Illinois Official Reports

Appellate Court

***Bagwell v. Illinois Workers' Compensation Comm'n*, 2017 IL App (4th) 160407WC**

Appellate Court Caption	DARRELL BAGWELL, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Nestle USA, Inc., Appellee).
District & No.	Fourth District, Workers' Compensation Commission Division Docket Nos. 4-16-0407WC, 4-16-0408WC cons.
Filed	September 8, 2017
Decision Under Review	Appeal from the Circuit Court of McLean County, No. 15-MR-401; the Hon. Paul G. Lawrence, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Steven R. Williams, of Williams & Swee, Ltd., of Bloomington, for appellant. Shawn R. Biery, of Keefe, Campbell, Biery & Associates, of Chicago, for appellee.
Panel	PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion. Justices Hoffman, Hudson, Harris, and Moore concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Darrell Bagwell, filed applications for adjustment of claims under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for injuries he sustained on June 2, 2008, and March 23, 2009, while performing his job duties for Nestle USA, Inc. (employer). The claims were consolidated for arbitration. Following a hearing, the arbitrator found that the claimant had sustained work-related accidents on June 2, 2008, and March 23, 2009, and that the claimant's current conditions of ill-being were causally related to those work accidents. The arbitrator awarded the claimant temporary total disability (TTD) benefits, temporary partial disability (TPD) benefits, and medical expenses but declined the claimant's claims for penalties and attorney fees.

¶ 2 The arbitrator also awarded the claimant wage differential benefits under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2008)) but rejected the claimant's argument as to how such benefits should be calculated. While he was working for the employer, the claimant also served as the pastor of a church. At the time of the claimant's work accidents, the employer was aware that the claimant served as a pastor. Relying upon section 10 of the Act (820 ILCS 305/10 (West 2008)), the claimant argued that his salary as a pastor should be included in calculating his average weekly wage for purposes of determining his entitlement to wage differential benefits. The arbitrator rejected this argument. The arbitrator found that, although it was undisputed that the employer was aware that the claimant served as a pastor, the claimant had failed to prove that the employer knew he was being compensated for that position at the time of the accidents. Accordingly, for purposes of wage differential benefits, the arbitrator calculated the claimant's average weekly wage based solely upon what the claimant would have earned from his employment with the employer, without including his earnings as a pastor.

¶ 3 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission vacated the arbitrator's award of medical expenses but otherwise affirmed and adopted the arbitrator's decision. Regarding the arbitrator's average weekly wage calculation pursuant to section 10 of the Act, the Commission found that the arbitrator had "properly excluded concurrent employment income from the *** calculation because while certain employees of the employer did know of [the claimant's] religious activities, there was no credible proof that the employer knew during the relevant pre-accident period that the claimant's activities actually constituted gainful employment, rather than volunteering or similar community activities."

¶ 4 The claimant then sought judicial review of the Commission's decision before the circuit court of McLean County, which affirmed the Commission's decision.

¶ 5 This appeal followed.

¶ 6 BACKGROUND

¶ 7 The claimant worked in the employer's candy factory for 27 years. On June 2, 2008, the claimant injured his back at work while lifting a box of taffy from the floor. An MRI revealed a disc herniation at L4-L5. On September 2, 2008, the claimant had surgery to repair the disc. Thereafter, the claimant continued to experience low back pain and back and leg pain associated with the L5 nerve root.

¶ 8 On March 23, 20009, shortly after the claimant returned to work, he reinjured his lower back while lifting and pushing heavy trays of candy down an assembly line. He was diagnosed with a recurrent herniation at L4-L5 and underwent another back surgery on April 15, 2009. His symptoms continued to worsen after the second surgery. In February of 2010, Dr. Keith Kattner, the claimant's neurosurgeon, diagnosed him with battered nerve syndrome and recurrent disc herniation and opined that the claimant was limited to a sedentary lifestyle and was no longer employable in his prior factory position. Dr. Kattner also opined that the claimant's 2008 work accident was causally related to his current conditions of ill-being and his need for lower back surgery.

¶ 9 While he was working for the employer, the claimant also served as the pastor of the Mt. Zion Missionary Baptist Church in Galesburg, Illinois (Mt. Zion). During the arbitration hearing, the claimant testified that he had been Mt. Zion's pastor for 16 years. He was serving as Mt. Zion's pastor at the time of the work accidents at issue, and he was still working in that capacity at the time of arbitration. Mt. Zion had 100 to 150 congregants. The claimant worked in the church on Sundays from 9:45 a.m. to 2:00 p.m., and he conducted Bible study at the church on Wednesday evenings from 7:00 p.m. to 8:00 p.m. The church paid the claimant $600 per week as a housing allowance.

¶ 10 The claimant testified that the employer was aware that he was a pastor while he was working for the employer. He noted that Andy Darling, a plant manager for the employer, came to Mt. Zion to hear the claimant preach and that other members of management knew he was a minister (including Jerry Holly, who was a pastor himself). Moreover, several other members of the employer's management had attended weddings or funerals that the claimant had officiated, including Chris Wattland, the employer's human resources manager, and two of the employer's former company nurses. The claimant further testified that he officiated a wedding at the plant on one occasion in 2005 or 2006 and that, on several occasions, the employer had asked the claimant to say the Thanksgiving prayer or to pray for individuals who "were in a catastrophe." In addition, prior to his first work accident, the claimant had filed a religious discrimination charge against the employer with the Illinois Department of Human Rights (IDHR) and the Equal Employment Opportunity Commission (EEOC), which put the employer on notice that the claimant worked as a minister at a church where he performed services twice per week.[1]

¶ 11 However, the claimant testified that the employer was not aware that Mt. Zion paid the claimant for his services as pastor. When asked by his attorney whether his supervisors and employers at the employer knew that he was being paid for his job as a minister, the claimant responded:

> "No, they didn't know I was being paid, because my religious position had nothing to do with [the employer]. After I put in my eight hours at [the employer] that was all I owed to them. I didn't owe them what else I was doing in my life. So, no, they didn't know how much money I was making."

