
$27,367.66 – West Suburban Hospital (03/06/2018-Surgery)
$11,690.00 – Romano Orthopaedics (01/09/2018-04/25/2018 only)

The Arbitrator also awards the payments made by respondent, with credit to be given for said payment.

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 medical evidence supports a finding that petitioner was temporarily totally disabled from December 15, 2017 to April 30, 2018. She was released to return to full-duty work by Dr. Romano on May 1, 2018. The Arbitrator therefore awards temporary total disability from December 15, 2017 to April 30, 2018, which is 19-4/7 weeks, at the rate of $306.25 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 sprained right wrist and torn medial meniscus in the left knee as a result of the work accident of December 9, 2017. There is no evidence petitioner's sustained any lasting effect from the sprained right wrist.

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

With regard to subsection (i) of §8.1b (b) the Arbitrator notes that there was no permanent partial disability impairment rating provided. The Arbitrator, therefore, cannot give any weight to this factor.

With regard to (ii) of §8.1b (b) the occupation of the injured employee, the Arbitrator notes petitioner was employed as a customer service supervisor, which required her to maintain the front end. There was no testimony as to how much time petitioner had to be on her feet in performing this job. She was released to unrestricted work on May 1, 2018. Petitioner voluntarily left her employment with respondent on May 14, 2018. There was no evidence that petitioner's work injury affected her ability to perform her job. Therefore, the Arbitrator gives no weight to this factor.

With regard to (iii) of §8.1b (b) the age of the employee at the time of the injury was 38 years of age. The Arbitrator gives more weight to this factor.

With regard to (iv) of §8.1b (b) the employee's future earning capacity, the Arbitrator notes petitioner was capable of returning to her usual employment with respondent without a loss of earning capacity. Although she testified she was earning less at J.C. Penney's, petitioner voluntarily left her employment with respondent to take this job, after being given a full-duty release by her doctor. 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 petitioner underwent a meniscectomy for a complex tear of the medial meniscus of petitioner's left knee. She was released from care on April 25, 2018 and to return to work full-duty. She doing well with improvement in strength and range of motion. Petitioner was to return as needed. Although petitioner returned on July 12, 2018, it was due to osteoarthritis. Therefore, the Arbitrator gives little 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 15% loss of use of the left leg pursuant to §8(e)12 and awards 32.25 weeks of permanent partial disability at the rate of $275.63 per week.

M. With respect to the issue of whether penalties or attorneys' fees should be imposed upon respondent, the Arbitrator makes the following conclusions of law:

Although the Arbitrator determined petitioner proved she was exposed to an increased risk due to the lack of matts at respondent's entrance, the Arbitrator noted the video showed customers were coming and going without difficulty. Although these factors were insufficient to defeat petitioner's claim, it is sufficient to show respondent was not acting vexatious or unreasonable by questioning the claim. Therefore, the claim for penalties and attorneys' fees is denied.

N. With respect to the issue whether respondent is due credit the Arbitrator makes the following conclusions of law:

Respondent is given credit for the medical payments and temporary total disability payments made.

O. With respect to the issue whether petitioner should reimburse respondent for payments made, the Arbitrator makes the following conclusions of law:

As the Arbitrator found in petitioner's favor, petitioner is not obligated to reimburse respondent for payments made.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021948
Case Name	KENNY, ARLENE v. AMAZON.COM, INC.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0575
Number of Pages of Decision	15
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Brent Eames
Respondent Attorney	Timothy McNally

DATE FILED: 11/19/2021

/s/ Deborah Simpson, Commissioner

Signature

21IWCC0575

STATE OF ILLINOIS)	☒ Affirm and adopt (with explanation)	☐ Injured Workers' Benefit Fund (§4(d))
) SS.	☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
COUNTY OF COOK)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☐ Modify Down	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

ARLENE KENNY,

Petitioner,

vs. NO: 19 WC 21948

AMAZON,

Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission agrees with the Decision of the Arbitrator while further acknowledging that the UR report issued on October 26, 2020 lacked persuasiveness in the face of the significant medical evidence establishing Petitioner's entitlement to prospective care. Upon authoring the UR report, Dr. James Cain, a board certified orthopedic surgeon, indicated that he had reviewed the following records: an MRI dated July 16, 2019; visit notes from Dr. John Hong dated September 12, 2019 and October 24, 2019; the §12 report from Dr. Alexander Ghanayem; a visit note from Dr. G. Pitsilos dated November 8, 2019, and a health insurance claim form dated November 21, 2019. Following the review of these records, Dr. Cain determined that the requested left L4-L5 decompression and fusion surgery was non-certified and not medically necessary.

However, Dr. Cain's list of records that he reviewed excludes numerous other medical records of Petitioner, including those from Dr. Anis Mekhail and Dr. Ashraf Darwish. It is significant that the records of Dr. Mekhail and Dr. Darwish were not seen by Dr. Cain, because they were Petitioner's two treating orthopedic surgeons who both opined that Petitioner's findings warranted lumbar surgery. Dr. Cain's failure to review a complete set of Petitioner's records weakens his opinion that the medical necessity for lumbar surgery was not established. While

non-certifying the L4-L5 decompression and fusion surgery, Dr. Cain stated that there was no unequivocal correlation in Petitioner's physical examinations indicating an anatomic neurological deficit correlating to the radiological imaging pathology. However, it is unknown whether Dr. Cain would have made this same determination had he seen Dr. Mekhail's and Dr. Darwish's treatment notes that suggested neurological compression and stenosis. The Commission was persuaded by the opinions of Dr. Mekhail and Dr. Darwish, which rebutted the UR report.

Given that Dr. Cain's review was missing important and relevant treatment notes, the Commission finds that the UR report lacked persuasiveness. The UR report failed to diminish the credible medical evidence supporting the award of prospective care, including the recommended lumbar surgery. The Decision of the Arbitrator is accordingly affirmed and adopted in its entirety.

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

IT IS THEREFORE FOUND BY THE COMMISSION that the UR report issued by Dr. Cain on October 26, 2020 lacked persuasiveness in the face of the significant medical evidence supporting the award of prospective care, including the lumbar surgery recommended by Dr. Mekhail.

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 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.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $1,900.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

November 19, 2021

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

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

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

DLS/met
O- 10/27/21
46

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC021948
Case Name	KENNY ARLENE v. AMAZON
Consolidated Cases	
Proceeding Type	19(b) Petition
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	12
Decision Issued By	Jessica Hegarty, Arbitrator

Petitioner Attorney	Brent Eames
Respondent Attorney	Carolyn Enright

DATE FILED: 5/14/2021

INTEREST RATE FOR THE WEEK OF MAY 11, 2021 0.03%

/s/ Jessica Hegarty, Arbitrator
Signature

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

ARLENE KENNY
Employee/Petitioner

v.

AMAZON
Employer/Respondent

Case # **19** WC **21948**

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 **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **March 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, **May 2, 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 $**20,270.09**; the average weekly wage was $**405.40**.

On the date of accident, Petitioner was **62** 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 $**6,437.53** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**6,437.53**.

Respondent is entitled to a credit of $**18,736.19** under Section 8(j) of the Act for short term and long term disability benefits received by the Petitioner.

ORDER

Respondent shall pay reasonable and necessary medical services of **$1,769.00**, as provided in Sections 8(a) and 8.2 of the Act.

Respondent shall further authorize and pay for future medical treatment as prescribed and recommended by the Petitioner's treating orthopedic surgeon, Dr. Anis Mekhail.

Respondent shall pay Petitioner temporary total disability benefits of **$270.27**/week for **93 1/7** weeks, commencing **05/04/19** through **10/15/2019**, and again from **11/12/2019** through **03/12/2021** as provided in Section 8(b) of the Act. Respondent shall be given a credit of $**6,437.53** for TTD paid, for a total credit of $**6,437.53**. Further, Respondent shall be given credit for $**18,736.19** for short-term and long-term disability benefits paid 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.

Jessica Hegarty_____ **MAY 14, 2021**
Signature of Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION
19(b)

ARLENE KENNY, Petitioner,	)	
v.	)	19 WC 21948
AMAZON, Respondent.	)	

FINDINGS OF FACT

Respondent disputes the following issues: accident, causal connection, liability for Petitioner's medical bills, TTD, and prospective medical treatment. (Arb Ex. 1)

Petitioner, Arlene Kenny, testified that she was injured while working for the Respondent, Amazon, on May 2, 2019. (Tr.7). Petitioner testified that on that date while performing "taping" duties, she ran out of tape, such that she needed to change the tape at her station. (Id.9). The roll of tape she had been handling weighed approximately 20 to 25 pounds and an attachment to the tape weighed an additional 10 to 15 pounds. (Id.10). Petitioner testified that as she changed the tape, "I must have twisted wrong, and I felt a pop." (Id.9-10). Petitioner noted the pop occurred in her left lower back. Although she felt low back pain, Petitioner continued to work. She later felt sick to her stomach. (Id.12). She proceeded to the bathroom where she vomited and broke out in a sweat. (Id.12-13). After taking some Tylenol, she returned to work. (Id.13). Her back pain increased throughout the day. She went home and sat in a whirlpool with Epsom salts. (Id.14). Petitioner also took some of her husband's prescription medication for her back pain. (Id.15).

The next day, Petitioner returned to work. During morning stretching, she reported her back pain to her supervisor who instructed her to report to Amcare, Respondent's on-site medical facility where she received ice, heat, and an application of Biofreeze to her back. (Id.15-16). She also completed an accident report with her area manager. Petitioner was sent back to work. She attempted to perform her duties, including pulling a cart, but felt physically unable to continue. She left work for the day. (Id.)

Petitioner testified she is generally off on Sundays, Mondays, and Tuesdays. By Monday, Petitioner's pain was such that she contacted her family physician at DuPage Medical Group. (Id.19).

The medical records from DuPage Medical Group indicate that Petitioner presented on to Dr. Mark Mackey on May 6, 2019. A history of back pain for the past four days after a work-related lifting injury was noted. (Px1, pgs.14-15) On exam, spasm and tenderness along the lumbar paraspinal muscle columns was noted, along with tenderness to the upper gluteal region affecting the left side. (Id., p.16) A diagnosis of a lower back muscle strain was noted. Petitioner was advised to rest, and various medications were prescribed. (Id., p.17) The Petitioner was advised to follow up with her primary care physician within the next 1-2 days for a recheck. (Id., p.18)

On May 13, 2019 Petitioner returned to DuPage Medical Group where Dr. Dalius Kedainis noted a history of a May 3, 2019 injury while working at Amazon warehouse. The doctor noted that Petitioner's job duties include lifting, turning heavy boxes, and applying packing tape. The doctor further noted, while "lifting a heavy box and turning to the right, she felt a sudden pain in her lower back, radiating to the left buttocks." (Px1, p.11) The Petitioner testified that she did not report to Dr. Kedainis that she was lifting a heavy box at the time of her injury. (T40) The records indicate Petitioner reportedly felt "a little bit better" but still was experiencing "moderate to severe lower back pain, primarily on her left side, which was rated at a 4/10 at rest, and 4-8/10 with physical exertion. (Id.) The doctor noted sciatica to the left buttock and left posterior leg. (Id.) On examination, Dr. Kedainis noted lower back muscle spasm. Petitioner denied having numbness or tingling. A diagnosis of acute left-sided low back pain with left-sided sciatica was noted. (Id., p.12) The doctor restricted Petitioner from work and physical therapy was prescribed. (Id., p.12-13)

Petitioner testified that after her appointment with Dr. Kedainis, she reported back to Respondent's in-house medical facility where she was instructed to report for further medical treatment at Premier Occupational Health in Bolingbrook (Id., p. 20-22) The Petitioner indicated that she would go wherever Respondent wanted her to go, so she agreed to transition her medical treatment to Premier Occupational Health. (T23) (PX2)

On May 15, 2019 the Petitioner presented to Premier Occupational Health for initial consult with Dr. Thomas Cronin who noted a history of a May 2, 2019 incident in which Petitioner was changing tape on line 2 when she twisted wrong and felt sharp pain. (PX2, p. 141) Dr. Cronin noted, "Arlene's primary problem is a strain. The problem began on 5/2/210 located in the back. She describes it as sharp. Her pain level is 7. She considers it to be moderate. Arlene says that it seems to be constant". (Id.) Petitioner was diagnosed with sciatica on her left side, and a sprain of the lumbar spine. Work restrictions of no lifting, pushing, or pulling more than five pounds were instituted and physical therapy was recommended. (Id., pgs. 136, 142) Dr. Cronin noted Petitioner's injury was related to her work activities. (Id., p. 142)

On May 23, 2019 the Petitioner followed up at Premier Occupational Health at which time Dr. Cronin again noted that, "Arlene's primary problem is a strain." (PX2).

Petitioner had commenced therapy with Premier Occupational Health as of May 15, 2019. Petitioner next came under the care of Dr. Pitsilos of Premier Occupational Health on May 28, 2019. The diagnosis remained sciatica, and Petitioner remained on restricted duty. (Id.).

On May 21, 2019 Premier Occupational Health noted Petitioner's continued complaints of sharp lower back pain. (PX2, p. 130) Work restrictions were adjusted to allow for lifting up to ten pounds. (Id., p. 131)

For the next two months, the Petitioner continued to perform physical therapy at Premier Occupational Health and continued to regularly follow up with Dr. Pitsilos. (Id., pgs. 103-123)

Lumbar MRI was performed at Molecular Imaging on July 16, 2019, pursuant to the order of Dr. Pitsilos. (Id., pgs. 94-97) The radiologist's report indicated disc abnormalities at multiple levels, including a 3 mm disc protrusion with effacement of the thecal sac at the L4-5 level, causing bilateral stenosis of neuroforamina that encroaches the left L4 existing nerve roots. (Id., p. 95) Given the findings of the MRI, Dr. Pitsilos referred the Petitioner to orthopedic surgeon, Dr. Hong. (Id., p. 90)

On August 22, 2019 Dr. John Hong, orthopedic surgeon at Gateway Spine & Pain Physicians, noted the Petitioner presented for initial consult. (Px3, p. 14) Petitioner reported a history of injury on May 2, 2019, while at work for Amazon she was "lifting roll of tape and felt pop and burning pain in the left lower back". (Id.)

