2018 IL App (5th) 160297WC

NOS. 5-16-0297WC, 5-16-0342WC (cons.)

Opinion filed: February 16, 2018

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DOBBS TIRE & AUTO, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Ted Adams, Appellee).	)	Appeal from the Circuit Court of St. Clair County. No. 14-MR-347 Appeal No. 5-16-0342WC Honorable Robert P. LeChien, Judge, presiding.
PEGGY STOLTE, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (St. Anthony's Memorial Hospital, Appellee).	)	Appeal from the Circuit Court of Fayette County. No. 16-MR-22 Appeal No. 5-16-0297WC Honorable J. Marc Kelly, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court, with opinion.

Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment and opinion.

OPINION

¶ 1 These appeals were consolidated for purposes of oral argument and opinion by this court's own motion. In the first appeal, the claimant, Peggy Stolte, appeals the June 23, 2016,

order of the circuit court of Fayette County that denied her motion for enforcement of judgment pursuant to section 19(g) of the Workers' Compensation Act (Act) (820 ILCS 305/19(g) (West 2014)) and interest on her workers' compensation award, pursuant to section 2-1303 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1303 (West 2014)). In the second appeal, the employer, Dobbs Tire & Auto, appeals the June 16, 2016, judgment of the circuit court of St. Clair County that awarded the claimant, Ted Adams, $72,178.83 in postjudgment interest, pursuant to section 2-1303 of the Code (*id.*), after the claimant filed a pleading, pursuant to section 19(g) of the Act (820 ILCS 305/19(g) (West 2014)), for the sole purpose of requesting the interest award. For the reasons that follow, we affirm the order entered by the circuit court of Fayette County in the appeal brought by Peggy Stolte, and we reverse the judgment entered by the circuit court of St. Clair County in the Dobbs Tire & Auto appeal.

¶ 2 FACTS

¶ 3 1. *Stolte Appeal*

¶ 4 On March 9, 2016, the claimant filed, in the circuit court of Fayette County, a pleading titled "Motion For Enforcement Of Judgment And Interest At 9% Per Annum, On Workers' Compensation Arbitration Decision And Commission Decision And Pursuant to 820 ILCS 305/19(g)" (motion). According to the motion, the arbitrator issued a decision on March 21, 2013, in favor of the claimant and against the employer, St. Anthony's Memorial Hospital, awarding the claimant permanent partial disability in the amount of $233.29 per week for 125 weeks, totaling $29,161.25. The employer appealed the award to the Illinois Workers' Compensation Commission (Commission), which confirmed the award. The employer appealed to the circuit court of Fayette County, which also confirmed the award, and then to this court,

which affirmed. See *St. Anthony's Memorial Hospital v. Illinois Workers' Compensation Comm'n*, 2015 IL App (5th) 140447WC-U.

¶ 5 The claimant's motion averred that the employer, when it paid the workers' compensation award, incorrectly calculated interest on the award by applying "only the .11 interest rate" provided by section 19(n) of the Act (820 ILCS 305/19(n) (West 2014)). The claimant asserted that once the circuit court ruled and confirmed the award, interest was due on the award at the rate of 9%, pursuant to section 2-1303 of the Code. 735 ILCS 5/2-1303 (West 2014).

¶ 6 On April 16, 2016, the employer filed a motion to dismiss, stating that it had paid the award in full on January 6, 2016, including interest in the amount of 0.11% pursuant to section 19(n) of the Act. 820 ILCS 305/19(n) (West 2014). The employer requested that the circuit court dismiss the claimant's motion, arguing that section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2014)) does not apply because the award had not been reduced to judgment at the time the award was paid. After briefing and oral argument, the circuit court entered an order on June 23, 2016, granting the employer's motion to dismiss. On July 11, 2016, the claimant filed a notice of appeal.

¶ 7 2. *Dobbs Tire & Auto Appeal*

¶ 8 On September 2, 2014, the claimant filed, in the circuit court of St. Clair County, a pleading titled "Motion For Enforcement Of Judgment And Interest On Workers' Compensation Commission Decision And Pursuant to 820 ILCS 305/19(g)" (motion). According to the motion, the arbitrator issued a decision on January 19, 2010, in favor of the claimant and against the employer, awarding the claimant medical expenses in the amount of $239,549.16 and permanent total disability in the amount of $847.10 per week. The employer appealed the award to the

Commission, which modified the medical expense award to $237,025.53 but otherwise confirmed the award. The employer appealed to the circuit court of St. Clair County, which confirmed the award, and then to this court, which affirmed. See *Dobbs Tire & Auto v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120576WC-U.

¶ 9 The claimant's motion averred that the employer, when it paid the workers' compensation award, incorrectly calculated interest on the award by applying "only the .13 interest rate" provided by section 19(n) of the Act[1] (820 ILCS 305/19(n) (West 2014)). The claimant asserted that once the Commission ruled, interest was due on the award at the rate of 9%, pursuant to section 2-1303 of the Code. 735 ILCS 5/2-1303 (West 2014).

¶ 10 On October 3, 2014, the employer filed a response to the claimant's motion, in which it averred that it had paid the entire award on November 1, 2013, by issuing a check in the total amount of $211,011.87, which included interest in the amount of approximately $1000, which was calculated at the rate of 0.13% pursuant to section 19(n) of the Act. 820 ILCS 305/19(n) (West 2014). The employer argued that because it had paid the entire award prior to the claimant's motion, the claimant's motion should be denied.

¶ 11 On June 16, 2016, after briefing and oral argument, the circuit court entered an order granting the claimant's motion. The circuit court ordered the employer to pay 9% interest on the award from the date that the circuit court affirmed the award on November 20, 2012, an amount it calculated to be $72,178.83. On June 27, 2016, the employer filed a motion to reconsider,

[1]Section 19(n) of the Act provides, in relevant part, that "decisions of the *** Commission reviewing an award of an arbitrator of the Commission shall draw interest at a rate equal to the yield on indebtedness issued by the United States Government with a 26-week maturity next previously auctioned on the day on which the decision is filed. Said rate of interest shall be set forth in the Arbitrator's Decision." 820 ILCS 305/19(n) (West 2014). Accordingly, the amount of interest varies among awards.

which the circuit court denied on July 28, 2016. On August 5, 2016, the employer filed a notice of appeal.

¶ 12 ANALYSIS

¶ 13 The sole issue raised in these appeals is whether the 9% judgment interest rate set forth in section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2014)) applies to a Commission award prior to the award being reduced to judgment by a circuit court pursuant to section 19(g) of the Act. 820 ILCS 305/19(g) (West 2014). We begin our analysis of this issue by identifying the applicable standard of review. The issue on appeal requires this court to interpret the interplay between several statutory sections. "Issues involving the interpretation of a statute present questions of law that we review *de novo*." *Continental Tire of the Americas, LLC v. Illinois Workers' Compensation Comm'n*, 2015 IL App (5th) 140445WC, ¶ 16 (citing *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12). " 'The primary rule of statutory construction is to ascertain and give effect to the intent of the legislature,' " and " '[t]he language used in the statute is normally the best indicator of what the legislature intended.' " *Id.* (quoting *Gruszeczka*, 2013 IL 114212, ¶ 12). With these standards in mind, we turn to the circuit court of Fayette County's finding that the claimant is not entitled to a judgment under section 19(g) of the Act (820 ILCS 305/19(g) (West 2014)) and interest under section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2014)), and the contrary judgment of the circuit court of St. Clair County.

¶ 14 In the cases at bar, the circuit court of Fayette County refused to enter a judgment in favor of Stolte on the claimant's workers' compensation award under section 19(g) of the Act (820 ILCS 305/19(g) (West 2014)) and 9% interest under section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2014)) because the employer paid the claimant the full amount of the award, plus

interest pursuant to section 19(n) of the Act (820 ILCS 305/19(n) (West 2014)) prior to the time the claimant filed her motion. In contrast, the circuit court of St. Clair County determined that such a judgment against Dobbs Tire & Auto would be appropriate, although the exact same circumstances existed. As explained below, the Second and Fourth Districts of our appellate court have found that such a judgment and interest award is contrary to law in *Radosevich v. Industrial Comm'n*, 367 Ill. App. 3d 769, 778 (2006), and *Sunrise Assisted Living v. Banach*, 2015 IL App (2d) 140037, ¶¶ 26-35, respectively.

¶ 15 In *Radosevich*, the court explained that a claimant is entitled to interest under section 19(n) of the Act on all awards of arbitrators and decisions of the Commission, which provides that such interest is " 'drawn from the date of the arbitrator's award on all accrued compensation due the employee through the day prior to the date of payments.' " 367 Ill. App. 3d at 777 (quoting 820 ILCS 305/19(n) (West 2004)). In contrast, the court explained, "[a] claimant is entitled to section 2-1303 interest if and when the arbitrator's award or Commission's decision becomes an enforceable judgment." *Id.* at 778. This occurs "[w]hen an employer fails or refuses to pay a final award determined by the arbitrator, which becomes the Commission's decision." *Id.* Once no further appeal is taken, a claimant may file a petition in the circuit court pursuant to 19(g) of the Act (820 ILCS 305/19(g) (West 2004)) to reduce the award to an enforceable judgment. *Radosevich*, 367 Ill. App. 3d at 778. Section 2-1303 (735 ILCS 5/2-1303 (West 2004)) interest is only proper once a judgment is entered by the circuit court and does not affect an employer who makes timely payments on the award. *Radosevich*, 367 Ill. App. 3d at 778.

¶ 16 Similarly, in *Sunrise Assisted Living*, the court, relying on *Radosevich*, affirmed a circuit court's refusal to deny a claimant a judgment under section 19(g) of the Act (820 ILCS

305/19(g) (West 2012)) and an award of an interest under section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2012)) in circumstances identical to the case at bar, explaining:

> "In this case, Sunrise appealed the Commission's decision, and section 19(n) interest accrued while that appeal was pending. When the appellate court rendered its decision, Sunrise promptly paid the lump sum, accrued installments, and section 19(n) interest, before [the claimant] filed her section 19(g) application. Sunrise did not refuse to pay before [the claimant] implemented section 19(g). When Sunrise tendered full payment of what was owed, [the claimant] was no longer entitled to a judgment under section 19(g). Without a judgment, [the claimant] was not entitled to additional interest under section 2-1303 of the Code." *Sunrise Assisted Living*, 2015 IL App (2d) 140037, ¶ 35.

¶ 17 We find the reasoning in *Radosevich* and *Sunrise Assisted Living* to be sound and to clearly dispose of the issue raised in these appeals. We reject the arguments of the claimants that section 3-111(a)(8) of the Administrative Review Law (735 ILCS 5/3-111(a)(8) (West 2014)) gives the circuit court's affirmance of the arbitrator's award on appeal the status of a judgment that could be enforced as other judgments, including the accrual of interest pursuant to section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2014)). Section 3-102 of the Administrative Review Law (735 ILCS 5/3-102 (West 2014)) clearly provides that the law only applies to an administrative agency "where the Act creating or conferring power on such agency, by express reference, adopts the provisions" of the Administrative Review Law. " 'The Act clearly does not adopt the Administrative Review Law.' " *Farris v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130767WC, ¶ 46 (quoting *Wal-Mart Stores, Inc. v. Industrial Comm'n*, 324 Ill. App. 3d 961, 966 (2001)). Accordingly, the Administrative Review Law has no bearing on

the provisions of the Act, which clearly set forth a specific procedure for the review of an arbitrator's workers' compensation award at all levels, interest on the award during this process, and the conversion of the award into a judgment at the conclusion of review, in the event that the employer fails to pay the award. 820 ILCS 305/19 (West 2014). Based on this statutory procedure, and the case law outlined above, we find that the circuit court of Fayette County did not err in refusing to award interest pursuant to section 2-1303 of the Code (735 ILCS 5/2-1303 (West 2014)), and the circuit court of St. Clair County erred in so doing.

¶ 18 CONCLUSION

¶ 19 For the foregoing reasons, we affirm the order of the circuit court of Fayette County and reverse the judgment of the circuit court of St. Clair County.

¶ 20 No. 5-16-0297WC, Affirmed.

¶ 21 No. 5-16-0342WC, Reversed.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Peggy Stolte,

Petitioner,

vs. NO: 11 WC 47860

14IWCC0101

St. Anthony's Memorial Hospital,

Respondent.

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed March 21, 2013, 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.

14IWCC0101

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $29,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: FEB 11 2014
TJT:yl
o 1/27/14
51

Thomas J. Tyrrell

Kevin W. Lamborn

Daniel R. Donohoo

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

STOLTE, PEGGY
Employee/Petitioner

Case# **11WC047860**

ST ANTHONY'S MEMOIRAL HOSPITAL
Employer/Respondent

14IWCC0101

On 3/21/2013, 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:

3067 KIRKPARTICK LAW OFFICES PC
ERIC KIRKPATRICK
#3 EXECUTIVE WOODS CT STE 100
BELLEVILLE, IL 62226

0734 HEYL ROYSTER VOELKER & ALLEN
JOHN FLODSTROM ESQ
PO BOX 129
URBANA, IL 61803-0129

14IWCC0101

STATE OF ILLINOIS)
)SS.
COUNTY OF Williamson)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Peggy Stolte
Employee/Petitioner

v.

St. Anthony's Memorial Hospital
Employer/Respondent

Case # 11 WC 47860

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 **Deborah L. Simpson**, Arbitrator of the Commission, in the city of **Mt. Vernon**, on **January 11, 2013**. 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 _____

14IWCC0101

FINDINGS

On **September 22, 2010**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$20,218.12**; the average weekly wage was **$388.81**.

On the date of accident, Petitioner was **59** years of age, ***single*** with **0** dependent children.

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

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

ORDER

The Respondent shall pay Petitioner permanent partial disability benefits of $233.29 /week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Richard L. Simpson
Signature of Arbitrator

March 20, 2013
Date

MAR 21 2013

14IWCC0101

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Peggy Stolte,	)	
	)	
Petitioner,	)	
	)	
vs.	)	**No. 11 WC 47860**
	)	
St. Anthony's Memorial Hospital,	)	
	)	
Respondent.	)	
	)	

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

The parties agree that on September 22, 2010, the Petitioner and the Respondent were operating under the Illinois Worker's Compensation or Occupational Diseases Act and that their relationship was one of employee and employer. On that date the Petitioner sustained an accidental injury or was last exposed to an occupational disease that arose out of and in the course of the employment. They further agree that the Petitioner gave the Respondent notice of the accident within the time limits stated in the Act.

At issue in this hearing is as follows: (1) Is the Petitioner's current condition of ill-being causally connected to this injury or exposure; (2) Were the medical services that were provided to the Petitioner reasonable and necessary; (3) Has the Respondent paid all appropriate charges for all reasonable and necessary medical services; (4) What is the nature and extent of the injury; and (5) Is the Respondent due any credit.

STATEMENT OF FACTS

On September 22, 2010, the Petitioner was employed by the Respondent as a laundry technician in the linen department. On that date she was lifting some bedspreads that were clean, folded and packaged together. When she lifted the spreads from where they were stacked overhead the cart she was going to place them on moved, they started to fall backwards, she was able to prevent herself as well as the bedspreads from falling, however the movement caused pain to her lower back that developed into pain down her right leg and into her foot. The Petitioner is claiming an injury to her back from turning to catch the falling bedspreads.

