2016 IL App (3d) 150284WC
No. 3-15-0284WC
Opinion filed July 12, 2016

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JASON ALLENBAUGH,	)	Appeal from the Circuit Court
	)	of Peoria County
Petitioner-Appellant,	)	
	)	
v.	)	No. 14-MR-716
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION and THE CITY OF PEORIA	)	
POLICE DEPARTMENT,	)	Honorable
	)	James Mack,
Respondents-Appellees.	)	Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 I. INTRODUCTION

¶ 2 Claimant, Jason Allenbaugh, appeals a decision of the circuit court of Peoria County confirming a decision of the Illinois Workers' Compensation Comm'n (Commission) denying his claim for benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 et seq. (West 2012)). For the reasons that follow, we affirm.

¶ 3 II. BACKGROUND

¶ 4 Claimant is a police officer employed by the City of Peoria (respondent). He is a patrol officer and typically works second shift, reporting at 2:45 p.m. His job requires him to be driving for at least 65% and up to 75% of a shift. On March 5, 2013, claimant was ordered to report at 8:00 a.m. for mandatory training. The training was to take place at police headquarters and at the Expo Gardens Opera House. Claimant was enroute to police headquarters. It was snowing, and there was ice and slush on the road. An oncoming vehicle crossed the center line and struck the left front side of claimant's truck. Claimant was forced into a ditch and struck several trees, sustaining neck and back injuries.

¶ 5 The arbitrator found claimant had sustained a work-related injury. He found that claimant was a patrol officer who typically worked second shift. He was ordered to perform mandatory training outside his usual duty hours. He was directed to bring various items of police gear to the training session. He left his house to attend training at 7:45 a.m. on March 5, 2013. The roads were hazardous that day. A third party, who was driving too fast for the hazardous conditions, ran into claimant's truck. Claimant was not at fault. According to claimant and the officer who responded to the accident, police officers were on duty 24 hours per day. Based on these facts (and without explaining the legal basis for his ruling), the arbitrator found that claimant sustained an accident arising out of and in the course of his employment.

¶ 6 The Commission reversed. It noted claimant's testimony that he believed he was on duty at all times and was required to respond to unlawful acts occurring in his presence; however, it further noted that at the time of the accident, claimant was not responding to unlawful conduct and was not responding to an emergency. It further cited the testimony of Assistant Chief of Police Jerry Mitchell that claimant was not on duty at all times and had no general obligation to intervene if he observed unlawful behavior while off duty. Respondent did

employ people on an on-call basis, but claimant was not assigned to such duty. Mitchell did agree that claimant was required to report crimes he observed while not on duty.

¶ 7 The Commission then found that the mere fact that the training claimant was required to attend occurred outside his usual duty hours was not sufficient to avoid the general rule that an "employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest." It noted claimant was not required to drive any particular route and that "he was not performing any activities of employment at the time of the accident." It agreed that, in other cases, police officers had been compensated while commuting where their employer retained control over them; however, this was not the case here. The Commission stated that the traveling-employee doctrine did not apply where claimant was simply driving his personal vehicle to his normal workplace. The dissenting commissioner believed that the traveling-employee doctrine applied because claimant was not commuting to his normal shift and the roads were hazardous. The circuit court of Peoria County confirmed, and this appeal followed.

¶ 8 III. ANALYSIS

¶ 9 On appeal, claimant advances two main arguments. First, he asserts that respondent maintained sufficient control over him that he remained within the scope of his employment at the time of the accident in accordance with *City of Springfield v. Industrial Comm'n*, 244 Ill. App. 3d 408 (1993). Second, he contends that he was a traveling employee when the accident occurred. Generally, whether a claimant's injury arose out of and occurred in the course of employment is a question of fact, and review is conducted using the manifest-weight standard. *Kemp v. Industrial Comm'n*, 264 Ill. App. 3d 1108, 1110 (1994). However, where, as here, the

material facts are undisputed and susceptible to but a single inference, review is *de novo*. *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 17.

¶ 10 A. CONTROL

¶ 11 Claimant first argues respondent maintained sufficient control over him that he was within the scope of his employment at the time of the accident. See *City of Springfield*, 244 Ill. App. 3d at 411. Plaintiff relies heavily on *City of Springfield*. In that case, a police officer was injured in an automobile accident while returning to the police station from lunch. The officer was a sergeant in the detective bureau and was assigned an unmarked police car for 24 hours per day. The officer was required to monitor the radio while using the car at all times, and he was to respond to any calls he received, even if he was off duty. He drove the car home to eat lunch on most days, and on the day of the accident, he was returning to work from lunch when a motorist ran a stop sign and collided with him. The officer was also given a beeper to facilitate responding to calls. He could do whatever he wanted during his lunch break. At the time of the accident, he was not responding to a call or emergency situation.

¶ 12 Claimant contends that *City of Springfield* controls here. He argues that respondent maintained similar control over him as the respondent did over the officer in *City of Springfield*. In response, he points out that he was "ordered to report to the police station in a winter storm" and that the "roads were dangerous." While the officer in *City of Springfield* presumably was required to return to work after lunch just as claimant was ordered—and hence required—to attend training, the *City of Springfield* court made no mention of the officer's obligation to return to the stationhouse after lunch in announcing its holding. See *City of Springfield*, 244 Ill. App. 3d at 411. Indeed, it seems to us that all employees are required to go to work. Thus, we fail to see how the fact that claimant was going someplace he was required to go for work distinguishes

his situation from normal commuting. Claimant cites nothing to support the proposition that one's obligation to go to the place where one works supports an inference that one is within the scope of employment while commuting. Claimant states he would have been subject to discipline if he missed the training session; this is simply another way of saying he was ordered to attend and that attendance was mandatory. Claimant also asserts he was required to drive in hazardous weather, but he does not explain how this renders his situation different from typical commuting.

¶ 13 Claimant relies on the fact that the training session was outside his usual hours of employment. We note that in *City of Springfield*, the officer was injured during his customary lunch break. Accordingly, *City of Springfield* sheds no light on this aspect of the instant situation. Claimant cites no other case where such a fact was given weight in finding an employee to be within the scope of his employment while commuting. Claimant points out that, per departmental directive, he was ordered to bring several items of equipment with him. It is true that the *City of Springfield* court relied on the fact that the officer had a radio (that was required to be on at all times) and a beeper with him at the time of the accident. However, in *City of Springfield*, the court mentioned that equipment because it allowed the respondent to maintain control over the officer while he was otherwise off duty. In claimant's case, he was required to bring to training his nightstick, gun belt, handcuffs and key, tazer, holster, and training uniform. Unlike a radio and beeper, none of these items allowed respondent to maintain control over claimant. Therefore, *City of Springfield* is distinguishable on this basis.

¶ 14 In sum, *City of Springfield* provides no meaningful support for claimant's position, and he identifies no other authorities where the facts he seeks to rely on were given weight in

assessing whether an employee remained within the scope of employment while otherwise commuting.

¶ 15 B. TRAVELING EMPLOYEE

¶ 16 Next, claimant contends that he was a traveling employee at the time of the accident. Of course, accidents that occur when an employee is traveling to and from work do not generally arise out of or occur in the course of employment. *Venture Newberg-Perini v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 16. However, if the employee is classified as a "traveling employee," an exception exists. *Id.* at ¶ 17. A traveling employee is an employee whose job duties require him or her to travel away from the employer's premises. *Id.* For a traveling employee, any act the employee is directed to perform by the employer, any act the employee has a common-law duty to perform, and any act that the employee can reasonably be expected to perform are all compensable. *Id.* at ¶ 18. Commuting is not encompassed by the doctrine. See *Pryor v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130874WC, ¶ 22 ("An injury suffered by a traveling employee is compensable under the Act if the injury occurs while the employee is traveling for work, *i.e.,* during a work-related trip. However, the work-related trip at issue must be more than a regular commute from the employee's home to the employer's premises.").

¶ 17 Claimant argues that he is required to drive for much of his usual shift. However, that is not what claimant was doing at the time he was injured, and he cites no authority that holds that where an employee regularly drives as part of his duties, his or her commute is brought within the scope of the employment. Our research has uncovered no support for this proposition as well. Claimant then contends that he was required to travel to the police station and then to the Expo Gardens on the day he was injured. While true, it is undisputed that at the time he was

injured, he was driving from his home to the police station. Finally, claimant again asserts that respondent required him to drive in hazardous conditions. We fail to see how this distinguishes claimant's situation from that of any other commuter in the northern half of this country.

¶ 18 Indeed, claimant cites no case where an employee has been found to be within the scope of employment on similar facts. The Commission observed, "We do not believe that the traveling employee doctrine should be extended to include any claimant who is involved in an accident on the way to their normal workplace, driving their personal vehicle without any additional compensation and not performing any duties incidental to their employment when the only basis for finding so is a department order that the claimant's regular work shift was different for that particular day." We agree with the Commission.

¶ 19 IV. CONCLUSION

¶ 20 In light of the foregoing, the order of the circuit court of Peoria County confirming the decision of the Commission is affirmed.

¶ 21 Affirmed.

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STATE OF ILLINOIS)
) SS.
COUNTY OF MCLEAN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joshua Allenbaugh,

Petitioner,

vs. NO: 13 WC 18975

City of Peoria Police Dept.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b) having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, notice, causal connection, medical expenses, prospective medical treatment and temporary total disability and being advised of the facts and law, reverses the Decision of the Arbitrator on the issue of accident as stated below. Petitioner, a 40-year-old police officer, alleged that he injured his neck and low back in a motor vehicle accident on March 5, 2013. The accident occurred on Petitioner's commute in his personal vehicle to a mandatory training session. The training was to occur on a regular work day and at the same location where Petitioner regularly reports for duty, however the training was to be held at 8:00 a.m. and Petitioner's usual work began at 2:45 p.m. The Arbitrator found that Petitioner's accident occurred in the course of and arose out of his employment by Respondent. After reviewing all of the evidence and for the following reasons we disagree.

Findings of Fact and Conclusions of Law:

Petitioner lives in East Peoria and works in Peoria; he drives his personal vehicle to and from the police department. His regular hours are 2:45 p.m. to 11:00 p.m. He testified that he could also be called in to work in an emergency situation. He is also required to attend training

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sessions. Petitioner was issued written orders on January 28, 2013 directing him to attend a training session to occur at 8:00 a.m. on March 5, 2013 at the Peoria Police Department. (RX 5) On cross-examination, Petitioner agreed that he was a salaried employee and would not receive any additional compensation to attend training. The training session was to be held at the Peoria Police Department. He would not be required to work his regular shift that day in addition to the mandatory training session.

Petitioner testified on direct-examination that in his opinion he works "24/7" because he could always be called in for an emergency. Also, he believed that he was required to respond if any unlawful act occurred in his presence, even while off-duty. On cross-examination, Petitioner agreed that at the time of the accident he was not responding to unlawful conduct nor had he been been called in for an emergency. Assistant Chief of Police Jerry Mitchell testified for Respondent. He disagreed that Petitioner's job could be considered "24/7." Assistant Chief Mitchell explained that only specific units, none of which Petitioner is assigned to, are issued work phones and vehicles and are compensated accordingly for on-call status. Assistant Chief Mitchell also disputed Petitioner's testimony that off-duty officers are absolutely required to act in the presence of unlawful conduct. He explained that off-duty officers are to use their discretion as to whether to act under the circumstances, however they are absolutely required to report unlawful conduct and to be a witness.

Petitioner testified that he left his house at 7:45 a.m. on March 5, 2013, driving his personal vehicle and transporting the police equipment he was ordered to bring to training. Petitioner testified that it was snowing that morning and there was ice and slush on the roadway. An oncoming car crossed into his lane and struck the left front side of his truck. Petitioner testified that "it forced me off the roadway and into a ditch where I struck several trees." Petitioner testified that he immediately called 9-1-1 and the police department. He spoke with Sergeant Bainter and reported that he was involved in an accident on his way to training and that he was going to the hospital and would not be able to attend the training.

The police officer who responded to the scene of the accident, Chris Hutt, testified via deposition on July 25, 2013. (PX 16) Officer Hutt testified that he was called to the scene at approximately 7:50 a.m. He recalled that it was snowing and that the road was covered in slush. When he approached the scene he noticed Petitioner's vehicle in a line of trees alongside the road and the other vehicle in the middle of the roadway. Petitioner was still in his vehicle when Officer Hutt arrived. Officer Hutt testified that he recognized Petitioner as an acquaintance. He told Petitioner not to move from his truck "because of his injuries. And in my opinion he wasn't able to get out anyway because of the damage and the trees around it." Officer Hutt recalled that Petitioner was concerned about getting to his training session. Petitioner testified that Officer Hutt removed Petitioner's police equipment from Petitioner's truck after Petitioner was taken to the hospital and later returned the equipment to Petitioner's wife.

The East Peoria Fire Department arrived at the scene at 8:11 a.m. and found Petitioner complaining of back pain. Petitioner was immobilized for spinal precautions and transported to

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OSF St. Francis. The East Peoria Fire Department records state that Petitioner had swerved to avoid a collision with the other driver and that the damage to Petitioner's vehicle appeared to be minor, the airbag did not deploy, and there was no intrusion into the passenger compartment. Petitioner was wearing a seatbelt at the time of accident and the Fire Department records indicate no other injuries. (RX 3)

At the OSF St. Francis emergency room, Petitioner complained of left paraspinal back pain. He was not admitted to the hospital but was treated with prescription painkillers and muscle relaxers and issued a slip to remain off of work until March 7, 2013. Petitioner was diagnosed with a mid-back strain and was instructed to follow up with Dr. Crnkovich. (RX 4, PX 8) Petitioner testified that he believes that he stopped by the police department after he left the hospital and told them he would not be back at work until March 8, 2013. Petitioner testified that on March 6, 2013 or March 7, 2013 he called in to work and spoke with the administrative secretary, Christy Williams. He told Ms. Williams that his back was hurting and told her about the accident and she rescheduled Petitioner for training on March 8, 2013. Petitioner also testified that Ms. Williams accepted his medical paperwork related to the accident. Ms. Williams did not testify at hearing.

Petitioner testified that he sought treatment with his chiropractor, Dr. Childs, on March 19, 2013 because he was having severe back spasms. Petitioner denied that he had any treatment for his low back or neck in 2012 or 2013 prior to the date of accident. Records offered into evidence by Respondent from Dr. Childs' practice, JSK Chiropractic, between September of 2006 and December of 2012 show that Petitioner in fact had a history of chiropractic treatment for stiffness and soreness in his neck, upper back and mid and lower back. (RX 9)

Petitioner was examined by Dr. Crnkovich on March 28, 2013. Petitioner gave a history of a motor vehicle accident on March 5, 2013 with low back spasms and pain in the mid-lower back shooting down his right side. Dr. Crnkovich ordered physical therapy and excused Petitioner from work retroactively from March 5, 2013. He issued work restrictions of no lifting or prolonged sitting or standing. (PX 10, PX 13) The following day, Petitioner requested light duty work "as a result of a non-duty related auto accident/injury" in a written memo to the Support Services Captain. (RX 7) He testified "I was told this wasn't a duty related accident" and that he was told by Assistant Chief Mitchell to state in the memo that it was a non-duty related accident. Assistant Chief Mitchell denied that he told Petitioner that he could get light duty only if he claimed his injury was not work-related. Petitioner admitted on cross-examination that he has had prior workers' compensation claims against Respondent and is familiar with the procedures for making claims; he agreed that he did not go through those procedures with respect to the accident of March 5, 2013.

Petitioner remained on light duty from March 29, 2013 through June 3, 2013. He was then placed back on full duty. Assistant Captain Mitchell testified that Petitioner was returned to full-duty because he failed to update the department as to what his restrictions were and the timetable of his expected return to full duty. On July 11, 2013 Petitioner wrote a new memo

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requesting light duty again "for an injury sustained as the result of a motor vehicle accident." (RX 8) He was then returned to light duty and remained on light duty on the date of hearing. Petitioner agreed on cross-examination that he took two vacations while on light duty and participating in physical therapy. The vacations were a big game hunting trip to Texas and a fishing trip to Alabama. He denied that he exceeded his light duty restrictions while on his vacations and he testified that he was cleared by his physical therapist and his doctor.

Petitioner was last seen by Dr. Crnkovich on July 22, 2013. Dr. Crnkovich recommended continued physical therapy and light duty work, with no projection for a full duty release. Dr. Crnkovich testified via deposition on August 22, 2013. Dr. Crnkovich is board certified in internal medicine, and as part of his practice he sees patients with back strains and bulging discs. Dr. Crnkovich opined that he believed Petitioner's symptoms of neck, thoracic and lumbar pain were the result of the injury sustained during the motor vehicle accident. He testified that he relied on Petitioner history that he had no complaints of pain prior to the motor vehicle accident. Dr. Crnkovich testified that he had been treating Petitioner since 2004 or 2005 but he was not sure whether Petitioner had ever mentioned prior chiropractic treatment. Dr. Crnkovich interpreted Petitioner's lumbar MRI as "fairly unremarkable until you got to the L5-S1 level. Then, you know, there was some arthritis" and "a little disc bulge. It was not dramatic, but, nonetheless, the patient had pain." Dr. Crnkovich testified that Petitioner did not have any neurological deficits. He believed that work restrictions to prevent re-injury would be necessary until Petitioner could be examined by a back specialist. He recalled that Petitioner went on two vacations, one of which was a fishing trip, but he did not know any details about Petitioner's activities on vacation. He testified that restrictions should be adhered to whether or not at work.

Petitioner testified that he currently notices pain on the right side of his low back that radiates. He occasionally feels a sharp pain between his quadriceps and hamstring and a shooting pain to the front of his heel.

Respondent argues that the accident did not occur in the course of or arise out of Petitioner's employment and furthermore that Petitioner failed to provide timely notice to Respondent of his alleged work injury. The Arbitrator found that the order requiring the Petitioner to appear at his mandatory training in the morning of March 5, 2013 was sufficient evidence to find a compensable accident. We do not agree. Although Petitioner was required to attend the training at a specific place and time, we do not find an exception to the general rule that the employee's trip to and from work is the product of his own decision as to where he wants to live, a matter in which his employer ordinarily has no interest. Petitioner lived outside of the City of Peoria, he drove his personal vehicle to and from work, he was not reimbursed for travel expenses, he was not directed to travel a particular route, and he was not performing any activities of employment at the time of accident.

