2018 IL App (3d) 170656WC
No. 3-17-0656WC
Opinion filed October 19, 2018

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

PAR ELECTRIC, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION and HENKELS & McCOY, (Dallas Hamm, Appellee).	)	Appeal from the Circuit Court of Peoria County. Nos. 16-MR-821 17-MR-246 Honorable James A. Mack, Judge, Presiding.

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

Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Barberis concurred in the judgment and opinion.

OPINION

¶ 1 On October 31, 2014, claimant, Dallas Hamm, filed an application for adjustment of claim (case No. 14 WC 37190) pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)), seeking benefits for an injury to his right arm on June 16, 2014, while in the employ of respondent, Par Electric. Claimant subsequently filed two additional applications for adjustment of claim (case Nos. 15 WC 19322 and 15 WC 19323), alleging injuries to his right shoulder on April 1, 2015, and April 3, 2015, while working for Henkels &

McCoy (Henkels). Following a consolidated hearing held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2014)), the arbitrator found that claimant sustained three accidents and that his condition of ill-being was causally related to all three accidents. In case No. 14 WC 37190, the arbitrator awarded claimant $23^{6}/_{7}$ weeks of temporary total disability (TTD) benefits, covering the period from September 26, 2014, through March 11, 2015. The arbitrator also concluded that respondent was liable for claimant's medical expenses, but only those incurred prior to March 11, 2015. In case Nos. 15 WC 19322 and 15 WC 19323, the arbitrator awarded claimant $37^{2}/_{7}$ weeks of TTD benefits, covering the period from April 6, 2015, through the date of the arbitration hearing, and ordered Henkels to pay medical expenses incurred after April 1, 2015, as well as prospective medical treatment.

¶ 2 Thereafter, Henkels and respondent sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). In case No. 14 WC 37190, the Commission modified the arbitrator's decision in part, but otherwise affirmed and adopted the decision of the arbitrator. Specifically, the Commission affirmed the arbitrator's finding that claimant sustained three distinct accidents on June 16, 2014, April 1, 2015, and April 3, 2015, but determined that the two accidents sustained in April 2015 did not constitute independent intervening accidents sufficient to break the causal connection from the initial accident. Accordingly, the Commission concluded that claimant's current condition of ill-being was causally related to the June 2014 accident and that respondent was liable for all medical expenses and benefits resulting from claimant's injuries. In addition, the Commission remanded the cause to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980). In case Nos. 15 WC 19322 and 15 WC 19323, the Commission reversed the decision of

the arbitrator, finding that claimant failed to sustain his burden of proving a causal connection between the April 2015 accidents and his current condition of ill-being.

¶ 3 Both respondent and claimant sought judicial review of the Commission's decisions. Following a hearing, the circuit court of Peoria County confirmed the decisions of the Commission. Respondent now appeals, challenging the Commission's finding that the April 2015 accidents did not constitute intervening accidents sufficient to break the causal connection from the June 2014 accident. We affirm.

¶ 4 I. BACKGROUND

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on December 22, 2015.

¶ 6 A. June 2014 Accident

¶ 7 Claimant testified he worked as an apprentice lineman through the International Brotherhood of Electrical Workers. Claimant's job duties in this position involved extensive physical work, including restoring power, building new lines, climbing poles, and digging holes. On June 16, 2014, claimant was assigned to work for respondent building new lines. On that date, as claimant was getting out of a bucket lift, he slipped. Claimant attempted to catch himself by grabbing something when he felt his right shoulder come out of the socket, resulting in a lot of pain. Claimant and a coworker reported the accident to respondent, and claimant was taken to the emergency room at OSF St. Francis Medical Center (OSF). Claimant testified that prior to June 16, 2014, he had not experienced any problems with his right shoulder while working for respondent.

¶ 8 In the emergency room, claimant provided a consistent history of the accident to the staff at OSF. An X-ray taken at the hospital was normal. Dr. Edward Moody treated claimant and

diagnosed a right rotator cuff strain. Claimant was placed on modified duty and eventually underwent a course of physical therapy. Nevertheless, claimant continued to experience pain with overhead activity and certain shoulder motions. As a result, Dr. Moody ordered an MRI of the right shoulder. The MRI, taken on August 5, 2014, suggested a diffuse labral tear but no rotator cuff tear. Dr. Moody referred claimant to Dr. Lawrence Li, an orthopaedic surgeon, for further treatment.

¶ 9 Claimant first presented to Dr. Li on August 14, 2014. After examining claimant and reviewing the MRI, Dr. Li diagnosed a right shoulder labral tear due to dislocation. He recommended surgical repair. Meanwhile, claimant remained on light duty until September 26, 2014, at which time Dr. Li performed a right shoulder arthroscopy with debridement of extensive tenosynovitis and repair of a capsulolabral Bankart-type separation. Postoperative treatment included a cortisone injection and an extensive course of physical therapy. By mid-January 2015, claimant reported to the physical therapist that the pain in his right shoulder was at level two on a ten-point scale.

¶ 10 On January 21, 2015, claimant underwent a functional capacity evaluation (FCE), which was considered valid with claimant providing maximum effort. Claimant reported discomfort in the anterior right shoulder during certain exercises, but the pain decreased once the activity ceased. Identified physical limitations included right shoulder pain, right shoulder strength deficits, bilateral hip range of motion deficits, and general deconditioning stemming from being off work since the date of injury. The therapist concluded that claimant was able to operate consistently at the medium physical-demand level with rare work in the heavy physical-demand level. He noted, however, that claimant's physical abilities did not match the requirements of his job and that claimant's physical limitations presented a barrier to returning to work unless

modifications could be made. The therapist recommended a work-conditioning program, which claimant began on January 26, 2015.

¶ 11 On February 26, 2015, claimant was evaluated by Dr. George Paletta. At that time, claimant was still experiencing mild discomfort to the anterior aspect of the shoulder, but reported making significant improvement in work conditioning. Dr. Paletta documented that claimant had a previous shoulder problem when he was in eighth grade, but once claimant underwent surgery and the injury healed, he had not had any problems with it. Upon physical examination, Dr. Paletta noted that claimant demonstrated minimal motion losses, excellent strength and function, and good stability. Dr. Paletta's impression was "[d]oing well status post arthroscopy with anterior stabilization and Bankart repair." He recommended an additional two weeks of work conditioning, followed by a return to full-duty work without restriction or limitation. Dr. Paletta opined that claimant's right shoulder condition was causally related to the June 2014 work accident.

¶ 12 Claimant was discharged from work conditioning on March 10, 2015. At that time, the therapist recorded that claimant had progressed rapidly during the final three weeks of work conditioning, had met all of his goals, and was prepared to return to work full duty. On March 11, 2015, Dr. Li released claimant to full duty without restrictions and instructed him to follow up in four weeks. Claimant testified that although his shoulder had progressed, it was still weak and painful. Nevertheless, claimant returned to work because he was released to do so and he thought that his condition would improve with work.

¶ 13 B. April 2015 Accidents

¶ 14 Claimant was hired by Henkels on or about March 23, 2015. Claimant worked for Henkels as an apprentice lineman—the same position he had with respondent. On April 1, 2015,

claimant was still experiencing pain and weakness in his right shoulder. On that date, claimant threw a large roll of electric tape to a coworker in a bucket lift. Claimant testified that he felt his shoulder "roll and come out of [the] socket," causing a lot of pain. Claimant ignored the pain because he did not want to think he reinjured his shoulder. He finished his work shift, but "babied" his shoulder the rest of the day.

¶ 15 Claimant returned to work the next day, although his shoulder was sore. On April 3, 2015, a Friday, claimant threw a wire grip to a coworker in a bucket lift. Claimant estimated that he tossed the wire grip 15 to 20 feet. Claimant testified that this activity is common in his job. According to claimant, when he threw the wire grip his shoulder "did the exact same thing as it had done" on April 1. That is, claimant felt his shoulder "roll" and "come out of the socket" and he experienced pain. Claimant finished the workday but had to "baby" his right shoulder. Claimant testified that the pain he experienced following these two incidents was more severe than it was when he went to work for Henkels.

¶ 16 Claimant returned to Dr. Li on April 6, 2015, for a prescheduled appointment. At that time, claimant related the two incidents that occurred while he was working for Henkels. Dr. Li ordered an MRI-arthrogram and placed claimant on light duty. However, there was not much light-duty work available in his field, so Henkels could not accommodate his restrictions. Claimant underwent the MRI-arthrogram on April 16, 2015. On April 22, 2015, Dr. Li noted the film showed a "[d]iffuse labral tear," "[n]o rotator cuff tear," "[o]ld posttraumatic and postsurgical changes of the glenoid rim," and a SLAP tear. ("SLAP" is a superior labral tear from anterior to posterior.) Dr. Li recommended surgery involving a repair of the SLAP tear "to prevent the subluxation that occurred after [claimant] returned to work." During an April 28, 2015, follow-up visit, claimant asked Dr. Li about the cause of his right shoulder

condition. Dr. Li told claimant that his right shoulder condition was "a result of his original injury from June 2014 and subsequent surgery." He also issued a note stating claimant's right shoulder injury "is related to the 6/16/14 injury."

¶ 17 Meanwhile, on May 4, 2015, claimant saw Dr. Paletta for an independent medical examination. Dr. Paletta noted that following claimant's June 2014 work accident, Dr. Li released claimant to full duty on March 11, 2015. Within the first week of returning to work, claimant was involved in two throwing incidents that resulted in problems involving his right shoulder. After examining claimant and reviewing the MRI-arthrogram, Dr. Paletta diagnosed a labral tear with biceps anchor or SLAP lesion involvement. Dr. Paletta opined that the previous area of repair was "likely intact" and that the recent injury appeared to be "an extended labral tear that involves a new area of the labrum not previously involved with the initial tear." Dr. Paletta found that the mechanism of injury described by claimant "would be appropriate for propagating or creating an extended labral tear." He agreed with Dr. Li's recommendation for a revision labral repair, but also recommended a biceps tenodesis. Dr. Paletta opined that claimant had reached maximum medical improvement (MMI) following the June 2014 injury and returned to full duty and that the need for the revision surgery was "related to the more recent injury and not as a result of the initial tear from 6-16-14 which clearly involved a different part of the labrum."

¶ 18 Claimant underwent a second surgery on July 8, 2015. The surgery, performed by Dr. Li, consisted of a right shoulder arthroscopy with debridement and chondroplasty of the humeral head, arthroscopic repair of the anterior and anterior inferior labrum, repair of a SLAP tear, a biceps tenodesis, and the removal of a loose anchor. Following surgery, claimant underwent conservative treatment and physical therapy. Claimant testified that he was placed on light duty

from April 6, 2015, through the date of surgery, but no employer had offered him work within his restrictions. As of the date of the arbitration hearing, claimant was still under the care of Dr. Li. Claimant testified that he continued to experience pain in his right shoulder and his strength was "not great." He noted that he recently began strength building in physical therapy.

¶ 19 C. Evidence Deposition of Dr. Li

¶ 20 Dr. Li—a board-certified orthopaedic surgeon specializing in shoulders, hands, and knees—testified by evidence deposition on July 27, 2015. Dr. Li testified that the trauma claimant sustained as a result of the work accident in June 2014 caused inflammation of the tenosynovium tissue; damage to the glenohumeral joint of the shoulder, which is commonly referred to as the ball and socket joint; and a complete tear of the capsulolabral complex "from about two to six o'clock." Dr. Li testified that these findings are consistent with someone who fell with an outstretched arm and whose shoulder was dislocated and relocated. Dr. Li testified that someone with this type of pathology is at "significant risk" for future dislocations. As a result, Dr. Li recommended surgery. To this end, on September 24, 2014, Dr. Li performed a right shoulder arthroscopy with debridement of tenosynovitis and repair of a capsulolabral Bankart-type separation. Dr. Li noted that one facet of the surgery involved anchoring sutures into the bone.

¶ 21 Dr. Li released claimant to return to work full duty without restrictions on March 11, 2015, after claimant had undergone physical therapy and work conditioning. Claimant presented to Dr. Li on April 6, 2015, following the two incidents that occurred while working for Henkels. Dr. Li ordered an MRI and later performed a second operation on July 8, 2015. The second operation consisted of an arthroscopy with debridement and chondroplasty of the humeral head, arthroscopic repair of the anterior and anterior inferior labrum, repair of SLAP tear, a biceps

tenodesis, and the removal of a loose anchor. Dr. Li recounted that a SLAP tear is a labral tear, but in the superior quadrant "between eleven and one o'clock."

¶ 22 Dr. Li was asked whether claimant's need for the second surgery and treatment resulted from the June 2014 accident or whether the accidents in April 2015 constituted intervening accidents which broke the chain of causal connection. Dr. Li testified that claimant's condition was partly attributable to *sequelae* of the June 2014 injury, adding that there was some worsening of claimant's condition from the subsequent dislocation. Dr. Li further responded:

> "I think the original surgery had not fully healed. The construct which he had for his shoulder at the time that he was throwing the tape and throwing the grip was weaker than he was—than it was before his first accident, and those actions caused the capsule to—well, the shoulder to dislocate and the capsule to pull away and the anchor to pull out.
>
> So because in my second surgery I was able to see the anchor pulled out I would have to relate it to that this would be a consequence of the treatment from his first injury, so therefore I relate it to his first injury."

