

ILLINOIS WORKERS' COMPENSATION COMMISSION
DECISION SIGNATURE PAGE

Case Number	20WC001292
Case Name	Tim Menefee v. City of Peoria
Consolidated Cases	
Proceeding Type	19(b-1) Petition Remand Arbitration
Decision Type	Arbitration Decision
Commission Decision Number	
Number of Pages of Decision	35
Decision Issued By	Bradley Gillespie, Arbitrator

Petitioner Attorney	Stephen Kelly
Respondent Attorney	Adam Casson, Kevin Day

DATE FILED: 5/22/2023

/s/ Bradley Gillespie, Arbitrator

Signature

STATE OF ILLINOIS)
)SS.
COUNTY OF Rock Island)

<input type="checkbox"/>	Injured Workers' Benefit Fund (§4(d))
<input type="checkbox"/>	Rate Adjustment Fund (§8(g))
<input type="checkbox"/>	Second Injury Fund (§8(e)18)
<input checked="" type="checkbox"/>	None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b-1)

Tim Menefee
Employee/Petitioner
v.

Case # **20 WC 001292**

Consolidated cases: _____

City of Peoria
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. Petitioner filed a *Petition for an Immediate Hearing Under Section 19(b-1) of the Act* on **12/28/22**. Respondent filed a *Response* on **1/19/23**. The Honorable **Bradley Gillespie**, Arbitrator of the Commission, held a pretrial conference on **1/11/23**, and a trial on **5/10/23**, in the city of **Rock Island**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, **6/3/19**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **\$64,410.84**; the average weekly wage was **\$1,23867**.

On the date of accident, Petitioner was **56** years of age, *married* with **0** dependent children.

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

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

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

ORDER

- Petitioner sustained an accident that arose out of and in the course of the employment of the Respondent on June 3, 2019.
- Petitioner's condition of ill-being was causally related to the work injury of June 3, 2019.
- Respondent shall pay all reasonable, necessary and causally related medical and hospital bills, from the date of the injury through the time of trial according to Section 8(a) and 8.2 of the Act.
- Respondent shall pay Petitioner temporary total disability benefits of \$825.77/week for 31 5/7 weeks, commencing January 20, 2021, through August 30, 2021, as provided in Section 8(b) of the Act.
- Respondent shall authorize and pay for the prospective medical care recommended by Dr. Crosby.

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

RULES REGARDING APPEALS Unless a party 1) files a *Petition for Review* within 30 days after receipt of this decision; and 2) certifies that he or she has paid the court reporter \$ **1,538.80** or the *final* cost of the arbitration transcript and attaches a copy of the check to the *Petition*; and 3) perfects a review in accordance with the Act and Rules, then this decision shall be entered as the decision of the Commission.

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

Bradley D. Gillespie

Signature of Arbitrator

May 22, 2023

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

TIM MENELEE,)
)
 Petitioner,)
)
 v.) **Case No: 20WC001292**
)
 CITY OF PEORIA,)
)
 Respondent.)
)

19(b-1) DECISION OF THE ARBITRATOR

I. Alleged Accident, Claim for Compensation, and 19(b-1) Petition

On or about January 9, 2020, Tim Menefee [hereinafter “Petitioner”] filed an Application for Adjustment of Claim alleging injuries to his left shoulder on June 3, 2019, after attempting to start a gas-powered blower while working for the City of Peoria [hereinafter “Respondent”]. (Arb. T. pp.153-154). On December 28, 2022, Petitioner filed a Petition for Immediate Hearing Under Section 19(b-1) of the Act. Therein, Petitioner alleged he was unable to work due to his work-related injuries and was not receiving appropriate temporary benefits or medical benefits. On May 10, 2023, the parties proceeded to hearing on said Petition in Rock Island, Illinois. (Arb. Ex. 1). The following issues were in dispute at arbitration:

- Causal Connection;
- Petitioner’s Earnings;
- Medical Expenses;
- Temporary Total Disability Benefits;
- Temporary Partial Disability Benefits; and
- Prospective Medical Treatment

II. Section 19(b-1) Hearing Testimony

A. Testimony of Ed Hopkins

Ed Hopkins, Respondent’s Senior Human Resources Specialist, was called as an adverse witness by Petitioner. As part of his job duties, Mr. Hopkins manages or oversees workers’ compensation claims filed by Respondent’s employees. (Arb. T. pp. 24-25). At the time of arbitration, Mr. Hopkins had been an employee of Respondent for approximately nineteen (19) years. Prior to his employment with Respondent, Mr. Hopkins obtained a degree in environmental biology from Eastern Illinois University. He also served in the Air National Guard for twenty-one (21) years, retiring at age thirty-eight (38). Prior to becoming the Senior Human Resources Specialist, Mr. Hopkins worked in environmental health for the State of Illinois and Peoria County. (Arb. T. pp. 87-88).

Over objections from Respondent's counsel, Mr. Hopkins provided testimony regarding meetings between City of Peoria representatives, Respondent's third-party workers' compensation adjuster, and OSF Occupational Health employees, namely Dr. Edward Moody and Nurse Case Manager Jessica Kelly. (Arb. T. pp. 27-40). Mr. Hopkins acknowledged meeting participants would discuss coordination of care for injured workers, including Petitioner. (Arb. T. pp. 27-43).

Mr. Hopkins went on to acknowledge Petitioner injured his left shoulder on June 3, 2019, and received medical treatment from Dr. Lawrence Li, including two (2) surgeries. (Arb. T pp. 43-44). Petitioner continued working for Respondent after the injury until his first left shoulder surgery in December of 2019. Mr. Hopkins also acknowledged Petitioner did not work between his first and second surgeries, due to the restrictions implemented by Dr. Li. He further agreed Petitioner underwent physical therapy after the second surgery at the direction of Dr. Li and was still under Dr. Li's care leading up to December of 2020. (Arb. T. pp. 44-45).

Mr. Hopkins acknowledged Petitioner's work restrictions from Dr. Li could have been discussed in a December 2020 meeting with OSF Occupational Health. He was unaware of whether OSF Occupational Health possessed a valid medical authorization from Petitioner after June of 2020. Mr. Hopkins agreed he relied upon Dr. Moody's opinions regarding Petitioner's ability to work at times throughout his claim. (Arb. T p. 45).

Mr. Hopkins stated he would not dispute Dr. Li's records regarding Petitioner's treatment and work restrictions from Dr. Li in January of 2021. (Arb. T pp. 47-50). He testified Petitioner worked for Respondent in the Public Works Department as a Maintenance Worker. (Arb. T p. 48). He also stated he testified at a hearing involving a labor grievance involving Petitioner. At the hearing, Mr. Hopkins provided testimony regarding Petitioner's job duties as a maintenance worker. *Id.*

Mr. Hopkins acknowledged Dr. Edward Moody placed permanent work restrictions on Petitioner, stating he could not return to work as a Maintenance Worker for Respondent. (Arb. T. pp. 49-50). He further agreed, on January 12, 2021, Respondent's attorney provided documents to OSF Occupational Health and asked Dr. Moody to review them and assess Petitioner's work status. Mr. Hopkins agreed Dr. Moody issued a letter stating Petitioner couldn't return to work as a Maintenance Worker, which Respondent relied upon for certain decisions. (Arb. T. pp. 51-56). He could not recall the specific work restrictions placed on Petitioner by Dr. Li and Dr. Nicholas Crosby in January 2021 or at the time of arbitration. (Arb. T. pp. 56-59).

Mr. Hopkins acknowledged he was aware Petitioner was examined by an orthopedic doctor, Dr. Brian Cole, who recommended a pain management referral. He also agreed Respondent subsequently requested a Section 12 examination with a pain management specialist. (Arb. T. pp. 59-60; 70-71).

Over Respondent's counsel's objection, Mr. Hopkins provided testimony concerning the facts leading-up to Petitioner's termination, which served as the basis for his labor grievance. (Arb. T. pp. 60-67). He then reaffirmed he would not dispute the records in evidence from Dr. Moody, Dr. Li, Dr. Crosby, and Dr. Cole. (Arb. T. pp. 67-77; 96-98). Mr. Hopkins testified a temporary

Maintenance Worker position was offered to Petitioner in June of 2021. (Arb. T. pp. 66-67). It was Mr. Hopkins understanding this job was offered based on a representation Petitioner could perform the unrestricted duties of a Maintenance Worker for Respondent. He affirmed it was his understanding as well that Respondent would have rehired Petitioner if he accepted the offer. (Arb. T. pp. 88-93). Based on his review of records in Respondent's possession, it was also Mr. Hopkins understanding Petitioner's base salary in the year preceding his accident was \$65,000.00. (Arb. T. pp. 93-94). He further agreed the records offered as Petitioner's Exhibit 16 were accurate. (Arb. T. pp. 98-100).

B. Testimony of Sie Maroon

Respondent's Deputy Director of Operations for the Public Works Department, Sie Maroon, was also called as an adverse witness by Petitioner. At the time of arbitration, Mr. Maroon had been the Deputy Director for eight (8) years and three (3) months. He testified he was indirectly Petitioner's boss, as there was a supervisor between them. (Arb. T. p. 106).

Mr. Maroon was aware of Petitioner's work injury in June of 2019 and his subsequent surgeries. When Petitioner returned to work in January of 2021, Mr. Maroon testified he was involved in the process. He acknowledged he then sent Petitioner home the next day. Mr. Maroon was aware Dr. Moody generated a report at that time stating Petitioner had permanent work restrictions. (Arb. T. pp. 106-109).

Mr. Maroon was also aware Petitioner exceeded one hundred and twenty (120) days of light duty while working for Respondent. (Arb. Tr. p. 109). He then testified regarding the process for employees providing work status notes, the process for assigning light duty work, and the documents and notes he maintains as a part of those processes. (Arb. T. pp. 110-115; 118-119).

Over Respondent's counsel's objection, Mr. Maroon acknowledged he attended meetings with OSF, Ed Hopkins, and department heads, which were held to provide updates on the status of care of injured workers, including Petitioner. (Arb. T. pp. 119-122).

Mr. Maroon further testified overtime within the Public Works Department is primarily based on seniority. (Arb. T. pp. 214-215). Mr. Maroon stated overtime within the Public Works Department was only mandatory during storm or weather-related events, like a snowstorm or flood. This mandatory overtime would consist of twelve-hour shifts during a large storm or flood. According to Mr. Maroon, any overtime not performed during a storm or weather-related event would be voluntary pursuant to a seniority-based overtime scheduling system. (Arb. T. pp. 214-215). Based on his long tenure with Respondent and understanding of these types of weather-related events, Mr. Maroon testified the weather-dependent overtime would not be regularly scheduled. (Arb. T. p. 215).

C. Testimony of David Haste

David Haste testified on behalf of Petitioner. Mr. Haste worked for Respondent in the Street, Sewer, and Forestry Departments, until he retired in 2016. He knew Petitioner and felt he was a hard worker and truthful. (Arb. T. pp. 127-129). Mr. Haste was in charge of street

maintenance during his employment with Respondent. He acknowledged Petitioner also worked in that department and it was heavy-duty work. In Mr. Haste's opinion, an individual with work restrictions would not be able to perform the work. (Arb. T. pp. 129-131).

D. Testimony of Jessica Kelly

Over the objections of Respondent's counsel and in-house counsel from OSF, Vince Boyle, Jessica Kelly was called as an adverse witness by Petitioner. At the time of arbitration, and subsequent to Petitioner's work accident, Ms. Kelly was the Nurse Case Manager for OSF Occupational Health. She acted as a liaison between OSF and employers. She facilitated appointments, documentation, and communication regarding medical care. (Arb. T. pp. 134-135; 142-146).

Over additional objections from Respondent's counsel and in-house counsel from OSF, Ms. Kelly testified she helped coordinate meetings between representatives of Respondent and OSF. (Arb. T. pp. 140-141; 146-149). She testified these meetings ended at some point. (Arb. T. pp. 146-148). She also coordinated documentation and treatment updates between OSF and Dr. Li's office. (Arb. T. pp. 142-143).