Accidental injuries to otherwise off-duty police officers have been found compensable in some cases that are distinguishable from the case at hand. In these cases, off-duty officers were injured while performing activities in their official capacity; responding to unlawful activity or

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providing aid in an emergency situation. *Keller v. Industrial Comm'n*, 125 Ill. App. 3d 486 (Ill. App. Ct. 5th Dist. 1984); *County of Peoria v. Industrial Comm'n*, 31 Ill. 2d 562 (Ill. 1964). In another case, injuries to a police sergeant from a car accident on his lunch break were found compensable where the sergeant drove an unmarked squad car with a radio. Not only was he on-call "24/7," he always had to have the radio on. The Court found that the employer "intended to retain authority over the claimant at the time his injuries arose." *Springfield v. Industrial Comm'n*, 244 Ill. App. 3d 408 (Ill. App. Ct. 4th Dist. 1993)

Under the circumstances of the case at hand, we do not find that Petitioner's accident was incidental to his employment by Respondent where he was merely commuting from his home to his usual work location in his personal vehicle. The only factor that could support compensability is that Petitioner was directed to attend training at a different time than his normal work shift. We do not find this to be a sufficient basis for compensability. We do not believe that the travelling employee doctrine should be extended to include any claimant who is involved in an accident on their way to their normal workplace, driving their personal vehicle without any additional compensation and not performing any duties incidental to their employment when the only basis for finding so is a department order that the claimant's regular work shift was different for that particular day.

With respect to the notice requirement, although we do not find that Petitioner's accident arose out of and in the course of his employment, we agree with the Arbitrator that Petitioner's notice of the alleged accident was sufficient. The purpose of the notice requirement is to enable an employer to investigate an alleged accident. Notice is reasonable as long as the employer possesses known facts related to the accident within forty-five days. Petitioner testified without rebuttal that he notified Respondent on the date of accident that he had been in a motor vehicle accident, was in the hospital and would not be able to attend training. Under the circumstances of this case, Petitioner's notice would not be defective for failure to specifically notify Respondent that the accident was allegedly work-related. Whether Petitioner's accident arose out and in the course of his employment is a legal question ultimately to be decided by the finder of fact.

IT IS THEREFORE ORDERED BY THE COMMISSION that the decision of the Arbitrator filed October 24, 2013 is hereby reversed and Petitioner's claim for benefits under the Act is denied.

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

DATED: OCT 1 0 2014
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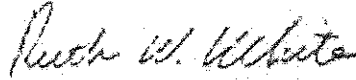


Ruth W. White

Daniel R. Donohoo

DISSENT

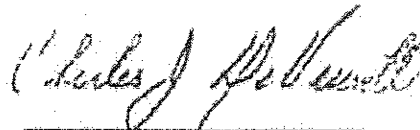
I must respectfully dissent from the majority's finding that Petitioner failed to prove that his accidental injuries arose out of the scope and in the course of his employment.

The Petitioner was a police officer for the City of Peoria. On March 5, 2013, the Respondent ordered him to attend a mandatory training session. This mandatory session took place during a shift different from the one the Petitioner was ordinarily assigned.

The Petitioner was doing more than merely commuting to and from his place of work. He was commuting at the request of his employer and doing so at a time which he normally wasn't required to report to work. The Petitioner became a "travelling employee" and was subject to the street risks that he encountered. The employer placed the Petitioner in a hazardous condition since the weather that day was snowy and slushy. Because of the weather, Petitioner was involved in a motor vehicle accident.

The Arbitrator should be affirmed and adopted.

DATED: OCT 1 0 2014



Charles J. DeVriendt

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***Durbin v. Illinois Workers' Compensation Comm'n*, 2016 IL App (4th) 150088WC**

Appellate Court Caption	MICHAEL K. DURBIN, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Archer Daniels Midland, Appellee).
District & No.	Fourth District Docket No. 4-15-0088WC
Rule 23 order filed Rule 23 order withdrawn Opinion filed	June 7, 2016 July 21, 2016 July 21, 2016
Decision Under Review	Appeal from the Circuit Court of Macon County, No. 14-MR-601; the Hon. Albert G. Webber, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Larry A. Calvo (argued), of Callis, Papa & Szewczyk, P.C., of Granite City, for appellant. Jerrold H. Stocks (argued), of Featherstun, Gaumer, Postlewit, Stocks, Flynn, Hubbard, of Decatur, for appellee.
Panel	JUSTICE HARRIS delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 On October 15, 2004, claimant, Michael K. Durbin, filed an application for adjustment of claim pursuant to the Workers' Occupational Diseases Act (Act) (820 ILCS 310/1 to 27 (West 2004)), seeking benefits from the employer, Archer Daniels Midland. (We note, however, the application for adjustment of claim erroneously reflected it was brought pursuant to the Workers' Compensation Act.) He alleged to have suffered injury to his lungs in the form of chronic obstructive pulmonary disease (COPD) due to exposure to irritants, and he listed the date of injury as June 11, 2003.

¶ 2 Following a hearing, the arbitrator found that claimant failed to prove an occupational disease caused by workplace exposure and denied him benefits under the Act.

¶ 3 On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Macon County confirmed the Commission's decision.

¶ 4 On appeal, claimant argues the Commission erred in (1) barring the causation opinion of his treating physician pursuant to Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) and (2) finding that he failed to prove an occupational disease caused by workplace exposure.

¶ 5 We affirm.

¶ 6 I. BACKGROUND

¶ 7 The following evidence relevant to the disposition of this appeal was elicited at the March 6, 2013, arbitration hearing.

¶ 8 At the time of arbitration, claimant was 59 years old. At the time of his retirement in 2003 at the age of 48, claimant had worked for the employer for approximately 30 years. According to claimant, he had been exposed to a butter flavoring ingredient that contained the chemical diacetyl over a period of 20 years while working for the employer. Claimant testified that as a "pumper loader operator" he was exposed to diacetyl on many occasions, including when he uncapped buckets containing butter flavoring and carried and poured the buckets, changed oil filters, cleaned spillage from the "tank farm" and the "remelt room" floors, cleaned "combinators," and cleaned out sample buckets. In addition, claimant stated that he could smell the butter flavoring throughout the plant.

¶ 9 On cross-examination, claimant testified that he did not know whether diacetyl was used in all the butter flavorings he had contact with and he had no knowledge of the amount of diacetyl used in the butter flavoring. Claimant testified that his job duties did not require him to enter the lab where the butter flavoring was mixed, and he agreed that, with the exception of opening the lids and pouring the flavoring into the tanks, the process at the plant was a "closed process" where the tanks were sealed and the additives were added through small ports.

¶ 10 Claimant denied having told Dr. Allen Parmet, who conducted an independent medical examination of claimant in July 2006, that he typically poured 12 to 15 buckets a day of butter flavoring that contained diacetyl into the tanks. According to claimant, he may have told Dr. Parmet that he poured 12 to 15 buckets per week. Batch records introduced by the employer showed that during his last 16 months of employment, claimant added butter flavoring to the tanks on 26 occasions. Although claimant stated it "took his breath away" when he opened the buckets of butter flavoring, he acknowledged never having spoken with the employer about the

smell. Claimant testified he did not experience burning eyes due to the buttery odor, but he did experience burning nasal passages. However, he never reported this symptom to his treating physicians. Claimant admitted that during his deposition in a pending civil suit against the butter flavor manufacturers, he testified he could not recall whether the butter flavoring had an odor.

¶ 11 Claimant testified that he first noticed problems with his lungs in 2000 or 2001 and began treatment for asthma. He acknowledged having been a smoker "[f]or a few years" and that both his parents were smokers. His mother had been diagnosed with COPD and died at the age of 53. It is unclear from the record whether claimant's mother died from emphysema or stomach cancer. Claimant's father died from coronary disease at the age of 56. Claimant denied having told a treating physician that he started smoking two packs a day at the age of 15. He testified that he smoked his first cigarette when he was 15 years old, but he did not start smoking on a regular basis until he was 27 years of age. At the time claimant quit smoking in 1997 or 1998, he was smoking one pack per day. Both claimant's first wife and current wife also smoked; however, his current wife quit smoking at the same time as claimant.

¶ 12 Claimant testified that he now has a difficult time breathing when he exerts himself, such as doing yard work or walking long distances—a problem he did not have before his work exposure. He further stated that he can no longer ride a motorcycle "because the air hitting me in the face takes my breath [away]" or water ski, and he is unable to play with his grandchildren as often. Additionally, claimant is now unable to work on his car, paint cars, garden, or keep his garage clean.

¶ 13 Brian Richardson testified he was the corporate safety and environmental manager for Stratas Foods, a joint venture company started by the employer. In 1993, he was a "whirl operator" in the whirl room where he made a butter flavoring product. Richardson had been a pump loader like claimant and had personal knowledge of a pump loader's job duties. According to Richardson, claimant's job duties as a pump loader would not have included any duties in the whirl room or any duties with respect to cleaning the combinator—a task that would have been completed by maintenance because it was a very detailed job. Richardson further testified that the job of cleaning the remelt room and floor would have been done by a laborer, not someone in claimant's position. Richardson stated that while claimant would have cleaned oil filters, he would not have been exposed to diacetyl during that process because the butter flavoring was too thick to run through the filters. According to Richardson, butter flavored oil constituted approximately 2% to 3% of the employer's business.

¶ 14 On cross-examination, Richardson agreed that claimant's supervisors could have had him perform some of the cleaning tasks that were typically completed by the laborers. Richardson further testified that in November 2004, the National Institute for Occupational Safety and Health (NIOSH) conducted an evaluation of the employer's plant looking for diacetyl-related health hazards. Following the evaluation, NIOSH recommended that employees wear organic vapor respirators. Thereafter, the employer provided its employees with the recommended respirators until 2006 when the flavor companies reformulated their product to be diacetyl free.

¶ 15 Kelly Singleton testified that she was employed as a lab technician with the employer in 1995 and was promoted to lab supervisor in 1999. In 2004, she became the quality assurance manager for Stratas Foods. As a lab technician, Singleton mixed the butter flavoring in the lab, broke the seals on the buckets, and opened the bungs on the buckets prior to setting the buckets outside the lab door to be picked up for delivery to the tanks by someone like claimant.

Singleton stated that when stainless steel buckets were used, it was common practice to close the buckets with stainless steel lids to protect food integrity. Singleton testified that "[t]o the best of [her] knowledge there was always a lid on it. That was a requirement." According to Singleton, when diacetyl was mixed in with the butter flavoring, it accounted for less than 2% of the mixture. Further, she stated that flavored oils were typically only used at the plant once a week.

¶ 16 Kevin Swanson, the vice president of operations for Stratas Foods and the general manager of the employer's packaging division, testified that he had worked in the employer's packaging plant since 2004. According to Swanson, only 2% to 3% of the plant's total oil production included butter flavorings containing diacetyl.

¶ 17 At arbitration, claimant introduced the evidence deposition of Dr. Donald Gumprecht, taken July 19, 2011. Dr. Gumprecht testified he was a pulmonologist and had been in practice for 32 years. Claimant had been referred to him for a second opinion regarding claimant's lung disease.

¶ 18 Dr. Gumprecht first saw claimant on May 7, 2003, at which time claimant reported a history of asthma that "had been gradually getting worse." At that time, claimant reported having been exposed to "various products" at the employer's plant, including "caustics, *** soaps and grain dust, anhydrous ammonia, and that he did not wear a respirator." Following his examination, Dr. Gumprecht diagnosed claimant with severe early onset COPD.

¶ 19 Dr. Gumprecht testified that upon learning claimant had been exposed to butter flavoring that contained diacetyl, he was reminded of an article he read in the New England Journal of Medicine titled "Clinical Bronchiolitis Obliterans in Workers at a Microwave-Popcorn Plant," which found a causal connection between butter flavoring containing diacetyl used in plants making microwave popcorn and bronchiolitis obliterans in workers who had been exposed. The employer objected and moved to strike Dr. Gumprecht's testimony regarding the article, asserting "[t]he article is not compliant as a basis pursuant to Illinois Rule of Evidence 702 to support a generally accepted scientific basis for the conclusions." Dr. Gumprecht then testified that based on "other medical literature," including an editorial in the American Journal of Respiratory and Critical Care Medicine titled "Occupational Bronchiolitis Obliterans Masquerading as COPD," as well as unspecified studies on rats, there was no "real dispute" in the medical community regarding whether butter flavoring containing diacetyl could cause lung disease. Over repeated objections by the employer, Dr. Gumprecht testified that a general causal connection existed between diacetyl exposure and lung disease.

¶ 20 Dr. Gumprecht declined to distinguish between whether claimant had COPD or bronchiolitis obliterans at his deposition because "[b]oth are fixed obstructive lung diseases, and in any one patient, it's very difficult to separate them." However, Dr. Gumprecht testified that he "had no doubt [claimant] had popcorn flavoring lung disease." According to Dr. Gumprecht, claimant told him he "had been working with flavorings basically from the 1980s to 2003, that he could smell the fumes, *** and that he was involved in mixing *** and he believes he was exposed to diacetyl basically the whole time." Dr. Gumprecht further added that claimant did not wear a respirator mask while he transported the buckets of butter flavoring and poured the flavoring into the tanks. While Dr. Gumprecht acknowledged claimant's history of smoking cigarettes could be a factor in his COPD, he did not believe smoking was the primary cause due to the early age of onset and that claimant's lung function

"deteriorated significantly" after he stopped smoking. Dr. Gumprecht stated he also ruled out other causes of claimant's lung disease, including asthma and genetic causes.

¶ 21 On cross-examination, Dr. Gumprecht agreed that three computerized tomography (CT) scans of claimant's lungs, taken in July 2003 and February and October 2009, exhibited generalized emphysema in both lungs, a condition commonly seen in smokers. Dr. Gumprecht further agreed that diacetyl was not a common cause of fixed obstructive lung disease and he had no knowledge regarding the levels of diacetyl that the popcorn plant workers had been exposed to or whether they were exposed to the same product as claimant. Further, Dr. Gumprecht admitted that he assumed most of the butter flavoring claimant was exposed to contained diacetyl. The following colloquy ensued:

> "Q. In terms of the opinions you're forming, are you assuming that any exposure to diacetyl is sufficient to cause the fixed obstructive lung disease?
>
> A. I'm assuming that exposure to peak exposures would be sufficient, because we do not know the low limit of safe exposure.
>
> Q. And you don't know the peak exposure?
>
> A. Correct; but it's smellable, and it's enough for me.
>
> Q. If you can smell it, it's a sufficient exposure?
>
> A. I think you have to assume that.
>
> Q. And you assume that until somebody proves the smell is safe to you?
>
> A. Correct."

¶ 22 The employer introduced the evidence deposition of Dr. Robert J. McCunney, taken May 31, 2012. Dr. McCunney testified that he had been a physician for 35 years and that he had been certified in and practiced occupational and environmental medicine for 30 years. He explained that occupational and environmental medicine is a specialty that involves the recognition and prevention of illnesses and injuries in both the occupational and general environment. According to Dr. McCunney, "an occupational physician has to understand the work environment and the exposures that may contribute to an illness [and] the various hazards in the workplace or the hazards in the environment," while pulmonologists are generally not trained in assessing workplace exposures.

¶ 23 Dr. McCunney testified that he was hired by the employer to review claimant's medical history and to perform a records review. In addition to reviewing records, Dr. McCunney conducted an independent medical examination of claimant and visited the employer's plant to observe the work environment. Dr. McCunney had been an expert witness in two other cases involving "flavoring-induced lung disease" in the three years preceding his retention in this case.

¶ 24 In December 2011, Dr. McCunney diagnosed claimant with COPD "with some evidence of reversibility of his lung function consistent with asthma." According to Dr. McCunney, claimant's pulmonary function studies were "very consistent with his smoking history. In fact, they're typical." In Dr. McCunney's opinion, claimant's work at the employer's plant "played no role in the development of his [COPD] condition." Instead, Dr. McCunney attributed claimant's COPD to a combination of smoking, chronic asthma, obesity, and family history.

¶ 25 Dr. McCunney acknowledged a link had been established between butter flavoring containing diacetyl and bronchiolitis obliterans in workers employed at certain microwave popcorn plants. However, based on his review of claimant's medical records, diagnostic

studies, imaging studies, and pulmonary function tests, Dr. McCunney concluded that claimant did not have bronchiolitis obliterans. Dr. McCunney testified that none of claimant's three high resolution CT examination reports revealed a mosaic pattern that he would have expected to see in a patient suffering from bronchiolitis obliterans. In addition, Dr. McCunney explained that bronchiolitis obliterans is a fixed obstructive lung disease, whereas claimant's pulmonary function studies showed evidence of reversibility. Further, Dr. McCunney testified if diacetyl played a causal role in claimant's lung condition, he would have expected to see diminished pulmonary function during claimant's employment; however, claimant's pulmonary function studies showed no change between 1995 and 2003.

¶ 26 Dr. McCunney also distinguished between the level of diacetyl exposure experienced at microwave popcorn plants and the employer's plant. Specifically, he testified that the tanks in microwave popcorn factories are not sealed like the tanks at the employer's plant and that "the proportion of flavorings relative to the amount of oil in the tanks is much lower in the [employer's] plants." He also noted the frequency of potential exposure at the employer's plant was limited to once or twice per week at most and only when the flavoring was poured into the tanks. On the other hand, quoting from his report, Dr. McCunney testified as follows:

> " 'In most large microwave popcorn plants, workers who develop bronchiolitis obliterans had poured flavorings into open tanks several times per work shift, reflective of higher exposures in that industry, in comparison to [the employer] which manufactures vegetable oils predominately. Based on my discussions with plant personnel during my site visit, less than five percent of the product manufactured at the facility used butter flavorings.' "

He continued as follows:

> " 'Since the top of the tanks were otherwise sealed [at the employer's plant], aside from brief periods of pouring the five-gallon [container], opportunity for significant chronic exposure was limited, if present at all. Note that the NIOSH measurements of diacetyl prior to pouring the five-gallon container was zero.
>
> In summary, the NIOSH evaluation of the [employer's] plant in Decatur indicates that the potential for exposure to butter flavorings and the corresponding risk of developing a specific lung disease, known as bronchiolitis obliterans is not present and finds no support by comparison to microwave popcorn plants.' "

Dr. McCunney further explained that NIOSH measured the levels of diacetyl at the employer's plant as the butter flavoring was poured from the five-gallon container into the tank at 0.07 parts per million. According to Dr. McCunney, this measurement was 450 times lower than the levels measured at the microwave popcorn plant.