Dr. Hong reviewed the MRI films, noting facet hypertrophy, compression involving the left lateral recess at L4-5 secondary to facet hypertrophy and disc bulge. (Id.) On exam, left lower lumbar paraspinal tenderness, pain with flexion, and pain with extension was noted. (Id., p. 14) After the physical evaluation, Dr. Hong diagnosed acute bilateral low back pain with left-sided sciatica recommending a bilateral transforaminal epidural steroid injection at the L4-5 and L5-S1 levels. (Id., p. 15)

On September 30, 2019, the Petitioner presented to Dr. Alexander Ghanayem for an independent medical examination, at Respondent's request, pursuant to section 12 of the Act. (Rx1) (Px2, p. 63) The Petitioner testified that she reported an accident history consistent with her testimony at the hearing. She testified she did not tell him that she was "not 100% sure" how she was injured. (T30) According to Petitioner, Dr. Ghanayem's examination lasted ten minutes. (T30)

On October 15, 2019, Respondent offered the Petitioner a temporary work placement which accommodated her physical restrictions as outlined by Dr. Pitsilos. (T30) The Petitioner was assigned to work at the St. Vincent DePaul consignment shop. (T30) She

sorted clothes throughout the day and was not required to lift anything. (T30) She was also allowed to stand and sit as she pleased. (T30)

On October 24, 2019, the Petitioner underwent the proposed bilateral L4-5 L5-S1 transforaminal epidural steroid injections by Dr. Hong. (PX3, p. 9) The Petitioner followed up with Dr. Hong on November 6, 2019 reporting substantial relief immediately following the injection, with pain returning to a moderately intense level as the injections wore off. (PX3, p. 7) Given the Petitioner's response to this injection, Dr. Hong recommended a repeat injection to facilitate further improvement and functionality, as well as a return to formal physical therapy to focus on core strengthening. (PX3, p. 7)

On November 11, 2019, Dr. Ghanayem issued his IME report from the September 30, 2019 examination in which he opined that Petitioner did not require any work restrictions and could return to her full duty position. (RX1, Exhibit 2) Following the issuance of this report, Respondent revoked the light duty accommodations for Petitioner. (T31) Petitioner then contacted the Respondent's workers' compensation claim handler to ask about next steps at which time the Petitioner was advised to apply for short term disability. (Id. 32)

The Petitioner applied and was approved for short term disability benefits through Respondent. (Id. 33) This process involved filling out an application using Respondent's online portal and forwarding medical notes and documentation. (Id.) After approximately six months of receiving short term disability benefits, the Petitioner's short-term disability leave transitioned into long term disability leave. (Id.)

Petitioner has not worked since her light duty position was terminated by Respondent. (Id.32)

Dr. Ghanayem, board certified orthopedic surgeon, testified via evidence deposition. (RX1, p.7) In addition to treating patients, approximately 10% of his medical practice is devoted to performing independent medical examinations, and he typically performs between four and seven of these examinations every week. (Id., p. 26)

Dr. Ghanayem reviewed the films from the Petitioner's lumbar MRI, noting the presence of age-appropriate degenerative changes at the L3-4 and L4-5 levels. (Id., p. 11) Based upon his review of the MRI films, Petitioner's subjective complaints and his objective findings during Petitioner's physical examination, the doctor concluded the Petitioner was not a surgical candidate. (Id., p.12) Dr. Ghanayem diagnosed the Petitioner with a soft-tissue injury, which required no injections, surgery, or any further medical treatment whatsoever. (Id., p. 17) He opined she was capable of returning to the same pre-injury work status in spite of her ongoing lower back discomfort given

that she already underwent the appropriate medical treatment for a soft-tissue back injury. (Id., p. 18-19)

On December 5, 2019 Petitioner presented to Dr. Anis Mekhail, orthopedic surgeon, at Parkview Orthopedic Group who noted an accident history consistent with Petitioner's testimony. Dr. Mekhail reviewed the MRI imaging, noting severe left-sided L4-5 stenosis, mostly foraminal, but also significant for lateral recess. (PX4, p. 6) Dr. Mekhail recommended a left L4-5 decompression and fusion. (Id., p. 7) He restricted Petitioner from working . (Id., p. 8)

After her consultation with Dr. Mekhail, the Petitioner returned to see Dr. Pitsilos at Premier Occupational Health. (T34-35) The Petitioner testified that Dr. Pitsilos had been the doctor treating her for the duration of her injury, so she wanted his opinion regarding the surgical recommendation from Dr. Mekhail. (Id., 34-35) Dr. Pitsilos referred the Petitioner for a second opinion with Dr. Ashraf Darwish. (PX2, p. 30) Dr. Pitsilos explained to the Petitioner that Dr. Darwish would not recommend surgery unless it was 100% necessary, so the Petitioner made the appointment for a consultation with Dr. Darwish for a second opinion. (T35)

On January 7, 2020 Dr. Ashraf Darwish at Hinsdale Orthopedics noted an accident history consistent with Petitioner's arbitration testimony. (PX5, p. 13) Dr. Darwish reviewed the lumbar spine MRI noting an L4-5 diffuse disc bulge with left foraminal disc protrusion causing left lateral recess and severe left foraminal narrowing. (Id., p. 14) After examination, Dr. Darwish diagnosed radiculopathy, lumbar spinal stenosis, and a herniated lumbar disc. (Id.) Given the failure of conversative treatment, Dr. Darwish concurred with the surgical recommendation for an L4-5 transforaminal lumbar interbody fusion with posterior instrumentation and use of allograft bone. (Id., p. 15) Dr. Darwish noted Petitioner's lower back problems stemmed from the work-related accident at issue. (Id.)

On January 16, 2020, Petitioner followed up with Dr. Mekhail indicating her wish to proceed with the proposed surgery. (PX4, p. 9)

Since January 16, 2020, the Petitioner has continued to follow up with Dr. Mekhail for medical care and management approximately every two months. (T35)(PX4) Throughout these follow-up appointments, Dr. Mekhail has continued to recommend surgery and restrict the Petitioner from work. (PX4, pgs. 13-24)

On November 19, 2020, the Petitioner reported to Dr. Mekhail that her leg became so numb that she fell, causing her to cut her right arm. (PX4, p. 21) (T36) The Petitioner testified that was a result of getting up in the night to use the bathroom, and her left leg completely gave out, causing her to fall and cut herself. (T36)

Dr. Mekhail testified via evidence deposition that he is a board-certified orthopedic surgeon practicing as such since 2003. (PX6, p. 6) Dr. Mekhail testified that the necessity of Petitioner's lower back injury was caused by the May 2, 2019 work accident at issue. (Id., pgs. 19-20) Dr. Mekhail reasoned that the Petitioner had no history of lower back pain or complaints prior to the May 2, 2019 injury, and her MRI findings clinically correlate with her complaints and symptoms. (Id., p.20) The lifting and twisting injury which the Petitioner described is a competent mechanism of injury to cause of an aggravation of Petitioner's preexisting lumbar condition. (Id., pgs. 20-21) Dr. Mekhail testified that if the Petitioner does not undergo the proposed surgery, her symptoms will likely worsen, with progression of numbness and weakness. (Id., p. 22)

On March 8, 2021 the Respondent obtained a second IME report, this time from Dr. Steven Mather of DMG Orthopedics. (RX3) The Petitioner did not meet with Dr. Mather and was not examined by Dr. Mather in connection with this report. (T39-40) The Petitioner testified that she has never spoken with Dr. Mather. (Id.) For his report, Dr. Mather reviewed the MRI films, as well as the December 5, 2019 note from Dr. Mekhail, the January 7, 2020 note from Dr. Darwish, and the IME report from Dr. Ghanayem. Dr. Mather agreed with Dr. Ghanayem that the Petitioner more than likely suffered a soft-tissue injury as a result of this work accident. This opinion was based in part upon the notation in Dr. Ghanayem's report that the Petitioner was allegedly not sure of the incident which caused her injury. However, Dr. Mather opined that the MRI films demonstrated borderline foraminal stenosis, and if surgery was actually warranted, a decompression should be pursued as opposed to the fusion surgery recommended by Dr. Mekhail and Dr. Darwish. (Id.)

The Petitioner testified that as she has been waiting to proceed with the proposed surgery, her lower back condition is worsening. (T36) She has a difficult time sleeping and has slept in a recliner to take pressure off of her lower back. (Id.37) She struggles with activities of daily living, such as cleaning her home and cannot lift her young grandchildren or be intimate with her husband. (Id.37-38) The Petitioner testified that she wants to undergo the proposed surgery because she wants her life back. (Id.39)

CONCLUSIONS OF LAW

CREDIBILITY OF PETITIONER

The Arbitrator found the Petitioner to be an exceedingly credible witness. The Petitioner's demeanor - the tone of her voice, her facial expressions, eye contact with the Arbitrator, the overall way in which she carried herself - conveyed to the Arbitrator that she was honest and trustworthy. The Petitioner was confident in telling the story of her accident and subsequent injuries. She withstood rigorous cross-examination and emerged unscathed. In addition, the medical records in evidence corroborate

Petitioner's testimony. Accordingly, the Arbitrator places a great deal of weight on her testimony.

ACCIDENT

Based upon the greater weight of the evidence, the Arbitrator finds that the Petitioner suffered an accident that arose out of and in the course of her employment with Respondent.

Petitioner testified credibly that while performing her assigned duties for the Respondent, she was injured as a result of lifting and twisting while attempting to change a roll of tape. Petitioner's testimony is corroborated by the treating medical records which chronicle her consistent reporting of the accident to numerous medical providers.

The Arbitrator finds Dr. Ghanayem's note, that Petitioner was "not 100% sure" how she was injured, inconsistent with the many histories and statements that Petitioner reported to her treating medical providers prior to the Ghanayem IME.

No medical expert testified or opined that the Petitioner did not suffer any injury as a result of the described incident of May 2, 2019.

Based upon the foregoing, the Arbitrator finds that the Petitioner did suffer an accident that arose out of and in the course of her employment by Respondent on May 2, 2019.

CAUSAL CONNECTION

Based upon the greater weight of the evidence, the Arbitrator finds the Petitioner's current condition of ill-being is causally connected to the work accident of May 2, 2019.

The Petitioner's credible, unrebutted testimony was that prior to the accident at issue, she was in good physical shape, and had never suffered any significant injury to her lower back. The medical evidence is completely void of any information or documentation which would contradict this testimony. Petitioner provided consistent histories of this work accident to each and every one of her medical providers.

Although Petitioner most likely suffered from preexisting, degenerative conditions in her lower back, such condition(s) were asymptomatic prior to the accident at bar. The subject work injury may not be the sole, proximate cause but is, at a minimum, *a* causative factor in Petitioner's condition of ill-being and need for medical care.

The Arbitrator finds the testimony of Dr. Anis Mekhail credible and persuasive. The Arbitrator notes that Dr. Mekhail's opinions regarding proposed medical treatment are corroborated by the opinions of Dr. Ashraf Darwish, who after reviewing the MRI films

and performing an examination of the Petitioner also opined that Petitioner was a candidate for the same surgery recommended by Dr. Mekhail.

The Arbitrator is not persuaded by the testimony or opinions of Dr. Alexander Ghanayem. While Dr. Ghanayem opined that the Petitioner had reached maximum medical improvement and required no further medical treatment of any kind, he acknowledged her credible complaints of ongoing lower back pain and suggested that these complaints may be permanent in nature. Clearly, this is not consistent with a diagnosis of a soft tissue injury, which Dr. Ghanayem testified should have resolved with physical therapy and conservative treatment. Dr. Ghanayem only saw the Petitioner one time for approximately ten minutes in September of 2019. By his own admission, he has "no idea" what the Petitioner's current condition looks like at the current time. This is in stark contrast to Dr. Mekhail, who has treated and seen the Petitioner consistently since his initial evaluation.

The Arbitrator does not find Dr. Ghanayem's note, that Petitioner stated she was not "100% percent sure" of how she was injured, credible in light Petitioner's consistent reporting to her treating medical providers regarding her workplace accident.

The Arbitrator is not persuaded by the opinions of Dr. Mather, who did not examine or speak to the Petitioner.

Based upon the foregoing, including the credible testimony of the Petitioner, the credible testimony of Dr. Anis Mekhail, the medical notes, records, and the greater weight of the evidence, the Arbitrator finds that the Petitioner's current condition of ill-being is causally connected to the work incident of May 2, 2019.

MEDICAL BILLS

Given the Arbitrator's finding regarding casual connection, and based upon the greater weight of the evidence, the Arbitrator finds that all claimed medical services provided to Petitioner were reasonable and necessary, and further finds that the Petitioner is entitled to payment of all related medical expenses. Accordingly, Respondent is liable for all of Petitioner's medical expenses, pursuant to the medical fee schedule, including $1,769.00 from Parkview Orthopedic Group as provided in Sections 8(a) and 8.2 of the Act.

PROSPECTIVE MEDICAL TREATMENT

Based upon the greater weight of the evidence contained in the record, including the credible testimony of Petitioner and the opinions of her treating medical providers, the Arbitrator finds that Petitioner has established entitlement to future medical care as

prescribed by her treating medical providers, including, but not limited to, the lumbar surgery proposed by Dr. Mekhail.

TTD

Given the Arbitrator's finding regarding casual connection, and based upon the greater weight of the evidence, the Arbitrator finds that Petitioner has established that she is entitled to payment of temporary total disability benefits from May 4, 2019 through October 15, 2019, as well as from November 12, 2019 through the date of hearing on March 12, 2021. The evidence demonstrates that aside from a brief light duty accommodation offered by the Respondent and performed by the Petitioner from October 16, 2019 through November 11, 2019, the Petitioner has not worked for Respondent since attempting to perform her duties on May 3, 2019. The greater weight of the evidence supports the finding that the Petitioner has been totally disabled from working for Respondent since that time, given the Respondent's inability to offer a proper accommodation. The Arbitrator finds the opinions of Dr. Mekhail, Dr. Pitsilos, and Dr. Hong to be persuasive and credible that the Petitioner has been and should be restricted from performing full duty work pending surgery. The Arbitrator was not persuaded by the opinions of Dr. Ghanayem and Dr. Mather that the Petitioner is capable of performing regular and unrestricted work duties.

Based upon the foregoing and the greater weight of the evidence, the Arbitrator finds that the Petitioner is entitled to TTD benefits in the lump sum of $25,173.72, totaling 93 1/7 weeks of temporary disability at a rate of $270.27 per week, which represents the periods of May 4, 2019 through October 15, 2019, and again from November 12, 2019 through March 12, 2021.

RESPONDENT'S CREDIT

The parties stipulated that Respondent has paid $6,437.53 in TTD benefits, for which it is entitled to a credit. Further, the Petitioner has received short term and long-term disability benefits from the Respondent, for which the Respondent is entitled to a credit totaling an additional $18,736.19, which represents its claimed liability in temporary disability benefits as of the date of hearing.

Based upon the foregoing, and the greater weight of the evidence, the Arbitrator finds that the Respondent is entitled to a credit for TTD paid totaling $6,437.53, as well as a credit under 8(j) totaling $18,736.19 for non-occupational disability benefits received by the Petitioner.

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	18WC030979
Case Name	PATRICK, CASSANDRA v. WALMART
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b)
Decision Type	Commission Decision
Commission Decision Number	21IWCC0576
Number of Pages of Decision	12
Decision Issued By	Deborah Simpson, Commissioner

Petitioner Attorney	Thomas Rich
Respondent Attorney	Dru Dennis

DATE FILED: 11/19/2021

/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

Casandra Patrick,

Petitioner,

vs. NO: 18 WC 30979

Walmart,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of medical and permanent disability and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. 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 1, 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.

November 19, 2021

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

o11/17/21
DLS/rm
046

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION 21IWCC0576
NOTICE OF 19(b) ARBITRATOR DECISION

PATRICK, CASSANDRA Case# **18WC030979**

Employee/Petitioner

WALMART

Employer/Respondent

On 4/1/2021, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

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

0210 GANAN & SHAPIRO PC
DRU DENNIS
411 HAMILTON BLVD SUITE 1006
PEORIA, IL 61602

STATE OF ILLINOIS)
)SS.
COUNTY OF MADISON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Cassandra Patrick
Employee/Petitioner

Case # 18 WC 30979

v.

