

WCLA NEWSLETTER

CASE LAW SUMMARIES APRIL 2020

I. Status of Employment

Qualizza v. Tile Roofs Inc., 28 ILWCLB 34 (Ill. W.C. Comm. 2020).

The Petitioner worked for the Respondent as a roofer. Before working for the Respondent, he worked at Mortenson Roofing, which was owned by the same woman who owned Respondent's company. The companies operated out of the same building and the Petitioner was the superintendent / foreman of the roofing projects. Mortenson Roofing paid for the Petitioner's work-related travel expenses, supplies, provided him a company truck. Most of the crew he managed were employees of Mortenson Roofing. After the Petitioner was semi-retired, he opened a business at the request of Mortenson Roofing. Mortenson Roofing continued to provide work supplies, and they were the Petitioner's only client. The only difference was that the Petitioner was paid through the company instead of personally. The Petitioner then fell from some scaffolding and injured himself while working. He did not carry workers' compensation insurance for his newly established business.

The Arbitrator found that no employer / employee relationship existed between the Petitioner and the Respondent and denied the claim. On appeal, the Commission reversed the decision of the Arbitrator and found that the substance of the relationship between the Petitioner and the Respondent stayed the same after he opened up his own company. The Respondent still provided supplies, employees, and was the Petitioner's only client. As such, the Petitioner was a *de facto* employee and established an employee / employer relationship.

II. Accidental Injury

Nickens v. Continental Tire of North America, 28 ILWCLB 45 (Ill. W.C. Comm. 2019).

The Petitioner worked for the Respondent for 37 years and testified his job required repetitive and forceful use of his hands including gripping tools, lifting weights, stripping wires, and twisting caps. The Petitioner also performed computer use. He eventually developed left hand carpal tunnel and cubital tunnel syndrome. Both the Petitioner's treating physicians and the IME doctor agreed with his diagnosis and causally related the Petitioner's condition to work if his job duties involved repetitive use of power drills and forceful gripping of tools. The Petitioner's testimony of his job duties was corroborated by his supervisor.

The Arbitrator denied benefits finding that the Petitioner did not sustain repetitive trauma injuries and failed to establish his condition was work related. The Commission reversed based on both doctors' opinions, which supported by the Petitioner's and the supervisor's testimony that he had job duties with repetitive use of his hands and forceful gripping and twisting, which would be a contributing factor to his diagnosis. The Commission found that the treating physician's explanation of cumulative micro-traumas the Petitioner sustained that resulted in his eventual diagnosis of carpal tunnel syndrome was compensable in similar cases and justified awarding benefits here.

Hodge v. Illinois, State of / Dept. of Corrections, 28 ILWCLB 46 (Ill. W.C. Comm. 2019).

The Petitioner worked in several positions for the Respondent. He initially worked as a correctional officer before a senior public service administrative warden. The latter position required Petitioner to conduct inspections, write up reports, keep logs, and type up reports. While working as a public service administrative warden, the Petitioner was diagnosed with arthritis in both hands. He was subsequently transferred to an internal security investigator position, which required seven to eight hours of typing per day and shooting firearms five times per year. While shooting in June of 2014, the Petitioner noticed pain in his hands.

The Arbitrator denied benefits finding that the Petitioner failed to establish he sustained an accidental injury arising out of his employment and failed to establish that his current condition of ill-being was causally connected to the work activities. The Commission reversed the decision of the Arbitrator and found that the Petitioner established that he sustained an accident at work based in part on repetitive trauma. The Petitioner provided un rebutted testimony that his job duties included more hand related tasks, including shooting firearms and his carpal tunnel syndrome developed only after starting this new position. The Commission stated that the records proved that the Petitioner developed carpal tunnel syndrome and the fact that he had underlying osteoarthritis did not prevent the Commission from finding that the Petitioner established that he sustained work related carpal tunnel syndrome.

III. Arising Out of Employment

Ludtke v. DeKalb, County of, 28 ILWCLB 35 (Ill. W.C. Comm. 2020).

The Petitioner was a maintenance worker who was assigned to the courthouse. On the day of the injury, he brought coffee and lunch to work. He temporarily parked in another employee's designated spot in order to drop off his coffee and lunch in the courthouse. He was then planning on moving his car to the main parking area. After dropping off his food and walking back to his car, the Petitioner slipped and fell in the parking lot. The Petitioner testified that he could have parked elsewhere and was not required to eat lunch in the courthouse.