[1]The claimant filed the IDHR and EEOC complaints after the employer had denied his request for a religious accommodation. The claimant had asked the employer to accommodate his religious beliefs by allowing him to withdraw his bid for the Laffy Taffy cook position and return to a first-shift position so that he would be free to teach Bible study at his church on Wednesday evenings. The parties ultimately settled the claim.

The claimant confirmed this testimony on cross-examination during the following colloquy with the employer's counsel:

> "Q. In response to a question from your attorney today, you indicated that [the employer] wouldn't have known what you were paid through the ministry because it was none of their business essentially or it was personal?
>
> A. Yes, sir, because that was a side job, that wasn't [the employer's] concern, what I made.
>
> Q. Okay. I just wanted to make sure I heard that correctly.
>
> A. Yes, yes, sir."

¶ 12 Dennis Gustafson, a certified vocational rehabilitation counselor, testified on the claimant's behalf by way of evidence deposition. Gustafson testified that the claimant had performed heavy, unskilled work for the employer and that, due to his current medical condition, the claimant was no longer able to perform such work. He noted that the claimant had some basic capabilities that would enable him to perform clerical work at an entry level. However, Gustafson opined that the claimant did not have any transferrable skills to sedentary work. Gustafson further opined that the claimant's likelihood of securing clerical work within his work restrictions was "poor" because (1) the claimant would need to sit or stand for long periods in a clerical job, which was difficult for him, (2) the claimant had no prior clerical work experience, (3) an employer would be more likely to hire someone 25 years old or younger who is starting out his or her career rather than a 57-year-old who has medical problems, and (4) there is a lot of competition for clerical jobs. Gustafson testified that, if the claimant were to secure employment, Gustafson estimated that the claimant's compensation would be between $9 and $10 per hour.

¶ 13 Daniel Minnich, a certified vocational rehabilitation counselor, testified on the employer's behalf by way of an evidence deposition. Minnich opined that the claimant was limited to sedentary work. As a result, Minnich concluded that the claimant was unable to perform many of the jobs he had previously held with the employer, and he was unable to perform the duties of a full-time clergy member (which required a higher level of physical exertion). Minnich estimated that entry-level positions for religious education would pay $9.49 per hour.

¶ 14 The parties each introduced a wage statement prepared by the employer, which indicated that, at the time of the June 2, 2008, work accident, the claimant's average weekly wage from the employer was $636.94. The parties stipulated that, pursuant to the collective bargaining agreement executed by the employer and the claimant's union, if the claimant were still working for the employer in the same position at the time of arbitration, his average weekly wage from the employer would have been $815.20.

¶ 15 The claimant also introduced a salary statement from Mt. Zion, which indicated that Mt. Zion had paid the claimant $600 per week from January 2010 through October 2013. Kim Mitchell, Mt. Zion's financial secretary, authenticated this document and testified that Mt. Zion had been paying the claimant $600 per week from June 2007 through the time of arbitration. The claimant also testified that he was earning $600 per week from Mt. Zion and that he had been earning that same amount since the year before his work accident.

¶ 16 The arbitrator found that the claimant had sustained work-related accidents on June 2, 2008, and March 23, 2009, and that the claimant's current conditions of ill-being were

causally related to those work accidents. The arbitrator awarded the claimant TTD benefits, TPD benefits, and medical expenses but declined the claimant's claims for penalties and attorney fees.

¶ 17 The arbitrator also awarded the claimant wage differential benefits under section 8(d)(1) of the Act. The arbitrator acknowledged that, "[w]hen a claimant is currently employed, all earnings must be considered when calculating [the claimant's] wages pursuant to section 10 of the Act." However, the arbitrator noted that wages the claimant earned from a second employer are included in this calculation only if such wages were "known by the first employer at the time of the accident." The arbitrator found that, in this case, the employer was aware at the time of the work accidents that the claimant was a pastor. However, after reviewing the relevant evidence, the arbitrator found that "there [did] not appear to be adequate proof that the [employer] was aware [that the claimant] was being compensated for a second job" at the time of the work accidents. In support of this conclusion, the arbitrator noted that the documentary evidence submitted by the claimant (including the claimant's written request for a religious accommodation and the discrimination charge he filed against the employer) did not indicate that the claimant was "seeking time off for a paying job." Moreover, the arbitrator noted that the claimant himself had testified that the wages he earned as a pastor were "none of [the employer's] business." Further, the arbitrator observed that, although the employer had subpoenaed Mt. Zion's tax and wage records, those records were never provided.[2]

¶ 18 For all these reasons, the arbitrator denied the claimant's claim for concurrent wages, *i.e.*, she declined to include the wages the claimant had earned as a pastor in his average weekly wage for purposes of determining the claimant's wage differential benefit. Based on the evidence presented by the parties (including the parties' stipulation that the claimant would be earning $815.20 per week if he still worked for the employer and the fact that the claimant was currently earning $600 per week as a pastor), the arbitrator found that the claimant was entitled to a wage differential benefit "representing two-thirds of the $215.20 difference in his current position as a pastor and what he could be earning at [the employer], or $143.47 per week, for the duration of his disability, commencing January 14, 2013."