The Petitioner has a history of a prior work related injury to her back. She was working for a previous employer when she injured her back in a lifting incident. She was under the care of Dr. Matthew Gornet and underwent a fusion at L4 to S1 in December 2003. (Pet. Ex. #3).

The Petitioner testified that she had continuing symptoms in her right leg following the surgery in December 2003, and prior to the claimed work accident of September 22, 2010. Specifically, she had ongoing numbness in her right calf and the toes of her right foot. She testified that she had been able to return to her regular job, full duty after the fusion surgery in 2003, and was able to perform all her duties. She acknowledged during her testimony that she was seen by her primary care physician at the Altamont Clinic on December 12, 2008. Her symptoms included right leg pain and back pain.

The Petitioner testified that when she was lifting some bedspreads they fell and she twisted her back while attempting to catch them. She caught herself with her right arm during the incident, but did not fall to the ground. She stated that she immediately felt burning pain in her lower back that eventually developed into pain radiating down her right leg, around her thigh and down into her right foot. She said that this pain was much stronger than the pain she had experienced in the past. She stated that the pain wrapping around her thigh down her leg was something she had never experienced before the accident.

She received her initial care from a chiropractor, Dr. Stanfield, and later transferred her care to Dr. Rudert at the Bonutti Orthopaedic Clinic. She was later referred to Dr. Matthew Gornet, who had treated her for her prior back injury.

Dr. Stanfield's treatment helped a little with the pain in her shoulder and her upper back, but provided no relief from the low back and leg pain.

Dr. Rudert treated the Petitioner with oral steroids and ordered physical therapy. The Petitioner had six physical therapy sessions and was given a TENS unit but that provided no relief from the back and leg pain.

The first visit with Dr. Gornet (related to the present case) took place on December 13, 2010. (Pet. Ex. #3). Dr. Gornet performed an examination and reviewed some test films. He recommended some treatment and stated in his notes that, "I do believe her current symptoms are causally connected to her work related injury of 9/22/10."

The petitioner remained under Dr. Gornet's care following the initial visit on December 13, 2010.

He stated that her current symptoms were causally related to her accident. He prescribed an epidural steroid injection which was done on December 27, 2010. He sent her for two injections. The injections provided a few days relief of her back pain but it was not permanent relief.

On March 3, 2011 Dr. Gornet noted the new MRI revealed pathology at L2-3 with a central disc protrusion. He recommended a discogram at L3-4 and L2-3. The discogram was performed on April 6, 2011. This discogram revealed a mildly provocative disc at L3-4 with a severely provocative disc at L2-3.

When surgical options were discussed on April 25, 2011 Petitioner was adamant about how her pain and symptoms affected all aspects of her life. Petitioner opted for the two-level spinous process distractor rather than another fusion.

Surgery was performed on June 14, 2011 consisting of a laminotomy at L2-3 and L3-4. "X-stop spinous process distractors" were placed at L2-3 and L3-4.

The Petitioner testified that post surgically she was painful but the pain that had wrapped around her right thigh and down her leg was relieved. Her back pain soon also lessened. The same was reported to Dr. Gornet when he saw her on July 7, 2011.

Dr. Gornet ultimately allowed her to return to work with restrictions which her employer accommodated. On June 25, 2012 these restrictions were made permanent; no lifting greater than 20lbs, alternating between sitting and standing and no repetitive bending or lifting.

On June 25, 2012, she was placed at maximum medical improvement.

The Petitioner testified that her employer does accommodate her permanent restrictions. Petitioner stated she cannot stand for more than 30 minutes or sit for more than 30 minutes at a time. She used to walk for exercise and now walks less; one-half of a mile vs. 1.5 miles. She is unable to do heavy housework such as vacuuming. In fact, she removed the carpet in her house because of her limitation.

Her hobbies have also been affected. She cannot sit and sew as she previously had done. She cannot go camping as before. In addition, she is unable to lift her grandchildren. She is also unable to sleep with her husband and many times sleeps in a recliner.

The respondent has stipulated that the petitioner sustained a work related injury to her back during the accident of September 22, 2010. However, the respondent has disputed that all of the medical care for the petitioner's back, including Dr. Gornet's surgery of June 14, 2011, is causally related to the claimed work accident.

CONCLUSIONS OF LAW

Thus, if a preexisting condition is aggravated, exacerbated, or accelerated by an accidental injury, the employee is entitled to benefits. *Sisbro supra.* "[*A*] Petitioner need only show that some act or phase of the employment was a causative factor of the resulting injury." *Fierke v. Industrial Commission,* 723 N.E.2d 846 (3rd dist. 2000).

Is the Petitioner's current condition of ill-being causally connected to this injury or exposure?

Dr. Gornet, after examining the Petitioner and taking a history from her as well reviewed her medical records. In reviewing the MRI of October 12, 2010 felt it showed a potential lateral disc herniation at L2-L3 which correlated with the symptoms that the Petitioner described. He

also felt she had a lateral disc herniation at L3-L4. He asked for a repeat MRI which Dr. Gornet noted the symptoms correlated with pathology at L2-3 and L3-4 and this was also confirmed by CT/discogram. It was the opinion of Dr. Gornet that her condition was causally related to her accident.

Dr. Matz opinioned that petitioner suffered a lumbar strain from the accident, but that the degenerative conditions in the low back were not related to the injury. He believed that for the work related injury she needed a TENS unit and work hardening. He felt surgery was for the preexisting condition. Dr. Matz's evidence deposition was received into evidence as respondent's Exhibit #1. Dr. Matz testified that he examined the petitioner and reviewed her medical records on January 11, 2012, after the surgery. According to Dr. Matz, and this is confirmed in Dr. Gornet's post-operative diagnosis of "stenosis", the surgery done by Dr. Gornet was done for the purpose of correcting a degenerative condition, lumbar stenosis, and not for any conditions related to the alleged work accident of September 22, 2010. (Resp. Ex. #1 at pg. 11). Dr. Matz concluded the petitioner would have suffered a lumbar strain in the twisting type accident and that that injury would not have created any need for surgical intervention. (Resp. Ex. #1 at pgs. 9-10).

When asked on cross-examination whether the lumbar strain he diagnosed, when superimposed on preexisting conditions could have caused those to become symptomatic he testified he expected that for the stretching to have irritated the nerve he would have expected the foramina to be critically tight. He then agreed that the surgical report of Dr. Gornet noted that the foramen was released as it was compressing the right sided nerve.

Significantly, Petitioner testified to the immediate onset of severe low back and then pain that she had never had before; pain down her right leg that wrapped around her thigh. Her quality of life deteriorated after this accident. Most significant is the fact that Petitioner testified to relief of her symptoms after her surgery.

The Respondent paid TTD and agreed to pay medical bills but disputes causation based upon the opinions expressed by Dr. Matz. This arbitrator finds the testimony of the Petitioner supports the opinion expressed by Dr. Gornet. This arbitrator finds that surgery was related to the accident and was necessary to relieve its effects. The Petitioner has sustained her burden of proving a causal relationship.

Were the medical services that were provided to the Petitioner reasonable and necessary? Is the Respondent entitled to any credit?

Based upon the reasoning above and the testimony of Dr. Gornet that the treatment was reasonable and necessary and the agreement of Dr. Matz that Dr. Gornet's treatment was appropriate for the spinal stenosis the Arbitrator finds that the medical services provided to the Petitioner were reasonable and necessary.

There is no evidence offered to establish that there are any outstanding unpaid medical bills or that there is any outstanding TTD owed. Since the Petitioner's condition of ill being was causally connected to the injury she sustained the Respondent would have been responsible for

the bills and the TTD which the Petitioner agreed were paid. The Respondent is not entitled to any credit against the PPD award.

What is the nature and extent of the injury?

The permanent restrictions placed upon the Petitioner are significant; no lifting greater than 20lbs, alternating between sitting and standing and no repetitive bending or lifting. The Respondent is accommodating these restrictions according to the Petitioner. However the limitations carry over into other aspects of the Petitioner's life. The Petitioner testified that she cannot stand for more than 30 minutes or sit for more than 30 minutes at a time. She used to walk for exercise and now walks less; one-half of a mile vs. 1.5 miles. She is unable to do heavy housework such as vacuuming and has removed the carpet in her house because of her limitation.

Her hobbies have also been affected. She cannot sit and sew or go camping. She cannot lift her grandchildren. She is also unable to sleep with her husband and many times sleeps in a recliner.

The Petitioner has been left with permanent damage that effects all aspects of her life. This arbitrator finds Petitioner is entitled to an award of 25% loss of a person as a whole.

ORDER OF THE ARBITRATOR

Respondent shall pay Petitioner permanent partial disability benefits of $233.29 /week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Deborah L. Simpson
Signature of Arbitrator

March 20, 2013
Date

0STATE OF ILLINOIS)
) SS.
COUNTY OF ST. CLAIR)

☐ 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

Ted Adams,
Petitioner,

Vs. No: 02 WC 63120

Dobbs Tire & Auto,
Respondent.

12IWCC0012

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 causal connection, medical expenses, nature and extent, and the admissibility of the testimony, opinions, and reports of Respondent's vocational rehabilitation witness, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission affirms the Arbitrator's award of medical expenses but modifies the decision to correct a clerical error in the Order section, which indicates a total of $239,549.16. The total medical award, as detailed in the body of the decision, is $237,025.53, calculated as follows:

Injured Workers Pharmacy	$ 25,728.58
Eisele's Pharmacy	28,798.82
Medical providers listed in PX49	182,498.13
	$237,025.53

On the issue of the admissibility of the testimony and reports of Lisa Simonin, Respondent's vocational rehabilitation witness, we find that the Arbitrator erred in excluding this evidence on the basis that she was not certified at the time services were rendered. The Act was amended effective November 1, 2005 to state: "Any vocational rehabilitation counselor who

provided service under this act shall have appropriate certifications which designate the counselor as qualified to render opinions relating to vocational rehabilitation." §8(a).

The Commission has addressed this issue before. In Hays v. Ameren CIPS, 08 IWCC 1275 (Nov. 5, 2008), the claimant was injured in 1999. The Arbitrator noted that "[a]ccording to the summary of HB 2137 provided on the official Illinois Workers' Compensation Commission website, the portion of Section 8(a) relating to vocational rehabilitation certification applies only to accidental injuries that occur on or after February 1, 2006." The Arbitrator held, and the Commission affirmed, that the requirement of certification clearly did not apply because the claimant was injured seven years before the amendment went into effect.

Likewise, Petitioner was injured on December 31, 1999, well before the amendment requiring vocational certification became effective. The Commission therefore reverses the Arbitrator's evidentiary ruling and hereby allows the testimony and reports of Lisa Simonin into evidence.

Despite the admission and consideration of Ms. Simonin's opinions, we nevertheless affirm the Arbitrator's finding that Petitioner is permanently and totally disabled. We find particularly persuasive the opinion of Respondent's Dr. David Lange who examined Petitioner on May 11, 2009. Dr. Lange noted Petitioner's complaints of bilateral lower extremity pain, numbness, tingling, and weakness, left upper extremity pain and numbness, incapacitating pain in the back of the neck passing up into the head, dizziness, severe headaches, inability to flex the left elbow or shoulder with any resistance whatsoever, and difficulty breathing. Dr. Lange discussed Petitioner's multiple surgeries including anterior C5-6 fusion, left shoulder arthroscopy, sternoclavicular joint medial clavicle resection, excision of the left sternoclavicular joint and medial aspect of the left clavicle, cervical fusion from C3 to C6, thoracic outlet decompression with removal of the first rib and partial resection of the distal clavicle, cervical fusion from C2 to C7, and left thoracotomy and plication of the left hemidiaphragm.

After reviewing the surveillance video from 2007, Dr. Lange noted that Petitioner tended to hold his neck stiffly and, while attempting to look upward, tended to lean backward and did not extend the neck in a normal fashion. Petitioner ambulated with the left upper extremity dangling down by the torso and he did not have a normal swinging motion. Dr. Lange opined that the video did not indicate that Petitioner could tolerate a full eight-hour day at any physical demand level. Dr. Lange's conclusion was that Petitioner "probably is not a candidate for the general employment pool considering his multiple musculoskeletal maladies, fairly obvious psychological disease, and his multiple, multiple medications." (Px1).

Based upon a review of the record as a whole, we affirm the Arbitrator's award of permanent total disability benefits under Section 8(f).

All else is affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $847.10 per week for a period of 488-3/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

12IWCC0012

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay the petitioner the sum of $847.10 per week for life, commencing May 12, 2009, as provided in Section 8(f) of the Act, because the injury caused the permanent and total disability of the petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the petitioner may become eligible for cost-of-living adjustments, paid by the Rate Adjustment Fund, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $237,025.53 for medical expenses under §8(a) of the Act.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: JAN 6 - 2012

Daniel R. Donohoo

drd/se
o-03/15/11
68

SPECIAL CONCURRING OPINION

This case was scheduled for Oral Arguments on March 15, 2011before a three member panel of the Commission including members Daniel R. Donohoo, Molly K. Mason and Kevin W. Lamborn, at which time Oral Arguments were either heard, waived or denied. Subsequent to Oral Arguments and prior to the departure of member Molly K. Mason on October 14, 2011, a majority of the panel members had reached agreement as to the results set forth in this decision and opinion, as evidenced by the internal Decision worksheet initialed by the entire three member panel, but no formal written decision was signed and issued prior to member Molly K. Mason's departure.

Although I was not a member of the panel in question at the time of Oral Arguments were heard, waived or denied, and I did not participate in the agreement reached by the majority in this case, I have reviewed the Decision worksheet showing how member Molly K. Mason voted in this case, as well as the provisions of the Supreme Court in Zeigler v. Industrial Commission, 51 Ill.2d 342, 281 N.E.2d 342 (1972), which authorizes signature of a Decision by a member of the Commission who did not participate in the Decision. Accordingly, I am signing this Decision in order that it may issue.

Thomas J. Tyrrell

PARTIAL CONCURRENCE AND DISSENT

I concur with the majority's decision finding the Arbitrator erred in excluding Respondent's vocational rehabilitation witness. I respectfully dissent from the majority's interpretation of the testimony and reports of said expert. I would remand the case for re-hearing on the employment/vocational issue and would permit Respondent's expert Lisa Simmonin to testify regarding her opinions concerning Petitioner's search for and abilities to work.

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ADAMS, TED
Employee/Petitioner

Case# **02WC063120**

12IWCC0012

DOBBS TIRE & AUTO
Employer/Respondent

On 01/19/2010, 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:

3067 KIRKPARTICK LAW OFFICES PC
JASON R CARAWAY
#3 EXECUTIVE WOODS COURT #100
BELLEVILLE, IL 62226

2091 HEYL ROYSTER VOELKER & ALLEN
EDWARD JOHNSTON
105 W VANDALIA SUITE 100
EDWARDSVILLE, IL 62025

STATE OF ILLINOIS)
)
COUNTY OF St. Clair)

- ☐ 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

Ted Adams
Employee/Petitioner

v.

Dobbs Tire & Auto
Employer/Respondent

Case # **02** WC **63102**

Belleville

12IWCC0012

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 **Jennifer Teague**, arbitrator of the Commission, in the city of **Belleville**, on **September 29, 2009 and October 26, 2009**. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. ☐ Was the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

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

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

G. ☐ What were the petitioner's earnings?

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

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

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☐ What amount of compensation is due for temporary total disability?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☒ Is the respondent due any credit?

