WCLA NEWSLETTER
CASE LAW UPDATE FEBRUARY 2020

I. ACCIDENT ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

McCarty v. Illinois State University, 19 I.W.C.C. 0375 (July 23, 2019)

The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of her employment when she slipped on stairs as her work qualitatively and quantitively placed her at a greater risk of injury than the general public. The Commission affirmed and adopted the decision of the Arbitrator.

Petitioner was employed as a building service worker for Respondent. Petitioner's job duties included janitorial and cleaning assignments. On November 25, 2015, Petitioner was working in a 28-story dormitory for the university. The dormitory consisted of 5 houses and an elevator stopped on the third floor of each house. In order to reach the other two floors, Petitioner had to traverse stairs. The stair surfaces were concrete and covered in a metal slate. On the alleged date of injury, Petitioner claimed the dormitory was insufficiently staffed so Petitioner had to cover an extra area, including a stairway. Petitioner had to traverse the stairs to perform her work on her regular floors and the extra areas. She also traversed the stairs to replenish cleaning supplies. Petitioner claimed she was moving faster than normal and while traversing the staircase and carrying cleaning materials she slipped on the stairs and twisted her right foot.

The Arbitrator found that Petitioner was subjected to an increased risk resulting from an increased workload because of staffing deficiencies requiring Petitioner to increase the frequency and manner (speed) when using the stairs. The Arbitrator found this quantitively and qualitatively increased her risk. The Arbitrator also found that using stairs were the only means of travel between most floors.

Almanza v. Caterpillar, Inc., 19 I.W.C.C. 0396 (July 30, 2019)

The Arbitrator found that Petitioner sustained accidental injuries arising out of and in the course of his employment when he was "hurrying" upstairs to complete a task on a backed-up assembly line when he turned to go up the stairs he felt a pop and pain in his left knee. The Commission affirmed and adopted the Arbitrator's decision.

Petitioner was employed by Respondent as an assembler. Petitioner worked on a line fairly new to him and he fell behind on his duties. A coworker agreed to assist the Petitioner but advised him to hurry as he had his own work to complete. The coworker was on a platform near Petitioner. To assist the coworker, the Petitioner rushed up stairs and as he turned to go up the stairs he felt a pop and pain in his left knee. Petitioner testified he recalled this happening on April 20, 2012. Respondent argued that the accident occurred on April 19, 2012 based upon testimony of the Section Manager who testified petitioner informed him that on April 19, 2012 he felt a pop in his left knee when he was walking.

The Arbitrator found that the date of accident was April 19, 2012 and found that Petitioner's left knee injury arose out of and in the course of his employment based upon an incident report of May 1, 2012 when an on-site nurse documented that Petitioner was ascending stairs when his left knee popped. A witness, who testified on behalf of Petitioner, supported Petitioner's testimony that he was working quickly and that he noticed pain in the left knee while on a stair. The Arbitrator found that the Petitioner was hurrying upstairs to complete a task which arose of his employment.

The Commission affirmed and adopted the decision of the Arbitrator.

DeLeon v. Fresenius Medical Care, 19 I.W.C.C. 0365 (July 19, 2019)

The Arbitrator found that Petitioner failed to prove that she sustained accidental injuries arising out of and in the course of her employment on December 2, 2010. On review, the Commission reversed the Arbitrator and found the Petitioner did sustain accidental injuries arising out of and in the course of her employment. The Commission found that the Petitioner's slip and fall on ice in a parking lot occurred in the course of her employment.

Petitioner was a patient care technician for the Respondent working with dialysis patients. Respondent's facility was located in an office building shared by a childcare center and vascular clinic. There was a parking lot where members of the public and employees could park. The parking lot was not owned, maintained or controlled by the Respondent. Witnesses testified there were no specific parking spots designated for employees. Petitioner and a co-worker arrived at work at 4:00 a.m. on December 22. It was dark and the parking lot was icy and slippery. Petitioner walked from her parking spot to the door to enter the Respondent's facilities. As Petitioner approached the door she slipped on ice and fell. The co-worker testified that the heshe saw Petitioner fall partially on the sidewalk and partially on the parking lot.

The Arbitrator found that Petitioner's fall did not arise out of her employment. The Arbitrator noted the Petitioner did not fall on Respondent's premises (either the sidewalk or parking lot). The Arbitrator noted Respondent did not own or maintain the area where Petitioner fell and the parking lot was open to the general public. The Arbitrator also found the Respondent did not require Petitioner to use the entrance and the Respondent did not direct the Petitioner to park in the area where she parked.

The Commission on review reversed the Arbitrator's decision. In determining whether the Petitioner's accident was in the course of employment, the Commission found the parking lot was part of the employer's premises. "Additionally, there is no dispute that Respondent's employees customarily park in the parking lot. In similar circumstances, the Illinois Supreme Court determined that "if the employer provides a parking lot which is customarily used by its employees, the employer is responsible for the maintenance and control of that parking lot. *De Hoyas v. Indus. Comm'n*, 26 Ill. 2d 110, 113 (1962). After analyzing the relevant facts, the Commission finds the parking lot is part of the employer's premises"

The Commission found the accident arose out of Petitioner's employment as the Petitioner's injuries resulted directly from the "hazardous" condition of the parking lot.