¶ 19 The claimant appealed the arbitrator's decision to the Commission. The Commission vacated the arbitrator's award for medical expenses but otherwise unanimously affirmed and adopted the arbitrator's decision. The Commission found that the arbitrator had "properly excluded concurrent employment income from the Average Weekly Wage calculation" under section 10 of the Act "because while certain employees of the employer did know of [the claimant's] religious activities, there was no credible proof that the employer knew during the relevant pre-accident period that the claimant's activities actually constituted gainful employment, rather than volunteering or similar community activities."

¶ 20 The claimant then sought judicial review of the Commission's decision before the circuit court of McLean County, which affirmed the Commission's decision.

¶ 21 This appeal followed.

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[2]The arbitrator noted that the claimant testified that he did not provide these records to the employer on the advice of another attorney who was not his workers' compensation attorney.

¶ 22 ANALYSIS

¶ 23 On appeal, the claimant argues that the Commission's determination of his average weekly wage was against the manifest weight of the evidence. Specifically, the claimant argues that the Commission erred by excluding his earnings as a pastor from the average weekly wage calculation for purposes of determining his wage differential benefit, in violation of section 10 of the Act.

¶ 24 The claimant has the burden of proving, by a preponderance of the evidence, the elements of his claim, including his average weekly wage. *Sylvester v. Industrial Comm'n*, 314 Ill. App. 3d 1100, 1103 (2000); *Zanger v. Industrial Comm'n*, 306 Ill. App. 3d 887, 890 (1999). The Commission's determination of claimant's average weekly wage is a question of fact that a reviewing court will not disturb unless it is contrary to the manifest weight of the evidence. *Sylvester*, 314 Ill. App. 3d at 1103. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 437, 440 (2008).

¶ 25 The basis for computing a claimant's average weekly earnings is governed by section 10 of the Act (820 ILCS 305/10 (West 2008)). Section 10 defines the employee's average weekly wage as

> "the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52[.] *** When the employee is working concurrently with two or more employers *and the respondent employer has knowledge of such employment* prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation." (Emphasis added.) 820 ILCS 305/10 (West 2008).

¶ 26 The dispositive question in this case is whether the employer had knowledge of the claimant's "employment" as a pastor prior to the work accidents at issue, thereby triggering section 10's concurrent wage calculation requirement.

¶ 27 The Act does not define "employment." According to Oxford's online English Dictionary, "employment" means "[t]he state of having *paid work*," or, "[a] person's trade or profession." (Emphasis added.) English Oxford Living Dictionaries, https://en.oxforddictionaries.com/ definition/employment (last visited Sept. 7, 2017). Other dictionaries define employment in a similar manner. See, *e.g.*, Dictionary.com, http://www.dictionary.com/browse/employment (last visited Sept. 7, 2017) (defining "employment" as "an occupation by which a person earns a living; work; business"). Although the Act does not define "employment," it implicitly adopts this understanding of employment as paid work in other, related definitions. For example, the Act defines an "employee" as "[e]very person in the service of another under any contract *of hire*." (Emphasis added.) 820 ILCS 305/1(b)(2) (West 2008). To "hire" is to "engage the services of (a person or persons) *for wages or other payment*." (Emphasis added.) Dictionary.com, www.dictionary.com/browse/hire (last visited Sept. 7, 2017); see also Merriam-Webster, https://www.merriam-webster.com/dictionary/hire (last visited Sept. 7, 2017) (defining "hire" as "payment for labor or personal services"). We therefore hold that the common, ordinary meaning of the term "employment" as used in section 10 of the Act encompasses the concept of payment for work or services rendered.

¶ 28 Accordingly, in this case, the wages the claimant earned as a pastor must be included as wages earned from the employer pursuant to section 10 only if the employer knew that the claimant received payment for his work as a pastor. 820 ILCS 305/10 (West 2008)). The Commission found that the clamant failed to prove that the employer had such knowledge. We cannot say that this finding was against the manifest weight of the evidence. Although the employer admitted that it knew the claimant served as a pastor during the relevant period, the claimant presented no evidence suggesting that the employer knew that he was compensated for that service. To the contrary, when asked during direct examination whether his supervisors and employers knew that he was being paid for his job as a minister, the claimant responded, "[n]o, they didn't know I was being paid." He confirmed this testimony on cross-examination, when he agreed that the employer would not have known what he was paid through the ministry because it was "none of their business" or it was "personal." At a minimum, this testimony establishes that the claimant did not inform the employer that he was "employed" (*i.e.*, paid) by Mt. Zion, that he had no reason to believe that the employer knew of such employment, and that, in fact, he believed that the employer had no such knowledge.

¶ 29 Despite having given this testimony before the arbitrator, the claimant argues on appeal that the employer "should have known" that he "worked for pay" as a pastor because (1) the employer knew that the claimant worked as a minister at a "fairly large" church where he performed services twice per week, (2) on several occasions, the employer asked the claimant to say prayers at the plant, (3) several of the employer's managers had seen the claimant preach at the church or officiate at weddings and funerals, and (4) the claimant had previously filed a claim for religious discrimination against the employer. Contrary to the claimant's argument, however, none of these facts establishes that the employer knew that the claimant was compensated for his services as a minister or pastor. When the claimant said prayers at the plant, he never asked for or received compensation for that service. Neither the claimant's request for a religious accommodation nor his IDHR and EEOC complaints against the employer mentioned that the claimant received payment from Mt. Zion. Moreover, as noted above, the claimant admitted that he never told the employer that he was paid for performing religious services. It was therefore reasonable for the employer to assume that the claimant performed those services on a volunteer basis. The claimant offered no evidence to suggest otherwise. Accordingly, the Commission's calculation of the claimant's average weekly wage was not against the manifest weight of the evidence.