E. Testimony of Petitioner

Petitioner testified he was employed as a maintenance worker for Respondent when the accident occurred in June 2019. (Arb. T. p. 151). He classified his position as heavy work. He was able to perform his job leading up to June 3, 2019, without any medical restrictions or medical treatment for his left shoulder. (Arb. T. pp. 152-153).

On June 3, 2019, he and his crew were working downtown Peoria. He was trying to start a gas-powered blower when he injured his left shoulder. He reported it to the Lead Painter, Gordon Crow. On June 4, 2019, he went to Dr. Edward Moody at OSF Occupational Health. (Arb. T. pp. 153-155). After meeting with Dr. Moody, he returned to work with restrictions. (Arb. T., pp. 155-156).

According to Petitioner, Dr. Li conducted an MRI of the left shoulder around June 18, 2019. Dr. Li gave him the option of surgery and physical therapy. Work restrictions were provided at that time, which included no lifting, pushing, and pulling over chest with his left arm. Per Dr. Li's direction, he went to physical therapy from June 20, 2019, to July 16, 2019. (Arb. T. pp. 157-158).

Petitioner then followed up with Dr. Li on July 18, 2019. They decided to do an injection, which eventually wore off. He then continued physical therapy until his first left shoulder surgery on December 10, 2019. After surgery, Dr. Li took him off work. Petitioner clarified he was working in a light duty capacity prior to the surgery. (Arb. T. pp. 158-161).

Petitioner testified he attended physical therapy after the first surgery through the middle of February 2020. He followed-up with Dr. Li on February 11, 2020, and Dr. Li told him he had

adhesive capsulitis in his left shoulder. Dr. Li administered another steroid injection and kept him off work. (Arb. T. pp.161-163).

He continued physical therapy through March of 2020 and returned to Dr. Li on March 11, 2020. At that time, his shoulder was not getting better, so Dr. Li recommended a left arthroscopic shoulder surgery. The surgery was performed on April 7, 2020. After the surgery, he remained off work. Petitioner continued physical through July of 2020. On August 10, 2020, Dr. Li recommended a left shoulder MRI. (Arb. T pp. 163-166).

Dr. Li then referred Petitioner to Dr. Brian Cole at Midwest Orthopedics at Rush in September of 2020 to address pain relief. Dr. Cole recommended a pain management consultation. Petitioner then attended an independent medical examination at the request of Respondent. (Arb. T. pp. 166-167).

Dr. Li ultimately referred him to Dr. Nicholas Crosby at the Indiana Shoulder Center, who recommended a nerve test. He then went to a separate facility and received an injection in his left shoulder. (Art. T pp. 168-169).

Petitioner testified Dr. Crosby eventually recommended a third shoulder surgery. According to Petitioner, he would proceed with this surgery, if he could afford it. He stated Respondent did not authorized the surgery. According to Petitioner, Dr. Li, Dr. Crosby, and Dr. Moody still had him on work restrictions at the time of arbitration. (Arb. T pp. 169-170).

Petitioner testified he returned to work at Respondent's request in January of 2021. He went back to work but was sent home the next day. In late January of 2021, he was informed he was being terminated. Petitioner testified he couldn't physically do the job Respondent offered him in June 2021. (Arb. T. pp. 171-172).

According to Petitioner, at the time of the labor grievance hearing, he was still being recommended for surgery by Dr. Crosby. He hadn't seen Dr. Li for some time by then, but he had not been released by him or Dr. Cole. (Arb. T. pp. 173-174).

Petitioner testified his workers' compensation temporary benefits were terminated around January 19, 2021. He affirmed he was seeking off-work benefits from January 9, 2021, to August 30, 2021, at arbitration. (Arb. T. pp. 174-175). Petitioner started working for MPSI on August 31, 2021. He testified that income does not substitute the money he made from Respondent while he was off work. (Arb. T. p. 175). He also has a business called Precision Products and Coatings, which is not supporting itself. It was never intended to supplement the income he lost while working for Respondent. The work he is doing for the business and MPSI does not exceed the restrictions placed on him by Dr. Li. (Arb. T. pp. 175-176).

Petitioner testified he tried to drive his friend's dump truck for three (3) hours, because his friend was looking for help. He stopped after three (3) hours due to a lot of pain in his left shoulder. (Arb. T. pp. 176-177). He also acknowledged he performs mowing at his commercial property but does not exceed the restrictions placed on him by Dr. Li. (Arb. T. p. 178).

At the time of arbitration, Petitioner was having pain in his left shoulder. He often can't get comfortable and doesn't sleep well. He also testified he gets fatigued and doesn't have the strength he did before his accident. According to Petitioner, if the surgery recommended by Dr. Crosby is authorized by Respondent, he would have it immediately, assuming he still met the criteria. (Arb. T pp 179-180).

On cross-examination, Petitioner acknowledged Respondent paid him all of the temporary benefits he was owed from the date of accident through January 19, 2021. (Arb. T p. 183-184). He further acknowledged Respondent authorized all medical treatment from his date of accident through January 12, 2021, when his therapy ended. (Arb. T pp. 184-185).

Petitioner affirmed the testimony he gave during the labor grievance hearing on February 10, 2022, was true and accurate. (Arb. T p. 182). He then recalled a left shoulder injection procedure he underwent on July 30, 2021, which was recommended by Dr. Crosby. Petitioner testified he got significant relief from the procedure. (Arb. T. pp. 185-188). He used a credit card to pay for this procedure. (Arb. Tr. pp. 208-209).

Petitioner was then asked, "You got such good relief, you felt you could return to your full, unrestricted job duties at the City of Peoria as a maintenance worker; correct?" To which he replied, "No." (Arb. T. p. 188).

He was then asked, "Do you recall during the grievance arbitration being asked, is it your testimony that you can perform full function as a maintenance worker with no modifications regarding your left arm [as of February 10, 2022]?" Petitioner recalled this question. However, when asked, "Do you recall your answer being, quote, 'I believe that given the opportunity, yes, I can,'" Petitioner stated he believed his testimony was actually "I'd like to opportunity to try." (Arb. T. pp. 188-189).

Petitioner was then directed to his sworn labor grievance arbitration testimony, specifically page 196, line 18 of Petitioner's Exhibit 12. After reviewing his prior testimony, Petitioner then affirmed, on February 10, 2022, he testified he could perform his full functions as a maintenance worker with no modifications regarding your left arm. (Arb. T. pp. 188-189).

Additionally, after reviewing additional labor grievance arbitration testimony on pages 196 and 197 of Petitioner's Exhibit 12, Petitioner affirmed, on February 10, 2022, he stated he felt he could perform the full functions of a maintenance worker with no modifications for his left arm due to success of the left shoulder injection procedure. (Arb. T. pp. 189-190).

Petitioner then testified he had no left shoulder pain following the injection procedure for "a day or two." He did not recall having no left arm pain as of February 10, 2022. He also did not recall stating, as of February 10, 2022, he had no intention of proceeding with the surgery recommended by Dr. Crosby. (Arb. T. pp. 190-191). Petitioner testified, "I believe [on February 10, 2022] I didn't have [the surgery] scheduled." (Arb. T. p. 191).

Petitioner was then redirected to his grievance arbitration testimony, specifically page 185 of Petitioner's Exhibit 12. He then acknowledged, on February 10, 2022, he testified, "No, sir." when asked whether he "was still trying to get the third surgery." (Arb. T. pp. 191-192).

Petitioner then acknowledged, on February 10, 2022, he testified he'd "gotten a lot stronger after [his] last procedure" and "I believe I can" do all work required of a maintenance worker with his left arm." (Arb. T. pp. 191-192).

He further acknowledged he utilized his wife's group health insurance through the Illinois Department of Transportation for in-network procedures in July of 2022.

Petitioner went on to discuss his current part-time employment with MPSI. (Arb. T. pp. 193-203). He carries a firearm in his job with MPSI, performing armed carrier services for the deposits from a cannabis dispensary. He carries the bags of money with his right hand, not his left hand. He drives to the dispensary, the money is placed in the vehicle, then he goes to the bank. (Arb. T. pp. 193-196). He'd been a fill-in for MPSI from August 31, 2021, to the time of arbitration, sometimes working 2-3 weeks in a row before not working for a period. He is paid a flat rate of \$200.00 if he's a rider. As a driver, his pay is based on a formula since they're driving their own vehicle. (Arb. T. pp. 197-198)

From August 31, 2021, through February 13, 2022, he received about \$5,200.00, or about \$1,000.00 a month, in his employment with MPSI. (Arb. T. pp. 199-200). Without looking at a spreadsheet his wife prepared, he cannot say how much he was paid by MPSI from February 15, 2022, to the time of arbitration. (Arb. T. pp. 200-202).

He told MPSI about his left shoulder when they originally reached out to him. He told them he didn't feel he could adequately protect his partner, so held off for a bit. However, eventually, he felt he could perform his job duties, which could require confrontational situations and firearm use from August 2021 to the time of arbitration. (Arb. T. pp. 203-204).

III. Petitioner's Medical Treatment

Voluminous medical evidence was submitted by the parties at arbitration addressing Petitioner's medical treatment. Having reviewed said evidence, the Arbitrator makes the following factual findings with regard to the medical treatment relevant to Petitioner's Petition for Immediate Hearing Under Section 19(b-1) and the conclusions of law set forth herein.

On June 4, 2019, Petitioner was seen at OSF Occupational Health by Dr. Edward Moody. Petitioner reported he injured his right shoulder on June 3, 2019, while attempting to start a gas-powered leaf blower that required repetitive pulling. After he attempted this, he had intense pain in his anterior shoulder and proximal left biceps. The pain continued and interfered with his sleep. Dr. Moody assessed the injury as a left shoulder rotator cuff injury. Work restrictions of no overhead use and no use of the arm away from the body, maximum arm-hand force of one (1) pound, paperwork only for left arm, and no work in areas where use of one arm compromises safety. Petitioner was scheduled for a follow up appointment in one week. (Pet. Ex. 1).

Petitioner followed-up with Dr. Moody on June 10, 2019. Petitioner noted he continued to have left shoulder pain that interferes with sleep and continued to have pain with abduction. An MRI was ordered of the left shoulder. Work restrictions of no overhead use, no use of the arm away from the body, and maximum arm-hand force of five (5) pounds was set in place. (Pet. Ex. 1).

On June 18, 2019, Petitioner was seen by Dr. Lawrence Li at Orthopedic and Shoulder Center. Petitioner noted a dull, sharp, and aching pain with moderate pain intensity. He also noted he has difficulty with reaching, raising his arm, and reaching out to the side. An ultrasound was performed by Dr. Li on Petitioner's left shoulder and bicep area. Dr. Li's diagnosis was a left shoulder rotator cuff tear from a traction injury and Petitioner may have injured his labrum, biceps, and strained his left AC joint. An MRI was recommended with a follow-up appointment to determine treatment. (Pet. Ex. 2).

A multiplanar multisequence MRI of the left shoulder was performed by Dr. Li on June 18, 2019, by Dr. Li. The general impression from the MRI was a grade 2 strain/partial-thickness tear of the infraspinatus muscle and tendon near the myotendinous junction, tendinosis and multifocal partial-thickness tears of the distal supraspinatus and infraspinatus tendons, mild tendinosis of the long head of the bicep tendon, possible degeneration and/or tear of the posterior superior labrum, and moderate acromioclavicular degenerative joint disease. (Pet. Ex. 2).

Petitioner began physical therapy with Traci Kissinger at Orthopedic and Shoulder Center on June 20, 2019. Petitioner's Exhibit 2 discusses Petitioner's course of physical therapy from June 20, 2019, through November 25, 2019. (Pet. Ex. 2).

Petitioner was seen by Dr. Lawrence Splitter at OSF Occupational Health on June 20, 2019. Dr. Splitter indicated the MRI demonstrated a grade 2 strain/partial thickness tear of the infraspinatus muscle and tendon near the myotendinous junction as well as the supraspinatus tendon. Mild tendinosis of the long head of the biceps tendon, possibility of degeneration and/or tear of the posterior superior labrum, and moderate acromioclavicular degenerative joint disease was also noted. Left shoulder restrictions of no pushing, pulling, or lifting above chest level were ordered. (Pet. Ex. 1).