Hasan v. Eagle Sports Range, 18 I.W.C.C. 02799 (August 16, 2019)

The Arbitrator found that Petitioner's injuries arose out of and in the course of his employment. The Commission affirmed and adopted the decision of the Arbitrator.

Petitioner worked as a salesperson and firearms instructor for Respondent's gun store. Respondent also had an on-site firing range. Petitioner had an Illinois Concealed Carry permit and an instructor's permit. On October 25, 2017, the Petitioner clocked into work, loaded bullets into an ammunition clip, loaded the clip into a pistol and "racked" the pistol (advancing a bullet into the firing chamber). As Petitioner holstered the firearm, the pistol discharged and a bullet went into Petitioner's right leg.

The Arbitrator found the Petitioner was in the course of his employment when the gun discharged as he had clocked in and holstered his gun so he could go on the sales floor to do his job duties. The Arbitrator also found that Petitioner's injury arose out of his employment since the risk of injury was incidental to his employment. Respondent encouraged employees to wear loaded firearms on its premises. Employees being armed discouraged any robberies and made potential customers comfortable being around employees that displayed guns and wore guns.

Lannon v. I.W.C.C. and S&C Electric Co. 2020 Ill. App. (1st D.) 181903WC

In an unpublished decision of the Illinois Appellate Court, First District, the Court affirmed the Circuit Court's reversal of the Commission finding that Petitioner failed to establish that he sustained accidental injuries arising out of and in the course of his employment.

Petitioner worked as a general machinist for the Respondent. On May 2, 2016, the Petitioner was operating a press machine. He reached to pull a lever down when something popped in his left shoulder.

The Arbitrator found Petitioner sustained an accidental injury and awarded benefits including prospective medical care. The Commission on review reversed the Arbitrator's decision finding that the Petitioner was injured while "reaching," which the Commission characterized as a "neutral risk," and that Petitioner failed to prove that his reaching performed at work was qualitatively or quantitatively different from that of the general public.

The Circuit Court of Cook County reversed the decision of the Commission. The Circuit Court in a *de novo* review standard agreed with the Commission that the act of reaching is a neutral risk. Contrary to the Commission, the Circuit Court found the Petitioner's job duties required him to reach up and pull a lever down on a machine hundreds of times per day (quantitatively different from the general public).

Petitioner testified he pulled the levers between 100 and 200 times per day. When he pulled the lever down on the date of the accident, he felt something pop in his left shoulder.

The Appellate Court first determined that the Circuit Court applied the incorrect standard of review and should have determined whether the Commission decision was against the manifest weight of

the evidence. The Appellate Court determined there were material facts in dispute. In reviewing the Commission's decision, using the manifest weight standard, the Court found that the Commissioner erroneously found that the Petitioner's reaching was not qualitatively or quantitively different from the general public. The Court stated, "risks are distinctly associated with the claimant's employment whenever the injury-producing act was required by the claimant's specific job duties, even if the injury-producing act is an activity of daily living, like reaching or pulling." The Court determined that the *McAlister v. IWCC,* 430 Ill. Dec. 434 (1st D. 2019) decision meant that "if the injury producing act was required by the claimant's job duties, the claimant has established an accidental injury arising out of his employment by that fact alone, and there is no need to perform a neutral risk analysis." The Court, in dicta, stated even if *McAlister* is overturned on appeal to the Supreme Court, the Petitioner proved that his neutral risk activities were quantitively different from the general public.

Purcell v. University of Illinois 19. I.W.C.C. 0432 (August 13, 2019)

The Arbitrator found that the Petitioner was not a traveling employee and that Petitioner's injury that occurred when she was walking to a personnel services building of the Respondent and attempted to hop over a chain barrier fence did not arise out of her employment. The Commission affirmed and adopted the Arbitrator's decision.

Petitioner worked as an administrative assistant for the Respondent. Petitioner claimed her job required her to leave her office in the undergraduate library daily to perform duties around the campus. Petitioner would generally walk to other buildings on the campus or take a bus. She decided what routes to take and managed her own schedule. On the day of injury, Petitioner took a bus to work and intended to go to the personal services building to drop off her timecard which she had to do every other Friday. On her route, she hopped over a chain fence when the heel of her shoe became caught and she fell dislocating her elbow. Petitioner admitted on cross-examination she was an hourly employee and not paid for lunch or for travel to and from work. Petitioner admitted about 10-15 feet to the left of where she fell there was no fence.

The Arbitrator found that Petitioner's job did not require her to leave the office building unless requested by her supervisor who testified this was uncommon for petitioner. Her supervisor also testified Petitioner could return her timecard during any time of the day. The Arbitrator cited the *Dodson v. Industrial Commission,* 308 Ill. App. 3rd 572 (5th D. 1999) case to support his finding that even if the petitioner was a traveling employee she exposed herself to an unnecessary danger by hopping over a fence when just 15 feet away she did not need to do so.

