WCLA NEWSLETTER

CASELAW SUMMARIES MAY 2020

I. Status of Employment

Larson v. Quad City Skydiving Center, 28 ILWCLB 56 (Ill. W.C. Comm. 2020).

The Petitioner was a pilot flying for the Respondent's skydiving operations. The flight hours she logged while working for Respondent went towards her license for her airline transit pilot certificate, which is required for her to become a commercial pilot. While flying with the Respondent, the Petitioner crashed a plane during a landing attempt. The Petitioner did not receive, nor did she expect to receive any money. There was no employment contract and the Petitioner agreed to be an unpaid pilot while flying for Respondent. A representative for the Respondent testified that no pilots were paid in the past and the Respondent did not have workers' compensation insurance as they had no employees. Various pilots testified on behalf of the Respondent that they all flew voluntarily for the Respondent and never received payment from the Respondent.

The Arbitrator found Petitioner established that an employee-employer relationship existed between her and the employer. The Commission reversed the Arbitrator's decision and denied benefits to the Petitioner. The Commission found the Petitioner failed to prove an employer-employee relationship with Respondent. The Commission compared the pilot Petitioner to the volunteer teacher petitioner in *Board of Education v. Industrial Commission [cite],* where the Supreme Court found that a college student volunteering at a public school in order to obtain hours for her graduation requirement was not an employee. Both the Petitioner and the college student had no expectation of payment and had no expectation that the fact that the Petitioner was volunteering at the school would lead to any future gainful employment with the Respondent. The Commission found there was no consideration, payment, or other compensation in exchange for the Petitioner volunteering to fly the Respondent's plane.

Commissioner Tyrell dissented and adopted the opinion of the Arbitrator that there was an employer-employee relationship. He opined the facts distinguished the Petitioner from the claimant in *Board of Education v. Industrial Commission* as the school still employed full-time teachers, while the Respondent in the instant case did not employ full-time pilots and relied solely on volunteer pilots.

II. Arising Out of Employment

Martin v. AT&T, 28 ILWCLB 57 (Ill. W.C. Comm. 2020).

The Petitioner alleged she sustained an accident that arose out of and in the course of her employment when she tripped on the Respondent's stairwell as she was returning to work to retrieve her cell phone.

The Arbitrator initially found that the Petitioner did not sustain an accident that arose out of and in the course of her employment. The decision was affirmed by the Commission and the Circuit Court. The Appellate Court reversed the Circuit Court's order, vacated the Commission's decision, and remanded the matter back to the Commission for further consideration. The Appellate Court ruled the Petitioner's accident was in the course of her employment since the incident occurred on the employer's premises within a reasonable time before and after work. The Appellate Court then turned to whether the accident "arose out of" her employment. It analyzed the categories of risk. The Appellate Court rejected that the accident should be analyzed as a neutral risk. The Court found that the matter should be assessed as an employment related risk. The Appellate Court highlighted that the Arbitrator and Commission's decisions addressed that the stair was missing a piece of strip tread, but the Commission failed to explain the significance of the missing tread.

The case appeared before the Commission on remand from the Appellate Court to allow the Commission to determine whether the defect in the step contributed to Petitioner's fall. The Commission concluded the condition of the stair was defective and contributed to the Petitioner's accident. It further concluded the injury arose out of and in the course of the Petitioner's employment. The Petitioner's testimony indicated her boot caught on a safety strip that had rolled up. The Petitioner's supervisor testified that she did not think the stairs were defective enough to cause someone to fall. However, the supervisor did not inspect the area until after maintenance had been performed.

McArthur v. Kohl's Department Stores, 28 ILWCLB 58 (Ill. W.C. Comm. 2020).

The Petitioner worked as a sales associate in the shoe department of a department store. On the date of accident, the Petitioner was taking a break in the designated break room. She retrieved her cell phone from her purse and when sitting down in a break room chair, the chair slid out from under her causing her to land on her left side. The Petitioner testified the chair landed on her. She finished her work day and then sought treatment for her neck, back, and left side of her body.