Consolidated cases: n/a

Walmart
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 February 26, 2021. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. ☐ Was there an employee-employer relationship?
C. ☐ Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
D. ☐ What was the date of the accident?
E. ☐ Was timely notice of the accident given to Respondent?
F. ☒ Is Petitioner's current condition of ill-being causally related to the injury?
G. ☐ What were Petitioner's earnings?
H. ☐ What was Petitioner's age at the time of the accident?
I. ☐ What was Petitioner's marital status at the time of the accident?
J. ☒ Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. ☒ 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 8, 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 $24,635.00; the average weekly wage was $473.75. The parties stipulated to the minimum rate.

On the date of accident, Petitioner was 36 years of age, single with 2 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. The parties stipulated that TTD benefits were paid in full to the date of trial.

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

ORDER

Respondent shall pay reasonable and necessary medical services as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

Respondent shall authorize and pay for prospective medical treatment including, but not limited to, disc replacement surgery as recommended by Dr. Matthew Gornet.

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

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

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

William R. Gallagher, Arbitrator
ICArbDec19(b)

March 27, 2021
Date

APR 1 - 2021

Findings of Fact

Petitioner filed an Application for Adjustment of Claim which alleged she sustained an accidental injury arising out of and in the course of her employment by Respondent on September 8, 2018. According to the Application, Petitioner "Slipped and fell" and sustained injuries to her "Lt Wrist/Elbow/Knee, Back/Body as a Whole" (Arbitrator's Exhibit 2). This case was tried in a 19(b) proceeding and Petitioner sought an order for payment of medical bills and prospective medical treatment in regard to her low back. Respondent disputed liability on the basis of causality in regard to Petitioner's low back. Respondent did not dispute liability in regard to injuries sustained to other areas of the anatomy as a result of the accident (Arbitrator's Exhibit 1).

At trial, Petitioner testified she worked for Respondent as a stocking associate. On September 8, 2018, Petitioner slipped and fell on a wet spot on the floor and sustained injuries to multiple areas of the anatomy. As aforestated, the only dispute in this proceeding was in regard to Petitioner's low back injury, so the medical treatment Petitioner received in regard to the injuries to other areas of the anatomy will not be reviewed/abstracted herein.

Petitioner testified she sustained a prior injury to her low back in February, 2016. The accident occurred under very similar circumstances, a slip/fall on a wet floor. Petitioner testified she was treated by Dr. David Raskas, an orthopedic surgeon, who administered injections and prescribed medication. Dr. Raskas subsequently released Petitioner to return to work without restrictions. At that time Petitioner sustained the accident on September 8, 2018, she had not sought any treatment from Dr. Raskas since the time he released her and has not lost any time from work because of low back issues.

Following the accident, Petitioner was seen in the ER of Sparta Community Regional Hospital. At that time, Petitioner complained of moderate low back and right leg pain. An x-ray of the low back was obtained which revealed chronic degenerative arthritic changes and a loss of disc space at L5-S1. Petitioner was diagnosed with the lumbar strain, prescribed medication and directed to follow up with her family physician, Dr. Shawn Beckemeyer (Petitioner's Exhibit 3).

Dr. Beckemeyer saw Petitioner on September 10, 2018. At that time, Dr. Beckemeyer examined Petitioner's low back and noted lumbar paraspinal muscle spasm. She recommended Petitioner continue taking medication. When Petitioner saw Dr. Beckemeyer on September 14, 2018, she recommended a referral to an orthopedic specialist (Petitioner's Exhibit 4).

Petitioner was seen by Dr. Thomas Lee, an orthopedic surgeon, on September 19, 2018, on referral from Dr. George Paletta (an orthopedic surgeon who was treating Petitioner for her left knee injury). When seen by Dr. Lee, Petitioner informed him of both the accident of September 8, 2018, and her prior accident of 2016. Petitioner advised she had recovered completely from the prior accident of 2016. On examination, Dr. Lee noted tenderness at L4 and L5 and a decreased lumbar range of motion. He ordered an MRI scan of Petitioner's lumbar spine (Petitioner's Exhibit 7).

The MRI scan was performed on September 19, 2018. According to the radiologist, the MRI revealed annular tears and central protrusions at L4-L5 and L5-S1 (Petitioner's Exhibit 6).

Dr. Lee reviewed the MRI scan and opined it revealed disc herniations at L4-L5 and L5-S1. When Dr. Lee saw Petitioner on October 5, 2018, Petitioner had been working light duty; however, because of her low back symptoms, Petitioner had difficulties with walking, standing, lifting and bending. Dr. Lee ordered physical therapy and imposed work/activity restrictions (Petitioner's Exhibit 7).

Dr. Lee again saw Petitioner on November 7, 2018. At that time, Petitioner had not received any physical therapy because it had not been approved. Petitioner's back pain had worsened and had previously been in the right gluteal region, but now was in the left as well. Dr. Lee recommended Petitioner undergo an epidural injection (Petitioner's Exhibit 7).

On November 27, 2018, Petitioner was seen by Dr. Helen Blake, a pain management specialist. At that time, Dr. Blake administered an epidural injection on the left and L4-L5 (Petitioner's Exhibit 8).

When Dr. Lee saw Petitioner on December 13, 2018, Petitioner advised the epidural injection helped briefly. However, Petitioner continued to have significant pain/complaints and have not received any physical therapy. Dr. Lee renewed his recommendation Petitioner receive physical therapy and continued to impose work/activity restrictions (Petitioner's Exhibit 7).

From January, 2019, through December, 2019, Petitioner continued to be treated by Dr. Lee for her low back as well as other conditions. When Dr. Lee saw Petitioner on March 28, 2019, he discussed possible disc replacement surgery at L4-L5 and L5-S1, but noted Petitioner weighed 278 pounds and indicated she should get her weight down to 225 pounds. When Dr. Lee last saw Petitioner on December 2, 2019, he noted Petitioner had an appointment with Dr. Matthew Gornet, an orthopedic surgeon (Petitioner's Exhibit 7).

At the direction of Respondent, Petitioner was examined by Dr. Timothy VanFleet, an orthopedic surgeon, on August 7, 2019. In connection with his examination of Petitioner, Dr. VanFleet reviewed medical records and diagnostic studies provided to him by Respondent. The diagnostic studies included the MRIs of December 30, 2016, and September 19, 2018. Petitioner informed Dr. VanFleet of both the accidents of September 8, 2018, and the prior accident of February, 2016. According to Dr. VanFleet's report, Petitioner was having difficulties with her back relating back to 2016/2017, was seen by Dr. Raskas and had improvement of her symptoms. Petitioner informed Dr. VanFleet she had been working subsequent to the accident, but on light duty doing paperwork and she continued to experience low back pain which was 5/10 when sitting and 7-8/10 when standing (Respondent's Exhibit 1).

On examination, Dr. VanFleet noted Petitioner weighed 273 pounds, was morbidly obese, had difficulty with flexion/extension and there was superficial tenderness in the midline. In his review of the MRI scans, Dr. VanFleet noted they both revealed disc protrusions at L4-L5 and L5-S1. When comparing the two, he opined they look "identical." Dr. VanFleet opined Petitioner had sustained a lumbar contusion as result of the accident of September 8, 2018, there were no

objective findings to substantiate Petitioner's complaints, Petitioner had evidence of non-organic pain manifestations, Petitioner did not need any further medical treatment and could work without restrictions (Respondent's Exhibit 1).

Dr. Gornet evaluated Petitioner on December 2, 2019. At that time, Petitioner advised Dr. Gornet of the accident of September 8, 2018, as well as the prior accident of February, 2016. Petitioner advised Dr. Gornet that, following the accident of February, 2016, she was treated by Dr. Raskas, an MRI was performed, she received an injection and was able to return to work without restrictions. Petitioner informed Dr. Gornet she had continued to work without restrictions until she sustained the accident of September 8, 2018 (Petitioner's Exhibit 12).

When seen by Dr. Gornet, Petitioner complained of low back pain on both sides, buttocks and hips. On examination, there was a decreased sensation in the L5 dermatome on the right and straight leg raising was positive on the left at 45°. Dr. Gornet reviewed the MRI of September 19, 2018, and opined it revealed large central disc herniations with associated tears at L4-L5 and L5-S1. Dr. Gornet opined the accident could aggravate an underlying condition or cause a new injury. He did note that he wanted to review the prior MRI scan. Dr. Gornet agreed with the work/activity restrictions that had been imposed by Dr. Lee. He also noted Petitioner weighed 259 pounds and needed to get to about 210 pounds before he could proceed further with treatment (Petitioner's Exhibit 12).

When Dr. Gornet saw Petitioner on March 9, and June 29, 2020, he continued to recommend Petitioner lose weight and kept her on light duty. Dr. Gornet again saw Petitioner on September 24, 2020, and Petitioner weighed 223 pounds. At that time, Dr. Gornet ordered another MRI scan of Petitioner's low back (Petitioner's Exhibit 12).

The MRI was performed on September 24, 2020. According to the radiologist, the MRI revealed midline annular tears and large midline protrusions at L4-L5 and L5-S1 (Petitioner's Exhibit 6).

Dr. Gornet reviewed the MRI of September 24, 2020, and compared it to the prior MRI of September 19, 2018. He opined there was increasing size of the annular tears at L4-L5 and L5-S1. Dr. Gornet recommended Petitioner undergo MRI spectroscopy and a CT scan. He again indicated he wanted Petitioner to get down to a weight of 210 pounds before proceeding with treatment recommendations (Petitioner's Exhibit 12).

Dr. Gornet again saw Petitioner on November 9, 2020. At that time, Petitioner weighed 218 pounds. Dr. Gornet reviewed the diagnostic studies he had ordered at the time of his last examination of Petitioner and noted the disc at L4-L5 had too much signal to noise and L5-S1 disc was at 9.95. The CT scan did not reveal any facet arthropathy. Dr. Gornet prescribed medication in anticipation of proceeding with surgery (Petitioner's Exhibit 12).

Dr. VanFleet was deposed on February 5, 2020, and his deposition testimony was received into evidence at trial. On direct examination, Dr. VanFleet's testimony was consistent with his medical report and he reaffirmed the opinions contained therein. Specifically, Dr. VanFleet testified he reviewed the MRIs of both 2016 and 2018. When he compared the 2018 MRI to the 2016 MRI, he opined there was no change. Dr. VanFleet testified Petitioner had central

protrusions at L4-L5 and L5-S1 which he said was like a bulging disc or a midline disc prolapse (Respondent's Exhibit 2; pp 17-19).

Dr. VanFleet testified Petitioner sustained a lumbar contusion as a result of the accident of September 8, 2018. He stated Petitioner had no evidence of any neurological abnormalities, exam findings did not substantiate her subjective complaints, Petitioner did not sustain an acute injury related to the 2018 accident, Petitioner could work without restrictions, no further treatment was indicated and Petitioner was at MMI (Respondent's Exhibit 2; pp 20-25).

On cross-examination, Dr. VanFleet agreed Petitioner had returned to work at full duty following the 2016 accident and was working in that capacity at the time of the accident of September 8, 2018. He also agreed Petitioner was not having any significant low back pain which required medical treatment prior to September 7, 2018. Dr. VanFleet was questioned that if he took Petitioner's word that she was not having significant low back pain just prior to the accident, not on any pain medication, and was working full duty would the accident have been a "contributing factor" to her current complaints. Dr. VanFleet responded, "I would agree with that, yes." (Respondent's Exhibit 2; pp 39, 43, 58).

Dr. Gornet was deposed on January 28, 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. He testified Petitioner informed him of her prior back injury and the treatment she had received thereafter. Dr. Gornet stated Petitioner's current symptoms were related to the accident of September 8, 2018, conservative treatment had failed and the only option was weight loss and disc replacement surgery at L4-L5 and L5-S1 (Petitioner's Exhibit 15; pp 8-10, 15).

In regard to the MRI findings, Dr. Gornet testified regarding his review and comparison of the MRI of September 19, 2018, and the MRI of September 24, 2020. Dr. Gornet stated the MRI of September 19, 2018, revealed central disc herniations at L4-L5 and L5-S1 and the MRI of September 24, 2020, revealed a progression of those disc herniations. Dr. Gornet testified this was consistent with the fact Petitioner sustained injuries to those disks as a result of the accident (Petitioner's Exhibit 15; p 12).

Dr. Gornet testified regarding Dr. VanFleet's opinions and stated he disagreed with them. In addition to his findings on examination and the diagnostic studies, Dr. Gornet noted Petitioner had worked for Respondent for 12 years and, other than the prior accident in 2016, Petitioner had work full duty without restrictions. Dr. Gornet stated there was no other explanation for her current symptoms other than the accident (Petitioner's Exhibit 15; pp 17-18).

On cross-examination, Dr. Gornet agreed he did not review or compare either the 2018 or 2020 MRIs to the MRI of 2016. He also agreed he had not reviewed any of the treatment records for Petitioner's 2016 injury. When questioned whether he would want to review same, Dr. Gornet responded that Petitioner had undergone a change in her medical condition and if there were records which revealed Petitioner had an active ongoing problem at or near the accident of September 8, 2018, that could cause him to change his opinion. However, in this case, Petitioner was doing well and working full duty prior to the accident (Petitioner's Exhibit 15; p 24).

At trial, Petitioner testified she has had persistent low back pain since the time of the accident and has continued to work light duty. Petitioner just saw Dr. Gornet on February 5, 2021, and wants to proceed with the disc replacement surgery as recommended by Dr. Gornet.

Conclusions of Law

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

The Arbitrator concludes Petitioner's current condition of ill-being in regard to her low back is causally related to the accident of September 8, 2018.

In support of this conclusion the Arbitrator notes the following:

There was no dispute Petitioner sustained a work-related accident on September 8, 2018, in which Petitioner sustained injuries to various areas of her anatomy, including her low back.

Petitioner testified she sustained a prior low back injury in February, 2016, for which she was treated by Dr. Raskas. Petitioner recovered from that prior low back injury and, at the time of the accident of September 8, 2018, was working without restrictions and had not sought any further treatment for her low back.

Petitioner's testimony that she has had persistent low back pain since the time of the accident and has only been able to work light duty was credible.

Petitioner's primary treating physician, Dr. Gornet, opined Petitioner's current low back condition was related to the accident of September 8, 2018. This was based on his findings on examination, review of diagnostic studies and the fact that, prior to the accident of September 8, 2018, Petitioner was working without restrictions and not receiving any active medical treatment for her low back.

In regard to Dr. Gornet's review of the MRI scans, he did not review the prior MRI of December 30, 2016; however, Dr. Gornet reviewed and compared the MRI scans of September 19, 2018, and September 24, 2020. Dr. Gornet opined the more recent MRI revealed a progression of the disc pathology which was consistent with his opinion regarding causality.

Respondent's Section 12 examiner, Dr. VanFleet, opined Petitioner sustained a contusion as a result of the accident of September 8, 2018, was at MMI and did not require further medical treatment. This was based, in part, on his review and comparison of the MRIs obtained on December 30, 2016, and September 19, 2018, wherein he opined there was no change. However, Dr. VanFleet did not review more recent MRI of September 24, 2020, which revealed a progression of the disc pathology.