¶ 30 In the alternative, the claimant argues that it is irrelevant whether the employer knew that he was paid for his religious services because section 10 merely requires the employer to have knowledge of the claimant's other "employment," not the wages he earned from such employment. We do not find this argument persuasive. As noted above, the word "employment" means "paid work" or "work for hire." Thus, the legislature clearly intended section 10's concurrent wage requirements to apply only if the employer knew that the claimant had other paid work at the time of his work injury.

¶ 31 One final point bears mentioning. The parties dispute the standard of review that should govern our analysis of this issue. The claimant argues that we should review the Commission's decision *de novo* because (1) the relevant facts are undisputed, (2) "there is no indication that the Commission drew any inferences or *** did anything other than apply the law to the undisputed facts", and (3) the question presented in this case is purely one of

statutory construction. See *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 553 (2004); *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1016 (2005). The employer counters that the manifest weight of the evidence standard applies because the relevant facts are disputed. We agree with the employer. The central dispute in this appeal, *i.e.*, whether the employer knew of the claimant's paid employment as a pastor prior to the work accidents at issue, is a factual dispute. Moreover, although the remaining material facts are undisputed, the dispositive question is whether those facts support a reasonable inference that the employer had such knowledge. Because different reasonable inferences could be drawn from the undisputed facts, we review the Commission's decision under the manifest weight of the evidence standard. *Gilster Mary Lee Corp. v. Industrial Comm'n*, 326 Ill. App. 3d 177, 182 (2001). However, even if we were to apply a *de novo* standard of review, the employer would still prevail.

¶ 32 CONCLUSION

¶ 33 For the foregoing reasons, we affirm the judgment of the circuit court of McLean County, which confirmed the Commission's decision.

¶ 34 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Barbara J. Dukich,
Petitioner,

vs.

No: 12 WC 13758

Fenton Community H.S.—Dist. 100,
Respondent.

15IWCC0121

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, future medical expenses, temporary total disability, and nature and extent of the permanent disability, and being advised of the facts and law, reverses the November 15, 2013 Decision of the Arbitrator, which is attached hereto and made a part hereof.

Arbitrator Carolyn Doherty found that Petitioner proved that she sustained an accident that arose out of and in the course of her employment on February 23, 2012 and also proved that her current condition of ill-being was causally related to that accident. The Arbitrator awarded Petitioner 3-4/7 weeks of temporary total disability, medical expenses, and permanent partial disability for 10% loss of the person as a whole for injuries to her face, right shoulder and right hip.

After considering the entire record, and for the reasons set forth below, the Commission reverses the November 15, 2013 decision of the Arbitrator.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner filed an Application for Adjustment of Claim on April 4, 2012, claiming injury on February 23, 2012 to her body as a whole. Petitioner described the accident as occurring when she slipped on wet pavement on her way to lunch as she walked down the sidewalk from the school building to her assigned parking spot.

2. Petitioner offered a surveillance video of the incident as Petitioner's Exhibit 8. The video depicts Petitioner walking out of the school building onto obviously wet cement paving between the building and parking lot. Petitioner is seen stumbling, tripping and falling face first onto the pavement.

3. Petitioner was holding her umbrella and purse when she slipped on water and fell forward onto the pavement.

4. Petitioner testified that she was taken to the school nurse's office in a wheelchair after the accident. The school nurse's notes indicate that Petitioner complained of a headache and she noticed some bleeding in Petitioner's mouth.

5. An ambulance transported Petitioner to Elmhurst Memorial Hospital's Emergency Room, where Petitioner was diagnosed with a contusion/hematoma on her head and was referred for a CT scan of her brain and facial bones. The brain CT scan was normal, but the maxillofacial CT scan revealed a nasal bone fracture. Petitioner was taken off work and instructed to follow up with her primary care physician, Dr. Dorothy Prusek.

6. On February 27, 2012, Petitioner followed up with Dr. Prusek, complaining of headaches and cervical spasms with episodic vertigo. Dr. Prusek diagnosed Petitioner with a nasal bone fracture, severe headaches, and post-concussive syndrome. She prescribed Tramadol for pain and Antivert for vertigo and ordered Petitioner off work. On March 5, 2012, Dr. Prusek noted that Petitioner's post-concussive syndrome was improved, but continued her off work status until March 19, 2012.

7. Dr. Prusek referred Petitioner to Dr. Jolanta Milet for physical therapy. On February 28, 2012, Petitioner complained of stiffness in her upper neck and back with severe headaches and pain in her right elbow, right shoulder, face, and low back. Petitioner continued to receive therapy from Dr. Milet through May 9, 2012.

8. On August 6, 2012, Petitioner was evalulated by Dr. Howard Freedburg, an orthopedic specialist. Dr. Freedburg noted that three years earlier Petitioner had suffered a right shoulder injury, which resolved after eight weeks of physical therapy. Dr. Freedburg suspected that Petitioner had now suffered a rotator curr tear and ordered an MRI of Petitioner's right shoulder. The September 6, 2012 MRI showed probable posterior labral tearing and interstitial tearing of the supraspinatus and infraspinatus tendons, as well as moderate acromioclavicular degenerative change. On September 25, 2012, Dr. Freedburg diagnosed Petitioner with right rotator cuff tear with AC joint degenerative joint disease, and he administered an injection to Petitioner's right shoulder.