Petitioner was seen by Dr. Moody at OSF Occupational Health on July 25, 2019. Petitioner indicated overall improvement. No overhead work restrictions were ordered. Dr. Moody indicated improving left rotator cuff partial thickness tear. Left shoulder restrictions include no pushing, pulling, or lifting above chest level. (Pet. Ex. 1).

Petitioner had a follow up appointment with Dr. Moody on August 22, 2019. Petitioner reported left shoulder pain that has been worsening and he has plateaued with physical therapy. Petitioner is discussing having another steroid injection with the orthopedist, and then possible surgery in mid to late November. Dr. Moody left Petitioner on the current work restrictions of no pushing, pulling, or lifting above chest level. (Pet. Ex. 1).

Petitioner's final physical therapy session prior to his first surgery was on November 25, 2019, with PT Kissinger. PT Kissinger reported Petitioner was more guarded as compared to previous sessions. Petitioner is scheduled for surgery on December 10, 2019. (Pet. Ex. 2).

On December 10, 2019, Petitioner underwent a left shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, excision of distal clavicle, extensive debridement of tenosynovitis glenohumeral joint and subpectoral biceps tenodesis. Surgery was performed by Dr. Li at Ireland Grove Center for Surgery. (Pet. Ex. 5).

Petitioner began a second course of physical therapy at Orthopedic and Shoulder Center on December 12, 2019. Physical therapy was recommended 2-3 times per week for 20-24 weeks. Petitioner's Exhibit 2 discusses Petitioner's course of physical therapy from December 12, 2019, through March 11, 2020. (Pet. Ex. 2).

Petitioner was seen by Dr. Moody on February 17, 2020. Petitioner reported he underwent left shoulder surgery on December 10, 2019. Dr. Moody reported with some effort, Petitioner was able to abduct the left shoulder 90 degrees and can internally rotate to bring his thumb to his left hip. Dr. Moody order work restrictions of no operation of commercial or industrial vehicles, and no use of the left arm. (Pet. Ex. 1).

Petitioner had a follow up appointment with Dr. Moody on March 5, 2020. Petitioner indicated he failed to progress with range of motion in physical therapy. Dr. Moody reported Petitioner actively abducts the left shoulder 80 degrees, range of motion of the left elbow 5 to 120 degrees, and passive abduction of the left shoulder is congruent with active range of motion. Dr. Moody noted Petitioner's left shoulder abduction is worse than the prior examination. The same work restrictions were ordered. (Pet. Ex. 1).

On April 7, 2020, Petitioner underwent a left shoulder arthroscopy with extensive debridement, arthroscopic lysis of adhesions and manipulation. Surgery was performed by Dr. Li at Ireland Grove Center for Surgery. Dr. Li indicated Petitioner had developed adhesive capsulitis post rotator cuff repair. (Pet. Ex. 5).

Petitioner began a third course of physical therapy at Orthopedic and Shoulder Center on April 8, 2020. Petitioner demonstrated signs and symptoms consistent with post-op status, including deficits in left shoulder, range of motion/flexibility, strength, joint mobility, postural awareness, pain, edema, and activity tolerance. It was noted Petitioner would benefit from skilled PT to address current deficits and to return Petitioner to full functional mobility. Petitioner is recommended to perform PT five (5) times per week for two (2) weeks, and then two to three (2-3) times per week for four to six (4-6) weeks. Petitioner's Exhibit 2 discusses Petitioner's course of physical therapy from April 8, 2020, through September 4, 2020. (Pet. Ex. 2).

At Petitioner's physical therapy session on April 15, 2020, Petitioner reported moderate soreness from the previous session. Petitioner was too sore to use the CPM machine. No complaints were presented at the end of the session. (Pet. Ex 2).

At Petitioner's physical therapy session on May 1, 2020, Petitioner demonstrated significantly improved passive external rotation since the last therapy session. Petitioner reported good pain reduction with IFC. (Pet. Ex 2).

Petitioner attended a physical therapy session on May 11, 2020, and reported he "is not terribly pleased with my progress." Gradual increase in range of motion was reported on the CPM machine. Moderate or moderate to severe limitation was indicated on all functional activities. Petitioner showed significant improvements in objective measurements from the previous session. Petitioner continues to exhibit deficits in left shoulder AROM, strength, joint mobility, postural awareness, pain, and activity tolerance. (Pet. Ex 2).

Petitioner exhibited fairly good shoulder range of motion with minimal deficits at the physical therapy session on May 13, 2020. Petitioner displayed good tolerance with exercises. (Pet. Ex 2).

On May 13, 2020, Petitioner was seen by Dr. Li at Orthopedic and Shoulder Center. Dr. Li indicated Petitioner is making slow progress in therapy. Mild swelling in the left shoulder was noted. During Petitioner's shoulder examination, Dr. Li noted strength testing of 4/5 supraspinatus and external rotation. Petitioner's range of motion was active flexion: 150; active abduction: 120; active ER: 40; Active IR: L5; passive flexion: 170; passive abduction: 160; and passive ER: 85. Dr. Li performed an ultrasound on the left shoulder which showed the rotator cuff and subpectoral biceps appeared intact. Petitioner was ordered to remain off work and follow up in four weeks. (Pet. Ex 2).

On May 18, 2020, Petitioner was seen by Dr. Moody as OSF Occupational Health. Petitioner reported since his prior visit, he underwent left shoulder arthroscopic debridement scar tissue on or about April 7, 2020, by Dr. Li. Petitioner reported he has been in physical therapy. Dr. Moody indicated Petitioner was at 85 to 90 degrees of left shoulder abduction. Dr. Moody ordered no work until the next appointment and expects Petitioner to return to at least light duty. (Pet. Ex. 1).

Petitioner was seen by Dr. Li on June 10, 2020. Petitioner indicated he was making very slow progress but is making progress. Dr. Li inspected Petitioner's left shoulder and noted strength testing of 4/5 supraspinatus and 5/5 external rotation. Petitioner's range of motion was active flexion: 170; active abduction: 160; active ER: 80; Active IR: L5; passive flexion: 170; passive abduction: 170; and passive ER: 90. An ultrasound was performed and showed the supraspinatus tendon appeared with tendinosis changes noted to the bursal aspect of the distal insertion. A cortisone injection would be scheduled to relieve some of Petitioner's current discomfort. (Pet. Ex 2).

Petitioner was seen by Dr. Moody on June 16, 2020. Petitioner reported frustration with lack of progress in his left shoulder. Examination of the left shoulder was limited due to postoperative status. Petitioner was able to abduct the left shoulder 145 degrees. Dr. Moody indicated Petitioner's left shoulder abduction has improved significantly compared to his last visit. Petitioner still have a significant internal rotation deficit but appears to be making progress with strength training in therapy. Dr. Moody ordered no working until next appointment. (Pet. Ex 1).

Petitioner was seen by Dr. Li on July 8, 2020. Petitioner indicated he has regained his motion and still has pain that limits left shoulder strength and the ability to pick things up. Dr. Li examined the left shoulder and reported strength testing of 4/5 supraspinatus and external rotation. Petitioner's range of motion was active flexion: 175; active abduction: 170; active ER: 85; Active IR: L4; passive flexion: 180; passive abduction: 175; and passive ER: 90. An ultrasound was performed and showed the supraspinatus tendon appears with thickening noted to the bursal aspect of the distal insertion. (Pet. Ex. 2).

Petitioner was seen by Dr. Li on August 5, 2020. Petitioner reported he continued to gain strength and good range of motion but still continued to have pain. Petitioner's range of motion was active flexion: 175; active abduction: 170; active ER: 85; Active IR: L4; passive flexion: 180; passive abduction: 170; and passive ER: 95. An ultrasound was performed and showed thickening to the bursal aspect of the supraspinatus distal insertion with fraying. An MRI was ordered and follow up appointment was scheduled. (Pet. Ex. 2).

On August 8, 2020, Petitioner underwent an MRI of the left shoulder due to continued pain and limited range of motion. The MRI found a signal void corresponding to postsurgical changes of prior rotator cuff repair. No evidence of a recurrent full thickness tear was found. (Pet. Ex. 2).

Petitioner was seen by Dr. Li on August 10, 2020, for a follow up for Petitioner's MRI. Dr. Li reported the MRI showed no evidence of a recurrent full thickness tear. Upon examination of the left shoulder, Dr. Li reported Petitioner's range of motion was active flexion: 175; passive flexion: 180; active abduction: 170; passive abduction: 170; active ER: 85; passive ER: 90; and Active IR: L4. Dr. Li scheduled a cortisone injection, and continued Petitioner in physical therapy. (Pet. Ex. 2).

Petitioner received a Kenalog/Lidocaine 40mg injection on August 12, 2020. (Pet. Ex. 2).

Petitioner attended a physical therapy session on August 18, 2020, where he reported continued pain and opined the cortisone injection did not help. (Pet. Ex. 2).

Petitioner had a physical therapy session at Orthopedic and Shoulder Center on September 1, 2020. Petitioner reports his shoulder is doing worse. During range of motion testing, Petitioner's left shoulder AROM flexion was 150 degrees, abduction was 146 degrees, ER was 70 degrees and IR was 35 degrees. Slow and shaky was indicated next to flexion, abduction, and ER. Petitioner's right shoulder AROM flexion was 162 degrees, abduction was 168 degrees, ER was 97 degrees, and IR was 62 degrees. The overall assessment was Petitioner was progressing slowly with strength and continues to have significant pain that does not respond to therapeutic modalities. (Pet. Ex. 2).

Petitioner had a physical therapy session at Orthopedic and Shoulder Center on September 4, 2020. Petitioner reported his pain continued to worsen and the pain medication isn't working. Petitioner noted the prone extension isn't nearly as painful, and isn't sore at all while performing the exercise, but pain returns upon stopping. (Pet. Ex. 2).

Petitioner was seen by Dr. Li on September 8, 2020. Petitioner indicated his pain is unchanged and that the injection as well as therapy did not make a big difference. During the shoulder examination, Dr. Li noted Petitioner experienced a pain increase with active abduction at 90 degrees and then the pain subsides. Dr. Li reported Petitioner is still having pain despite MRI showing no evidence of a recurrent full-thickness tear. Dr. Li recommended a referral to Dr. Brian Cole for a second opinion. (Pet. Ex. 2).

On September 28, 2020, Petitioner was seen by Dr. Brian Cole at Midwest Orthopedics at Rush. Petitioner reported the pain is nearly constant and still cannot lift his arm over his head. An x-ray was performed on the left shoulder which Dr. Cole noted the results were normal. Dr. Cole also reviewed the August 10, 2020, MRI and noted it also appeared to be normal. After reviewing Petitioner's shoulder, Dr. Cole reported he is uncertain of the exact cause of Petitioner's pain. Dr. Cole suggested the chronically painful shoulder "may not be an orthopedic anatomical issue that can be addressed surgically." Dr. Cole recommended a pain management consultation for alternative measures to be considered. Dr. Cole also noted on the Quick Report that Petitioner is able to work but did not consider Petitioner to be at MMI given the need for a pain management consult. (Pet. Ex. 7).

Petitioner was seen by Dr. Moody as OSF Occupational Health on November 25, 2020. Petitioner reported he is no longer in physical therapy, and he gets some tingling in his left third and fourth fingers that appears to be position/activity dependent. Dr. Moody reported Petitioner is able to abduct the left shoulder 90 degrees, passive abduction was equal to active, and no gross tandem motion of the scapula. Dr. Moody noted Dr. Cole's suspicion for an alternative pain generator is certainly reasonable, given the delayed recovery. Dr. Moody ordered work restrictions of light duty if available with limited use of the left upper extremity. (Pet. Ex. 1).