Dr. Li further opined that because the subsequent labral tear was adjacent to the tear claimant sustained as a result of the June 2014 accident, the subsequent tear was an extension of the previous tear "up to the region of the SLAP tear" and was related to the first accident. Dr. Li also cited the proximity in time between claimant's first accident, his release to work, and his subsequent accidents as a factor in finding causation "because it's certainly within the time frame of incomplete healing."

¶ 23 On cross-examination by respondent's attorney, Dr. Li acknowledged that the extended tear was not the result of the June 2014 accident, but rather the April 2015 accidents. Dr. Li

agreed that if claimant did not perform the throwing actions in April 2015, it is unlikely he would have re-dislocated his shoulder. Dr. Li also agreed that claimant did not have a SLAP tear as a result of the first accident and that the tear from the first injury did not extend as high as what would be required to perform a biceps tenodesis. Dr. Li was unaware of claimant having a history of dislocations prior to the 2014 accident.

¶ 24 On cross-examination by the lawyer for Henkels, Dr. Li testified that if claimant had had a dislocation 15 years earlier, that fact would have no impact on his causation opinion regarding claimant's current condition. Dr. Li testified that the January 2015 FCE determined that claimant was capable of medium-duty work. As this was not sufficient for claimant to return to his regular job duties, work conditioning was ordered. Upon claimant's release from work conditioning, he had some limited scapular abduction and decreased internal and external rotation. Dr. Li testified that a loss of range of motion would be expected as a result of the surgery claimant underwent, and he was not concerned about it as long as claimant was able to meet his job duties. Dr. Li testified that when he released claimant in March 2015, he asked claimant to follow up with him in four weeks. Dr. Li wanted to see claimant again because, he explained, no matter how good work conditioning is, it is not the real job. Dr. Li added that claimant was not released from his care in March 2015 when he released him to work full duty. Dr. Li further explained that "there were some findings in the second surgery that weren't present in the first surgery, but there was still the finding—the crux of this is the finding where the shoulder re-dislocated, pulled out the anchor that was inserted to repair the labrum that was put in as a result of the original injury." Therefore, Dr. Li opined that claimant's injuries following the April 2015 accidents were related to the initial injury and resulting treatment.

¶ 25 On redirect examination, Dr. Li was asked whether—based upon claimant not healing

completely from the first surgery, the extension of the labral tear, the extension being adjacent to the previous tear, and the anchor coming loose from the site of the previous surgery—it was more likely than not that claimant's second surgery was "a continuation" of the first surgery. Dr. Li responded "[f]or sure because the anchor was found to be loose it is a continuation of the first surgery."

¶ 26 On recross-examination by respondent's attorney, Dr. Li testified that the extension of the tear being related to the first injury is based in large part on the fact that the injuries in April 2015 loosened the anchor he installed during the first operation. Dr. Li further testified that the second surgery most likely would not have happened if the first injury had not happened.

¶ 27 D. Dr. Paletta's October 1, 2015, Deposition

¶ 28 Dr. Paletta testified by evidence deposition on October 1, 2015, that he is a fellow trained in sports medicine and that 60% of his practice involves shoulder work, with the remainder evenly divided between elbow and knee work. Dr. Paletta first evaluated claimant on February 16, 2015, and prepared a report of his findings. At that time, Dr. Paletta took a history from claimant, which included an incident when claimant was in eighth grade and that resulted in a fracture and dislocation of his right shoulder that necessitated surgical treatment. Claimant stated that once the injury healed, he "basically" returned to normal function with the right shoulder. Claimant told Dr. Paletta that he injured his right shoulder at work in June 2014 when he "fell in the bed of a truck and reached out with his right arm to try and prevent the fall." On the date of the examination, claimant reported that he was doing well after undergoing an operation on his right shoulder. Although claimant complained of some mild discomfort in the front of the shoulder, he indicated that he was making continued improvement with physical therapy and was participating in a work-conditioning program. Dr. Paletta thought claimant was doing well

following surgery and was "nearly complete in his recovery." Dr. Paletta recommended that claimant complete the course of work hardening, after which he could return to full duty. Dr. Paletta testified that claimant's condition, as of the date of the February 2015 evaluation, was causally related to claimant's June 2014 work accident.

¶ 29 Dr. Paletta saw claimant again on May 4, 2015. At that time, claimant reported that he had completed work hardening and returned to full duty work when he was involved in two incidents that he associated with a recurrence of shoulder pain. During the first incident, claimant felt his shoulder slip out of place as he threw a roll of electrical tape to a coworker. Claimant was able to manipulate the arm so as to pop the shoulder back into place. The second incident occurred a couple of days later. Claimant described throwing a wire grip, weighing a couple of pounds, to a coworker in a bucket lift about 12 feet away. Claimant again experienced the sensation of his shoulder slipping out of position, requiring claimant to manipulate his arm to get it back into place.

¶ 30 At the time of claimant's visit in May 2015, claimant's principal complaint was of pain in the right shoulder. Claimant stated that the pain was identical to the pain he experienced prior to his most recent surgery. Dr. Paletta noted that the MRI-arthrogram showed the repaired labral tear was still intact, although claimant appeared to have "a new labral tear that extended beyond the area that had been previously repaired." Dr. Paletta's diagnosis was an extended superior labral tear, or SLAP lesion, following previous repair of the anterior/inferior labrum. Dr. Paletta opined that the pathology shown on the MRI-arthrogram was a new tear. Insofar as claimant's injury involved a new area of the labrum, it was Dr. Paletta's opinion that the injury was not a consequence of his old injury, but rather represented "a new problem." Dr. Paletta agreed with Dr. Li's recommendation for a repeat labral repair, although he noted that the repair would

involve a different part of the labrum. Dr. Paletta also recommended a biceps tenodesis.

¶ 31 Dr. Paletta testified that whether Dr. Li placed claimant at MMI after the first surgical procedure made no difference in reaching his opinion about claimant's current condition. Dr. Paletta explained that at the time of his evaluation in February 2015, claimant had no signs or symptoms of a SLAP tear and the operative photographs from his initial surgery showed no evidence of a SLAP tear. After the throwing incidents, however, the MRI-arthrogram clearly showed evidence of a SLAP tear without any disruption of his previous labral tear. Dr. Paletta concluded that one or both of the throwing incidents "caused or contributed" to the development of the SLAP tear, "which was a different condition in his shoulder than what Dr. Li had previously treated [claimant] for."

¶ 32 Dr. Paletta was asked to comment on the causation opinion in Dr. Li's deposition testimony. Dr. Paletta noted that when he formulated his reports, he did not have information regarding Dr. Li's observations during claimant's second surgery. Thus, the question posed to him contained "new information" that had not been previously provided. According to Dr. Paletta, based on the information available to him, it appeared that claimant's previous labral repair had healed completely and there was no evidence of a loose anchor. Dr. Paletta testified if there was evidence to suggest that the previous labral tear had not completely healed, there was a failure of one of the anchors, and the new tear extended from the area of the old tear upwards, it would be his opinion that the second injury was due to incomplete healing of the first repair and an extension of the first tear and not a completely isolated second injury. Thus, based on this additional information from Dr. Li's deposition, Dr. Paletta opined that the second set of injuries occurred because of the failure of the first injury to have adequately healed.

¶ 33 E. Dr. Paletta's November 19, 2015, Deposition

¶ 34 Over the objection of claimant and Henkels, Dr. Paletta testified at a second deposition on November 19, 2015. Dr. Paletta testified that when he previously testified, he was not aware that claimant had undergone a second operation and he did not have the operative report available to him. Since that testimony, Dr. Paletta reviewed the operative report and arthroscopic photos of the second surgery and prepared a supplemental report of his findings.

¶ 35 Dr. Paletta testified that the "most salient line" from Dr. Li's operative report was a statement that Dr. Li had "evaluated the site of previous repair and it was loose and [he] could see that the dislocation had caused one of the anchors to pull loose." In addition, Dr. Li performed a biceps tenodesis, which was not indicated at the time of the initial surgery. After reviewing the additional records and photos, Dr. Paletta's diagnosis was "a recurrent tear of the anterior labrum as well as a new tear of the superior labrum or so called SLAP tear." Dr. Paletta opined that the second surgery was attributable to the two throwing accidents. Dr. Paletta testified that he changed his opinion from the prior testimony because "the operative report clearly documented that there was a new area of the labrum that was involved with the tear that was not present previously" and Dr. Li's impression was that the anchor was loose "as a consequence of the dislocation episodes." According to Dr. Paletta, anchors typically fail as a result of trauma. He stated that if an anchor fails for any other reason, there is typically evidence of resorption of bone around the anchor, a condition called osteolysis. However, Dr. Li did not document that condition at the time of the second surgery. Dr. Patella added that claimant had made a full recovery and had returned to full duty. Dr. Li did not document any residual signs or symptoms of instability at the time he released him. Further, by claimant's own admission, when Dr. Patella took his history, he was doing well up until those two incidents.

¶ 36 On cross-examination by the attorney for Henkels, Dr. Paletta testified that he received 64 pages of additional material from claimant's attorney on October 2, 2015, the day after his first deposition. Dr. Paletta noted that the most recent medical record he received as part of that package was Dr. Li's note of August 20, 2015, which was prior to his original deposition. He was not asked to review Dr. Li's deposition testimony, although during his initial deposition, there was a break to allow him to review Dr. Li's testimony.

¶ 37 Dr. Paletta further testified that, as part of the 64-page package, he received intraoperative photographs. Dr. Paletta agreed that in his report he stated that the intraoperative photos were not helpful in differentiating the mechanism of loosening of the anchor. He added that there was no picture of a loose anchor in the photographs. Dr. Patella also noted that there was no photo of the chondral damage documented by Dr. Li. Dr. Patella agreed that what Dr. Li could visualize with his own eyes during the surgery, he did not have the opportunity to review with respect to those two factors (loose anchor and chondral change).

¶ 38 Dr. Patella testified that the last note he had from Dr. Li after the first surgery was from March 11, 2015, releasing claimant to full duty. Dr. Patella agreed that if there was no specific note declaring claimant at MMI, it was fair to say that Dr. Li did not believe that claimant's condition had reached a state of MMI as of March 11, 2015. Dr. Patella testified that he was not aware that Dr. Li had requested claimant to follow up with him a few weeks after he returned to work. He agreed that when he tells his patients that he wants to see them in four weeks, it is because he wants to continue to monitor and assess the condition for which they are being treated.

¶ 39 On redirect-examination, Dr. Paletta testified that he was provided color intraoperative photographs by email, but he printed them out in black and white to review because he does not

do well reviewing photos on a computer. After reviewing the color photographs at the deposition, Dr. Paletta could still not see the loose anchor or evidence of chondral damage, although he did note evidence of the loosening of the previous repair and of the SLAP tear. Dr. Paletta stated that he saw nothing different in the color pictures as compared to the black and white photographs. In commenting on Dr. Li's reference to the temporal relationship between the second injury and the initial surgery, Dr. Paletta noted that there was no discussion of a second surgery prior to the throwing accidents taking place. Dr. Paletta also noted that the SLAP tear was not present or documented by Dr. Li at the first surgery but was present and documented as part of the second surgery. Dr. Paletta added that although the new area of tear "may connect or communicate" with the old area of tear, it clearly involved a new area of the labrum that had not been involved previously. Dr. Paletta added that Dr. Li attributed the loose anchor to the second dislocation. Finally, Dr. Paletta testified that the fact that Dr. Li did not place claimant at MMI did not have any effect on his opinion because Dr. Li believed claimant was able to perform all of his work duties.

¶ 40 F. Arbitrator's Decision

¶ 41 Based on the foregoing evidence, the arbitrator found that claimant sustained three accidents and that his condition of ill-being was causally related to all three accidents. Specifically, the arbitrator concluded that claimant's right shoulder treatment through March 11, 2015, was causally related to the accident claimant sustained on June 16, 2014, while in respondent's employ, and that claimant's right shoulder treatment after April 1, 2015, was causally related to the accidents claimant sustained on April 1 and April 3, 2015, while in Henkels's employ. In so finding, the arbitrator essentially determined that the April 2015 accidents constituted intervening accidents breaking the causal connection from the initial

accident. In support of this finding, the arbitrator cited (1) the change in claimant's subjective complaints after the April 2015 incidents, *e.g.*, reports of increased pain and instability, (2) a "clear change in pathology" following the April 2015 incidents as evidenced by a new labral tear and a loosened anchor, (3) the lack of evidence that Dr. Li contemplated additional surgery for claimant prior to the April 2015 incidents, and (4) the fact that claimant was able to work full duty before the April 2015 accidents. The arbitrator also found the causation opinion of Dr. Paletta more persuasive than that of Dr. Li. In this regard, the arbitrator questioned why Dr. Li would release claimant to return to full duty if he had not completely healed.