On cross-examination, Dr. VanFleet admitted that if Petitioner's prior history is accurate, the accident would have been a "contributing factor" to her current complaints.

Based on the preceding, the Arbitrator finds the opinion of Dr. Gornet to be more persuasive than that of Dr. VanFleet in regard to causality.

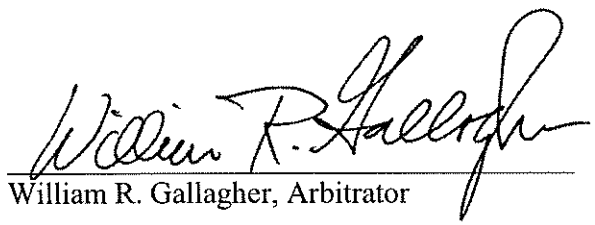
In regard to disputed issue (J) the Arbitrator makes the following conclusion of law:

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes that all of the medical treatment provided to Petitioner in regard to her low back condition was reasonable and necessary and Respondent is liable for payment of the medical bills incurred therewith.

Respondent shall pay reasonable and necessary medical services for treatment provided to Petitioner for her low back condition as identified in Petitioner's Exhibit 1, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule.

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

Based upon the Arbitrator's conclusion of law in disputed issue (F) the Arbitrator concludes Petitioner is entitled to prospective medical treatment including, but not limited to, the disc replacement surgery as recommended by Dr. Gornet.



William R. Gallagher, Arbitrator

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	19WC012840
Case Name	TILLMAN, RHONDA R v. MADO HEALTHCARE, LLC.
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0577
Number of Pages of Decision	16
Decision Issued By	Marc Parker, Commissioner

Petitioner Attorney	Jennifer Kelly
Respondent Attorney	Robert Cozzi

DATE FILED: 11/24/2021

/s/Marc Parker, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rhonda R. Tillman,

Petitioner,

vs. NO: 19 WC 12840

Mado Healthcare, LLC.,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 28, 2020, is hereby affirmed and adopted.

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

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

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

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

November 24, 2021
MP:yl
o 11/18/21
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 19(b) ARBITRATOR DECISION

21IWCC0577

TILLMAN, RHONDA R
Employee/Petitioner

Case# **19WC012840**

MADO HEALTHCARE
Employer/Respondent

On 12/28/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0009 ANESI OZMON RODIN NOVAK KOHEN
JENNIFER J C KELLY
161 N CLARK ST SUITE 2100
CHICAGO, IL 60601

0208 GALLIANI DOELL & COZZI LTD
ROBERT J COZZI
77 W WASHINGTON ST SUITE 1601
CHICAGO, IL 60602

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

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION – 19B

Rhonda R. Tillman
Employee/Petitioner

v.

Mado Healthcare
Employer/Respondent

Case # **19** WC **12840**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Gerald Napleton**, Arbitrator of the Commission, in the city of **Chicago**, on **October 21, 2020**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **February 1st, 2019**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $**23,905.96**; the average weekly wage was $**459.73**.

On the date of accident, Petitioner was **55** years of age, ***single*** with **0** dependent children.

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

Respondent shall be given a credit of $**3,809.67** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**3,809.67**

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

ORDER

The Arbitrator finds that Petitioner's current condition of ill-being involving her right shoulder and neck are causally related to the work accident of February 1, 2019.

The Arbitrator finds that all medical treatment rendered to date has been reasonable and medically necessary and orders Respondent to pay the outstanding medical charges listed herein pursuant to the Illinois Workers' Compensation fee schedule.

The Arbitrator finds that Petitioner is entitled to prospective medical treatment and orders Respondent to authorize the treatment prescribed by Dr. Tu.

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

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

Signature of Arbitrator

12/22/20
Date

DEC 28 2020

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Rhonda R. Tillman Petitioner, v. Mado Healthcare, Ltd., Respondent.	2019 WC 12840

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Findings of Fact:

The Petitioner, Rhonda R. Tillman, was employed as a certified nursing assistant ("CNA") with the Respondent, Mado Healthcare, Ltd. Petitioner's job duties consisted of assisting residents with their various need which included showering, dressing, dining and transferring them from a bed to a wheelchair.

On February 1, 2019, Petitioner reported for work and testified that she was feeling great. She completed her shift, clocked out, and slipped and fell on ice while exiting the building. Petitioner stated she fell onto her right side, impacting her right elbow. She felt immediate pain in her right shoulder, right knee, neck and back. Petitioner reported the injury to her manager, Laverne, completed an incident report, and was referred to Dr. Ashok Shah for treatment.

Petitioner's Prior Injury and Pre-accident Treatment

During her testimony, Petitioner acknowledged a prior injury to her right arm and shoulder in September 2009 when she slipped and fell in a grocery store and landed on her right side. Petitioner testified that she went to the emergency room after her fall and then sought treatment with her primary care physician, Dr. Jabr, and then Dr. Michael Treister, an orthopedist. A right shoulder MRI was reviewed by Dr. Treister on December 11, 2019 which revealed a supraspinatus insertional tear, supraspinatus and subscapularis small tendinosis, attenuated biceps tendon which may also be torn, and subacromial/subdeltoid bursitis. Petitioner complained of right shoulder pain. Dr. Treister's records note "MRI report and CD shows a rotator cuff tear which is small and will likely heal up with some NSAID medication and a course of physical therapy with the goal of increased muscle strength."

Dr. Treister recommended physical therapy and home exercises. On February 18, 2010, the records reflect that Petitioner claimed she was only in a small amount of pain. Dr. Treister's examination of Petitioner revealed full range of motion and good rotator cuff strength with no evidence of instability. She stated her shoulder was better and she only had occasional soreness. Petitioner was released to full duty work without restrictions. Her treatment with Dr. Tresiter ended on May 12, 2010. Petitioner testified that she never returned to Treister Orthopedics for additional treatment for her right shoulder after that date.

Petitioner testified that between May 12, 2010 and her work injury of February 1, 2019, a period of almost nine years, she never saw another orthopedic specialist for right shoulder complaints and she never was directed by a physician to limit her physical activities or work duties due to her right shoulder. However, Petitioner testified that she did have two visits to Weiss Hospital on October 1, 2017 and August 15, 2018. Petitioner's testimony and the records reflect that on October 1, 2017 she presented to the emergency room after being scratched by a patient. On the second date, August 15, 2018, she presented to the emergency room requesting a chest x-ray due to exposure to TB patients while working. During that August visit, Petitioner also reported experiencing intermittent right shoulder and arm pain. She referenced a right arm "fracture" in 2011 for which she treated with an orthopedic physician, and she denied any new trauma. A shoulder x-ray was performed and revealed some degenerative changes of the AC joint. No shoulder CT scan or MRI study was recommended or done. Physical examination demonstrated no right upper extremity tenderness, edema or swelling, and normal range of motion. The diagnosis was shoulder joint pain and "free text DX: chest x-ray." Petitioner was discharged from the emergency room without any additional testing or treatment being ordered for her right shoulder. On cross-examination, Petitioner acknowledged that at the August 15, 2018 visit, she told the emergency room doctors that she hadn't sustained any new trauma to the right shoulder. She further testified that she only mentioned her shoulder at that visit because she sometimes felt pain with her work activities.

Between August 15, 2018 and the work injury of February 1, 2019, Petitioner testified there were no other medical visits involving her right arm or shoulder. Petitioner continued to perform her full duty work as a CNA and she was able to handle those work activities without difficulty.

Petitioner's Post-Accident Treatment

Following Petitioner's fall at work on February 1, 2019, Petitioner sought care with Dr. Ashok Shah on February 4, 2019. Petitioner gave a history of her fall at work and complained of pain in her

neck, right shoulder, right elbow and right knee. Dr. Shah's impression on that date was cervical strain and radiculitis, bruised right shoulder and right elbow, and hypertension. Dr. Shah directed Petitioner to rest and stay home from work.

Petitioner continued her treatment with Dr. Shah on February 11, 2019 and February 15, 2019, at which time he ordered a cervical MRI and physical therapy. Petitioner continued to complain of right neck pain radiating to the right upper extremity. The cervical MRI was completed on February 25, 2019 and revealed degenerative changes throughout the cervical spine with moderate left and mild right neural foraminal narrowing C6-7, mild bilateral narrowing at C7-T1. Petitioner began physical therapy at NovaCare Rehabilitation on February 26, 2019 and continued to follow up with Dr. Shah through April 29, 2019, Dr. Shah's and NovaCare's treatment notes reflect Petitioner continued to complain of pain at various times in her right upper extremity, right arm, right shoulder, and neck. Petitioner was released to modified work on April 29, 2019 with a 15-pound lifting restriction and referred for pain management with Dr. Michael Rock and to ATI for further physical therapy. She reported for work the following day.

Petitioner began therapy at ATI on May 8, 2019, where she gave a history of her fall at work and complained of pain in her right upper arm, neck and back, as well as headaches. She reported pain and difficulty with lifting anything off the ground or to overhead shelves, as well as increased fatigue levels at the end of her work shift.

Petitioner saw Dr. Rock on May 20, 2019 where she gave a history of her fall at work and complained of shoulder pain, back pain, headache, and neck pain. Physical examination revealed tenderness to palpation at the AC joint, glenoid, scapular, and subacromial areas, and multiple positive right shoulder tests including Empty can, Lift-off, Drop Arm, Impingement, Neer's, Hawkin's and Speed's. Dr. Rock opined that Petitioner's symptoms were consistent with right shoulder issues, including glenoid pain and rotator cuff injury. Dr. Rock administered an injection to the right shoulder and ordered a right shoulder MRI. He also ordered ongoing therapy and imposed work restrictions of no overhead lifting, lifting more than 10 pounds, or repetitive motion of the right upper extremity.

The right shoulder MRI was performed on May 25, 2019. It revealed a full thickness retracted tear of the supraspinatus tendon, tear and retraction of the long head biceps tendon from the anchor, infraspinatus and subscapularis tendinosis, and glenohumeral and acromioclavicular arthrosis.

Petitioner returned to Dr. Rock on June 10, 2019 at which time the MRI results were discussed. The medical record notes Petitioner expressed concern about her work restrictions not being honored and that her workload was exacerbating her pain. Petitioner testified that her employer did not alter any

of her work duties despite her restrictions and that she felt intense and worsening pain in the right shoulder as she continued to perform these work duties. Petitioner testified to experiencing temporary relief from the injection performed by Dr. Rock. The medical record reflects the injection helped her shoulder pain and cervicalgia but the benefits had already worn off. Dr. Rock recommended ongoing therapy as well as evaluation with a shoulder surgeon. After discussion with Dr. Rock and her attorneys, Petitioner was referred to G&T Orthopedics. Petitioner continued to attend therapy at ATI through June 21, 2019, where her records notes she reported significant reduction in neck pain but ongoing right shoulder pain.

Dr. Wehner's initial Section 12 report and Addendum

At the request of the Respondent, Petitioner underwent a Section 12 evaluation with Dr. Julie Wehner on April 2, 2019. Dr. Wehner's reports noted that Petitioner complained of slipping and falling on ice when leaving work on February 1, 2019, landing on her right side, and experiencing pain in the right-sided neck, right shoulder and right upper back area. Petitioner informed Dr. Wehner that in about 2011, she was treated for right arm pain when she slipped on water in a grocery store and subsequently had an MRI and treated with Dr. Treister. Dr. Wehner's diagnosis was neck pain, right shoulder pain and right upper back pain after a contusion/sprain of the cervical and right shoulder area. Dr. Wehner opined this diagnosis was causally related to the slip and fall of February 1, 2019. Dr. Wehner also opined Petitioner had reached maximum medical improvement and could return to work full duty.

On June 18, 2019, Dr. Wehner authored an addendum report to her April 2, 2019 report after reviewing some additional medical records, including the May 25, 2019 right shoulder MRI. Dr. Wehner noted the MRI did not distinguish between a chronic supraspinatus tear and an acute tear and opined that Petitioner suffered at most a right shoulder contusion from the February 1, 2019 injury and that her right shoulder complaints were preexisting. She again stated Petitioner was at MMI for the right shoulder contusion.

Petitioner's Treatment with G&T Orthopaedics

On June 26, 2019, Petitioner had her first visit with Dr. Kevin Tu at G&T Orthopaedics. Her fall at work was discussed where Petitioner stated she tried to break her fall with her right arm. Petitioner complained of persistent right shoulder pain and difficulty with overhead activities. Dr. Tu's physical examination resulted in positive findings on Neer impingement and Hawkins reinforcement tests, and he reviewed the MRI report to note a full thickness rotator cuff tear of the supraspinatus tendon as well as

evidence of a proximal biceps tendon rupture. Dr. Tu recommended right shoulder surgery, and restricted Petitioner from lifting with the right arm.

The medical records from Petitioner's June 26, 2019 visit with Dr. Tu note that Petitioner denied any prior right shoulder symptoms. Petitioner at her hearing acknowledged that she failed to tell Dr. Tu about her prior right shoulder injury in 2009. She testified that it was an oversight and that she forgot to mention it to him. She further testified that it had been almost nine years since her prior injury, that she did not remember all the details of her prior treatment, and that she did not purposely withhold any information from Dr. Tu regarding her 2009 right shoulder issue. It is worth noting that she did speak with Dr. Tu about the prior 2009 injury during her very next visit on August 7, 2019.

At the August 7, 2019 visit, Dr. Tu noted that he had been made aware of Petitioner's previous right shoulder injury. While the initial history outlined by Dr. Tu states the prior injury occurred on September 23, 2018, an addendum at the bottom of the note corrects that prior accident date to September 23, 2009. Dr. Tu noted that the prior records from Dr. Treister showed a prior diagnosis of a partial thickness rotator cuff tear, for which Petitioner underwent treatment and then was able to resume her normal work activities. Dr. Tu further explained Petitioner's described fall and impact on her elbow was a mechanism of injury that was consistent with the development of a rotator cuff tear, and that her work injury was certainly more than a contusion as stated by Dr. Wehner.

Dr. Shahid's Section 12 Report

At the Respondent's request, Petitioner underwent an additional Section 12 examination with a different physician, Dr. Hythem Shadid, on September 25, 2019. Petitioner gave a history of her fall and stated persistent right shoulder pain with numbness into tips of the fingers. According to Dr. Shadid's report, the entire physical examination was normal. However, he still opined that Petitioner was suffering from a chronic rotator cuff tear which pre-existed the February 1, 2019 injury. Dr. Shadid opined that falling and landing on the right elbow was inconsistent with a rotator cuff tear and he also stated the level of retraction viewed in the MRI was only seen in chronic tears. Dr. Shadid agreed that right shoulder surgery was reasonable but opined it was due to her pre-existing condition dating back to 2009 rather than the February 1, 2019 work incident. Dr. Shadid opined that Petitioner sustained a right elbow contusion and right shoulder strain as a result of the February 1, 2019 injury and that she had reached maximum medical improvement from those injuries.

