WCLA NEWSLETTER
CASE LAW SUMMARIES JUNE 2020

I. Slips & Falls / Parking Lots / Arising Out Of & In The Course Of - *Reiman v. St. Joseph Memorial Hospital*., 28 ILWCLB 68 (Ill. W.C. Comm. 2019).

Petitioner, a 77-year-old women, fell on the sidewalk while walking to her car that was parked in the employer's parking lot. Although Petitioner offered no testimony as to what exactly caused her fall, she testified that she did notice some ice on the sidewalk and parking lot when she fell. Petitioner also testified that it was sleeting at the time of the accident. Therefore, Petitioner assumed she slipped and fell on ice. Petitioner testified she was required to park in the area in which she fell.

Respondent presented no less than six witnesses and two certified weather reports to counter Petitioner's allegation that there was ice on the sidewalk and the parking lot. Nearly all of the witnesses, except one, testified there was no ice on either the sidewalk or parking lot at the time in question. Moreover, both of the certified weather reports introduced by Respondent showed there was no rain, snow, sleet, or any other type of precipitation on the date of the accident. However, there was evidence of salt present in the area of the fall. Respondent's witnesses testified the employer did not direct or require its employees to park in a designated parking area.

The Arbitrator found Petitioner's statement that she was required to park in the area where she fell not credible. The Arbitrator also noted the Petitioner's statement that it was sleeting at the time of the accident was contradicted by the two certified weather reports. Nevertheless, the Arbitrator still found Petitioner's accident was due to ice. The Arbitrator based this finding on Petitioner's statement to her treatment providers that she fell on ice, and also on the fact that there was some salt on the ground at the time of Petitioner's fall. Although the Arbitrator noted there was conflicting evidence as to whether there was ice on the sidewalk based on the presence of salt, which is designed to eliminate ice, the Arbitrator reasoned there must have still been ice since the presence of the salt did not "completely leave out the possibility of ice."

After determining Petitioner fell on ice, the Arbitrator found her claim to have both arisen out of and occurred in the course of her employment based primarily on the finding in *Dukich v. Ill. Workers' Comp*. Comm'n, 86 N.E.3d 1161 (injuries arising out of the natural accumulations of ice and snow to be compensable, but slips and falls due to rain are not to be compensable.) Although the Arbitrator classified her risk as a neutral risk, no analysis was provided to show how this neutral risk became compensable risk based on either a qualitative or quantitative theory basis. On appeal, the Commission affirmed and adopted the Arbitrator's decision in full without further comment.

II. Slips & Falls / Parking Lots / Arising Out Of & In The Course Of - *Hamby v. United Contractors*., 28 ILWCLB 67 (Ill. W.C. Comm. 2020).

Petitioner, who ran a water truck for a paving crew, walked to his truck when he stepped on a large rock, causing him to roll his ankle and fall on his right shoulder. Petitioner's truck was parked in the entrance area of a gravel pit owned by the Respondent.

The Arbitrator found that Petitioner's accident arose out of and in the course of his employment with Respondent. The Arbitrator used a neutral risk analysis to arrive at this conclusion.

On appeal, the Commission affirmed the Arbitrator's decision but noted that the Arbitrator's neutral risk analysis was unnecessary since the risk in question, exposure to a "large" three inch in diameter rock,

which was within a sea of similar rocks in a gravel pit, constituted a defect on Respondent's premises such that it made the risk of injury a risk distinctly associated with the Petitioner's employment rather than a neutral risk. The Commission did not explain why a three inch rock located in a gravel pit full of similar sized rocks constituted a "defect", while a two or two and a half inch rock did not constitute a "defect".