¶ 42 In light of his findings, in case No. 14 WC 37190, the arbitrator awarded claimant $23\frac{6}{7}$ weeks of TTD benefits from respondent, covering the period from September 26, 2014, through March 11, 2015. The arbitrator concluded that respondent was liable for claimant's medical expenses, but only those incurred prior to March 11, 2015. In case Nos. 15 WC 19322 and 15 WC 19323, the arbitrator awarded claimant an additional $37\frac{2}{7}$ weeks of TTD benefits from Henkels, covering the period from April 6, 2015, through December 22, 2015. In addition, the arbitrator ordered Henkels to pay for claimant's medical expenses incurred after April 1, 2015, as well as his prospective medical treatment.

¶ 43 G. Commission Decision

¶ 44 Henkels and respondent sought review of the arbitrator's decision before the Commission. In case No. 14 WC 37190, the Commission modified the arbitrator's decision in part but otherwise affirmed and adopted the decision of the arbitrator. Specifically, the Commission affirmed the arbitrator's finding that claimant sustained three distinct accidents on June 16, 2014, April 1, 2015, and April 3, 2015, but determined that the two accidents sustained in April 2015 did not constitute intervening accidents sufficient to break the causal connection

from the initial accident. Rather, the Commission concluded that claimant's current condition of ill-being was causally related to the June 2014 accident and that respondent was liable for all medical expenses and benefits resulting from claimant's injuries. In addition, the Commission remanded the cause to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 45 In support of its decision, the Commission found the opinion of Dr. Li more persuasive than that of Dr. Paletta. The Commission explained that Dr. Li personally observed the pathology of claimant's shoulder during surgery. Based on his observations, Dr. Li opined that the original injury had not completely healed at the time claimant began to work for Henkels and that the labral tear from the April 2015 incidents was an extension of the tear from the June 2014 accident. As such, Dr. Li related claimant's current condition of ill-being to the June 2014 injury. Dr. Li also cited the proximity between the April 2015 accidents and claimant's first operation as a factor.

¶ 46 The Commission also found significant that when Dr. Li released claimant to full duty on March 11, 2015, he did not declare claimant at MMI, he did not release claimant from treatment, and he scheduled a follow-up appointment for claimant. The Commission stated that by opining that claimant had not completely healed from the initial injury at the time he released claimant to work, Dr. Li "tacitly accept[ed] that he may have released [claimant] prematurely to work full duty in a heavy physically demanding level occupation." The Commission found that Dr. Li's admission that claimant had not fully healed from when he released claimant to work, rendered his testimony "more persuasive rather than less persuasive."

¶ 47 The Commission also cited the facts that claimant was never symptom free following his initial surgery and that the only FCE, which was administered in January 2015, found that

claimant was unable to return to his previous job. In reference to the former, the Commission observed that the medical records showed that claimant complained of continued pain throughout his therapy, he still had pain and weakness when he returned to work, and he returned to work because of Dr. Li's release, not because he felt ready to return to his position.

¶ 48 Finally, citing to *Vogel v. Hogan Plumbing*, Ill. Workers' Comp. Comm'n, 98-WC-42870 (Oct. 22, 2003), *aff'd & remanded by Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780 (2005), the Commission further determined that even if all three accidents constituted concurrent causes of claimant's condition of ill-being, that finding would not be sufficient for the April 2015 incidents to become independent intervening accidents, thereby breaking the chain of causation from the initial accident on June 16, 2014.

¶ 49 In case Nos. 15 WC 19322 and 15 WC 19323, the Commission reversed the decision of the arbitrator, finding that claimant failed to sustain his burden of proving a causal connection between the April 2015 accidents and his current condition of ill-being.

¶ 50 H. Trial Court Decision

¶ 51 Respondent sought judicial review of the Commission's decisions in the circuit court of Peoria County. Meanwhile, claimant sought judicial review of the Commission's decisions in the circuit court of Marion County. Claimant's appeal was later transferred to Peoria County and consolidated with respondent's appeal. Following a hearing, the circuit court of Peoria County confirmed the decisions of the Commission. This appeal by respondent followed.[1]

¶ 52 II. ANALYSIS

¶ 53 On appeal, respondent raises two issues. First, respondent argues that the Commission's

[1]Claimant filed a notice of cross-appeal. However, on Henkels's motion, we dismissed the cross appeal for want of jurisdiction.

decision was contrary to the analysis outlined in *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, and, therefore, the arbitrator's decision should be reinstated. Alternatively, respondent contends that the Commission's finding that claimant's current condition of ill-being is causally related to the June 16, 2014, accident was against the manifest weight of the evidence. We address these arguments in turn.

¶ 54 A. *National Freight Industries v. Illinois Workers' Compensation Comm'n*

¶ 55 Initially, respondent relies on this court's analysis in *National Freight Industries v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120043WC, to argue that the Commission's decision was contrary to law. In support of its position, respondent asserts there is a conflict between "the line of cases that hold an employer takes an employee as they [*sic*] find them [*sic*] and intervening accident cases where the subsequent work-related accidents occur." Respondent requests that we resolve this alleged conflict "with an interpretation that distinguishes between subsequent work-related and non-work-related accidents." According to respondent, we outlined such an approach in *National Freight Industries*, which sets forth a factor-based analysis to address causation where a subsequent work-related accident is at issue, yet the Commission failed to apply this analysis to the instant case. Respondent maintains that an application of the factor-based analysis developed in *National Freight Industries* supports a finding that claimant experienced intervening accidents that broke the causal chain on April 1 and April 3, 2015, while he was in the employ of Henkels.

¶ 56 As respondent observes, employers take their employees as they find them. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 199 (2002). Thus, even though an employee has a preexisting condition that may make him or her more vulnerable to injury, recovery for an accidental injury will not be denied as long as the employee establishes that the employment was

a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). For this reason, the relevant inquiry in preexisting-condition cases is whether the employee's condition is attributable solely to a degenerative process of the preexisting condition or to the aggravation or acceleration of the preexisting condition resulting from a work-related accident. *Sisbro, Inc.*, 207 Ill. 2d at 204-05. Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. *International Harvester Co. v. Industrial Comm'n*, 46 Ill. 2d 238, 245 (1970). That the other event, whether work-related or not, may have aggravated the employee's condition is irrelevant. *Vogel*, 354 Ill. App. 3d at 786. An employer is relieved of liability only if the intervening cause completely breaks the causal chain between the original work-related injury and the ensuing condition of ill-being. *Global Products v. Illinois Workers' Compensation Comm'n*, 392 Ill. App. 3d 408, 411 (2009).

¶ 57 In arguing that there is a conflict between these two lines of cases, respondent asserts that under a preexisting-condition analysis, claimant "would not have [been] prevented *** from claiming Henkels was liable for a work-related injury if he had hypothetically originally injured his shoulder at home as opposed to while working for [respondent]" whereas "the intervening accident case law, and the 'whether work-related or not' language cited in [intervening-accident cases], likely leads to an opposite result—that the pre-existing condition precludes a finding that Henkels is liable." Although inartfully phrased, respondent seems to suggest that a conflict exists between these lines of cases because recovery is permitted under a preexisting-condition analysis if the employee establishes that his or her employment was *a* causative factor in the resulting condition of ill-being, but under an independent intervening cause analysis, an employer is

relieved of liability only if the intervening event *completely* breaks the causal chain between the original work-related injury and the ensuing condition of ill-being. In other words, respondent would have us limit an employer's liability in intervening cause cases if a subsequent event was *a* causative factor in the employee's resulting condition of ill-being. However, respondent cites no authority for such a position. Indeed, this is clearly not the law in Illinois. See *International Harvester Co.*, 46 Ill. 2d at 247 (rejecting apportionment of compensation involving multiple accidents); see also *National Freight Industries*, 2013 IL App (5th) 120043WC, ¶ 26 ("Every natural consequence that flows from an injury that arose out of and in the course of one's employment is compensable under the Act absent the occurrence of an independent intervening accident that breaks the chain of causation between the work-related injury and an ensuing disability or injury."); *Dunteman v. Illinois Workers' Compensation Comm'n*, 2016 IL App (4th) 150543WC, ¶ 42; *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 742 (1994); *Boatman v. Industrial Comm'n*, 256 Ill. App. 3d 1070, 1074 (1993)). Respondent advances no cogent reason to overturn this well-established precedent.

¶ 58 Moreover, contrary to respondent's claim, we did not set forth a test in *National Freight Industries* for determining whether a subsequent work-related event constitutes an independent intervening cause that severs the chain of causation from an earlier work injury. In *National Freight Industries*, the claimant sustained an injury on November 6, 2006, while working for Fischer Lumber. *National Freight Industries*, 2013 IL App (5th) 120043WC, ¶ 4. On that date, the claimant was pulling boxes off a truck when he felt a "pop" in his low back followed by a sharp pain that radiated to his right leg. *Id.* On December 4, 2008, one day before the claimant was scheduled to undergo a right L3-4 microdiscectomy, he was involved in a motor vehicle accident while working for National Freight Industries. *Id.* ¶¶ 8-9. At the time of the motor

vehicle accident, the claimant felt a "pop" on the left side of his back and began to immediately experience a sharp pain down his left side and low back as well as numbness and tingling down his left leg. *Id.* ¶ 9. Thereafter, the claimant's doctor recommended he undergo a lumbar laminectomy and fusion with stabilization at L3-4 and L4-5. *Id.* ¶ 14. The Commission found that the motor vehicle accident constituted an independent intervening cause that broke the chain of causation between the claimant's condition of ill-being and his November 2006 work injury. *Id.* ¶ 20.

¶ 59 After analyzing the evidence in *National Freight Industries*, we concluded that it was reasonable for the Commission to conclude that the motor vehicle accident resulted in more than a mere aggravation of the injuries the claimant sustained in the initial work accident. *Id.* ¶ 33. In support of this holding, we cited evidence that following the motor vehicle accident there were changes in (1) the claimant's symptoms and the intensity of his pain, (2) the pathology of the claimant's condition, (3) the nature of the surgical intervention, and (4) the claimant's ability to work. *Id.* ¶¶ 29-32. Because there was sufficient evidence in the record to support the Commission's causation finding, we held that the Commission's decision was not against the manifest weight of the evidence. *Id.* ¶ 33.

¶ 60 Respondent attempts to use our analysis in *National Freight Industries* to support its argument that the Commission's finding regarding causation is contrary to law. In particular, respondent asserts that in *National Freight Industries*, we identified four factors to assess whether a subsequent work-related event constitutes an independent intervening cause that severs the chain of causation from an earlier work injury. Contrary to respondent's claim, however, we did not set forth such a test in *National Freight Industries*. Rather, we merely recounted the evidence in the record that supported the Commission's resolution of the issue. For

the aforementioned reasons, we reject respondent's claim that the Commission's finding regarding causation was contrary to law.

¶ 61 B. Manifest Weight of the Evidence

¶ 62 Alternatively, respondent argues that the Commission's finding that claimant's current condition of ill-being is causally related to the June 16, 2014, accident is against the manifest weight of the evidence. According to respondent, claimant's accidents on April 1 and April 3, 2015, while he was working for Henkels, constituted independent intervening accidents because there was no evidence that the April 2015 dislocation episodes were natural consequences of the June 2014 accident.

¶ 63 To obtain compensation under the Act, an employee must establish by a preponderance of the evidence a causal connection between a work-related injury and the employee's condition of ill-being. *Vogel*, 354 Ill. App. 3d at 786. Every natural consequence that flows from a work-related injury is compensable under the Act unless the chain of causation is broken by an independent intervening accident. *National Freight Industries*, 2013 IL App (5th) 120043WC, ¶ 26; *Vogel*, 354 Ill. App. 3d at 786; *Teska*, 266 Ill. App. 3d at 742. Under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the original injury. *International Harvester Co.*, 46 Ill. 2d at 245. Thus, when an employee's condition is weakened by a work-related accident, a subsequent accident, whether work related or not, that aggravates the condition does not break the causal chain. See *Lee v. Industrial Comm'n*, 167 Ill. 2d 77, 87 (1995); *Vogel*, 354 Ill. App. at 787; *Lasley Construction Co. v. Industrial Comm'n*, 274 Ill. App. 3d 890, 893 (1995). "For an employer to be relieved of liability by virtue of an intervening cause, the intervening cause must completely break the causal chain

between the original work-related injury and the ensuing condition." *Global Products*, 392 Ill. App. 3d at 411. As long as there is a "but for" relationship between the work-related injury and subsequent condition of ill-being, the first employer remains liable. *Global Products*, 392 Ill. App. 3d at 412.