¶ 27 Dr. McCunney criticized Dr. Gumprecht's opinion that the mere smell of butter flavoring was enough exposure to cause claimant's lung condition, noting that Dr. Gumprecht's theory failed to distinguish between an odor threshold and a toxic threshold. According to Dr. McCunney, based on studies conducted at the microwave popcorn plants, "[t]he odor threshold of diacetyl is considerably lower than the toxic threshold." Specifically, he noted the odor threshold of diacetyl was 7000 times lower than the toxic levels associated with bronchiolitis obliterans found in the microwave popcorn industry. Dr. McCunney further criticized Dr. Gumprecht's opinion that the smell of the popcorn flavoring could be inhaled deep into the lungs, explaining that diacetyl is a water-soluble compound that is "impacted by the upper respiratory system which *** means the eyes, nose and mouth," whereas "fat-soluble

substances can get deeper into the lungs." Lastly, Dr. McCunney criticized Dr. Gumprecht's reliance on an editorial to form his causation opinion, noting "it is not customary scientific practice to refer to an editorial to support causality assessments. Customarily, the original study should be cited." According to Dr. McCunney, a link between diacetyl exposure and COPD has not been generally accepted in the medical community.

¶ 28 On May 9, 2013, the arbitrator issued his decision. As stated, he found that claimant failed to prove an occupational disease caused by workplace exposure. Accordingly, he denied claimant benefits under the Act. On June 30, 2014, the Commission affirmed and adopted the arbitrator's decision. On January 12, 2015, the circuit court of Macon County confirmed the Commission's decision.

¶ 29 This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 On appeal, claimant argues that the Commission erred in (1) barring Dr. Gumprecht's causation opinion pursuant to Illinois Rule of Evidence 702 (eff. Jan. 1, 2011) and (2) finding that he failed to prove an occupational disease caused by workplace exposure.

¶ 32 Initially, we note the record is unclear regarding whether the arbitrator ruled Dr. Gumprecht's causation opinion was inadmissible. Because the record is unclear, we will address claimant's argument that Dr. Gumprecht's causation opinion withstood the employer's Rule 702 challenge.

¶ 33 "In Illinois, the admission of scientific evidence is governed by the *Frye* standard [citation] which has now been codified by the Illinois Rules of Evidence ***." *In re Detention of New*, 2014 IL 116306, ¶ 25, 21 N.E.3d 406. See *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923). Rule 702 provides, in relevant part:

> "Where an expert witness testifies to an opinion based on a new or novel scientific methodology or principle, the proponent of the opinion has the burden of showing the methodology or scientific principle on which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which it belongs." Ill. R. Evid. 702 (eff. Jan. 1, 2011).

"The purpose of the *Frye* test is to exclude new or novel scientific evidence that undeservedly creates 'a perception of certainty when the basis for the evidence or opinions is actually invalid.' " *Detention of New*, 2014 IL 116306, ¶ 26, 21 N.E.3d 406 (quoting *Donaldson v. Central Illinois Public Service Co.*, 199 Ill. 2d 63, 78, 767 N.E.2d 314 (2002), *abrogated on other grounds by In re Commitment of Simons*, 213 Ill. 2d 523, 530, 821 N.E.2d 1184, 1189 (2004)). We review *de novo* whether a methodology or principle is generally accepted in the relevant scientific community. *Detention of New*, 2014 IL 116306, ¶ 26, 21 N.E.3d 406.

¶ 34 In determining whether an expert's opinion is admissible under *Frye*, our focus is on whether the underlying method used to generate the expert's opinion is one that is reasonably relied upon by the experts in the field. *Donaldson*, 199 Ill. 2d at 79, 767 N.E.2d at 325. "If the underlying method used to generate an expert's opinion is reasonably relied upon by the experts in the field, the fact finder may consider the opinion—despite the novelty of the conclusion rendered by the expert." *Id.* at 77, 767 N.E.2d at 324.

¶ 35 We note the arbitrator here did not conduct a separate *Frye* hearing. However, that does not impair our review. We noted the existence of similar circumstances in *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 594, 840 N.E.2d 300, 310 (2005):

> "During a worker[s'] compensation arbitration hearing, most expert testimony is received via evidence depositions. In most cases, it would be impractical and inconsistent with the general nature of worker[s'] compensation proceedings to require a separate *Frye* hearing with live witnesses. Here, the arbitrator and the Commission considered all of the expert deposition testimony and the *Frye* standard and then ruled on the admissibility of claimant's proposed expert testimony. *** The arbitrator and the Commission considered all of the evidence relevant to the *Frye* issue before ruling on the admissibility of [the expert's] testimony and dealt with the issues they would have addressed had a separate *Frye* hearing been held. Therefore, we believe that the procedure employed here was appropriate."

¶ 36 After reviewing the record, we conclude Dr. Gumprecht's causation opinion is not based on a scientific methodology or principle that has gained general acceptance in the relevant scientific community, and it was therefore inadmissible under *Frye* and Rule 702. Dr. Gumprecht's causation opinion was based fundamentally on two publications, only one of which was peer-reviewed, regarding diacetyl exposure at microwave popcorn plants. In particular, Dr. Gumprecht relied on an article published in the New England Journal of Medicine that, according to him, concluded butter flavoring components, specifically diacetyl, caused bronchiolitis obliterans in exposed workers. However, we note Dr. Gumprecht did not opine that claimant suffered from bronchiolitis obliterans, and, therefore, the New England Journal of Medicine article fails to support his causation opinion. Further, Dr. Gumprecht acknowledged he did not even know whether claimant was exposed to the same injurious product used at the microwave popcorn plants studied in the article. As pointed out by Dr. McCunney, the NIOSH evaluation of the ADM plant in Decatur indicated there was no comparative risk to lung disease *vis-a-vis* the microwave popcorn plant workers.

¶ 37 Next, Dr. Gumprecht cited an editorial published in the American Journal of Respiratory and Critical Care Medicine that he noted was "getting toward the concept of general acceptance." While this editorial was not a peer-reviewed article, Dr. Gumprecht relied heavily on it. According to Dr. Gumprecht, the editorial concluded "bronchiolitis obliterans was simply an outlier that made it possible to recognize that the exposure [to diacetyl] caused lung disease, but that probably the majority of patients don't have just bronchiolitis obliterans, that it can cause a more garden variety of COPD." As pointed out by Dr. McCunney, however, an editorial in a medical journal is not the equivalent of a peer-reviewed article based upon medical studies. This editorial was insufficient to serve as a basis for Dr. Gumprecht's causation opinion, as it was not established to be the type of medical literature reasonably relied upon by experts in the field.

¶ 38 In addition, Dr. Gumprecht opined the mere smell of butter flavoring containing diacetyl was evidence of sufficient exposure to cause claimant's lung disease. However, Dr. Gumprecht acknowledged on cross-examination he had very little information regarding the frequency of claimant's exposure to the butter-flavoring smell, the period of time in which claimant might have been exposed to diacetyl-containing ingredients, and which butter-flavoring ingredients used at the ADM plant in Decatur actually contained diacetyl. This final basis for Dr. Gumprecht's causation opinion appears to be based solely on supposition.

Dr. Gumprecht identified nothing in the medical literature upon which he relied that would support the theory. Further, Dr. Gumprecht's "smell theory" was roundly criticized by Dr. McCunney in his testimony. Dr. McCunney explained the odor threshold of diacetyl was 7000 times lower than the toxic levels associated with bronchiolitis obliterans found in the microwave popcorn plant workers.

¶ 39 In short, Dr. Gumprecht's causation opinion was based on a speculative theory and lacked support in the relevant scientific literature. While there may be evidence that exposure to diacetyl can cause bronchiolitis obliterans, Dr. Gumprecht's leap to finding a causal connection between diacetyl exposure and COPD is arguably supported only by an editorial, not a peer-reviewed article, that, by his own admission was only "getting toward the concept of general acceptance." We find claimant failed to establish Dr. Gumprecht's causation opinion was based on a scientific methodology or principle which has gained acceptance in the relevant scientific community. Accordingly, if indeed the arbitrator ruled Dr. Gumprecht's causation opinion was inadmissible, we would agree with the ruling.

¶ 40 Claimant next argues that the Commission's finding he did not suffer an occupational disease was against the manifest weight of the evidence.

¶ 41 "To recover compensation under the Act, a claimant must prove both that he or she suffers from an occupational disease and that a causal connection exists between the disease and his or her employment." *Bernardoni*, 362 Ill. App. 3d at 596, 840 N.E.2d at 312. An occupational disease is defined as "a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. Such aggravation shall arise out of a risk peculiar to or increased by the employment and not common to the general public." 820 ILCS 310/1(d) (West 2004).

¶ 42 When making its factual determinations, it is within the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 782-83, 901 N.E.2d 906, 910 (2008). A reviewing court will not overturn a factual determination of the Commission unless it is against the manifest weight of the evidence. *Id.* at 783, 901 N.E.2d at 910. A decision is against the manifest weight of the evidence only where the opposite conclusion is apparent. *St. Elizabeth's Hospital v. Workers' Compensation Comm'n*, 371 Ill. App. 3d 882, 887, 864 N.E.2d 266, 272 (2007).

¶ 43 As noted, claimant bore the burden of proving he suffered an occupational disease. The only evidence presented by claimant, however, to support a finding of causation between his exposure to diacetyl and his COPD diagnosis was the medical opinion of his treating physician, Dr. Gumprecht—an opinion we find was inadmissible under *Frye* and Rule 702.

¶ 44 We further note the Commission found claimant was not a credible witness. The record reflects claimant's testimony regarding his exposure to diacetyl was not consistent with the evidence. For example, claimant told Dr. Parmet that he poured 12 to 15 buckets of butter flavoring into the tanks per day. At arbitration, claimant stated he poured 12 to 15 buckets of butter flavoring into the tanks per week. However, the employer introduced batch records that showed claimant added butter flavoring to the tanks on only 26 dates during his last 16 months of employment. Further, Richardson disputed claimant's testimony that he was regularly exposed to diacetyl when he completed certain work tasks, including changing oil filters, cleaning spillage from the floors, and cleaning the combinators. According to Richardson, the butter flavoring was too thick to enter the oil filters and the other tasks would typically not

have been completed by someone in claimant's position. Further, despite claimant's claim that the steel buckets containing butter flavoring were not always sealed with a lid, Singleton testified that to her knowledge, "there was always a lid" to protect food integrity. Moreover, the record shows that diacetyl was only used in 2% to 3% of the butter flavoring used at the employer's plant and claimant had no knowledge of which butter flavoring he had contact with contained diacetyl.

¶ 45 Next, the Commission found Dr. McCunney's medical opinions persuasive. We find the record supports the Commission's decision. As noted, despite claimant's contention in his brief, the record affirmatively shows that he was never diagnosed with bronchiolitis obliterans, the occupational lung disease linked to prolonged exposure to diacetyl in microwave popcorn plant employees. Rather, both Dr. Gumprecht and Dr. McCunney diagnosed claimant with COPD. Although Dr. Gumprecht and Dr. McCunney agreed that a lung biopsy—which was not done here—is required for a definite diagnosis of bronchiolitis obliterans, Dr. McCunney found it notable that none of claimant's CT scans demonstrated the heterogeneous mosaic pattern that he would expect to see in patients with bronchiolitis obliterans. Rather, Dr. McCunney, who reviewed claimant's medical history, performed an independent medical examination of claimant, and visited the employer's plant, attributed claimant's COPD to a variety of factors, including his smoking history, asthma, obesity, and family history. Even Dr. Gumprecht agreed that claimant's CT scans showed generalized emphysema commonly seen in smokers.

¶ 46 Based on the above, claimant failed to show that he suffered an occupational disease. Accordingly, the Commission's finding on this issue was not against the manifest weight of the evidence.

¶ 47 III. CONCLUSION

¶ 48 For the reasons stated, we affirm the circuit court's judgment confirming the Commission's decision.

¶ 49 Affirmed.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Michael K. Durbin,

Petitioner,

vs. NO: 04 WC 49564

Archer Daniels Midland,

14IWCC0522

Respondent,

DECISION AND OPINION ON REVIEW

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

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed May 9, 2013 is hereby affirmed and adopted.

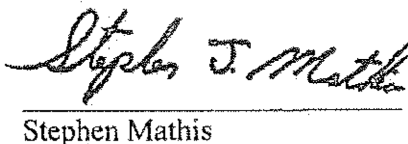
The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUN 30 2014

Mario Basurto

MB/mam
o:5/29/14
43

David L. Gore



Stephen Mathis

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DURBIN, MICHAEL K
Employee/Petitioner

Case# **04WC049564**

14IWCC0522

ARCHER DANIELS MIDLAND
Employer/Respondent

On 5/9/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.07% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

2453 CALLIS LAW FIRM
LARRY A CALVO
1326 NIEDRINGHAUS AVE
GRANITE CITY, IL 62040

0771 FEATHERSTUN GAUMER ET AL
JERROLD H STOCKS
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DECATUR, IL 62523

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14IWCC0522

STATE OF ILLINOIS)
)SS.
COUNTY OF SANGAMON)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL K. DURBIN
Employee/Petitioner

v.

ARCHER DANIELS MIDLAND
Employer/Respondent

Case # 04 WC 49564

Consolidated cases: ______

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brandon J. Zanotti**, Arbitrator of the Commission, in the city of **Springfield**, on **March 6, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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14IWCC0522

FINDINGS

On **June 11, 2003**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$38,700.48**; the average weekly wage was **$744.24**.

On the date of accident, Petitioner was **49** years of age, *married* with **0** dependent children.

Respondent shall be given a credit of **$0** for TTD, **$0** for TPD, **$0** for maintenance, and **$100,660.11** for other benefits, for a total credit of **$100,660.11**.

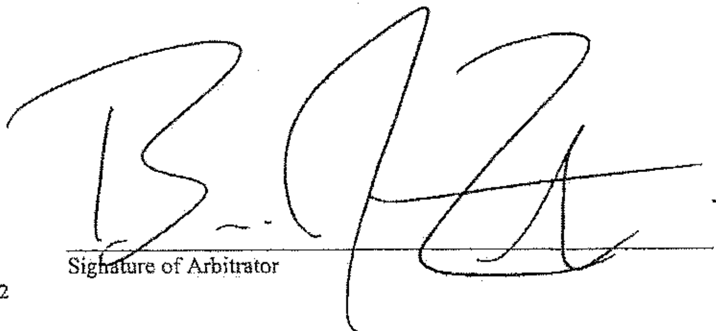
Respondent is entitled to a credit for all medical bills paid under Section 8(j) of the Act.

ORDER

Petitioner failed to prove he sustained an accident on June 11, 2003 arising out of and in the course of his employment with Respondent. For the foregoing reasons, Petitioner's claim for compensation is denied and no benefits are awarded.

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

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



Signature of Arbitrator

<u>05/06/2013</u>
Date

MAY - 9 2013

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14IWCC0522

STATE OF ILLINOIS)
)SS
COUNTY OF SANGAMON)

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

MICHAEL K. DURBIN
Employee/Petitioner

v. Case # 04 WC 49564

ARCHER DANIELS MIDLAND
Employer/Respondent

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

Petitioner, Michael K. Durbin, was born in 1953. Petitioner commenced employment with Respondent, Archer Daniels Midland, in 1972. (Respondent's Exhibit (RX) 3-B, pp. 12-17). Respondent's plant is a food packaging facility. (Arbitration Transcript (AT), p. 80). The major activity of the plant is the packaging of vegetable oils that do not contain Diacetyl. (RX 2, p. 3). Petitioner has worked at multiple facilities of Respondent in Decatur, Illinois. (RX 3-B, p. 12-17). Petitioner worked two stints as a pumper/loader in the production department at Respondent's packaging plant in Decatur, Illinois. (AT, pp. 26, 32, 72). The first stint was approximately 1978 to the early 1980s. (AT, p. 32; RX 3-B, pp. 12-17). The second stint was from approximately 1993 to 2003. (AT, p. 32; RX 3-B, p. 12-17). Petitioner's last day of work for Respondent was May 15, 2003. (See AT, pp. 4-5; see also Arbitrator's Exhibit 1).

As a pumper/loader, Petitioner alleges exposure to butter flavorings containing the compound identified as Diacetyl. (AT, p. 11). Petitioner claims diminished lung function and shortness of breath as a result of his exposure to butter flavors containing Diacetyl to which he was exposed during his employment as a pumper/loader. (PX 1, p. 53; AT, p. 11).

Case studies at microwave popcorn plants have suggested a correlation between high exposures to butter flavorings containing Diacetyl and a specific lung disease identified as Bronchiolitis Obliterans. (RX 2, p. 13). The editorial relied upon by Petitioner's medical expert was specific for Bronchiolitis Obliterans. (PX 1, p. 22). Commentators have indicated a need for data gathering of respiratory diseases of unknown etiology to identify common exposures which may be relevant. (PX 1, Dep. Exh. 3, pp. 17-18).

Petitioner did not know which butter flavoring products he handled contained Diacetyl. (AT, p. 34). Petitioner testified that he handled butter flavors from the 1980s through 2003. (AT, p. 34). However, Diacetyl containing butter flavors were not introduced to the Decatur packaging plant until the early 1990s. (RX 3-B, p. 16). Respondent was required to take precautions to assure that the food grade components were protected from contamination. (AT, p. 80). Butter flavoring added to the oil tanks generally was a Flavorchem product. (AT, pp. 117, 121). Flavorchem was kept in a refrigerated state until it was needed for the oil tanks. (AT, p. 77). The lab would unseal the refrigerated Flavorchem product by

removing the lid and cap on the plastic bucket. (AT, pp. 122-123). After mixing the additive in the lab, the lab would replace the lid and screw the cap on the bunghole on the top of the lid. (AT, p. 123). The plastic buckets contained five gallons. (AT, p. 77). When a lesser quantity of flavoring was required, the lab workers would pour Flavorchem product into a stainless steel bucket and place a lid upon the bucket inside the lab. (AT, pp. 79, 83, 124). The lab personnel would then place the bucket outside the lab door for the pumper/loader's retrieval and delivery to the oil tank. (AT, p. 121). Petitioner testified that the lid on the stainless steel bucket was not always present. (AT, p. 16). Kelly Singleton, Respondent's quality control agent for the laboratory, testified that the lid was always on the stainless steel bucket because of product integrity issues for the food grade operation. (AT, pp. 115-116, 124). Petitioner never worked in the lab. (AT, p. 121). Petitioner would carry the bucket of butter flavorings to oil tanks and pour the flavorings into the tank. (AT, pp. 14-17). The amount of flavoring which would be poured into the tank would be based upon the customer's specifications. (AT, p. 119). The tanks contained approximately 50,000 to 100,000 pounds of flavoring. (AT, p. 119). The total additive which Petitioner would pour into the tank would approximate .002% of the oil tank. (AT, p. 120). The bucket of flavoring would contain less than 2% Diacetyl when a Flavorchem butter flavoring was carried to the oil tank. (AT, p. 119). The concentration of Diacetyl in the oil tank, after addition of the butter flavoring would be .002 X .02 = 0.00004. (AT, p. 120). During the time Petitioner was employed by Respondent as a pumper/loader, less than two to three percent of all product mixed or packaged by Respondent at the Decatur packaging plant contained butter flavors. (AT, pp. 82, 84).