O. ☐ Other _____

12IWCC0012

FINDINGS

- On **December 31, 1999**, the respondent **Dobbs Tire & Auto** ***was*** operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship ***did*** exist between the petitioner and respondent.
- On this date, the petitioner ***did*** sustain injuries that arose out of and in the course of employment.
- Timely notice of this accident ***was*** given to the respondent.
- In the year preceding the injury, Petitioner earned $ **66,073.80** ; the average weekly wage was $ **1,270.65** .
- At the time of injury, the petitioner was **45** years of age, ***married*** with **0** children under 18.
- Necessary medical services ***have in part*** been provided by the respondent.
- To date, $ **413,740.58** has been paid by the respondent for TTD and/or maintenance benefits.

ORDER

- The respondent shall pay the petitioner temporary total disability benefits of $ **847.10**/week for **488 3/7** weeks, from **December 31, 1999** through **May 11, 2009** , which is the period of temporary total disability for which compensation is payable.
- The respondent shall pay the petitioner the sum of $ **847.10**/week for **life**, as provided in Section **8(f)** of the Act, because the injuries sustained caused **Petitioner to become permanently and totally disabled** .
- The respondent shall pay the petitioner compensation that has accrued from **December 31, 1999** through **October 26, 2009** , and shall pay the remainder of the award, if any, in weekly payments.
- The respondent shall pay the further sum of $ **239,549.16** for necessary medical services, as provided in Section 8(a) of the Act. See attached Findings of Fact and Conclusions of Law for specific details. The Medical Fee Schedule does not apply herein and all bills shall be paid directly to Petitioner.
- The respondent shall pay $ **N/A** in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ **N/A** in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ **N/A** in attorneys' fees, as provided in Section 16 of the Act.

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

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

Signature of arbitrator

January 13, 2010
Date

JAN 19 2010

The Arbitrator hereby makes the following Findings of Fact:

This case was previously tried as a 19(b) hearing and a decision was rendered on September 19, 2005. An appeal was taken by Petitioner concerning TTD benefits. The Commission agreed with Petitioner, extending the original award of TTD benefits. Respondent appealed the Commission decision to the Circuit Court of St. Clair County. The Circuit Court entered its Order affirming the Commission extension of TTD benefits on August 8, 2007. All prior findings of fact and conclusions of law are hereby incorporated herein by reference.

Petitioner was injured on December 31,1999 while using a pry bar that snapped forcing him to fall backwards into a water cooler and subsequently a brick wall. Since the accident Petitioner has received an extraordinary amount of medical care.

Petitioner had his first cervical fusion surgery at C5-6 on January 13, 2000 at the hand of Dr. Sprich. Petitioner next underwent a left shoulder arthroscopy and resection at the hand of Dr. Baumer on October 16, 2000. These surgeries were undisputed by Respondent.

Petitioner's third surgery was a left sternoclavicular excision performed by Dr. Nicholson on July 25, 2002. His fourth surgery was a left shoulder excision performed by Dr. Suen on February 18, 2004 and his fifth surgery was a second cervical fusion at C3-C6 at the hand of Dr. Sprich on November 11, 2004. These surgeries were found compensable via the prior Arbitration Decision.

After the initial hearing on September 19, 2005, Petitioner continued to have pain around the previously resected left sternoclavicular joint. Petitioner's family physician, Dr. Farmer, referred Petitioner to Dr. Catherine Wittgen at St. Louis University for further evaluation and treatment.

On December 28, 2005 Petitioner saw Dr. Wittgen. Dr. Wittgen noted that in the original workplace injury Petitioner had dislocated his left sternoclavicular joint. Dr. Wittgen noted the Petitioner presented with intermittent numbness in his left arm and that his entire left hand turned blue with certain maneuvers. Dr. Wittgen ordered a series of procedures to pinpoint the source of the left arm complaints. These studies revealed thoracic outlet decompression. As such, Dr. Wittgen referred Petitioner to Dr. Robert Thompson, a vascular surgeon at Washington University.

Petitioner presented to Dr. Thompson on February 21, 2006. Dr. Thompson opined Petitioner's current state of ill-being was a result of the original work place injury which caused fractures of the spine, disruption of the left sternoclavicular joint and other trauma. Upon examination Dr. Thompson noted a palpable abnormality where the medial clavicle had been previously resected. The physical examination also revealed the left arm had limited range of motion and when manipulated caused significant pain.

Dr. Thompson opined that after all of the previously rendered treatment it would not be unreasonable to consider that some degree of the symptoms in the left arm and shoulder areas were being caused by thoracic outlet decompressions. Dr. Thompson reviewed the tests ordered by Dr. Wittgen and opined Petitioner was suffering from thoracic outlet syndrome. Dr. Thompson referred Petitioner for physical therapy at the Rehabilitation Institute of St. Louis in a conservative attempt to alleviate the ongoing left arm and left shoulder complaints.

Physical therapy did not alleviate Petitioner's symptoms and Dr. Thompson performed a thoracic outlet decompression with resection of the first rib and partial resection of the distal clavicle on March 17, 2006 at Barnes Jewish Hospital. Post-operatively Petitioner again underwent physical therapy and was prescribed various narcotic pain medications.

On July 6, 2006, approximately four months after the thoracic outlet decompression, Dr. Thompson noted there were several factors slowing down Petitioner's recovery. These included probable phrenic nerve paralysis. Dr. Thompson assured Petitioner that phrenic nerve paralysis after thoracic outlet surgery goes away in the vast majority of situations in nine or ten months.

Dr. Thompson continued to see the Petitioner and on February 22, 2007 noted Petitioner continued to suffer from longstanding phrenic nerve paralysis even one year after the thoracic outlet surgery. One year later on February 21, 2008, Dr. Thompson noted the longstanding phrenic nerve paralysis was affecting Petitioner's respiratory mechanics. Dr. Thompson opined at that time that Petitioner should be characterized as totally disabled. Dr. Thompson further opined that he did not foresee the likelihood that Petitioner would be able to return to work as a consequence of the constellation of problems he has presented with.

Due to respiratory difficulty after the thoracic outlet surgery, Dr. Farmer referred Petitioner to Dr. Barbara Sudholt at St. Elizabeth's Hospital. Petitioner presented for evaluation and treatment with Dr. Sudholt on May 24, 2006. Dr. Sudholt noted Petitioner did not have any respiratory issues before the recent thoracic outlet surgery. Dr. Sudholt noted a chest x-ray from April 28, 2006 revealed a significant increase in the left hemidiaphragm which was not present on comparison films from 2004.

Dr. Sudholt opined Petitioner was suffering from dyspnea on exertion since his left rib resection surgery and that this was due to a paralyzed left hemidiaphragm. Dr. Sudholt ordered an inhaler to attempt to conservatively manage the shortness of breath. The inhaler did not alleviate Petitioner's respiratory symptoms. Dr. Sudholt ordered a SNIFF test to evaluate the paralysis of the left hemidiaphragm. The test verified the paralysis.

Dr. Sudholt opined that over time the condition might improve but was unsure of what level, if any, of respiratory function would return. At this point respiratory treatment was placed on hold due to the pending cervical fusion at the hand of Dr. Kutz. Petitioner returned to Dr. Sudholt who then ordered a sleep study to further evaluate his respiratory problems. The study indicated decreased oxygenation during sleep.

Due to Petitioner's increased respiratory symptoms, Dr. Farmer referred Petitioner to Dr. Trevis Crabtree at Washington University for a second opinion. On December 17, 2007 Petitioner presented for evaluation and treatment with Dr. Crabtree. Dr. Crabtree noted shortness of breath and opined Petitioner's condition was related to the left hemidiaphragm paralysis that developed post-operatively.

Dr. Crabtree ordered a CT scan which revealed left hemidiaphragm paralysis. Dr. Crabtree believed that given the overall condition of Petitioner, a placation surgery to repair the paralyzed diaphragm could do more harm than good. Dr. Crabtree indicated that if Petitioner's chronic pain syndrome were to improve he might consider performing the placation surgery.

As Petitioner was still experiencing no relief of his respiratory symptoms, he was also referred to Dr. Hon Chi Suen by Dr. Sudholt and Dr. Farmer. Dr. Suen first saw Petitioner for his respiratory symptoms on March 3, 2008. Dr. Suen noted Petitioner previously had multiple surgeries and that since the thoracic outlet surgery, his left hemidiphragm had been paralyzed. Dr. Suen noted Petitioner presented with ringing in his ears, vocal changes, spitting up blood, and shortness of breath. Dr. Suen repeated the SNIFF test originally done at the request of Dr. Sudholt, which again confirmed the left hemidiaphragm paralysis. A stress test was then ordered, which ruled out any cardiac involvement with Petitioner's continuing shortness of breath.

On March 3, 2008, Dr. Suen performed a left thoracotomy and placation of the left hemidiphragm at Missouri Baptist Hospital. During the surgery Petitioner lost cardiac function and was given emergency electric cardioversion shock treatment. Petitioner was released from the hospital on March 14, 2008. On June 11, 2008, Dr. Suen opined Petitioner's breathing had improved post-operatively, although he still had periods of shortness of breath and a cough.

Dr. Suen was deposed regarding the placation surgery. He testified he was a board certified cardiothoracic surgeon. He also opined the SNIFF test was the only way to properly determine diaphragmic paralysis and clearly Petitioner's left hemidiphragm was paralyzed. He explained the placation procedure tightens the muscles surrounding the paralyzed diaphragm to assist in contraction and therefore to allow easier breathing. Dr. Suen further testified that hemidiphragm paralysis is most often caused by phrenic nerve pathology and the phrenic nerves originate out of the cervical spine. With regards to returning to work, he testified the Petitioner would no longer be able to do manual labor due to difficulty breathing, which Petitioner would continue to suffer from.

Due to continuing symptoms in his left arm and shoulder area, Dr. Farmer referred Petitioner to Dr. Jay Keener at Washington University. Petitioner presented to Dr. Keener on February 13, 2008. Dr. Keener indicated Petitioner was well known to his Orthopedics department and that the problems centered around his cervical spine, left first rib, and left sternoclavicular joint all stemmed from a Workers' Compensation related injury which occurred in 1999.

Dr. Keener indicated Petitioner had learned to live with the clavicle pain but that he was now experiencing posterior periscapular pain. The periscapular pain was noted to have intensified over time. Dr. Keener's diagnosis was complex sternoclavicular joint residual pain and instability status post sternoclavicular resection. Dr. Keener ordered steroid injections in an attempt to alleviate the periscapular pain. The injection relieved Petitioner's symptoms for approximately three weeks.

A trial of physical therapy was then ordered. Dr. Keener saw Petitioner on July 9, 2008 indicating Petitioner continued to show dynamic scapular winging on the left side and global weakness in the parascapular muscles. Dr. Keener indicated Petitioner was suffering from scapulothoracic bursitis caused by the complications and treatments Petitioner had previously undergone for his work related cervical spine and sternoclavicular joint injuries. As conservative measures had failed, Dr. Keener performed an arthroscopic left scapulothoracic bursectomy on August 8, 2008 at Barnes Jewish Hospital.

After the scapulothoracic bursectomy, Dr. Keener sent Petitioner to an associate, Dr. Leesa Galatz, in his Orthopedic surgery department. Dr. Galatz saw Petitioner on September 30, 2008 to address the

affect of the left shoulder and arm surgeries on his cervical spine. Dr. Galatz believed nothing more could be done to alleviate Petitioner's pain as it related to his left shoulder, left arm, and cervical spine.

Dr. Keener again saw Petitioner on April 1, 2009. At this point Petitioner was still experiencing pain in the previously operated scapulothoracic area. Dr. Keener ordered another steroid injection. In terms of further resecting the clavicle, Dr. Keener noted any further resection of the clavicle would have unpredictable results, but that if another resection was going to be performed he would have to enlist Dr. Thompson to assist him, due to potential vascular issues. With regards to his left arm and shoulder, Dr. Keener opined Petitioner would have permanent restrictions of no lifting over 10 pounds with the left arm and no repetitive overhead motions.

Petitioner also continued to have pain in his cervical spine after the second fusion performed by Dr. Sprich. Petitioner returned to Dr. Sprich. Dr. Sprich referred Petitioner for further evaluation and treatment to Dr. Daniel Scodary at Depaul Medical Group. Due to the unavailability of Dr. Scodary, his partner, Dr. Scott Kutz received the referral and saw Petitioner on July 12, 2006.

Dr. Kutz noted Petitioner had suffered an infection after his second cervical surgery and also had undergone a thoracic outlet decompression surgery which resulted in phrenic nerve injury. Dr. Kutz opined that conservative treatment, including facet injections and large amounts of narcotics had failed to relieve Petitioner's cervical symptoms. Dr. Kutz ordered a SPECT scan to further evaluate Petitioner's cervical condition. The SPECT scan revealed increased neural activity in the mid-cervical region. In an attempt to avoid a third cervical surgery, facet injections were ordered. The facet injections were performed by Dr. Gunapooti.

As the facet injections provided minimal and temporary relief, Dr. Kutz recommended and performed a C2-C7 posterior cervical fusion on October 19, 2006 at the Depaul Health Center. Petitioner was released from treatment with regards to his cervical spine on March 7, 2007 by Dr. Kutz.

Petitioner continued however to have cervical pain and was experiencing periods of black outs. As such, he presented to Dr. Christopher Moran, an associate of Dr. Robert Thompson, with whom Petitioner had previously treated. On August 12, 2009, Dr. Moran opined Petitioner previously had extensive cervical surgery and was concerned the left C3 pedicle screw was impinging upon the left vertebral artery and the spinal canal. A CT angiogram was ordered and performed which revealed the left C2 lateral screw was in a medial and inferior position encroaching the C2-C3 neural foramen. Dr. Thompson and Dr. Farmer, Petitioner's family physician, referred Petitioner for evaluation and treatment back to Dr. Kutz.

Petitioner returned to see Dr. Kutz on December 2, 2008. Dr. Kutz noted Petitioner had been experiencing increasing cervical and occipital pain. Dr. Kutz also noted Petitioner had underwent a lung resection recently and during an awake intubation was trying to sit up and jerk the intubation tube out and that after this episode the pain had increased in his cervical and occipital regions. Dr. Kutz reviewed the recent cervical imaging and agreed that the pedicle screw at C2-3 was extending into the neural foramen. Dr. Kutz opined it would be reasonable to attempt to perform a permanent nerve root block at C3 and that if this did not offer relief, a potential surgery would be indicated to remove the misaligned screw.

Petitioner sought a second opinion on Dr. Kutz's recommendations for treatment regarding the pedicle screw. He saw Dr. Matthew Gornet for his opinion on January 29, 2009 based upon a referral from Dr. Farmer. Dr. Gornet reviewed the pertinent imaging and opined the right pedicle screw at C2 was encroaching the neural foramen. Dr. Gornet opined there was little chance of the screw moving and that removing the hardware surgically would present a high level of danger, including further muscle damage and perhaps death. Dr. Gornet further opined the patient would never return to gainful employment as a result of his cervical condition. Dr. Gornet believed that if any surgery was going to be performed, it would have to be a removal of the impinging screw itself and not a complete removal of the hardware from C2-C7.

Dr. Kutz was deposed regarding his treatment of Petitioner. Dr. Kutz is a board certified neurosurgeon. He opined that after the fusion he performed that Petitioner would never be pain free in his cervical region and that post-operatively he continued to have muscular pain in his neck. Dr. Kutz opined, that solely for the condition he treated Petitioner for, that as of March 7, 2007, the Petitioner could only perform sedentary work and could not return to work as a mechanic.