Bruno v. Conifer Care Continuom Solutions, LLC. 19 I.W.C.C. 0424 (August 8, 2019)

The Arbitrator denied that Petitioner sustained an accident arising out of her employment when Petitioner reached behind her while sitting on a toilet to flush the toilet with a malfunctioning handle. The Commission reversed.

Petitioner worked for a third-party medical billing representative for the Respondent. On July 12, 2016, during her workday, she went to the ladies restroom located in an employee-only area. While sitting on a toilet, she reached behind her with her right arm to flush the toilet. Petitioner

testified that the toilet did not immediately flush and she had to push the handle harder. When Petitioner pushed the handle harder, she experienced a sharp pain in her right shoulder which traveled down her elbow. The Arbitrator denied benefits and found that Petitioner failed to establish that she sustained a compensable accident.

The Commission, in a 2-1 decision, found Petitioner's injuries were compensable based on the personal comfort doctrine. The Commission found that Petitioner was injured in the course of her employment as the injury occurred in facilities provided by the Respondent; Petitioner did not use the facilities in an unreasonable or unforeseen manner and Petitioner was attempting to flush a toilet with a malfunctioning handle. The Commission found the injury arose out of Petitioner's employment since flushing the toilet was a neutral risk and from a quantitative standpoint, the Petitioner was exposed to a greater risk of injury due to her employment given the frequency with which she was forced to utilize the facilities. The Commission also noted that the handle malfunctioned and concluded that Petitioner was qualitatively exposed to a greater risk.

The Dissenting Commissioner noted that the Arbitrator did not find Petitioner credible since her "accident" was unwitnessed and Petitioner waited 17 days before seeking any medical treatment. The Petitioner also claimed that at the time she had to push the toilet handle she felt a "ripping" sensation in her shoulder. The Dissenting Commissioner agreed that the Petitioner's incident was in the course of her employment but did not arise out of her employment. The Dissenting Commissioner noted that no evidence was submitted actually proving the toilet handle was defective – only testimony that sometimes it required more than one flush.

II. OCCUPATIONAL DISEASE

Goddard v. Emerald Performance Materials 19 I.W.C.C. 0430 (August 12, 2019)

The Arbitrator awarded benefits finding that the Petitioner was subjected to repetitive exposure to toxic chemicals which manifested on October 28, 2011. The Commission modified the decision on review in finding no causal connection between a diabetic condition and occupational exposure.

Petitioner worked for respondent for over 20 years at a polymer chemical plant that made rubber accelerators. Petitioner was exposed to dust created by rubber accelerators with little to no ventilation in the building in which petitioner worked. Even with dust masks, Petitioner was still covered in the powdered dust. Petitioner also worked with methylene chlorine, which petitioner could smell through his respirator. Petitioner worked with another chemical called morpholine, which when on his skin caused it to burn.

The MSDS sheets offered into evidence indicated that some chemicals could cause kidney disorders in laboratory animals and some the chemicals could aggravate kidney disorders. Dr. David Fletcher testified on behalf of Petitioner and opined that petitioner had an occupational-related renal disease based in part on results of a renal biopsy. Dr. Shirley Conibear testified that she agreed with Dr. Fletcher's diagnosis (nephrotic syndrome secondary to membranous nephropathy) but disagreed on causation stating no epidemiological studies or toxicologic literature supported Dr. Fletcher's opinion. A third doctor, Dr. Arnishi Desai, found no causal

connection opinion stating no literature links the chemicals which Petitioner was exposed to kidney disease.

The Arbitrator found Petitioner proved sufficient exposure and found the opinions of Dr. Fletcher more credible than Dr. Conibear or Dr. Desai. The Commission on review modified the Arbitrator's decision in finding that Petitioner's diabetic condition was not related to his chemical exposure. The Commission noted that Dr. Fletcher stated in his deposition he could not state to a reasonable degree of medical certainty a causal connection existed between petitioner's diabetic condition and the chemical exposure.

Woolsey v. Global Brass 19 I.W.C.C. 0461 (August 26, 2019)

At hearing, the Arbitrator found that Petitioner did not prove that he was exposed to excessive noise at work that caused a loss of hearing. On review, the Commission reversed.

Petitioner worked for the Respondent from June 16, 2000 through January 31, 2015. In the last two or three years of his employment, he worked in the cupping department on a "government press." He wore hearing protection consisting of "spongy" ear plugs. The majority of Petitioner's shifts were over 12 hours. The cupping area had 22 presses, which stamped out shell casings and produced bullet jackets. Before working for Respondent, he worked in an auto body shop which he testified was not as loud as his cupping department.

OSHA testing of the facility revealed that noise level existed between 65 and 95 decibel levels. A document indicated the area where petitioner worked reached 103 decibels.