9. Petitioner reported 50-60% improvement following the first injection on November 8, 2012 and told Dr. Freedburg that she did not have time for additional physical therapy, as she was currently working two jobs. On December 27, 2012, Petitioner reported to Dr. Freedburg that her shoulder was still bothering her. Dr. Freedburg noted that additional therapy, injections or even surgery might be warranted if her complaints continued, but

Petitioner did not return to Dr. Freedburg or any other physician for treatment of her right shoulder after December 27, 2012.

10. At the time of hearing, Petitioner continued to work for Respondent in her same position. She testified that she noticed some pain in her right shoulder at the end of the work day and either took Advil or iced it for pain relief.

11. Respondent offered the testimony of two of the groundskeepers at Fenton High School. Both testified that there was no ice or snow in the area where Petitioner fell, but it was wet from the rain that day. Officer Matthew Nelson testified that he served as school resource officer on the date of the accident and had helped Petitioner to the nurse's office after her fall.

12. All witnesses, including Petitioner, testified that there were no defects in the pavement that would have contributed to her fall.

13. Arbitrator Doherty found that the parties agreed that the accident occurred within the course of Petitioner's employment. However, Respondent disputed that the accident arose out of the employment. The Arbitrator noted the following:

> Petitioner must present evidence which supports a *reasonable inference* that the fall stemmed from a risk associated with the employment. Employment related risks are those to which the general public is not exposed, such as "the risk of tripping on a defect at the employer's premises, falling on uneven or *slippery ground* at the work site. . ." *First Cash Financial Services*, 367 Ill. App. 3d 102, 853 N.E.2d 799 (2006). In the instant matter, the record as a whole supports a finding that the accident sustained by Petitioner arose [out] of her employment. Petitioner provided direct evidence in the form of her credible testimony, as buttressed by the video, that she slipped on the wet concrete walkway located on Respondent's premises resulting in her fall. The Arbitrator further notes that Petitioner was in fact exposed to an increased risk as the wet concrete area where she slipped and fell is a Respondent-controlled designated pathway specifically for Petitioner to reach her employee designated parking spot.

Arbitrator's Decision, p. 4.

Having found accident and causal connection, the Arbitrator awarded Petitioner 3-4/7 weeks of temporary total disability, reasonable and necessary medical expenses, and permanent partial disability of 10% loss of the person as a whole.

Respondent timely appealed the Arbitrator's award of benefits to the Commission. After considering the entire record, the Commission reverses the Arbitrator's findings with respect to accident.

Employment-related Risk. On appeal, Respondent argues that Petitioner failed to prove that her accident arose out of her employment. It points to Petitioner's admissions that there was no defect in the sidewalk and that she did not slip on ice, snow, or a rain puddle, but that the rain

made the employer-controlled sidewalk slippery, as evidence that Petitioner was not exposed to an employment related risk and also was not exposed to a neutral risk to a greater extent that the general public.

The Appellate Court recently reviewed the law with regard to accident risks in *Don Young v. Illinois Workers' Comm'n*, 2013 IL App. (4th) 130392WC, 13 N.E.3d 1252, 383 Ill. Dec. 131. In that case, the Arbitrator, Commission, and Circuit Court had all found that Petitioner failed to prove that he suffered an accident that arose out of his employment. After reviewing the evidence and the relevant caselaw, the Appellate Court reversed that finding and remanded the matter to the Commission for further findings and awards.

In *Young*, as in the instant case, the parties agreed that the accident occurred in the course of Petitioner's employment. The issue in both cases was whether the accident arose out of the Petitioner's employment. The Court cited the Illinois Supreme Court in *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 192, 204, 797 N.E.2d 665, 672, 278 Ill. Dec. 70 (2003) (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667, 133 Ill. Dec. 454 (1989)):

> 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties.'

In *Young*, the Appellate Court found that the mechanism of injury alleged by Petitioner, reaching into a box for items to be inspected, was employment-related. In reaching that conclusion, the Court considered that there are three categories of risks to which an employee may be exposed: (1) risks distinctly associated with her employment; (2) personal risks; and (3) neutral risks which had no particular employment or personal characteristics. Employment risks are compensable under the Act, as they arise out of the employment. Personal risks are non-compensable. Neutral risks are non-compensable unless the employee is exposed to a greater degree than the general public by reason of his employment. In *Young*, the Court concluded that reaching into the box was an employment-related risk, as defined in *Sisbro* and *Caterpillar*. Petitioner was injured while performing his job duties, inspecting parts contained in a box. The Court found that the evidence "unequivocally shows claimant was performing acts that the employer might reasonably have expected him to perform so that he could fulfill his assigned duties on the day in question."

Arbitrator Doherty relied upon language in *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 853 N.E.2d 799, 304 Ill. Dec. 722 (1st Dist. 2006), to conclude that Petitioner's slip and fall on wet cement was employment-related. In *First Cash*, the claimant was a bank teller, who was injured when she slipped and fell on the floor of the employees' bathroom, which was not accessible to the public. Despite the fact that no direct evidence was presented establishing the cause of the teller's fall, the Arbitrator found that the risk was employment-related and awarded Petitioner benefits; the Commission affirmed the award; and

the Circuit Court confirmed. The Appellate Court reversed, finding that the claimant failed to prove that the risk of falling was work-related.

> Employment related risks are those to which the general public is not exposed such as the risk of tripping on a defect at the employer's premises, falling on uneven or slippery ground at the work site, or performing some work related task which contributes to the risk of falling. [Citations omitted.]

First Cash, 367 Ill. App. 3d at 186. Arbitrator Doherty applied the "slippery ground" language to determine that Petitioner's fall on the wet cement resulted from an employment-related risk. However, the Arbitrator failed to take into account the remaining language which restricted the location of the "slippery ground" to "at the work site." The results here might be different if Petitioner had fallen on an uneven or slippery floor inside the school building. Here Petitioner had left her office and the building. She alleged no defect in the cement's surface or accumulation of ice or snow, and she was performing no work-related task that contributed to her risk of falling. Therefore, Petitioner's risk in this case does not meet the *First Cash* definition of employment risk.