Petitioner's Ongoing Treatment with Dr. Tu

Petitioner continued to treat with Dr. Tu from October 2019 through March 2020. During those months, she complained of ongoing shoulder pain and difficulty with overhead tasks and reaching as she continued to perform her work duties. Dr. Tu continued to recommend right shoulder surgery as well as ongoing work restrictions. Dr. Tu noted on March 4, 2020 that Petitioner still wished to move ahead with the recommended right shoulder arthroscopic rotator cuff repair and subacromial decompression surgery but had not yet received authorization. Dr. Tu confirmed his opinion regarding causation, specifically stating Petitioner's mechanism of injury of falling on the right elbow is a mechanism known to cause disruption of the rotator cuff tendons and to cause a rotator cuff tear. He stated that when patients fall onto an extremity, the rotator cuff muscles are contracted and significant trauma to the arm, including a fall on the right elbow, can disrupt the tendons of the rotator cuff that are in a contracted position as a patient is falling. Dr. Tu noted Petitioner did have a prior right shoulder injury in 2009, but further noted that she did not have issues with her shoulder after completing treatment with Dr. Treister, whereas her fall in February 1, 2019 has resulted in ongoing pain, difficulty with overhead and reaching activities, difficulty performing her normal work activities.

Petitioner testified that she continued to work at the Respondent leading up to April of 2020, but she has not worked since April 20, 2020 because she tested positive for COVID-19 and continued to experience side effects. Petitioner returned briefly on or about May 26, 2020 but was taken off work again due to her lingering symptoms. Petitioner, however, is still considered an employee of the Respondent. Petitioner confirmed that she had since tested negative for COVID-19.

Petitioner has continued to treat with Dr. Tu and had a visit on July 22, 2020. At that time, Dr. Tu continued to reiterate his surgery recommendation. Petitioner has also continued to see Dr. Rock for pain management, and her current prescription medication includes Tylenol with Codeine No. 3. Her last visit with Dr. Rock was on October 6, 2020, at which time she reported ongoing right upper extremity pain. It was recommended she continue home exercises and follow up with the shoulder surgeon.

Testimony of Treating Surgeon, Dr. Tu.

Dr. Tu testified that Petitioner's current right shoulder condition and need for surgery are causally related to the work injury of February 1, 2019. He reviewed the IME reports authored by Dr. Wehner and pointed out that Dr. Wehner is a spine surgeon and that he disagreed with her opinions as Petitioner's mechanism of injury and symptoms were consistent with a rotator cuff tear as opposed to a

contusion. Regarding the MRI findings, Dr. Tu testified that the 2009 right shoulder MRI demonstrated a partial tear whereas the 2019 MRI after Petitioner's fall at work demonstrated a full thickness tear. Dr. Tu also reviewed the IME report authored by Dr. Shadid and he disagreed with his opinion. Dr. Tu explained that as you fall, the rotator cuff muscles contract and the weight of the body falling onto the arm is enough force to disrupt the rotator cuff muscles/tendons and cause a tear. Dr. Tu acknowledged that Petitioner had a prior partial thickness rotator cuff tear from 2009 and that partial tears can cause occasional pain, but he noted that Petitioner had resumed unrestricted work after the 2009 injury and continued working without restrictions until the accident on February 1, 2019. He further testified that "after the work injury… she developed her full thickness rotator cuff tear as her mechanism of injury is consistent with the diagnosis, she had dysfunction in her shoulder to the point where she couldn't return back to her normal work activities."

On cross-examination, Dr. Tu noted that the retraction of the tendons shown on the 2019 MRI could be consistent with an old rotator cuff tear and that a partial tear can progress into a full thickness tear. On re-direct examination, however, he further testified that a fall onto the right upper extremity can cause a partial thickness tear to become a full thickness tear, and, further, that such a fall can exacerbate or aggravate an underlying rotator cuff tear and cause it become dysfunctional and symptomatic.

Dr. Shahid's Section 12 Testimony

The deposition of Dr. Shadid took place on August 19, 2020. (R.Ex.3). Dr. Shadid testified consistent with his report that he felt Petitioner's mechanism of injury was not consistent with a rotator cuff tear and that the degree of retraction present on the 2019 MRI indicated the tear was chronic in nature, rather than acute. Dr. Shadid stated a shoulder replacement may be indicated but he opined any surgical intervention would not be related to the work injury of February 1, 2019. During cross-examination, Dr. Shadid agreed that Petitioner sustained some kind of work related injury to her right shoulder and right elbow, and he acknowledged that from February 4, 2019 through the time of his evaluation on September 25, 2019, Petitioner had continued to receive medical treatment for her persistent right upper extremity complaints. Dr. Shadid also agreed that based on the notes from Treister Orthopedics, Petitioner's right shoulder condition was significantly improved at the time of her discharge from care in May 2010, and that she had no positive findings on physical examination at that time. Dr. Shadid further acknowledged that based on the information he reviewed, Petitioner was not under active medical treatment in the months leading up to her work injury and she was not under any work restrictions prior to the February 1, 2019 fall at work. Dr. Shadid also agreed that the 2009 MRI

documented a partial or small rotator cuff tear whereas the May 2019 MRI demonstrated a large rotator cuff tear. Dr. Shadid opined that a fall onto a hard surface could only aggravate a pre-existing shoulder tear if the individual grabbed onto something. However, Dr. Shadid recognized that symptoms are what cause patients to seek treatment, and that Petitioner underwent "a lot more treatment after the injury…"

Petitioner's Current Condition

Petitioner testified that "it's very hard to do a lot of the normal things that I'm used to doing, like washing your back, stirring eggs, beating eggs, you know, stirring things makes my arm tired and painful real quick. Reaching, lifting. I mean, it's close to un-normal right now, yes." She further testified, that from the start of her employment with Respondent in April 2018 through her work injury of February 1, 2019, she had been performing her full duty work activities as a CNA without a problem. It is noteworthy that prior to the accident of February 1, 2019, Petitioner had never received a recommendation for surgical repair of her shoulder. Petitioner testified that she does wish to proceed with the surgery recommended by Dr. Tu.

Conclusions of Law:

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

Petitioner's slip and fall at work on February 1, 2019 has been consistently reported to her treating physicians. Similarly, Petitioner's consistently reported ongoing complaints of pain to her neck, right shoulder and right upper extremity. The medical records and testimony reflect that her complaints never subsided and that Petitioner has remained under active and consistent medical treatment. Petitioner's subjective complaints of shoulder pain, neck pain, and upper extremity weakness are substantiated by the physical examination findings of Dr. Tu, Dr. Rock and the physical therapy records. This is further corroborated by the MRI demonstrating a full thickness rotator cuff tear.

While the Arbitrator notes that Petitioner suffered a prior right shoulder injury in 2009, the evidence demonstrates that she was discharged from treatment from that injury in May 2010 with no restrictions. Her medical records at that time demonstrated Petitioner had a full range of motion of the right shoulder and noted only occasional soreness. She went on to work full duty without limitations or ongoing orthopedic care until her undisputed fall at work on February 1, 2019. Both Dr. Tu and the IME examiner, Dr. Shadid, noted the MRI in 2009 showed only a small, partial thickness rotator cuff tear whereas the MRI after the fall in 2019 demonstrated a full thickness tear. While the arbitrator

acknowledges that partial tears can progress on their own to full thickness tears, the Arbitrator also notes, consistent with the medical testimony herein, that a partial tear can become a full tear as a result of a traumatic fall. Similarly, a traumatic incident can cause an existing tear to become symptomatic and dysfunctional. The Arbitrator views the Petitioner's slip and fall as a traumatic, precipitating event that caused Petitioner to suffer from ongoing and severe shoulder complaints from which she is still seeking relief.

The arbitrator found the Petitioner's testimony to be credible. The arbitrator is not convinced that one emergency room visit in 2018 referencing intermittent shoulder pain is somehow indicative of a chronically symptomatic shoulder condition. Petitioner's shoulder complaints were not the primary factor for the emergency room visit at that time. It is noteworthy that in the nine years between May 2010 and February 2019, the evidence reflects only one medical visit referencing Petitioner's right shoulder. This substantiates the Arbitrator's view that Petitioner's condition was predominantly asymptomatic, became symptomatic after her fall, and remained symptomatic to date. This is further substantiated by the fact that Petitioner was able to work her full job duties and perform activities of daily living without difficulty until her fall on February 1, 2019. Further, the Arbitrator views Petitioner's testimony to be credible while acknowledging that injured workers may be imperfect historians when it comes to their prior medical history. Respondent argues that Petitioner's failure to mention her 2009 injury at her first visit with Dr. Tu suggests Petitioner lacks credibility. Respondent further argues that Petitioner's failure to mention her ER visits to Dr. Tu similarly suggest a lack of credibility. The Arbitrator notes that Petitioner corrected her deficient medical history on her very next visit with Dr. Tu and notes, again, that the primary reason for her ER visits did not involve her shoulder.

The arbitrator finds the opinion of Dr. Tu to hold more weight than the opinions outlined by the Section 12 examiners, Dr. Wehner and Dr. Shadid. The arbitrator adopts Dr. Tu's opinion that Petitioner's mechanism of injury of falling onto her right elbow could cause injury or disruption to the shoulder tendons and is consistent with the development or progression of a rotator cuff tear. Dr. Tu's opinions on causation are shared by Petitioner's other treating physician, Dr. Rock. Even the Section 12 examiner, Dr. Shadid, acknowledged that following the undisputed fall at work, Petitioner's right shoulder symptoms required significantly more medical treatment than she had prior to this injury. The Arbitrator does not find Dr. Shadid's testimony that a mechanism of injury to the rotator cuff must involve traction or pulling to be convincing. Dr. Shadid acknowledged that Petitioner had not been actively treating for her shoulder in the time leading up to her fall and that she had been working full duty but as a result of her February 1, 2019 accident she then required ongoing work restrictions.

It is understandable for the Respondent to argue that Petitioner's rotator cuff injury was long-standing based on Dr. Shadid's testimony and that the degree of retraction suggests a long-standing tear, however, this argument ignores the holding in *Sisbro, Inc. v. Industrial Comm'n,* that an accidental injury need not be the sole causative factor, nor even the primary factor, as long as it was *a* causative factor in the resulting condition. 207 Ill.2d. 193, 205 (2003). The evidence supports the position that any long-standing tear in Petitioner's shoulder, whether full or partial, small or large, was largely asymptomatic until her February 1, 2019 accident which subsequently caused on ongoing need for medical care.

Accordingly, the arbitrator finds that Petitioner's current neck and shoulder conditions are causally related to her fall at work on February 1, 2019.

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

Having found that Petitioner's ongoing condition of ill-being is causally related to her accident and in conjunction with the factual and medical evidence before the Arbitrator the Arbitrator finds that the medical treatment rendered to date has been reasonable and necessary. The medical bills remain unpaid. Accordingly, the Arbitrator orders Respondent to pay for the medical services administered to Petitioner as outlined in Petitioner's Exhibit 8, pursuant to the Section 8.2 Medical Fee Schedule.

N. Is Petitioner entitled to any prospective medical care?

Having found that Petitioner's ongoing condition of ill-being is causally related to her accident and in conjunction with the factual and medical evidence before the Arbitrator the Arbitrator finds that Petitioner is entitled to future medical care to address her ongoing cervical and shoulder complaints. Petitioner wishes to proceed with the rotator cuff repair surgery recommended by Dr. Tu. The Arbitrator finds that Petitioner is entitled to the treatment recommended by Dr. Tu and orders Respondent to authorize and pay for such reasonable and necessary medical treatment.

Signature of Arbitrator

12/22/20
Date

ILLINOIS WORKERS' COMPENSATION COMMISSION

DECISION SIGNATURE PAGE

Case Number	15WC021448
Case Name	KOSZUTA, NICOLE v. SCHOOL DISTRICT 13
Consolidated Cases	
Proceeding Type	Petition for Review under 19(b) Remanded Arbitration
Decision Type	Commission Decision
Commission Decision Number	21IWCC0578
Number of Pages of Decision	28
Decision Issued By	Christopher Harris, Commissioner

Petitioner Attorney	Mark Maritote
Respondent Attorney	Justin Schooley

DATE FILED: 11/24/2021

/s/Christopher Harris, Commissioner

Signature

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

NICOLE KOSZUTA,

Petitioner,

vs. NO: 15 WC 21448

BLOOMINGDALE SCHOOL DISTRICT 13,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 6, 2020 is hereby affirmed and adopted.

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

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

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

Under Section 19(f)(2) of the Act, 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.

November 24, 2021

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

CAH/tdm
O: 11/18/21
052

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

/s/ *Marc Parker*
Marc Parker

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

21IWCC0578

KOSZUTA, NICOLE Case# **15WC021448**
Employee/Petitioner

BLOOMINGDALE SCHOOL DISTRICT 13
Employer/Respondent

On 3/6/2020, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.01% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

5342 R MARK MARITOTE PC
107 3RD ST
BLOOMINGDALE, IL 60108

0560 WIEDNER & McAULIFFE LTD
ROMA PARIKH DALAL
ONE N FRANKLIN ST SUITE 1900
CHICAGO, IL 60606

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
AMENDED ARBITRATION DECISION
19(b)

Nicole Koszuta
Employee/Petitioner

v.

Bloomingdale School District 13
Employer/Respondent

Case # **15 WC 21448**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Frank Soto**, Arbitrator of the Commission, in the city of **Wheaton**, on October 15, 2019. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **12/17/12**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $61,782.06; the average weekly wage was $1,188.12.

On the date of accident, Petitioner was 39 years of age, ***married*** with 0 dependent children.

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

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $9,970.08 for a PPD advance in other benefits, for a total credit of $9,970.08.

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

ORDER

Respondent shall pay Petitioner the sum of $891.00 for pain medications and the sum of $6,222.81 for the services provided by University Pain Physicians as provided by Sections 8(a) and 8.2 of the Act and pursuant to fee schedule, as set forth in the Conclusions of Law attached hereto;

Respondent shall approve for an CT scan of the cervical spine and, in the event the CT scan does not reveal severe spinal stenosis, the replacement of the spinal cord stimulator with a test DRG stimulation, and if the test is successful, a permanent DRG stimulation with appropriate follow up treatment as recommended by Dr. Lubenow. In the event the CT scan shows severe spinal stenosis, Respondent shall approve the intraspinal drug delivery system in lieu of the DRG stimulation as recommended by Dr. Lubenow, as set forth in the Conclusions of Law attached hereto;

The Arbitrator further finds that Petitioner's condition has not stabilized, and Petitioner is entitled to TTD benefits from August 25, 2018 through October 15, 2019, as set forth in the Conclusions of Law attached hereto;

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

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

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

Signature of Arbitrator

3/5/2020
Date

ICArbDec19(b)

MAR 6 - 2020

Procedural History:

This case proceeded to trial on October 15, 2019 pursuant to Sections 19(b) and 8(a) of the Act. The issues in this matter are: (1) whether Petitioner sustained an accidental injury that arose out of and in the course of employment; (2) whether Petitioner's condition of ill-being is causally connected to this injury; (3) whether Respondent is liable for unpaid medical bills; (4) whether Petitioner is entitled to TTD benefits from August 15, 2016 through October 9, 2016 and from August 25, 2018 through October 15, 2016 (5) prospective medical treatment and a determination of MMI.

Finding of Facts:

Nicole Koszuta (hereafter referred to as "Petitioner") testified that she is a first-grade teacher for Bloomingdale School District 13 (hereinafter referred to as "Respondent") and that she worked for Respondent since 2002. (T. 11, 15). Petitioner testified that, prior to becoming a teacher, she attended Triton College for two years but earned her Bachelor of Arts in elementary education University of Illinois at Chicago. Petitioner also earned a master's degree in education administration and supervision from Loyola University. (T. 12).