Dr. Fletcher testified on behalf of Petitioner. Dr. Fletcher opined that hearing protection is useful but not fool proof. Dr. Fletcher opined that noise decibel level of 85 decibels could cause harm and definitely anything above 95 would cause work-related noise exposure. Dr. Mikulec testified on behalf of the Respondent. Dr. Mikulec noted that the rating of the noise protection would lower the decibel level from 100 to 87 decibels. Dr. Mikulec opined that Petitioner did not sustain occupational hearing loss based upon Petitioner's significant hearing loss after retirement, hearing loss documented prior to his employment with Respondent (audiogram demonstrated 33.3% hearing loss in the right ear), and he was not exposed to a greater decibel of 90 with the hearing protection.

The occupational disease act provides that an exposure of 90 decibels per day for an 8-hour period is the threshold for establishing a claim for hearing loss. The scale is adjusted for a higher decibel level. For example, a 102-decibel level requires only 1.5 hours of exposure per day. The Arbitrator denied the claim finding that the Petitioner could not overcome the evidence that the noise protection provided by the ear plugs as claimed by the manufacturer reduced the noise level exposure below the threshold level.

The Commission reversed, citing the experts, who both testified that the manufacturer level suggested by the employer was not correct. Dr. Fletcher testified was not the actual level achieved in practice. Dr. Mikulec conceded that the reduction in noise level would be 13 decibels, not 33.

The Commission found that Petitioner proved exposure levels to 103.4 decibels so even with the reduction for the protection this still exceeded the statue.

III. CAUSAL RELATIONSHIP

Parks v. Qual-A-Wash 19 I.W.C.C. 0420 (August 6, 2019)

The Arbitrator found that Petitioner proved his knee and lumbar spine injuries were causally related to his work accident. On review, the Commission agreed Petitioner's left knee was causally related but denied the lumbar condition as related.

On January 10, 2013, Petitioner fell through a missing grate on a tank trailer he was washing, while working for respondent. Petitioner claimed injuries to both knees, low back and left hip. Petitioner claimed that he did not seek treatment immediately for his low back because of the severe pain in his knees. Petitioner's case proceeded to hearing on a 19(b). The Arbitrator awarded benefits including surgeries for his knees.

At a subsequent 19(b), 8(a) hearing, the new Arbitrator found that Petitioner's low back condition was related to his accidental injury (although not addressed at the initial hearing) because petitioner's knee condition was "clearly a bigger problem for him at the time of his first 19(b) than his lower back." The Arbitrator also noted that the Section 12 examiner noted Petitioner had back complaints before the prior 19(b).

The Commission modified the Arbitrator's decision on review. The Commission noted that Petitioner first sought treatment for his low back condition in November 2016 even though his original accident occurred on January 10, 2013. Later, Petitioner clarified that he originally mentioned his low back complaints to the Section 12 examiner in April 2013. Petitioner also admitted that during his prior testimony, he did not mention anything regarding his low back or any other body part besides his knees.

The Commission found Petitioner failed to prove his lumbar condition as causally related. Although Petitioner claimed he had low back pain after his accident of January 10, 2013, he first mentioned it to the Section 12 examiner in April 2013 and did not mention it to any treating physician until October 2014. The Commission noted that while there are circumstances when a Petitioner might prioritize treatment for his most significant injuries and delay treatment for less serious complaints, those circumstances were not present in the instant case.

IV. AVERAGE WEEKLY WAGE

Beattie v. IWCC & St. Clair County Sheriff's Dept. 2020 Ill. App. (5th D.) 190041WC

In a *Rule 23 decision* of the Illinois Appellate Court, Fifth District, the Court held that the Commission's decision was not against the manifest weight of the evidence where the Commission held that the Petitioner's secondary work was not concurrent employment.

Petitioner worked as corrections officer for the sheriff's department at the time of his accident on November 11, 2013. He was also working as a "public safety officer" for Metrolink scheduled by the sheriff's department. While working for Metrolink, the Petitioner wore his sheriff's department uniform, badge and weapon issued by the sheriff's department. The Arbitrator based Petitioner's average weekly wage on the earnings petitioner made from the sheriff's department and his work for Metrolink. The Arbitrator explained her decision by stating that Respondent provided evidence that Metrolink was reimbursed by Respondent for those wages and Respondent controlled all of Petitioner's activities while he worked at Metrolink.

The Commission modified the decision of the Arbitrator finding that the wages from Metrolink should be excluded from the average weekly wage. The Commission found that Section 10 requires a contract for hire for a concurrent employer and Respondent offered Petitioner the work at Metrolink as secondary duty. Further, Respondent determined when Petitioner could work for Metrolink, and if he needed to change his shift at Metrolink, he contacted Respondent. Respondent was responsible for disciplining Petitioner. Based upon these factors, the Commission found that Petitioner remained in the employment of Respondent while performing work for Metrolink. Thus, as no employment relationship existed between Petitioner and Metrolink and those wages from Metrolink were excluded from a Section 10 calculation.

The Appellate Court affirmed the Commission's decision in finding that the Respondent ultimately exercised the right to control the Petitioner and the nature of his work.