With regards to the misaligned screw, he testified the misalignment could have affected the phrenic nerve which in turn may have led to Petitioner's hemidiaphragm paralysis. Dr. Kutz could not however give an opinion to a reasonable degree of medical certainty as to whether the intubation event or Petitioner's isolated incident of allegedly assisting in cutting down portions of a tree with a chainsaw was the proximate cause of the misaligned screw. When asked about what permanent restrictions Petitioner would be under currently, Dr. Kutz opined Petitioner needed to be restricted to no lifting over 30 pounds and no overhead activity at all.

Petitioner has also undergone treatment on his thoracic and lumbar spine since his work place accident. Dr. Sanchez examined Petitioner five days after his accident on January 4, 2000. At this time Dr. Sanchez's notes indicates a consistent history and mechanism of injury. Dr. Sanchez indicates a pry bar broke injuring Petitioner's upper back and neck. As Petitioner had other more severe medical concerns, namely his cervical and left arm injuries, imaging of the thoracic and lumbar spine occurred much later in the course of his nearly ten year treatment saga.

On October 2, 2004, Dr. Farmer ordered an MRI of the thoracic spine which was performed at Mid-America Imaging. The MRI revealed old compression deformities at T7-T10 and decrease in disc space at T7-8 and T11-12. Imaging of the lumbar spine was also ordered by Dr. Farmer on the same day and revealed loss of disc space at L3-4 and L5-S1.

During this time period and continuing through November 2009, Petitioner received pain management treatment from Dr. Guy Burrows for numerous conditions. Dr. Burrows prescribed various pain management procedures including cervical and lumbar epidural steroid injections as well as various prescriptions. Dr. Burrows ordered an MRI of the lumbar spine on August 12, 2005 which revealed a right lateral protrusion L2-3 with compression of the right L2 nerve root and a protrusion at L4-5. Dr. Burrows administered several facet injections to Petitioner's cervical and lumbar spines over the course of his eight year treatment of Petitioner.

Dr. Burrows was deposed on November 25, 2003. He testified that in terms of Petitioner's neck spasms and back pain and the condition in his back, with the leg spasms, at least historically it seems

to be related to the accident. He further noted that over the course of time treating Petitioner, it's remained a persistent problem. Dr. Burrows also testified that October 3, 2002, Petitioner was experiencing back and hip problems. At the initial 19(b) trial, the Arbitrator awarded complete payment of Dr. Burrows' bills, which encompassed the treatment of Petitioner's lower back from a pain management perspective.

Dr. Kutz also commented on Petitioner's low back condition stating in a letter to Dr. Burrows on March 7, 2007, "Regarding the patient's complaints of low back pain, he states he continues to have significant low back pain which radiates out to the paraspinal regions and also down to the buttocks and into the legs, extending below the knees on the left, and down to the region of the groin and hip on the right. The patient states he has not had any physical therapy for the lumbar spine and did experience some benefit with epidural injections in the past although the benefit lasted only a few months." Dr. Kutz reviewed thoracic imaging as well which he opined revealed ligamentous hypertrophy especially on the left side of the spinal canal at two of the mid-thoracic levels, approximately T5-6 and T8-9.

Petitioner could no longer see Dr. Burrows after November 2009 due to Dr. Burrows moving out of state. As such Petitioner began treating for pain management and prescription issuance with Dr. Naheed Bashir. Petitioner first saw Dr. Bashir on August 14, 2009. Dr. Bashir's notes indicate Petitioner presented with muscle pain, back pain, neck pain, joint pain, left arm and shoulder pain. Dr. Bashir's initial and continuing diagnoses were chronic neck pain, chronic left shoulder pain, and lumbar radicular pain, all stemming from his original workplace injury. Dr. Bashir provided multiple facet injections into Petitioner's cervical and lumbar spines. Dr. Bashir continues to treat Petitioner.

Since the initial 19(b) hearing, Respondent has had Petitioner examined pursuant to Section 12 of the Act by Dr. Phillip George and Dr. David Lange. Dr. George performed his initial Section 12 examination on August 22, 2007, but had previously provided Respondent a brief records review without examination on August 9, 2005.

Dr. George's August 22, 2007 examination report contains a consistent history and mechanism of Petitioner's work place accident. Despite having copious amounts of Petitioner's medical records, he opined Petitioner's diagnosis was status post cervical sprain "work related, December 1999" and "status post 14 subsequent surgeries to neck, shoulders, hands, and left sternoclavicluar joints..." He further commented "This is a mind boggling history and presents the picture of a surgical saga, the likes of which I have never seen. Clearly, certainly at this point in time, I would have to state that this gentleman is not able to enter the open labor market as a result of his multiple surgeries to his neck and both upper extremities. He is certainly at maximum medical improvement. At this point, no return appointments were scheduled and no medication was prescribed."

At some point after this initial report was generated, counsel for Respondent supplied Dr. George with a surveillance tape of Petitioner, which allegedly shows Petitioner doing yard work involving the cutting of a tree. Dr. George then generated a short letter to counsel for Respondent indicating, "I have reviewed the surveillance tape that you sent me concerning claimant Ted Adams. I would certainly agree that this gentleman is able to return to the open labor market. As a matter of fact, I would suggest only restricting his overhead work. He should have no other restrictions."

After this supplemental report and the original report, generated at the request of Respondent, which indicated no further treatment was needed and Petitioner was at maximum medical improvement, Dr. George agreed to see Petitioner as a private patient. He administered injections to Petitioner's left shoulder with steroids. At this visit just one month after his original opinions, Dr. George diagnosed impingement syndrome left shoulder and further instructed Petitioner to ice down the shoulder and return for follow up in the future as necessary.

Dr. George was deposed. He testified 95% of his medical legal work was on behalf of Respondents. His only explanation regarding his change in position on Petitioner's condition was that he observed him doing yard work and that he saw Petitioner as a private patient and not for the purposes of the pending case on the day he injected his shoulder and opined Petitioner was suffering from impingement syndrome of the left shoulder.

On May 11, 2009, Petitioner was examined by Dr. David Lange at the St. Louis Orthopedic Institute. In preparation for his exam Dr. Lange was given 640 pages of medical records pertaining to Petitioner. Dr. Lange's report contains a consistent history and mechanism of Petitioner's original work place accident. Dr. Lange was also given a complete list of all medications Petitioner was currently taking.

Dr. Lange's physical examination revealed atrophy of the left deltoid muscle, and extreme winging of the left scapula. Dr. Lange was also provided the aforementioned surveillance video purporting to show Petitioner doing yard work involving cutting down a tree. Dr. Lange commented on the tape stating:

> "Mr. Adams did hold a chain saw with the left upper extremity with the arm dangling down somewhat. Mr. Adams did forcibly jerk on the starting rope several times. This having been said, it was noted that Mr. Adams tended to hold the neck stiffly and while attempting to look upward to presumably talk to an individual up in a tree, tended to lean backward and did not extend the the neck in a normal fashion. Also, it was noted that he tended to ambulate with the left upper extremity dangling down by the torso and did not have a normal swinging motion."

With regards to the video's affect on an opinion regarding Petitioner's ability to work, Dr. Lange commented:

> "At the time of the surveillance Mr. Adams may well not have been disabled from all occupations, at least taking the video out of context. Certainly one might suggest he could have been fit for perhaps the sedentary physical demand level at that time. This having been said, certainly a review of the surveillance video does not allow one to state that Mr. Adams could tolerate a full 8 hour day at any physical demand level. Also a review of the medical records would suggest that Mr. Adams at that point was on multiple medications, perhaps presenting a stumbling block also in reference to employment. Granted, Mr. Adams was attempting to utilize a chain saw despite all of these medications. The bottom line is that Mr. Adams probably was not fit for

his usual occupation at Dobb's at the point of the surveillance.

Dr. Lange's report found causal connection between his cervical condition and the work place accident, although Dr. Lange found the second and third fusions to perhaps have been unnecessary. Dr. Lange also opined the left shoulder and arm joints were most likely injured as a result of the original work place accident.

Dr. Lange further believed the clavicle resections produced an unstable situation, contributing to thoracic outlet syndrome. Dr. Lange further commented that, "With this in mind, one would logically suggest the thoracic outlet syndrome was related to the clavicle resections, which in turn were related to sternoclavicular discomfort and in turn to the December 31, 1999 incident."

Dr. Lange connected all of the procedures in question, opining, "While this long series is just that, long; one would typically conclude that the thoracic outlet syndrome was indirectly related to the 12/31/99 incident. Utilizing this same line of reasoning treating complications of the various surgical endeavors related to the left sternoclavicular junction in one way or another would be indirectly causally associated with the 12/31/99 work-related incident. More specifically, providing chest surgery for the injured phrenic nerve from the thoracic outlet surgery would be indirectly related to the 12/31/99 incident."

With regards to Dr. Keener's bursectomy, while Dr. Lange believed Petitioner suffered a causally related injury resulting in discomfort and winging of the scapula, he questioned the surgery based upon the fact that no procedures in the past had solved his left arm and shoulder problems.

Dr. Lange concluded his report indicating, "Everything considered, one would figure that Mr. Adams has reached maximum medical improvement unless he decides to have the left C2 lateral mass screw removed. As one would logically figure, he probably is not a candidate for the general employment pool considering his multiple musculoskeletal maladies, fairly obvious psychological disease, and his multiple medications. Finally, one can't fault his surgeons for trying to improve his functional status and decrease his pain."

From December 9, 2007 through February 14, 2008 the Respondent provided vocational rehabilitation services to Petitioner through Lisa Simonin of Corvel. In a separate ruling the Arbitrator has stricken the majority of Ms. Simonin's trial testimony and all of her reports as she was not certified at the time services were rendered pursuant to the Act. Simonin could not even sit for the proper certification exam under the Workers' Compensation Act in effect at the time vocational services were rendered.

Petitioner presented evidence of a job search which included applications at over 100 places of employment. He was not offered any form of permanent and stable employment. Respondent terminated vocational services to Petitioner alleging his lung placation surgery was not causally connected to his original work place accident and since he was off work for the lung surgery which prevented him from doing a job search, he was non-compliant with vocational efforts. No further attempt or offer of vocational rehabilitation was ever offered by Respondent after termination of services.

12IWCC0012

Petitioner attempted to return to work for Respondent twice since his original injury. He attempted to return to work in 2000 as a tire salesman, however he was unable to continue this job due to pain levels and the multiple narcotic medications he was taking. Petitioner also attempted to return to work in February 2004. At this time his job duties included ordering parts and providing various price estimates. Petitioner was unable to continue in this capacity due to the lung placation surgery which was performed by Dr. Suen. Since 2004, Petitioner has never been contacted by anyone from Respondent regarding returning to work in any capacity.

Prior to trial, Respondent's executive vice-president, Jim Bernadini was deposed. He testified that if Petitioner's restrictions were no more than they were in 2004 that Respondent had a position for him. Bernadini also testified that the use of narcotic medications such as those Petitioner is currently taking might well interfere with any employment with Respondent.

With regards to the surveillance video, Petitioner testified he was using a specialized chain saw, designed to have minimal vibratory impact. He also testified that the other individual was doing the majority of the difficult labor and that even given this situation, he was in significant pain after the activity found on the tape. The videographer was present and testified in the trial. He indicated he had not taped Petitioner after the job was over and did stop the tape on occasion during the filming.

At trial, Petitioner confirmed he was on the following medications, vicodin, vitamin B12, trazadone, rhythmol, paxil, flexeril, xanax, metoprolol, provigil, glucovance, accuchecks, kapedex, fentanyl patches, kristalose, tussinex suspension, lidoderm, and ambien. If he does not take this medication his pain level is intolerable and he cannot sleep at all.

Petitioner has no immediate intention to have any of the surgical recommendations performed regarding the removal of the encroaching pedicle screw due. Petitioner fears that, given his recent cardioversion during the lung placation and his overall poor physical condition, he would not survive the surgery.

Petitioner described continuing to have severe restriction of motion both horizontally and vertically in his neck. He explained that this restricts his ability to drive in a safe manner. He also has persistent headaches and neck spasms. His left arm is basically unusable due to the number or procedures he has undergone. When he does attempt to utilize his left arm he routinely drops the items or is incapable of lifting them in the first place.

Petitioner has a large amount of lumbar and thoracic pain which hinders him from sleeping or sitting for any period. He testified on average he gets 2-3 hours of sleep per night. With regards to his ability to breathe, Petitioner testified that after any exertion he continues to experience shortness of breath, and this is especially worse on humid days. He testified his average day consists of waking in the morning then taking his various medications to get through the day.

The parties stipulate and agree that despite Respondent's contentions, Respondent has appropriately paid all TTD and or Maintenance benefits, even during periods of time Respondent argues Petitioner was unable to work due to unrelated causes.

Therefore, the Arbitrator concludes:

1. Petitioner's current condition of ill being in its entirety is causally related to his original work place accident of December 31, 1999. The Arbitrator does not find it necessary to address every single procedure as noted above, however reliance on key pieces of evidence are noted:

Regarding Petitioner's cervical condition, the Arbitrator finds it of great importance that Respondent does not dispute liability or causation regarding Petitioner's three fusion procedures. The Arbitrator further notes that the misaligned pedicle screw resulted from the third cervical fusion, which was accepted.

The Arbitrator notes that there is no single instance of testimony in the voluminous record that supports any finding contrary regarding a causal connection between the thoracic outlet syndrome, and the previous surgeries to Petitioner's cervical, and upper extremity surgeries which have previously been found to be related to Petitioner's original work place accident. Furthermore, as an extension of the thoracic outlet syndrome, Petitioner's lung placation surgery is also causally related.

The Arbitrator has conducted a careful review of the medical records and testimony tendered herein. The Arbitrator relies on the opinions of Dr. Lange, Respondent's own section 12 examiner, wherein he opined that Petitioner's current state of ill-being in his cervical spine, amongst other maladies was causally related to his original work place injury.

The Arbitrator further relies on the chain of events which have transpired herein. Of note, Petitioner's complaints and treatment for said complaints have been ongoing and continuous. The Arbitrator does not find convincing the idea that one isolated incident of yard work in 2007 was the cause of the misaligned screw and in fact notes that the record contains no such opinion given to a reasonable degree of medical certainty.

2. The Arbitrator finds that all medical treatment Petitioner received on and after August 19, 2005 was reasonable and necessary and causally related to the accident of December 31, 1999. The Arbitrator notes that Petitioner's condition failed to improve and in fact deteriorated and worsened over time. The physicians herein provided reasonable and necessary medical attention and treatment in an effort to cure and relieve Petitioner's symptoms. Of note, Dr. Lange concluded that he could find no fault with any of Petitioner's surgeons for attempting to increase his quality of life by performing the myriad of prior surgeries.