¶ 64 Whether a causal connection exists between an employee's condition of ill-being and a particular work-related accident presents a question of fact. *Vogel*, 354 Ill. App. 3d at 786; see also *Bell & Gossett Co. v. Industrial Comm'n*, 53 Ill. 2d 144, 148 (1972) (whether an accident constitutes an independent, intervening cause is a question of fact for the Commission); *Bailey v. Industrial Comm'n*, 286 Ill. 623, 626 (1919) (same). In resolving factual matters, it is the function of the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences therefrom. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). This is especially true with respect to medical issues, where we owe heightened deference to the Commission due to the expertise it has long been recognized to possess in the medical arena. *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). A reviewing court may not substitute its judgment for that of the Commission on factual matters merely because other inferences from the evidence may be reasonably drawn. *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 407 (1984). We review the Commission's factual determinations under the manifest-weight-of-the-evidence standard. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). Thus, we will overturn the Commission's causation finding only if an opposite conclusion is clearly apparent. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120564WC, ¶ 21.

¶ 65 In this case, the Commission concluded that the accidents occurring on April 1 and April

3, 2015, did not constitute independent intervening accidents that severed the chain of causation between claimant's current condition of ill-being and the accident occurring on June 16, 2014, while claimant was in respondent's employ. Stated differently, the Commission determined that claimant's condition of ill-being after April 2015 would not have resulted "but for" his original work injury. After reviewing the record, we cannot say that a conclusion opposite that of the Commission is clearly apparent.

¶ 66 It is undisputed that claimant injured his right shoulder on June 16, 2014, while working for respondent. At that time, Dr. Li diagnosed a right shoulder tear due to dislocation. Dr. Li recommended surgical repair and eventually performed a right shoulder arthroscopy, which involved repairing the labral tear and anchoring sutures into the bone. Post-operatively, claimant underwent physical therapy, an FCE, and work hardening. On March 11, 2015, Dr. Li released claimant to full duty without restrictions, but instructed claimant to follow up with him in four weeks. On April 1, 2015, claimant redislocated his shoulder when he threw a roll of electrical tape to a co-worker in a bucket lift. Claimant injured his shoulder a third time on April 3, 2015, after throwing a wire grip to a coworker in a bucket lift. On April 6, 2015, claimant reported to Dr. Li's office for his prescheduled appointment. At that time, claimant reported the two throwing incidents. Dr. Li diagnosed a SLAP tear and later performed a second operation to repair the same. During the surgery, Dr. Li also removed a loose anchor from the first operation.

¶ 67 Dr. Li was of the opinion that that the accidents of April 2015 did not constitute independent intervening accidents, breaking the chain of causation between claimant's condition of ill-being and the June 2014 injury. Dr. Li explained that the June 2014 shoulder accident made claimant more susceptible to dislocation and claimant had not completely healed from the surgery performed after the first dislocation. Dr. Li testified that the throwing accidents in April

2015 redislocated claimant's shoulder, pulled out an anchor that was inserted to repair the labrum at the first surgery, and resulted in the subsequent SLAP tear. Dr. Li further testified that the SLAP tear was an extension of the labral tear claimant sustained as a result of the June 2014 accident. Dr. Paletta agreed that claimant sustained a SLAP tear as a result of the April 2015 accidents. However, Dr. Paletta opined that this was a new tear without any disruption of the labral tear sustained in June 2014. In support of this conclusion, Dr. Patella testified that by March 2015, claimant had made a full recovery with no residual signs or symptoms of instability and had been returned to full duty. Dr. Patella acknowledged that claimant had a loose anchor, but attributed the condition to trauma, since Dr. Li did not document osteolysis at the second surgery and osteolysis was the only other condition that would cause the anchor to fail.

¶ 68 As the foregoing establishes, the Commission was presented with conflicting causation opinions. As noted above, it is the function of the Commission to decide questions of fact and causation, to judge the credibility of the witnesses, and to resolve conflicting medical evidence. *Hosteny*, 397 Ill. App. 3d at 674. In resolving this conflict, the Commission found the causation opinion of Dr. Li more persuasive than that of Dr. Paletta. In this regard, the Commission noted that Dr. Li personally observed the pathology of claimant's shoulder during surgery. Based on that observation, Dr. Li opined that the original injury had not completely healed and the first injury caused the shoulder to dislocate after claimant threw a roll of tape. Dr. Li also related claimant's condition of ill-being after April 2015 to the initial injury based on his finding that the SLAP tear was an extension of claimant's June 2014 labral tear and the proximity between the first surgery and the second injury. The Commission also found noteworthy that while Dr. Li released claimant to full duty on March 11, 2015, he did not declare him at maximum medical improvement and did not release claimant from treatment. Given the Commission's fact-finding

role and the expertise it possesses in the medical arena, we cannot say that its decision to adopt the causation opinion of Dr. Li over that of Dr. Paletta was against the manifest weight of the evidence.

¶ 69 Despite the foregoing record, respondent contends that there is no testimony or evidence that the April 2015 dislocation episodes were a natural consequence of the June 2014 accident. In support of this argument, respondent contends that Dr. Li testified that "but for the April 2015 accidents, [claimant's] dislocation episodes would not have occurred and [he] would not have required additional surgery." However, as stated above, under an independent intervening cause analysis, compensability for an ultimate injury or disability is based upon a finding that the employee's condition was caused by an event that would not have occurred "but for" the *original* injury. *International Harvester Co.*, 46 Ill. 2d at 245 (observing that the "but for" rationale has been extended to cases where the event immediately causing the second injury was not itself caused by the first injury, yet but for the first injury, the second event would not have been injurious). Here, Dr. Li testified that having experienced the first dislocation, claimant's pathology made him more susceptible to dislocation in the future. Dr. Li further testified that claimant had not completely healed from the original surgery when he began working for Henkels. As a result, claimant's shoulder was in a weakened state when the throwing incidents occurred, causing the shoulder to dislocate, the capsule to pull away, and the anchor to pull out. Thus, the evidence of record can reasonably be interpreted to support the Commission's inference that claimant's condition of ill-being after April 2015 would not have resulted "but for" his original work injury. See *id.* at 244-47 (affirming Commission's resolution of conflicting medical evidence in favor of the claimant regarding whether the claimant had fully recovered from the effects of his work-related brain injury when he was struck in the eye by his wife,

causing an increase in his neurosis); *Lasley Construction Co.*, 274 Ill. App. 3d at 893-94 (affirming Commission's finding, based on medical evidence, that the claimant would not have suffered a herniated disc following chiropractic adjustments and flu but for his work-related injury).

¶ 70 In its decision, the Commission cited to *Vogel*, 354 Ill. App. 3d 780. Respondent claims that *Vogel* is distinguishable because in this case, unlike in *Vogel*, the evidence demonstrates that claimant had recovered following his first shoulder surgery and had been released to full duty work. However, the Commission did not cite to *Vogel* because it found the case factually similar. Rather, the Commission cited to *Vogel* for the proposition that a condition of ill-being can be attributable to concurrent causes but that such a finding is not sufficient for the subsequent accidents to break the causal chain from the initial accident. In any event, despite respondent's contention to the contrary, the evidence of record reasonably supports a finding that claimant had *not* completely recovered from his first surgery despite being released to return to work. First, the fact that an employee has returned to employment following a work-related injury does not alone establish that the employee has recovered from the injury. *International Harvester Co.*, 46 Ill. 2d at 244. Second, the evidence supports a finding that claimant had not completely healed by the time he returned to work. In this regard, although Dr. Li released claimant to return to work in March 2015, he did not find claimant at maximum medical improvement, he did not release claimant from his care, and he instructed claimant to follow up with him in four weeks. Dr. Li also opined that claimant's original surgery had not fully healed at the time the April 2015 accidents occurred. Finally, we note that claimant testified that although his shoulder had progressed when Dr. Li released him to return to work, it was still weak and painful. Claimant related that he returned to work only because he was released to do so, and he thought his

shoulder would improve with work. That claimant had not fully recovered at the time he was released to return to work is also evidenced by the fact of his April 2015 injuries while he was performing activities common to his job.

¶ 71 For the reasons stated above, we hold that the Commission's finding that the April 2015 accidents did not constitute independent intervening causes sufficient to break the causal connection between claimant's current condition of ill-being and his June 2014 work-related accident was not against the manifest weight of the evidence.

¶ 72 III. CONCLUSION

¶ 73 For the reasons set forth above, we affirm the judgment of the circuit court of Peoria County, which confirmed the decision of the Commission. This cause is remanded to the Commission for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327.

¶ 74 Affirmed and remanded.

STATE OF ILLINOIS)
) SS.
COUNTY OF McCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

DALLAS HAMM,

Petitioner,

16IWCC0690

vs. NO: 14 WC 37190

PAR ELECTRIC,

Respondents.

DECISION AND OPINION ON REVIEW

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

By way of background, three claims were consolidated and arbitrated together. There were three separate accident dates all alleging injury to Petitioner's right shoulder, with Par Electric the Respondent in 14WC37190, and Henkels & McCoy the Respondent in 15WC19322 and 15WC19323. The Arbitrator found Petitioner proved all three alleged accidents which all caused his current condition of ill-being. In 14WC37190, the accident apparently was stipulated, and the Arbitrator awarded Petitioner 23&6/7 weeks of temporary total disability benefits but found Respondent, Par Electric, not liable for temporary total disability and medical expenses incurred after March 11, 2015. In 15WC19322 and 15WC19323 the Arbitrator found accidents on April 1, 2015 and April 3, 2015, respectively. In those claims the Arbitrator awarded Petitioner 37&2/7 weeks of temporary total disability benefits, to the date of arbitration, and ordered Respondent, Henkels & McCoy, to pay medical expenses incurred after March 12, 2015 as well as prospective treatment.

Findings of Fact and Conclusions of Law

1. Petitioner testified he worked as an electrical lineman through the IBEW and was almost finished with his apprenticeship. Job duties of a lineman include restoring power, building new lines, climbing poles, and digging holes; it involves a lot of physical work.

2. On June 16, 2014 he was working for Par Electric building new lines. On that date he slipped and went to catch himself and "dislocated [his] shoulder. It felt like it came out of the socket." He had no previous problems with his right shoulder. A co-worker reported the accident and "safety guys came out and took" him to an Emergency Department. They referred him for physical therapy.

3. Petitioner had physical therapy at OSF for a few weeks. The doctor at OSF referred Petitioner to Dr. Li, an orthopedic surgeon, who ordered an MRI. He was on light duty from the accident to about September 26, 2014, at which time Dr. Li performed surgery and took him off work. He had a lot of postoperative physical therapy. He then had work hardening. Dr. Li released him to full duty as of March 11, 2015. His shoulder progressed but it still was not 100% "by any means," but he returned to work because he was released to return to work. His shoulder was still weak and painful but he thought it would probably improve with work.

4. Petitioner got onto a job with Henkels & McCoy about March 23, 2015 through the union. He worked in the exact same job as he had with Par. On April 1, 2015 his shoulder still had some pain and weakness. He threw a big roll of electric tape to a co-worker on a crane hoist. He had a lot of pain in his right shoulder. He kind of ignored it because he did not want to think he re-injured his shoulder. He babied his shoulder the rest of the day.

5. Petitioner testified he went to work the next day even though his shoulder was very sore. On April 3, 2015, which was a Friday, he threw a wire grip tool to a co-worker on a crane hoist. His shoulder "did the exact same thing it had done" on April 1st. He felt it "come out of the socket" and he had pain; he then knew it "wasn't a fluke." He estimated he tossed the tool 15 to 20 feet. It's an activity that is common in his job. He again finished his workday, but again had to baby his shoulder.

6. Petitioner returned to Dr. Li on April 6, 2015. He ordered a new MRI and put him on light duty. But there is not much light duty work available in his field. Henkels & McCoy could not accommodate his restrictions. He just told them he hurt his shoulder, but "just thought it was from the previous injury" so he "never even did any kind of paperwork on it."

7. Petitioner had a second surgery on July 8, 2015. He had been on light duty the entire time since April 6, 2015; nobody had offered him work within those restrictions. He was still under the care of Dr. Li. He still has pain in his shoulder and his strength was "not great." He has currently "gotten into the strength building in therapy."

8. On cross examination, by the lawyer for Par Electric, Petitioner testified Par authorized the surgery performed on September 26, 2014 by Dr. Li. He was paid temporary total disability benefits after that surgery. In physical therapy after the first surgery he complained of 2/10 ongoing pain in the front of his shoulder. Dr. Li had him concentrate on overhead exercises in physical therapy.

9. Petitioner also testified he may have mentioned that his son jumped on his shoulder on November 19, 2014 causing pain. However, he did not report in December of 2014 that he hurt his shoulder trying to catch his dog; he doesn't have a dog. He had a functional capacity evaluation ("FCE") at Dr. Li's recommendation, in January 2015, and suffered no dislocations through that, physical therapy, or work hardening.

10. Petitioner further testified that there were no dislocation events until he started working for Henkels & McCoy. He did slip on ice in February 2015 and pulled a muscle in his back, but he did not hurt his right shoulder. Petitioner felt like he dislocated his shoulder in the two incidents in April 2015, and Dr. Li had not recommended an MRI or surgery prior to those incidents. Petitioner had surgery for a dislocation of his right shoulder when he was 13, which was 17 or 18 years ago.