Neutral Risk. Arbitrator Doherty also found that Petitioner was exposed to an increased risk "as the wet concrete area where she slipped and fell is a Respondent-controlled designated pathway specifically for Petitioner to reach her employee designated parking spot." Arbitrator's Decision, p. 4. Illinois has rejected the positional risk theory of recovery (*Brady v. Louis Ruffolo & Sons Constr. Co.*, 143 Ill. 2d 542, 578 N.E.2d 921, 161 Ill. Dec. 275 (1991)), so the mere fact that Petitioner was injured while on her employer's property does not suffice to establish that the injury arose out of the employment.

However, Arbitrator Doherty also found that Petitioner suffered an increased risk as a result of her employment. Petitioner's increased risk would be relevant if the risk she encountered in walking on wet cement were deemed to be neutral. In *Young*, the Appellate Court acknowledged the general rule that neutral risks do not arise out of the employment and are compensable only where the employee was exposed to the risk to a greater degree than the general public by reason of his employment, citing *Springfield Urban League v. IWCC*, 2013 IL App (4th) 120219WC, ¶27, 990 N.E.2d 284 and *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005, 109 Ill. Dec. 166 (1987). Therefore, if Petitioner in this case were exposed to a greater risk of falling on wet cement than the general public due to her employment with Respondent, then the neutral risk could be compensable under the Act.

At the time of her accident, Petitioner was not carrying anything other than her own purse and umbrella. She was not hurrying to complete an assigned task. The walkway where Petitioner fell was not defective. There was no accumulation of ice or snow that caused her to fall, and the walkway was open to the public. The Commission finds that Petitioner was not at an increased risk for injury over that faced by any member of the general public in transversing wet pavement. Because Petitioner faced no increased risk due to her employment, the neutral risk of walking on wet pavement while it was raining remains non-compensable.

15IWCC0121

After considering all of the evidence, the parties' briefs, and the relevant case law, and after hearing oral arguments by both parties, the Commission finds that Petitioner's injury did not result from an employment-related risk or from a neutral risk to which Petitioner was at increased exposure as a result of her employment with Respondent. Petitioner's risk of injury, given the evidence in this case, was personal. Therefore, Petitioner's accident is not compensable under the Act, and the Arbitrator's Decision finding that the accident arose out of her employment with Respondent and awarding benefits is hereby reversed.

IT IS THEREFORE ORDERED BY THE COMMISSION that the November 15, 2013 Decision of the Arbitrator is reversed. The Commission finds Petitioner failed to prove by a preponderance of the evidence that her accident on February 23, 2012 arose out of and in the course of her employment. All benefits are therefore denied.

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

DATED: FEB 9 - 2015

Daniel R. Donohoo

Ruth W. White

o-12/17/14
drd/dak
68

DISSENT

I vehemently dissent from the findings of my colleagues. The Arbitrator correctly found that Petitioner's undisputed fall arose out of and in the course of her employment.

Respondent agrees that Petitioner's fall on the asphalt entrance to Respondent's school was in the course of employment. However, it argues that the Petitioner failed to show that the water in the entranceway caused her to fall, or in the alternative, arise out of her employment since the general public could have been equally exposed to such a condition.

The Petitioner had an employee designated parking space and had to walk past the area of the entranceway to get to and from the school building on a regular basis.

The Petitioner gave a consistent history to the emergency room that she "slipped on a wet surface." (Petitioner Exhibit 2 Pg. 2) She also gave a consistent history, which appeared in the ambulance report that she "slipped on the wet asphalt." (Petitioner Exhibit 2 Pg. 25) Matthew Nelson, the school policeman, acknowledged that following the incident he helped the Petitioner "get back in the building because it was wet that day, it was raining." (Transcript Pg. 48) The school nurse's notes indicate that the Petitioner was placed in a wheel chair "due to rain/safety concerns." (Petitioner Exhibit 1) Clearly, Petitioner sustained the burden of proof that she had slipped on the wet pavement.

Petitioner was exposed to a greater risk than the general public because she regularly passes the entranceway where she fell to access her vehicle in her designated parking spot. In Mores-Harvey v. Industrial Commission, 345 Ill. App. 3d 1034, 1093 (2004), the Court noted that "by restricting where claimant could park her vehicle, the employer exercised control over its employees actions. In this way, the employee faced risks to a greater extent than the general public." The court held the same in University of Illinois v. Industrial Commission, 355 Ill. App. 3d 906, 912, when they held that the Petitioner was placed at an increased risk since she regularly passes the entrance way in which she sustained her injury.

The Petitioner sustained accidental injuries in the course of her employment with Respondent. It is also clear that the fall was a result of wet pavement which was a hazardous condition. Petitioner had to use that hazardous parking lot to access her car which was placed in an employee assigned spot. This clearly put her at a greater risk than that of the general public.

The Arbitrator should be affirmed and adopted.

Charles J. DeVriendt

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Barbara J. Dukich
Employee/Petitioner

Case # 12WC013758

v.

Consolidated cases: none

Fenton Community H.S. - District 100
Employer/Respondent

15IWCC0121

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable Carolyn Doherty, Arbitrator of the Commission, in the city of Wheaton, on 10/15/2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

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FINDINGS

On 02/23/2012, Respondent *was* operating under and subject to the provisions of the Act.

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

On this date, Petitioner *did* sustain an accident that arose out of and in the course of employment.