The Arbitrator hereby awards the following pharmacy charges incurred at Eisele's Pharmacy from August 2, 2005 through August 31, 2009 by Petitioner as shown in Petitioner's Exhibit 48. The "*" denotes medications previously found to be causally connected and reasonable to treat Petitioner's state of ill-being :

PRESCRIPTION		TOTAL	OUT OF POCKET
1.	Hydrocodone*	$790.06	$201.00
2.	Paroxetine*	$934.76	$283.00
3.	Fentanyl Patches*	$16,697.83	$154.00
4.	Lidoderm Patches*	$3,915.42	$1,002.34

5.	Trazadone*	$66.05	$66.05
6.	Oxycodone*	$82.46	$60.80
7.	Ambien	$4,817.64	$1,332.67
8.	Diazepam	$16.00	$16.00
9.	Lyrica	$882.14	$280.00
10.	Methocarbamol	$78.75	$40.00
11.	Methylpred	$16.00	$16.00
12.	Miralax	$40.00	$40.00
13.	Alprazolam	$196.99	$117.59
14.	Azithromycin	$92.84	$56.00
15.	Zolipidem	$80.80	$0
16.	Warfarin	$91.08	$78.55
	Total:	$28,798.82	$3,744.00

In awarding the above medications the Arbitrator finds the above awarded prescriptions to be prescribed by the following physicians for Petitioner's state of ill-being causally connected to his work place accident:

1.	Ambien	Dr. Burrows
2.	Diazepam	Dr. Farmer
3.	Lyrica	Dr. Thompson
4.	Methocarbamol	Dr. Thompson
5.	Methylpred	Dr. Thomopson and Dr. Kutz
6.	Miralax	Dr. Burrows
7.	Alprazolam	Dr. Farmer
8.	Azithromycin	Dr. Sudholt and Dr. Farmer
9.	Zolipedem	Dr. Dr. Burrows
10.	Warfarin	Dr. Suen and Dr. Farmer

The Arbitrator further finds the pharmacy bill incurred by Petitioner at the Injured Workers Pharmacy to be causally connected to Petitioner's work place injury with the exception of the f ollowing prescription charges:

May 5, 2009	(Diabetic Medications)	$2,585.88 - DENIED
July 29, 2009	(Diabetic Medications)	$1,939.32 - DENIED
July 30, 2009	(Diabetic Medications)	$867.03 - DENIED

Thus, the Arbitrator awards payment to the Injured Workers Pharmacy of $25,728.58

The Arbitrator finds the following medical bills causally connected to Petitioner's original work place injury. "CS" denotes treatment to the cervical spine, "UE" denotes treatment to Petitioner's left shoulder and left arm, "LT" denotes treatment to Petitioner's lumbar or thoracic spine. "TOS" denotes treatment due to Thoracic Outlet Syndrome. "RE" indicates treatment related to Petitioner's respiratory injury. The following bills were submitted with treatment dates as Petitioner's Exhibit 49.

Provider	Total Charge
Dr. David Rubin (UE)	$114.00
Dr. Ken Yamaguchi (UE)	$181.00
Dr. Robert Thompson (TOS)	$8,642.00
Dr. Jay Keener (UE)	$81.00
Dr. Trevis Crabtree (RE)	$415.00
Dr. Hunt (UE)	$295.00
Dr. Sharma (CS)	$250.00
Dr. Glazer (RE)	$224.00
Barnes Jewish Hospital (UE)	$12,723.45
Memorial Hospital (RE/CS)	$12,621.68
Premier Pathology (RE)	$360.00
Rehab Institute of St. Louis (UE)	$398.00
St. Elizabeth's Hospital (CS,UE,RE)	$79,545.83
Anesthesia Associates (RE)	$800.00
Dr. George (UE)	$205.00
Dr. Guy Burrows (CS/LT)	$23,495.00
Interventional Pain Mgt. (LT)	$5,678.00
Dr. Bashir (CS/LT/UE/RE)	$1,810.00
Hearth Health Center (RE)	$688.99
Midwest Radiology (RE/LT)	$932.00
Dr. Gornet (CS)	$612.00
Dr. Suen (RE)	$3,700.00
St. Anthony's Hospital (RE)	$1,329.00
Dr. Farmer (CS/LT/UE/CS)	$450.00
Dr. Hayat (RE)	$50.00
CT Partners of Chesterfield (CS)	$1,750.00
Professional Therapy Services (CS)	$2,053.00
Dr. Kutz (CS)	$192.00
Depaul Health Center (CS)	$12,466.00
Healthcare Phys. Of SI (RE)	$950.98
Dr. Sudholt (RE)	$1,255.00
Benchmark PT (UE/LT)	$405.00
Intermed Med. Consultants (RE)	$164.45
Ortho & Sports Med. Phys. (UE)	$289.00
West County Cardiothoracic (TOS)	$2,274.75
SSM Medical Group (TOS)	$167.00
Dr. Graham (CS)	$4,930.00
Total Charges:	$182,498.13

Respondent, as the Illinois Guaranty Fund, will receive credits related to charges owed to either pharmacy or medical providers for payments made by any private insurance carrier, but will not receive any credits for portions of the above listed pharmacy and medical provider charges which were paid by Medicare, pursuant to controlling State and Federal law.

12IWCC0012

After Respondent is credited for payments made to the awarded charges paid by private insurance carriers, all remaining charges will be paid directly to Petitioner. Respondent will also be given credit for all pharmacy and medical provider charges previously paid by Respondent.

3. The Arbitrator finds Petitioner has not exceeded his choice of providers as allowed under the Act. Examination of the record reveals all providers were either referred by Petitioner's family practitioner, Dr. Farmer, other specialists or were inter-departmental referrals.

4. As a result of the accident of December 31, 1999 Petitioner sustained injuries which have left him permanently and totally disabled. The facts in their entirety, including the nine surgeries performed on Petitioner, overwhelmingly support this conclusion. To reach any other conclusion would be nonsensical.

Dr. Gornet, who reviewed Petitioner's cervical condition, opined Petitioner was not a candidate for general employment solely on the basis of his cervical condition.

Dr. Lange, Respondent's Section 12 Examiner, reviewed a plethora of Petitioner's treatment records regarding multiple diagnoses and conditions. Dr. Lange opined Petitioner was not a candidate for employment due to his multiple surgeries and medications.

The Arbitrator cannot place any weight on the opinions of Dr. George. He rendered an opinion, and then changed his opinion based upon surveillance provided to him after his examination. The Arbitrator finds this conduct reasonable. His opinions lack credibility in the mind of this Court because he began a course of treatment with Petitioner as a private patient, which was contrary to his opinions previously rendered.

The Arbitrator would recognize that Petitioner made an appropriate job search and was diligent in his effort. Although the Arbitrator excluded the opinion testimony of Lisa Simonin, Respondent's vocational expert, her opinions would have been worthless had they been admitted. Simonin last saw Petitioner in February 2008. After February 2008, Petitioner underwent two additional surgeries. The opinions rendered by Simonin based upon her knowledge of Petitioner's condition of ill being in February 2008. Simonin acknowledged she had no idea of Petitioner's current condition.

The Arbitrator further considered the testimony of Respondent's Executive Vice President, Jim Bernadini wherein he believed Respondent could accommodate Petitioner. His testimony is highly suspect on two fronts. First, Bernadini testified that no one from Respondent ever contacted Petitioner about returning to work. Second, Bernadini was unaware at the time of his testimony that Petitioner had undergone multiple surgeries since 2004. Bernadini acknowledged that the use of narcotic medications such as those Petitioner is currently taking might well interfere with any employment opportunities Respondent may have. Lastly, and most importantly, the Arbitrator finds it curious that after 5 years of never offering Petitioner a job, on the eve of trial, Bernadini purports to have the ability to place Petitioner in a store.

12IWCC0012

5. To obtain mileage reimbursement, a petitioner is required to show he had to travel outside his local area to get reasonable and necessary medical treatment. *Frey v. Aldi, Inc*, 09 I.W.C.C. 0061, 06 IL.W.C. 32921 (2009). Petitioner has not met this burden and as such, mileage is denied.

2018 IL App (2d) 170263WC
No. 2-17-0263WC
Opinion filed March 8, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

DEBRA M. RECHENBERG, Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Centegra Memorial Medical Center, Appellant).	)	Appeal from the Circuit Court of McHenry County. No. 16-MR-205 Honorable Michael T. Caldwell, Judge, Presiding.

JUSTICE HARRIS delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Barberis concurred in the judgment and opinion.

OPINION

¶ 1 On February 27, 2014, claimant, Debra M. Rechenberg, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2012)), seeking benefits from the employer, Centegra Memorial Medical Center. Following a hearing, the arbitrator determined claimant sustained an injury to her right shoulder that arose out of and in the course of her employment and awarded her (1) $34^3/_7$ weeks' temporary total disability (TTD) benefits and (2) $57,865.25 in medical expenses. On review, the Illinois Workers' Compensation Commission (Commission) reversed the arbitrator's decision,

finding claimant "failed to prove she sustained an accident arising out of and in the course of her employment *** or that her current condition of ill-being [was] casually related to her employment." On judicial review, the circuit court of McHenry County reversed the Commission's decision, finding it was against the manifest weight of the evidence. It ordered that the arbitrator's decision be reinstated. The employer appeals, arguing the Commission's determination that claimant failed to prove a compensable, work-related injury was not against the manifest weight of the evidence. We reverse the circuit court's judgment and reinstate the Commission's decision.

¶ 2 I. BACKGROUND

¶ 3 On January 27, 2015, the arbitration hearing was conducted. Claimant testified she was a registered nurse and had worked as a nurse for over 25 years. For approximately 10 of those years, she worked for the employer. In February 2006, claimant was hired by the employer on a part-time basis. She testified she was a floor nurse on a medical/surgical unit that dealt with "a lot of abdominal surgeries." Claimant cared for individuals undergoing gastric bypass surgery, diabetic patients, and patients going through detox. She described her job as being very physical and requiring her to "do a lot of movement" of patients. As a part-time employee, claimant worked two to three days per week. She typically worked 8-hour shifts but was asked to work 12-hour shifts on occasion.

¶ 4 Claimant alleged she suffered a work-related injury to her right shoulder on January 18, 2014. However, she also acknowledged that, in December 2013, approximately one month before her alleged work injury, she was involved in an accident at home that affected her right shoulder. Claimant described that accident as follows: "I was walking down the basement stairs and I misstepped one step and landed straight down on my butt. And my feet were on the floor of

the ground and I bumped my right shoulder." Claimant denied falling down the entire flight of stairs but acknowledged feeling pain in her buttocks and soreness in her shoulder as a result of the incident.

¶ 5 Claimant described feeling "a little twinge" in her right arm or shoulder at the time she fell, as well as pain on the side of her right arm and "generalized achiness" in her right shoulder. She did not immediately seek medical care for her symptoms, but she did schedule a doctor's appointment at the encouragement of her son, a physical therapist. Claimant stated, in the meantime, she continued working for the employer as a floor nurse with no problems or work restrictions. On cross-examination, claimant testified her fall at home occurred on approximately December 18, 2013. Further, she agreed to working on three specific dates after her December 2013 fall at home and prior to her January 18, 2014, alleged work accident. Specifically, she testified she worked on December 22, 2013, from 6:55 a.m. to 4:30 p.m.; for eight hours on December 25, 2013; and for eight hours on December 28, 2013. Claimant's testimony also indicated there were additional days when she was scheduled to work but there was a "low census" and she was "put on call." During those times, claimant would get paid "to sit at home and wait for a call."

¶ 6 At arbitration, the employer submitted a "wage statement" for claimant into evidence. The wage statement showed that from December 8, 2013, to December 21, 2013, claimant was paid by the employer for a total of 40.75 hours. From December 22, 2013, to January 4, 2014, she was paid for a total of 43.5 hours.

¶ 7 On January 18, 2014, claimant worked a 12-hour shift for the employer, which began at 7 a.m. She estimated she was assigned five or six patients, whom she assisted by positioning and repositioning them in bed and helping them to the toilet. Claimant recalled caring for one patient

in particular who was obese and weighed approximately 250 pounds. Several times during the day, she was required to reposition that patient in bed. Claimant stated "the morning was not a problem"; however, when adjusting the patient in bed in the afternoon, claimant felt "a deep stabbing, like pinpointing type of pain" in her right shoulder. She further described that incident as follows:

> "[The patient] wanted me to boost her or adjust her one more time, and it was just the one motion, and I just felt like—like an 'oh my, shit,' or like 'oh, my gosh, what did I do to my—what did I do to my arm?' It was like, 'Oh boy, oh boy, oh boy.' "

Claimant denied feeling that same type of pain earlier in the day or previously having any trouble readjusting any of her patients.

¶ 8 Claimant stated she finished her shift "in tears" and felt pain as she continued to lift her patients. She described the pain as constant and "always there" but stated it was not as sharp or intense as it had been and that it was different from "that first 'Oh, my gosh,' pain." Claimant testified she reported her injury to both the charge nurse and her supervisor.

¶ 9 According to claimant, she also worked the next day, January 19, 2014, and continued to have constant soreness in her arm. She stated she tried to "call in sick" but did end up working. Claimant asserted she was in "constant pain" while working and her arm "throbbed with any activity." She also testified that she filled out an injury report form on January 19, 2014, at the request of her supervisor, Karen Orlando. She identified a copy of that form, which was submitted at arbitration. Claimant testified the top half of the form was in her own handwriting. On the form, she described an injury to her right shoulder/biceps muscle that occurred "mid afternoon" on Saturday, January 18, 2014. Further, she reported the injury occurred due to "repeativly [*sic*]/frequently repositioning pt in bed." At arbitration, claimant agreed the injury

report made no mention of experiencing an "oh wow" or "oh boy" moment. After working on January 19, 2014, claimant did not believe she could safely perform her job duties because she did not feel safe moving patients. She reiterated that she did not have any trouble or difficulty caring for patients prior to January 18, 2014.

¶ 10 Following her alleged work accident, claimant first sought medical treatment on January 20, 2014, with the office of Dr. Rolando Izquierdo, an orthopedic surgeon. Claimant acknowledged her appointment with that office had been scheduled prior to her alleged work accident. Specifically, she acknowledged that on January 15, 2014, she called Dr. Izquierdo's office to schedule an appointment because her shoulder was "sore on and off, like a muscle soreness, like when you work-out."

¶ 11 At the appointment, claimant saw Alicia Heuser, Dr. Izquierdo's physician's assistant. Claimant's medical records reflect she complained of right shoulder pain that had been present since December 2013 when she "fell down the stairs in her home." Claimant reported the pain had been "significantly worse" since working as a registered nurse for the employer. She stated her pain was at the top of her shoulder and described her pain as dull and occasionally stabbing. Heuser noted that claimant reported that the pain occurred "at all times" and made it difficult for her to sleep at night. Her symptoms were reportedly "worse with brushing teeth and reaching behind." Additionally, Heuser noted as follows:

> "Work Injury:
>
> Employer: Centegra Woodstock. [Claimant] noted the injury was witnessed by a tech repetitive all day long with the same patient. [Claimant] did seek medical care with Dr. Izquierdo. Date and time of injury: [January 18, 2014,] repetitive all day long. *** What were you doing when the accident occurred: repetitively moving a patient all day

long with the assistance of a tech. How did the accident occur: repetitively boosting a patient in bed with the assistance of a tech."

¶ 12 Following an examination and X-rays, Heuser assessed claimant as having a "[d]isorder of bursae and tendons in [her] shoulder region." She also recommended a magnetic resonance imaging (MRI) scan of claimant's right shoulder "due to the traumatic nature of the initial injury." Finally, claimant was given work restrictions of no overhead lifting and no lifting more than two pounds with her right arm.

¶ 13 On January 23, 2014, claimant underwent the right shoulder MRI. The MRI report set forth the following findings:

"1. There are small full-thickness tears of the supraspinatus tendon.