11. On cross examination, by the lawyer for Henkels & McCoy, Petitioner testified that he attributed his right shoulder injury in June of 2014 to work he was doing for Par. He came under the care of Dr. Li at that time and with whom he still treats. He has been under the care of Dr. Li continuously since September 2014. He was never released from treatment by Dr. Li. He already had an appointment scheduled with Dr. Li for April 6, 2015 at the time Dr. Li released him to full duty on March 11, 2015.

12. Petitioner further testified that it sounded right that Petitioner started working for Henkels & McCoy on March 30, 2015, which was a Monday. He went through some training on both March 30th and March 31st, with some work also in the field. He did not seek medical treatment immediately after the April 1st incident. He had pain in his shoulder prior to that incident, and continued to complain to Dr. Li about limitations regarding overhead activities. He worked both Saturday and Sunday after the April 3rd incident. He did not file any accident reports with Henkels & McCoy.

13. On redirect examination, Petitioner testified that even though he did not file any paperwork with Henkels & McCoy, he told his foreman about the incidents in April 2015. He did not have any problems with, or treatment for, his shoulder for the 10 years prior to the June 16, 2014 accident.

14. The medical record reveals that on August 14, 2014, Petitioner presented to Dr. Li on referral from Dr. Moody. Petitioner reported injuring his shoulder six weeks previously when he fell at work and tried to catch himself with his right arm (Par accident). He actually felt his shoulder dislocate and relocate. He had physical therapy and conservative treatment with no relief of pain, or of his weakness and instability. Dr. Li diagnosed a right shoulder labral tear due to dislocation and recommended surgery.

15. On September 26, 2014, Dr. Li performed right shoulder arthroscopy with debridement of extensive tensynovitis and repair of capsulolabral Bankart-type separation for type 1 superior and posterior labral tears, tensynovitis, and capsulolabral tear.

16. Petitioner commenced post-operative treatment including a cortisone injection and physical therapy. After about 26 physical therapy sessions Petitioner reported 2/10, which was pretty consistent throughout the physical therapy.

17. On January 15, 2015, Petitioner had an FCE, which was considered valid with Petitioner providing maximum effort. He was able to operate consistently at the medium physical demand level; however, he was not sufficiently improved to return to unrestricted work. His perceived physical demand capabilities were slightly lower than the ones observed to perhaps a light to medium level. Petitioner began work conditioning 11 days later.

18. On March 10, 2015, in physical therapy, Petitioner reported no significant issues from the previous session. He had progressed rapidly the last three weeks of work conditioning. In the previous sessions he did not complain of pain but he did complain mostly of fatigue. He had met all goals in work conditioning. He was to be released to full duty the following day. After about 28 sessions, Petitioner was discharged from work conditioning.

19. On March 11, 2015, Petitioner returned to Dr. Li, who noted he had completed work conditioning and was ready to return to work. He discharged Petitioner to full duty, but he did not discharge him from treatment.

20. On April 6, 2015, Petitioner returned to Dr. Li. Petitioner reported he returned to work the previous week. There were two episodes which were concerning; one when he threw a roll of tape and one when he threw a grip (Henkels & McCoy incidents). These overhand motions caused him discomfort. He felt like his shoulder dislocated after throwing the tape but did not feel that sensation when throwing the grip. On examination strength and range of motion were full. Dr. Li ordered an MRA.

21. An MRA, taken on April 16, 2015 after "2014 surgery and dislocation of the right shoulder twice the previous week," showed a diffuse lateral tear with no rotator cuff tear and old posttraumatic and postsurgical changes in the glenoid rim.

22. On April 22, 2015, Dr. Li noted the MRA showed "diffuse lateral tear with no rotator cuff tear and old posttraumatic and postsurgical changes in the glenoid rim" and "SLAP tear present." Dr. Li recommended arthroscopic repair of the SLAP tear. They would await a scheduled Section 12 examination.

23. On April 28, 2015, Petitioner asked Dr. Li whether his condition was the result of the original injury and subsequent surgery. Dr. Li indicated that it was related to the original injury of June 16, 2014. He wrote in a "restriction: the right shoulder condition is related to the" June 16, 2014 injury.

24. On May 4, 2015, Dr. Paletta examined Petitioner at Respondent's direction, and issued a report. He noted that he had seen Petitioner previously on February 16, 2015 for evaluation of the same shoulder. His original injury was on June 16, 2014 as a result of a fall at work. He was originally diagnosed with a labral tear or Bankart lesion. Dr. Li performed arthroscopic stabilization or Bankart repair on September 24, 2014. When Dr. Paletta saw him on February 16th, he was doing well with good strength, good function, good stability, and only minimal motion losses. It was Dr. Paletta's impression that he could return to work after he completed work hardening, within a month or so.

25. Dr. Paletta noted that Petitioner returned to Dr. Li on February 25, 2015, after the previous Section 12 report, and he continued work hardening. Petitioner reported he completed work hardening and was released to work at full duty on March 11, 2015, but it took him a couple of weeks thereafter to secure employment.

26. Petitioner reported that within a week of returning to work he had two incidents. First, he threw an about 2-lb roll of electrical tape to a co-worker. He felt the shoulder slip out of place and he had to manipulate it a little to get it back in place. A couple of days later, he threw a grip weighing a few lbs to a co-worker in a bucket about 12 feet overhead. He again felt the shoulder slipping out and had to manipulate it to get it back into position.

27. Petitioner returned to Dr. Li on April 6, 2015. He was concerned about a possible recurrent labral tear and ordered an MRI. The MRI showed a diffuse labral tear including a SLAP tear. Dr. Li noted that the repair of the glenoid appears to be intact, but recommended a revision shoulder stabilization surgery due to "some stretching of the capsular labral complex." After his examination and review of the MRI, Dr. Paletta diagnosed "extended superior labral tear status post previous anterior labral repair." The previous area of repair seemed to be intact. He agreed with Dr. Li's recommendation for a revision labral repair and he would also consider a biceps tenodesis. Because the new injury did not extend to the area that was previously repaired, Dr. Paletta attributed his current condition and need for revision surgery to the more recent incidents.

28. On July 8, 2015, Dr. Li performed right shoulder arthroscopy with debridement and chondroplasty of the humeral head, arthroscopic repair of the anterior and anterior inferior labrum, repair of a SLAP tear, biceps tenodesis, and removal of loose anchor for shoulder instability with labral tears, SLAP tear, grade 2 chondral injuries of the humeral head from dislocation, and loose anchor in the right shoulder.

29. On July 27, 2015, Dr. Li testified by deposition. He is a board certified orthopedic surgeon and specializes in shoulders, hands, and knees. He first saw Petitioner on August 24, 2014 after he was referred to him by Dr. Moody, an occupational medicine doctor. Petitioner had fallen at work and dislocated and relocated his right shoulder; he had persistent pain and instability thereafter. Dr. Li performed arthroscopic surgery with debridement of tensynovitis and repair of repair of a capsulolabral Bankart-type separation on September 26, 2014.

30. Dr. Li explained that a Bankart-type separation is a separation of the tissue between the shoulder socket and the tissue that connects it to providing stability to the joint. The labrum maintains the humeral head within the socket and provides a cushion. Petitioner's trauma caused the tensynovium to become really inflamed and it grew "like a weed." It becomes hard to see inside the glenohumeral joint until the surgeon removes that tissue. When Petitioner dislocated, or when he relocated, his shoulder some bone chipped off of the socket and there was some damage to the ball.

31. Dr. Li also testified that the pathology he noted in the operative report is consistent with a patient falling on an outstretched arm. The pathology, as well as a Hill-Sachs deformity, increased the likelihood of future dislocations; that was why he performed the surgery. Dr. Li was able to accomplish what he wanted in surgery.

32. Petitioner had postoperative physical therapy and work conditioning to strengthen him so he would be able to return to work at his previous job as an electrician. Dr. Li released him to full duty on March 11, 2015, after he completed work conditioning. Petitioner's time for recovery was about standard for his type of surgery. Dr. Li would have told Petitioner he would probably experience some loss of range of motion both because the surgery tightened up the joint structure and there would be some scar tissue.

33. Petitioner returned to Dr. Li on April 6, 2015 and reported the two throwing incidents. He ordered an MRI and later performed arthroscopy with debridement and chondroplasty of the humeral head, labrum/SLAP tear repair, biceps tenodesis, and removal of a loose anchor on July 8, 2015. The SLAP tear was an extension of the previous labral tear "up to the region of the SLAP tear." However, he did not think it was "new tear."

34. Dr. Li also testified that some of Petitioner's condition was *sequelae* of the initial injury but he thought that there was a worsening of Petitioner's condition by the second dislocation. However, each dislocation made him more susceptible to subsequent dislocations. He had labral tears and the anchor from the previous surgery had loosened by the second dislocation, but the rotator cuff was intact. Dr. Li then opined that the original injury had not completely healed and the first injury caused the shoulder to dislocate after Petitioner threw the roll of tape. Because the tear was an extension of the initial tear, he related Petitioner's condition to the initial injury. The proximity between the second injury and the surgery was also a factor.

35. On cross examination, by the lawyer for Par Electric, Dr. Li testified the extended tear was not the result of the first accident. The extension of the tear was caused by the subsequent incidents. If he did not perform those actions, the re-dislocation probably would not have happened. He did not have a SLAP tear from the first accident. The tear extended to the extent that he chose to perform a biceps tenodesis. Dr. Li did not believe he was aware of any dislocations prior to the 2014 accident.

36. On cross examination by the lawyer for Henkels & McCoy, Dr. Li testified that if Petitioner had a previous dislocation 15 years previously that would have no impact on his opinions about causation of his current condition.

37. Dr. Li believed that an FCE in January 2015 rated Petitioner to be able to function at a medium physical demand level. He had work hardening after the FCE because that status was not sufficient to have him return to work in his regular job.

38. Dr. Li reviewed Dr. Paletta's Section 12 report, but only after he had released Petitioner. He did not know what Petitioner meant when he told Dr. Paletta that he felt his shoulder was unstable in 2/15. He understood that upon his release from work conditioning, Petitioner "had some limited scapular abduction, a-b-abduction, and decreased internal and external rotation." That would be consistent with his assessment at that time. He was not really concerned about a little loss of range of motion as long as Petitioner could meet his job duties. A loss of range of motion would be expected after the surgery Petitioner had. When he released Petitioner to full duty he asked that he return for follow up in four weeks. Petitioner was not released from care when he was released to full duty work.

39. Dr. Li further explained "there were some findings in the second surgery that weren't present in the first surgery, but there was still the finding – the crux of this is the finding where the shoulder re-dislocated, pulled out the anchor that was inserted to repair the labrum that was put in as a result of the original injury." Therefore, he thought Petitioner's subsequent condition related to the initial injury and resulting treatment.

40. On redirect examination, Dr. Li testified that the extension of the labral tear was based on Petitioner not completely healing from the first injury. It was "undeniable" that the loosening of the anchor was an extension of the first injury.

41. On re-cross examination, by the lawyer from Par, Dr. Li testified even if the second injury occurred 18 months after the first surgery he would still relate the condition to the initial injury. However, if he had not re-dislocated the shoulder the anchor would not have loosened. The second surgery probably would not have been necessary if there had not been the initial injury.

42. Dr. Paletta was deposed on October 11, 2015 by a lawyer for Par Electric. Dr. Paletta testified he is fellowship-trained in sports medicine; 60% of his practice relates to shoulders, 20% knees, and 20% elbows. About 40% of his patients are workers' compensation and about 3% of his practice involves Section 12 examinations. He sees about 100 patients a week and performs 12 to 15 surgical procedures a week.

43. He first saw Petitioner on February 16, 2015 and issued a report. He also saw him again and issued another report in May 2015. He reviewed medical records, mostly from Dr. Li, physical therapy notes, and an FCE. Petitioner reported that in the 8th grade he was in an accident in which he fractured and dislocated his right shoulder, requiring surgery. Once he healed and pins were removed he "had basically gone back to normal function with the shoulder."

44. At the first examination, Petitioner reported to Dr. Paletta that he was doing well in recovery from recent shoulder surgery. He had "some mild discomfort in the front of the shoulder" and was making continued progress in physical therapy. He was currently in work hardening. Dr. Paletta thought Petitioner was "nearly complete in his recovery," and he could work at full duty once work hardening was complete.

45. Dr. Paletta examined Petitioner again on May 6, 2015. Petitioner reported that he finished work hardening and had been returned to full duty. He reported two incidents that were associated with recurrent shoulder pain. Dr. Paletta agreed that "it (apparently referring to Petitioner's condition) was different that when [he] evaluated him initially." In the first incident he threw a roll of tape "a good distance" like a baseball. In the second incident he reported throwing a tool that weighed a couple of pounds about 12 feet. In both instances he felt the sensation of his shoulder slipping out and he had to manipulate the shoulder to get it back into position. Dr. Paletta did not consider that either activity constituted an occurrence of everyday living outside a sports context. Petitioner reported the pain was exactly the same as it was prior to his surgery.