V. COMPUTATION OF AWARDS

O'Kane v. City of Chicago, 19 I.W.C.C. 0374 (July 22, 2019)

The Commission issued a decision denying wage differential benefits to the Petitioner. On appeal to the Appellate Court, the Court reversed this finding and remanded the case to the Commission to "calculate a wage differential benefit based upon the evidence in the record." The Appellate Court found Petitioner's pre-accident earning capacity was $1,408.00 per week. The Commission found that Petitioner's current earning capacity was $11.12 per hour based upon a MedVoc report, indicating the Petitioner had earning capacity from $8.25 per hour to $14.25 per hour.

In August of 2012, after Dr. Heller imposed permanent restrictions, Respondent initiated vocational rehabilitation. As noted by the Appellate Court, Petitioner failed to follow up on multiple job referrals, failed to submit applications or resumes when requested by prospective employers, and provided incorrect or invalid contact information to prospective employers. "On November 4, 2013, MedVoc identified 15 prospective employers willing to hire [Petitioner] given his education, work history, and work restrictions. The positions varied in wage, and the mean wage was $ 11.12 per hour. [Petitioner] testified that he did not apply to any of the jobs identified in this labor market survey." *O'Kane*, 2018 IL App (1st) 171654WC-U, P 18. In March of 2014, Petitioner found a job as a food delivery person at an hourly wage of $8.25. In April of 2014, Petitioner increased his hours to full-time. On September 12, 2014, MedVoc performed another labor market survey. Again, Petitioner did not apply for any of the jobs identified in the labor market survey.

The Commission found Petitioner's current earning capacity was $ 11.12 per hour, based on the labor market survey performed on November 4, 2013, and confirmed by a subsequent labor market survey of September 12, 2014. Accordingly, the Commission computed the weekly wage differential benefit as follows: 66 2/3% x ($1,408.00 - $11.12 x 40) = $642.13.

Carter v. Chicago Transit Authority 19 I.W.C.C. 0455 (August 23, 2019)

The Arbitrator awarded Petitioner wage differential benefits based upon what the Petitioner could earn if working 40 hours per week with her new employer even though she averaged 33.49 hours per week. The Commission modified the decision and found the differential must be based on Petitioner's actual earnings from her new employer, but also must be based upon what Petitioner could have earned in her usual and customary employment *at time of her injury* because she was terminated for cause before she reached maximum medical improvement.

Petitioner sustained an undisputed accident to her neck and right shoulder on May 30, 2014. On January 9, 2017, her physician released her to return to work with permanent restrictions that prevented her from returning to work as a bus operator for the Respondent, which was her preinjury job. Through vocational services Petitioner obtained a job as a security officer for a different employer earning $12/hour. Payroll records indicated the Petitioner worked an average of 33.47 hours per week with an average weekly wage of $401.63. The collective bargaining agreement indicated that as a full-time bus operator Petitioner would have been earning $35.01 per hour effective July 1, 2018.

Petitioner testified that her job as a security officer was a full-time position, but her employer did not always schedule her for a 40-hour work week. Petitioner introduced PX2 consisting of sixteen (16) payroll stubs covering bi-weekly periods between January 12, 2018 and August 23, 2018. (The case went to hearing on 9/11/2018). The payroll stubs indicated Petitioner worked an average of 66.98 hours biweekly or 33.49 hours per week. The Arbitrator found that Petitioner was able to earn $480.00 per week ($12/hour x 40 hours) based upon the Petitioner's testimony. The Arbitrator was not persuaded that PX2 supported a finding that Petitioner's employment contemplates a less than 40-hour work week.

The Commission modified the decision of the Arbitrator. The Commission agreed with Petitioner that since her payroll records demonstrated she averaged 33.47 hours per week her average weekly wage in her current employment is $401.64, not $480.00. However, the Commission disagreed that in awarding wage differential benefits the Commission should consider what Petitioner would currently earn as a bus operator or $35.01 per hour because she was terminated for cause on February 15, 2015. Because of this termination, the Commission found "the evidence establishes that she would not be able to earn ($35.01)." Therefore, the Commission calculated what the petitioner would be able to earn in the full performance of her duties as of her date of injury. ($918.83 instead of $1,400.40). The Commission modified the award of the Arbitrator for wage differential benefits from $613.60 per week ***down*** to $344.80.

VI. PERMANENCY BENEFITS

Allen v. Ford Motor Company, 19 I.W.C.C. 0377 (July 23, 2019)

At arbitration the parties placed in dispute causal connection, maintenance benefits and the nature and extent of Petitioner's injuries. The parties agreed Petitioner sustained an accident on July 8, 2014, while working as a plumber/pipefitter for Respondent. Petitioner testified she felt a strain on her neck and right shoulder while reaching up and attempting to move a handle on July 8, 2014. Her shoulder felt "really tight" and she experienced extreme pain.

The Arbitrator found Petitioner credible and determined there was a causal connection between her accidental injury and her right arm/shoulder and cervical spine conditions. The Arbitrator based this finding on the treating physician opinions. The Arbitrator also awarded maintenance benefits based upon Petitioner's attempt to secure accommodations with her employer from time-to-time.