2. There is severe tendinopathy of the infraspinatus tendon.

3. Small shoulder joint effusion and subacromial/subdeltoid bursal effusion.

4. Moderate osteoarthritis of the acromioclavicular joint."

¶ 14 On February 3, 2014, claimant saw Dr. Izquierdo for the first time. His medical records reflect claimant complained of right shoulder pain and noted that the date of her injury was "December 2013 when she fell down the stairs at home." Dr. Izquierdo reviewed the MRI of claimant's right shoulder and diagnosed her with "[d]isorder of bursae and tendons in shoulder region" and a "[h]igh grade partial thickness supraspinatus tear." Further, his office note contained the following opinion: "I do believe that all of their symptoms are directly related to the industrial injury they sustained on 1-18-14 while working for [the employer] as a Nurse." Ultimately, Dr. Izquierdo recommended surgery for claimant and provided her with work restrictions of no lifting more than two pounds, no overhead lifting, and no repetitive pushing or

pulling. Claimant testified the employer could not accommodate her modified-duty work restrictions.

¶ 15 On March 11, 2014, Dr. Izquierdo performed surgery on claimant in the form of a right shoulder arthroscopic rotator cuff repair, mini-open subpectoral biceps tenodesis, arthroscopic extensive debridement of the glenohumeral joint, arthroscopic subacromial decompression with anterior acromioplasty. After surgery, he prescribed the use of a sling and a course of physical therapy. During a follow-up visit on April 21, 2014, Dr. Izquierdo recommended continued physical therapy but found claimant could stop using the sling. Further, he found claimant could return to light-duty work if available.

¶ 16 Claimant testified that during physical therapy, she hit a plateau and her range of motion was not improving. During a follow-up visit, on May 19, 2014, Dr. Izquierdo noted claimant was doing slightly better than her last visit and but had complaints of pain and stiffness. He recommended continued physical therapy and that claimant start a "CPM chair" to help with her range of motion. On July 14, 2014, he gave claimant an injection in the glenohumeral joint of her right shoulder. On October 16, 2014, claimant saw Dr. Izquierdo for the last time and he released her to return to full-duty work with no restrictions. Claimant testified she did not return to work for the employer, however, because her "job was terminated."

¶ 17 At arbitration, a letter authored by Dr. Izquierdo on October 27, 2014, was submitted into evidence by the employer. In the letter, Dr. Izquierdo answered specific questions posed to him by claimant's counsel regarding her condition. The letter stated as follows:

> "3. Did the work injury of January 18, 2014[,] while continuously lifting and readjusting a patient at work cause or contribute to [claimant's] condition of ill being?

Answer: The difficulty here is that [claimant] reported a fall in December of 2013 *** and subsequently then reported a worsening of symptoms while lifting a patient in the hospital on January 18, 2014. Certainly, if she would have had a partial thickness rotator cuff tear or a partial injury to the tendon, could she have aggravated it or completed it while boosting a patient repeatedly over an entire shift? It is a possibility, although certainly not definitive.

4. Based on your opinion, do you believe that the work injury she sustained on January 18, 2014[,] caused her condition which required surgical intervention?

Answer: Again, this is difficult. [Claimant] sustained a fall in December, which was documented in the medical history. She then reports worsening of symptoms in January. It is very difficult to know whether she would have required surgical intervention regardless of aggravating the shoulder at work or if she worsened the condition at work. It is certainly plausible to consider that if she had a partial injury to the rotator cuff or a small tear, that she gradually made it larger through repetitive hoisting of a patient and lifting of a patient, although it is very difficult to confirm this, as well.

5. Is the mechanism of injury she reported on January 18, 2014[,] of lifting and re-adjusting the patient consistently over a work shift consistent with her biceps tendon pathology and rotator cuff tear?

Answer: As a 52-year-old female, her tissue and bone quality is very reasonable. It would be very difficult to just repetitively cause that type of pathology over a 12[-]hour shift. Now, if she had a small rotator cuff tear or a high grade partial thickness rotator cuff tear, could she have completed that while hoisting and lifting the patient? The answer is yes, possibly, however in my opinion, she probably would have a moment in

time while she was lifting that the pain got worse and that needs to be delineated from the patient.

6. Is *** your opinion [that claimant's] condition of *** ill being was caused by her work injury based on the fact that she was working full duty without restrictions up until the work injury and has been unable to work as a floor nurse since then?

Answer: The difficulty here is the history. [Claimant] reports two specific traumatic events or difficulties; one which was the fall down the stairs, which is a higher energy injury, and the second which is a repetitive insult over a 12[-]hour shift. I cannot give you an answer. My opinion is that ***, unless there is one moment or a specific point in time where she felt pain worse than others, where there is an acute injury, it is unlikely that she were to tear her rotator cuff completely just moving a patient over a 12 hour shift because of repetitive issues.

However, if she were to have already had a rotator cuff tear, could she have worsened that by lifting a patient? The answer is yes. In theory, she could have gradually propagated the tear and made it slightly larger, or in fact completed a high grade partial thickness tear. *** Certainly, this is not a clear cut case and more detail[s] from [claimant] regarding the type of injury that she sustained while moving that patient are necessary."

¶ 18 At arbitration, claimant submitted Dr. Izquierdo's deposition into evidence. The deposition was taken November 11, 2014, with claimant in attendance. Dr. Izquierdo testified he was an orthopedic surgeon and that he concentrated his practice on shoulder injuries. He described his treatment of claimant, stating he reviewed both claimant's MRI films and the MRI report. He determined claimant had a "high grade partial thickness rotator cuff tear of the

supraspinatus tendon without retraction," which he described as "essentially, a near complete tear of the supraspinatus tendon."

¶ 19 Dr. Izquierdo acknowledged rendering an opinion on February 3, 2014, which causally related claimant's symptoms to her work injury. He testified he based that opinion on claimant's report of symptoms that worsened after working. Dr. Izquierdo also testified as follows regarding the issue of causal connection:

> "So the [question] is—is did she tear her rotator cuff while moving a patient or did she tear her rotator cuff at the—at the fall in December of 2013, and the answer is I—I can't answer that, all right, no—nobody knows. What I do know is that she was working full-time, she went to lift a patient, and her symptoms got worse. So could she have already had a tear that she aggravated *** that made her symptomatic enough to seek treatment, the answer is yes. Could she have torn her rotator cuff at the time of the fall, yes. But again, she was asymptomatic enough to be able to work ***, and I don't have documentation of the specific injury, but following a specific work day, she reported to be unable to work anymore. And from that standpoint, could she have worsened the tear, the answer is yes, although I—I can't—without having a pre-MRI and a post-MRI, there's not [*sic*] way to answer that."

On examination by claimant's counsel, Dr. Izquierdo agreed that claimant's work on January 18, 2014, "could have been a cause" of her right shoulder injury.

¶ 20 On examination by the employer's counsel, Dr. Izquierdo acknowledged that a fall down stairs "on an outstretched arm" was a typical cause of a rotator cuff tear. He stated other causes for such an injury were falls, motor vehicle accidents, or a "lifting event." He described a lifting event as occurring when a person tried to lift something that overpowered the person's ability.

Dr. Izquierdo asserted that the lifting did not necessarily have to be above shoulder level and could include anything "that would require you to drive your arms upward." He stated that, depending on arm position, "anything from below, pulling up could certainly" cause a rotator cuff tear."

¶ 21 Dr. Izquierdo agreed that claimant's fall in December 2013 could have caused her rotator cuff tear. Further, he acknowledged that he did not know when claimant returned to work after her December 2013 fall. Also, the following colloquy occurred between the employer's counsel and Dr. Izquierdo:

"Q. Now you indicated just a few minutes ago that lifting could cause a rotator cuff tear if there is an overload of the rotator cuff, is that correct?

A. Correct. So if you have a moment in time when there's a specific injury while lifting, absolutely, that could be a cause for a rotator cuff tear.

* * *

Q. But it has to be of a significant load, is that correct?

A. Correct. So and—and not just a significant load, most people would recognize a moment in time when they went to lift something, and they would feel—they would feel a—a sharp pain or an immediate symptom.

Q. Okay. And in your history from your patient, did she give you a history of a sharp pain or symptom while doing this activity[?]

A. I don't have any—I have a repetitive lifting issue, so in that—and I think that's one of—one of the difficulties in this, right, is that we have two potential causes. So no, I don't have a specific moment in time where she had symptoms."

Dr. Izquierdo agreed that he could not say with medical certainty that lifting at work in January 2014 was "[t]he cause" of claimant's rotator cuff tear.

¶ 22 Dr. Izquierdo went on to testify that someone with a rotator cuff tear would have symptoms if he or she used the shoulder and put overload or strain on the rotator cuff. He stated there were "a myriad of things that [could] cause *** worsening pain with rotator cuff pathology." However, there were also individuals with such injuries who were asymptomatic. Dr. Izquierdo stated that "with the rotator cuff tear, every time you move your arm, pick up your arm, use your arm you could, theoretically, propagate the tear." Additionally, he agreed that there was "nothing in [his] record to show that [claimant's] lifting at work accelerated the underlying condition of the rotator cuff," rather than "just [bringing] about *** increased symptoms."

¶ 23 Dr. Izquierdo testified he would correct the causation opinion from his February 3, 2014, office note that "all" of claimant's symptoms were directly related to her January 18, 2014, work activities by removing the word "all" and saying "her symptoms were worse because of" her work activities. He agreed that, in finding claimant's symptoms were worse, he relied on the history provided by claimant. Dr. Izquierdo ultimately agreed, however, that he could not state with any medical certainty that claimant's January 2014 work activities "changed" her rotator cuff tear. On further questioning by the employer's counsel, Dr. Izquierdo testified he was of the opinion that it would be difficult to repetitively cause the type of pathology claimant had over a 12-hour shift. He stated it was "possible" that she could have completed a partial tear while hoisting or lifting a patient but that he could not reach such an opinion with a reasonable degree of medical certainty. Dr. Izquierdo indicated, however, he could reach such an opinion with a different history, stating as follows: "[I]f I would have had a history, a moment in time where she

said, 'oh my god, at 2:15, I lifted this lady, and my arm hurt substantially more,' some—'Now I can't pick up my arm,' that's a different history, right, but I don't have that history." Further, he emphasized that "if there was a reported and documented moment or incident in time *** [claimant] could have made [her rotator cuff tear] bigger."

¶ 24 The record further reflects that on April 22, 2014, claimant was examined by Dr. Prasant Alturi, an orthopedic surgeon, at the employer's request. Dr. Alturi authored a report regarding his examination that was submitted at arbitration. He noted claimant provided a history of injuring her right shoulder on January 18, 2014, while working as a floor nurse. Claimant asserted she was required to constantly move and reposition a patient and that she " 'kept aggravating it, boosting her up.' " According to Dr. Alturi, claimant acknowledged having a "prior shoulder injury in mid-December 2013," which occurred when she " 'missed a step' at home." He noted claimant had been sore since her fall at home but that she described her symptoms as being "minimal" by the date of her alleged work accident.

¶ 25 Dr. Alturi's impression was that claimant suffered a right rotator cuff tear that was surgically repaired. In his report, he provided an opinion that claimant's right shoulder condition was not causally related to her work activities. He stated as follows:

> "[Claimant] indicated that her symptoms were due to repetitively assisting with the positioning of one of her patients at work. She indicated that all of these activities were done with her arms below shoulder level while she was trying to reposition the patient. There was no impact or sudden load to the upper extremities. There was no overhead lifting. These types of activities could not have caused [claimant's] right shoulder rotator cuff tear. These types of activities could not have caused any aggravation of a right shoulder rotator cuff tear. [Claimant's] right shoulder rotator cuff tear is more plausibly

attributable to the incident when she fell while on a staircase at home. This is consistent with the clinical documentation as well as within her clinical findings."

¶ 26 Dr. Alturi's deposition was taken on December 10, 2014, and submitted into evidence at arbitration. He testified consistently with his report and opined claimant's right rotator cuff tear was not causally related to her January 2014 work activities. Dr. Alturi noted claimant reported performing repetitive activities at work and demonstrated the position of her upper extremities while performing those activities. He noted claimant did not report any impact to her upper extremities while at work, "any sudden load to her upper extremities" while at work, or any overhead exposure associated with lifting or forceful use of her upper extremities. Rather, Dr. Alturi opined that claimant's condition was most "consistent with a traumatic rotator cuff tear from a fall that was painful" he stated it was likely claimant then felt pain while performing activities at work and at home. Further, he stated it was "not possible to get a full thickness rotator cuff tear, or even aggravate a full thickness rotator cuff tear with the type of activities [claimant] described."

¶ 27 Dr. Alturi disagreed with Dr. Izquierdo's opinion that lifting activities below the shoulder could damage the rotator cuff. He stated it was not plausible to damage the rotator cuff in such a way because "when the arms are below shoulder level the rotator cuff is not really contributing in any meaningful fashion to the application of force." During examination by the employer's counsel, Dr. Alturi clarified that his opinion regarding arm position concerned "activity related damage to the rotator cuff" rather than "a traumatic rotator cuff injury."

¶ 28 On examination by claimant's counsel, Dr. Alturi testified it was his understanding that claimant continued working full duty for the employer without accommodations or restrictions after her December 2013 fall and prior to January 18, 2014. It was also his understanding that

claimant was unable to work after January 18, 2014. Further, he acknowledged that there were ways that claimant could have completed a small or partial rotator cuff tear when hoisting or lifting a heavy patient. However, he did not believe that is what occurred in claimant's case based in large part on the way she described that she was adjusting her patient. Dr. Alturi admitted that if his history was incorrect his opinion could change.

¶ 29 On February 17, 2015, the arbitrator issued his decision in the matter, finding claimant sustained work-related injuries arising out of and in the course of her employment on January 18, 2014, and awarding her $34^{3}/_{7}$ weeks' TTD benefits and medical expenses. The arbitrator relied on Dr. Izquierdo's opinions over those provided by Dr. Alturi and found that even if claimant injured her right shoulder in December 2013, "the activity she reported at work on January 18, 2014[,] unquestionably increased whatever symptoms she was having as a result thereof and caused her to seek medical care."

¶ 30 On March 16, 2016, the Commission reversed the arbitrator's decision and denied claimant compensation under the Act. It found claimant failed to prove she sustained an accident arising out of and in the course of her employment on January 18, 2014, or that her current condition of ill-being was causally related to her employment. In so holding, the Commission determined claimant was not credible. It also found that both Dr. Izquierdo and Dr. Alturi essentially agreed that the history and mechanism of injury claimant described prior to the date of arbitration was not a reasonable or likely cause of her shoulder condition of ill-being. The Commission concluded that the evidence, instead, "support[ed] Dr. Alturi's belief that subsequent to the fall at home, [claimant] was most likely experiencing right shoulder symptoms outside of and unrelated to her work duties prior to January 18, 2014."

¶ 31 Claimant sought judicial review of the Commission's decision with the circuit court of McHenry County. On March 8, 2017, the court reversed the Commission's decision, finding it was against the manifest weight of the evidence. It ordered the arbitrator's decision reinstated.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 Initially, we note that, in her appellee's brief, claimant argues the employer's appeal should be dismissed for a lack of appellate jurisdiction. She argues that the signature of the employer's counsel that appears on its notice of appeal does not match counsel's signature on another document in the record. Therefore, she maintains that the notice of appeal was not properly signed by the employer's counsel and a jurisdictional requirement is lacking. We note, however, that claimant previously filed a motion to dismiss the employer's appeal and raised this same jurisdictional argument. On June 29, 2017, this court denied her motion. Thus, her claim has been addressed and found to be without merit. We adhere to our previous decision on the matter and decline to further consider it.