The Arbitrator found the Petitioner did not sustain an accident that arose out of and in the course of her employment. The Arbitrator acknowledged the personal comfort doctrine and found that the Petitioner satisfied the "in the course of" prong, but found the Petitioner did not prove the incident arose out of her employment since she did not testify there was any moisture or debris around the chair and there was no evidence the chair was broken or defective. The Petitioner was also retrieving her personal cell phone from her purse to check her personal messages. The Arbitrator noted that Petitioner was not retrieving a work phone. The Arbitrator found the Petitioner misjudged the location of her seat and the chair shifted as she tried to sit on it. The Arbitrator identified additional cases in which injuries under the personal comfort doctrine were deemed compensable when the environment the employer controls or provided caused the Petitioner to be exposed to additional hazards they would not otherwise be exposed to. The Arbitrator found it significant that the act of misjudging a seat of a chair is not a unique hazard of

employment but rather a happenstance personal to the Petitioner. The Commission affirmed the Arbitrator's decision and corrected a scrivener's error.

III. Accidental Injury

Stout v. Gerresheimer Glass, 28 ILWCLB 59 (Ill. W.C. Comm. 2020).

The Petitioner was a millwright. He had been working as a millwright since 1991. He testified that his position required him to perform work above shoulder level 90% of the time. He also provided what he thought to be an accurate description of his job duties. Petitioner sustained a prior right shoulder dislocation with another employer in 1996. The prior injury required surgeries. He sustained another injury to the right shoulder with the Respondent in 2002 but did not file a claim.. Petitioner reported pain to his right shoulder on September 1, 2017 and underwent arthroscopic surgery to the right shoulder on November 16, 2017. He claimed at the time of his surgery, that he discussed his job duties with his physician. Further, the Petitioner believed that his right shoulder condition was related to his duties at work. The Petitioner texted HR and stated that he wanted to file a claim on November 16, 2017. He alleged that the injury arose out of the repetitive use of his shoulder. The Petitioner later returned to work and eventually underwent a total shoulder replacement in February 2018. The Petitioner returned to work without restrictions in October 2018.

The Arbitrator found that Petitioner did not meet his burden of proving accident and causation. The Arbitrator noted the job description for the Petitioner did not include repetitive activities and did not specify that the Petitioner lifted on a continued or repetitive basis. He noted the Petitioner's treating physician did not opine there was any correlation between the Petitioner's job duties and his shoulder condition. Further, the physician attested in the Petitioner's disability paperwork that the shoulder condition was not related to work. The Arbitrator found the opinions of the IME physician more persuasive than that of the treating physician.

The Commission reversed the Arbitrator's decision and found the Petitioner sustained a compensable accident and found causal connection between the accident and his condition of ill-being. The Commission found the Petitioner established that most of his work was performed above the shoulder level for many years and that the IME physician relied on an inaccurate job description in forming his opinions. The Commission found the opinions of the treating physician was more credible and that the treating physician had a more complete understanding of the Petitioner's job duties. The Commission agreed with the treating physician that the Petitioner's repetitive work placed continuous stress on his shoulder, which accelerated his arthritis and the need for a shoulder replacement.

IV. Causal Relationship

Burkey v. Carle Foundation Hospital, 28 ILWCLB 60 (Ill. W.C. Comm. 2020).

The Petitioner worked as a floor maintenance man. He testified that on February 13, 2017, his left ankle caught on the elevator floor and he fell onto his knees. He was later diagnosed with tendinosis and a longitudinal tear of the left ankle and foot. The Petitioner was also diagnosed with congenital conditions to the left ankle. He was not aware of the congenital condition. His treating physician recommended the Petitioner undergo left foot and ankle procedures to repair the tendon and to correct the congenital deformities. The Respondent's IME diagnosed the Petitioner with pre-existing conditions and indicated such were not related to his work injury.

The Arbitrator found the Petitioner's condition of ill-being was not causally related to the work accident. The Arbitrator found the IME physician's causation opinion was more persuasive than the treating physician. The Commission reversed the Arbitrator's decision and remanded the case for further proceedings regarding temporary total compensation or permanent disability. The Commission opined the Petitioner's pre-existing conditions were asymptomatic prior to his accident and the congenital deformities needed to be corrected along with the Petitioner's tendon repair to increase the likelihood that a tendon repair would not fail. The Commission relied on the opinions of the treating physician.