Petitioner had an occupational therapy appointment on December 8, 2020, at Orthopedic and Shoulder Center. Petitioner indicated his left shoulder is still painful and reported numbness in the left hand when he does stretches at home. Petitioner demonstrated significant weakness to the left rotator cuff and the left peri scapular stabilizers. (Pet. Ex. 2).

Petitioner had an occupational therapy appointment at Orthopedic and Shoulder Center on December 21, 2020. Petitioner indicated he was still having a lot of pain in the shoulder, and it was not getting any better. Petitioner was able to perform his exercises but demonstrated weakness of the rotator cuff and fatigued quickly. (Pet. Ex. 2).

On January 5, 2021, Petitioner had an occupational therapy appointment at Orthopedic and Shoulder Center. Petitioner indicated pain at about an 8-9/10, and his shoulder seems to be getting worse. TOS provocation testing showed negative during Roos, Adson, and Costoclavicular maneuver, and positive during the Allen test. Petitioner reported severe tenderness to palpation over the anterior left shoulder, moderate tenderness to palpation over the left AC joint, and mild tenderness to the palpation over the left subacromial space. Petitioner was noted to be progressing slowly. (Pet. Ex. 2).

Petitioner's final occupational therapy appointment was on January 12, 2021. Petitioner indicated his pain was a 7-8/10 and his shoulder seems to be getting worse. Petitioner noted pain

at the AC joint during the cross-body adduction test, and mild numbness in the 4th digit at 20 seconds during the Category Cyriax release test. Petitioner was very limited with active left shoulder range of motion to all planes of motion activity. Petitioner demonstrated good passive range of motion of the left shoulder to all planes of motion. Weakness was still demonstrated by Petitioner in the left rotator cuff and left peri scapular stabilizers. (Pet. Ex. 2).

Petitioner had a follow up appointment with Dr. Li on January 14, 2021. Dr. Li noted there was no significant functional improvement in Petitioner's left shoulder. Petitioner still fatigued easily and had residual weakness. Petitioner indicated he still has pain when raising his arm in abduction. Dr. Li marked no bruising and full active range of motion for Petitioner's shoulder. Dr. Li opined the potential cause for Petitioner's weakness would be compression of the suprascapular nerve. Dr. Li recommended proceeding with getting an EMG/NCV to evaluate any neurologic cause to Petitioner's dysfunction and weakness. (Pet. Ex. 2).

Petitioner was seen by Dr. Edward Trudeau at Memorial Medical Center for an EMG on January 25, 2021. Dr. Trudeau agreed with Dr. Li's assessment of a suprascapular nerve entrapment. (Pet. Ex. 3).

On February 4, 2021, Petitioner had an appointment with Dr. Li for a follow up on Petitioner's EMG results. Petitioner indicated pain with active abduction. Pain increased during the visit with active abduction at 90 degrees and then it subsides. Dr. Li diagnosed Petitioner with a left shoulder rotator cuff repair with residual dysfunction due to suprascapular nerve entrapment. A referral was made to Indiana Hand to Shoulder Center for continued evaluation. (Pet. Ex. 2).

Petitioner was seen by Dr. Nicholas Crosby at Indiana Hand to Shoulder Center on June 9, 2021. Petitioner was diagnosed with carpal tunnel syndrome. Dr. Crosby noted he is concerned about Petitioner's left shoulder, but he is unsure if Petitioner's symptoms are related to suprascapular nerve compression. Dr. Crosby recommended a repeat nerve study to corroborate the findings of the suprascapular nerve compression as well an image-guided glenohumeral injection to evaluate for pain or to rule out pain, potentially intra-articularly. (Pet. Ex. 4).

A fluoroscopically guided left glenohumeral therapeutic injection was performed by Dr. Anthony Parr at Center for Diagnostic Imaging on July 30, 2021, with comparison on Petitioner's August 10, 2020, left shoulder MRI. Dr. Parr concluded: (1) technically successful fluoroscopically guided left glenohumeral therapeutic injection; and (2) Resolution of the patient's left shoulder pain and significantly improved range of motion following intra-articular injection of anesthetic and steroid. Petitioner reported a post-procedure pain level of zero out of ten (0/10) with significantly improved range of motion. (Pet. Ex. 4).

Petitioner had a second visit with Dr. Crosby at Indiana Hand to Shoulder Center on September 8, 2021. Dr. Crosby requested a new EMG study as he had concern for the existence of suprascapular nerve impingement. Dr. Crosby noted "it actually only showed a little bit of possible cervical radiculopathy and maybe some carpal tunnel syndrome, could not pick up the suprascapular nerve concern as it was specifically looked at." Petitioner reported the glenohumeral injection was extremely helpful for the first two days, and he had virtually no pain. His range of motion improved and felt very good for several weeks. Petitioner reported left shoulder symptoms

began to recur within the last week. Dr. Crosby and Petitioner discussed the possibility of doing a scope going into the joint and evaluating the structures and treating as necessary, including likely revision rotator cuff repair and a debridement and subacromial decompression with acromioplasty. Dr. Crosby stated, “I am encouraged that the injection helped significantly, although having 2 surgeries on this side, I am a little nervous about the ability to improve his pain. He wants to be functional. He wants to be back to normal use at work if he would choose to do so.” (Pet. Ex. 4).

Petitioner’s final visit to Dr. Li was on September 16, 2021. Dr. Li notes Petitioner “wants to go over the recommendations of Dr. Crosby who plans another arthroscopy and possible repair of the partial tears.” Dr. Li discussed with Petitioner Dr. Crosby’s findings. Dr. Li further notes “he will proceed with the surgery and we will handle the therapy per Dr. Crosby’s instructions.” (Pet. Ex. 2).

IV. Evidence Deposition Testimony

A. Deposition Testimony of Dr. Lawrence Li

Dr. Li is a board-certified orthopedic surgeon affiliated with OSF and Carle BroMenn in Bloomington, Illinois. (Pet. Ex. 11, p. 7). He is Petitioner’s treating physician. (Pet. Ex. 11, p. 8). Dr. Li said in his testimony in this case was given in reliance on his treating medical records. (Pet. Ex. 11, p. 28). Dr. Li testified his medical treatment records are summaries and relevant information related to a particular examination. *Id.*

Dr. Li provided treatment to Petitioner for the first time in December of 2016 (Pet. Ex. 11, p.8). He assessed him as having pain in the right shoulder *Id.* Petitioner was released from Dr. Li’s care regarding his right shoulder injury in May of 2018. *Id.* Dr. Li next saw Petitioner on June 18, 2019. *Id.* Dr. Li took a history of Petitioner at that time. *Id.* The history was Petitioner was pulling a backpack blower and had to pull it about five (5) times and felt a sudden pain in his left shoulder. (Pet. Ex. 11, p. 8-9). Petitioner reported he was having pain in his left shoulder, wasn’t getting any better, it hurt him to raise his arm, reach to the side, and it kept him up at night. *Id.*

Dr. Li stated the MRI performed on June 18, 2019, showed a partial tear of the posterior aspect of the supraspinatus tendon that measured about 2 centimeters by 1 centimeter. (Pet. Ex. 11, p. 8-9) The MRI also showed a partial tear of the subscapularis tendon which measured about 1.1 centimeters. (Pet. Ex. 11, p. 9). Dr. Li’s diagnosis was some large partial tears to the rotator cuff tendons in the left shoulder. (Pet. Ex. 11, p. 10). Dr. Li testified, “to a reasonable degree of medical certainty, that the June 3rd incident when he was pulling on the blower was a direct cause of his left shoulder rotator cuff tears.” (Pet. Ex. 11, p. 11).

Dr. Li provided additional testimony consistent with his other examinations of Petitioner. Surgery was performed by Dr. Li on December 10, 2019. (Pet. Ex. 11, p. 14-15). Dr. Li performed a left shoulder arthroscopy with rotator cuff repair, arthroscopic subacromial decompression, excision of distal clavicle, a debridement of all inflammation in the joint, and a subpectoral biceps tenodesis for labral tearing and biceps tearing. (Pet. Ex. 11, p. 15). Dr. Li confirmed the findings he saw on surgery on December 10, 2019, were consistent with what he saw in the MRI on June 18, 2019. (Pet. Ex. 11, p. 16). Dr. Li explained the post care treatment is to start with therapy, and therapy

could last between four to six months depending on the extent of the problem. *Id.* Dr. Li uses a Game Ready Vasopneumatic compression device for swelling, and a CPM machine to help decrease the risk of adhesive capsulitis, which Dr. Li admitted Petitioner developed and had treated. (Pet. Ex. 11, p. 16-17). Dr. Li testified all medical modalities used to treat Petitioner were reasonable, necessary, and essential to treating Petitioner's problems. *Id.*

When asked about Petitioner's tears in his rotator cuff, Dr. Li testified "they weren't the largest, but they were, I would say, moderate to large." (Pet. Ex. 11, p. 17). Dr. Li acknowledged he ordered an ultrasound on March 11, 2020, for the purpose of monitoring Petitioner's healing of the tendon. *Id.* Dr. Li also acknowledged Petitioner consistently participated in recommended physical therapy between his first surgery on December 10, 2019, and his second surgery on April 7, 2020. (Pet. Ex. 11, p. 18). Dr. Li acknowledged Petitioner was off work leading up to his second surgery on April 7, 2020. *Id.* On April 7, 2020, Dr. Li performed a left shoulder arthroscopy with debridement and lysis of the adhesions and manipulation on Petitioner. *Id.* Dr. Li testified Petitioner developed adhesions after the first surgery, which is common, but Petitioner's adhesions were too much, and he wasn't making any progress in therapy. (Pet. Ex. 11, p. 18-19). Dr. Li explained he used the same modalities on Petitioner for the second surgery as he did for the first surgery. (Pet. Ex. 11, p. 19). The main focus in therapy was to get Petitioner's range of motion and strength back. *Id.*

Dr. Li acknowledged a second MRI was ordered for Petitioner's left shoulder on August 10, 2020. (Pet. Ex. 11, p. 19-20). Dr. Li testified that the reason for the MRI "was because on the August 5th visit, we had determined that his range of motion was good but he was still having pain, and because of the persistent pain I recommended MRI to see if there was something on the MRI that would show us what's causing this pain." (Pet. Ex. 11, p. 20). Dr. Li testified his interpretation of the MRI result was consistent with postoperative changes and he did not see any full thickness tearing of the rotator cuff, tendon, or any disruption of the repair. *Id.* Dr. Li further stated as a result of no findings of additional structural causes, he treated Petitioner for pain due to inflammation, and recommended a cortisone shot and therapy. *Id.*

Dr. Li acknowledged the inflammation in Petitioner's left shoulder was related to the injury in June 2019, the subsequent surgeries and the treatment for the injuries. (Pet. Ex. 11, p. 20-21). Dr. Li further acknowledged the inflammation in the left shoulder can often cause pain. *Id.*

Dr. Li acknowledged he is still treating Petitioner today, and he kept Petitioner off work from August 2020 to January 2021. (Pet. Ex. 11, p. 21). On January 4, 2021, Dr. Li referred Petitioner for an EMG with Dr. Trudeau in Springfield, Illinois. (Pet. Ex. 11, p. 21-22).