The Arbitrator denied benefits based on accident. The Arbitrator found that falling on ice was not a risk peculiar to the Petitioner's employment and he was not exposed to a risk greater than the general public. The Commission reversed and found that because the lot was under the exclusive control of the Respondent, the hazardous condition on its premises was a risk incidental to the Petitioner's employment and he did not need to prove he was exposed to a risk greater than the general public. The Commission relied on the Appellate Court's explanation that a parking lot is considered to be on the employer's premise when it is controlled by Respondent and provides access for its employees. The Commission further found that the Petitioner's temporary use of the nearest parking spot was reasonable and foreseeable.

McAlexander v. Mt. Vernon School District No. 80, 28 ILWCLB 36 (Ill. W.C. Comm. 2020).

The Petitioner was an aide at a middle school. She was hurrying to class and tripped and fell on the strip that separated the tile from carpet. The evidence at trial established that the ledge separating the surfaces was higher than the tile. The Arbitrator found that because the strip

was higher and the hallway was not open to the general public, the Petitioner sustained an accident that arose out of and in the course and scope of her employment. The Commission affirmed the Arbitrator's finding that the Petitioner was engaged in a work-related task at the time of her fall and the strip between the surfaces was a risk incidental to her employment that caused her to fall.

Baldock v. Vandalia Correctional Center, 28 ILWCLB 37 (Ill. W.C. Comm. 2019).

The Petitioner was a lieutenant at a correctional facility where he was required to perform routine, daily inspections of the premises for safety. One day he was inspecting the gym and while doing so, his knee buckled and he felt pain in his knee. He testified that he stepped to the right to avoid hitting a boxing bag, causing his knee to buckle.

The Arbitrator found that the only evidence of the Petitioner having to sidestep the bag was on the Application for Adjustment of Claim and there was no evidence indicating there was any defect in the ground. Based on this finding, the Arbitrator denied benefits and found that the Petitioner was subject to a personal risk that did not arise out of his employment. The Commission affirmed the Arbitrator's denial of benefits.

IV. Course of Employment

Anderson v. Homewood Flossmoor High School, 28 ILWCLB 38 (Ill. W.C. Comm. 2019).

The Petitioner was an athletic director at a high school. On the night of the accident, he was required to be at school for orientation. At 4:30pm, he lifted weights and told a co-worker he was going to run on the treadmill. Shortly thereafter, he was found unresponsive on the treadmill and pronounced dead at the scene.

The Arbitrator denied benefits and found that the Petitioner's exercise on the treadmill was a personal risk, not associated with his work. The Petitioner was not required to exercise as part of his employment and therefore it was voluntary recreation under Section 11 of the Act. The Commission affirmed the Arbitrator's denial of benefits and found that "a program" under Section 11 is not narrowly interpreted and expressly includes athletics such as exercise. The Commission categorized the Petitioner's activities on the treadmill as "exercise."

V. Calculation of Preinjury Wages

Fedorov v. Highland Park, Park District, 28 ILWCLB 47 (Ill. W.C. Comm. 2020).

The Petitioner worked part time for the Respondent as an ice-skating instructor. He also owned his own business and he taught ice skating lessons. The Petitioner was the sole shareholder of his private business and claimed the net profits as income, but did not pay wages to anyone, including himself. The Respondent knew that the Petitioner owned and operated the private business. The Petitioner sustained an injury to his knee while teaching lessons to children. The Petitioner was performing work for Respondent at the time of the accident.

The Arbitrator awarded benefits. However, the Arbitrator did not include the wages from his concurrent employment from the Petitioner's private business in calculating the average weekly wage. The Arbitrator relied on the Illinois Appellate Court's rulings that held that if the

self-employment wages were not paid to the Petitioner as wages from an employer, it could not be included in the average weekly wage calculations. The Commission amended the period of benefits, but otherwise affirmed and adopted the Arbitrator's ruling regarding exclusion of the concurrent employment wages.

VI. Permanent Disability Benefits

Perry v. Speedway Super America, 28 ILWCLB 39 (Ill. W.C. Comm. 2019).

The Petitioner was a gas station cashier who sustained a work-related injury that required several neck and back surgeries. Following her treatment, she underwent an FCE that stated she could perform activities at the sedentary physical demand level with no lifting over 10 lbs. The Arbitrator found that the Petitioner was permanently and totally disabled. The Commission modified the decision of the Arbitrator. The Commission found that the Petitioner failed to establish that she was permanently and totally disabled to the extent of 65% loss of use of the person as a whole. The Circuit Court remanded the matter back to the Commission to make a credibility determination in connection with the medical opinions offered at hearing. On remand, the Commission reaffirmed its prior decision and found that the Petitioner was not permanently and totally disabled. This decision was based on her treating physician's opinion that she was not totally disabled and her submaximal effort on the FCE.