Regarding permanency, the Arbitrator assigned significant weight to the second and third factors of Section 8.1(b), Petitioner's occupation and age at the time of injury. Petitioner returned to work for Respondent in April 2018, following a long hiatus. Although she is still a plumber/pipefitter in terms of her job title, salary and access to overtime, and was earning more than she did before the accident, she was unable to perform many of the tasks associated with her trade. Her injury involves her dominant right arm. Respondent elected to offer her an accommodated, supervisory job two months prior to trial. There was no guarantee that this accommodation would continue. As for the fourth factor, future earning capacity, the Arbitrator again noted that, while Petitioner was reaping the financial benefits of her trade as of trial, there is no assurance she will continue to do so in the future. From a medical/restrictions standpoint, she was not able to perform many of the duties required of a plumber/pipefitter. With respect to the fifth and final factor, evidence of disability corroborated by the treating medical records, the Arbitrator noted the examination findings of Drs. Nigro, Miz, Robinson and Lowe along with the various MRI and EMG results.

The Arbitrator, having considered the foregoing along with Petitioner's credible testimony as to her current symptoms and limitations, found that Petitioner established permanent partial disability equivalent to 35% loss of use of the person as a whole, representing 175 weeks of benefits under Section 8(d)2 of the Act.

On review the Commission modified the decision of the Arbitrator. The Commission found that after reviewing and reweighing the evidence pertaining to the second factor [occupation of the injured employee] and fourth factor [employee's future earning capacity], the PPD award was excessive. The Commission instead found that Petitioner was entitled to twenty-two-and-a-half percent (22.5%) loss of use of the person as a whole under Section 8(d)2 of the Act. The Commission found that the Petitioner established that her injuries partially incapacitated her from pursuing the duties of her usual and customary line of employment. In other words, her occupation changed. In her Brief, Petitioner relied on *First Assist Inc. v. Indus. Comm'n*, 371 Ill. App. 3rd 488 (2007), which stood for the proposition that despite similar job titles, not all nurses perform the same job functions and not all nurses are paid the same. In the instant case, although Petitioner had the same job title pre- and post-injury, she could no longer perform her regular duties as a

plumber/pipefitter. She was instead limited to supervising and directing people. The evidence also demonstrated that after the work accident, Petitioner attempted to perform her regular duties as a plumber/pipefitter for Respondent's various departments, and she was unable to perform those duties for any length of time. [author's note – I am unclear as to how the Commission distinguished the second factor from the Arbitrator's finding that the petitioner's occupation was in name only]

Regarding the fourth factor, the Commission did not believe the evidence supported the conclusion that the Petitioner had or sustained a diminished earnings. While the Arbitrator seems to say the Petitioner's current job is a sham, there was no evidence upon which to base that conclusion.

McGrane v. Trane Chicago, 19 I.W.C.C. 0379 (July 24, 2019)

The parties proceeded to arbitration on the issues of causal connection and nature and extent of the injury. The Arbitrator found Petitioner's condition of ill-being to his low back that required a laminectomy at L3-L4, microdiscectomy at L2-L3 and a fusion at L4-L5 was causally related to his accidental injury of September 28, 2016. Respondent referred Petitioner for an impairment rating performed by Dr. Ryon Hennessy. Dr. Hennessy found Petitioner had a 15% person as a whole impairment rating. Based upon the 8.1b factors, the Arbitrator found Petitioner incurred permanent partial disability to the extent of 25% loss of use of person as a whole.

The Commission on review *modified* the award of the Arbitrator finding that the Petitioner incurred permanent partial disability to the extent of 20% loss of use of person as a whole. The Commission assigned less weight to factor (v) of Section 8.1b(b)—evidence of disability corroborated by the treating medical records. While Petitioner testified that he continued to experience from severe residual symptoms, the medical evidence paints a different picture. Dr. Kahn discharged Petitioner from his care on October 4, 2017 and prescribed no work or activity restrictions. Petitioner returned to his regular job in July 2017 and continued to perform all his work duties until his retirement. These work duties included using ladders to access rooftops. Petitioner has never sought additional treatment relating to his allegedly significantly deteriorating condition and does not take prescription medication to deal with his symptoms. Petitioner testified that he only occasionally takes over-the-counter pain medicine. Petitioner also admitted that his lumbar spine was not pain free before his work injury. While there is no question that Petitioner's work injury aggravated the pre-existing condition of his lumbar spine, the Commission believes a finding that Petitioner sustained a 25% loss of use of the whole person does not adequately account for the lack of corroboration in the medical records regarding the severity of Petitioner's alleged ongoing complaints.

Hoffman v. State of Illinois/Menard Correctional Center, 19 I.W.C.C. 0393 (July 25, 2019)

The parties proceeded to arbitration on the issue of nature and extent only. No impairment rating was submitted by the parties. Based upon the other factors of 8.1b the Arbitrator determined that Petitioner incurred permanent partial disability to the extent of 15% loss of use of person as a whole. Petitioner's treating physician performed a C4-C5 disc replacement surgery and ultimately released Petitioner to return to work full duty. With regard to subsection (ii) of § 8.1b(b), the

occupation of the employee, the Arbitrator noted that the record revealed Petitioner was employed as a Correctional Officer at the time of the accident and he was able to return to work in his prior capacity as a result of the injury. The Arbitrator noted Petitioner was able to return to his normal duties without restrictions. Therefore, and therefore gives *some* weight to this factor.