Wyse v. Lakeshore Recycling Systems, 28 ILWCLB 61 (Ill. W.C. Comm. 2019).

The Petitioner was employed as a roll-off truck driver for Respondent for 13 years. On June 8, 2016, the Petitioner twisted his body while pulling a tarp over a metal stud and fell to the ground landing on concrete and grass. He reported a popping in his right knee and was subsequently diagnosed with a meniscal tear. He also had preexisting issues and treatment for right knee arthritis. The Petitioner underwent right knee arthroscopy and partial medial meniscectomy. Petitioner's treating physician recommended that Petitioner undergo a right knee replacement.

The Arbitrator found that Petitioner sustained an accidental injury arising out of and in the course of his employment and that his right knee condition was causally connected to the work-related accident. The Commission affirmed the Arbitrator's decision. The Commission found the Petitioner's treating physician had ample opportunities to examine the Petitioner and evaluate his condition. However, the IME physician only examined the Petitioner once and was unaware of the twisting mechanism of accident and the surface areas involved in the accident. The Commission opined the treating physician had more complete information relating to the Petitioner's mechanism of injury and ongoing condition than the IME physician. The Commission affirmed the Arbitrator's award of future treatment for a total knee replacement. The Commission also found the Petitioner credible and that his off-work activities (participating in a 5K, deep see fishing, falling from a bicycle, hiking, and walking) did not affect his credibility or causal connection.

V. **Permanent Disability Benefits**

Bukala v. City of Joliet, 28 ILWCLB 62 (Ill. W.C. Comm. 2020).

The Petitioner was a patrol officer for the City of Joliet. He sustained a fracture to the left distal tibia during a fall he sustained while chasing a suspect on August 18, 2016. He underwent an open reduction and internal fixation of the distal fibular fracture.

The Arbitrator found that Petitioner was permanently and partially disabled to the extent of 32.5% loss of use of the left leg. The Commission modified the Petitioner's award. The Commission cited the Illinois Supreme Court in *Eagle Discount Supermarket v. Industrial Comm.*, where the Court determined a distal fibula fracture is classified as a part of the foot when determining permanency. The Commission found the Petitioner was permanently and partially disabled to the extent of 25% loss of use of the left foot. The Commission relied on the testimony of the Petitioner that he had not sought treatment for two years prior to trial and he was capable of working full duty without difficulty.

Hawkins v. Village of Beecher, 28 ILWCLB 63 (Ill. W.C. Comm. 2020).

Petitioner was employed as a part-time police officer with the Respondent. She sustained injuries on February 22, 2014 to her left shoulder, back, and right hip while restraining an individual. Petitioner underwent conservative treatment, including physical therapy and injections. Petitioner was later able to return to work as a police officer on a full-time basis.

The Arbitrator found that the Petitioner was permanently and partially disabled to the extent of 15% loss of use of the right leg and 7.5% loss of use of the person as a whole. The Commission modified the Arbitrator's permanency award of 7.5% loss of use of the person as a whole and found the Petitioner entitled to 3% loss of use of the person as a whole. The Commission adopted the Arbitrator's Section 8.1(b) analysis, but found the evidence supported a reduction in permanency due to the minor nature of the injury. The Commission relied on the fact that Petitioner was diagnosed with a low back and right shoulder strain.

VI. Medical & Rehabilitation Benefits

Adams v. City of Carbondale, 28 ILWCLB 64 (Ill. W.C. Comm. 2019).

The Petitioner was a solid waste collector for the City of Carbondale. She sustained an injury to her right shoulder on April 14, 2014 from repetitive lifting. She was diagnosed with a rotator cuff tear and underwent two arthroscopic procedures. The case had previously been tried pursuant to a Section19(b) petition on September 17, 2015. The Arbitrator found that Petitioner sustained a compensable accident and that the current condition of ill-being was causally connected to the work-related accident. The Arbitrator awarded medical expenses and TTD benefits.