III. Slips & Falls / Parking Lots / Arising Out Of & In The Course Of - *Graves v. The State of Illinois,* 28 ILWCLB 78 (Ill. W.C. Comm. 2020)

Petitioner, a Circuit Court Judge, walked from her assigned parking spot to the Circuit Court building when she tripped and fell in an empty parking lot. The parking lot in question was limited to employees only and not accessible to the general public. Petitioner carried a backpack full of work materials as she walked to work. Lastly, Petitioner had to traverse several different uneven surfaces, including uneven gravel, in order to get from the assigned parking spot to the Circuit Court building. Petitioner testified she took was the most direct route, and the other potential routes from her assigned parking spot to her work were even more hazardous.

The Arbitrator awarded Petitioner benefits after finding that Petitioner's accident arose out of and in the course of her employment based on an increased neutral risk theory. The Arbitrator emphasized that the parking lot was for employees only, that Petitioner was instructed to park in said lot, that she carried a heavy backpack full of work materials, and that the path between the parking lot and the Circuit Court building required traversing over several uneven surfaces as support for the finding of an increased risk of injury. On appeal, the Commission affirmed the Arbitrator's decision in its entirety.

IV. Bending Over / Neutral Risk v. Employment Risk - *Gomez v. City of Northlake,* 28 ILWCLB 69 (Ill. W.C. Comm. 2019).

Petitioner, a manual laborer for over 14 years, performed yard restoration for the Respondent. As he bent down to pick up a bucket of grass seed, he felt a sudden pain and he twisted his low back and right side. Although Petitioner's job duties as a laborer varied between shoveling snow, yard work, and other landscaping projects, Petitioner testified that his job required significant bending and occasional lifting between 50-100 lbs. However, Petitioner did not provide any specific testimony or evidence as to how many times per day his job duties required him to bend over.

Respondent disputed the accident arose out of Petitioner's employment as Petitioner only bent over when his back pain started which was a risk common to the general public.

While the Arbitrator agreed with Respondent that the act of bending over was a neutral risk, the Arbitrator still found the claim compensable based on an increased quantitative risk theory. However, the Arbitrator acknowledged that Petitioner failed to provide any specific evidence as to exactly how many times per day he bent over. Nevertheless the Arbitrator still found an increased quantitative risk of injury based primarily on the fact that Petitioner was a laborer. In order to support this conclusion, the "Arbitrator will not split hairs over the exact mechanism of injury for a laborer who bends daily, twists, and lifts heavy objects." Petitioner's occupation as a laborer came with a presumption that Petitioner was required to bend over more frequently than the general public, thereby making his injury compensable.

On appeal, the Commission agreed that Petitioner was required to bend over in order to perform his job duties as a laborer. However, the Commission went further and found that the simple act of bending over was a specific employment related risk in addition to a compensable neutral risk. Thus, the Commission not only affirmed the Arbitrator's finding of an increased neutral risk, but also classified the act of bending over as a specific employment related risk.

V. Reaching / Neutral Risk vs. Employment Risk - *Estill v. Ball-Chatham CUSD #5,* 28 ILWCLB 79 (Ill. W.C. Comm. 2019)

Petitioner, a school bus driver, reached up over her shoulder to pull down a seat belt to buckle herself in when she felt a sudden pop in her right shoulder. Petitioner testified she would have to use her right arm to reach approximately two feet above her left shoulder and then bring the seat belt down with her right arm to buckle it. Petitioner testified that buckling herself in the bus was different from buckling herself in her car because she would have to reach higher to grab the seat belt in the bus than in the car, and pulling down the seat belt in the bus required greater force than that required in her car. As a result of this injury, Petitioner was diagnosed with right shoulder impingement and rotator cuff tears.

After considering Petitioner's testimony and reviewing photographs of the seatbelt in question, the Arbitrator concluded that the act of reaching over the shoulder to pull down a seat belt was a neutral risk. Nevertheless, the Arbitrator found this claim to have been a compensable neutral risk based on a qualitative increased risk of injury. Specifically, the Arbitrator noted that the seat belt in question was higher than a normal vehicle's seat belt which required more force to pull it down making the risk of injury qualitatively different than that faced by the general public. As a result, the Arbitrator awarded Petitioner benefits.