White v. Rich Township High School No. 227, 28 ILWCLB 48 (Ill. W.C. Comm. 2019).

The Petitioner was a part time high school police liaison officer with the Respondent and a full-time police officer with another employer. While working for the Respondent, the Petitioner sustained injuries to his neck and shoulder resulting in permanent sedentary work restrictions. Both the treating physician and the IME examiner agreed that the Petitioner could not return to police work. The Petitioner testified that he did not look for work following his work accident or participate in vocational rehabilitation. The Respondent offered him a position monitoring surveillance cameras within his restrictions, which the Petitioner declined. A labor market survey was prepared. The labor market survey set forth that there was gainful employment available for the Petitioner. The Petitioner would earn much less than he previously earned.

The Arbitrator found that the Petitioner was not entitled to receive wage differential benefits and instead found that Petitioner was permanently and partially disabled to the extent of 50% loss of use of a person under 8(d)2. The Commission affirmed the denial of wage differential benefits and reasoned the Arbitrator's finding that Petitioner sustained a loss of occupation. The Commission explained that because the Petitioner did not engage in a job each, he did not prove his impairment of earning capacity under 8(d)1.

Alvarez v. Chicago, City of / Dept. of Water Management, 28 ILWCLB 49 (Ill. W.C. Comm. 2019).

The Petitioner was a truck driver for the Respondent. He sustained a back injury that required a lumbar fusion resulting in permanent light duty work restrictions. His job as a truck driver required the medium physical demand level. The Petitioner testified he applied for 1,500 jobs without success. The Respondent did not offer him a position within his restrictions. The Respondent introduced a labor market survey that stated employment was available but required computer skills which the Petitioner did not have. The Petitioner's labor market survey stated that no stable labor market existed.

The Arbitrator found that the Petitioner was permanently and totally disabled. The Commission affirmed the decisions of the Arbitrator and found that the Petitioner was an odd-lot permanent total. The Commission reasoned that the Petitioner fulfilled his burden of looking for work and completed a diligent and unsuccessful job search. The Commission further found that the Respondent did not fulfill its burden of finding suitable employment for the Petitioner. As such, it found that the Petitioner to be permanently and totally disabled under the odd lot category.

Hondros v. Illinois, State of / Dept. of Corrections, 28 ILWCLB 50 (Ill. W.C. Comm. 2020).

The Petitioner was a 77-year-old prison maintenance worker who injured his hand at work. Following treatment for the work injury, the Petitioner received permanent restrictions of no lifting over 10 pounds, no repetitive activity, no climbing, and no significant use of tools or equipment. The Respondent did not accommodate the Petitioner's restrictions during or after the date he reached his MMI on July 30, 2015. A Transferable Skills Analysis was completed and set forth that the likelihood of the Petitioner finding alternative gainful employment was poor.

The Arbitrator awarded temporary total disability benefits through July 30, 2015, maintenance benefits from July 31, 2015 through March 12, 2019, and permanent total disability benefits commencing March 13, 2019. The Commission held that the maintenance benefits were unnecessary as he was permanently and totally disabled as of July 31, 2015 when he reached MMI. After the Petitioner was placed at MMI from his treating physician, the employer confirmed in writing that it could not accommodate the Petitioner's restrictions and the vocational counselor opined he would likely not find alternative employment. Thus, the Commission vacated the maintenance benefits and awarded PTD benefits commencing July 31, 2015.

Alvarez v. 2542 Inc. d/b/a Select Ultra Lounge, 28 ILWCLB 51 (Ill. W.C. Comm. 2019).

The Petitioner was a cocktail server for the Respondent. While working, her supervisor pushed her causing her to fall and cut her arm on a box. The Petitioner received nine stitches for the laceration and eventually developed a scar. At trial, the Arbitrator noted a three to four-inch scar on her arm. The Arbitrator found that the Petitioner was disfigured to the extent of 25 weeks of disfigurement. On review, the Commission noted the scar one to one and a half inches in length. The Petitioner acknowledged it had shrunk since trial. The Commission reduced the award to 15 weeks of disfigurement.

VII. Medical & Rehabilitation Benefits

Mosley v. Illinois, State of / Shapiro Developmental Center, 28 ILWCLB 52 (Ill. W.C. Comm. 2019).

The Petitioner was a mental health technician who sustained an injury to her neck and back while transferring a disabled patient from the bed to a wheelchair during a fire alarm. She underwent surgery and was released with permanent restrictions following an FCE. The Respondent was unable to accommodate the Petitioner's restrictions and she began a vocational rehabilitation program. The vocational counselor recommended the Petitioner obtain her GED and complete a computer training program. The Petitioner completed the recommendations of the vocational counselor. The Petitioner was receiving maintenance benefits during this time. However, the Petitioner ultimately failed the computer course because she failed to sit for the final examination. The record showed that the Petitioner had difficulty finding employment and unreliable transportation and family hospitalizations hindered her ability to find work.