46. Dr. Paletta noted Petitioner returned to Dr. Li who ordered an MRA. Dr. Paletta reviewed the MRA which showed that the labrum tear repaired in the surgery was still intact. It appeared that he had "a new labral tear that extended beyond the area that had been previously repaired." He diagnosed Petitioner "had an extended superior labral tear, or SLAP tear following previous repair of the anterior/inferior labrum." Dr. Paletta opined that the pathology shown on the MRA was a new tear. He noted that a SLAP tear can be the result of a throwing mechanism. Dr. Paletta agreed with Dr. Li recommendation for repeat labrum repair, but while he used the term "'repeat' it was going to be a repair in a different part of the labrum."

47. Dr. Paletta also noted that whether or not Dr. Li placed Petitioner at maximum medical improvement after the surgery made no difference in reaching his opinion about Petitioner's current condition. There was no evidence of a SLAP tear prior to, or during, surgery. Then after the throwing injuries the MRA clearly showed the SLAP tear.

48. Dr. Paletta was then asked to comment on the causation opinion in Dr. Li's deposition testimony. Dr. Paletta noted that the question posed to him contained new information that he was previously provided. He had no information about a "loose anchor" and if there were evidence that the previous labral repair had failed, that might change his causation opinion. Full information would include an operative report and operative photos. In fact, if Dr. Li's suggestion that Petitioner had not completely healed from the first labral tear were true, he would opine that the condition was due to the initial injury.

49. On cross examination by Petitioner's lawyer, Dr. Paletta testified he had no criticism of the treatment provided Petitioner by Dr. Li. The surgical procedures he performed would be same procedures Dr. Paletta would have performed. As an independent medical examiner, Dr. Paletta is "completely bound by the information made available to" him. He did not have the observations Dr. Li made during surgery when he authored his May 2015 Section 12 report.

50. Dr. Paletta was recalled for deposition by Respondent Par Electric on November 19, 2015. He testified that when he testified previously it was primarily about the need for a second surgery for Petitioner. At that time he was not aware that Petitioner actually had a second surgery and did not have access to the operative report. Since that testimony he had been provided that information.

51. Thereafter, he prepared a third report dated October 9, 2015. Dr. Paletta found most salient, Dr. Li's statement in the operative report that he "evaluated the site of the previous repair and it was loose and [he] could see that the dislocation had caused one of the anchors to pull loose." Dr. Li also performed a biceps tenodesis, which was not indicted at the time of the initial surgery.

52. Based on all the information now available to him, Dr. Paletta now diagnosed "recurrent tear of the anterior labrum as well as a new tear of the superior labrum, or so called SLAP tear." He now opined that the need for the second surgery was caused by the two subsequent throwing incidents Petitioner reported. He noted that the operative report clearly showed a tear in a new area of the labrum and Dr. Li's impression that the anchor came loose due to the second dislocation. Typically, anchors fail due to trauma; the first repair would not have failed if not for the throwing incidents.

53. Dr. Paletta also noted that Petitioner had made a full recovery and returned to full duty. Dr. Li did not document any signs of residual instability at the time he released him. In the history Petitioner provided Dr. Paletta he indicated he did well until the two subsequent incidents.

54. On cross examination, by a lawyer for Respondent Henkels & McCoy, who did not pose any questions at the initial deposition, Dr. Paletta agreed that the last medical record he reviewed in preparation of his latest report was Dr. Li's note from August 20, 2015. He had not been asked to review any records after that date, nor was he asked to review Dr. Li's deposition testimony. He was asked to review the additional records the day after his previous deposition.

55. Dr. Paletta received black & white copies of the intraoperative photos; actual films are generally in color. He agreed that his most recent report indicated that the photos were not helpful in differentiating the mechanism of loosening of the anchor; he could not "not even see the loose anchor in this photo." There was also no photo of the chondral damage Dr. Li noted. He agreed that Dr. Li personally observed the pathology of Petitioner's shoulder.

56. Dr. Paletta noted that the last note he had from Dr. Li after the first surgery was from March 11, 2015 releasing him to full duty. He did not recall whether Dr. Li found him to be at maximum medical improvement at that time. If there was no specific note declaring Petitioner at maximum medical improvement, it would be fair to say that Dr. Li did not consider Petitioner to actually be at maximum medical improvement. He was not aware that at that time Dr. Li requested Petitioner follow up with him a few weeks after he returned to work.

57. On cross examination by Petitioner's lawyer, Dr. Paletta testified that the additional material he reviewed after his initial deposition was "absolutely" new to him.

58. On redirect, after reviewing his e-mail attachments, Dr. Paletta testified color intraoperative photos were sent to him by e-mail but he printed them out to review them; he does not do well reviewing photos on a computer. In viewing the color images he still could not see the anchor, though he did see evidence of loosening of the previous repair and the SLAP tear. In commenting on Dr. Li's reference to the proximity between the second injury and the initial surgery, Dr. Paletta noted that the injury was more temporarily proximate to the throwing incidents. In addition, the anchor loosening was associated with the second dislocation. The fact that Dr. Li did not place Petitioner at maximum medical improvement did not have any effect on his opinion, because Dr. Li believed Petitioner was able to perform all of his work duties.

The Arbitrator did not specifically address the issue of accidents in the body of his decision. He began his analysis with causal relationship of all the accidents. As noted above, Par Electric stipulated to the accident in 14WC37190. However, Henkels & McCoy did not stipulate to accidents in 15WC19322 & 15WC19323. In its brief Henkels & McCoy argues the Arbitrator erred in finding accidents on April 1, 2015 and April 3, 2015 because Petitioner neither reported the incidents nor sought immediate medical attention as a result of them.

The Commission affirms the Arbitrator's determination that Petitioner suffered three distinct accidents on June, 16, 2014, April 1, 2015, and April 3, 2015 which is implicit in his decision. Petitioner's testimony about the incidents was credible and corroborated by the treatment notes of Dr. Li. There is no evidence contradicting his testimony about suffering such accidents. In addition, it was understandable that he did not seek medical attention, because he had an appointment already scheduled with Dr. Li in a few days. Similarly, his failure to report the incidents was understandable because he personally attributed his re-injury to his previous accident, an impression apparently supported by his conversation with Dr. Li.

On the issue of causation, the Arbitrator found that Petitioner's current condition of ill-being was causally related to both the initial accident/injury on June 16, 2014 and the subsequent throwing incidents in April 2015. The Arbitrator concentrated his decision on the causal connection of the secondary incidents, which in effect he found to be intervening accidents breaking the causal connection from the initial accident. The Arbitrator noted the change in Petitioner's subjective complaints after those incidents. He also found the causation opinion of Dr. Paletta more persuasive than that of Dr. Li. He specifically noted Dr. Paletta's testimony that the failure of the anchor was traumatic in nature. He also found Dr. Li unpersuasive because if Petitioner had not completely healed he would not have released him to full duty.

The Commission agrees with the Arbitrator that Petitioner suffered accidents in April 2015 subsequent to the initial accident and injury of June 16, 2014. The fundamental issue before the Commission becomes whether those accidents were sufficient to become intervening accidents breaking the causation from the initial accident. We find that they did not and that Petitioner's current condition of ill-being relates back to his initial accident on June 16, 2014.

In this instance, the Commission finds the causation opinion of Dr. Li more persuasive than that of Dr. Paletta. Dr. Li actually personally observed the pathology of Petitioner's shoulder during surgery. Based on that observation, Dr. Li opined that the original injury had not completely healed and the first injury caused the shoulder to dislocate after Petitioner threw the roll of tape. Because the tear was an extension of the initial tear, he related Petitioner's condition to the initial injury. Dr. Li also noted that the proximity between the second injury and the surgery was also a factor. The Commission also finds noteworthy that while Dr. Li released Petitioner to full duty on March 11, 2014, he did not declare him at maximum medical improvement, he did not release him from treatment, and he actually scheduled a follow-up appointment.

The Arbitrator indicated he did not find Dr. Li's opinion persuasive because he would not have released Petitioner to work full duty if he thought he had not healed completely after his initial surgery. The Commission disagrees with the Arbitrator's assessment. The Commission notes that at times the practice of medicine is more of an art than a science. Sometimes, doctors' educated conclusions regarding a patient's current condition can be later found to be inaccurate or incomplete. Here, by opining that Petitioner had not completely healed from the initial injury, Dr. Li is tacitly accepting that he may have released Petitioner prematurely to work full duty in a heavy physically demanding level occupation. The Commission finds that by acknowledging that Petitioner had not fully healed from the initial accident when he released him Dr. Li testimony was actually more persuasive rather than less persuasive.

The Commission also notes that the only FCE, taken in January 2015, evaluated him as unable to return to his previous job and there was no FCE performed after Petitioner completed work hardening. Finally, the Commission also finds relevant the fact that Petitioner was never symptom free after his initial surgery. He complained of continued pain throughout his physical therapy and work hardening. Petitioner testified he still had pain and weakness when he returned to work, and that he returned because he was released to work not necessarily because he felt ready to return to work.

This case is similar to that of *Vogel v. Hogan Plumbing*, 03 I.I.C. 743, (filed October 22, 2003). There, the case was remanded to the Commission by order of the "Circuit Court of DuPage County entered October 7, 2002, which found that the auto accident on June 9, 1999 and subsequent accidents did not break the chain of causation between Petitioner's July 10, 1998 work accident and the pseudoarthrosis in that the work and auto accidents were concurrent causes of that pseudoarthrosis. The Circuit Court further remanded to the Commission to enter an award of medical and temporary total disability benefits." Complying with the remand order in *Vogel*, the Commission assessed such benefits against the employer.

Therefore, even if the Commission accepts the Arbitrator's conclusion that all the accidents are concurrent causes of Petitioner's condition of ill-being, that finding in itself would not be sufficient for the subsequent accidents to become intervening accidents thereby breaking the chain of causation from the initial accident on June 16, 2014. Therefore, the Commission finds that throughout the period relevant to these proceedings Petitioner's condition of ill-being of his right shoulder relates back to his initial accident on June 16, 2014.

Accordingly, the Commission finds that Respondent, Par Electric, is responsible for all medical expenses and benefits arising out of Petitioner's right shoulder condition. By separate Decisions, the Commission reverses the Decisions of the Arbitrator in 15WC19322 and 15WC19323; finding therein that Petitioner did not prove the respective accidents on April 1, 2015 and April 3, 2015 were intervening accidents causing his current condition of ill-being and denying compensation in those claims.

IT IS THEREFORE ORDERED BY THE COMMISSION, that Respondent pay to Petitioner the sum of $733.33 per week for a period of 61&1/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all medical expenses thus far incurred for treatment of Petitioner's right shoulder under §8(a) of the Act pursuant to the applicable medical fee schedule.

IT IS FURTHER ORDERED BY THE COMMMISSION, that Respondent authorize and pay for all prospective treatment for Petitioner's right shoulder recommended by Dr. Li.

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

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

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

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

DATED: OCT 2 8 2016

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

RWW/dw
O-10/4/16
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16IWC03390

STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19 (B)

DALLAS HAMM
Employee/Petitioner

Case # 14 WC 37190

v.

Consolidated cases: 15 WC 19322, 15 WC 19323

PAR ELECTRIC
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Arbitrator McCarthy, Arbitrator of the Commission, in the city of Bloomington on December 22, 2015. 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. ☐ _____

Findings

16IWCC0390

On the date of accident, June 16, 2014, Respondent was operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident was given to Respondent.

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

In the year preceding the injury, Petitioner earned $57,200.00; the average weekly wage was $1,100.00.

On the date of accident, Petitioner was 31 years of age, married, with 1 children under 18.

Petitioner is entitled to TTD benefits for the period of September 26, 2014 to March 11, 2015.

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

Respondent shall be given a credit of $17,390.40 for TTD, $0.00 for TPD, $0.00 for maintenance, and $19,885.37 for other benefits, for a total credit of $37,275.77.

ORDER

This case proceeded pursuant to Sections 8(a) and 19(b) of the Act. The parties agree that no claims for PPD are being made at this time.

For the reasons set forth in the attachment to this Arbitration Decision, the Arbitrator finds that Petitioner has proven that his current condition is causally related to the alleged accident, as well as the accidents proven in the companion cases, 15 WC 19322 and 15 WC 19323. For the reasons set forth, the Arbitrator also finds the Respondent Par Electric not responsible for payment of medical treatment from April 3, 2015 through the date of arbitration, as well as TTD benefits for the same period of time.

The Arbitrator finds that Petitioner is entitled to TTD benefits for the period of September 26, 2014 to March 11, 2015, and for medical bills incurred prior to March 11, 2015. Petitioner is not entitled to any TTD or medical expenses after March 12, 2015 at Respondent's expense. The Arbitrator finds that Respondent is entitled to a credit for $37,275.77 for TTD and other benefits paid.

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

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

STATEMENT OF INTEREST RATE If the Commission reviews this award, interest of 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.

D. Dylan McCarty

1/24/2016

Signature of Arbitrator

Date

FEB 2 - 2016

FINDINGS OF FACT

The parties arbitrated three cases by consolidation. All of the alleged accidents involve the Petitioner's right shoulder. The main issue is causation among the three accidents with the Petitioner's injuries. The Arbitrator will use one Findings of Fact and Conclusions of Law on the three claims.