On appeal, the Commission affirmed the Arbitrator's conclusion that this was a compensable work-related injury, but noted that the Arbitrator did not need to go through the neutral risk analysis in order to reach that conclusion. Rather, the Commission found that based on the recent Appellate Court decision in *McAllister v, Ill. Workers' Comp. Comm'n*, the Petitioner's risk of injury, i.e., reaching over her shoulder to put on a seat belt, was an employment related risk, and therefore compensable, because buckling her seat belt was both incidental to her employment and an action that Respondent would have reasonably expected her to perform. As such, the Commission found the Arbitrator's analysis under the neutral risk theory unnecessary.

VI. Aggravation of Preexisting Condition - *Stuber v. Murray Developmental Center*, 28 ILWCLB 71 (Ill. W.C. Comm. 2020).

Petitioner alleged she sustained an injury to her shoulder, lower back, and neck while lifting a bowl. Respondent did not dispute the accident itself but disputed causation and the nature and extent of the injury. After reviewing the records, the Arbitrator awarded Petitioner 5% loss of the person as whole for the left shoulder, cervical and lumbar strains.

On appeal, the Commission affirmed the Arbitrator's decision as to the lumbar strain and left shoulder strain, but modified the decision as it pertained to the cervical injury. In particular, the Commission found Petitioner suffered an aggravation of a pre-existing asymptomatic degenerative cervical condition rather than just a cervical strain. In support of its decision, the Commission pointed to the credible testimony offered by Respondent's first IME doctor and Petitioner's treating doctor, both of whom testified Petitioner had complaints consistent with cervical radiculopathy. The Commission also found it significant that the MRI, according to the treating doctor, showed disk protrusions at C4-5 and C5-6. Accordingly, the Commission increased the award for Petitioner's permanent disability to 8% loss of the person as a whole which included 2% loss of the lumbar strain, 1% loss for the left shoulder strain, and 5% for the aggravation of a pre-existing degenerative cervical condition.

Even though the Commission increased the award for the cervical aggravation, the Commission rejected Petitioner's claim that her forearm and hand pain was also causally related to the work injury. In denying this part of the claim, the Commission found it significant that Petitioner failed to provide any specifics about the exact location of her pain or how far down her pain went. The Commission found Petitioner's general statement that she was still having "pain down my left arm" insufficient to establish compensability.

VII. Employer/Employee Relationship - *Lingenfelter v. Cloverleaf Golf Course, Inc*., 28 ILWCLB 72 (Ill. W.C. Comm. 2019).

Petitioner began working for Respondent on a part-time basis at a golf course, in exchange for unlimited free use of the golf course while also collecting TTD benefits for a prior unrelated work injury to his right eye. Petitioner never received money for his work and his only compensation was free use of the golf course so that he could play golf whenever he wanted. Petitioner specifically requested this arrangement so he did not jeopardize his entitlement to TTD benefits from his prior work injury. While working for Respondent under this arrangement, Petitioner was stuck in the left eye by a golf ball. Petitioner subsequently filed a claim alleging he was an employee of the golf club despite not receiving any money for his services.

The Arbitrator and Commission originally classified as a volunteer rather than an employee of the golf club and denied benefits. The Arbitrator and Commission both reasoned in part that Petitioner was not credible. However, pursuant to a second remand, the Commission reversed its original ruling and instead found Petitioner was concurrently employed by both the golf club and the prior construction company from whom he continued to collect TTD benefits. However, since Petitioner never received money for his work with the golf club, the Commission found the Petitioner failed to meet his burden in proving his earnings from said golf club. As a result, the Commission found that only Petitioner's earnings from the original employer should be used in calculating his concurrent average weekly wage.

VIII. Overtime / AWW Calculations / Permanency - *Pate v. Warren G. Murray Developmental Center*, 28 ILWCLB 73 (Ill. W.C. Comm. 2019).