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

Petitioner's current condition of ill-being *is* causally related to the accident.

In the year preceding the injury, Petitioner earned $31,532.80; the average weekly wage was $606.40.

On the date of accident, Petitioner was 62 years of age, *single* with 0 dependent children.

Petitioner *has* received all reasonable and necessary medical services.

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

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

Respondent is entitled to a credit of $4,277.82 under Section 8(j) of the Act. ARB EX 1.

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $404.27/week for 3-4/7 weeks, commencing February24, 2012 through March 19, 2012, as provided in Section 8(b) of the Act.

Respondent shall pay Petitioner the reasonable and necessary medical expenses incurred by Petitioner in the care and treatment of her causally related injuries pursuant to Sections 8 and 8.2 of the Act. Respondent shall receive credit for amounts paid and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent is receiving this credit, as provided in Section 8(j) of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $363.84/week for 50 weeks, because the injuries sustained caused the 10% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

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

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

Signature of Arbitrator

11/14/13
Date

NOV 15 2013

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FINDINGS OF FACT

Petitioner, Barbara Dukich, works as an attendance clerk for Respondent Fenton High School. (P. 6 – 7). She has worked for the Respondent since 1996. (T. 7). She drives to work on a daily basis and was provided a designated parking spot # 48 in the school parking lot located adjacent to the school. (T. 7).

On February 23, 2012, Petitioner was leaving the school to have lunch at home. As she was leaving the premises and stepped out of the building, she noticed that it was raining hard. (T. 7 – 8). Petitioner testified that she was holding an umbrella and her purse when she slipped on the water that was on the school premises causing her to fall forward onto the pavement. (T. (T. 8-9).

Petitioner offered into evidence a surveillance video of the incident as Petitioner's Exhibit 8. Petitioner viewed the video at hearing and identified herself as the individual falling in the video (T. 9). Petitioner testified that she slipped forward and she believed that her head hit the pavement first. (T. 10). The Arbitrator viewed the video at trial and again after the trial. Petitioner is seen on the video walking out of school on the cement pavement between the school building and the parking lot. Petitioner is seen stumbling, tripping and falling face first onto the pavement. The video depicts raining conditions and obviously wet pavement. Petitioner recalled that following the incident she was taken to the school nurse's office in a wheelchair. (T. 11). According to the school nurse's notes, "due to rain/safety concerns patient assisted in with wheelchair and escorted to health office." (PX. 1). The note further indicates that Petitioner was complaining of headache and noticed some bleeding in the mouth.

Petitioner testified that an ambulance arrived from Bensenville Fire Protection and transported her to Elmhurst Memorial Hospital emergency room. (T. 12). The ambulance records of Bensenville Fire Protection state: "patient stated that she was walking to her car when she slipped on the wet asphalt of the parking lot and hit her head." (PX. 2, pg. 25).

Petitioner testified that upon arrival at Elmhurst Memorial Hospital, she noticed pain in her head, right shoulder and right hip. (T. 14 – 15). At Elmhurst Memorial Hospital, history was taken of "patient presents here via ambulance after she slipped on a wet surface, fell face forward injuring her face and forehead." (PX. 2, pg. 28). She was diagnosed with a contusion/hematoma and referred to a CT of the brain and facial bones. (PX. 2, pg. 30). The CT of the head was performed that day and interpreted as negative. (PX. 2, pg. 36 – 37). The CT of the maxillofacial region was also performed and demonstrated a nasal bone fracture. (PX. 2, pg. 39). Petitioner was told to stay off work until 2/27/12 and to follow up with her primary care doctor in 3 to 5 days. PX 2, p. 31.

Following the hospital visit, Petitioner followed up with her primary care physician, Dr. Dorothy Prusek of the York Medical Center on February 27, 2012. (T. 12, PX. 3). On that day, Dr. Prusek noted that "patient here for follow up after ER evaluation following a fall while walking out of work falling into a rain. Fell onto nose and..." (PX. 3, pg. 4). Dr. Prusek noted Petitioner

was complaining of headache, cervical spasms with episodic vertigo. She diagnosed her with a nasal bone fracture, severe headaches, and post concussive syndrome and placed her off of work through March 5, 2012. (PX. 3, pg. 4). She was provided with Tramadol and Antivert for vertigo. (PX. 3 pg. 4). On 3/5/12, Dr. Prusek diagnosed post concussive syndrome partially improved and kept Petitioner off work through 3/19/12. RX 2.

Petitioner testified that Dr. Prusek referred her for physical therapy with Dr. Jolanta Milet of Chicagoland Health, Inc. (PX. 4). On February 28, 2012 Dr. Milet noted that Petitioner was complaining of stiffness in her upper neck bilaterally and upper back bilaterally with severe headaches. (PX. 4). In addition, she was complaining of pain in her right elbow, right shoulder, face and low back. Dr. Milet noticed bruising and swelling around both eyes. (PX. 4). In the description of accident it was noted that Petitioner fell on her face, right shoulder, right elbow and right knee. (PX. 4). Dr. Milet noted Petitioner reported, "I fell down on my face stepping off the sidewalk onto the street on the way from the building of the school I work at." PX 4.

Petitioner underwent physical therapy with Dr. Milet from February 28th through May 9, 2012. Throughout this period she was receiving care from Dr. Milet, to her right hip, upper back and neck and right shoulder. By May 9, 2012, Dr. Milet noted that Petitioner stated that she was slowly "getting back to her old self." (PX. 4). Petitioner testified that she was off of work from February 24th until March 19, 2012. (T. 13).