Petitioner testified that he worked for the Local 51 Union as an electrical lineman. He testified he was still an apprentice electrical lineman, but was almost finished with his apprenticeship. He testified that his typical job duties included building lines, climbing poles, digging holes, etc. He testified that his job essentially involved physical work.

Petitioner testified that he experienced an undisputed injury to his right shoulder on June 16, 2014 while working for Par Electric. He testified that he went to get off of a bucket and slipped. He testified that he grabbed a bar and dislocated his right shoulder.

He then testified to his subsequent treatment with OSF St. Francis, OSF Occupational Medicine and with Dr. Li. He confirmed that he underwent surgery on September 26, 2014, followed by physical therapy and work hardening. (Px. 4, 5) He testified that as of March 11, 2015, he was released to return to full duty work. (Px. 5) He testified that at the time his shoulder was not 100% and that it was still weak and painful.

Significantly, Petitioner admitted that during physical therapy, his FCE and work conditioning, he had no further dislocations to his right shoulder. He testified that in between his full duty release and the time he started working for co-Respondent, Henkels and McCoy, that he did not have any further shoulder dislocations. He testified that there were no recommendations for additional diagnostics such as an MRI. He testified that he was not being referred for any additional invasive treatments such as surgery.

His medical records through March 11, 2015 confirm there were no further reports of dislocations or recommendations for additional diagnostics or surgery. In fact, his medical records through March 11, 2015 document decreased complaints of pain and improved functional capabilities, which resulted in a release to return to full duty work on March 11, 2015. (Px. 5)

Petitioner was examined by Dr. George Paletta, an orthopedic surgeon, at Respondent Par Electric's request on February 16, 2015, which was prior to the two intervening accidents of April 1 and 3, 2015. Dr. Paletta noted Petitioner had mild complaints with minimal loss of range of motion, excellent strength and good stability. He recommended additional work hardening followed by a return to full duty work. He agreed that Petitioner's treatment through February 16, 2015 was reasonable, necessary and causally related to the June 16, 2014 accident while working for Par Electric. (Rx. 1, Ex. 2)

Petitioner testified that his medical benefits were approved by Par Electric through March 11, 2015 and that he was paid TTD benefits up until his full duty release on March 11, 2015 by Dr. Li. There are no disputes that Respondent, Par Electric, is responsible for the payment of medical and TTD benefits through March 11, 2015 when Petitioner was released at full duty by Dr. Li.

Petitioner testified that he eventually returned to work for co-Respondent, Henkels and McCoy, as an apprentice lineman. He testified that he was performing the exact same type of work that he performed for Par Electric.

Petitioner testified that he started working for Henkels and McCoy in late March 2015 and that he worked for seven days, from a Monday through Sunday. He testified that on the first day that he was employed he underwent training. He testified that on the second day he underwent a half day of training and worked a half day in the field. On that day, which was Wednesday, he was working on the ground with electrical line. He testified that he had a wide roll of electric tape and threw it up to other employees in a bucket. He testified that his shoulder dislocated and that he was in a lot of pain on April 1, 2015. He testified that when he finished work, his shoulder was very sore but that he returned to work on April 2, 2015. He testified that he engaged in limited use of the shoulder on that date.

He also testified as to a subsequent accident that occurred on April 3, 2015 while he was working for Henkels and McCoy. He testified that other employees in a bucket approximately 12 feet off the ground needed a wire grip. He testified that he picked up the wire grip and threw it upwards towards the other employees. He testified that he again experienced another dislocation in his right shoulder with increased pain.

He testified that throwing tape or grips to other employees is a normal part of his work duties. He testified that on April 3, 2015 he finished work but was "babying" his shoulder. He testified that he was also "babying" his shoulder during the remaining days he worked for Henkels and McCoy.

Petitioner testified that he experienced pain following the April 1, 2015 shoulder dislocation while working for Henkels and McCoy. He testified that his pain was greater than what he had prior to working for Henkels and McCoy. He testified the same regarding the April 3, 2015 incident. He testified that his pain following the incidents was greater than before either of the April 2015 incidents.

Petitioner testified that he had a regularly scheduled appointment with Dr. Li as a follow up to his original accident on April 6, 2015, and he gave Dr. Li a history of what happened to him on April 1 and 3, 2015. He testified that Dr. Li recommended he undergo another MRI and placed him on light duty work. Significantly, Petitioner testified that he told Dr. Li that his shoulder hurt following the April 1 and 3 incidents.

Petitioner testified that he then called Jeremy, his general foreman at Henkels and McCoy, telling him that he had hurt his shoulder. He said he did not go into detail because he thought the problem was related to his original injury. He said that he was not offered any light duty work.

The records of Dr. Li from April 6, 2015 document that Petitioner reported a history of the two intervening accidents occurring on April 1 and 3, 2015. Petitioner reported histories of the two accidents that were consistent with his testimony at trial. Dr. Li's records document that Petitioner had "two episodes which were concerning." Based on the report of the two incidents, Dr. Li referred Petitioner for an MR Arthrogram. (Px. 5)

Petitioner underwent another MRI on April 16, 2015. It was interpreted to reveal a diffuse labral tear. (Px. 2).

Petitioner was evaluated again by Dr. Paletta at Respondent Par Electric's request on May 4, 2015. Dr. Paletta noted the history of the two intervening accidents on April 1 and 3, 2015. Petitioner reported to Dr. Paletta that prior to the April accidents "everything felt great and I was doing great." Petitioner reported that upon returning to work for a new employer, co-Respondent Henkels and McCoy, he had two incidents that resulted in recurrent problems with the right shoulder. The histories he provided of those two incidents were consistent with his testimony at Arbitration and the medical records of Dr. Li. He reported feeling that his shoulder dislocated during both episodes with pain. (Rx. 1, Ex. 3).

Significantly, Dr. Paletta noted that Petitioner was reporting that his right shoulder as of May 4, 2015, which was before he underwent an additional surgery in July 2015, felt the same as it did following his June 2014 accident. Petitioner reported a sense of instability. (Rx. 1, Ex. 3) This indicates a significant worsening of his right shoulder condition following the two April incidents while working for Henkels and McCoy.

Dr. Paletta reviewed the April 15, 2015 MR Arthrogram and agreed with Dr. Li's recommendation for surgery. However, Dr. Paletta opined that the need for additional treatment and work restrictions was the result of the April 1 and 3, 2015 accidents while working for Henkels and McCoy. He felt that Petitioner had reached MMI as a result of the June 16, 2014 accident while working for Par Electric, but that two new accidents while working for a new employer with a new objective injury in the form of a new labral tear per Petitioner's MR Arthrogram caused the need for Petitioner to undergo an additional surgery.

Petitioner eventually underwent surgery performed by Dr. Li on July 8, 2015. He underwent a right shoulder arthroscopy with debridement and chondroplasty of the humeral head; arthroscopic repair of the anterior and anterior inferior labrum; repair of a SLAP tear; biceps tenodesis; and removal of a loose anchor. (Px. 3)

Dr. Li documented the following in his operative report:

"There was clearly an anterior and anterior inferior labral tear. I evaluated the site of the previous repair and it was loose and **I can see the dislocation had caused one of the anchors to pull loose**." (Px. 3)

Dr. Li provided testimony via evidence deposition on July 27, 2015. (Px. 6) Dr. Li testified that he treated Petitioner for a fall at work in June 2014 that resulted in a dislocation. He testified that Petitioner's history was that he dislocated and then relocated the right shoulder in June 2014,, which resulted in "persistent pain and instability." (Px. 6, p. 5)

Dr. Li noted that the initial September 26, 2014 surgery revealed a Hill-Sachs deformity and other pathology that placed Petitioner at increased risk for future right shoulder dislocations. (Px. 6, p. 10) He testified that he was able to accomplish what he wanted to accomplish during the first September 26, 2014 surgery. (Px. 6, p. 11)

Dr. Li admitted that following work conditioning Petitioner was "released from care to return to work full duty," on March 11, 2015. He confirmed Petitioner was "released without restrictions." (Px. 6, p. 12) He testified that Petitioner recovered in a typical timeframe to return to full duty work for the kind of injury he had on June 16, 2014 while working for Par Electric. (Px. 6, p. 13)

Dr. Li testified that Petitioner returned to see him after going to work for Henkels and McCoy on April 6, 2015 and reported a history of the two incidents occurring on April 1 and 3, 2015. (Px. 6, p. 14-15) He confirmed that he performed another surgery on July 8, 2015 to repair, among other things, a SLAP tear, which he confirmed was the result of a tear from "11 and 1 o'clock . . . on the clock face," versus the area that was previously repaired from "2 to 6 o'clock" during the September 2014 surgery. (Px. 6, p. 15) Dr. Li testified that the SLAP tear was an extension of the prior labral tear that resulted from the June 2014 accident while working for Par Electric, (Px. 6, p. 20), and felt the new extended tear was related to the September 2014 surgery and Petitioner's incomplete recovery from same. (Px. 6, p. 25)

He testified that the July 2015 surgery revealed Grade II articular changes of the humeral head that represented a "worsening" from the September 2014 surgery. Dr. Li testified that some of the worsening was "sequelae" from the June 2014 injury, but also admitted that there was "some additional injury from the second dislocation episode of April 1, 2015. (Px. 6, p. 16)

He testified that an anchor placed during the September 2014 surgery was found to be loose during the July 2015 surgery. He testified that "when [Petitioner] dislocated" the shoulder again in April 2015, Petitioner "**pulled the anchor out of the bone**." (Px. 6, p. 18)

Dr. Li was asked whether it was his opinion that the need for an additional surgery in July 2015 was causally related to the June 2014 accident involving Par Electric or the April 1 and April 3, 2015 incidents involving Henkels and McCoy. Dr. Li testified that the "original surgery had not fully healed." (Px. 6, p. 24) He testified that during the April incidents involving Henkels and McCoy, the throwing "actions caused the capsule to – well, the shoulder to dislocate and the capsule to pull away and the anchor to pull out." As a result, he causally related to need for the July 2015 surgery to "be a consequence of the treatment from his first injury." (Px. 6, p. 25)

Dr. Li opined that the proximity in time between Petitioner's September 2014 surgery, his March 2015 full duty release, and the recurrent dislocations in April 2015 also provided him with a basis to causally relate the need for additional surgery to the June 2014 accident. (Px. 6, p. 26)

On cross-examination, Dr. Li admitted the following:

- That Petitioner did not have a SLAP tear extending from 11 and 1 o'clock as a result of the June 2014 accident or noted during the September 2014 surgery. (Px. 6, p.27, 28);
- That the SLAP tear was an extension of the prior labral tear "as a result of [the] two incidents that [Petitioner] described [as] throwing the tape and throwing the grip." (Px. 6, p.27);
- That but for the April 1 and April 3 incidents while working for Henkels and McCoy, which resulted in dislocations, Petitioner would not have experienced a new SLAP tear. (Px. 6, p.28);
- That he used two new anchors during the July 2015 surgery to replace two anchors. (Px. 6, p. 29);
- That the tear from the June 2014 injury "did not extend as high as what would be required to perform a biceps tenodesis," (Px. 6, p.29), a procedure the Arbitrator notes was performed during the July 2015 surgery. (Px. 3);
- That there were new findings of lesions on the glenoid and humeral head during the July 2015 surgery that were not present per Dr. Li during the September 2014 surgery. (Px. 6, p. 30-31);
- That he was not concerned with a "little loss of range of motion" when he decided to release Petitioner back to full duty work on March 11, 2015. (Px. 6, p. 36);
- That there were "some findings in the second surgery that weren't present in the first surgery." (Px. 6, p. 39);

- That the re-dislocation of April 2015 "pulled out the anchor that was inserted to repair the labrum that was put in as a result of the original injury." (Px. 6, p. 39).