Petitioner, a 31-year-old mental health technician, worked for the state caring for adults with physical and mental disabilities. She injured her right arm and cervical spine while assisting a patient. As a result of the injury, Petitioner underwent conservative treatment for the right arm and a single level cervical disk replacement. Petitioner subsequently received permanent restrictions of no working more than 8 hours per day and 40 hours per week (i.e., no overtime work) as a result of her disk replacement.

At trial, Petitioner testified that she was required to work overtime and had worked 77 hours of overtime prior to her injury. Respondent introduced testimony that overtime was only mandatory in limited circumstances but working overtime was otherwise voluntary.

The Arbitrator found that Petitioner's overtime was mandatory and included Petitioner's overtime earnings in the average weekly wage calculation. The Arbitrator also awarded Petitioner 5% loss of the right hand and 35% loss of the person as a whole for her single level cervical disk replacement.

On appeal, the Commission reduced the Arbitrator's cervical award of 35% loss of the person as a whole down to 20% loss of the person as a whole. The Commission also modified the Arbitrator's average weekly wage calculation by excluding the Petitioner's overtime earnings as it found the Petitioner failed to prove which of her overtime hours were mandatory and which of her overtime hours were voluntary. In addition, the Commission also found that Petitioner's overtime was inconsistent since she only had a total

of 77 hours of overtime in the preceding 52 weeks of work prior to her injury. As such, the Commission declined Petitioner's request that her overtime be included in the average weekly wage calculation.

IX. TTD / TPD / Voluntary Abandonment of Accommodated Light Duty Work - *Adams v. Hayes Mechanical Contractors*, 28 ILWCLB 74 (Ill. W.C. Comm. 2019).

Petitioner suffered a work-related accident after just two weeks on the job. As a result of this accident, Petitioner suffered an acute medial meniscus tear and received restrictions of light to sedentary duty until he was able to undergo surgery. Petitioner was placed on these restrictions on May 17, 2018 and continued to work under these restrictions until October 31, 2018. On October 31, 2018, Petitioner became ill and advised the Respondent that he could not come into work that day. Petitioner was also ill on the following day. Respondent was aware that Petitioner was ill both days, but terminated Petitioner on November 1, 2018 since Petitioner failed to report for light duty work.

The Arbitrator found Petitioner did not voluntarily abandon his light duty work and awarded TTD benefits post-termination as Petitioner had not reached MMI. The Arbitrator further found Petitioner entitled to TTD until he reached MMI and awarded TTD benefits through the date of the hearing.

Of note, the Arbitrator also awarded Petitioner 27 2/7 weeks of TPD benefits ($24,738.95) because the Arbitrator found that Petitioner earned less than his average weekly wage while working light duty. Petitioner earned a total of $37,809.41 over these 27 2/7 weeks working a full 40 hour work week. Petitioner alleged that based on his average weekly wage of $2,745.00, he should have earned $74,899.29 over those same 27 2/7 weeks working 60 hours per week. Despite the fact that Petitioner had only worked for Respondent for two weeks prior to his injury and that his average weekly wage was solely based on two weeks of work, the Arbitrator still awarded Petitioner $24,738.95 in TPD benefits even though Petitioner worked a full 40 hours per week during the 27 2/7 weeks in question earning the same as he had prior to his injury. Commission affirms Arbitrator's Decision.

X. Appeal to the Commission / Filing of Transcripts / Vocational Testimony - *Rosario v. City of Chicago*., 28 ILWCLB 76 (Ill. W.C. Comm. 2019).

This case involves a compensable injury resulting in the Arbitrator finding that Petitioner, a 66-year-old, was permanently and totally disabled based on the opinions of Respondent's own vocational expert. Even though the vocational expert did not perform any type of vocational aptitude testing or job search, the Arbitrator found the vocational experts testimony that Petitioner was not employable very persuasive.