The Petitioner subsequently underwent an FCE placing her at the medium physical demand level and she was placed at MMI on November 18, 2015. The Respondent could not accommodate her restrictions but did not terminate the Petitioner from employment. The Petitioner retained vocational services in December 2016. She also underwent a second arthroscopic surgery for her

shoulder in March 2017. The Respondent offered the Petitioner employment as a utility maintenance worker in December 2017. The Respondent disputed payment of vocational services given the Respondent offered a temporary position, which later became a permanent position to the Petitioner. On another 19(b), the Arbitrator found that the petitioner proved both a work accident and causal connection between her work accident and her right shoulder condition. The Arbitrator awarded TTD and reasonable and related medical services. In the petitioner's bill exhibits included a bill for vocational rehabilitation. The Respondent appeared indicated that the decision of the Arbitrator should not have awarded the vocational rehabilitation bill and two other medical charges.

The Commission modified the decision of the Arbitrator. The issues on Review, included the payment of two medical bills, a healthcare visit from May 11, 20015 and a bill for emergency department services from May 12, 2015, which the records showed were related to abdominal pain. The Review also included a bill for vocational rehabilitation services. The Commission found the Petitioner failed to prove that the medical treatment from May 11, 2015 and May 12, 2015 was casually related to her April 12, 2014 accident. Regarding vocational rehabilitation, the Commission found no precedent to preclude an award of vocational rehabilitation services. The Commission found that the circumstances were appropriate for the Petitioner to utilize vocational rehabilitation.

VII. Evidence

Eppenstein v. Langlois Roofing, 28 ILWCLB 65 (Ill. W.C. Comm. 2019).

The Petitioner was a journeyman roofer. He alleged that he sustained an injury on August 8, 2017. Petitioner was moving insulation materials and rolls weighing over 200 pounds when he slipped and fell. The instant case was consolidated with another case arising out of an accident which Petitioner sustained while working for another respondent, All Sealants.

The Petitioner moved to admit a Fee Schedule Analysis. Respondent objected to the admission of the Fee Schedule Analysis based on hearsay. It also reserved any additional objection to the admission of the Analysis. The Petitioner cited no exceptions to the hearsay rule or present a witness to lay the proper foundation for the admission of the Analysis. The Arbitrator admitted the Petitioner's Fee Schedule Analysis over Respondent's objection. The Arbitrator allowed both Respondents until July 5, 2019 to submit their own fee schedule assessments. Only All Sealants provided a fee schedule assessment.

The Commission found the Petitioner's Fee Schedule Analysis should not have been admitted into evidence. The Commission noted that the document should have been excluded based on hearsay and lack of foundation. The Commission noted that the person who prepared the Fee Schedule Analysis was not present at the hearing to testify, the Respondent had no opportunity for cross examination regarding the qualifications of the preparer, the method of calculation, or to verify the accuracy of the document. The Commission modified the Decision of the Arbitrator to exclude

the Fee Schedule Analysis and struck any references made by the Arbitrator to it. Excluding the Fee Schedule Analysis resulted in the Commission vacating the $121,243.06 award to the Petitioner as compensation for medical expenses. The Commission awarded medical bills pursuant to the statutory Fee Schedule.

VIII. Insurance Practice & Procedures

IWCC Insurance Compliance Dept. v. Collier, 28 ILWCLB 66 (Ill. W.C. Comm. 2019).

The Petitioner, Illinois Workers' Compensation Commission and Insurance Compliance Department, brought an action against the Respondent alleging violation of Section 4(a) of the Illinois Workers' Compensation Act. They alleged that Respondent failed to carry workers' compensation insurance. A hearing regarding the insurance compliance case was held on November 14, 2016 and no one appeared on behalf of the Respondent.

The Commission found that the Respondent was knowingly and willfully in noncompliance with Section 4 of the Act from at least July 20, 2005 to November 20, 2011 (2,325 days) and owed a fine of $500.00 per day, or $1,162,500.00.