Dr. Li testified the results of the EMG revealed Petitioner had a left suprascapular neuropathy, moderate in nature, which would explain the persistent pain. (Pet. Ex. 11, p. 22). The EMG also showed Petitioner had left median neuropathy at the carpal tunnel. *Id.*

Dr. Li next saw Petitioner on February 4, 2021. (Pet. Ex. 11, p. 23)., Dr. Li testified Petitioner indicated he continued to have pain with active abduction, and it was his complaint for several months. (Pet. Ex. 11, p. 24). Dr. Li concluded Petitioner had that pain and weakness due to the suprascapular nerve entrapment. (Pet. Ex. 11, p. 24-25). Dr. Li recommended a referral to

Indiana Hand to Shoulder Center for an evaluation. (Pet. Ex. 11, p. 25). Dr. Li opined the referral was related to the described work injury through the treatment Petitioner had undergone. *Id.*

Dr. Li testified he still has Petitioner off work at the time of the deposition, and Petitioner is not at maximum medical improvement. (Pet. Ex. 11, p. 26). Dr. Li testified “it’s my opinion, to a reasonable degree of medical certainty, that the injury that he suffered back in June of ’19 pulling on – pulling hard on a blower that was hard to start directly led to the subsequent treatment and the development of the suprascapular nerve injury.” (Pet. Ex. 11, p. 27). Dr. Li further testified all treatment provided was reasonable, necessary, and directly related to the June 2019 injury. *Id.*

On cross-examination, Dr. Li acknowledged he had treated injured employees represented by Mr. Kelly other than Petitioner. (Pet. Ex. 11, p. 29). Dr. Li further acknowledged he has performed independent medical examinations at Mr. Kelly’s request and is paid a fee for performing those IMEs. *Id.* Dr. Li admitted on cross-examination he is not a pain management specialist and is not board certified in pain management. (Pet. Ex. 11, p. 31).

When asked if Dr. Li would rely upon a specialist’s opinion whom he referred a patient to, Dr. Li testified “I would certainly listen to that specialist’s opinion and seriously consider it.” *Id.* Dr. Li further acknowledged there were no objective issues during the ultrasound on January 14, 2020, to suggest the surgery performed on December 10, 2019 was unsuccessful. (Pet. Ex. 11, p. 35-36).

Dr. Li testified on cross-examination over fifty percent (50%) of his patients develop adhesive capsulitis following a rotator cuff repair. (Pet. Ex. 11, p. 36-37). When asked on cross-examination about the MRI results of Petitioner’s left shoulder on August 10, 2020, Dr. Li testified his impression was the MRI was a typical post-op rotator cuff repair MRI. (Pet. Ex. 11, p. 39). Dr. Li testified what he saw in the MRI was what he would expect in a rotator cuff repair that is healing. (Pet. Ex. 11, p. 40). Dr. Li further acknowledged he did not have any explanation for Petitioner’s pain complaint. (Pet. Ex. 11, p. 40-41).

When asked about Petitioner’s pain complaints on September 8, 2020, Dr. Li testified “Petitioner’s subjective pain complaints were inconsistent with the objective findings on MRI.” (Pet. Ex. 11, p. 41). Dr. Li acknowledged he referred Petitioner for a second opinion and stated “I referred him for a second opinion because I could not think of what was causing his pain, I couldn’t come up with a reason, so I thought it would be in his best interests to get a fresh set of eyes to oversee his treatment and see if there’s something I missed.” (Pet. Ex. 11, p. 41-42). Dr. Li further testified he refers patients for second opinions approximately once a month or once every two months. *Id.*

Dr. Li acknowledged he referred Petitioner to Dr. Cole and admitted he trusts Dr. Cole’s opinion. (Pet. Ex. 11, p. 42). Dr. Li further acknowledged Dr. Cole’s reputation and opinions are highly regarded in the orthopedic and medical community *Id.*

When reviewing Dr. Cole’s report from September 28, 2020, Dr. Li acknowledged Dr. neither Dr. Cole nor himself could identify an objective orthopedic issue to Petitioner’s shoulder

pain. (Pet. Ex. 11, p. 45-46). Dr. Li further admitted he referred Petitioner to Dr. Ji Li for a pain management evaluation based on Dr. Cole's recommendations. (Pet. Ex. 11, p. 46).

When asked if Dr. Li identified any recent orthopedic issues with Petitioner's left shoulder, Dr. Li testified "right now we have a suprascapular nerve neuropathy, that's an orthopedic condition." (Pet. Ex. 11, p. 48-49).

On re-direct, Dr. Li acknowledged Dr. Cole did not have an EMG report in front of him since the EMG was done after the exam with Dr. Cole. (Pet. Ex. 11, p. 49-50). Dr. Li further testified the EMG identified an orthopedic issue that explains Petitioner's pain complaint *Id.* Dr. Li continued by testifying he would disagree with any position that Petitioner is at maximum medical improvement. *Id.*

B. Deposition Testimony of Dr. Nicholas Crosby

Dr. Nicholas Crosby is a board-certified orthopedic surgeon with Indiana Hand to Shoulder Center. (Pet. Ex. 10, p. 6). Dr. Crosby specializes in the entire upper extremity, hand to shoulder. (Pet. Ex. 10, p. 7). Petitioner was referred to Dr. Crosby by Dr. Li. Petitioner presented himself to Dr. Crosby's office on June 9, 2021. (Pet. Ex. 10, p. 8). Dr. Li said in his testimony in this case was given in reliance on his treating medical records. (Pet. Ex. 11, p. 28). Dr. Li testified his medical treatment records are summaries and relevant information related to a particular examination. *Id.*

Petitioner provided a history to Dr. Crosby of his past surgeries to his right shoulder in 2016 and his left shoulder in 2019. (Pet. Ex. 10, p. 9.) Petitioner reported to Dr. Crosby he had a rotator cuff repair and a secondary surgery due to stiffness for capsular release. (Pet. Ex. 10, p. 10). Petitioner further reported to Dr. Crosby he had ongoing pain in his left shoulder and never improved much after the first surgery *Id.* Petitioner explained to Dr. Crosby that he had a recent MRI, ultrasound and nerve study performed. (Pet. Ex. 10, p.11). Dr. Crosby testified he treats some supraspinatus nerve impingement, and the condition is very rare. *Id.* Dr. Crosby further stated an EMG showing a supraspinatus nerve impingement would be "a very unusual finding." *Id.*

Dr. Crosby added Petitioner complained of numbness, tingling middle and ring fingers, and the nerve study showed some carpal tunnel syndrome. (Pet. Ex. 10, p. 12). Dr. Crosby performed a physical examination of Petitioner on June 9, 2021. *Id.* The physical examination found the carpal tunnel had showed positive provocative symptoms, positive Phalen's, positive compression, negative Tinel's, which would all be consistent with carpal tunnel syndrome. (Pet. Ex. 10, p. 12-13.) Dr. Crosby noted Petitioner's left shoulder had limited range of motion due to pain specifically and then some weakness. *Id.* Dr. Crosby did not observe any atrophy in the supraspinatus and infraspinatus muscles, but found suprascapular nerve innervation, and findings that were consistent with rotator cuff pathology. *Id.* Dr. Crosby did not see any significant weakness but Petitioner had pain when Dr. Crosby stressed the two rotator cuff muscles at the top. *Id.*

When asked about his diagnosis of Petitioner, Dr. Crosby testified, "I was concerned. And the diagnosis or preliminary diagnosis here was carpal tunnel syndrome, which again I believe was

involved but I don't know this is a major concern..." (Pet. Ex. 10, p. 14). Dr. Crosby further testified because of the EMG showing suprascapular nerve impingement, he "wasn't finding physical symptoms that would agree with that..." *Id.* Dr. Crosby was concerned about Petitioner's rotator cuff, whether or not it had fully healed or if there was some tearing or complete tearing of the cuff again. *Id.* Dr. Crosby acknowledged a "back pocket" diagnosis was suprascapular nerve impingement. *Id.* Dr. Crosby's preliminary diagnosis was a rotator cuff pathology, meaning partial tearing, tendinitis, or complete tearing. *Id.* Dr. Crosby acknowledged his diagnosis was consistent with the history Petitioner gave him. (Pet. Ex. 10, p. 15).

When asked about a treatment plan for Petitioner, Dr. Crosby wanted to have a new EMG completed, and an ultrasound-guided injection. (Pet. Ex. 10, p. 15-16.). A electromyogram and nerve conduction velocity was performed on Petitioner's shoulder on July 30, 2021 at JWM Neurology. (Pet. Ex. 10, p. 16). Dr. Crosby indicated the results of the EMG study showed there "could be some cervical nerve compression leading to changes in the trapezius muscle, carpal tunnel, and then possibly some nerve compression down in the forearm." (Pet. Ex. 10, p. 16-17). Dr. Crosby admitted the findings from the EMG study were not consistent with his initial diagnosis. (Pet. Ex. 10, p. 17).

The next test conducted on Petitioner was a fluoroscopic-guided injection into the shoulder joint. *Id.* Dr. Crosby noted Petitioner's pre-procedure pain rating was a "7 out of 10" and after the procedure a "0 out of 10." (Pet. Ex. 10, p. 18). Dr. Crosby noted a very significant and notable pain improvement. *Id.* Dr. Crosby saw Petitioner again on September 8, 2021, to discuss what he found on both diagnostic studies. (Pet. Ex. 10, p. 19). Dr. Crosby indicated he made a note that Petitioner stated, "he wanted to get back to normal and get back to work." (Pet. Ex. 10, p. 20). Dr. Crosby performed another physical examination on Petitioner which showed his range of motion improved a little, and still some findings consistent and concerning for rotator cuff pathology. *Id.* Dr. Crosby reported good strength in Petitioner's left shoulder. *Id.* Petitioner indicated the injection helped him for one or two days. (Pet. Ex. 10, p. 21).

When asked about his diagnosis of Petitioner, Dr. Crosby testified "I believe probably his main complaints would be any of the structures in the joint, the shoulder joint itself, I was a little concerned also about possible biceps tendon pathology, but really the rotator cuff was what stood out and I was concerned that despite having the repair he may have a re-tear, whether complete or partial, of his rotator cuff, and that evaluation of that and possible re-repair would be helpful. (Pet. Ex. 10, p. 21).

When asked about his "back pocket" diagnosis of suprascapular nerve impingement, Dr. Crosby stated, "I moved away from that even more after the first visit, getting into the second visit. The nerve study did not pick it up, my exam continued to be less concerning for that, and again when you're looking at prevalence of injuries, suprascapular nerve impingement is really not very common and so I pretty much brushed that off as suggesting that that's not the concern." (Pet. Ex. 10, p. 22).

Dr. Crosby recommended Petitioner undergo arthroscopic surgery, more specifically an arthroscopic evaluation of the rotator cuff with either partial debridement, if it looked mostly intact, or repair if it's torn. (Pet. Ex. 10, p. 23). Dr. Crosby indicated the recovery time to discharge

and fully return to work after arthroscopic surgery would be six months. (Pet. Ex. 10, p. 24). Dr. Crosby acknowledged that after both examinations, Petitioner was not able to go back to full duty. (Pet. Ex. 10, p. 25). Dr. Crosby also agreed with Dr. Li's work restrictions of no lifting more than 15 pounds and limited use of the left arm. *Id.* Dr. Crosby further indicated that light duty would be appropriate for Petitioner. *Id.* Dr. Crosby acknowledged he would perform surgery on Petitioner if Petitioner want to proceed with surgery. (Pet. Ex. 10, p. 26).

When asked about the mechanisms of Petitioner's injury, Dr. Crosby acknowledged this injury could tear the biceps tendon up high. (Pet. Ex. 10, p. 26-27). Dr. Crosby also admitted he had not ruled out cervical involvement. (Pet. Ex. 10, p. 29). When asked about carpal tunnel syndrome, Dr. Crosby indicated he could not comment on whether Petitioner's work activities could bring on the condition of carpal tunnel syndrome. (Pet. Ex. 10, p. 30).

When asked whether his diagnosis and conclusions of Petitioner's shoulder was an orthopedic issue or pain specialist issue, Dr. Crosby indicated the suprascapular nerve impingement and arthroscopy are both orthopedic issues. *Id.* Dr. Crosby testified pain management would not take care of Petitioner's issue if he wanted to improve. (Pet. Ex. 10, p. 33).