Petitioner's testimony regarding her accident:

Petitioner testified that, on December 17, 2013, at around 3:40 p.m. she was injured after falling in her classroom. Regarding how she fell, Petitioner testified as follows:

> "*I was cleaning up my classroom as I typically would do at the end of every day. I was walking around and picking up papers at my guided reading tables. I was shuffling papers and I had a piece of paper that I was going to throw away, the garbage can was a few feet away; and I was walking to the garbage can when I stumbled, tripped, fell on the carpeting. I fell with full force on my right side of my body.*
>
> *The condition of the carpet was worn by students. They were kindergarten students, so it was worn. Was in worn condition. I actually had put an area rug in an area of the carpeting, you know, for safety, make sure it was all right.*
>
> *In fact, I had fallen a few times prior to that incident when I caught myself though when I got tripped up and caught up in the carpeting before, but I never had to report it. I never got injured at those situations, but I did stumble a few times prior to that incident happening.*" (T. 19-20).

"All I was doing was just walking and throwing a sheet of paper out and my feet got tripped up in the carpeting, and I stumbled with full force onto my right side of my body." (T. 20,21)

"The carpet was just worn. Just general use with kindergarteners...I heard a crack after I fell. And I knew instantly that I had broke something." (T. 21).

Petitioner testified that she completed an Employee's Accident Report and in in the report Petitioner indicated that she was walking in the classroom when she stumbled on the carpet which caused her to fall forward on her right elbow. (T. 72, RX 5).

Petitioner's medical treatment:

Petitioner presented to the emergency room that day at Central DuPage Hospital with complaints of right elbow pain after a trip and fall inside her classroom, landing on her right arm. X-rays of the right elbow revealed a complete posterior dislocation of the radius and ulna with respect to the distal humerus. Treatment was administered by Dr. Gannon Dudlar who opined she suffered from a posterior elbow dislocation with a large fragment that included the radial neck and head. A closed reduction procedure was recommended and if successful petitioner would be splinted and released. X-rays of the right elbow post reduction confirmed that the radial shaft and ulnar were in anatomic position in relation to the distal humerus. However, persistent anterior displacement and rotator of the large fragment containing the radial head and part of the radial neck was noted. Petitioner was provided with a splint. (PX 1)

On December 21, 2012, Petitioner presented to Edward Hospital and was seen by Dr. Walsh. Petitioner underwent treatment of the right radial head fracture with right radial head replacement. Petitioner's post-operative diagnosis was displaced right radial head fracture with comminution. (PX 3)

On February 13, 2013, Petitioner presented to Dr. Mark Cohen at Midwest Orthopedics Hand and Shoulder Center for a second opinion. Dr. Cohen suspected Petitioner may require, in the future, a smaller radial head implant and elbow release procedure. Additional X-rays were secured on February 14, 2013, which revealed good alignment and no clear evidence of complicating process involving the right elbow. (PX 4)

During the follow-up visit with Dr. Cohen on March 1, 2013, Dr. Cohen reviewed a CT scan of the elbow, which revealed a radial head implant, which appeared slightly large for Petitioner's capitellum size, which could attribute to possible erosion of the implant. Dr. Cohen

recommended right elbow revision with lateral collateral ligament repair and ulnar nerve release. Petitioner underwent the same on April 18, 2013. Post-operative diagnosis included right elbow arthritis with heterotopic bone, retained implant and lateral ligamentous insufficiency. (PX 4). Petitioner initiated post-operative physical therapy on April 22, 2013, with Rehabilitation Institute of Chicago.

Petitioner continued to follow up with Dr. Cohen from April through June of 2013. Dr. Cohen eventually recommended a right elbow release and debridement surgery and, on August 8, 2013, Petitioner underwent a right elbow release with arthrotomy, synovectomy and in capsule resection, cubital tunnel release through a separate fascule approach, implant removal of the right elbow, and neuroplasty of the medial antebrachial cutaneous nerve. Post-operative diagnosis included right elbow arthritis with ulnar neuropathy and retained implant. (PX 4) Petitioner subsequently followed up with Dr. Cohen undergoing therapy, CPM machine and medication. Petitioner reported to Dr. Cohen on September 11, 2013 that she was doing well she began to develop some stiffness about the joint. Dr. Cohen was concerned about her recent loss of mobility. He planned to treat her aggressively with another oral prednisone taper. (PX 4)

On November 6, 2013, Petitioner returnd to Dr. Cohen reporting continued pain in her right elbow and she felt like she plateaued in therapy. Dr. Cohen noted it was undetermined whether she would need a manipulation of her elbow but if she continued to plateau with extension it may be a consideration. (PX 4)

Dr. Cohen eventually recommended the procedure, and, on January 9, 2014, Petitioner underwent right elbow biopsy with synovectomy of the joint proper and manipulation of the elbow under anesthesia. Post-operative diagnosis included right elbow post-traumatic arthritis with synovitis and limitation of motion or arthrofibrosis. (PX 4). Petitioner continued to follow up with Dr. Cohen. As of April 4, 2014, Petitioner's pain levels were 4/10. (PX 4). On May 16, 2014, Petitioner returned to Dr. Cohen reporting that she was happy with her progress four months post-manipulation. Dr. Cohn released Petitioner to return to work with restricitons consisting of 50% use of the right arm and light use of the right arm. (PX 4)

On October 14, 2014, Petitioner contacted Dr. Cohen and reported that she was experiencing signficant pain increase in her right elbow and arm. Petitioner indicated that she was initially doing well after her most recent manipulation but the increased use of her arm

caused increased symptoms. Petitioner was referred to a pain center for additional treatement. (PX 4)

At the direction of Dr. Cohen, Petitioner presented to Dr. Yousuf Sayeed of the Rolling Ridge Pain Clinic on October 29, 2014. Examination revealed globally diminished right upper extremity strength. Dr. Sayeed had little to offer in way of interventional procedures for her symptoms; however, he did offer to help her wean off her opioids and reduce her medication. (PX 2)

On December 15, 2014, Petitioner returned to Dr. Sayeed to review her lumbar spine MRI. She continued to complain of upper extremity pain. Dr. Sayeed attempted to wean Petitioner down to two Norco pills a day, but she continued to use three pills. Petitioner reported that she was unable to tolerate the weaning down of the Norco. Dr. Sayeed increased Petitioner's Lyrica prescription to 100 bid. Dr. Sayeed also recommended Petitioner consider psych for desensitization.

On March 11, 2015, Petitioner returned to Dr. Cohen reporting pain and dysfunction in the right elbow. Dr. Cohn ordered a CT scan of the elbow, which showed an interval exchange of the radial head arthroplasty hardware in optimal position, no evidence of fracture or dislocation, small elbow joint effusion, likely heterotopic ossification along the posterior aspect of the radial head, and in the region of the brachialis tendon and mild to moderate degenerative changes of the humeral ulnar joint. Dr. Cohn referred Petitioner to Rush Pain Center and he ordered an FCE. Petitioner underwent the FCE at Athletico on March 27, 2015 which placed Petitioner at a medium physical demand level. (PX 4).

On April 13, 2015, Petitioner presented to Rush University Medical Center where she was examined by Dr. Matthew Jaycox, at the request of Dr. Cohen. Dr. Jaycox opined that while Petitioner did not meet all the diagnostic criteria of complex regional pain syndrome (CRPS), several symptoms were concerning, which included severe allodynia, pseudo motor changes, mottling, trophic changes to the nails, hyperalgesia, and pain outlasting a greater time period than which to be expected with her injury. Dr. Jaycox recommended Lyrica, possible stellate ganglion block, Qsart test, and EMG. (PX 6)

Petitioner returned to Ruch Pain Center on May 5, 2015. Upon examination, Dr. Sandeep Amin agreed with Dr. Jaycox's opinion that Petitioner did not meet all the diagnostic criteria for

CRPS. The possibility of adding a Butrans patch to her medication regime was considered, and Petitioner was advised to follow-up in three months for a refill on medications. (PX 6)

On May 15, 2015, Dr. Jaycox performed a stellate ganglion block of the cervical sympathetic. Dr. Jaycox recommended repeating the block in one week and restarting physical therapy. Dr. Timothy Lubenow of University Pain Centers performed a right stellate ganglion block May 21, 2015. (PX 6)

On June 3, 2015, Petitioner returned to Dr. Cohen who noted diminished range of motion in Petitioner's right elbow. Dr. Cohn recommended x-rays of the elbow that revealed concentrically reduced joint. Dr. Cohen recommended Petitioner continue treating at Rush Pain Center and he restricted Petitioner to performing only administrative work. (PX 4)

On June 8, 2015, Petitioner underwent right T2 ganglion thoracic sympathetic nerve block. The operative note indicated that Dr. Lubenow, the operating surgeon, opined that Petitioner developed complex regional pain syndrome (CRPS) and, on July 21, 2015, Petitioner underwent a lumbarthoracic sympathetic block at Rush Pain Center.

On August 12, 2015, Petitioner returned to Dr. Lubenow reporting that the right stellate ganglion block helped for only one hour and, at that time, Dr. Lubenow recommended a 5-day epidural infusion. (PX 6)

On August 13, 2015, Petitioner was scheduled for a Section 12 examination with Dr. Konowitz. Petitioner left the examination before the Section 12 examiner was able to complete the examination. Dr. Konowitz completed a records review and diagnosed right arm elbow pain and possible CRPS. Relative to making a definitive diagnosis regarding the CRPS condition, Dr. Konowitz indicated that he needed to complete a physical examination. Dr. Konowitz opined that Petitioner's current pain symptoms were related to the original work injury and that all treatment administered to date was reasonable and necessary. (RX 1a)

Dr. Konowitz recommended weaning Petitioner off long-term medically prescribed opioids with the use of a Butrans patch, Lidoderm patch at the site of the pain, and neuropathic medication. Dr. Konowitz also recommended a comprehensive pain assessment examination to determine the need for a spinal cord stimulator or repeat nerve blocks and he opined that Petitioner could return to work within restrictions consistent with the FCE. (RX 1a)

On October 8, 2015, Petitioner returned to Dr. Lubenow reporting that the Norco was working well, and allowed her to return to work as a teacher. Petitioner was scheduled for the 5-day epidural infusion. (PX 6)

On October 22, 2015, Petitioner returned to Dr. Konowitz to complete the Section 12 examination. After the examination, Dr. Konowitz opined that Petitioner's right arm/elbow complaints were neuropathic pain and he did not believe that Petitioner met the clinical diagnostic criteria of complex regional pain syndrome (CRPS). Dr. Konowitz further opined that Petitioner's neuropathic pain was secondary to her work-related elbow fracture and/or related surgical treatment. Dr. Konowitz also opined that Petitioner's current issues were consistent with and causally related to the work injury. Dr. Konwitz further opined that all of Petitioner's treatment had been reasonable and necessary. (RX 1a)

Dr. Konowitz recommended treatment for neuropathic pain and to discontinue titration of Lyrica. Dr. Konowitz also recommended the Norco should be replaced with butrans patch and utilize for up to 4 months. Dr. Konowitz further opined that Petitioner did not need thoracic nerve blocks, spinal cord stimulator, or epidural infusion for treatment. Dr. Konowitz recommended Petitioner be provided an aide in the classroom. (RX 1a)

On November 3, 2015, Petitioner was treated by Dr. Amin for medication management and she was scene, on December 3, 2015, by Dr. Lubenow who performed a medication management check. At that time, Petitioner reported that her current pain medications helped decrease her pain 25% for 1 to 2 hours and that she was not experiencing any side effects to her pain medications. On December 10, 2015, Petitioner was treated by Dr. Young who diagnosed ulnar neuropathy at the elbow, complex regional pain syndrome I (CRPS) of the upper limb and prescribed Elavil in addition to Norco. (PX 6)

On January 20, 2016, Petitioner followed-up with Dr. Lubenow reporting that her pain levels were unchanged and that the Amitriptyline 25 mg did not help. Dr. Lubenow prescribed a higher dose of Amitriptyline. On February 25, 2016 and March 30, 2016, Dr. Lubenow performed medication management checks and he reported that Petitioner's medication were controlled and she was not experiencing side effects. (PX 6)

On May 4, 2016, Petitioner returned to Dr. Lubenow who recommended a spinal cord stimulator because Petitioner's worsening CRPS in the ulnar nerve and ongoing symptoms of neuropathy. Dr. Lubenow opined that Petitioner met the Budapest criteria because of

temperature asymmetry in the right hand, allodynia over the right elbow, and decreased range of motion with regard to elbow and wrist extension. (PX 6)

On June 8, 2016, Petitioner followed up with Dr. Lubenow reporting that she was taking 10 Oxycodone pills to make her pain more tolerable. Dr. Lubenow recommended a spinal cord stimulator (SCS) because conservative care was not effective. (PX 6)

On June 30, 2016, Petitioner returned to Dr. Konowitz for another Section 12 examination. Dr. Konowitz noted global right arm hyperalgesia, allodynia with loss of range of motion, increased hair growth in the right arm, reported sweating changes, and burning pain throughout the right upper extremity. At this time, Dr. Konowitz diagnosed CRPS and he opined that all of Petitioner's medical treatment had been reasonable and necessary.

Dr. Konowitz recommended additional treatment consisting of: **(1)** psychological assessment prior to SCS with medication treatment to include anxiety and sleep issues. Consideration for Lexapro, Paxil, and Trazodone as therapeutic options; **(2)** changing to Nucynta followed by weaning off opioids and to butrans over the next four months; (3) if the above recommendations are to provide satisfactory, spinal cord stimulator trial; (4) additional alternative neuropathics could be considered are Trileptal, Zonegran. Dr. Konowitz opined Petitioner had not reached MMI but she could work with limited use of the right arm. (RX 1a)

On November 14, 2016 Petitioner underwent implantation of a trial of a spinal cord stimulator and reported 50% improvement and pain. On December 19, 2016, Petitioner underwent a permanent implant of an SCS. (PX6)

On January 4, 2017, Petitioner followed up with Dr. Lubenow reporting an increase in pain since the SCS placement. At that time, dr. Lubenow reprogrammed the SCS implant and prescribed Norco. On February 22, 2017, Petitioner returned to Dr. Lubenow reporting pain levels of 7/10. (PX 6)

On March 22, 2017, Petitioner returned Dr. Lubenow reporting pain levels of 8/10. Dr. Lubenow recommended an FCE and that Petitioner could likely return to work but would likely require a full-time teacher to aide in her teaching duties. (PX 6).

On March 30, 2017, Petitioner underwent an FCE at Industrial Rehab Allies. The FCE placed Petitioner at a sedentary capacity work level. It was noted on the FCE that Petitioner did not meet the validity criteria. (PX 6).