At the trial, the Arbitrator awarded maintenance benefits finding that she fully participated in her vocational rehabilitation process throughout five years of vocational rehabilitation programs. On review, the Commission held that the evidence proved the Petitioner was non-compliant with vocational rehabilitation and she did not conduct a valid job search. Based on this, it vacated the award of maintenance benefits from January 27, 2015 through February 15, 2016 on the basis that she did not undergo a valid job search.

VIII. Authority of Commission

Centeno v. (Minute Men of Illinois), IWCC, 28 ILWCLB 55 (Ill. App. Ct., 2nd 2020).

The Petitioner sought benefits for a work injury which occurred on October 7, 2010. The Arbitrator awarded TTD and medical benefits after a 19(b) hearing. The Commission reduced the medical benefits awarded, but otherwise affirmed the decision of the Arbitrator. The case was appealed to the Circuit Court. The Circuit Court increased the weekly TTD rate, but otherwise affirmed the Commission's decision. The Illinois Appellate Court affirmed.

While this matter was pending in the Illinois Appellate Court, the Petitioner filed another 19(b) motion. During this second hearing, the Petitioner gave testimony suggesting he was employed under two different identities. The Petitioner's attorney asked for a bifurcation at that time on the basis of a breakdown in the attorney client relationship. The Arbitrator granted the request for the bifurcation. When the hearing began again, the Petitioner's attorney sought to withdraw the 19(b) motion and end the hearing. The Arbitrator denied this request and also denied benefits. The Commission affirmed and the Circuit Court affirmed the Commission's decision.

The Appellate Court affirmed the Commission's ruling finding it was not against the manifest weight of the evidence. The Illinois Appellate Court held that the Petitioner did not have an absolute right to withdraw a 19(b) motion after the hearing began and testimony was given. It reasoned that the issue was forfeited because it was not addressed in the Petitioner's statement of exceptions and supporting brief to the Commission and it found no merit in this argument. The Court also found no error was committed by the Commission in relying on a

transcript from another case in reaching its decision. Lastly, the Court found no error in the direction to obtain enforcement of unpaid benefits at the Circuit Court.

Restivo v. Mach Mining LLC, 28 ILWCLB 40 (Ill. W.C. Comm. 2020).

The Petitioner filed an Application for Adjustment of Claim alleging he contracted an occupational disease while working. The Petitioner died during the pendency of the claim. The Petitioner's widow was substituted as the Petitioner. The Arbitrator found that the Petitioner did not prove that he sustained a compensable injury. The Commission affirmed the Arbitrator's denial of benefits. The Commission separately explained that the widow was properly substituted in as the Petitioner and she did not need to take any further steps to pursue the claim. The majority of the Commission explained that the Act, Commission Rules, and case law do not require a separate probate or Circuit Court ruling be made before someone can be properly substituted in on a workers' compensation claim. However, the new taker does need to qualify as a dependent as defined by the Act.

IX. Benefit Payment Procedures

Hudson v. Illinois, State of / Dept. of Corrections, 28 ILWCLB 41 (Ill. W.C. Comm. 2019).

The Petitioner was a nurse at a corrections facility. She sustained an injury to her ankle after stepping in a pothole on the Respondent's premises. While treating for this injury, the Petitioner passed away from unrelated causes. She had not reached MMI from the work injury treatment. The Arbitrator declined to award permanent disability benefits because the Petitioner had not reached MMI. The Commission affirmed and adopted the Arbitrator's ruling. The Commission explained that the administrator of the estate may recover benefits accrued until the date of death. An estate's recovery is limited to benefits due from the date of MMI though the date of death.

Frasco v. Cook County Clerk of Circuit Court, 28 ILWCLB 53 (Ill. W.C. Comm. 2019).

The Petitioner was a court reporter who sustained an injury to her knee after her shoe became caught in a hole in the ground causing her to fall. She received treatment for her back treatment and underwent a total knee replacement as a result of her work injury. Following her treatment, the IME examiner recommended that the Petitioner required permanent sedentary work restrictions. The Petitioner required continued narcotic use and accommodations to and from her desk with limited walking. The Respondent instructed the Petitioner to return to work in a light duty capacity. The Petitioner presented to work and waited for reinstatement paperwork to be completed. However, the Petitioner left due to pain. The Respondent terminated TTD benefits after this date. At trial, the supervisor testified the Petitioner could not return to work if on narcotics.