The tank system into which additives were placed at Respondent's facility was a closed system. (AT, pp. 79-80). Respondent's oil tanks were not heated. (AT, p. 86). The oil tanks had a nitrogen blanket seal to prevent the escape of vapors. (AT, p. 80). To fill the oil tanks, the pumper/loader would remove an approximate one foot diameter lid at the top of the tank and pour the additive into the tank. (RX 7(a) & (b)). Brian Richardson, Respondent's safety and environmental manager, testified that the pouring operation would take two minutes to pour five gallons into the tank. (AT, p. 76; also see AT, p. 16).

Pumper/loaders would prepare a batch sheet for retention in the lab each time the pumper/loader would take butter flavor to the oil tanks. (AT, pp. 80-81, 122; RX 5). Respondent's batch records available during the last 16 months (approximately 500 days) of Petitioner's employment as a pumper/loader record 26 different dates on which Petitioner had occasion to pour butter flavor into the oil tanks. (RX 4; RX 5). Thus, Petitioner had occasion to deliver butter flavor to the oil tanks approximately two occasions per month based on Respondent's batch records. (RX 4; RX 5). Petitioner reported to Dr. Parmet, one of his retained experts in the pending civil case against the butter flavor manufacturers, that he would deliver up to 15 buckets per day, but averaged about 12 per day. (PX 14). At hearing, Petitioner disputed the recordation of history by Dr. Parmet and stated that he told Dr. Parmet he delivered up to 15 buckets per week. (AT, p. 47).

Petitioner claims exposure to butter flavoring in other operations in the packaging plant to include the whirl room, the combinator cleaning, remelt room cleaning, oil filter changing, washing of plastic buckets, and washing of stainless steel buckets. (AT, pp. 17-26). Petitioner's job duties did not include working in the whirl room. (AT, pp. 33, 71). Petitioner's duties included no responsibilities for the combinator. (AT, pp. 33, 71-72). Mr. Richardson testified that the combinator was cleaned by the maintenance department because the combinator was a closed system requiring ammonia purging. (AT, p. 72). Mr. Richardson explained that maintenance department duties and production department duties were distinct and separate. (AT, pp. 72-73). Mr. Richardson testified that Petitioner had no duties in the remelt room and explained that remelt activity was a laborer's job. (AT, p. 73). Mr. Richardson testified that Petitioner had no duties in the whirl room. (AT, p. 71). Mr. Richardson and Ms. Singleton testified that the cleaning of oil filters did not encompass any crystallized oils. (AT, pp. 74-75). Each explained that the

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only oils that would contain a Diacetyl butter flavoring would be crystallized oils. (AT, pp. 75, 125-126). Each explained that there was no exposure to Diacetyl in the course of cleaning filters because the product that possibly could contain Diacetyl would clog the filters. (AT, pp. 75, 125-126). Stainless steel buckets used by the pumper/loader were returned to the lab and the lab washed the stainless steel buckets (because they were reused in food grade production). (AT, p. 86). Mr. Richardson testified that the used plastic buckets were the subject of disposal and not reuse. (AT, p. 86). Mr. Richardson testified that Petitioner had no duties that would result in Petitioner cleaning any plastic buckets. (AT, p. 86). Petitioner did not work with Sweetex. (AT, p. 118).

On June 24 and 25, 2003, Respondent conducted a series of industrial hygiene monitoring tests at the Decatur packaging plant. (RX 8; AT, p. 95). Diacetyl was not detectable in the background workplace environment. (RX 8; AT, p. 101). The air re-circulates in the facility seventeen times per hour. (RX 3-B, p. 17). On November 9 and 10, 2004, in response to a request for a health hazard evaluation submitted by Pace International Union, NIOSH conducted a health hazard evaluation at the Decatur, Illinois and Granite City, Illinois packaging plants. (RX 6). NIOSH compared Respondent's Decatur facility to the microwave popcorn production plant in Missouri. (RX 6). At the Decatur plant, NIOSH observed the laboratory worker weigh and pour flavoring from a five gallon bucket into a metal container which was covered with a lid. (RX 6). NIOSH observed a different worker carry the metal container to large oil containing tanks and pour the flavoring into the tank through a small opening at the top of the tank. (RX 6). NIOSH noted that the opening in the tank and others was kept tightly sealed except when flavoring or other ingredients are added. (RX 6). NIOSH measured total VOCs (Volatile Organic Compounds) during the pouring of flavoring into the tank to increase to 1.5 ppm from a background meter reading of zero ppm. (RX 6). A specific concentration for Diacetyl was not calculated. (RX 6). NIOSH found that the air concentrations of Diacetyl measured by Respondent during flavoring use were low (all less than 0.07 ppm). (RX 6). NIOSH observed that Archer Daniels Midland (ADM) workers have less opportunity for exposure to butter flavoring chemicals compared to workers in microwave popcorn plants. (RX 6). NIOSH concluded that compared to microwave popcorn plants evaluated by NIOSH, the two ADM packaged oil plants differ with regard to factors that would affect worker exposure to airborne butter flavoring chemicals. (RX 6). The differences included tanks that contain oil and flavorings are tightly sealed at ADM, whereas tanks in the microwave popcorn plants are not sealed. (RX 6). NIOSH observed that the proportion of flavorings relative to the amount of oil in the tanks is much lower at the ADM plants. (RX 6). NIOSH noted that in the popcorn plants, mixtures of butter flavoring and oil measure and pour flavorings into tanks several times per work shift. (RX 6).

There is no established permissible exposure level (safe) for Diacetyl. (PX 1, p. 52; PX 1, Dep. Exh. 3). No toxic exposure level has been established. (PX 1, p. 52; PX 1, Dep. Exh. 3). Diacetyl has been deemed by the Food and Drug Administration (FDA) as "generally regarded as safe." (PX 1, p. 53). The MSD sheet for Flavorchem does not identify any toxic hazard in connection with Diacetyl. (PX 1, Dep. Exh. 3). The Givaudan MSD sheet provides that its butter flavoring has no known medical conditions generally aggravated by exposure. (PX 1, Dep. Exh. 3). Diacetyl is highly water soluble. (RX 1, p. 36; PX 1, p. 76). Diacetyl vapors are heavier than air and do not vaporize readily. (AT, pp. 102, 103; PX 1, Dep. Exh. 3).

Respondent called John Jurgiel, an industrial hygienist, to testify regarding the NIOSH report, Respondent's environmental monitoring report, and his knowledge of the microwave popcorn plants. (AT, pp. 96-99). Mr. Jurgiel has a bachelor of science (BS) in Civil Engineering and a masters degree in Industrial Hygiene from Harvard University. (AT, p. 96). Mr. Jurgiel explained that his professional experience as an industrial hygienist involved the recognition and evaluation of chemical and biological stresses that can cause sickness and impact the health of workers. (AT, p. 97). Mr. Jurgiel testified that

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Diacetyl was non-detectable at Respondent's Decatur plant. (AT, pp. 101, 102, 109-110). Upon the specific activity of pouring additive into the butter flavoring tank, volatile organic compounds would measure 1.5 ppm. (AT, p. 101). Diacetyl would be a lesser component of the volatile organic compounds. (AT, p. 107). Mr. Jurgiel testified that there was no generally accepted standard for permissible exposure levels to Diacetyl. (AT, p. 106). He stated that current industry suggestions are for establishing a permissible level at 25 ppm. (AT, p. 106). Mr. Jurgiel testified that the only NIOSH reading potentially in excess of currently considered permissible exposure levels occurred briefly in the lab under a hood during the NIOSH testing at the ADM facility measured at 40 ppm – total VOCs. (AT, p. 107). Petitioner did not work in the lab. (AT, p. 107). Mr. Jurgiel testified that the common exposure to Diacetyl when opening a bag of microwave popcorn is far greater than the potential exposure to Petitioner when performing his job activities. (AT, p. 115). Mr. Jurgiel also described the differences in the microwave popcorn facilities compared to Respondent's facility. (AT, pp. 103-105, 110). Microwave popcorn plants deal with workers exposed for an entire shift to open vats of heated product. (AT, p. 110).

Respondent called Dr. Robert J. McCunney, who has practiced occupational and environmental medicine for 30 years. (RX 2, p. 18; RX 1, p. 7). Dr. McCunney is board certified by the American Board of Preventive Medicine and Occupational and Environmental Medicine and is a research scientist at the Massachusetts Institute of Technology where he conducts research and teaches courses in epidemiology, the evaluation and treatment of workers exposed to potential occupational and environmental hazards. (RX 2, p. 18; RX 1, p. 6-7). Dr. McCunney has a BS in chemical engineering, a master of science degree in environmental health and a masters degree in public health in occupational medicine from Harvard University. (RX 2, p. 18; RX 1, p. 7). Dr. McCunney has research experience relative to Diacetyl. (RX 2, p. 18; RX 1, pp. 10-11).

Dr. McCunney testified that the butter flavoring and oil at Respondent's facility are not heated like the microwave popcorn plants and that the time associated with any potential exposure to flavorings during pouring was limited to, at most once to twice per week and often less than that amount based on ADM batch sheets, for very short duration, less than two to five minutes. (RX 2, p. 10). Dr. McCunney's comparison of published case studies at the microwave popcorn plants to Respondent's packaging plant in Decatur, Illinois disclosed an exposure differential at a magnitude of 450 to 1. (RX 1, p. 30; RX 2, p. 13).

Dr. McCunney concluded that the NIOSH evaluation of Respondent's plant in Decatur indicates that the potential for exposure to butter flavorings and the corresponding risk of developing a specific lung disease (Bronchiolitis Obliterans) is not present and finds no support by a comparison to microwave popcorn plants. (RX 2, p. 10). The exposure to butter flavorings that may have contained Diacetyl was so infrequent that such exposure did not play a role in the development or aggravation of Petitioner's chronic lung disorder. (RX 2, p. 14). As a result of the limited exposure, the absence of typical findings on the HRCT and generally accepted alternative scientific explanations for his lung disease such as smoking, asthma, obesity and family history, it was Dr. McCunney's opinion that Petitioner's exposure to butter flavorings did not play a role in the development or aggravation of his chronic lung disorder. (RX 2, p. 14).

Petitioner proffered the testimony of Dr. Donald Gumprecht to offer opinions supporting the diagnosis of an occupational disease resulting in disablement arising out of exposures in the workplace. (PX 1). Dr. Gumprecht is a medical doctor whose practice concentrates in pulmonology. (PX 1, pp. 4-5). Dr. Gumprecht is not an expert in industrial hygiene. (PX 1, pp. 53-54). Dr. Gumprecht was the physician treating Petitioner's respiratory symptoms since approximately May 2003. (PX 1, Dep. Exh. 6). Dr. Gumprecht offered the opinion that Petitioner suffered from a fixed obstructive lung disease, non-specific, specifically caused by workplace exposure to butter flavorings containing Diacetyl. (PX 1, p. 44).

Respondent objected to the admissibility of Dr. Gumprecht's opinions diagnosing an occupational disease and opinions regarding causation connecting any occupational disease to a workplace exposure, on the basis that the opinions were speculative, failed to satisfy the generally accepted methodology requirements of *Frye*[1], and failure to meet threshold requirements for admissibility pursuant to Illinois Rule of Evidence 702. (AT, p. 7; Arbitrator's Exhibit 2, p. 2; PX 1, pp. 21, 22, 23, 26, 27, 28, 33 and 36).

Dr. McCunney ruled out Bronchiolitis Obliterans based on review of medical studies. (RX 1, p. 19). Dr. Gumprecht agreed that Diacetyl is not a common explanation for fixed obstructive lung disease. (PX 1, p. 52).

Bronchiolitis Obliterans is diagnosed by specific findings of air trapping and a patchy and heterogeneous mosaic pattern in the lungs documented upon high resolution computerized tomography (HRCT) examination (hereinafter "imaging studies"). (RX 1, p. 20; PX 1, pp. 45-46; RX 2, p. 13). Petitioner has undergone imaging studies on three separate occasions. (PX 1, pp. 44-46; RX 1, p. 20). On October 20, 2009, a chest CT scan and MRI did not disclose typical radiographic signs associated with Bronchiolitis Obliterans. (PX 1, pp. 44-46). In February 2009, HRCT examination showed no findings associated with Bronchiolitis Obliterans. (PX 1, pp. 44-46). In connection with the February 2009 examination, Dr. Lawrence Repsher, an Occupational Medicine Specialist, concluded that Petitioner had no evidence of Bronchiolitis Obliterans. (RX 11). In July 2003, at the order of Dr. Gumprecht, high resolution HRCT testing to "rule out" Bronchiolitis Obliterans failed to document any evidence of Bronchiolitis Obliterans. (PX 1, pp. 44-46). HRCT examinations do reveal diffuse generalized emphysematous changes noted throughout both lungs indicative of chronic obstructive pulmonary disease (COPD) caused by smoking. (PX 1, pp. 45-46).

Dr. Gumprecht did not visit Respondent's facility or otherwise review/conduct any audit of the workplace activities of Petitioner. (PX 1, p. 55). Dr. McCunney conducted an audit and visit of Respondent's facility to evaluate the potential exposures. (RX 1, pp. 16-17; RX 2, p. 6). Dr. Gumprecht conceded that he had no data that would enable him to quantify the exposure of Petitioner to any Diacetyl containing butter flavoring. (PX 1, pp. 55, 58-61). Dr. Gumprecht testified that he had no knowledge regarding quantifying the exposure levels of workers at the microwave popcorn plant, the case reports on which he based his opinions of causation. (PX 1, pp. 56, 58-61). Dr. Gumprecht had no knowledge of safe exposure or toxic exposure levels for Diacetyl. (PX 1, p. 52). Dr. Gumprecht had no knowledge of latency periods for Diacetyl. (PX 1, p. 62). Dr. Gumprecht was unable to determine disease onset within a range of ten years. (PX 1, p. 62). The editorial relied upon by Dr. Gumprecht notes that there is a short latency between hazardous exposure to Diacetyl and manifestation of Bronchiolitis Obliterans. (RX 1, McCunney Dep. Exh. 3). Dr. Gumprecht agreed that it is difficult to draw conclusions when there are "unknowns." (PX 1, p. 74).

Dr. Gumprecht testified that quantifying the exposures of Petitioner compared to the exposures of the workers in the microwave popcorn plant case studies upon which he relied was unnecessary. (PX 1, pp. 55-56). Dr. Gumprecht does not require any minimum exposure threshold to support his causation opinion for the non-specific diagnosis of fixed obstructive lung disease. (PX 1, p. 61). According to Dr. McCunney, a valid evaluation of the potential links between exposure to any hazard and any health effect requires a full understanding of the nature of the exposure and the precise diagnosis under review. It is not appropriate to simply indicate that any exposure regardless of dose is capable of causing the health effects reported with higher exposures. "It would be as silly as claiming that since heavy alcohol use is associated with liver disease, that drinking one beer poses a similar risk of liver disease." (RX 2, p. 14).

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[1] *See Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923).

Dr. Gumprecht bases his opinions on the assumption that the Diacetyl compound was sufficiently volatized for injury causing inspiration because the Diacetyl could be smelled. (PX 1, pp. 60-61, 76-77). Dr. Gumprecht stated, "...it's smellable, and it's enough for me." (PX 1, p. 60). Dr. Gumprecht assumed that smell is sufficient exposure to injure until somebody proves the smell is safe. (PX 1, p. 60). Dr. Gumprecht was unable to identify any studies to support his foregoing "smell theory." (PX 1, pp. 61, 77).

Dr. McCunney testified, based on generally accepted scientific methods, that Dr. Gumprecht's methodology was unreliable. (RX 1, p. 46). Dr. McCunney evaluated the "smell theory" proffered by Dr. Gumprecht. (RX 2, pp. 8-9). Dr. McCunney testified that Dr. Gumprecht's opinion is inconsistent with scientific literature on odors explaining that odor threshold is the concentration when the presence of a substance can be detected and a toxic threshold is the concentration at which the substance is harmful. (RX 2, p. 8). Relying upon published studies relating to the odor threshold of Diacetyl, Dr. McCunney calculated that the odor threshold of Diacetyl is 7,000 times lower than levels associated with Bronchiolitis Obliterans in the microwave popcorn industry. (RX 2, p. 9). Dr. McCunney further testified that it has been well known in toxicology that solubility is the most important feature of a compound that predicts whether it will reach the deep lungs. (RX 2, p. 8). Dr. McCunney explained that particle size has a limited role in olfaction since the receptors are present in the nose and the nose plays a role in filtering out particles so as to debunk Dr. Gumprecht's assertion that anything that has been in the air long enough to smell has small enough particle size to make it distally into the lungs beyond the upper airways. (RX 2, p. 8). Diacetyl is highly water soluble, which is why symptoms are expected to be experienced in the upper airway, eyes, etc. (RX 1, p. 36). Petitioner denied any eye irritation during any of his workplace exposures. (AT, p. 59). The butter flavoring was not heated sufficiently to create vapors. (RX 2, p. 6). At no time during his employment with Respondent did Petitioner report any symptoms associated with odors while performing his work activities. (AT, p. 47).

At trial, Petitioner testified that he could smell the odors of the butter during his entire 20 year history at the packaging plant. (AT, p. 34). On two occasions during his sworn testimony in the civil case against the butter flavoring manufacturers, Petitioner denied recalling or recognizing any distinctive orders when dealing with the butter flavorings. (AT, pp. 35-37). Petitioner confirmed that he never told any of his treating medical personnel that the smell of the butter would irritate his nasal passageways because he did not "feel it was relevant." (AT, p. 60). Petitioner's work accident history did not record any complaint of exposures or odor complaints. (AT, pp. 85-86; RX 12). Petitioner never complained to the lab that any additive he handled was irritating. (AT, p. 125).