On April 20, 2017, Petitioner returned to Dr. Lubenow who noted that the FCE placed Petitioner at a sedentary work level capacity. As of May 1, 2017, Dr. Lubenow released Petitioner to work pursuant to the FCE recommendations and that Petitioner should be provided a classroom assistant. (PX 6)

On June 18, 2017 Petitioner followed up with Dr. Young and reported feeling frustrated because the spinal cord stimulator was not working. Dr. Young noted he would provide new programming and if there was no improvement they would consider a lead revision. On July 5, 2017, Petitioner returned to Dr. Lubenow reporting the onset of paresthesia in the shoulder region and sub optimal pain relief. At that time, Dr. Lubenow recommended surgery to revise and replace the migrated electrode. (PX 6)

On August 3, 2017, Petitioner presented to Dr. Howard Konowitz for another Section 12 examination. At this time, Dr. Konowitz diagnosed CRPS. Dr. Konowitz reviewed x-rays and determined a malposition of the spinal cord stimulator leads and opined that it was reasonable to proceed with revision of leads. Dr. Konowitz believed that Petitioner was not appropriately using Norco and he recommended a trial of Topamax, Zonegran, or Tripetal and Tizanidine at bedtime. Dr. Konowitz indicated that these medications were alternate neuropathic medications and effective treatment in other CRPS patients. Dr. Konowitz opined that Petitioner needed work a classroom aide. Dr. Konowitz opined that MMI could not be determined until after the revision of the lead and up to 90 days of post-operative care. (RX 1a)

On September 27, 2017, Petitioner returned to Dr. Lubenow reporting more pain since returning to work and that she was not being provided sedentary work. Petitioner further reported she was taking Norco 8 times per day during the week and, since July, she had been experiencing extreme burning at the incision sites of the spinal cord stimulator. Petitioner was assessed with CRPS type 1 of the right upper extremity, neuropathic pain, and malfunction and migration of the spinal cord stimulator. SCS. (PX 6)

On October 5, 2017, Petitioner underwent surgery to replace the cervical epidural electrode with C-arm, complex analysis of neurostimulation, and to replace the pulse generator battery pocket. Petitioner's postoperative diagnosis was epidural electrode migration and complex regional pain syndrome of the right upper extremity. (PX 6)

On October 11, 2017, Petitioner returned to Dr. Lubenow reporting a 25% improvement after the leads revision procedure. Petitioner followed up with Dr. Lubenow on November 9, 2017 reporting pain levels of 8/10 and that the spinal cord stimulator was not effective. (PX 6)

On February 7, 2018, Petitioner underwent another Section 12 examination with Dr. Konowitz who noted that the stimulator provided approximately 10% to 20% relief but the initial relief during the trial was 50%. Upon examination, Dr. Konowitz noted allodynia and temperature change of the right arm and he diagnosed CRPS indicating that Petitioner met the Budapest criteria. Dr. Konowitz noted Petitioner would require 4 visits per year for programing of the spinal cord stimulator because it will need periodic programming to maintain maximum coverage. Dr. Konowitz opined that Norco was not an effective treatment of CRPS and he found that Petitioner had a demonstrable tolerance. Dr. Konowitz recommended pantoprazole, tizanidine HCL, hydrocodone-acetaminophen, alprazolam, and zolmitriptan. Dr. Konowitz opined that Petitioner had appropriate work restrictions of light duty of no lifting more than 5-pounds with the right arm and he placed Petitioner at maximum medical improvement. (RX 1a)

On February 8, 2018, Petitioner returned to Dr. Young who also diagnosed CRPS type 1. Dr. Young refilled the Tizanidine and Norco. On March 8, 2018, Petitioner followed up with Dr. Lubenow who noted that the spinal cord stimulator was only helping 10%. Dr. Lubenow prescribed Oxycodone HCl and Terazosin, stopped Norco, and refilled Tizanidine. (PX 6)

On July 11, 2018, Petitioner returned to Dr. Lubenow reporting that her pain was everywhere. Dr. Lubenow recommended a series of burst SCS programs for 6 weeks and if it didn't help, an intrathecal drug pump. Dr. Lubenow took Petitioner off work. (PX 6)

On July 25, 2018, Petitioner presented to Dr. Merriman of Rush University Medical Center at the recommendation of Dr. Lubenow. Dr. Merriman's records state that Petitioner had a number of setbacks and was experiencing pain in her right arm. The session focused on psychoeducation regarding the relationship between cognitions, emotions and pain perception. (PX 6)

On August 9, 2018, Petitioner returned to Dr. Konowitz for another Section 12 examination. Dr. Konowitz noted that Petitioner had a revision of her spinal cord stimulator with incomplete pain relief. Dr. Konowitz noted that Petitioner had Allodynia and temperature changes of the right arm. Dr. Konowitz diagnosed CRPS and opined that all of Petitioner's treatment to date had been reasonable and necessary but ineffective.

Dr. Konowitz further opined that Petitioner did not need any additional medical treatment and that no changes to the spinal cord stimulator would improve Petitioner's current state. Dr. Konowitz placed Petitioner at MMI issued work restrictions of no use of the right arm. Dr. Konowitz opined that Petitioner did not meet the criteria for continued use of opioids and he determined her AMA rating to be 29% MAW.

On August 10, 2018, Petitioner returned to Dr. Merriman for pain management counseling. Petitioner was diagnosed with pain disorder associated with psychological factors and medical condition. (PX 6)

On October 9, 2018 Petitioner underwent a CT scan ordered by Dr. Lubenow which showed mild disc degeneration at C6-7. The CT scan also showed two electronic leads extending along the posterior aspect of the spine. (PX 9).

On June 5, 2019, Petitioner returned to Dr. Lubenow who noted the progression and migration of CRPS to lower extremities. At this time, Dr. Lubenow recommended replacing the spinal cord stimulator with Dorsal Root Ganglion Stimulation (DRG) to address Petitioner's chronic pain. (PX 7).

Deposition of Dr. Timothy Lubenow's Petitioner's treating physician.

Dr. Lubenow testified that he treated over a thousand patients suffering from Reflex Sympathetic Dystrophy (CRPS) and about half of his current patients suffer from CRPS. Dr. Lubenow testified that he helped write the diagnostic criteria for CRPS, which is referred to as the Budapest Criteria. (PX 10, p. 7)

Dr. Lubenow testified that he first saw Petitioner in April of 2015. At that time, her symptoms consisted of muscle and nerve related pain, increased sensitivity in the right upper extremity, which is always present and responsive to changes in the environment, hyperalgesia and hypersensitivity as well as mottling of the volar surface of the forearm and her pain worsened with snow, rain and barometric pressure. (PX 10, p. 11). After examining Petitioner, Dr. Lubenow initially diagnosed neuropathic pain but later he confirmed the diagnose of CRPS. (PX 10, p. 14).

Dr. Lubenow recommended sympathetic blocks followed by a spinal cord stimulator trial, which was carried out in November of 2016. Thereafter, Petitioner received a permanent implant in December of 2016. (PX 10, p 16). Dr. Lubenow testified that Petitioner's CRPS spread to her entire arm with symptoms extending to the posterior back region. (PX 10, p. 18).

Because Petitioner's CRPS was spreading, Dr. Lubenow recommended a revision of the stimulating system and upgrading the system to the newest refinement in stimulation for CRPS which the Dorsal Root Ganglion Stimulation (DRG). (PX 10, p. 17). Dr. Lubenow testified that prior to the DRG stimulation, Petitioner will need an updated CT scan of the cervical spine to determine the diameter of the cervical spine and the presence or absence of any neural foraminal narrowing.

Dr. Lubenow testified that if Petitioner does not have cervical spinal stenosis he recommends proceeding with a trial DRG stimulation and, if successful, the permanent DRG stimulation followed by 6 weeks for therapy. Dr. Lubenow testified that if Petitioner has severe spinal stenosis, he would recommend proceeding with the intraspinal drug delivery system in lieu of the DRG stimulation. (PX 10, pgs. 39-40).

Dr. Lubenow testified that the DRG stimulation is the newest refinement in the field of spinal stimulation. Electrodes are placed along the proximal nerve root instead of the mid portion of the spinal cord. It is placed along the portion of the nervous system where the sensory fibers are separate from the motor fibers and it gives a better quality of pain relief than spinal cord stimulators. (PX 10, p. 42).

Dr. Lubernow also testified that in a seminal study comparing DRG stimulation to spinal cord stimulators for CRPS, patients who received the DGR stimulator were mile likely to have a positive result of 50% or greater of pain relief and 86% of those who reported 50% of pain relief continued to have the pain relief after one year. The study showed that only 50-55% of patients who received the spinal cord stimulator show 50% pain relief. (PX 10, p. 42, 43).

Dr. Lubernow testified that Petitioner only takes 4 tablets a day of Oxycodone and under carefully controlled medication treatment by physicians trained in the use of opiate medications and that it is reasonable to utilize opioid medication which can be done effectively for long sustained time frames. (PX 10, 44,45). Dr. Lubernow testified that Petitioner takes 60 milligrams of morphine equivalent per day which is below the 90 milligrams the CDC recommends staying below. Dr. Lubernow testified that you cannot describe Petitioner as being on a high dose of opiates because she takes half the recommended maximum amount the CDC recommends. (PX 10, p. 26,27). Dr. Lubernow further testified that the original 2016 publication regarding opiate usage was not intended to imply that patients should be weaned from their opiates if it results in a further aggravation of their pain. The publication should not be

used as a mechanism to take away form palliative care of patients who are otherwise responding to opiates. Dr. Lubernow opined that Petitioner is responding her pain medication even if it increases her function by 10%. (PX 10, p. 27,28). Dr. Lubernow testified to understand the opiate problem in the US, prior to 2016, roughly 50% of opiates were prescribe by primary care physicians while only 16% were prescribed by pain physicians. (PX 10, p. 32).

Dr. Lubenow further testified that he would not place Petitioner at maximum medical improvement until the stimulator system is replaced. Once that is done, he believed that Petitioner should be able to return to work with restrictions of sedentary activities, lifting restrictions of 15-pound and avoiding repetitive motion and cold environments. (PX 10, 38).

Deposition of Dr. Howard Konowitz, the Section 12 examiner

Dr. Howard Konowitz testified that he is board certified and treated conditions of complex regional pain syndrome. (RX, p. 8). Dr. Konowitz testified that he conducted a record review on August 13, 2015 as Petitioner left the IME, performed an independent medical evaluation on October 22, 2015, a second independent medical evaluation on June 30, 2015, a third independent evaluation on August 3, 2017, a fourth evaluation on February 7, 2018, and a fifth evaluation in conjunction with an AMA evaluation on August 9, 2018. (RX 1, p. 10-11).

Dr. Konowitz testified that he originally diagnosed Petitioner with right arm elbow pain and possible CRPS. (RX 1, p. 13). Dr. Konowitz believed Petitioner's pain was more neuropathic pain. He noted that nerve pain was traditionally not something you want to treat with opioids and that there was literature indicating that opioids may worsen neuropathic pain states. (RX 1, p. 16)

Dr. Konowitz testified that he later diagnosed complex regional pain syndrome because Petitioner had met the Budapest criteria. (RX 1, p. 19). At the June 30, 2016 IME, he noted that Petitioner should reduce the opioids and consider a spinal cord trial. He noted that when patients weaned their pain medication it could help reset their pain. (RX 1, p. 21). Dr. Konowitz noted that failed opioid therapy was when someone comes in with high pain scores and showing signs of tolerance, the opioids are not providing significant pain relief. (RX 1, p. 27). Dr. Konowitz opined that Petitioner's treatment of neuropathic pain was substandard for medication management. He further noted that Norco was not working and should not be utilized pursuant to the 2016 CDC guidelines. (RX 1, p.28-31)

Dr. Konowitz testified that during his February 7, 2018 evaluation, he noted that Petitioner only had 10 to 20% coverage and, in these types of cases, he recommends removing the stimulator after the life of the battery or now. (RX 1, p. 32). Dr. Konowitz opined that Petitioner was maximum medical improvement. (RX 1, p. 33). Dr. Konowitz testified that Petitioner was taking medication with a morphine equivalent dose of 60 milligrams and you want to be concerned with doses over 50. Dr. Konowitz recommended placing a Butrans patch to provide pain relief and to wean down the opioid medication. (RX 1, p. 32)

Dr. Konowitz testified that he examined Petitioner, again, on August 9, 2018. At that time, Petitioner had undergone a revision of her spinal cord stimulator without much relief. Dr. Konowitz recommended removing the stimulator because it was only providing 10 to 20% relief. (RX 1, p. 37). Dr. Konowitz opined that Petitioner was at MMI. (RX 1, p. 39). Dr. Konowitz also opined that it was indeterminate whether the CRPS spread to Petitioner's legs. (RX 1, p. 57). Dr. Konowitz recommended work restrictions of no use of the right arm. (RX 1, p. 83)

Dr. Konowitz did not agree with replacing the stimulator with a DRG stimulator. Dr. Konowitz testified that it was newer technology and considered experimental by BCBS. (RX 1, p. 44). Dr. Konowitz also testified that they have not come full circle on the literature yet and there was no Cochrane review. (RX 1, p. 45). Dr. Konowitz testified that DRGs were too early in the development stage and he noted too many bad outcomes. (RX 1, p.45). Dr. Konwitz testified that he also does not agree with the recommendation for an intrathecal pain pump because he has not seen any good long-term outcomes. (RX 1, p. 47)

Testimony of Mark Dwyer, Respondent's witness

For Respondent, Mark Dwyer, the principal testified. (T. 86) Mr. Dwyer testified that he deals with employees in worker's compensation claims and ensures that proper documentation is provided. (T. 86) He further testified that he hired Petitioner and knew her well and believed she was a good teacher. (T. 87 and 127).

Mr. Dwyer testified that an accident report that was filled out during the accident. He noted that the accident reports are typically reviewed with the injured person and the injured person signs off on the same. (T. 88) He noted that the District's business practice is to prepare these types of report and these reports were stored in the regularly conducted course of business activity. (T. 89) He further testified that the reports are done contemporaneously with the accident. (T. 91). Mr. Dwyer also noted that a variety of people are allowed in the classroom, to

include parent volunteers, parents, custodians, para-professionals, custodians, staff members, OT staff, PT staff and special ed. He noted that there is always a variety of people that are in and out of the classrooms throughout the day. (T. 106)

Mr. Dwyer also testified that the District accommodated Petitioner's arm restrictions. (T. 92) He noted that para-professionals that are in the classroom are also available to assist. They typically spend 51% of their time working with students, the other is to be spent doing teacher tasks such as clerical work, grading papers, doing bulletin boards, laminating, copying and Xeroxing. (T. 92-93) He further advised that teachers are given 300 minutes a week of prep time throughout the school year. Teachers usually use this time to prepare for their classes for the next day or for the next week. (T. 94) Typical hours for teachers are 7:30-7:45 a.m. and they are required to stay until 3:45 p.m. (T. 95) Depending on teachers schedules he has seen some teachers stay until 4:30-5 p.m. (T. 96)

Mr. Dwyer further testified that there are people who buy all the supplies for the teachers and classrooms. (T. 97) He further testified that the District hired aides and paraprofessionals to assist with Petitioner's right arm and one-handed restrictions. (T. 99) He further advised that Petitioner was to direct the aide or paraprofessional with what she needed help with as she was the classroom teacher. (T. 100)

Mr. Dwyer testified that Petitioner was also placed to work as an interventionist, which is a sedentary job, and, in this job, Petitioner works with the students in small groups or one-on-one. He further advised that this could be a permanent position for Petitioner if she could not use her right arm. (T. 100-101) Mr. Dwyer continued to advise that the District could accommodate the one-handed restriction. (T. 102) He further noted that the District has assistive technology to help teachers such as text to speech, interactive chalkboards and handwriting apps that Petitioner could use. (T. 104). Mr. Dwyer testified that Petitioner taught kindergarten/first grade and the curriculum generally stays the same from year to year with only minor tweaks. (T. 107).