Following the Arbitrator's ruling, Respondent appealed to the Commission. However, Respondent failed to timely file a copy of the trial transcript with the Commission as part of the appeal. As a result, Petitioner's attorney refused to sign and authenticate the transcript. Petitioner's attorney also filed a motion to dismiss Respondent's appeal based on the late filing of the trial transcripts. The Commission found that Respondent's tardiness in filing the transcript did not preclude the Commission from having subject matter jurisdiction over the claim. Moreover, the Commission also found that Petitioner's attorney had waived any right to object to the late filing of the transcripts because he agreed to the typical stenographic stipulations at the time of trial and had also stated on the record that the transcripts were in fact a true and accurate copy of the trial record. Thus, the Commission found that Petitioner's attorney waived any objections he may have had as it related to the trial transcripts.

XI. **Interlocutory Appeals** - *Montgomery v. Illinois Workers' Compensation Com'n*., 28 ILWCLB 77 (Ill. App. Ct., 3rd 2020).

The Commission, based on an 8(a) petition, awarded Petitioner prospective medical care and payment of all reasonable and related medical bills relating to his diagnosis and treatment for CRPS. Respondent disputed both the reasonableness and necessity of the medical bills submitted by Petitioner. The Commission did not specify which of Petitioner's submitted medical bills were reasonable and necessary and which, if any, were not. On appeal, the Circuit Court affirmed the Commission's decision.

The Appellate Court, in an unpublished decision, reversed the Circuit Court based on a finding that the Circuit Court lacked subject matter jurisdiction because the Commission's decision was interlocutory and not a final order. The Appellate Court found the Commission's decision to have been interlocutory because the Commission had failed to specifically note which of the disputed medical bills were reasonable and necessary and which bills were not. The Appellate Court noted that merely stating that Respondent was responsible for paying all reasonable and related medical bills was just a recitation of the employer's statutory duty, not a finding as to which medical bills in question were the responsibility of Respondent.

XII. Repetitive Trauma / Repetitive Use - Bartlett v. State of Illinois Dep. of Transportation, 28 ILWCLB 81 (Ill W.C. Comm. 2019)

Petitioner, a highway maintainer-bridge inspector, was responsible for inspecting, maintaining, and repairing over 1,100 bridges under his jurisdiction. When he was not repairing bridges Petitioner and his crew were required to perform equipment maintenance, traffic control, cutting brush and tresses, metal repair, and snow plowing. However, the one activity that Petitioner did more than any other on a daily basis was deck patching, which involved jackhammering, finishing concrete, and shoveling broken concrete. This required bending, squatting, and lifting weights ranging from 20 pounds to over 100 pounds. Petitioner alleged that he suffered a repetitive injury to his left knee as a result of his work activities.

The Arbitrator denied benefits based both on a finding that Petitioner failed to provide Respondent notice within the statutory 45 days and, based on a finding that Petitioner had failed to meet his burden in proving that he suffered a repetitive trauma. The Arbitrator relied on the opinion of the Respondent's IME doctor, who found that Petitioner's left knee issues were degenerative and were not aggravated by his work.

On appeal, the Commission reversed the Arbitrator and awarded Petitioner benefits based on a theory that Petitioner's previously operated left knee was further injured/aggravated by Petitioner's repetitive work activities. Although the Commission acknowledged that Petitioner provided limited evidence as to how often he had to perform each task, the Commission nevertheless awarded benefits since it found that there is no specific requirement that a certain percentage of time be spent on a task in order for those work duties to meet the legal definition of repetitive.

XIII. **Use of Drugs / Intoxication** - *Deaton v. Southeast Personnel Leasing Inc*., 28 ILWCLB 82 (Ill. W.C. Comm. 2020).

Petitioner was injured when his left arm got caught in a conveyor belt. While at the hospital, a drug test confirmed the presence of THC in Petitioner's system. Based on this initial positive test, Petitioner was asked to provide a urine test in order to confirm the presence of THC. Petitioner told the provider that he was unable to provide a sample since he had just gone to the bathroom moments before. As a result, no urine test was ever performed, but Petitioner did admit at the time of trial to having smoked marijuana two days prior to the injury.