During Petitioner's work at Respondent's plant, there was no change in his lung function by spirometry from 1995 to 2003, the period for which data are available. (PX 1, pp. 80-81; RX 2, pp. 11, 13). In 1995, Petitioner's FEV1 was 1.67 liters; in 2003, it was 1.65 liters – no change over the last eight years of his work at Respondent's plant. (RX 2, pp. 11, 13). Since leaving work, his FEV1 declined from 1.46 liters in early 2004 to 1.05 liters in December 2011 – a 410 ml decline over a nearly eight year period. (RX 2, pp. 14-15). The average annual decline of approximately 50 ml per year, slightly higher than the customary 30 ml annual age related decline, is consistent with smoking and/or natural accelerated decline based on individual factors. (RX 2, pp. 14-15). Dr. Gumprecht agreed that smokers can decline 90 ml per year. (PX 1, pp. 72-73). Analysis of Petitioner's pulmonary function tests fails to disclose an accelerated decline in lung function typically associated with lung disease caused by Diacetyl containing butter flavorings. (RX 2, p. 7). The editorial Dr. Gumprecht relies upon in offering opinions sets forth a diagnostic criterion for a 330 ml decline in FEV1 over 6 to 12 months after injurious exposure to Diacetyl. (RX 2, p. 7). However, Dr. Gumprecht did not know of the existence of the diagnostic criterion contained in the editorial upon which he relied. (PX 1, p. 63). The pulmonary function testing does not disclose any acute decline meeting the diagnostic standard. (PX 1, pp. 80-81; RX 2, pp. 12-13).

Dr. Gumprecht's diagnosis was based on spirometry testing exhibiting results by Petitioner that failed to meet the predicted findings for an individual of the same age and height as Petitioner. (PX 1, pp. 47, 68-69). The data against which Petitioner's examination findings are predicted did not account for smokers. (PX 1, pp. 69-70). Dr. Gumprecht did not know the database utilized for determining predicted values in his spirometry testing. (PX 1, p. 69). Dr. Gumprecht acknowledged that predicted values for pulmonary function are affected by smoking. (PX 1, pp. 69-73). Dr. Gumprecht acknowledged that the younger one starts smoking, or is exposed to smoking, the earlier pulmonary function will plateau and commence regression. (PX 1, pp. 70-73). Dr. Gumprecht conceded that maximum pulmonary function is not realized by individuals that smoke or are exposed to smoking at an early age. (PX 1, pp. 70-73). Dr. Gumprecht agreed that the extent of one's smoking and smoking exposure history can accelerate the regression of one's pulmonary function over time. (PX 1, pp. 70-73). Dr. McCunney concluded that the diminished pulmonary function findings in spirometry are explained readily by the smoking history of Petitioner. (RX 2, pp. 11, 14-15).

Based on reports to Dr. Arnold, Petitioner's pulmonologist in the mid 1990's, Petitioner commenced smoking at or about the age of 15. (RX 10, PX 1, p. 65). His smoking habit was one and a half to two packs per day. (RX 10). Petitioner quit smoking in November 1997. (PX 1, p. 66). Petitioner's parents smoked from birth to the time he left the residence at age 18. (AT, p. 50; PX 1, p. 67). The second-hand smoke contributed to the pack-year history to which Petitioner was exposed. (PX 1, pp. 67-68). Two of Petitioner's wives smoked. (AT, p. 53). Petitioner has given differing reports of his smoking history to other physicians [25 pack-years to 50 pack-years (RX 1, p. 40-41)] and stated that he did not start smoking, himself, until walking the picket line in 1979. (AT, pp. 50-51). Historical reports support a 58 pack-year first hand smoking history before cessation in 1998 (PX 1, p. 66), which Dr. Gumprecht agreed would be sufficient for COPD (PX 1, p. 66).

Dr. Gumprecht agreed that smoking is the most common explanation for COPD. (PX 1, p. 68). Dr. McCunney diagnosed COPD caused by smoking and chronic asthma. (RX 1, pp. 12-13). The findings on the imaging studies were classic findings for COPD. (PX 1, pp. 45-46). Petitioner's mother died from emphysema/COPD at age 53. (PX 1, pp. 73-74; AT, p. 53). Petitioner's father died in his 50s from coronary disease complicated by a smoking history. (AT, p. 55). Dr. McCunney and Dr. Gumprecht agreed that family history is a genetic indicator for COPD. (RX 2; PX 1, p. 73). Dr. McCunney testified that it is not generally accepted in the medical community that Diacetyl causes COPD. (RX 1, p. 18).

Dr. Gumprecht cited an editorial article to support his opinions on diagnosis and causation, but that editorial was not offered into evidence. (PX, pp. 21-22, 34). According to Dr. McCunney, a medical editorial is not generally accepted scientific source and does not constitute an independent scientific study. (RX 1, pp. 37-39). Dr. Gumprecht agreed that the editorial is "getting toward the concept of" general acceptance, but, inferentially, not generally accepted science. (PX 1, p. 34).

Dr. Gumprecht denied that Petitioner suffered from asthma during his course of treatment with Petitioner. (PX 1, pp. 46). Dr. Gumprecht acknowledged that there is a longstanding previous history of asthma documented in the medical records. (PX 1, pp. 50, 63, 64). Dr. Gumprecht did not interpret his spirometry testing as showing reversibility sufficient to document asthma. (PX 1, p. 47). Dr. McCunney, citing the standards established by the American Thoracic Society and noting results from bronchodilation tests, found that Petitioner did document reversibility diagnostic for longstanding asthma. (RX 2, pp. 4-7). Dr. McCunney also documented reversibility comporting with the standards of the American Thoracic Society. (RX 2, p. 4). Longstanding asthma is a recognized cause for diminished lung function on spirometry testing. (RX 2, pp. 7, 12). Further, Dr. Repsher diagnosed asthma. (RX 11).

The report of Dr. Parmet, the physician retained by Petitioner's attorney in the civil case, assumed that Petitioner was exposed to an open system (similar to popcorn plants), delivering up to 15 buckets of additives per day in a heated process. (PX 14). Petitioner denied prior lung conditions to Dr. Parmet. (PX 14). Petitioner's prior lung condition history included: childhood pneumonia (AT, p. 51); 1972 – asthma (AT, p. 50); bronchitis/asthma during the 1980s and thereafter (RX 10); sinus surgery – 2000 (RX 10); and paint exposures (RX 10).

When Dr. Gumprecht reviewed the report of Dr. Repsher diagnosing asthma and ruling out Bronchiolitis Obliterans, Dr. Gumprecht prepared an unsolicited report to Petitioner's attorney challenging Dr. Repsher's opinion. (PX 1, p. 32). When Dr. Gumprecht reviewed a CT report prepared by Dr. Jill Sullivan, which described mild diffuse emphysematous changes, Dr. Gumprecht prepared a report telling her that the changes were "severe." (PX 1, p. 79). Dr. Gumprecht conceded that he has diagnosed COPD in other patients at younger ages. (PX 1, pp. 64-65).

Dr. McCunney conducted a medical examination of Petitioner at Respondent's request pursuant to Section 12 of the Illinois Workers' Occupational Diseases Act, 820 ILCS 310/1 et seq. (hereafter the "Act"). (RX 2, p. 1). Petitioner's body mass index was 32.7, a value reflecting obesity. (RX 2, p. 4). Dr. McCunney's examination disclosed an unchanged oxygen saturation rate after mild exercise. (RX 2, p. 4). Bronchodilator examination indicated reversibility consistent with asthma. (RX 2, p. 4). Dr. McCunney's examination disclosed reversibility, a key feature of asthma, consistent with the American Thoracic Society guidelines for airway reversibility associated with asthma. (RX 2, p. 6).

Dr. McCunney testified, within a reasonable degree of medical and scientific certainty, that Petitioner's lung disease is due to a combination of non-work related factors, including his smoking history, asthma, obesity and family history. (RX 2, pp. 14-15). Dr. McCunney opined that Petitioner's work at Respondent's plant that involved limited exposure to Diacetyl containing butter flavorings played no role in the development or aggravation of his lung ailment. (RX 2, pp. 14-15).

CONCLUSIONS OF LAW

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

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

Petitioner Failed to Prove an Occupational Disease

To prove an occupational disease, Petitioner must establish a disease arising out of and in the course of the employment or which has become aggravated and rendered disabling as a result of the exposure of the employment. 820 ILCS 310/1(d). Petitioner has the burden of showing by a preponderance of credible evidence that his disease arises out of and in the course of employment, which requires a showing of causal connection. *See Horath v. Industrial Comm'n*, 96 Ill.2d 349, 356, 449 N.E.2d 1345 (1983). After evaluating the admissibility of opinion testimony, the weight to be accorded to the testimony of competing experts, the credibility of Petitioner and the totality of legal and factual circumstances presented in the record, the Arbitrator finds that Petitioner has failed to meet his burden to prove an occupational disease that arose out of and in the course of employment.

In Illinois, the admission of expert testimony is governed by the standard first expressed in *Frye v. United States*, 293 F.3d 1013 (D.C. Cir, 1923). *In re Commitment of Simons*, 213 Ill.2d 523, 529 (2004).

Commonly called the "general acceptance" test, the *Frye* standard dictates that scientific evidence is admissible at trial only if the methodology or scientific principle upon which the opinion is based is sufficiently established to have gained general acceptance in the particular field in which in belongs. *Bernardoni v. Industrial Comm'n*, 362 Ill. App. 3d 582, 594, 840 N.E.2d 300, 310 (3d Dist. 2005) (citing *Simons*, 213 Ill.2d at 529-30). The proponent of expert testimony has the burden of demonstrating that the proffered opinion is worthy of admission into evidence. *Bernardoni*, 362 Ill. App. 3d at 595, 840 N.E.2d at 310. (COPD from smoking, non-work related). An expert witness opinion cannot be based on mere conjecture and guess. *Dyback v. Weber*, 114 Ill.2d 232, 244, 500 N.E.2d 8, 13 (1986). If the basis of an expert's opinion is grounded in guess or surmise, it is too speculative to be reliable. *Modelski v. Navastar International Transportation Corp.*, 302 Ill. App. 3d 879, 885, 707 N.E.2d 239, 244 (1st Dist. 1999). Based on the record, Dr. Gumprecht's opinions diagnosing an occupational disease and opinions relating a workplace cause for fixed obstructive lung disease are insufficient for Petitioner to meet his burden of proof.

Petitioner Does Not Have Bronchiolitis Obliterans

Limited case study of microwave popcorn plant workers exposed to butter flavoring containing Diacetyl in high concentrations for prolonged exposures has noted the presence of the specific diagnosis of Bronchiolitis Obliterans in certain workers. There is no generally accepted science relating COPD to Diacetyl exposure. As applied in this case, Petitioner does not satisfy the diagnostic criteria for the occupational disease, Bronchiolitis Obliterans. Petitioner fails to present admissible or persuasive evidence to meet his burden of proving an occupational disease.

Lung biopsy is the most definitive test for diagnosing Bronchiolitis Obliterans. Petitioner has not had a lung biopsy. The signature pathology for a Diacetyl induced lung disease is the heterogeneous patchy mosaic findings on imaging studies. HRCT imaging is diagnostic for Bronchiolitis Obliterans. More specifically, HRCT imaging should disclose the heterogeneous patchy mosaic pattern. Three HRCT imaging studies were performed on Petitioner. None supported the diagnosis of Bronchiolitis Obliterans. Drs. McCunney, Gumprecht and Repsher each agree on this point. However, the signature pathology for COPD from smoking, diffuse emphysematous findings, are documented. From the outset of the analysis, the evidence indicates that Petitioner does not suffer any disease for which Diacetyl is the suspected causative factor.

The pulmonary function tests, including more particularly, FEV1, remained constant from 1995 to initial testing in 2003 after Petitioner's cessation of work for Respondent. In other words, Petitioner did not experience any decline in his pulmonary function during the last eight years of his workplace exposure to any butter flavoring containing Diacetyl. Even if the editorial relied upon by Dr. Gumprecht had obtained the level of generally accepted science, the editorial identifies a diagnostic criterion of a 330 ml drop in FEV1 in a six month to twelve month time frame following the injurious exposure to the Diacetyl product. Dr. Gumprecht's conclusion defies the very scientific data upon which he relies. Accordingly, the diagnosis of the occupational disease, Bronchiolitis Obliterans, is not supported by the diagnostic testing. Thus, even if one accepts for argument purposes that it is a widely accepted fact that exposure to Diacetyl can cause Bronchiolitis Obliterans, there is no evidence that Petitioner has Bronchiolitis Obliterans. Accordingly, Petitioner has failed to satisfy his burden of proof that an occupational disease has been sustained. *See Lukesh v. ABF Freight*, 10 IWCC 862 (Sept. 7, 2010).

Petitioner's Disease Did Not Arise Out of and in the Course of His Employment

To satisfy the concept that Diacetyl is a cause for any lung disease as generally accepted in the medical community, a sufficiently broad sample of experts need to concur. *Bernardoni*, 362 Ill. App. 3d at 595, 840 N.E.2d at 311. The causes for Bronchiolitis Obliterans with obstructive lung disease are unknown. *See Hughes v. Performers Flooring*, 08 IWCC 354 (March 25, 2008) (theories are not medical fact). Notwithstanding, even if any recognized hazard meeting the standard for occupational disease was confirmed, the methodology employed by Dr. Gumprecht to relate the occupational disease to Respondent is not generally accepted. Dr. Gumprecht assumes that the smell of butter flavor in the workplace is sufficient evidence of causation until Respondent proves otherwise. The "smell test" masks the fact that Dr. Gumprecht has no quantitative data arising from any scientific article or the particular circumstances of Petitioner's exposure to support a causal connection. Dr. Gumprecht confesses that he has no data regarding the exposures confronting Petitioner at Respondent's plant. Dr. Gumprecht concedes that he has no data regarding the exposures experienced by the microwave popcorn employees in the limited case studies which he accepts for purposes of his opinions. Dr. Gumprecht acknowledges that he has performed no comparison to ascertain whether the activities of Petitioner were in any way comparable to the activities of the popcorn workers who carried the diagnosis of Bronchiolitis Obliterans. Thus, Dr. Gumprecht embraces a principle that says that smell alone enables inspiration of sufficient quantities of the compound without any scientific support for the theory.

First, the "smell theory" proffered by Dr. Gumprecht requires, as its central factual tenet, complaints by Petitioner when smelling the product. On this central factual tenet, the credibility of Petitioner is at issue. At hearing, Petitioner said that the smells would "take his breath away." In his discovery deposition in the related civil case against the butter flavoring manufacturers, Petitioner denied both recognition and any irritation caused by odors. At hearing, Petitioner said that the odors would cause nasal airway irritation. However, Petitioner admitted that he never reported such symptom to a single treating physician. Petitioner's explanation for failure to report the nasal airway symptoms was that he did not consider it relevant. Noteworthy, Petitioner never reported eye irritation when encountering the odors or when exposed to any product. Given the highly water soluble characteristic of Diacetyl, the absence of eye irritation shows an absence of significant exposure. Further, Petitioner never complained to his employer regarding any irritation or breathless episodes for over 20 years. Accordingly, Petitioner was not a credible witness.

Dr. McCunney evaluated the science related to odor threshold versus toxic threshold for the compound Diacetyl. Assuming toxicity at the level documented in the microwave popcorn plant workers diagnosed with Bronchiolitis Obliterans and reviewing research related to the odor threshold for Diacetyl, Dr. McCunney calculated that the toxic threshold was 7,000 times greater than the odor threshold for Diacetyl. Not only does Dr. Gumprecht fail to identify any authority or publication recognizing the "smell test" as a generally accepted methodology in the medical community, the scientific evidence weighs 7,000 to 1 against his approach.

Opinion testimony premised upon the assertion that an exposure to microwave popcorn butter flavor at any level is unsafe unless the respondent can prove otherwise has been rejected as a non-scientific conclusion. *See Newkirk v. ConAgra Foods, Inc.*, 727 F. Supp. 2d 1006, 1031 (E.D. Wash. 2010) (affirmed on appeal). In *Newkirk*, Dr. Parmet testified to an assumption that a consumer's exposure to microwave popcorn butter flavor, at any level, was unsafe unless defendants could prove otherwise. *Id.* Dr. Parmet's conclusions failed to present any parameters as to what a safe or unsafe level of exposure would be and his methodology was not the product of reliable principles based upon sufficient facts or

data as required by Federal Rule of Evidence 702. *Id.* "This conclusion is not only scientifically unsound, it is legally unsound in light of the plaintiff's burden to prove causation..." *Id.*

The *Newkirk* analysis supports rejecting the diagnostic and causation opinions of Dr. Gumprecht in the instant case. Dr. Gumprecht had no data to support his opinions of workplace causation. The diagnostic criterion for Bronchiolitis Obliterans is not present. Dr. Gumprecht admitted that he was unaware of any safe level of exposure and no knowledge of a dangerous level of exposure. Like Dr. Parmet, Dr. Gumprecht assumed that any exposure [from smell] was dangerous until someone proved otherwise. Dr. Gumprecht's principle and methodology are not supported by any scientific study and are not generally accepted methodologies. The proponent of expert testimony has the burden of demonstrating that the proffered opinion is worthy of admission into evidence. *Bernardoni*, 362 Ill. App. 3d at 595, 840 N.E. 2d at 310. (MCS not generally accepted diagnosis). Said opinions are therefore entitled to no weight and the preponderance of evidence is against the opinions provided by Dr. Gumprecht.

On the other hand, Dr. McCunney is better qualified by training, education, and professional experience to address the diagnosis and causation issues presented in this case. Unlike Dr. Gumprecht, Dr. McCunney performed an extensive review of the facts and circumstances related to Petitioner's exposures and had an extensive understanding of the exposures of the microwave popcorn workers diagnosed with Bronchiolitis Obliterans. The preponderance of the evidence supports the opinion of Dr. McCunney that Petitioner's exposure to butter flavorings did not play a role in the development or aggravation of his chronic lung disorder. It is well settled that where one opining physician has superior information versus another, the former is to be accorded greater weight. *Hickman v. Beniach Construction*, 07 IWCC 233 (March 5, 2007).

The scientific literature balances in favor of Dr. McCunney's conclusions. The independently documented exposure data supports Dr. McCunney's conclusions. The alternative diagnoses for the current state of ill being suffered by Petitioner related to non-work causes is well supported by literature, overwhelming historical data regarding Petitioner, and is generally accepted.

Dr. McCunney conducted a comparative evaluation of popcorn plant exposure to Petitioner's potential exposure. The documented background presence of Diacetyl in the workplace was undetectable. The exposure when pouring the liquid butter flavoring into the tank was .07 ppm. Dr. McCunney calculated that the highest exposure indicated in the NIOSH investigation at Respondent's plant remained a magnitude of 450 times less than the exposure experienced by the popcorn plant workers diagnosed with Bronchiolitis Obliterans.