Petitioner's testimony regarding current condition and ability to work

Petitioner testified that her pain was worse now and she also experiences tremors in her right arm. (T. 62). Petitioner testified that she cannot work because she does not sleep well, has difficulty driving, and is irritable. (T. 65) Petitioner testified that when she was working, after her injury, she still meet all of her expectations and received excellent evaluations. (T. 79). Petitioner testified that Respondent provided her support, but she believed it was inadequate. (T.

79, 82). Petitioner testified the interventionist position was less demanding, but she was upset about the position. (T. 81). Petitioner testified that she had several aides and paraprofessionals in her classroom who typically worked from 8:00 a.m. to 3:40 pm (T. 42).

The Arbitrator found the testimony of Petitioner to be credible.

Conclusions of Law

The Arbitrator adopts the above Findings of Fact in support of the Conclusions of Law as set forth below. The claimant bears the burden of proving every aspect of her claim by a preponderance of the evidence. *Hutson v. Industrial Commission*, 223 Ill App. 3d 706 (1992).

In support of the Arbitrator's decision relating to issues "C" whether an accident occurred that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds as follows:

To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "arose out of" and "in the course of" his employment. 820 *ILCS* 305/1(d) (West 2014). Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill.App.3d 102, 105, 853 N.E.2d. 799, 803 (2006).

The requirement that the injury "arise out" of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 2017 Ill. 2d. 193, 203. 797 N.E.2d 665, 672 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Parro v. Industrial Comm'n,* 167 Ill. 2d 385, 393, 212 N.E.2d 882, 885 (1995). Rather, "[T]he "arising out of" component is primarily concerned with causal connection and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury" *Sisbro*, 207 Ill. 2d at 203.

After determining the mechanism of a claimant's injury, the Commission's first task, in determining whether the injury" arose out" of the claimant's employment, is to categorize the risk the claimant was exposed in light of its factual findings relevant to the mechanism of the injury. *First cash Financial Services*, 367 Ill.App.3d at 105. There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not

have any employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n,* 378 Ill. App. 3d 113, 116 (881 N.E.2d 523, 527 (2007); see also *Brady v. Louis Ruffolo & Sons Construction Co.,* 143 Ill.2d 542, 552, 578 N.E.2d 925 (1991) (noting that "neutral" in workers' compensation terms means "neither personal to the claimant nor distinctly associated with the employment").

"injuries resulting from a risk distinctly associated with employment, *i.e.* an employment-related risk, are compensable under the Act." *Steak 'N Shake v. Illinois Workers' Compensation Comm'n,* 2016 IL App (3d) 150500WC Par. 35, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Id. (quoting Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989)); see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, Par 18, 1 N.E.3d 535 (stating the Supreme Court "has found that injuries arising from three categories of acts are compensable: (1) acts the employer instructs the employee to perform; (2) acts which the employee has a common law or statutory duty to perform while performing duties for his employer; (3) acts which the employee might be reasonably expected to perform incident to his assigned duties"). "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45, 509 N.E.2d. 1005, 1008 (1987).

Alternatively, neutral risks-risks that have no particular employment characteristics "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." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill.App.3d 1010, 1014, 944 N.E.2d 800, 804 (2011). "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." *Id.*; see also *Campbell "66" Express, Inc. v. Industrial Comm'n*, 83 Ill. 2d 353, 357, 415 N.E.2d 1043, 1045 (1980) (finding the Commission could reasonable conclude from the evidence presented "that the necessity for a truck driver to be on the highway at all times of the

day and night, and in all kinds of weather, subjected the claimant***to a greater risk of injury from [a] tornado than that to which the general public in that vicinity was exposed"); *Chmelik v. Vana*, 31 Ill. 2d 272, 280, 201 N.E..2d 434, 439 (1964) (stating that "[t]he regular and continuous use of the parking lot by employees, most particularly at quitting time when there is a mass and speedy exodus of the vehicles on the lot, would result in a degree of exposure to the common risk beyond that to which the general public would be subjected").

When categorizing risk, the "first step" is to determine whether the claimant's injuries resulted from an employment-related risk." *Steak 'N Shake*, 2016 IL. App. (3d) 150500WC Par. 38. "[W]hen a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk or injury to a greater degree than the general public." *Young*, 2014 Il. App (4th) 130392WC, par. 23.

As an initial matter, the Arbitrator notes that there is no dispute that Petitioner was acting "within the course of" her employment at the time of her right arm December 17, 2012. The "in the course of employment" element refers to "[i]njuries 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…" *Metropolitan Water Reclamation District of Greater Chicago v. IWCC*, 407 Ill. App.3d 1010, 1013-14 (1st Dist. 2011). Petitioner testified that she was performing her job duties, which involved cleaning up the classroom and picking up papers was she typically would do. Respondent presented no evidence to the contrary. Therefore, the Arbitrator finds that Petitioner's injury occurred "in the course of" her employment.

The issue in this case is whether Petitioner has proven by the preponderance of the evidence that her injury "arose out of" her employment. First, it must be determined whether tripping or stumbling over worn carpeting is an injury that arises out of Petitioner's employment.

"Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Steak 'N Shake v. Illinois Workers' Compensation Comm'n,* 2016 IL App (3d) 150500WC Par. 35, 67 N.E.3d 571, (*quoting Caterpillar Tractor Co. v. Industrial Comm'n,* 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989)); see also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation*

Comm'n, 2013 IL 115728, Par 18, 1 N.E.3d 535. "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45, 509 N.E.2d. 1005, 1008 (1987).

The Arbitrator finds that the Petitioner's was injured while performing an act that Respondent might reasonably expected her to perform to fulfill her job duties. Petitioner was cleaning up the classroom and throwing out papers when she tripped or stumbled on worn carpeting. Petitioner testified that she was throwing out a sheet of paper when her feet got tripped up in the carpeting. (T. 21). Petitioner testified that the carpet was worn and that she previously placed an area rug over a portion of the carpeting for safety reasons. (T. 21).

The Arbitrator finds that Petitioner was injured due to an employment-related risk because she was injured while performing job duties (*i.e.* cleaning up the classroom and throwing out papers) and the activity that she was performing was an activity that Respondent would reasonably expected Petitioner to perform as part of her job duties. Respondent did not proffer evidence rebutting these facts or the condition of the carpeting. Because the Arbitrator finds that Petitioner was injured due to an employment-related risk, neutral risk analysis is not required. "[W]hen a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk or injury to a greater degree than the general public." *Young*, 2014 Il. App (4th) 130392WC, par. 23.

Assuming Petitioner was not performing a risk distinctly associated her employment, the Arbitrator finds that Petitioner was exposed to a common risk more frequently than the general public. Petitioner was assigned to a particular class room. The general public does not have unfettered access to the class rooms. Access to the school was limited to parent volunteers, parents, custodians, para-professionals, custodians, staff members. There was no evidence that the general public had access to Petitioner's classroom. This was not a situation where the school was open to the general public for an athletic event or other school event. Petitioner was assigned to a classroom that had worn carpet and she would be walking over the worn carpeting continuously during the day. Clearly, Petitioner was exposed to the risk to a greater degree of the general public.

Respondent in support of their position cites to *Meierdirks v. Ill. Workers' Comp. Comm'n*, 12 IWCC 0647 (2012). In *Meierdirk*, the Petitioner wore a brace on her left ankle and

suffered from rheumatoid arthritis. The Petitioner, in *Meierdick*, said, in a recorded statement, that there were no defects whatsoever with the carpet, which was new, and she just lost her footing. The Arbitrator in *Meierdick* found that Petitioner failed to prove her fall stemmed from a risk associated with her employment which would be described as a defect at the employer's premises that contributed to a risk of falling. Citing *First Cash Financial Services v. Industrial Comm'n,* 853 N.E.2nd 799 (Ill.App.1st Dist. 2006). In the instant case, unlike the facts in *Meierdick*, Petitioner tripped over worn carpeting.

In support of the Arbitrator's decision relating to "F," whether Petitioner's current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

Accidental injuries need not be the sole cause of the Petitioner's current condition of ill-being as long as the accidental injuries are a causative factor resulting in the current condition of ill-being. *Sisbro, Inc. v. Industrial Commission,* 207 Ill.2d 193 (2003). The Arbitrator finds that Petitioner proved by the preponderance of the evidence that her current right arm condition (CRPS) is causally related to her work injury.

Dr. Lubenow diagnosed CRPS and opined that Petitioner's right arm condition was related to her work injury. Dr. Konowitz, who performed the 12 examinations, also diagnosed CRPS and opined that Petitioner's right arm condition was caused by her work accident of December 17, 2018. (RX 1). The Arbitrator notes that prior to her work injury of December 17, 2018, Petitioner was not experiencing any problems with her right arm.

In support of the Arbitrator's decision relating to "J," whether the medical services were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Under Section 8(a) of the Act, a claimant is entitled to recover reasonable medical expenses, the incurrence of which are causally related to an accident arising out of and in the scope of employment and which are necessary to diagnose, relieve, or cure the effects of the claimant's injury. *Absolute Cleaning/SVMBL v. Ill. Workers' Compensation Comm'n,* 409 Ill.App.3d 463, 470 (4th Dist. 2011).

Petitioner is seeking the payment for prescriptions pain medication totaling $891.00 and for medical services provided by University Pain Physicians totaling $6,222.81. (Arb. Ex. #1). The Arbitrator finds that Petitioner's treatment was related to her accident and the treatment was also necessary to relieve, care or diagnose Petitioner from the effects of her injury. As such, the

Arbitrator finds that Respondent shall pay Petitioner the sum of $891.00 for pain medications and the sum of $6,222.81 for the services provided by University Pain Physicians as provided by Sections 8(a) and 8.2 of the Act and pursuant to fee schedule.

In Support of the Arbitrator's decision relating to "K" whether Petitioner is entitled to prospective medical treatment, the Arbitrator finds as follows:

The Arbitrator finds that Petitioner has proven by the preponderance of the evidence that she is entitled to prospective medical care. As such the Respondent shall approve for an CT scan of the cervical spine and, in the event the CT scan does not reveal severe spinal stenosis, the replacement of the spinal cord stimulator with a test DRG stimulation, and if the test is successful, a permanent DRG stimulation with appropriate follow up treatment as recommended by Dr. Lubenow. In the event the CT scan shows severe spinal stenosis, Respondent shall approve the intraspinal drug delivery system in lieu of the DRG stimulation as recommended by Dr. Lubenow.

The Arbitrator finds the opinions of Dr. Lubenow to be more persuasive than the opinions of Dr. Konowitz. Petitioner continues to experience significant pain and her CRPS has spread into the entire arm and posterior back region. The current spinal cord stimulator provides about 10% relief, below the level of relief obtained during the testing. The Arbitrator finds that Petitioner's condition has not stabilized and appears to be worsening. In response to Petitioner's worsening condition and less than optimal relief provided by the spinal cord stimulator, Dr. Lubernow recommends replacing the spinal cord stimulator with the DRG stimulation. Dr. Lubernow testified that the DRG stimulation could relieve a significant portion of Petitioner's symptoms and may allow her to return to work.

As Petitioner's condition deteriorates Dr. Konowitz recommends removing the existing spinal cord stimulator, which provides approximately 10-20% relief of pain, and he further recommends taking Petitioner off opiate pain medications, which provides approximately another 10% relief of pain and which is being monitored by physicians specializing in pain management. The Arbitrator notes that Dr. Konowitz does not offer any further treatment, despite the anticipated increase of symptoms that would result from the removal of the spinal cord stimulator and opiate medications, and he also disagrees with the DRG stimulation because it is too new.

The Arbitrator notes that Dr. Lubenow recommended DRG stimulation because of its success with CRPS patients as reflected in a recent study which compared DRG stimulation with spinal cord stimulators in CRPS patients. Dr. Lubenow testified that the study showed that patients who received the DGR stimulator were more likely to have a positive result of 50% or greater of pain relief of which 86%, of those patients, continued to have the pain relief after one year. The same study showed that only 50-55% of patients who received the spinal cord stimulator show 50% pain relief. (PX 10, p. 42, 43).

The Arbitrator notes that both doctors agree that the spinal cord stimulator has not provided Petitioner optimal relief. To address the less than optimal performance of the spinal cord stimulator, Dr. Lubernow recommends replacing it with DRG stimulation, which is an upgraded or more advanced version of the spinal cord stimulator. Dr. Konowitz recommends the removal of the spinal cord stimulator and discontinuation of opiate pain medication. The Arbitrator notes that both doctors agree that the spinal cord stimulator is not preforming as hoped but the removal of the device would cause Petitioner to experience more pain thus a further deterioration of her quality of life at a time that Petitioner's CRPS appears to be spreading. The Arbitrator finds that this fact undermines Dr. Konowitz's opinions.

In support of the Arbitrator's decision relating to "K," whether Petitioner is entitled to temporary total disability benefits and the Arbitrator's decision relating to "O" whether Petitioner is at MMI, the Arbitrator finds as follows:

"The period of temporary total disability encompasses the time from which the injury incapacitates the claimant until such time as the claimant has recovered as much as the character of the injury will permit, *i.e.,* until the condition has stabilized." *Gallentine v. Industrial Comm'n*, 201 Ill. App. 3d 880, 886 (2nd Dist. 1990). The dispositive test is whether the claimant's condition has stabilized, *i.e.,* reached MM.I. *Sunny Hill of Will County v. Ill. Workers' Comp. Comm'n*, 2014 IL App (3d) 130028WC at 28 (June 26, 2014, Opinion Filed); *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760 (4th Dist. 2003). To show entitlement to temporary total disability benefits, a claimant must prove not only that he did not work, but also that he was unable to work. *Gallentine*, 201 Ill. App. 3d at 887; *see also City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (5th Dist. 1996).

The Arbitrator's findings and conclusions relating to the issues of accident and causal connection are incorporated herein. Petitioner claims to be entitled to temporary partial

disability benefits from August 15, 2016 through October 9, 2016 and from August 25, 2018 through October 15, 2019.

The Arbitrator finds that Petitioner has proven by the preponderance of the evidence that her condition has not stabilized as of July 11, 2018. On that day, Dr. Lubernow took Petitioner off all work and he recommended replacing the spinal cord stimulator. The Arbitrator finds the opinions of Dr. Lubernow more persuasive than the opinions of Dr. Konowitz. The Arbitrator further finds that Petitioner's condition has not stabilized. As such, Petitioner is entitled to TTD benefits from August 25, 2018 through October 15, 2019.

The Arbitrator further finds that Petitioner failed to prove that by the preponderance of the evidence that she did not work or could not work from August 15, 2016 through October 9, 2016. Petitioner testified that she worked with restrictions during 2016 and that Respondent was accommodating her restrictions. Petitioner failed to prove that she did not work or that she was unable to work during this period. The Arbitrator notes that during this period of time, Petitioner was allowed to work with restrictions by Drs. Lubernow and Konowitz.