Respondent denied the claim pursuant to Sections 9140.40 and 9140.50 of the Rules Governing Practice before the IWCC in light of the Petitioner's positive initial drug test which showed the presence of THC.

The Arbitrator found that although the initial test was positive for THC, the report from that initial test indicated that the results were presumptive or unconfirmed. Thus, the Arbitrator found that this initial test did not meet the requirements under Sections 9140.40 and 9140.50 of the Rules Governing Practice before the IWCC so as to create a presumption of intoxication. As a result, the Arbitrator rejected Respondent's contention that Petitioner's claim should be denied since Petitioner was intoxicated at the time of the accident. The Arbitrator further noted that even if such a presumption existed, Petitioner would still prevail since both of Petitioner's co-workers testified that petitioner was not stumbling, slurring his speech, or otherwise showing any visible signs of intoxication at the time of his accident. On appeal, the Commission affirmed the Arbitrator's decision.

XIV. **Permanency Value / PPD Benefits** - *Queiro v. JBS USA*, 28 ILWCLB 83 (Ill. W.C. Comm. 2020).

Petitioner suffered a repetitive trauma injury to her right hand as a result of her work with Respondent. Petitioner's job duties required her to cut frozen hog jowls with a knife repetitively throughout the day. Her specific diagnosis was right carpal tunnel syndrome. Petitioner had to undergo three separate surgeries in order to correct her injury but still experienced lingering numbness and limited use of her right hand.

The Arbitrator, in determining what permanency Petitioner suffered under Section 8.1(b), placed significant weight on the fact that the Petitioner was only 34-years-old, and still employed in an occupation that required significant repetitive use of her hands. However, the Arbitrator also assigned significant weight to the AMA rating obtained by Respondent, which found Petitioner only had a 5% impairment rating. As a result, the Arbitrator awarded Petitioner 10% loss of use of the right hand.

On appeal, the Commission modified the Arbitrator's decision. The Commission found the Petitioner's young age and her inability to perform repetitive jobs carried more weight in determining permanency than the AMA rating. As such, the Commission increased the permanency award to 15% loss of the right hand.

XV. Prospective Medical - *O'Connor v. Trimark Marlinn*, 28 ILWCLB 84 (Ill. W.C. Comm. 2019)

Petitioner was injured when he fell on a concrete floor while working for Respondent. Following an unsuccessful course of conservative treatment, Petitioner's treating doctor noted the Petitioner could consider a spinal fusion. However, the doctor had some reservations about the surgery since the potential success rate for this surgery was not very high. Despite the risk, Petitioner elected to undergo surgery.

The Arbitrator awarded TTD and medical expenses related to the injury, but denied Petitioner's request for prospective medical treatment in the form of the proposed spinal fusion. The Arbitrator denied the request for surgery on the basis that the treating doctor did not believe the success rate for said surgery was very high when compared to the potential risks.

On appeal, the Commission reversed the Arbitrator's finding as to prospective medical and awarded the Petitioner the recommended spinal fusion. The Commission noted that although the doctor said the success rate for the surgery was not very high since it was only at about 70%, the risks associated with the surgery were relatively low since there was no risk of paralysis. The Commission also noted the doctor still thought there was a chance the recommended surgery could reduce Petitioner's complaints of pain. As such,

the Commission opined that the surgery was reasonable and necessary since there was a chance that said surgery could relieve some, if not all, of Petitioner's complaints of pain.

XVI. **Penalties / Unreasonable & Vexatious Conduct** - *Weatherspoon v. Metropolitan Water Reclamation District*, 28 ILWCLB 86 (Ill. W.C. Comm. 2019).