Petitioner testified to numerous activities where he may have been exposed to butter flavoring. Petitioner acknowledged that he had no personal knowledge as to which butter flavorings contained Diacetyl and which did not. Petitioner, a union member, claimed that he performed job duties of other union members at the Decatur packaging plant. Brian Richardson, safety director and former whirl room operator at the same plant, testified to his personal knowledge of Petitioner's job duties. Petitioner did not work in the whirl room. Petitioner did not work in the re-melt room. Laborers performed the operations in the re-melt room. Kelly Singleton, laboratory quality control officer, testified that Petitioner did not clean stainless steel buckets. Mr. Richardson and Ms. Singleton testified that there was no Diacetyl in the oils that run through the oil filters. Mr. Richardson testified that the plastic Flavorchem buckets were disposed of and not cleaned. Petitioner had no duties relative to the combinator. Petitioner's claims that he would perform the job functions of other union workers outside his job description are not credible. The exposures claimed by Petitioner are overstated and speculative. Respondent's documents and witnesses were more credible.

14IWCC0522

The data relied upon by Dr. McCunney in his opinions finds further support in his understanding of the job duties executed by Petitioner. Review of Respondent's batch records disclosed that Petitioner added butter flavoring with Diacetyl on only 26 occasions during his last 16 months of employment. Dr. McCunney's use of a frequency of two to three times a month for a two to five minute duration is consistent with Respondent's batch records and Petitioner's job duties. On the other hand, Petitioner advised Dr. Parmet, the expert retained by Petitioner's attorneys in the pending civil litigation, that he would deliver butter flavoring to the oil tanks twelve to fifteen times per day, thus, an approximate 75 to 1 overstatement of frequency by Petitioner. At hearing, Petitioner sought to retreat from the excessive frequency described to Dr. Parmet. Dr. McCunney accurately understood the closed, non-heated ADM process. Petitioner told Dr. Parmet that the process was open with heated product. Petitioner acknowledged at hearing that Dr. Parmet's assumptions were erroneous. Dr. Gumprecht had no knowledge of the process or quantification of any activity.

Dr. McCunney provides a credible explanation for the diminished pulmonary function of Petitioner. Dr. McCunney diagnosed COPD, long standing asthma, genetic predisposition for COPD, and obesity. The imaging studies disclosed the classic presentation for COPD based on smoking. Drs. McCunney and Gumprecht agreed that smoking was the most commonly recognized cause for COPD. Drs. McCunney and Gumprecht both agreed that smoking reduces the expected pulmonary function of the smoker such that the smokers PFTs will be less than predicted. Dr. McCunney testified that the reductions in pulmonary function, to the extent spirometry testing was valid, was consistent with the smoking history, standing alone.

Petitioner reported to his treating physicians (and at hearing), different histories regarding his smoking. Petitioner grew up in a home with two smoking parents. His mother died at age 53 from emphysema, a genetic marker for Petitioner's COPD. His father died of coronary disease complicated by smoking history. The history reported to his pulmonologist in 1995 was that he had smoked a pack and a half to two packs a day since age 15. At trial, Petitioner reported that he did not start smoking regularly until age 26. The date for cessation of smoking has not been consistent. However, it appears that his last period for smoking regularly was November 1997. Based on the most extensive smoking history that Petitioner has reported to treating physicians, Petitioner has a pack-year history well in excess of 50 pack-years before one considers the effects of secondary smoke from two parents and two smoking wives. Dr. McCunney relied upon American Cancer Society-published reports supporting the conclusion that Petitioner is high risk for COPD based on smoking history alone. The genetic marker increases the COPD risk. The longstanding asthma history further increased the risk – all non-work related causes.

The greater weight of evidence establishes that Respondent's packaging plant and processes were not comparable to the microwave popcorn plants. Petitioner's opinion evidence requires comparability to provide any support for the medical/scientific opinions necessary to meet Petitioner's burden of proof. On the other hand, the factual and scientific data relied upon by Respondent's opinion witnesses has evidentiary support in the record and is to be accorded greater weight. *See Hickman v. Beniach Construction*, cited *supra*.

Respondent's industrial hygiene testing disclosed no detectable Diacetyl in the background at Respondent's facility in June 2003. NIOSH performed its audit and testing concluding that the Decatur packaging plant and the microwave popcorn plants presented significant differences. Respondent called John Jurgiel, an experienced industrial hygienist, to explain the significance of Respondent's monitoring and NIOSH testing of the Decatur packaging plant. All evidence in the record establishes that both

quantitatively and qualitatively, the workplace at Respondent's packaging plant was not comparable to the microwave popcorn plants.

There is no permissible exposure limit or unsafe exposure limit that has been adopted with respect to Diacetyl. Mr. Jurgiel testified that there are considerations in the industry that could place a permissible exposure limit at 30 ppm for Diacetyl. The measurement for volatile organic compounds (for which Diacetyl is a presumed component) during the pouring of additives activity did not exceed 1.5 ppm. Only briefly in the laboratory while working under a ventilation hood did NIOSH take any measurement in excess of the currently considered permissible exposure limit. However, Petitioner never worked in the laboratory and was not exposed to the brief borderline concentration in the lab. Petitioner's potential exposure was less than a bag of popcorn – an exposure level common to the public.

Based on the totality of evidence, determinations of the credibility of witnesses and the respective weight to be assigned to the evidence presented by both parties, the finding is that Petitioner has failed to prove an occupational disease caused by a workplace exposure and, as such, Petitioner's claim is denied.

Petitioner's Current Condition of Disability is Related to Non-Work Causes

Petitioner did not experience any documented decline in pulmonary function during the last eight years of his alleged workplace exposure to Diacetyl. On the other hand, the pulmonary function of Petitioner, compared against predicted values for non-smokers of his age and height, is explained by his extensive smoking history (in some reports in excess of 58 pack-years) and normal age related reductions in lung function. Further, longstanding asthma explains the decline in pulmonary function in conjunction with genetic predisposition. The diagnosis of Dr. McCunney that Petitioner's lung disease is due to a combination of non-work related factors including his smoking history, asthma, obesity and family history without contribution from any limited exposure to Diacetyl containing butter flavorings, is the more persuasive testimony. The information possessed by Dr. McCunney was superior and entitled to greater weight. Respondent has shown that Petitioner's COPD was not causally related to workplace exposures to Diacetyl and that Petitioner's current pulmonary function is consistent with normal regression for smokers and age.

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

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

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

Based on the foregoing findings concerning accident and causation, the Arbitrator therefore finds that all other issues are moot. Accordingly, no medical expenses, temporary benefits or permanent partial disability benefits are awarded.

2016 IL App (1st) 151366WC
No. 1-15-1366WC

Opinion filed: July 29, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SCOTT MORAN,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County.
	)	
v.	)	No. 2014 L 050679
	)	
THE ILLINOIS WORKERS'	)	Honorable
COMPENSATION COMMISSION, *et al.*	)	Robert Lopez Cepero,
(Village of Homewood, Appellee).	)	Judge, presiding.

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

OPINION

¶ 1 The claimant, Scott Moran, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2010)) against his employer, the Village of Homewood, seeking workers' compensation benefits for post traumatic stress disorder (PTSD) allegedly caused by a March 30, 2010, work-related accident. After an arbitration hearing, the arbitrator found that the claimant did not sustain an accidental injury that arose out of and in the course of his employment.

¶ 2 The claimant sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). The Commission struck one sentence from the arbitrator's decision and otherwise affirmed and adopted her decision.

¶ 3 The claimant filed a timely petition for judicial review in the circuit court of Cook County. The circuit court confirmed the Commission's decision, and the claimant appealed.

¶ 4 **BACKGROUND**

¶ 5 The following factual recitation is taken from the evidence presented at the arbitration hearing on January 7, and September 13, 2013.

¶ 6 The claimant testified that he started working as a firefighter in 1986. On February 22, 1991, he went to work for the employer's fire department as a firefighter/paramedic. In 2006, he was promoted to lieutenant/paramedic.

¶ 7 The claimant testified that just before 9:00 p.m. on March 30, 2010, a call came into the fire station, reporting a man trapped in a chair in a house fire. On the way to the fire, the dispatcher told him that the police were on the scene and that they were unable to rescue the man. The Hazel Crest fire department arrived on the scene minutes before the claimant arrived with his fire engine and crew. He testified that, under the Incident Command System, a single person is responsible for the overall operation of an incident. He was told by radio to take command of the incident. He went to the front door and saw the Hazel Crest firefighters enter the house. He determined the gauge of hose to use in extinguishing the fire. He instructed firefighter Christopher Kieta to take the hose in the front of the house. He listened to the radio for another chief to come on the radio so he

could transfer command and go in with Kieta. As he was putting on his mask and getting ready to go in, Brian Carey came up to him and stated "we got this Lieu. We got this." "Lieu" was a reference to lieutenant. Carey and Kieta went inside. The claimant testified that he looked around the house and that the fire in back was worse than he had originally thought, and he noticed that no one was on the roof ventilating. A Flossmoor Fire Department lieutenant arrived, and the claimant told him to vent the house. The claimant escalated the alarm to a "full still" so that additional mutual aid companies would respond to the scene.

¶ 8 The claimant testified that, as he walked back around to the front of the house, there was a flash. He saw Kieta and firefighter Karra Kopas come out of the building, and Kopas started screaming that Carey was still in the house. After what "seemed like hours," the claimant saw firefighters drag Carey out. He was not wearing his mask or helmet. The claimant looked down and said "Oh, my god." The ambulance at the scene had been driven by Carey and, therefore, was not available to transport him to the hospital. The claimant escalated the alarm to a mayday and called to secure an ambulance from a mutual aid department. The claimant continued to supervise the scene and obtain medical care for Carey. As Carey was being transported to the ambulance, Chief Casper from Country Club Hills approached the claimant and relieved him of his command. After Carey had been transported to the hospital, Chief Robert Grabowski came up to the claimant and asked what happened. The claimant told him "Chief, it's real bad. [Carey's] hurt. It's bad. You got to go to the hospital." Chief Grabowski left for the hospital.

¶ 9 Chief Grabowski testified that he had worked for the employer's fire department as the chief for three and one half years. Prior to that, he had worked for the Village of Hazel Crest for 23 years. Chief Grabowski testified that shortly after he arrived at the fire on March 30, 2010, Chief Dunn of the Tinley Park Fire Department approached him and told him that there was probably a line-of-duty death. Chief Grabowski told the claimant to have the crew return to the station along with all the other initial responders. From his training, and as fire chief, he knew that after this type of accident it was important to get everyone into one area to begin the critical incident stress debriefing. A little less than two weeks after the incident, there was another debriefing at the Village Hall.

¶ 10 The claimant testified that he and the other first responders from the employer's fire department were transported by the police to the police training room where clergy and other support staff interacted with them. Carey died as a result of his injuries caused by the fire. A critical incident stress debriefing team was brought in to assist the first responders in coming to grips with the loss of a colleague. For approximately ten days after the March 30, 2010, fire, the employer's fire department ceased performing fire suppression and emergency medical service operations, and all of its calls were referred to mutual aid companies.

¶ 11 Chief Grabowski testified that after the fire they implemented the Emergency Operation Plan where surrounding fire departments provided coverage for a period of about one week. It had never been used before. He stated that because they are a small department and some of the firefighters were very close to Carey, he had concerns about

the responders involved in the fire. He and Deputy Chief Clint Johnson spoke to psychologist Dr. Timothy McManus, and they decided not to take calls to make sure all the employees were okay.

¶ 12 Deputy Chief Johnson testified that he had worked full time for the employer's fire department since 1979 and had been deputy chief since 2008. He testified that after the March 30, 2010 fire, it was the first time in his career that the fire department had all their calls taken by other fire departments.

¶ 13 Christopher Kieta testified that he worked as a firefighter/paramedic for the employer and that he was part of the crew that responded to the March 30, 2010, fire. He stated that the claimant ordered him to pull a 2 ½ inch line hose into the house through the front door. He entered the house and made his way toward the kitchen. When he started extinguishing the kitchen fire, a huge amount of steam conversion erupted, touching the exposed skin around his face and pushing him to the ground. As he tried to pull his hood up, he bumped into Carey. He asked Carey to take the hose while he fixed his hood. He backed up behind Carey and bumped into Kopas. He asked Kopas to back Carey up so he could adjust his helmet and hood. He fixed his hood and noticed that they were pulling on the line. He picked up the hose and started maneuvering it forward. When he was in the front room about three feet from the front door, he heard breaking glass, and there was a flashover[1]. He heard someone on the radio ordering everyone out of the house. The Hazel Crest firemen rushed out, and he got pushed out the door. The

[1] A flashover is the sudden spread of flame over an area and the rapid transition to a fully developed fire.

Hazel Crest firefighters grabbed Kopas and pulled her out. He informed the Hazel Crest crew that Carey was still in the building. He went to his engine to get another hose line. He passed the second line to the Hazel Crest firefighters and followed them in the house. About 10 feet into the structure, they found Carey. Carey was carried into the yard, where emergency personnel began administering aid. Kieta stated that he was transported to the fire station for a traumatic debriefing session.

¶ 14 The claimant testified that he went to the fire station on April 9, 2010, to do work for his position as pension board secretary. Chief Grabowski called him into his office and stated that he could not return to work until he was cleared by a psychiatrist.

¶ 15 The employer selected Dr. McManus to treat some of the firefighters involved in the March 30, 2010, fire. An email from the claimant to Chief Grabowski dated April 20, 2010, was admitted into evidence. The claimant wrote that he had sent an email to Deputy Chief Johnson on April 12, 2010, requesting the name and number of the psychiatrist chosen to evaluate the firefighters. He had requested an appointment with the doctor the next day and had been denied. He wrote that he had emailed Deputy Chief Johnson again for the information about the doctor and had received no response. He closed "In the interest of preserving my mental status and recognizing signs of PTSD I have arranged to begin seeing Dr. Slutsky."

¶ 16 Chief Grabowski's response email dated April 20, 2010, was admitted into evidence. He wrote that he received "word yesterday that [the claimant was] able to see Dr. McManus." He stated that it was important that the claimant seek help as needed and that he would be scheduled with Dr. McManus as soon as possible.

¶ 17 The claimant testified that, on referral from his attorney, he made an appointment to see psychiatrist Dr. Marc Slutsky, on May 5, 2010. He then received Dr. McManus' contact information and began treating with him on April 23, 2010. He stated that this was the first time he had received mental health treatment. The claimant testified that he treated with Dr. McManus to deal with his inability to get his mind off the fire, his difficulty sleeping, and his interactions with other people including his family.

¶ 18 Licensed clinical psychologist Dr. McManus testified by evidence deposition. His records were also admitted into evidence. He testified that he received a referral from Chief Deputy Johnson to assess several firefighters, including the claimant, who were involved in the March 30, 2010, fire. He stated that he first saw the claimant for an assessment on April 23, 2010. In his notes, Dr. McManus wrote that the claimant expressed significant frustration with the referral process. The claimant reported a mixture of feelings of guilt about the fire, the burden of his responsibility as supervisor for the death, feelings of abandonment by his supervisors, sleep difficulties, and dreams about the event. Dr. McManus stated that the claimant was guarded and that it was difficult to engage him in the therapeutic process. He diagnosed the claimant with acute stress disorder.

¶ 19 On May 5, 2010, Dr. McManus diagnosed the claimant with PTSD. He wrote in his patient notes that the claimant seemed "lost and tremendously burdened." Dr. McManus testified that the change from acute stress disorder to PTSD is a natural progression diagnostically and that PTSD is not diagnosed within the first 30 days of when an individual experiences any kind of trauma.

¶ 20 Dr. McManus testified that his fourth session with the claimant was a turning point in the therapy. They worked together to facilitate a less guarded response to sessions and to begin to use the sessions in a way that would benefit the claimant. Dr. McManus explained that the claimant was not the kind of person who spoke about his feelings and that getting him to verbalize emotions showed a change in the trust level and a willingness to be more engaged in the therapy process. He felt that the claimant was showing signs of subtle improvement emotionally, in managing his stress, and in his sleep patterns.

¶ 21 On June 4, 2010, Dr. McManus administered a personality and assessment inventory called the MMPI-RF to the claimant to determine the claimant's progress. He testified that the test results indicated that the claimant experienced a traumatic event; that there was mild distrust of the process; that the claimant was showing good control over his anxiety, mood, and any depressive affect; and that the claimant had made sufficient progress to consider returning to work. Dr. McManus testified that he determined that effective June 14, 2010, the claimant could return to work as long as he remained in therapy. He testified that the claimant's PTSD symptoms were stable, meaning that the claimant's symptoms were not disrupting his functioning or interfering with his relationships.

¶ 22 Dr. McManus testified that, at the August 26, 2010, session, he and the claimant discussed a visual flashback the claimant had while driving with his son. Dr. McManus stated that the event was psychologically significant because it showed that the fire was significantly or powerfully coded within the claimant's memory structures. He stated that

the flashback indicated that the fire had impact and power for the claimant and that a picture of the event could surface under a very relaxed condition or a non-guarded condition. They discussed the meaning of the flashback and its significance.

¶ 23 Dr. McManus continued to treat the claimant in September and October 2010. Dr. McManus testified that the claimant formally returned to work between the October 25 and November 9, 2010, sessions. During the November sessions, they discussed the claimant's condition after he returned to work, coping mechanisms, and sleep difficulties at the fire station.

¶ 24 On December 21, 2010, Dr. McManus released the claimant from treatment. He felt that the claimant had transitioned back to work successfully. Dr. McManus told the claimant that he could return for treatment if he experienced any difficulties.

¶ 25 Dr. McManus testified that he treated the claimant again on January 11, 2011. The claimant returned because there were things at the fire station that triggered memories of Carey and caused him to think about Carey's death. The claimant expressed difficulty shutting the thoughts off and struggled with feelings of conflict and guilt about the accident. The claimant testified that he asked Dr. McManus if the flashbacks were ever going to end and whether it would get better or worse. Dr. McManus testified that he told the claimant that his responses to the cues in the firehouse were normal, and they reviewed some thought-stopping exercises and how to turn the cues from adverse to more positive. The claimant testified that he never had comparable mental experiences prior to the March 30, 2010, fire.

¶ 26 Dr. McManus testified that it was not unusual that the claimant experienced symptoms once he had returned to work because he was in a setting where he was reminded of the March 30, 2010, fire on a daily basis; nor was it unusual that the claimant continued to think about the event over and over. Dr. McManus testified that the claimant would continue to have ruminations, thoughts about the event, or flashbacks after therapy even though they did not affect his ability to work.

¶ 27 Psychiatrist Dr. Marc Slutsky testified by evidence deposition. He testified that the claimant was referred by his attorney as a possible patient for psychotherapy. On May 4, 2010, Dr. Slutsky conducted a psychiatric evaluation of the claimant. Dr. Slutsky testified that the claimant told him about the March 30, 2010, fire and described his initial terror, his feelings of responsibility, his guilt for the deployment of personnel within the fire, his guilt that in commanding he was not in the fire himself, the shock of seeing one colleague killed and another injured, his feelings of fear and anxiety, the terrifying thoughts that were dominating his thinking, and the recurrent reliving of the fire. He discussed how this led him to be withdrawn and more irritable and angry. He also expressed how frightened he was that he would be locked in this state and wanted help.