¶ 35 As to the merits of the appeal, the employer argues the Commission's finding that claimant failed to prove a compensable, work-related injury was supported by the record and not against the manifest weight of the evidence. After reviewing the record, we agree with the employer's argument and find the circuit court erred by reversing the Commission's decision.

¶ 36 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). The "in the course of employment" phrase "refers to the time, place and circumstances surrounding the injury" and, to be compensable, an injury "generally must occur

within the time and space boundaries of the employment." *Id.* "The 'arising out of' component is primarily concerned with causal connection" and is satisfied by a showing "that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.*

¶ 37 In cases involving a preexisting condition of ill-being, recovery depends upon "the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being can be said to have been causally connected to the work-related injury and not simply the result of a normal degenerative process of the preexisting condition." *Id.* at 204-05. Ultimately, an "[a]ccidental injury need not be the sole causative factor, nor even the primary causative factor, as long as it was *a* causative factor in the resulting condition of ill-being." (Emphasis in original.) *Id.* at 205.

¶ 38 Here, the parties first disagree on the appropriate standard of review by this court. The employer maintains that the Commission's decision should not be overturned unless it is against the manifest weight of the evidence while claimant argues that a clearly erroneous standard of review applies. We agree with the employer.

¶ 39 "As a general rule, the question of whether an employee's injury arose out of and in the course of his employment is one of fact for the Commission." *Bolingbrook Police Department v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130869WC, ¶ 38, 48 N.E.3d 679; see also *Sisbro*, 207 Ill. 2d at 205 ("Whether a claimant's disability is attributable solely to a degenerative process of the preexisting condition or to an aggravation or acceleration of a preexisting condition because of an accident is a factual determination to be decided by the Industrial Commission."). On review, the Commission's determinations on factual matters will not be disturbed unless they are against the manifest weight of the evidence. *Bolingbrook Police*

Department, 2015 IL App (3d) 130869WC. "A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent." *Id.*

¶ 40 Further, "[i]n resolving questions of fact, it is within the province of the Commission 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." *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674, 928 N.E.2d 474, 482 (2009). "The relevant inquiry is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other might reach an opposite conclusion." *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 538-39, 865 N.E.2d 342, 353 (2007).

¶ 41 In certain cases, a clearly erroneous standard of review has been applied where the issue presented on appeal contained a mixed question of law and fact. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205, 692 N.E.2d 295, 302 (1998). " 'A mixed question is one involving an examination of the legal effect of a given set of facts, that is, where the facts and law are established and the issue is whether the facts satisfy a certain statutory standard.' " *Dodaro v. Illinois Workers' Compensation Comm'n*, 403 Ill. App. 3d 538, 544, 950 N.E.2d 256, 261 (2010) (quoting *Western & Southern Life Insurance Co. v. Edmonson*, 397 Ill. App. 3d 146, 151, 922 N.E.2d 1133, 1139 (2009)).

¶ 42 Here, the relevant underlying facts have not been "established" and are very much in dispute. Thus, we are not simply examining the legal effect of a given set of facts but, instead, considering the Commission's resolution of disputed facts, including the manner in which it resolved evidentiary conflicts and assessed witness credibility. Thus, the appropriate standard of review in this case is the manifest-weight-of-the-evidence standard.

¶ 43 Additionally, we find that the clearly erroneous standard is inapplicable when reviewing decisions of the Commission. In *Belvidere*, 181 Ill. 2d at 205, our supreme court first applied the clearly erroneous standard to judicial review of an administrative agency's decision. However, unlike this case, *Belvidere* involved an order of the Illinois State Labor Relations Board (Board) under the Illinois Public Labor Relations Act (5 ILCS 315/1 to 28 (West 2012)). *Belvidere*, 181 Ill. 2d at 204. Further, the Board's decision in that case was governed by the Administrative Review Law. *Id.* (citing 735 ILCS 5/3-110 (West 1994)). We note that the Administrative Review Law does not apply in the context of a workers' compensation proceeding. *Wal-Mart Stores, Inc. v. Industrial Comm'n*, 324 Ill. App. 3d 961, 966, 755 N.E.2d 98, 102 (2001) ("The Act clearly does not adopt the Administrative Review Law."). Thus, this case is procedurally distinguishable from *Belvidere*.

¶ 44 Moreover, even after *Belvidere* our supreme court has continued to apply only the manifest-weight-of-the-evidence and *de novo* standards of review in workers' compensation cases. In *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 18, 956 N.E.2d 543, we expressly noted that the "supreme court has never applied [the clearly erroneous standard] to an appeal involving a decision of the Workers' Compensation Commission." That statement remains true today. See The *Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 14, 1 N.E.3d 535 (recognizing only the application of manifest-weight and *de novo* standards when reviewing decisions of the Commission).

¶ 45 To support her contention that the clearly erroneous standard should apply in this case, claimant cites this court's decision in *Dodaro*, 403 Ill. App. 3d at 545, wherein we employed the clearly erroneous standard when reviewing a decision of the Commission. However, as support

for applying that standard in *Dodaro*, we relied on case authority outside of the workers' compensation framework, which dealt with decisions from administrative agencies other than the Commission. *Id.* As a result, we decline to follow that decision. Further, we emphasize that, unless and until the supreme court directs otherwise, we continue to apply only the manifest-weight-of-the-evidence and *de novo* standards of review when reviewing decisions of the Commission.

¶ 46 We now turn to the merits of the employer's appeal. Here, in finding a non-compensable injury, the Commission first determined that both parties' medical experts "largely agree[d] that the history and mechanism of injury described by [claimant was] not a reasonable or likely cause of the right shoulder condition surgically treated by Dr. Izquierdo." This finding is supported by the record. As noted by the Commission, prior to testifying at arbitration, claimant repeatedly and consistently described a repetitive-trauma type work injury. Dr. Alturi opined claimant's right shoulder injuries were most "consistent with a traumatic rotator cuff tear from a fall that was painful." He did not believe it was possible for claimant to have caused or aggravated her rotator cuff tear with the type of work activities she described to him, which involved constantly moving and repositioning a patient.

¶ 47 Additionally, although Dr. Izquierdo initially offered an opinion that causally related claimant's right shoulder and arm condition to her work for the employer, he later significantly qualified that opinion both in his October 2014 letter and during his deposition. Dr. Izquierdo acknowledged that claimant's December 2013 fall could have caused her rotator cuff tear and agreed that he could not state with "medical certainty" that her January 18, 2014, work activities either "caused" or "changed" her condition. Importantly, he opined that it would be difficult to cause the type of pathology that claimant had simply by repetitive movement over a 12-hour

shift. Further, although he stated it was possible for claimant to aggravate such an injury while hoisting or lifting a patient, he would have expected a different history than the repetitive-trauma type history that claimant reported to him. Specifically, Dr. Izquierdo testified he would expect "a moment in time where she said, 'oh my god, at 2:15, I lifted this lady, and my arm hurt substantially more.' "

¶ 48 In providing his opinions, Dr. Izquierdo reiterated several times that "if there was a reported and documented moment or incident in time *** [claimant] could have made [her rotator cuff tear] bigger." However, he also repeatedly stated that he was never provided with such a history by claimant. As a result, Dr. Izquierdo could not offer an opinion on causation based on a reasonable degree of medical certainty.

¶ 49 Moreover, to the extent Dr. Izquierdo's opinion on causation could be construed as supporting the existence of a causal connection, we note his opinion was based on the history provided to him by claimant, whom the Commission found was not credible. The Commission's credibility determination is also supported by the record.

¶ 50 The Commission first found claimant was not credible regarding her December 2013 fall at home. It noted that although claimant tried to minimize the fall when testifying at arbitration, stating that she merely missed a single step, fell to her buttocks, and "bumped" her right shoulder, it was nevertheless significant enough that symptoms in claimant's right upper extremity continued to bother her one month later. The record supports this finding by showing claimant contacted Dr. Izquierdo's office to schedule an appointment regarding her right shoulder on January 15, 2014, three days prior to her alleged work accident. As noted by the Commission, Dr. Izquierdo was an orthopedic surgeon who specialized in shoulder treatment. Further, Dr. Izquierdo's records do not support claimant's contention at arbitration that her

December 2013 fall was only a minor incident. Contrary to claimant's testimony that she missed a step, medical records indicate claimant reported to Dr. Izquierdo's office that she "fell down the stairs in her home." Further, an MRI scan was prescribed "due to the traumatic nature of the initial injury."

¶ 51 Second, the Commission also found claimant was not credible because, contrary to her testimony at arbitration, neither her accident report nor the medical histories she provided delineated "a specific episode of sudden or significant pain while lifting a particular patient on January 18, 2014." The evidence at arbitration supports this finding, showing claimant's first report of an "oh wow" or "oh boy" moment of experiencing symptoms was while testifying at arbitration. Her arbitration testimony also occurred after claimant attended Dr. Izquierdo's deposition and heard him describe the importance of such a specific painful moment in time relative to claimant's condition of ill-being. As the Commission found, claimant's "subsequent testimony at arbitration gives a strong indication that an effort was made to closely conform to [Dr. Izquierdo's] reasoning in order [to] show causation."

¶ 52 On appeal, claimant responds to the employer's arguments and the Commission's finding of no compensable injury by arguing that the Commission failed to properly consider that she worked full-duty without restrictions after her December 2013 fall but was unable to continue working following her January 2014 work accident. She argues that " '[a] chain of events which demonstrates a previous condition of good health, an accident, and a subsequent injury resulting in disability may be sufficient circumstantial evidence to prove a causal nexus between the accident and the employee's injury.' " *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 39, 976 N.E.2d 1 (quoting *International Harvester v. Industrial Comm'n*, 93 Ill. 2d 59, 63-64, 442 N.E.2d 908, 911 (1982)). We do not disagree that such

circumstantial evidence can support the existence of a causal connection. However, in this case, the Commission determined claimant's descriptions of both her initial injury and her condition of ill-being prior to her alleged work accident were not credible. As set forth above, the Commission's credibility determinations were supported by the record.

¶ 53 Further, in reaching its decision, the Commission pointed out that claimant worked "significantly less than her usual part-time schedule during the period between mid-December 2013[,] and January 18, 2014." Although claimant argues that factual finding was erroneous, claimant's own testimony at arbitration supports the Commission's decision. Specifically, claimant testified to only three specific days that she worked during the relevant time period between her fall at home and her alleged January 18, 2014, work accident.

¶ 54 Claimant also argues that the wage statement submitted by the employer contradicts the Commission's finding regarding the number of days she worked and, instead, shows she continued to perform full-duty work after her December 2013 fall. Initially, we note that the wage statement at issue covers only up to January 4, 2014, and, thus, it is not representative of the entire time period between claimant's fall at home and her alleged work accident. Additionally, the wage statement demonstrates only the total number of hours for which claimant was compensated by the employer and not the total number of hours claimant spent performing her regular, physical job duties. Again, claimant acknowledged during her arbitration testimony that there were times of "low census," during which she would be compensated for being on-call at home rather than performing her regular work duties as a floor nurse. Given the evidence presented, the Commission could reasonably infer that claimant worked less than her usual part-time schedule during the relevant time frame.

¶ 55 Here, the record contains sufficient support for the Commission's decision, thus an opposite conclusion from that reached by the Commission is not clearly apparent. As a result, the Commission's finding that claimant failed to prove a compensable injury was not against the manifest weight of the evidence.

¶ 56 III. CONCLUSION

¶ 57 For the reasons stated, we reverse the circuit court's judgment and confirm the Commission's decision.

¶ 58 Circuit court's judgment reversed; Commission's decision confirmed.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Debra M. Rechenberg,

Petitioner,

16IWCC0189

vs.

NO: 14 WC 06524

Centegra Memorial Medical Center,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) of the Act having been filed by the Respondent herein and notice given to all parties, the Commission, after considering all of the issues and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below and finds that Petitioner failed to prove she sustained an accident arising out of and in the course of her employment by Respondent on January 18, 2014 or that her current condition of ill being is causally related to her employment.

Petitioner, a 51-year-old registered nurse, was hired by Respondent on a part-time basis in February of 2006 and she continued to work in that capacity as of the alleged date of accident, January 18, 2014. She normally worked two or three days per week and every other weekend; her shifts were usually eight hours long but occasionally she worked twelve hour shifts. Petitioner testified that her work duties as a "floor nurse" were very physical. She was assigned to a medical and surgical unit where she was often required to assist patients who were disabled by injury or medical conditions and needed to be moved and repositioned. She explained that assistants and technicians were available for "the big moves," but that she performed readjustments or "boosting up" as needed to care for her patients.

Petitioner testified that in December of 2013 she fell at home while descending her basement steps. She testified that she fell straight down on her buttocks, and bumped her right shoulder against the wall. She did not recall the exact date of the fall, but she knew it occurred

before Christmas; on further questioning she agreed that the date of the fall would have been around December 18, 2013. She sought no immediate medical treatment, but she testified that she continued to experience some right shoulder soreness in the weeks after the fall. She testified that her son, a physical therapy student, urged her to go and have her shoulder examined. Petitioner testified that she made an appointment with Dr. Izquierdo at Crystal Lake Orthopedics for January 20, 2014. Dr. Izquierdo is a board certified orthopedic surgeon and a shoulder specialist; Petitioner testified that she was previously familiar with Dr. Izquierdo because her children had been seen by other doctors at Crystal Lake Orthopedics.

Between the December 2013 fall and the January 18, 2014 alleged injury, Petitioner testified that she continued working her regular duties and did not take any time off of work. On cross-examination, she testified that after the fall she worked approximately eight hour shifts on December 22, 25, and 28, and then a twelve-and-a-half-hour shift on January 18, 2014, the date of accident. Petitioner started her shift on January 18, 2014 at 7:00 AM. She testified that she was assigned to care for an obese patient in room 221 and that this patient required frequent repositioning in bed. Petitioner testified that sometime after lunch, while using her arms to "boost" the patient up in bed, she experienced a deep stabbing localized pain in her right shoulder. She testified that this was a sudden pain that occurred with one motion, and she thought to herself *"oh boy, oh boy, oh boy"* and *"what did I do to my arm?"* She testified that she continued her shift, performing her regular duties of moving and readjusting patients. She testified that the pain in her right shoulder continued as she performed her work activities, but that it was *"a different pain,"* not the sudden *"Oh, my gosh, pain"* that she experienced readjusting the patient in room 221. On cross-examination, she claimed that she was *"in tears"* due to pain as she continued her shift on January 18, 2014, yet she admitted she did not seek medical care at Employee Health or go to the emergency room. Petitioner acknowledged that she had an orthopedic evaluation previously scheduled for January 20, 2014.

The following day, Petitioner was also scheduled to work. She testified that she *"tried"* to call in sick, but she admitted that she went to work as scheduled and performed her regular duties rather than reporting to Employee Health or the emergency room on January 19, 2014. She testified that she had pain and throbbing in her right shoulder while working. Petitioner's accident report was admitted into evidence as Petitioner's exhibit 1 and Respondent's exhibit 1. Although Petitioner testified that she reported the injury on the date of accident, Petitioner's supervisor, "Karen Orlando," reported that she was notified of the injury on January 19, 2014 at 1:20 PM. Per the accident report, the injury occurred sometime in the midafternoon on January 18, 2014 as Petitioner was caring for her assigned patient in room 221: *"repetitively/frequently repositioning pt in bed to improve 02 sat/comfort turning in bed/diaper change."* The nature of the injury was described as right shoulder pain and biceps muscle spasms. The accident report does not indicate any specific event of sudden pain. Petitioner testified that she did not believe she could safely perform her job after January 19, 2014 due to her pain.