On cross-examination, Dr. Crosby acknowledged his opinions he was providing during the deposition would be limited to Petitioner's condition and treatment as of September 8, 2021. (Pet. Ex. 10, p. 35). Dr. Crosby acknowledged in his notes for Petitioner's initial visit, he indicated the concern for nerve impingement was unusual. (Pet. Ex. 10, p. 36). Dr. Crosby further admitted he did not pick up the suprascapular nerve concern in the study he ordered. *Id.*

Dr. Crosby admitted on cross-examination the arthroscopic examination of Petitioner's shoulder would be "partial exploratory with a high level of suspicion for rotator cuff pathology." (Pet. Ex. 10, p. 37). Dr. Crosby acknowledged he had concerns whether a third surgery would improve Petitioner's pain complaints. *Id.* When asked about the increased risk of performing a third surgery on an individual's left shoulder, Dr. Crosby testified "I do believe that revision of a rotator cuff has a higher risk of failure, but not necessarily any risk to the shoulder joint itself." *Id.*

On further cross-examination, Dr. Crosby stated his treatment plan would be altered if Petitioner was doing better since September 8, 2021. Dr. Crosby stated, "I mean, they feel like they can do their job and are functional and almost pain-free or virtual pain-free I would not operate on a person like that." (Pet. Ex. 10, p. 38-39).

V. Independent Medical Examinations

A. Section 12 Examination of Dr. Kenneth Candido

On December 22, 2020, Petitioner attended a pain management Independent Medical Examination with Dr. Kenneth Candido. Dr. Candido noted the left AC joint was tender to palpation, limited internal rotation and elevation on the left side, compared to the right side. Neer's and Hawkins' signs on the left were positive for impingement of the left shoulder. Based on the objective findings on the physical examination of Petitioner, Dr. Candido opined the reduction in elevation/abduction of the left shoulder does not correlate with Petitioner's subjective complaints

of pain in the left acromioclavicular joint. Petitioner's pain is not related to the glenohumeral joint, but to the AC joint. Dr. Candido noted Petitioner's pain complaints correlates with the August 10, 2020, MRI which revealed arthritis in the AC joint. Dr. Candido opined Petitioner is capable of lifting and carrying up to 100 pounds, but his overhead work is limited by his limited range of motion. Dr. Candido opined Petitioner can work heavy duty work with no use of the left arm and left shoulder to do overhead work with work over 10 pounds. Dr. Candido felt Petitioner can perform some, but not all of his current job duties with the City of Peoria. Dr. Candido suggested that Dr. Cole essentially determined Petitioner to be at MMI form an orthopedic perspective. Dr. Candido opined that interventional pain management would not resolve Petitioner's left shoulder impingement syndrome and therefore, from a pain management perspective, he was also at MMI. (Pet. Ex. 8).

B. Section 12 Examination of Dr. Troy Karlsson

Petitioner was seen for an Independent Medical Evaluation by Dr. Troy Karlsson at DuPage Medical Group. Petitioner indicated he gets pain over the front and lateral aspects of the left shoulder. Petitioner further indicated the pain is worse if he is completely still and not doing any activity or if he is trying to raise his arm up in the air. Dr. Karlsson found normal girth of the left arm with no muscular wasting or atrophy. He noted the finding of mild to moderate suprascapular nerve dysfunction from the EMG nerve conduction test does not correlate to Petitioner's areas of pain. Petitioner was found by Dr. Karlsson to have 5/5 rotator cuff strength, similar to Dr. Cole's finding and Dr. Li's prior notes. Dr. Karlsson stated he "believe he has a subclinical compression of his suprascapular nerve, which is not leading to any clinical problems." Dr. Karlsson found Petitioner to be at MMI since August 10, 2020, when Petitioner had the MRI confirming lack of re-tear to the rotator cuff. Dr. Karlsson noted the MRI was approximately 4 months after Petitioner's second surgery for the shoulder, which would be generous time for recuperation. Dr. Karlsson further noted that he does not believe Petitioner needs nay further medical treatment, referring back to Petitioner having 5/5 rotator cuff strength by Dr. Cole and himself. When discussing Petitioner requiring occupational or non-occupational restrictions, Dr. Karlsson stated "he needs no restrictions whatsoever. He has been documented by surgery, ultrasound, and MRI to have an intact rotator cuff. He has regained normal girth and has documented near normal motion in Dr. Li's notes." (Resp. Ex. 3).

VI. Grievance Arbitration Proceedings

A. Testimony of William Ed Hopkins

Ed Hopkins testified in the grievance hearing on 2/10/22. Ed testified that his job title is Senior Human Resources Specialist for the City of Peoria (Pet. Ex. 12, pg. 9). Mr. Hopkins testified that he has helped administer over 1,000 workers compensation claims for the City of Peoria (Pet. Ex. 12, pg. 10). Mr. Hopkins testified that the City utilizes the city's doctors at OSF Occupational Health to review and look at employee's work restrictions and determine their abilities to return to work (Pet. Ex. 12, pg. 12).

Mr. Hopkins testified that in a workers' compensation claim, if the claim has already been accepted, the City relies solely upon the medical (Pet. Ex. 12, pg. 14). He further testified

that employees are offered light duty work. He further testified that when a doctor determines that an employee is able to work in a light duty or modified capacity, the doctor will forward a note and list the restrictions. Once the restrictions are received, the department will determine whether or not there is a job available that would not violate the restrictions. (Pet. Ex. 12, pg. 16-17).

Mr. Hopkins testified that light duty work is covered by the Collective Bargaining Agreement. He testified that the contract provided a limitation on the number of days an employee could have light duty work provided to 120 days (Pet. Ex. 12, pg. 17). Mr. Hopkins testified that typically the City does not make exceptions for Laborer's Unions to work in excess of 120 days (Pet. Ex. 12, pg. 17).

Mr. Hopkins testified that maximum medical improvement is where the doctor has determined that an employee does not require additional treatment warranted or necessary at that point (Pet. Ex. 12, pg. 20).

Mr. Hopkins testified that he is aware the Petitioner sustained a work injury on 6/3/19 (Pet. Ex. 12, pg. 28). He testified that at the time of the injury, Petitioner was a maintenance worker assigned to the sign shop working on the paint truck. Mr. Hopkins further testified that the work of a maintenance worker for the City of Peoria is considered heavy work (Pet. Ex. 12, pg. 29).

Mr. Hopkins testified that the Petitioner's job description showed the position to be "very heavy, exerting over 100 lbs. occasionally, 50 to 100 lbs. frequently or up to 20 to 50 lbs. constantly." (Pet. Ex. 12, pg. 30).

Mr. Hopkins testified that the first surgery with Dr. Li in December 2019 was authorized. Additionally, he confirmed the second surgery with Dr. Li was authorized in April 2020 (Pet. Ex. 12, pg. 32).

Mr. Hopkins testified that the Petitioner was sent to an independent medical exam at the request of the employer to Dr. Cole on 9/28/20. At that time, Dr. Cole did not place the Petitioner at maximum medical improvement. (Pet. Ex. 12, pg. 36-37).

Mr. Hopkins testified that Petitioner was sent to Dr. Candido for an independent medical exam at the request of the employer. At that time, Dr. Candido determined that Petitioner had an ongoing orthopedic shoulder condition. (Pet. Ex. 12, pg. 39).

Mr. Hopkins testified that as of 12/22/20, the City had an opinion from Dr. Cole and Dr. Candido regarding Petitioner's ability to return to work and maximum medical improvement and that is why the City told the Petitioner to return to work (Pet. Ex. 12, pg. 40).

Mr. Hopkins testified that the Petitioner returned to work on 1/12/21. He confirmed that the Petitioner was assigned his previous position of maintenance worker working on the paint truck. Mr. Hopkins testified that he was aware Sie Maroon believed Petitioner could not do the job (Pet. Ex. 12, pg. 41).

Mr. Hopkins testified that Dr. Moody issued a letter on 1/13/21 stating that after reviewing the medical records, it was his opinion that Petitioner had reached medical maximum improvement. Dr. Moody also provided permanent restrictions of 3 lbs. maximum force, no use of the left arm, left arm away from the body, no above chest level work, no pushing, pulling or repetitive motion of the left arm (Pet. Ex. 12, pg. 42). He also testified that Petitioner would not be able to work as a maintenance worker with said work restrictions (Pet. Ex. 12, pg. 43).

Mr. Hopkins testified that he was aware that as of September 2021, Petitioner was still receiving medical treatment. He confirmed that Petitioner's treating physicians still had him on work restrictions (Pet. Ex. 12, pg. 45).

Mr. Hopkins testified that in May 2021, Petitioner's counsel requested that the City return the Petitioner to work full duty. He testified that the City offered the Petitioner a temporary maintenance worker position (Pet. Ex. 12, pg. 46).

Mr. Hopkins testified that other maintenance workers had workers' compensation claims against the Respondent at the same time as the Petitioner. Those individuals were Frankie King, Robert Jackson, and Aubrey Duncan. He testified that in the City's opinion, these individuals had reached maximum medical improvement. Mr. Hopkins confirmed that all of these individuals had been terminated. (Pet. Ex. 12, pg. 49).

B. Sie Maroon Testimony

Sie Maroon testified in the grievance hearing on February 10, 2022. Mr. Maroon testified that his job title is Deputy Director of Operations for the City of Peoria. He testified that the Petitioner worked for the City of Peoria as a maintenance worker (Pet. Ex. 12, pg. 70). He testified that a maintenance worker requires heavy work with a lot of pushing, pulling, lifting, and carrying (Pet. Ex. 12, pg. 72). He also testified that a painter requires heavy job duties as they use the forklift and carry 5-gallon buckets (Pet. Ex. 12, pg. 73-75). Mr. Maroon testified that a leaf blower that maintenance workers operate with weight up to 20 lbs. (Pet. Ex. 12, pg. 76).

Mr. Maroon testified that workers could have to lift and carry paint stencils to haul to locations. (Pet. Ex. 12, pg. 78). He testified that, if Petitioner had 15 lb. restrictions, he would not be able to complete the job duties (Pet. Ex. 12, pg. 78). Mr. Maroon testified that Petitioner's job duties would include flipping and installing signs that weigh up to 30 lbs. (Pet. Ex. 12, pg. 79). He testified that Petitioner's job duties would also include drilling fence posts using an auger weighing up to 25 lbs. or more (Pet. Ex. 12, pg. 82).

Mr. Maroon testified that workers must also be able to use sandbags on windy days when putting up signs. He testified that sandbags weigh up to 50 lbs. (Pet. Ex. 12, pg. 84). He testified that portable signs would be used to replace a stop sign that was knocked down or power outage of traffic signals. Mr. Maroon confirmed that the portable signs have to be pushed and pulled and weighed about 20 lbs. (Pet. Ex. 12, pg. 85).

Mr. Maroon reiterated that, if Petitioner had a work restriction of no lifting more than 15 lbs., he would not be able to perform the job functions of a maintenance worker. (Pet. Ex. 12, pg. 87). He testified that Petitioner's job duties would also include driving a 7-ton haul truck. Mr. Maroon testified that Petitioner would have to pull himself into the truck using his arms. (Pet. Ex. 12, pg. 89). He testified that the truck pans are very heavy weighing more than 30 lbs. sometimes taking 2 people to get the pan up, level, and locked in. (Pet. Ex. 12, pg. 90).

Mr. Maroon testified that maintenance workers would be responsible for flooding work. He testified that flooding work involves bagging sand, building sandbag walls and driving equipment. (Pet. Ex. 12, pg. 92).

Mr. Maroon testified that the Petitioner returned to work in January 2021 for 1 day, but he sent him home the next day. (Pet. Ex. 12, pg. 96). He testified that it is a condition of employment that Petitioner be able to fulfill all job requirements. (Pet. Ex. 12, pg. 96).

Mr. Maroon testified that given Petitioner's 15 lb. work restrictions, Petitioner would not be able to handle the job tasks of that of a maintenance worker (Pet. Ex. 12, pg. 95). He further stated that, if Petitioner had any work restrictions, he would not be able to perform the job tasks of a maintenance worker full duty. (Pet. Ex. 12, pg. 98).

The Arbitrator has reviewed the corrected opinion award of Arbitrator Brian E. Reynolds. This was a result of the grievance hearing that took place on February 10, 2022.

The Arbitrator notes that Arbitrator Reynolds rendered an opinion that the Petitioner was not capable of returning to full duty work unrestricted.