¶ 28 The claimant did not become a patient, but Dr. Slutsky saw him again on February 8, and November 2, 2012. He testified that, when he first met the claimant in 2010, "his almost consummate focus was on the terror, the fear, the anxiety, the panicky state." The claimant was in a post acute stress situation and was very much all consumed by it. By 2012, his symptoms of flashbacks, episodes of stimulation that brought the incident to mind, general irritability and discomfort, and change in sleep patterns were

more compatible with PTSD. He went from a totally consuming state to where the episodes were triggered by specific people or things that reminded him of the accident or spontaneous sporadic episodes. Dr. Slutsky stated that, in February 2012, the claimant had significantly improved in his ability to function, even though he had significant signs of PTSD, including tremendous elements of irritability, difficulty relating, isolation, flashbacks, and other symptoms. The claimant had a somewhat improved sense that he could use the tools of self reflection, withdrawal, relaxation, and limitation of interaction to lessen the intensity of his symptoms. Dr. Slutsky testified that, when he saw the claimant in November 2012, the claimant's symptoms were more encapsulated, meaning that they were more specifically episodic, they had more definitive beginnings and ends, and they were less severe and more easily controlled.

¶ 29 Dr. Slutsky testified that the event of March 30, 2010, caused the claimant to suffer an overwhelmingly traumatic experience, in which he witnessed and was confronted with a life-threatening experience, and he experienced overwhelming feelings of horror, helplessness, fear, and guilt. Dr. Slutsky stated that the claimant suffers from a number of symptoms, including recurrent intrusive recollections, images of experiences, flashbacks, dreams, and insomnia. The claimant withdraws from social interactions; he does not feel comfortable being relaxed at the fire station; he has a pessimism he did not have before; there are times he is overly worried and irritable; and he has difficulty concentrating. Dr. Slutsky diagnosed the claimant with chronic PTSD based on the fact that the claimant had an exposure to a sudden, unusual, traumatic event, and the fact that, over a period of time, he developed symptoms in a number of different patterns,

including hypervigilance, withdrawal, insomnia, flashbacks, horrible nightmares, and intrusive thoughts. Dr. Slutsky stated that PTSD is an evolving response and that the diagnosis often does not manifest itself in any form for weeks, months, or even years after the trauma. He stated that the claimant's profession did not alter his diagnosis. Dr. Slutsky testified that people like firefighters or paramedics develop coping methods to deal with deaths in fires or automobile accidents, but when something happens that is of an extraordinarily different nature, such as when a colleague dies in a fire, it presents a totally different situation. He testified that, within a reasonable degree of medical and psychiatric certainty, the claimant's diagnosis of PTSD was caused by the March 30, 2010, events.

¶ 30 The claimant described his flashbacks as recurring visions that popped into his head throughout the day for no reason. He said he had six or seven different flashbacks but the most prominent were visions of firefighters dragging Carey from the fire, emergency personnel carrying Carey off on a stretcher, and Carey's funeral. The claimant testified that he continues to have multiple flashbacks each day; he is unable to sleep at the firehouse; and he does not sleep well at home. Since being released by Dr. McManus, he has been able to go to fires and on emergency medical calls and has been able to function as a lieutenant despite the flashbacks and trouble sleeping.

¶ 31 The arbitrator found that the claimant did not prove that he sustained accidental injuries that arose out of and in the course of his employment with the employer and, therefore, awarded no benefits. She noted that the claimant had an adverse emotional reaction stemming from the March 30, 2010, fire. She found that he had not experienced

a sudden, severe emotional shock because he did not sustain a physical injury, he did not witness Carey's death, and he was not involved in rescue efforts. She found that the proper interpretation and evaluation was to compare the claimant with other firefighters, rather than with the public in general. She found that this case was similar to cases that did not allow recovery for non-traumatic psychic injury where the employee could identify a stressful work-related episode, but his injury was dependent on his peculiar vicissitudes as he related to his work environment. She awarded the employer a credit of $7,477.30 for temporary total disability benefits paid to the claimant. She found all other issues moot.

¶ 32 The claimant sought review of the arbitrator's decision before the Commission. The Commission affirmed and adopted the arbitrator's decision, striking the following sentence: "The Arbitrator also notes that the cases are employment specific and, in the context of firefighters and police officers, establish a trend to deny recovery for post-traumatic stress disorder to first responders." The claimant sought judicial review of the Commission's decision in the circuit court. The circuit court confirmed the Commission's decision, and the claimant appealed.

¶ 33 **ANALYSIS**

¶ 34 The claimant argues that the Commission's decision that he did not sustain an accident that arose out of and in the course of his employment with the employer on March 30, 2010, is contrary to law. The parties differ on the standard of review. The claimant argues that the only question is the application of law to the undisputed facts, and, therefore, the Commission's decision should be reviewed *de novo* and set aside. The

employer argues, on the other hand, that there are disputed facts or conflicting inferences that can be drawn from the facts and the Commission's decision should not be disturbed unless it is against the manifest weight of the evidence. We agree with the employer.

¶ 35 The disputed issue presented in this case is whether the claimant suffered a sudden, severe emotional shock during the March 30, 2010, fire that produced a psychological injury. The employer argues that the claimant did not suffer a sudden, severe emotional shock because he was not inside the house when the flashover occurred, he did not see Carey or Kopas sustain their injuries, and he did not seek treatment on his own accord. The claimant argues that he did suffer a sudden, severe emotional shock because he was at the scene of the fire in a position of command and he did seek treatment on his own accord. When the facts are in dispute or conflicting inferences may be drawn from the facts, this court will not disturb the Commission's decision unless it is against the manifest weight of the evidence. *Chicago Transit Authority v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120253WC, ¶ 24, 989 N.E.2d 608. A decision is against the manifest weight of the evidence only where an opposite conclusion is clearly apparent. *Id.* "Although we are reluctant to conclude that a factual determination of the Commission is against the manifest weight of the evidence, we will not hesitate to do so when the clearly evident, plain, and undisputable weight of the evidence compels an opposite conclusion." *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶17, 999 N.E.2d 711.

¶ 36 In *Pathfinder v. Industrial Comm'n*, 62 Ill. 2d 556, 562, 343 N.E.2d 913, 916 (1976), the supreme court addressed the question of whether an employee can recover for

psychological disability when the accident caused no physical injury. The court held that an employee who suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained. *Id.* at 563, 343 N.E.2d at 917. This is known as the mental-mental theory of recovery. *Diaz*, 2013 IL App (2d) 120294WC, ¶ 23, 989 N.E.2d 233.

¶ 37 In the instant case, the Commission found that "the proper interpretation and evaluation is to compare the petitioner in the present case with other firefighters, rather than the general public." The Commission found that the case was similar to *General Motors Parts Division v. Industrial Comm'n*, 168 Ill. App. 3d 678, 522 N.E.2d 1260 (1988). In that case, the employer appealed from the Commission's order awarding benefits to the claimant for a psychological injury suffered after his supervisor verbally assaulted him with profanity and racial slurs. *Id.* at 679, 522 N.E.2d at 1260. The appellate court found that *Pathfinder* does not "permit recovery for every nontraumatic psychic injury from which an employee suffers merely because the employee can identify some stressful work-related episode which contributes in part to the employee's depression or anxiety." *Id.* at 687, 522 N.E.2d at 1266. The court held that "*Pathfinder* is limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury and is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment." *Id.* The court found that the claimant's condition was not the immediately apparent

severe reaction to an exceptionally distressing stimulus which, pursuant to *Pathfinder*, constituted a compensable injury. *Id.* at 688, 522 N.E.2d at 1267. The court found that the claimant failed to establish that the verbal abuse he suffered, though unpleasant, was anything other than an ordinary incident of employment which was not uncommon to and might well be encountered in a great many occupations. *Id.*, 522 N.E.2d at 1266. The court also found that the claimant failed to establish that his disability flowed from the confrontation and that the evidence supported a finding that his breakdown was caused by a gradual deterioration of his mental processes brought on by a variety of factors, not a single work-related event or stimulus. *Id.*, 522 N.E.2d at 1266-67.

¶ 38 In *Diaz*, this court clarified the holding in *General Motors*. In *Diaz*, the claimant, a police officer, responded to a disturbance call and was approached by an individual who pulled a gun and pointed it at the claimant. *Diaz*, 2013 IL App (2d) 120294WC at ¶ 4-5, 989 N.E.2d 233. The claimant did not realize until some later time that the gun was a toy gun. *Id.*, ¶ 5, 989 N.E.2d 233. Backup was called and the individual returned to his home, where an extended standoff occurred. *Id.*, ¶ 5-6, 989 N.E.2d 233. Until the individual was restrained, the almost 40 officers present at the standoff considered him armed and dangerous. *Id.*, ¶ 7, 989 N.E.2d 233. Three days later, the claimant had a panic attack, and he was subsequently diagnosed with PTSD. *Id.*, ¶ 8-9, 989 N.E.2d 233. The Commission applied the narrow construction of *Pathfinder* as expressed in the *General Motors* decision. *Id.*, ¶ 26, 989 N.E.2d 233. The Commission acknowledged that the claimant's encounter with an individual armed with a gun presented a dangerous and precarious situation but denied compensation because the traumatic event was not an

uncommon event of significantly greater proportion than he would otherwise have been subjected to in the normal course of his employment as a police officer. *Id.*, ¶ 30, 989 N.E.2d 233.

¶ 39 The claimant appealed, and this court considered whether the Commission held the claimant, a police officer, to a unique standard of "severe emotional shock" not otherwise applicable to employees in other lines of work, rendering its decision contrary to law. *Id.*, ¶ 22, 989 N.E.2d 233. The court found that the claimant's psychological harm was compensable under the Act. *Id.*, ¶ 34, 989 N.E.2d 233. The court held that the phrase "an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment" was used in *General Motors* to distinguish compensable claims from a mental disability that arises from the ordinary job-related stress common to all lines of employment. *Id.*, ¶ 31, 989 N.E.2d 233. The court noted that it is well established that mental disorders not arising from a severe emotional shock must arise from a situation of greater dimension than emotional strain and tension all employees experience from worry, anxiety, pressure, and overwork. *Id.* The court found that the claimant did not develop a mental disability attributable to factors such as worry, anxiety, tension, pressure, overwork, and the emotional strain all employees experience but, instead, experienced a severe emotional shock traceable to a specific time, place, and event that produced his disability. *Id.* The court held that "whether a worker has suffered the type of emotional shock sufficient to warrant recovery should be determined by an objective, reasonable-person standard,

rather than a subjective standard that takes into account the claimant's occupation and training." *Id.*, ¶ 33, 989 N.E.2d 233.

¶ 40 In the present case, the employer argues that the claimant did not suffer a severe emotional shock on March 30, 2010. The employer argues that the claimant was not involved in the traumatic event because he was not inside the house, he was not involved in the flashover, he did not sustain a physical injury, he was not involved in the rescue of Carey or Kopas, he was not involved in the efforts to resuscitate Carey, and he did not witness the death of Carey or the burns sustained by Kopas. The claimant's presence outside the house does not preclude the event from being traumatic. The claimant was in command of the fire. He instructed the crew on where to enter the house and what gauge hose to use. He planned to go inside the house when Carey told him "we got this," and he opted to remain outside to command. He escalated the fire alarm to a "full still." He saw Carey dragged from the house. Because there was no ambulance readily available, he secured an ambulance. He supervised the scene and obtained medical care for Carey. When Chief Grabowski arrived at the scene, the claimant informed him that Carey was badly injured and that he should go to the hospital. Carey died from injuries sustained in the fire.

¶ 41 The death of a co-worker had not previously occurred during the claimant's career. Due to the traumatic nature of the March 30, 2010, event, the first responders were taken from the fire to the police station for critical incident stress debriefing. For approximately 10 days after the fire, the employer's fire department ceased performing fire suppression and emergency medical service operations, and all of its calls were

referred to mutual aid companies. Deputy Chief Johnson stated that he had worked for the employer's fire department since 1979, and it was the first time in his career that the fire department had its calls taken by mutual aid companies. Chief Grabowski testified that this emergency operation plan had never been used before and was instituted after he and Dr. McManus determined that it would be best to help the firefighters deal with the trauma and come to grips with the fire and Carey's death. None of the firefighters involved in the March 30, 2010, fire were allowed to return to work until he or she had been cleared by a mental health professional. Extraordinary steps were taken to help the claimant and his fellow firefighters deal with the trauma of the March 30, 2010, events. Additionally, Dr. Slutsky testified that although firefighters and paramedics develop coping mechanisms to deal with deaths in fires and automobile accidents, the death of a colleague in a fire is an event of an extraordinarily different nature. Clearly, this is not the kind of event that an employee would be subject to during the normal course of employment.

¶ 42 The claimant's condition was not a gradual deterioration of his mental processes brought on by a variety of factors but a single, work-related event. Dr. McManus noted that the claimant had feelings of guilt about the fire and felt the burden of responsibility for Carey's death because of his command role. Dr. McManus testified that he administered a personality and assessment inventory test to the claimant, and it indicated that the claimant had experienced a traumatic event. Dr. Slutsky testified that the claimant had feelings of responsibility; guilt for the deployment of personnel within the fire; guilt that in commanding he was not in the fire itself; and shock from seeing one

colleague suffer fatal injuries and another suffer serious burns. Dr. McManus diagnosed the claimant with PTSD caused by the trauma of the March 30, 2010, event. He stated that the claimant's August 26, 2010, flashback showed that the fire was powerfully coded within the claimant's memory structure. Dr. Slutsky testified that, within a reasonable degree of medical and psychiatric certainty, the claimant's PTSD was caused by the March 30, 2010, events. No conflicting medical evidence was presented. The claimant's condition was a severe reaction to an exceptionally distressing emotional shock.

¶ 43 The employer argues that the claimant's delay in seeking psychological treatment calls into question whether he sustained an accidental injury on March 30, 2010. In *Chicago Transit Authority v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 120253WC, ¶ 20, 989 N.E.2d 608, the court examined whether a claimant's psychological injury must be immediately apparent to recover for traumatically induced mental-mental injuries.

¶ 44 In *Chicago Transit Authority*, the claimant was driving a bus through an intersection when a passenger from the back of the bus shouted that someone chasing the bus had been hit. *Id.*, ¶ 6, 989 N.E.2d 608. The claimant stopped the bus, exited, and saw a man lying near the curb. *Id.* The man was removed from the scene by ambulance. *Id.*, ¶ 7, 989 N.E.2d 608. While at the employer's garage completing an accident report, the claimant was informed that the accident victim had died. *Id.*, ¶ 8, 989 N.E.2d 608. She was shaken up and had flashbacks and trouble sleeping but did not seek professional help for two months. *Id.*, ¶ 8-11, 989 N.E.2d 608. She was diagnosed with an adjustment disorder with mixed anxiety and depressed mood. *Id.*, ¶ 11, 989 N.E.2d 608.

The Commission found that the claimant proved she sustained psychological injuries arising out of and in the course of her employment, and the employer appealed. *Id.*, ¶ 13-15, 989 N.E.2d 608. The employer argued that the claimant could not recover because her psychological injury was not immediately apparent. *Id.*, ¶ 18, 989 N.E.2d 608. The appellate court rejected the assertion that to recover for traumatically induced mental-mental injuries the psychological injury must be immediately apparent. *Id.*, ¶ 20. The court held that "if the claimant shows that she suffered a sudden, severe emotional shock which caused a psychological injury, her claim may be compensable even if the resulting psychological injury did not manifest itself until some time after the shock." *Id.*

¶ 45 In the instant case, the claimant suffered an accidental injury on March 30, 2010. On April 12, 2010, the claimant sought the name of a psychiatrist from Deputy Chief Johnson. In an email to Chief Grabowski dated April 20, 2010, he again sought help in obtaining psychological treatment and indicated that he was having symptoms of PTSD. He began treatment with Dr. McManus on April 23, 2010. The claimant sought help less than two weeks after the accident and began treatment less than one month after the accident. In *Chicago Transit Authority*, the claimant did not seek psychological treatment for two months. *Id.*, ¶ 23, 989 N.E.2d 608. Here, although the claimant's psychological injury was not immediately apparent, he, like the claimant in *Chicago Transit Authority*, suffered a sudden, severe emotional shock which caused a psychological injury that manifested itself some time after the shock.

¶ 46 The March 30, 2010, accident arose out of and in the course of the claimant's employment, and his condition of ill-being was causally related to the accident. He was

responding to a fire and was in command of the fire. He determined what gauge hose should be used and instructed the firefighters where to go to fight the fire. After the house flashed, he witnessed Carey being dragged from the house and assisted by locating an ambulance and obtaining medical care. Carey died as a result of the fire. The claimant was treated by Dr. McManus and Dr. Slutsky, who both diagnosed him with PTSD attributable to the March 30, 2010, events. No conflicting medical evidence was presented.

¶ 47 The employer's actions following the March 30, 2010, fire indicate that it believed the first responders suffered a sudden, severe, emotional shock of greater dimension than emotional strain and tension all employees experience from worry, anxiety, pressure and overwork. Due to the traumatic nature of the event, all first responders returned to the station for critical incident debriefing. For the first time in the history of the fire department, the department ceased performing fire suppression and emergency medical service operations and referred all calls to mutual aid companies for a period of approximately ten days. This decision was made by Chief Grabowski and Deputy Chief Johnson after consultation with Dr. McManus. The defendant was not permitted to return to work until cleared by Dr. McManus who the employer hired to treat firefighters involved in the March 30, 2010, fire.

¶ 48 The Commission's decision that the claimant did not sustain accidental injuries that arose out of and in the course of his employment with the employer is against the manifest weight of the evidence. The claimant's psychological injuries stemmed from a

single, traumatic event on March 30, 2010, and he is entitled to recover for his psychological disability.

¶ 49 The claimant also argues that the Commission's determination that he failed to provide proper notice was against the manifest weight of the evidence. The Commission did not make such a finding. While notice was a disputed issue, the Commission did not address the issue, finding that, because the claimant did not prove an accident, the remaining issues were moot. Because the case must be remanded, the issues the Commission determined moot, including notice, should be addressed at that time.

¶ 50 The claimant also argues that the Commission's decision to award the employer credit for temporary total disability benefits was against the manifest weight of the evidence. The Commission did award the employer a credit of $7,477.30 for temporary total disability benefits paid to the claimant. The decision contains no analysis or reasoning for this award. As this matter must be remanded, the issue of the credit for temporary total disability benefits should be addressed on remand.