Regarding subsection (iii) of § 8.1b(b), the Arbitrator noted that Petitioner was 29 years old at the time of the accident. Because of Petitioner's age, the Arbitrator therefore gives *no* weight to this factor. Regarding subsection (iv) of § 8.1b(b), Petitioner's future earnings capacity, the Arbitrator noted that there was no evidence that Petitioner's earning capacity was affected by this injury. Because there was no evidence that Petitioner's earning capacity was affected by this injury, the Arbitrator therefore gives *no* weight to this factor. Regarding subsection (v) of § 8.1b(b), evidence of disability corroborated by the treating medical records, the Arbitrator noted that Petitioner treated with Dr. Kevin Rutz for his cervical disc injury consisting of disc replacement at C4-5 on July 18, 2018. On August 21, 2018, Dr. Rutz returned Petitioner to work full duty without restrictions. At this visit it was noted that Petitioner was doing well and had no permanent restrictions. Therefore the Arbitrator gives *greater* weight to this factor.

On review the Commission *modified* the Arbitrator's decision. The Commission *increased* the permanent partial disability to 17.5% loss of use person as a whole. The Commission viewed the evidence differently with respect to Section 8.1b(b) factor (iii) - the age of the employee at the time of the injury. The Arbitrator noted Petitioner was 29 years old on the date of accident and, "because of the Petitioner's age," concluded this factor should be afforded no weight. The Commission disagreed. The Commission found Petitioner's young age meant he will endure the pain and physical deficits resulting from his accidental injury for an extended period. We find this factor weighs in favor of increased permanent disability.

Butler v. State of Illinois, Choate Mental Health 19 I.W.C.C. 0427 (August 8, 2019)

The Arbitrator awarded petitioner 17.5% loss of use person as a whole for injuries to the face and eye. The Commission modified the Arbitrator's award increasing the percentage to 25% loss of use person as a whole.

On December 9, 2013, Petitioner, 35-year-old mental health technician was called for assistance regarding an altercation with a patient. As the Petitioner approached, the patient, he grabbed an old-style telephone and struck the Petitioner on the right side of his face. Petitioner ultimately was diagnosed with an acute right orbital blow out fracture, as well as post-traumatic trigeminal neuralgia and post-traumatic migraines.

The Arbitrator considered the factors in 8.1b and noted no impairment rating was submitted into evidence. Regarding factor ii of 8.1b the Arbitrator noted Petitioner's occupation of a mental health technician was very physical and involved evening shifts. The Arbitrator noted that Petitioner was released to return to work without restrictions and sought new employment with the State of Illinois. The new job is sedentary and involves only computer work. However, Petitioner claimed he has light sensitivity using the computer and needs to take frequent breaks. In either job, the Arbitrator found the injuries had an impact and gave weight to this factor.

Regarding factor iii, the Arbitrator gave great weight to this factor since Petitioner was relatively young and as such he would be working with the effects of this injury for a longer period of time. Regarding factor iv, the Arbitrator assigned little weight to this factor since Petitioner claimed he declined overtime in his new position but did not state how much in earnings this meant nor did he testify to what difference, if any, between the two different jobs he experienced. Regarding factor v, the Arbitrator found that the medical records provide consistent corroboration of his ongoing physical complaints. Based upon these factors the Arbitrator awarded 17.5% person as a whole.

On review the Commission modified the award. Regarding factor iii, the Commission gave "greater weight" to the petitioner's age as he will have many working years with ongoing pain, symptoms and neuralgia, along with aggravating triggers and lifelong medication management. The Commission also gave "greater weight" to the corroborating medical records. The Commission noted that both the treating physician and Section 12 examiner agreed Petitioner would require some form of medication management. The Commission also gave "some weight" to the second (ii) factor of petitioner's occupation noting petitioner claimed lost opportunity for overtime. The Commission increased the award to 25% loss of person as a whole.

VII. MEDICAL AND REHABILITATION BENEFITS

Smith v. Superior Express, 19 I.W.C.C. 0417 (August 2, 2019)

The parties proceeded to arbitration on the issues of causal connection, medical expenses and prospective medical care pursuant to a 19(b) filed by petitioner. The Arbitrator found, in part, that Petitioner's condition of ill-being was causally related to his accidental injury. The Arbitrator found Petitioner's cervical condition was not causally related to the accidental injury. The Commission modified the decision and did find the cervical condition related but denied prospective medical care of a cervical disk replacement.

The parties agreed Petitioner sustained an accident on September 18, 2015 when he fell off a trailer. Petitioner testified he landed on his back with his shoulders and neck hitting the ground. Petitioner did not mention any pain in the left side of his neck until he was seen several times at Concentra and not until October 31, 2015. Petitioner eventually underwent an MRI of his neck on February 8, 2016. One of Petitioner's treating physicians opined after reviewing the MRI that Petitioner sustained disc injuries from C3-C6. On April 28, 2016, the physician prescribed surgery. Respondent's Section 12 examiner opined that the delay in neck symptoms was inconsistent with Petitioner having sustained an acute injury to his cervical spine. The Arbitrator concluded that the neck was not related to the accidental injury.