At the May 10, 2023, hearing, Petitioner offered into evidence a transcript of grievance arbitration proceedings between the City of Peoria and Laborers International Union of North America, Local #165 concerning the discharge of Petitioner. (Pet. Ex. 12). Petitioner also offered into evidence the corresponding written decision of Arbitrator Brian Reynolds concerning the grievance filed by Petitioner as a result of his termination from Respondent, effective January 29, 2021. (Pet. Ex. 13).

Having reviewed the grievance arbitration evidence, the Arbitrator determines the labor grievance evidence is consistent with regard to the medical treatment and physician testimony above. Three (3) of the four (4) witnesses who testified at the February 10, 2022, grievance arbitration also testified during the Section 19(b-1) hearing on May 10, 2023, Ed Hopkins, Sie Maroon, and Petitioner. While useful for gauging the credibility of these witnesses, the grievance arbitration transcript and decision primarily establish facts not in dispute at the May 10, 2023, hearing.

The evidence establishes Petitioner began working for Respondent on September 6, 2012. He was initially assigned to Streets and Sewers, but later transferred to the Traffic Division and paint truck. Petitioner was working in this capacity at the time of the work accident.

The Maintenance Worker job duties and job description were discussed at length, including the specific equipment and duties on the paint truck. The job description describes the paint truck assignment as involving heavy-duty work, "[e]xerting 50-100 lbs. occasionally, 10-25 lbs. frequently, or up to 10-20 lbs. constantly." Examples of PTW assignment heavy duty work include carrying 35-pound buckets of paint or cleaning material and operating leaf blowers and power washers. The sign shop work includes lifting signs, 50-pound sandbags, and moving around traffic cones and barrels.

On June 3, 2019, Grievant injured his left shoulder while trying to start a gas-powered blower the crew uses to prepare to paint a stripe. It did not start on first pull and when he pulled the cord the second time, he felt a very sharp pain in his shoulder which felt numb and tingly and was sufficiently painful to drop Grievant to one knee. Petitioner then received fairly extensive treatment for his left shoulder injury. The labor grievance evidence is consistent with the above treatment summary, deposition testimony, and IME reports.

The labor grievance evidence ultimately establishes Petitioner returned to work for one (1) day on January 12, 2021. When he returned to work on January 13, 2021, Petitioner was pulled aside and informed that he was not meant to be there. Dr. Moody subsequently placed Petitioner at maximum medical improvement and recommended permanent restrictions. Petitioner was later informed his employment would be terminated, effective January 29, 2021, based on the maximum medical improvement opinions of Dr. Cole, Dr. Candido, and Dr. Moody, and Petitioner's inability to perform his essential job functions.

Although Petitioner testified that he could perform his full, unrestricted job duties as a Maintenance Worker as of February 10, 2022, and stated he had no intention of moving forward with additional medical treatment, including surgery, the grievance arbitrator found Respondent had just cause to terminate Petitioner as of January 29, 2021. This decision is final and unappealable.

CONCLUSIONS OF LAW

Petitioner's Average Weekly Wage

Petitioner's average weekly wage was placed at issue by the parties at arbitration. As stated in Arbitrator's Exhibit 1, Petitioner alleged his average weekly wage was \$1,411.53 during the fifty-two (52) weeks preceding the accident. Respondent alleged Petitioner's correct average weekly wage was \$1,238.67. The Arbitrator finds the parties' disagreement concerning Petitioner's appropriate average weekly wage is largely, if not solely, based upon whether Petitioner's overtime earnings should be included in his average weekly wage calculation.

The Act defines average weekly wage as "the *actual earnings* of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement *excluding overtime, and bonus* divided by 52..." 820 ILCS 305/10. (Emphasis added).

The Act expressly states overtime is to be excluded from calculating average weekly wage. 820 ILCS 305/10. In *Airborne Express, Inc. v. Illinois Workers' Compensation Commission*, 372 Ill. App. 3d 549 (1st Dist. 2007), the First District Appellate Court reiterated that overtime hours are not to be included unless (1) the worker is required to work overtime as a condition of his or her employment (*i.e.*, it is mandatory); (2) the worker consistently works a set number of hours of overtime each week; and (3) the overtime hours worked were part of his or her regular hours of employment. Petitioner has the burden of proving, by a preponderance of the evidence, the elements of his claim, including his average weekly wage. *Bagwell v. Illinois Workers' Compensation Commission (Nestle USA, Inc)*, App. 4 Dist.2017, 416 Ill. Dec. 672, 84 N.E.3d 1149.

At the May 10, 2023, hearing, Sie Maroon, Respondent's Deputy Director of Operations for Public Works, testified overtime within the Public Works Department is primarily based on seniority. (Arb. T. p. 214-215). Mr. Maroon stated overtime within the Public Works Department was only mandatory during storm or weather-related events, like a snowstorm or flood. This mandatory overtime would consist of twelve-hour shifts during a large storm or flood. According to Mr. Maroon, any overtime not performed during a storm or weather-related event would be voluntary pursuant to a seniority-based overtime scheduling system. (Arb. T. pp. 214-215). Based on his long tenure with Respondent and understanding of these types of weather-related events, Mr. Maroon testified the weather-dependent overtime would not be regularly scheduled. (Arb. T. pp. 215).

The Arbitrator notes Petitioner did not offer any testimony at the May 10, 2023, hearing regarding his earnings during the fifty-two (52) weeks prior to his claimed accident or any overtime he may have worked for Respondent prior to his accident. However, during the February 10, 2022, grievance arbitration, Petitioner offered testimony consistent with Mr. Maroon's explanation of the seniority process and the twelve-hour shifts used for snow plowing. (Pet. Ex. 12 p. 126-128).

With regard to Petitioner's appropriate average weekly wage, the Arbitrator further notes Respondent's Senior Human Resources Specialist Ed Hopkins testified he reviewed documents in Respondent's possession and control prior to arbitration regarding Petitioner's earnings during the fifty-two (52) prior to the accident. Based on his review of said documents, Mr. Hopkins understood Petitioner's earnings during that time were approximately \$65,000.00. (Arb. T., 93-94). Petitioner did not testify as to the overtime included in his pay stubs submitted as Petitioner's Exhibit #16. Therefore, there is no way for the Arbitrator to infer that the overtime included in those pay stubs was mandatory as opposed to voluntary or based on seniority.

Based on the foregoing and the evidentiary record as a whole, the Arbitrator finds two cases particularly instructive on the issue of Petitioner's correct average weekly wage - *Herbert Taylor v. City of Chicago*, 20 I.W.C.C 0655, 2020 WL 8474830 and *Allen Yates v. City of Peoria*, 20 WC 031799.

In *Taylor*, the claimant was employed as a Motor Truck Driver for the Chicago Water Department. In addition, he volunteered to also work for the Department of Streets and Sanitation as a seasonal snowplow driver, for which he was paid an overtime rate. He claimed his average weekly wage should be computed with his overtime pay included. The arbitrator found the claimant failed to prove his overtime hours were a condition of employment, mandatory, regular,

and consistent. In that case, there was no evidence that overtime hours as a seasonal snowplow driver were either regular or consistent. The arbitrator held snowplow drivers are subject to the vagaries of weather, which are neither regular nor consistent. Accordingly, the claimant's overtime pay was not included in the computation of his average weekly wage. *Taylor*, 20 I.W.C.C 0655, 2020 WL 8474830.

In *Yates*, this Arbitrator reviewed wage documents and the relevant testimony of the claimant and Mr. Maroon and concluded the claimant's overtime hours were neither regular nor consistent. While the evidence in this matter establishes Petitioner may have been required to work mandatory overtime occasionally during storm-related incidents, like the claimant in *Yates*, said overtime was subject to the vagaries of weather and was neither regular or consistent. As such, Petitioner cannot meet his burden of proving, by a preponderance of the evidence, his overtime pay should be considered and computed into his average weekly wage.

The case at hand is similar to *Taylor* and *Yates*. While the evidence establishes Petitioner would have to work mandatory overtime during storm related incidents, the overtime hours were subject to the vagaries of weather, which are neither regular nor consistent. For overtime pay to be considered and computed into average weekly wage, the overtime hours must be a condition of employment, mandatory, regular, and consistent. As such, Petitioner cannot meet his burden of proving, by a preponderance of the evidence, his overtime pay should be considered and computed into his average weekly wage.

Based on the foregoing and the evidence submitted at arbitration, the Arbitrator finds and concludes that Petitioner's earnings in the year preceding his accident were \$64,410.84 providing thereby producing an average weekly wage is \$1,238.67.

Maximum Medical Improvement and Causation

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law set for in the foregoing paragraphs.

The parties agree that Petitioner sustained a work injury that arose out of and in the course of his employment with Respondent on June 3, 2019. The parties agree that Petitioner's condition of ill-being immediately following his accident up to the time of Dr. Candido's Independent Medical Evaluation on December 22, 2020. At arbitration, with the exception of the aforementioned wage issue, the remaining issues were in dispute: (1) causation; (2) payment of incurred medical expenses; (3) responsibility and payment for, prospective medical treatment; and (4) Petitioner's entitlement to additional temporary benefits. After reviewing the evidence and arguments of the parties, the Arbitrator finds these issues primarily involve the threshold question of whether Petitioner had reached maximum medical improvement from his June 3, 2019, work accident at the time his benefits and employment were terminated.

Petitioner bears the burden to prove, by a preponderance of evidence, his condition of ill-being at the time of hearing is causally related to the work accident on June 3, 2019. *Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App. 3d 284 (1991). Similarly, Petitioner

bears the burden of proving he has not reached maximum medical improvement for his alleged condition.

A careful review of the evidence establishes Petitioner has met this burden. The Arbitrator adopts and incorporates by reference the above factual findings in support of this conclusion, particularly, the opinions of Dr. Cole, Dr. Li, and Dr. Crosby. Respondent attempts to characterize Dr. Cole's report as an MMI opinion which is a blatant mischaracterization. While Dr. Cole does not see a condition which needs to be addressed from an orthopedic surgery perspective, Dr. Cole is abundantly clear in his Quick Report that he does not consider Petitioner to be at Maximum Medical Improvement. In fact, Dr. Cole recommended a referral to pain management for "consideration for other possible intrinsic pain generator to the upper extremity, such as a cervical spine, other narrative root hyperactivity or other pain generator that has not been addressed." (Pet. Ex. 7) Based upon Dr. Cole's report, Respondent directed Petitioner to see Dr. Candido for an Independent Medical Examination on December 22, 2020. Again, this IME was described as a pain management consultation which misrepresents the true character of the appointment. Dr. Candido suggested that Dr. Cole's opinion was that Petitioner was at MMI from an orthopedic perspective. (Pet. Ex. 8) However, that misrepresents Dr. Cole's report. After reviewing Dr. Cole's report with Petitioner, Dr. Li sent Petitioner to Dr. Trudeau for an EMG nerve conduction study. (Pet. Ex. 3) Based upon the results of the EMG nerve conduction study Dr. Li sent Petitioner to Dr. Crosby to evaluate a possible supraspinatus nerve impingement. (Pet. Ex. 2) Even though Petitioner was pronounced at Maximum Medical Improvement by Dr. Moody, the company medical doctor, Petitioner continued to voice concerns regarding his left shoulder pain to his doctors and physical therapist.