- That if Petitioner did not have the April incidents involving re-dislocations, Dr. Li would not have needed to perform the July 2015 surgery. (Px. 6, p. 42); and

- That he testified "of course [Petitioner] did," when asked whether Petitioner "had another dislocation or another accident resulting in the need for further surgery." (Px. 6, p. 42)

Dr. Paletta provided testimony via evidence deposition on October 1, 2015 and November 19, 2015. On October 1, 2015, during direct examination, Dr. Paletta initially testified consistent with his narrative reports prepared following his February 16 and May 4, 2015 examinations. (Rx. 1)

Dr. Paletta testified that Petitioner reported a history of two incidents occurring on April 1 and 3, 2015, which involved over hand throwing motions. He testified that the act of throwing a roll of electrical tape or a grip would not be considered an ordinary act of everyday living. (Rx. 1, p. 12-14) Dr. Paletta testified that Petitioner reported a history on May 4, 2015 of pain in the shoulder that was "identical to the pain he was experiencing prior to the" September 2014 surgery. (Rx. 1, p. 14)

Dr. Paletta testified that at the time of his second evaluation of the Petitioner on May 4, 2015 he had the recent April 16, 2015 MR Arthrogram and treatment notes of Dr. Li. (Rx. 1, p. 14) He testified that his review of the April 2015 MR Arthrogram revealed a new labral tear that extended beyond the area that was previously repaired. (Rx. 1, p. 15) He testified Petitioner had a Superior Labrum Anterior to Posterior (SLAP) tear that was not present during the original September 2014 surgery. (Rx. 1, p. 16)

Dr. Paletta initially testified it was his opinion that Petitioner experienced new accidents on April 1 and 3, 2015, which resulted in the need for Petitioner to undergo additional treatment. (Rx. 1, p. 17) He testified Petitioner experienced a new tear of the labrum. (Rx. 1, p. 16) He testified the throwing incidents were a competent cause for a SLAP tear. (Rx. 1, p. 17) He testified he was in agreement with Dr. Li's recommendation for additional surgery. (Rx. 1, p. 18)

Dr. Paletta testified it made no difference with respect to his opinions regarding causation whether or not Petitioner was formally placed at MMI by Dr. Li before he was released to full duty work or before the April incidents while working for Henkels and McCoy. (Rx. 1, p. 19-20)

Dr. Paletta testified that the status of Petitioner's right shoulder changed after the April 1 and 3, 2015 incidents with the development of a new SLAP tear. (Rx. 1, p. 21) He testified that Petitioner symptoms changed after the April 1 and 3 incidents where Petitioner reported increased instability and pain after the April incidents. (Rx. 1, p. 21-22) He testified that the April incidents required more extensive testing and treatment.

Finally, he testified that the April incidents changed Petitioner ability to work full duty. (Rx. 1, p. 22)

Dr. Paletta was then asked about Dr. Li's opinions regarding causation. Dr. Paletta was informed that Petitioner had undergone an additional surgery in July 2015 and was advised that Dr. Li partially based his causation opinions on the finding of a loose anchor. (Rx. 1, p. 22-23) Dr. Paletta was not aware prior to the October 1, 2015 deposition that Petitioner had undergone another surgery in July 2015. He did not have an opportunity to review the operative report prior to or during the deposition of October 1, 2015. (Rx. 1, p. 23-24)

Dr. Paletta reviewed some of Dr. Li's testimony and testified that "there is the suggestion that there was in fact not complete healing of the first labral tear, that there was failure of one of the anchors, and that an area of the labrum that had been previously repaired was not healed, and that the tear, the new tear extended from that area of the labrum upwards." Based on same, he opined that the need for the July 2015 surgery was possibly the result of an incomplete healing of the September 2014 repair. (Rx. 1, p. 25) **However, he also testified that while his opinions had changed based on Dr. Li's deposition testimony, he did not have "full information" including arthroscopy pictures and the operative report**. (Rx. 1, p. 26-27)

Following the deposition, Dr. Paletta was provided with the operative report and arthroscopy pictures by counsel for Par Electric and Dr. Paletta was asked to prepare a narrative report commenting on same. His report was prepared on October 9, 2015. (Rx. 2, Ex. 1).

Following his review of the previously unavailable documentation, Dr. Paletta opined that "the necessity of the second surgery was related to the two new incidences [of April 2015] causing the need for additional surgery." He noted that Petitioner had returned to full duty work and that at the time of that release there was "no evidence of any failure of the [September 2014] repair." He opined that the "arthroscopy photographs documented what appeared to be a traumatic failure of the proximal portion of the prior labral repair," with a failure of an anchor." He opined that anchor failures typically occur as a result of trauma. (Rx. 2, Ex. 1)

He opined that there was a progression of the prior labral tear to involve a new portion of the labrum and that therefore Petitioner experienced a traumatic labral tear from the April incidents. He opined, similar to Dr. Li, that "if those two throwing incidences had never occurred . . . it [was] unlikely that the first surgery would have failed as a result of the loosened anchor." He opined that the loosened anchor was not inevitable. He noted it would be uncommon for an anchor to loosen as a result of normal activities of everyday living, and that there was no evidence to indicate a loosening before the April incidents. (Rx. 2, Ex. 1)

He provided testimony again via evidence deposition on November 19, 2015. (Rx. 2) Both Petitioner's attorney and counsel for Henkels and McCoy objected to additional

testimony from Dr. Paletta, but did not cite to any relevant authority for why Dr. Paletta's deposition testimony could not be re-taken. Whether to allow the re-deposition of Dr. Paletta is within the arbitrator's discretion, see Janda v. U.S. Cellular Corp., 356 Ill.Dec. 329 (2011), and the arbitrator finds the deposition testimony of Dr. Paletta from November 19, 2015 to be admissible based on the fact that Dr. Paletta did not have complete information or documentation at his initial deposition in October 2015.

Dr. Paletta testified that he reviewed the operative report and arthroscopic photos. He testified consistent with his narrative report dated October 9, 2015. (Rx. 2, Ex. 1) He testified that Dr. Li himself noted in his operative report that "the site of the previous repair . . . was loose and I could see that the dislocation had caused one of the anchors to pull loose." (Rx. 2, p. 9)

He was asked why his opinions had changed again. Dr. Paletta testified as follows:

> "Because the operative report clearly documented that there was a new area of the labrum that was involved with the tear that was not present previously . . . That clearly demonstrates there was new injury to an area that had previously been normal. In addition, Dr. Li's impression was, from the time of surgery, that the previous repair was now loose and that the anchor was loose as a consequence of the dislocation episodes. Those factors taken together in addition to the review of the arthroscopy photos allows me to conclude within a reasonable degree of medical certainty it is my opinion that the need for the additional surgery was a result of those two incidents that occurred while throwing." (Rx. 2, p. 11)
>
> "The issue that was notable on the operative report and the arthroscopy photographs from the second surgery had to do with the loose anchor. Typically, anchors fail, in my experience, as a result of trauma. If they fail for any other reason, there's typically evidence of . . . what we call osteolysis where the anchor then becomes loose, and there was no evidence of that . . . at the time of [the July 2015] surgery. So it is highly unusual, in my opinion, for anchors to come loose on their own unless there's significant trauma that causes the anchor to fail or there's come reaction to the anchor that causes lysis of the bone." (Rx. 2, p. 11-12)
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> "This gentleman had made a full recovery. He had returned to full duty. Dr. Li had not documented any residual signs or symptoms of instability at the time that he released him. And by the patient's own admission when I took his history, he was doing well up until those two incidents. So he had two distinct incidents with surgically documented evidence of a new portion of the labrum torn and surgically documented evidence of loosening of the previous repair. Those are the factors that say to me he clearly had a new injury and that this injury extended to a new part of the labrum and resulted in failure of the previous repair." (Rx. 2, p. 14)

On cross examination, Dr. Paletta admitted that the operative report findings and not the arthroscopy photos caused his opinions to change with respect to the loose anchor. He did however say that the new SLAP tear was visible in the photos, and the tear was not present during the first surgery. (Id at 19-20). Dr. Paletta also testified, in agreement with Dr. Li, that if the April 2015 throwing incidents had not occurred, the Petitioner's September 2014 labral repair would not have failed. (Rx. 2, p. 15)

Petitioner testified that he continues to undergo postoperative care with Dr. Li, (Px. 8), and there are no genuine disputes related to the reasonableness and necessity of same. The primary issue in dispute is who is liable for the medical treatment and off work benefits incurred after March 11, 2015 – Par Electric or Henkels and McCoy.

CONCLUSIONS OF LAW

(F, K, L) **Is Petitioner's current condition of ill-being causally related to the injury? Is Petitioner entitled to prospective medical care? Is Petitioner entitled to TTD benefits?**

The Arbitrator finds that the Petitioner's current condition is causally related to all three of the accidents which are the subject of these three consolidated claims. However, the Arbitrator also feels that the surgery of July 8, 2015 and the subsequent treatment and lost time from work is causally related to the Petitioner's two accidents at Henkel's and McCoy, and that Respondent is responsible for payment of those benefits.

First of all, the Petitioner's current condition is a right shoulder post two labral tears, one of which occurred in June 2014 and the other in April 2015. The Petitioner testified that when he was released by Dr. Li from his first course of treatment in March 2015, he still had weakness and pain in the shoulder. His testimony is consistent with the medical evidence. After three months of post surgical physical therapy, the Petitioner reported a nagging pain in the front of the shoulder and showed a mild deficit in flexion. (PX 5; 1-19-15) At his FCE two days later he was found to have significant right shoulder pain lifting 45 pounds, and found to be limited to work at the medium demand level. (Id) After an additional two months of work hardening, he was found on March 10, 2015 to have decreased strength with abduction. (Id) While Dr. Li did return him to full duty work, he testified that his original injury had not fully healed. (PX 6 at 24)

Certainly the Petitioner can pursue additional compensation for permanency from his first accident against Par Electric in a later proceeding.

Henkel's and McCoy are responsible for the second surgery and follow up care. The events which occurred on April 1 and 3 were shown to represent accidents arising out of his employment. Throwing rolled tape and wire cutters a fair distance to co-workers on the jobsite are not activities which create risks of injury equal to those experienced by members of the general public. They are employment risks. The resulted in classic

aggravations of the Petitioner's pre-existing condition, causally related to the subsequent care.

Dr. Li testified that the initial injury made the Petitioner more prone to future dislocations. The Petitioner testified that, while he did not experience any dislocations after his first surgery while in therapy, work hardening or taking the FCE, he did experience dislocations throwing the items at work. Dr. Li said that these dislocations caused abrasions to his humeral head, a tear in a different section of the labrum and a loosening of one of the anchors he'd placed in the shoulder to repair the original labral tear. (PX 6 at 15, 17, 27) Dr. Paletta agreed in his testimony. (RX 1 at 16-20; RX 2 at 10-11)

Henkel's and McCoy argue that the only reason that the Petitioner's arm dislocated on two occasions in April was because the anchor from the first surgery had not healed. Dr. Li seems to support their theory in his testimony, explaining that if more time had elapsed after the first surgery, the more likely one could conclude the shoulder had healed. (Id at 26) The Arbitrator does not find this persuasive. If April 2015 was not a sufficient amount of time for the anchors to heal from surgery performed over six months earlier, then why would Dr. Li have released the Petitioner to return to full duty electrical work? Why would not the shoulder have dislocated while the Petitioner was performing physical therapy and work hardening, or when performing an FCE?

Dr. Paletta was more persuasive. He said that the typical reason anchors fail was because of trauma. If not the result of trauma, there would be osteolysis, or resorption of the bone around the anchor. He noted that no such finding was referenced by Dr. Li in his operative report. (RX 2 at 12) Furthermore, he noted Dr. Li's own statement in the operative report that the "dislocation caused one of the anchors to pull loose." (PX 3)

In addition, Petitioner's symptoms changed by his own admission and based on his admissions to Drs. Li and Paletta. The Arbitrator notes above that Petitioner reported increased pain following the throwing incidents. Petitioner also admitted to Dr. Paletta that he felt increased instability following the April 2015 dislocations resulting from the throwing incidents, and that he felt his shoulder had returned to a condition it was at before he underwent the September 2014 surgery.

Also, there was a clear change in pathology following the April 2015 throwing incidents as documented in the records of Dr. Li, petitioner's April 2015 MR Arthrogram, his July 2015 operative report, and confirmed by the review of Dr. Paletta. Petitioner had a new labral tear, new adhesions, and a loosened anchor, all of which were not present at the time of his September 2014 surgery.

There was also no recommendation for surgery before the April 2015 incidents. There is no indication in the records that Dr. Li contemplated that Petitioner would ever need to undergo another shoulder surgery. Therefore, this factor weighs strongly in favor of finding Petitioner experienced intervening accidents while working for Henkels and McCoy.

Finally, he was able to work full duty before the April 2015 incidents per Dr. Li. Following the dislocating throwing incidents of April 1 and 3, 2015 Petitioner was placed on restricted work.

Based on the foregoing, the Arbitrator finds that Petitioner's accidents on April 1 and 3, 2015, and not the accidents of June 16, 2014, are causally related to the need for treatment and need for subsequent TTD benefits. Petitioner is therefore not entitled to any medical or TTD benefits at Respondent Par Electric's expense after March 11, 2015. Petitioner is entitled to TTD benefits from Henkels and McCoy from April 6, 2015 through December 22, 2015, the date of arbitration.

For the reasons stated above, the Arbitrator finds the medical treatment since April 3, 2015 to be causally related to the Petitioner's accidents at Henkels and McCoy. They are responsible for payment of the ensuing medical bills, as well as the Petitioner's ongoing treatment, which now consists of physical therapy.

(C; E) Did accidents occur on April 1 and 3, 2015 arising out of the Petitioner's employment and did the Petitioner provide notice to the Respondent?

For the reasons stated above on the discussion on causation, the Arbitrators finds the Petitioner did sustain accidents arising out of his employment with Henkels and McCoy on the two dates alleged.

The Arbitrator also finds the Respondent had sufficient notice of said accidents within the time required by statute. The Petitioner's testimony that he called his foreman, Jeremy, soon after he saw Dr. Li on April 6, at which time he was given work restrictions, constituted notice. He said that he told Jeremy that he had hurt his shoulder and gave him the restrictions. His testimony was not rebutted.