¶ 51 The claimant also argues that the Commission's decision not to admit his exhibit 4 into evidence was error. The claimant's exhibit 4 was a photograph taken of the resuscitation efforts on Carey, with the claimant in the left-hand margin. The employer objected on the ground that no foundation had been laid. The arbitrator rejected the exhibit. The evident purpose for offering the photograph into evidence was to show that the claimant was present at the scene of the traumatic event. Since we are reversing the Commission's determination that this claim is not compensable based on the other evidence in the case, we need not address this issue.

¶ 52 **CONCLUSION**

¶ 53 For the foregoing reasons, the judgment of the circuit court of Cook County, confirming the decision of the Commission, is reversed and the cause is remanded to the Commission.

¶ 54 Reversed and remanded.

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott Moran,
Petitioner,

vs. NO: 10 WC 20287

14IWCC0705

Village of Homewood,
Respondent.

DECISION AND OPINION ON REVIEW

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

The Commission strikes the following sentence from the Arbitrator's decision: "The Arbitrator also notes that the cases are employment specific and, in the context of firefighters and police officers, establish a trend to deny recovery for post-traumatic stress disorder to first responders".

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed December 17, 2013 is hereby affirmed and adopted.

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

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

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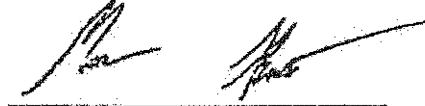
14IWCC0705

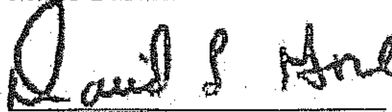
The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: AUG 2 0 2014



Mario Basurto

MB/jm



David L. Gore

O: 8/7/14

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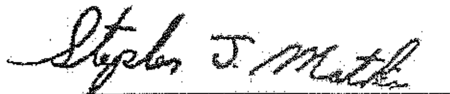

Stephen Mathis

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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

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

14IWCC0705

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Scott P. Moran
Employee/Petitioner

Case # 10 WC 20287

v.

Village of Homewood
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 Lynette Thompson-Smith, Arbitrator of the Commission, in the city of Chicago, on January 7, 2013 and September 30, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. [ ] Was there an employee-employer relationship?

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

D. [ ] What was the date of the accident?

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

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

G. [ ] What were Petitioner's earnings?

H. [ ] What was Petitioner's age at the time of the accident?

I. [ ] What was Petitioner's marital status at the time of the accident?

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

K. [ ] What temporary benefits are in dispute?

[ ] TPD [ ] Maintenance [ ] TTD

L. [x] What is the nature and extent of the injury?

M. [ ] Should penalties or fees be imposed upon Respondent?

N. [ ] Is Respondent due any credit?

O. [x] Other Admissibility of Petitioner's Exhibits 10-12, which were accepted as rejected exhibits.

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FINDINGS

On March 30, 2010, Respondent was operating under and subject to the provisions of the Act.

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

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

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

In the year preceding the injury, Petitioner earned $88,752.04; the average weekly wage was $1,706.77.

On the date of accident, Petitioner was 42 years of age, married, with 2 children under 18.

Petitioner has received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $7,477.30 for TTD, $N/A for TPD, $N/A for maintenance, and $N/A for other benefits, for a total credit of $7,477.30.

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

ORDER

The Petitioner has not proven, by a preponderance of the evidence, that he sustained accidental injuries, which arose out of and in the course of his employment with the respondent on March 30, 2010. Therefore, no benefits are awarded, pursuant to the Act.

Respondent shall be given a credit of $7,477.30 for temporary, total disability benefits paid to Petitioner.

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

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

SCOTT MORAN
10WC20287

14IWCC0705

Findings of Fact

The disputed issues in this matter are: 1) accident; 2) notice; 3) causal connection; 4) the admissibility of Petitioner's exhibits 10-12; and 5) the nature and extent of the injuries. *See*, AX1.

Scott Moran, (the "petitioner") was hired by the Village of Homewood, (the "respondent") as a firefighter/paramedic, on February 22, 1991. Prior to working for the respondent, he worked as a paid, on call firefighter for the Villages of Justice and Willow Springs, where he also served as Assistant Chief. The petitioner testified that he has responded to fires and vehicle accidents, which involved both injuries and deaths, between 1986 and 1993.

The petitioner also testified that he was promoted to the position of Lieutenant for the Village of Homewood, in May of 2006. This involved working in both a supervisory as well as a "hands on" capacity, depending upon the severity of each call.

It is undisputed that the petitioner was in charge of a crew that responded to a house fire on March 30, 2010. As the incident commander, Petitioner took charge of the fire by directing the firefighters where to go and what to do at the scene. Petitioner testified that he was about to put on gear to help fight the fire when firefighter Brian Cary said to him "we got this lieu". Petitioner told firefighters Kieta and Carey to enter and attempt to extinguish the fire and support firefighters from Hazel Crest, who were already in the building. Petitioner testified that all of his activities occurred outside of the house and that he did not go into the house or onto the roof. He also was not involved in any rescue activities i.e., pulling anyone out of the fire or assisting with any type of emergency medical services, at the scene.

It is undisputed that a fellow firefighter, Brian Carey, died in this fire and that another firefighter, Karra Kopas, sustained serious burns. When Carey was pulled from the building, he was wearing neither mask nor helmet. Petitioner testified that he escalated an alarm and sent out a mayday signal, which secured an ambulance from a mutual aid department. Resuscitation and first aid efforts were performed by a Flossmoor firefighter by the name of Urbanetti, before Carey was transported to the hospital.

The petitioner remained in charge of the fire scene until Chief Kasper assumed responsibility. After the fire was out, the petitioner and the other firefighters were taken to the training room for a debriefing and counseling by support staff and clergy. The firefighters from the other towns were also taken to the training room for a debriefing. A Critical Incident Stress Debriefing ("CISD") team was brought in that evening to assist all persons regarding the loss of a co-worker. For approximately two (2) weeks after the incident, the Homewood Fire Department referred all of its calls to neighboring fire departments and took no calls. Petitioner and all of the other firefighters, who had experienced the death of firefighter Carey, were ordered, by Deputy Chief Johnson, to present to Dr. Timothy McManus; a psychologist, who treated them on an individual basis.

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Dr. McManus testified that four (4) to five (5) firefighters were referred to him by Deputy Chief Johnson, for psychological care and that Lieutenant Moran suffered from post-traumatic stress disorder, as a result of the incidents of March 30, 2010. Dr. McManus further testified that petitioner felt responsible for what happened to both firefighters and that the doctor had originally diagnosed the petitioner as having acute stress disorder. As Petitioner worked through his problems, Dr. McManus stated that upon his return to work, the petitioner was showing good control over his anxiety. The petitioner also presented to Dr. Marc Slutsky, who concurred with Dr. McManus' findings. *See*, PX 13 pgs. 11-29; PX14 pgs. 13, 20; & PX3.

The petitioner testified that he did not sustain any physical injuries as a result of the fire on March 30, 2010; and that this case is a claim for psychological injuries. The petitioner testified that he contacted Dr. Mark Slutsky at the request of his attorney; which is documented by an e-mail dated April 23, 2010. The petitioner also testified that he began seeing Dr. Slutsky on May 5, 2010, while he was also seeking treatment with Dr. McManus, with whom he first treated on April 23, 2010. *See*, PX9.

The petitioner testified that his treatment with Dr. McManus consisted of talking about the effects of the fire as well as his difficulty sleeping; and the fact that he was having flashbacks of the fire. The petitioner also testified that Dr. McManus released him to return to work on June 14, 2010; and that he continued to follow up with Dr. McManus through December 21, 2010.

Dr. McManus' notes from his final session with the petitioner, on December 21, 2010, provided a diagnosis of post-traumatic stress disorder, which had improved. In his evidence deposition on May 16, 2013, Dr. McManus testified at that the petitioner was not experiencing symptoms when he was seen in December of 2010. He also testified that the petitioner returned to see him on January 11, 2011 and told him that he had again begun to experience some symptoms that were related to the fire. Dr. McManus advised the petitioner to return to see him if he had any further problems. At the time of Dr. McManus' evidence deposition on May 16, 2013, the petitioner had not returned to see him.

After being released to return to work on June 14, 2010, the petitioner responded to numerous house fires and a hotel fire. The petitioner testified that he had responded to approximately twenty-nine (29) fires, and that he performed all of his job duties at these fires. He also testified that he did not make any complaints about his job duties or about having any problems performing his job to any of his supervisory personnel, including Deputy Chief Johnson and Chief Grabowski. Additionally, the petitioner testified that he has been able to perform all of his jobs duties associated with the position of a lieutenant for the Homewood Fire Department, subsequent to returning to work.

The Arbitrator recognizes that the petitioner had adverse emotional reactions stemming from the circumstances of the March 30, 2010 fire; which resulted in the death of a fellow firefighter and burns to another firefighter. However, the Arbitrator also notes that the petitioner did not sustain a physical injury or receive any treatment, other than psychological treatment, subsequent to the fire.

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Conclusions of Law

The Arbitrator initially notes that cases involving psychological problems, in the absence of a direct physical injury, are generally found not to be compensable. However, exceptions to this position do exist and were addressed by the Supreme Court in *Pathfinder Co. v. Industrial Commission*, 62 Ill.2d 556, 343 N.E.2d 913 (1976). The Court, for the first time, permitted recovery for a psychological disability when the claimant sustained no physical injury. In *Pathfinder*, the claimant suffered a severe, immediate, emotional trauma after she extracted the severed hand of a co-worker from a punch press that amputated the coworker's hand at the wrist. She immediately fainted at the sight of the severed hand and was taken to the hospital. The Court stated that it "must conclude that an employee who, like the claimant here, suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act, though no physical trauma or injury was sustained." Since *Pathfinder*, courts have adhered to the requirement of a shocking event resulting in a immediate reaction, in order for a petitioner to recover for solely psychological injuries.

In line with *Pathfinder*, the court in *Chicago Bd. of Educ. v. Industrial Comm'n.*,169 Ill.App. 3d 459, 523 N.E.2d 912 (1st Dist. 1988) rejected the contention that mental disorders are compensable as occupational diseases when the disorder was caused by general, work-related emotional pressures, common to the employment relationship. *Id.*, at 523 N.E.2d at 917. By way of dicta, the *Chicago Bd. of Educ.* court stated that employment conditions, causing a physical disorder, need not be the sole or major cause of the disability but only a contributing cause. However, the requirements are more stringent when the employment conditions are alleged to have caused a mental disorder. The worker must prove that the employment conditions, when compared with non-employment conditions, were the major contributory cause of the mental disorder. *Id.*, at 523 N.E.2d at 918. The mental disorder must have arisen from situations of greater dimensions that that which all similarly situated employees must face.

In the case of *Perry v. City of Peoria*, 1 IIC 791, 2001 Ill. Wrk. Comp. LEXIS 804, that petitioner and several other firefighters went into a house fire with petitioner leading the way, holding an uncharged fire hose. While in the attic, there was a "flashover," which petitioner testified was the sudden explosive ignition of fire within the residence. Petitioner further testified that he had never been involved in or seen a flashover before. As a result of the flashover, petitioner and several other firefighters were trapped on the upper floors of the residence, and had no water to protect themselves as the hose had been burned through. They eventually escaped by climbing out windows. At his next scheduled shift, during a debriefing, the fire chief stated that he thought his firefighters had died.
That Petitioner began experiencing nightmares, nervousness and difficulty sleeping over the next two days and was diagnosed with PTSD. The arbitrator, in that matter, found the case compensable, holding that recovery for non-traumatically induced mental disease is limited to those who can establish that: (1) the mental disorder arose in a situation of greater dimensions that the day to day

emotional strain and tension which all employees must experience; (2) the conditions existed in reality, from an objective standpoint; and (3) the employment conditions when compared with the non-employment conditions, were the "major contributory cause" of the mental disorder; citing *Chicago Bd. of Educ.*, supra. The court also cited *Pathfinder*, stating that an employee who suffers a sudden, severe emotional shock, traceable to definite time and place and to a readily perceivable cause, which produced immediate psychological disability, can recover under the act even though no physical trauma was sustained.

The Arbitrator also notes that the claimant in *Perry* received psychiatric treatment for more than two years on a regular basis and continued to follow up with his psychiatrist on a regular basis up to and including the time of trial. Petitioner also continued to take various psychotropic prescription medications, including Ativan, Zoloft, Alprazolam, Xanax, Klonopin and Prozac. He also testified that he takes extra medication on the days he works in order to control his anxiety. The petitioner in the present case received treatment for symptoms and complaints. However, he testified that he has not seen Dr. McManus or any other doctor relative to this matter since January 11, 2011 and that he has no appointments scheduled for a follow up visit.

In the cases of *Ushman v. City of Springfield*, 08 IWCC 0234, *Runion v. Industrial Comm'n.*, 245 Ill.App.3d 470, 615 N.E.2d 8 (5th Dist. 1993) and *City of Springfield v. Industrial Comm'n.*, 214 Ill.App.3d 301, 573 N.E.2d 836 (1991), similar facts and holdings distinguish these cases from the instant case.

In *Ushman*, the claimant was a police officer who pursued an armed murder suspect. He fired shots at the suspect, and the suspect later died due to a self-inflicted gunshot wound. The claimant was under the mistaken impression he had shot and killed the suspect. The Commission confirmed the arbitrator's decision, holding that because the claimant felt normal for a period of less than two (2) weeks and the event was not an uncommon event for a police officer, he could not be compensated under the Act.

In *Runion*, the Appellate court denied benefits, holding that the employee had not shown that any "on the job" pressures were extraordinary to his employment. The court held that on the job stress itself is not a disease. Besides being extraordinary, the conditions producing the disability must have existed in reality from an objective standpoint; and the conditions must have been the major contributory cause of the mental disorder. The claimant in *Runion* was a lathe operator and his job conditions and production schedule were compared with those of every other employee, which again suggests that the proper interpretation and evaluation is to compare the petitioner in the present case with other firefighters, rather than with the general public.

In *City of Springfield*, the claimant, a fire inspector, claimed his workload, politics, interpretation of rules and discrimination led to stress related mental disease. Court held that because conditions

claimant referred to were not unique to claimant's employment or to claimant himself, claimant did not satisfy the test that would allow court to find he suffered an occupational disease.

In *General Motors Parts Division v. Industrial Comm'n.*, 167 Ill.App.3d 678, 522 N.E.2d 1260 (1st Dist. 1988), the Appellate Court reversed the Circuit Court and Commission, denying compensation and adhering strictly to *Pathfinder* in holding that a "sudden, severe emotional shock which results in immediately apparent psychic injury and is precipitated by an uncommon event of significantly greater proportion or dimension than that to which the employee would otherwise be subjected in the normal course of employment" is required for compensability. The Appellate Court stated that *Pathfinder* does not permit recovery for every non-traumatic psychic injury from which an employee suffers, merely because the employee can identify some stressful work related episode which contributes in part to the employee's depression or anxiety. Anxiety, emotional stress or depression, which develops over time in the normal course of an employment relationship does not constitute a compensable injury under *Pathfinder*. "Compensation for non-traumatic psychic injury cannot be dependent solely upon the peculiar vicissitudes of the individual employee as he relates to his general work environment." *See also, Turrentine v. Springfield Park Dist.*, 99 IIC 0847, 97 IWCC 61559, where the claimant was employed as police officer and was denied compensation stemming from his claim that a stabbing, at a domestic abuse call, was a shocking event.

Comparing the facts and holdings in the cases cited above with the instant case, the Arbitrator specifically notes that the petitioner did not sustain a physical injury on March 30, 2010 or any time thereafter. He was also not inside of the house, did not witness the actual death of his co-worker or the burns sustained by his other co-worker; and was not involved in the rescue efforts of either of them. The Arbitrator also notes that cases are employment specific and, in the context of firefighters and police officers, establish a trend to deny recovery for post-traumatic stress disorder to first responders.

The Petitioner relies on Illinois Appellate Court case *Diaz v. Illinois Workers' Compensation Comm'n*, 2013 Ill.App.2d, 12024, WC, 989 N.E.2d 233 (2d Dist. 2013) and *Kieta v. Village of Homewood*, 12 IWCC 1263 (2012), to support his claim for workers' compensation benefits. The Arbitrator finds that the subject case is distinguished from these cases. In *Diaz* the employee, a police officer, sought worker's compensation for post-traumatic stress disorder caused by a work-related accident. An individual pulled and pointed a gun at the officer and he did not realize, at the time, that the gun was a toy. Until the individual was restrained, approximately forty (40) officers considered the perpetrator to be armed and dangerous. Three (3) days after this incident, the officer suffered a panic attack and was subsequently diagnosed with post-traumatic stress disorder. The Commission found that the officer had failed to prove that he had sustained a compensable accident and the trial court affirmed this decision. On appeal, the Court found that the Commission had held the employee to a unique standard of severe emotional shock not otherwise applicable to employees in other lines of

work. This employee had suffered a sudden, severe emotional shock that resulted in his development of post-traumatic stress disorder.

In *Kieta*, this petitioner, a firefighter, was at the scene of the subject fire with the subject petitioner and actually went into the burning building on Petitioner's directive. This firefighter crawled into the house, as there was zero visibility. While attempting to douse the fire with a 2 ½-inch hose, steam and smoke hit his facemask and he asked a co-worker, i.e., Carey, to take the hose, while he adjusted his equipment. He transferred the hose to him. There was a sudden order to get out of the house however, before they could evacuate, a flash over occurred, which severely burned Kopas and subsequently killed Carey. This petitioner testified that he felt guilty and responsible for Carey and Kopas because he was the one who was supposed to be on the flash line and he had transferred that duty to others, who suffered severe and fatal injuries. This petitioner also saw Dr. McManus approximately two weeks after the fire, where he complained of nightmares, constantly seeing the fire, not wanting to talk about the fire; and increased alcohol intake. In addition, there was an investigation of this petitioner, regarding his behavior at the fire; and he feared termination as a result of the investigation. These facts support a conclusion that the petitioner in *Kieta* suffered a sudden, severe, emotional shock. The Arbitrator does not find similar facts in the subject case.

The Arbitrator finds that the petitioner has not proven, by a preponderance of the evidence, that he sustained accidental injuries, which arose out of and in the course of his employment with the respondent on March 30, 2010. Accordingly, all claims for compensation are denied. As the Arbitrator has found that the petitioner has not proven an accident, the remaining issues are moot and will not be addressed.

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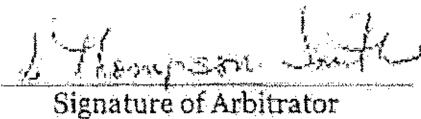

Signature of Arbitrator

December 17, 2013
Date of Decision

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