Respondent seeks to conflate two separate time frames by drawing inferences from Petitioner's testimony at the February 10, 2022, grievance arbitration to suggest that he was at MMI in January of 2021. However, the medical evidence in this case establishes that Petitioner was under active care with Dr. Li when he was told to return to work in January 2021. The facts establish that Petitioner saw Dr. Cole on September 28, 2020. (Pet. Ex. 7) He was then evaluated by Dr. Moody on November 25, 2020. (Pet. Ex. 1) Dr. Moody noted Dr. Cole's suspicion for an alternative pain generator to be reasonable given Petitioner's delayed recovery. *Id.* Dr. Moody recommended light duty if available with limited use of the left upper extremity. *Id.* Petitioner had occupational therapy with the Orthopedic and Shoulder Center on December 8, 2020, December 21, 2020, January 5, 2021, and January 12, 2021, where he continued to report pain in his left shoulder that was not getting better. (Pet. Ex. 2) Petitioner was sent home from work on January 13, 2021. Petitioner followed up with Dr. Li on January 14, 2021, reporting ongoing pain complaints (Pet. Ex. 2) Dr. Li recommended an EMG nerve conduction study to examine the possibility of compression of the suprascapular nerve. *Id.* The EMG nerve conduction study was undertaken by Dr. Trudeau on January 25, 2021. (Pet. Ex. 3) Petitioner returned to Dr. Li on February 4, 2021, still complaining of pain with active abduction. (Pet. Ex. 2) Based on his review of the EMG nerve conduction and his physical examination, Dr. Li diagnosed a left rotator cuff repair with residual dysfunction due to suprascapular nerve entrapment. He then referred Petitioner to Dr. Crosby. Thereafter, Dr. Crosby recommended a repeat EMG nerve conduction study and based upon its result and his physical examination recommended a third arthroscopic surgery.

Respondent offered no opinion that Petitioner had any intervening accident or event severing causation. In fact, Dr. Cole was of the opinion that Petitioner's condition was causally related to his work accident. Dr. Candido confirmed Petitioner's left shoulder diagnosis was related to the initial work injury. Petitioner testified at the time of arbitration that he was still having issues with his left shoulder and those complaints have never gone away since the injury.

The Arbitrator finds the opinions of Dr. Cole, Dr. Candido, Dr. Moody, and Dr. Karlsson less persuasive than the opinions of Dr. Li and Dr. Crosby.

Wherefore, based upon the preponderance of the evidence, the Arbitrator finds and concludes that Petitioner's present condition of ill-being is causally related to his June 3, 2019, work injury.

Temporary Benefits

The Arbitrator incorporates by reference the Findings of Fact and Conclusions of Law set forth in the foregoing paragraphs. Petitioner placed temporary total disability benefits at issue at arbitration. Petitioner claimed entitlement to temporary total disability benefits and temporary partial disability benefits. Petitioner testified he was paid all temporary benefits through at least January 19, 2021. At the grievance arbitration, he testified he was paid all temporary benefits through January 26, 2021. Respondent presented no evidence as to the amount of TTD benefits it paid.

Based on the record at Arbitration, the Arbitrator finds and concludes that Petitioner is owed TTD benefits from January 20, 2021, through August 30, 2021, when he commenced his new employment. This period is 31 5/7 weeks at Petitioner's TTD rate of \$825.77 equals \$26,188.70. While an award of temporary partial disability might be available to Petitioner from August 21, 202, through the time of arbitration, the amount of such benefits is too speculative to discern based upon the scant evidence provided about Petitioner's current earnings.

Medical Bills

Past Medical Expenses and Prospective Medical Treatment

The Arbitrator hereby incorporates by reference the Findings of Fact and Conclusions of Law as set forth in the foregoing paragraphs.

The Arbitrator finds and concludes that the Medical bills set forth in Petitioner's Exhibit 14 are reasonable, necessary and causally related to Petitioner's June 3, 2019, work accident.

Wherefore, the Arbitrator orders the Respondent to pay all outstanding medical bills for Petitioner's reasonable and necessary care, as outlined in Petitioner's Exhibit 14 pursuant to sections 8(a) and 8.2 of the Act.

Respondent shall make this payment directly to Petitioner's attorney in accordance with Section 9080.20 of the Rules Governing Practice before the IWCC.

Provider:	Service Date:	Amount Billed:	Adjustments:	Amount Paid:	Payor:	Amount Owed:
Rx Partners	12/17/2019	\$1,686.26		\$312.58		\$1,373.68
	12/3/2020	\$1,210.22		\$194.30		\$1,015.92
	1/14/2021	\$1,210.22		\$194.30		\$1,015.92
TOTAL:		\$4,106.70		\$701.18		\$3,405.52

Ireland Grove Surgery	12/10/2019	\$46,783.25	\$21,309.55	\$25,473.70		
	4/7/2020	\$13,027.25	\$8,211.82	\$4,815.43		
TOTAL:		\$59,810.50	\$29,521.37	\$30,289.13		\$0.00

Dr. Li	6/18/2019	\$1,945.80		\$1,657.28		\$288.52
	6/19/2019	\$1,469.99				\$1,469.99
	6/20/2019	\$204.21		\$204.21		
	6/24/2019	\$175.08		\$175.08		
	6/26/2019	\$175.08		\$175.08		
	7/2/2019	\$148.47		\$148.47		
	7/5/2019	\$194.29		\$194.29		
	7/9/2019	\$178.75		\$178.75		
	7/11/2019	\$175.08		\$175.08		
	7/16/2019	\$148.47		\$148.47		
	7/18/2019	\$621.61		\$621.61		
	7/23/2019	\$591.34		\$591.34		
	7/26/2019	\$144.84		\$144.84		
	7/30/2019	\$591.34		\$591.34		
	8/1/2019	\$545.48		\$545.48		
	8/8/2019	\$545.48		\$545.48		
	9/5/2019	\$224.60		\$224.60		
	9/13/2019	\$148.47		\$148.47		
	9/20/2019	\$591.30		\$591.30		
	9/24/2019	\$545.48		\$545.48		
	10/11/2019	\$545.48		\$545.48		
	10/17/2019	\$274.09		\$274.09		
	10/25/2019	\$545.48		\$545.48		
	11/1/2019	\$545.48		\$545.48		
	11/8/2019	\$594.97		\$594.97		
	11/19/2019	\$545.48		\$545.48		
	11/21/2019	\$651.89		\$651.89		
	11/25/2019	\$575.76		\$575.76		
	12/10/2019	\$44,394.06		\$35,598.54		\$8,795.52
	12/12/2019	\$204.21		\$169.84		\$34.37
	12/17/2019	\$988.56		\$988.56		
	12/20/2019	\$178.75		\$178.75		
	12/24/2019	\$175.08		\$175.08		

Service Date:	Amount Billed:	Adjustments:	Amount Paid:	Payor:	Amount Owed:
12/27/2019	\$175.08		\$175.08		
12/31/2019	\$175.08		\$175.08		
1/3/2020	\$178.07		\$178.07		
1/7/2020	\$232.15		\$232.15		
1/10/2020	\$181.81		\$181.81		
1/14/2020	\$480.04		\$480.04		

1/17/2020	\$178.12	\$178.12	
1/21/2020	\$178.12	\$178.12	
1/24/2020	\$178.12	\$178.12	
1/28/2020	\$181.81	\$181.81	
1/30/2020	\$178.07	\$178.07	
2/4/2020	\$178.07	\$178.07	
2/7/2020	\$160.05	\$160.05	
2/10/2020	\$291.86	\$291.86	
2/11/2020	\$539.41	\$539.41	
2/13/2020	\$1,629.20	\$629.56	\$999.64
2/18/2020	\$151.02	\$151.02	
2/19/2020	\$214.13	\$214.13	
2/21/2020	\$163.79	\$163.79	
2/25/2020	\$181.81	\$181.81	
2/26/2020	\$256.99	\$256.99	
2/28/2020	\$4,791.39	\$4,791.39	
3/3/2020	\$181.81	\$181.81	
3/10/2020	\$181.81	\$181.81	
3/11/2020	\$607.82	\$607.82	
4/7/2020	\$15,913.37	\$6,633.11	\$9,280.26
4/8/2020	\$207.73	\$172.78	\$34.95
4/9/2020	\$181.81	\$181.81	
4/10/2020	\$228.41	\$228.41	
4/13/2020	\$178.07	\$178.07	
4/14/2020	\$510.83	\$510.83	
4/15/2020	\$228.41	\$228.41	
4/16/2020	\$181.81	\$181.81	
4/17/2020	\$208.07	\$208.07	
4/20/2020	\$181.81	\$181.81	
4/21/2020	\$232.15	\$232.15	
4/23/2020	\$177.28	\$177.28	
4/27/2020	\$181.81	\$181.81	
4/29/2020	\$178.12	\$178.12	
5/1/2020	\$705.27	\$705.27	
5/6/2020	\$224.77	\$224.77	
5/8/2020	\$147.33	\$147.33	
5/11/2020	\$197.67	\$197.67	
5/13/2020	\$480.04	\$480.04	
5/15/2020	\$151.02	\$151.02	
5/18/2020	\$151.02	\$151.02	
5/22/2020	\$151.02	\$151.02	
5/26/2020	\$151.02	\$151.02	
5/29/2020	\$151.02	\$151.02	
6/3/2020	\$151.02	\$151.02	
6/5/2020	\$151.02	\$151.02	
6/8/2020	\$151.02	\$151.02	
6/10/2020	\$480.04	\$480.04	
6/12/2020	\$1,501.42	\$100.68	\$1,400.74
6/15/2020	\$151.02	\$151.02	
6/17/2020	\$151.02	\$151.02	
6/22/2020	\$151.02	\$151.02	
6/26/2020	\$151.02	\$151.02	
6/29/2020	\$151.02	\$151.02	
7/1/2020	\$151.02	\$151.02	
7/2/2020	\$151.02	\$151.02	
7/6/2020	\$151.02	\$151.02	
7/8/2020	\$557.48	\$557.48	
7/10/2020	\$151.02	\$151.02	
7/13/2020	\$547.18	\$547.18	
7/15/2020	\$197.62	\$197.62	
7/17/2020	\$151.02	\$151.02	

Service Date:	Amount Billed:	Adjustments:	Amount Paid:	Payor:	Amount Owed:
7/20/2020	\$547.18		\$547.18		
7/22/2020	\$547.18		\$547.18		
7/24/2020	\$547.18		\$547.18		
7/27/2020	\$597.52		\$597.52		
7/29/2020	\$547.18		\$547.18		
7/31/2020	\$547.18		\$547.18		
8/3/2020	\$151.02		\$151.02		
8/5/2020	\$224.72		\$224.72		
8/7/2020	\$151.02		\$151.02		
8/10/2020	\$1,434.67		\$1,434.67		
8/12/2020	\$1,501.42		\$501.78		\$999.64
8/14/2020	\$181.81		\$181.81		
8/18/2020	\$151.02		\$151.02		
8/21/2020	\$151.02		\$151.02		
8/25/2020	\$181.81		\$181.81		
8/28/2020	\$181.81		\$181.81		
9/1/2020	\$201.36		\$201.36		
9/4/2020	\$151.02		\$151.02		
9/8/2020	\$77.44		\$77.44		
10/8/2020	\$406.46		\$406.46		
11/5/2020	\$406.46		\$406.46		
12/3/2020	\$406.46		\$406.46		
12/8/2020	\$154.15		\$154.15		
12/15/2020	\$147.28		\$147.28		
12/21/2020	\$147.28		\$147.28		
1/5/2021	\$147.28		\$147.28		
1/12/2021	\$232.96		\$149.18		\$83.78
1/14/2021	\$495.54		\$495.54		
2/4/2021	\$162.22		\$162.22		
6/8/2021	\$162.22		\$162.22		
8/23/2021	\$162.22		\$162.22		
9/16/2021	\$162.22		\$162.22		
TOTAL:	\$109,243.25		\$84,564.14		
\$24,679.11					
Memorial Physicians					
1/25/2021	\$6,331				
\$6,331					
TOTAL:	\$6,331				
\$6,331					
Indiana Hand to Shoulder					
6/9/2021	\$250		\$250		
9/8/2021	\$265		\$265 pt paid		
TOTAL:	\$515				
\$515					
GRAND TOTAL:	\$180,006.45	\$29,521.37	\$115,819.45	\$34,665.63	

Prospective Medical Treatment

The Arbitrator hereby incorporates by reference the Findings of Fact and Conclusions of Law as set forth in the foregoing paragraphs.

Based on the medical testimony by the treating physicians, Dr. Li and Dr. Crosby, the Arbitrator finds and concludes that Respondent is liable for the prospective medical treatment recommended by Dr. Crosby. Respondent shall be responsible for Petitioner's medical care and treatment such time as Petitioner has been deemed at maximum medical improvement by his treating physicians from these work injuries.