The Commission reversed on the causality of the cervical spine. The Commission found that Petitioner had symptoms of a neck injury prior to October 31, 2015, although he did not specifically mention his neck. For instance, in the two initial visits at Concentra after the accident the Commission noted the physician wrote "neurological review of symptoms" included arm weakness, tingling and numbness. The Commission also noted the physical therapy note four days later which stated "initially [left upper extremity] was numb for about [two] hours." The Commission found that throughout the medical records "left arm numbness" is repeatedly

memorialized. The Commission found that the cervical condition was causally related to the accidental injury. However, the Commission declined to award payment for the 3-level disc replacement. The Commission based this denial on the Section 12 report of Dr. Kitchens, who stated that Petitioner did not have "signs or symptoms of cervical radiculopathy or cervical myelopathy." The Commission also found this type of procedure in a young (31) petitioner "highly problematic."

Cruse v. Choate Mental Health Center, 19 I.W.C.C. 0419 (August 6, 2019)

The Arbitrator awarded TTD, medical benefits and prospective medical to the Petitioner. The Commission modified the decision explaining that charges related to an MRI spectroscopy were neither reasonable nor necessary.

Petitioner sustained an undisputed accidental injury when she was attacked by a patient and injured her back. Petitioner was an RN and worked as floor nurse for the Respondent. Petitioner fell to the floor and twisted her back. Petitioner received treatment from two physicians including an MRI, discogram and CT scan. Petitioner also underwent epidural injections. The discogram demonstrated provocative discs at L3-L4 and L5-S1. Her treating physician prescribed a two-level fusion.

The Respondent required Petitioner to participate in a Section 12 examination. The Section 12 physician opined that Petitioner sustained a back strain/contusion from her accident and had reached MMI. The examiner also opined Petitioner was not a good surgical candidate.

The Arbitrator found the opinions of the treating physician more persuasive than the examining physician. The Arbitrator ordered Respondent to pay the medical bills submitted into evidence and to pay for the two-level fusion surgery.

On review, the Commission modified the decision of the Arbitrator and found that the medical charges relative to the MRI spectroscopy ordered by Dr. Gornet was neither reasonable nor necessary. The Commission noted there is no evidence that such a test is generally accepted or recognized by the orthopedic community, and as such the charges associated with same are hereby denied.

VIII. CLAIM FILING PROCEDURES

Jones v. Ford Motor Company, 19 I.W.C.C. 0414 (August 2, 2019)

The Arbitrator found that although an application for adjustment of claim was not filed within three years of the alleged date of injury, the claim was filed within two years of the last payment of compensation and thus not barred by the statute of limitations. The Commission affirmed.

Petitioner conceded his claim was not filed within three years of a January 9, 2008 accident, but maintained it was filed within two years of the last payment of compensation, pursuant to Section 6(d) of the Act. Petitioner claimed December 16, 2013 as the date on which compensation was last paid. This is the date Respondent paid Midland Orthopedics' bill for Dr. Sonnenberg's initial visit

of November 11, 2013. [See RX 7.] Petitioner also argued that Respondent was estopped from asserting a statute of limitations defense. Respondent maintained that medical payments do not constitute compensation for statute of limitations purposes. Respondent maintained that timeliness is governed, not by Section 6(d), but by the more specific provisions of Section 8(j)(3). The December 16, 2013 payment did not revive the statute, since there had been earlier payments in 2011, with the last occurring more than two years before December 16, 2013. (RX 7). Respondent also contended that the doctrine of estoppel was not applicable.

Section 8(j)(1) provides, in relevant part, that the period for filing a claim does not commence to run until the termination of payments made under a group plan and, in paragraph (3), that "the extension of time for the filing of [a claim] as provided in paragraph 1 above shall not apply to those cases where the time for such filing had expired prior to the date on which payments or benefits enumerated herein have been initiated or resumed."

The Arbitrator found that medical payments do constitute compensation for statute of limitations purposes, under *Legris v. Industrial Commission*, 323 III.App.3d 789 (2001) and that the filing comports with the specific timeline set forth in Section 6(d). Petitioner filed his Application on June 18, 2015, within two years of Respondent's December 16, 2013 payment to Midland Orthopedics. The Arbitrator stated "(t)he legislature has never acted to attach the tenets of Section 8(j)(3) to 6(d). Moreover, RX 7 reflects that Respondent made the payment to Midland Orthopedics within its "workers compensation system" and not pursuant to any group plan." The Arbitrator also cited *Creel v. Industrial Commission*, 54 III.2d 580 (1973).

The Arbitrator found that Respondent was estopped from asserting the statute of limitations defense based upon their conduct and found the facts mirror those cited in *Herlihy Mid Continent Co. v. Industrial Commission*, 252 III.App.3d 211 (1st Dist. 1993), a case in which the Appellate Court held that the employer was estopped from raising a statute of limitations defense.

The Commission affirmed the Arbitrator on the statute of limitations issue.