On January 20, 2014, Petitioner was examined by Alicia Hauser, a physician assistant at Crystal Lake Orthopedics (later Rockford Orthopedics). The "New Patient" portion of the history reads: *"a 51 year old right hand dominant female being seen for right shoulder pain that has been present since 12/2013 when the patient fell down the stairs in her home. The pain has been significantly worse since working as an RN for Centegra-Woodstock."* Petitioner complained of

pain at a level 2/10 at rest and 8/10 with activity, described as constant and dull or occasionally stabbing and located at the top of the shoulder. Symptoms increased brushing her teeth and reaching behind her, and she had been taking Ultram for pain which provided some relief. The "Work Injury" portion of the history read that Petitioner noted the date and time of the injury as *"1-18-14 – repetitive all day long"* and that Petitioner noted that the injury was witnessed and that the accident occurred *"repetitively moving a patient all day with the assistance of a tech"* and *"repetitively boosting a patient in bed with the assistance of a tech."* There was no mention of any specific injury or occurrence. On physical examination, Petitioner had no pain with palpation of the AC joint, cross body adduction or reaching for the belt loop but had positive impingement signs and pain with palpation of the biceps tendon. X-rays of Petitioner's right shoulder were taken and interpreted as negative. P.A. Hauser prescribed Vimovo, ordered an MRI *"due to the traumatic nature of the original injury,"* and restricted Petitioner to light duty work. Petitioner testified that restricted duty was not available.

Petitioner was seen in follow up by Dr. Izquierdo on February 3, 2014. The history states that Petitioner sustained an injury in *"December 2013 when she fell down the stairs at home."* Petitioner reported that she felt she was doing worse compared to her last visit. On examination, her range of motion had improved somewhat from January 20, 2014. A January 23, 2014 right shoulder MRI was interpreted by Dr. Izquierdo as showing a high grade partial thickness supraspinatus tear. Dr. Izquierdo recommended arthroscopic rotator cuff repair, subacromial decompression and anterior acromioplasty, and possible biceps tenodesis at Petitioner's earliest convenience. In the meantime, Dr. Izquierdo continued Petitioner's work restrictions and prescribed Ultram. The closing statement of Dr. Izquierdo's examination record reads: *"I do believe that all of their symptoms are directly related to the industrial injury they sustained on 1-18-14 while working for Centegra as a Nurse."*

Petitioner's claim was denied. She underwent surgery by Dr. Izquierdo on March 11, 2014. Dr. Izquierdo performed a right shoulder arthroscopic rotator cuff repair, mini open sub pectoral biceps tenodesis, extensive debridement of the glenohumeral joint, and subacromial decompression with anterior acromioplasty. Petitioner participated in post-operative physical therapy and follow up with Dr. Izquierdo.

On April 22, 2014 Petitioner was evaluated by Dr. Atluri at Respondent's request; his report was admitted into evidence as Respondent's exhibit 5. One day before, Dr. Izquierdo allowed Petitioner to discontinue use of the sling. However Petitioner testified that she remained in the sling at her examination by Dr. Atluri. Petitioner told Dr. Atluri that she fell on stairs at home in mid-December of 2013 and that she had right shoulder soreness aggravated each time she boosted a certain patient up in bed while she worked as a floor nurse on January 18, 2014. Dr. Atluri noted that Petitioner held her arms near her sides with her elbows flexed as she demonstrated boosting the patient up in bed. Petitioner did not describe any sudden injury or occurrence of pain at a specific moment in time. Dr. Atluri opined that Petitioner's diagnosis and treatment was reasonable but that Petitioner's rotator cuff tear was not related to her work activities on January 18, 2014. He reasoned that Petitioner's description of the mechanism of activity involved no sudden impact or load on the right shoulder, and he opined that a rotator cuff tear was more likely attributable to the incident when she fell on the staircase at home.

Petitioner returned to Dr. Izquierdo on May 19, 2014 and June 9, 2014. He prescribed a CPM chair to improve Petitioner's range of motion and discussed glenohumeral injections for adhesive capsulitis. On July 14, 2014 Dr. Izquierdo injected Petitioner's right shoulder to treat her continued right shoulder stiffness. Petitioner returned to Dr. Izquierdo in further follow up on August 11, 2014 and September 15, 2014, before being released to full duty work on October 16, 2014. Petitioner testified that her job was terminated the first week of October, coinciding with the end of her FMLA period, and she subsequently obtained COBRA coverage for medical insurance. On cross-examination, Petitioner testified that she never went back to Respondent after October 16, 2014 with the full duty release in order to apply for a new job, although she agreed that under the circumstances she was in fact eligible to do so.

At Petitioner's request, Dr. Izquierdo issued a narrative letter dated October 27, 2014 and the letter is in evidence as Petitioner's exhibit 4 and Respondent's exhibit 7. Dr. Izquierdo stated that Petitioner initially contacted his office on January 15, 2014 and reported falling down stairs at home. When she was examined on January 20, 2014, Petitioner's fall down stairs was again documented, but Petitioner had also noticed her symptoms were worse after working a long shift and moving the same patient over and over on January 18, 2014. In response to Petitioner's attorney's request for a causal connection opinion between the "work injury" sustained on January 18, 2014 and the condition that required surgical intervention, Dr. Izquierdo opined that it was very difficult to confirm whether Petitioner would have required surgery regardless of aggravating her shoulder at work. He opined that it would be very difficult to repetitively cause biceps tendon pathology and a rotator cuff tear over the course of a twelve hour shift. He stated that a significant pre-existing partial tear could have, in theory, been completed boosting up the patient in bed. However, he believed that in that case Petitioner would have been able to delineate a moment in time where she experienced an acute onset of symptoms.

Dr. Izquierdo testified via deposition on November 11, 2014 with Petitioner in attendance. His deposition was admitted into evidence as Petitioner's exhibit 5. Dr. Izquierdo is board certified in orthopedic surgery, he completed a shoulder fellowship, and he is a member of the American Shoulder and Elbow Surgeons; shoulder treatment represents 85-90% of his practice. On direct-examination, Dr. Izquierdo testified that based on Petitioner's history that she fell at home in December 2013 and her symptoms became worse after working on January 18, 2014, it was his understanding that she sustained an aggravation of a pre-existing injury. He testified that she could have sustained the tear when she fell in December 2013, but a pre and post injury MRI would be needed to confirm. When Petitioner's attorney asked Dr. Izquierdo to give his causal opinion within a reasonable degree of medical certainty as to whether the alleged work accident caused or contributed to Petitioner's condition of ill-being, he answered: *"I can't answer that, all right, no – nobody knows."* He testified that when he examined Petitioner he accepted the history she gave that *"it was worse after working."* Therefore, he included the statement identified at the end of his examination record on February 3, 2014. He testified that he uses a template and chooses to include a causation statement if it is pertinent. Dr. Izquierdo testified that he relied on Petitioner's history at the time and reasoned that even if Petitioner had a pre-existing injury she was asymptomatic enough to be able to work before January 28, 2014, and after that she felt she could not work.

On cross-examination, Dr. Izquierdo testified that he did not know when Petitioner came

back to work after the mid-December 2013 fall or how much time she spent working prior to the January 18, 2014 alleged work accident. He agreed that the MRI could not prove whether the tear happened in December or January. On further questioning, Dr. Izquierdo testified that he believes it was incorrect to have used the word "all" in his causal statement (*"I do believe that all of her symptoms are directly related..."*) He testified that he would modify the statement to state that her symptoms were worse after the work injury; he agreed that this causal statement would have been based solely on Petitioner's history.

Dr. Izquierdo testified that in his opinion it would be difficult to cause a rotator cuff tear repetitively over a twelve hour shift. He believed it was possible that a pre-existing partial tear could have been completed during the course of the day's activities, but he testified that he still believed there would be *"a moment in time where she said, "Oh my god, at 2:15, I lifted this lady, and my arm hurt substantially more," some – "Now I can't pick up my arm," that's a different history, right, but I don't have that history."* Dr. Izquierdo further testified that in order for him to change his opinion, he would have to be confronted with a different history than what he obtained from Petitioner: *"Let's put it this way, if she – if there was a reported and documented moment or incident in time, the answer is yes, she could have made it [the tear] bigger."* Dr. Izquierdo testified that he thought *"there's a lot of gray here... [a] lot of gray as in what – in time as to where exactly in time did the tear occur."*

Dr. Izquierdo further testified that, a "pulling up" movement could possibly cause a rotator cuff tear. However, he believed that this mechanism of injury would normally involve lifting a heavy load and sudden symptoms: *"most people would recognize a moment in time when they went to lift something, and they would feel – they would feel a – a sharp pain or an immediate symptom."* He testified that in the history he obtained, Petitioner described *"a repetitive lifting issue,"* not a specific moment in time. Dr. Izquierdo could not state within a reasonable degree of medical certainty that lifting at work was the cause of the rotator cuff tear. On redirect examination, Dr. Izquierdo conceded that the work injury alleged "could or might have" aggravated a pre-existing tear but cautioned: *"[W]e're really splitting hairs here."*

Dr. Atluri testified via deposition on December 10, 2014 and the transcript was admitted into evidence as Respondent's exhibit 2. Dr. Atluri is a board certified orthopedic surgeon who exclusively treats upper extremity problems; he estimated that shoulder patients represent 30% of his practice. Dr. Atluri testified consistently with his §12 examination report in evidence as Respondent's exhibit 5. Dr. Atluri testified that following his physical examination and record review he diagnosed Petitioner as status post arthroscopic right rotator cuff repair but not yet at maximum medical improvement. He ultimately concluded that Petitioner's right shoulder rotator cuff tear was not related to her work activities. He based his conclusion on Petitioner's description of having sustained a traumatic injury at home with resultant shoulder pain, and then experiencing symptoms while repositioning a patient multiple times over a period of twelve hours on January 18, 2014. Dr. Atluri noted that Petitioner demonstrated the position of her upper extremities while performing that activity, as he noted in his report. At the April 22, 2014 §12 examination, Petitioner gave no history of a sudden impact or load on the right shoulder. Dr. Atluri testified that Petitioner's rotator cuff could not have been stressed to the point of causing full thickness tear in the performance of the job duties that she described. Furthermore, Dr. Atluri held the general opinion that lifting with the arms below shoulder level was not a plausible

mechanism of injury to the rotator cuff. He explained that the rotator cuff is only minimally affected by the force of lifting when the arm is below shoulder level. Dr. Atluri also denied that Petitioner could have completed a small rotator cuff tear by adjusting a patient in bed, again because of the mechanics of the activity described to him by the Petitioner.

On cross-examination, Dr. Atluri agreed that he did not have the opportunity to review Petitioner's operative report until before the deposition; however, he testified that viewing the report did not alter his opinions. Dr. Atluri testified that without the report he already knew that Petitioner had arthroscopic right rotator cuff surgery and he had radiographic images of the shoulder. He agreed that without an MRI taken between the December and January incidents he is unable to discern when the rotator cuff tear occurred. He again disagreed that a prior tear could have been completed on January 18, 2014 via the physical activity described by Petitioner. Dr. Atluri agreed that his opinion could change if the history was different.

After considering all of the evidence, we conclude that the credible record does not support a finding of a compensable accident on January 18, 2014 or causal connection between Petitioner's current condition of ill-being and her employment by Respondent. In this case, Petitioner's treating physician and Respondent's §12 examiner largely agree that the history and mechanism of injury described by Petitioner is not a reasonable or likely cause of the right shoulder condition surgically treated by Dr. Izquierdo. Both doctors acknowledged that the December 2013 fall at home was the only history of a *traumatic* event that Petitioner recounted; she described a repetitive-type injury occurring at work. Dr. Izquierdo relied on Petitioner's history that she was subjectively worse after January 18, 2014, however he could not opine within a reasonable degree of medical certainty that there was causal connection to the rotator cuff tear and surgery he ultimately performed.

We find that Petitioner's testimony at the §19(b) hearing lacks credibility regarding the nature of the December 2013 fall at home. Although Petitioner testified that she merely missed one step and fell straight down on her buttocks, no more than "bumping" her right shoulder against the wall, she nevertheless admitted that her right shoulder continued to bother her nearly a month later and that she made an appointment with an orthopedic surgeon specializing in shoulder treatment. We further note that the records of Dr. Izquierdo's office fail to corroborate Petitioner's testimony. The records do not reflect that Petitioner merely "missed a step" and landed directly on her buttocks, or that she only had slight "soreness" but was urged by her son in physical therapy school to have it checked out.

The evidence supports Dr. Atluri's belief that subsequent to the fall at home, Petitioner was mostly likely experiencing right shoulder symptoms outside of and unrelated to her work duties prior to January 18, 2014. On direct examination, Petitioner testified to only three days of work between the fall at home in mid-December 2013 and the January 18, 2014 alleged accident, which in fact occurred on her first day of work since the end of December. Despite working significantly less than her usual part-time schedule during the period between mid-December 2013 and January 18, 2014, Petitioner's shoulder symptoms apparently bothered her to the point of making an appointment with a shoulder specialist. Dr. Izquierdo testified that he relied on Petitioner's history that she was "worse" after repetitively adjusting a patient in bed on January 18, 2014, but he agreed that he did not know how many days Petitioner worked prior to the

alleged accident.

Finally, nowhere in Petitioner's accident report or the medical histories did Petitioner delineate a specific episode of sudden or significant pain while lifting a particular patient on January 18, 2014. Instead, Petitioner reported a repetitive-type injury on January 18, 2014. Only at arbitration did Petitioner testify that she had a specific recollection of a moment in time where she felt a sharp stabbing pain while performing one movement at work. She further testified that at that moment she became unequivocally aware that she injured her right shoulder, and the pain she felt as she continued working the remainder of her shift and the following day was "different" and not like the sudden pain of the injury. As previously noted, Dr. Izquierdo testified that after considering all of the information available to him, including the objective evidence and Petitioner's history, he could not opine within a reasonable degree of medical certainty that the work activities on January 18, 2014 caused or permanently aggravated Petitioner's shoulder condition. He testified that he would modify the general causation statement in his examination record from February 3, 2014 when he was confronted at deposition with the known facts, including those from his own records. In Petitioner's presence, Dr. Izquierdo testified that if Petitioner's history was different in that she recalled a specific occurrence of sudden and severe pain with activity his opinion could change. Furthermore, Dr. Izquierdo agreed that the fall at home in December 2013 could have caused or completed a rotator cuff tear, and his testimony proves that he was unaware Petitioner had only worked three days in a month between mid-December and January 18, 2014. We find that Petitioner's subsequent testimony at arbitration gives a strong indication that an effort was made to closely conform to the doctors' reasoning in order show causation. We do not find Petitioner's testimony to be credible and it is not supported by the medical records or the expert opinions in this case.

In conclusion, we find that Petitioner failed to prove she sustained a compensable work accident on January 18, 2014 and failed to prove by the credible medical evidence that her right shoulder condition is causally related to the alleged work injury on that day. Therefore, we reverse the decision of the arbitrator and vacate the arbitrator's award of temporary total disability benefits and medical expenses.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed February 17, 2015 is hereby reversed.

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

DATED: MAR 16 2016
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46

Ruth W. White

Joshua D. Luskin

Charles J. DeVriendt