Petitioner, a police officer, was injured in a motor vehicle accident. Although Respondent disputed accident at the time of trial, no evidence was provided by Respondent to support its dispute. As a result of the accident, Petitioner suffered a rotator cuff tear that required surgery. While undergoing physical therapy post-surgery, Petitioner's condition worsened to the point where a second surgery was recommended. In response, the Respondent sent Petitioner for an IME. The IME indicated that Petitioner's need for the second surgery was not related to his work accident, or the treatment following that accident, but rather as a result of his pre-existing degenerative condition. Based on this IME opinion, Respondent denied authorization for a second surgery.

The Arbitrator found all of Petitioner's treatment, including the need for the second surgery, casually connected to the original work-related motor vehicle accident. The Arbitrator also found that Respondent had no justification to deny accident, and that Respondent's denial of the second surgery was unreasonable and vexatious conduct despite the Respondent having based said denial on the IME opinion. As a result, the Arbitrator imposed both Section 16 and Section 19(k) penalties.

On appeal, the Commission affirmed the Arbitrator on all issues except for penalties. The Commission found that Respondent's denial of the proposed second surgery was not unreasonable since said denial was based on the opinion of their IME doctor. Furthermore, the Commission also noted the Act does not provide for penalties for failure to pay for or refusal to authorize prospective medical treatment. As such, the Commission vacated the Arbitrator's decision as the award of penalties.

XVII. Jurisdiction - *Tyler v. Aureus Medical Group*, 28 ILWCLB 87 (Ill. W.C. Comm. 2019).

Petitioner, a resident of Illinois, was contacted by a recruiter who worked for Respondent with an opportunity to work in Indiana as a traveling nurse. Petitioner did her interview and completed all other aspects of the job hiring process, while at her home in Illinois. After being hired, Petitioner traveled to Indiana to start her job. A week after starting her job in Indiana, Petitioner suffered a right shoulder and right knee injury.

At hearing, the Arbitrator found that Petitioner had signed the contract for hire electronically while in Illinois. This agreement stated that Petitioner was an employee of Respondent but would work on temporary assignments for other companies. The agreement also provided additional specifics as to Petitioner's job, benefits, and salary. As a result, the Arbitrator found this agreement to have constituted a contract for hire which was entered into in Illinois when Petitioner electronically signed the agreement. Because the contract for hire was made in Illinois, the Arbitrator found Illinois had jurisdiction over this claim under the Illinois Workers' Compensation Act. The Commission affirmed the Arbitrator's decision in its entirety.

XVIII. Vocational Services / Rule 9110.10 - *Broner v. Saks Fifth Avenue*, 28 ILWCLB 85 (Ill. W.C. Comm. 2020).

Although neither party placed vocational services under Rule 9110.10 of the Rules Governing Practice before the Commission at issue at arbitration, the Arbitrator nevertheless, sua sponte, ordered the Respondent to provide a written assessment by a certified rehabilitation counselor, of the Petitioner's choice, pursuant to Rule 9110.10. The Arbitrator found that Rule 9110.10 was clear that the rule requires

Respondent to provide a vocational rehabilitation written assessment when the total incapacity from work exceeds 365 days or when the injured worker will be unable to resume her regular pre-injury duties. Since Petitioner had been off work for 187 weeks, well over the 365 day requirement, the Arbitrator found that all requirements under Rule 9110.10 had been met, triggering a duty on the part of Respondent to provide a vocational written assessment.

On appeal, the Commission affirmed the Arbitrator's finding that Rule 9110.10 required Respondent to provide a written vocational rehabilitation assessment, but disagreed with the Arbitrator's finding that the Petitioner chooses which vocational expert is for this assessment. Instead, the Commission opined that Rule 9110.10 clearly states that the vocational assessment is to be prepared by the employer's vocational rehabilitation counselor, not the employee's vocational counselor. As a result, the Commission found that Respondent may choose a vocational expert to prepare a written vocational report under Rule 9110.10 not Petitioner.