The Arbitrator awarded medical, TTD benefits, and penalties under sections 19(l), 19(k), and attorney's fees under section 16. The Arbitrator found that the light duty position was not a valid accommodation and did not meet her restrictions. The Commission also found that the light duty assignment was not valid since it did not accommodate all of the Petitioner's restrictions and affirmed the penalties against the Respondent. Further, even though the

Respondent's restrictions of limited walking and continued narcotic use were not accommodated, the Petitioner still attempted to return but the Respondent did not complete her reinstatement documents.

Reagan v. Tiffany & Co., 28 ILWCLB 54 (Ill. W.C. Comm. 2020).

The Petitioner was a sales associate clerk who slipped and fell at work injuring her right hip. While receiving medical treatment, she developed pain in her left hip from overcompensation. The Respondent disputed payment for the left hip condition. The Petitioner testified that the TPD benefits she did receive from the Respondent were irregular.

The Arbitrator awarded TTD benefits, TPD benefits, medical, prospective medical care, and penalties and attorney's fees under sections 19(k), 19(l), and 16. On review, the Commission agreed with the Arbitrator's findings that the Respondent failed to present any evidence to rebut the presumption of unreasonable delay, the Respondent failed to provide a response within 14 days of Petitioner's demand for payment, and Respondent did not provide a written denial of benefits. However, the Commission disagreed with the penalties under sections 19(k) and attorney's fees under section 16 as it did not find that the Respondent's conduct was vexatious. It was persuaded by the Respondent's argument that calculating benefits was difficult with the Petitioner's irregular and fluctuating hours. Further, the Commission confirmed that the benefits were denied based on the report of the IME examiner, who did not find causation to the bilateral hip condition. As such, the Commission affirmed the \$10,000.00 in penalties under section 19(l) but vacated the penalties under sections 19(k) and 16.

X. Claim Filing Procedures

Hernandez v. Accurate Personnel Services, 28 ILWCLB 42 (Ill. W.C. Comm. 2020).

The Petitioner filed an Application for Adjustment of Claim in March 2015. In August 2015, the Arbitrator dismissed the claim for want of prosecution. An E-Notice of Dismissal was generated from the Commission three days later. The Petitioner filed a Petition to Reinstate on November 20, 2018. The Petitioner argued that the claim was in settlement negotiations and that he did not receive the E-Notice of Dismissal. He stated that he only learned that the case was dismissed after trying to obtain a hearing date. The Petitioner stated on the record that his firm has an office email to receive Commission Notices and that he did not receive the Dismissal. The Respondent argued that the Reinstatement was not filed within 60 days of the dismissal and that the Arbitrator did not have jurisdiction to hear the matter. The Arbitrator granted the Petitioner's reinstatement and approved a settlement contract between the parties.

The Commission affirmed the Arbitrator's holding. The Commission explained that the E-Notice does not contain the email addresses of recipients, so there is no evidence of where the E-Notification was sent. The Commission found that the Petitioner's statements on the record were credible and were enough to rebut the E-Notice presumption. The Commission also found that the claim was being diligently pursued as was evidenced by the fact that the Petitioner's attorney requested and tried to obtain a hearing date.

XI. State Court Authority & Procedures

Anderson v. Greif Packaging LLC, 28 ILWCLB 43 (N.D. Ill. 2020).

A Plaintiff filed a claim in Illinois state court alleging the Defendant wrongfully terminated him in retaliation for filing a workers' compensation claim. The Defendant removed the claim to U.S. District Court. However, the Plaintiff's motion to remand to state court was granted because under *Craig v. Ford Motor Co.*, the Court established actions alleging retaliatory conduct under 4(h) of the Act cannot be removed to federal court.

XII. Insurance Practices & Procedures

IWCC v. Koev, 28 ILWCLB 44 (Ill. W.C. Comm. 2020).

An employee of the Respondent was injured at work on July 16, 2012. The Respondent did not carry workers' compensation insurance as required by the law. The Injured Workers' Benefit Fund paid benefits in the amount of \$24,766.57 to the injured worker. The Illinois Workers' Compensation Commission then brought an action against the Respondent for failing to carry workers' compensation insurance. The Commission found that the Respondent had not carried the mandatory insurance for 898 days and he was not made aware of this action in the past as there had only been one claim filed at the IWCC. The Respondent did not appear for the hearing or show any willingness to cooperate or settle. As such, the Commission assessed a penalty of \$400.00 per day for 898 days (\$359,200.00) plus \$24,766.57, for a total of \$383,966.57.