Following her course of physical therapy with Dr. Milet, Petitioner was referred to Dr. Howard Freedburg, an orthopedic specialist with Suburban Orthopedics. Petitioner first saw Dr. Freedburg on August 6, 2012 wherein a history was taken of 63 year old female who complains of right shoulder and right hip injury from work related injury on February 23, 2012 when she was "...exiting the school when she fell on the concrete and injured her right shoulder and right hip. States when this occurred it was freezing rain." (PX. 5, pg 31). Dr. Freedburg noted that Petitioner had a pre-existing condition with respect to her right arm three years prior for which she received 8 weeks of physical therapy and then reported being "100% resolved". Dr. Freedburg suspected a right shoulder rotator cuff tear upon physical examination and recommended that Petitioner undergo an MRI of the right shoulder. He ordered Petitioner to perform home exercises and discussed injections and surgery as possible future options. PX 5.

An MRI of the right shoulder was performed on September 6, 2012 at Suburban MRI which revealed a "probable posterior labral tearing..., linear interstitial insertional tearing of the supraspinatus and infraspinatus tendons..., moderate acromioclavicular degenerative change." (PX. 5, pg. 27). On follow up on September 25, 2012, Dr. Freedburg reviewed the MRI report and diagnosed right shoulder rotator cuff tear with AC joint degenerative joint disease. PX 5. He performed an injection to Petitioner's right shoulder. (PX. 5, pg. 24 and 27).

Petitioner followed up with Dr. Freedburg on November 8, 2012 where Petitioner reported that she was feeling a 50-60% improvement since the injection performed in September and that she was living with the shoulder pain. (PX. 5, pg. 18). Petitioner reported "all in all she is 100% on the hip." PX 5. Dr. Freedburg recommended a home exercise program and discussed the possibility of a future injection and surgery. (PX. 5, pg. 21). Physical therapy was discussed as

an option but it was noted that Petitioner "elects to wait she is working 2 jobs and has no time for PT." PX 5, p. 21.

Petitioner saw Dr. Freedburg on December 27, 2012 and noted that Petitioner's shoulder was still bothering her. (PX. 5, pg. 14). Dr. Freedburg's records and recommendations therein appear unchanged from the prior visit. Petitioner did not return to Dr. Freedburg or to any doctor for any additional care of her injuries after 12/27/12. She testified that she has not had any surgery for her injuries.

Currently, Petitioner continues to work for the Respondent in the same position. Petitioner testified that she still notices pain in her right shoulder particularly at the end of the work day. (T. 16). She testified that to alleviate her pain she will either ice it or take Advil. (T. 16). When it is particularly bad, she will lie down. (T. 16). On cross-examination, Petitioner admitted to having suffered a work injury to her right shoulder three years prior. (T. 20). She clarified that she did not file a workers' compensation claim or receive a settlement for that case. (t. 20). She underwent eight weeks of physical therapy and could not recall he medical providers she treated with in 2008. Petitioner testified that she did not pursue anything further in that matter as her arm completely resolved. (T. 19 – 20).

Respondent offered the testimony of Walter Glomp, a former groundskeeper at Fenton High School for 34 years. Mr. Glomp testified that he recalled the incident involving the Petitioner of February 23, 2012. He testified that he immediately inspected the area where Petitioner claimed to have fallen. (T. 28). He did note that it was raining and wet but that there was no snow or ice that he had to remove from the area that day. (T. 28 – 29). RX 8. He did not detect any seams. (T. 33). On cross-examination, Mr. Glomp clarified that by the time the Petitioner had fallen, whatever snow had been accumulated prior to that time had been melted. He testified that the area was damp from rain. (T. 37 – 38).

Respondent also offered the testimony of Ruben Angel Perez, also a groundskeeper with Fenton High School. Mr. Perez also testified that he inspected the area that Petitioner claimed to have fallen and testified that there was no snow or ice in the location, but that it was wet from having rained that day. (T. 42). RX 7.

The Respondent offered the testimony of Officer Matthew Nelson, a police officer with the City of Wood Dale. Office Nelson testified that his particular assignment is that of school resource officer to Fenton High School. Officer Nelson recalled the incident of February 23, 2012 and testified that he responded to the incident nearly thirty seconds following the fall. (T. 46, 53). Officer Nelson testified that Petitioner did not tell him that she slipped on ice or snow or that she tripped on a crack or defect. Officer Nelson admitted that the area in which Petitioner fell was wet as it was raining. (T. 53).

CONCLUSIONS OF LAW

With respect to Issue (C), whether an accident occurred that arose out of and in the course of Petitioner's employment by the Respondent, the Arbitrator finds as follows:

Petitioner credibly testified that upon exiting the school for lunch, she slipped on rainwater causing her to fall forward and sustain injuries to her face, right shoulder, and right hip. Petitioner's account is supported by the histories in the ambulance report from Bensenville Fire Protection, the medical records of Elmhurst Memorial Hospital, Dr. Prusek, Dr. Milet as well as Suburban Orthopedics. Furthermore, the Arbitrator has reviewed the surveillance video of the incident which clearly shows that the conditions outside were wet and rainy. The Arbitrator notes that the video clearly depicts Petitioner slipping on the water as described in her testimony.

The Respondent does not dispute that Petitioner was "in the course of her employment" as the area in which the Petitioner slipped was in the control of the Respondent. Respondent's groundskeeper indicated it was an area that he would otherwise clean or inspect. Respondent does not dispute that the accident occurred in a wet area. All of the Respondent's witnesses support the Petitioner's account that the area was wet.

The Arbitrator notes that for an injury to have "arisen out of the employment," Petitioner must present evidence which supports a *reasonable inference* that the fall stemmed from a risk associated with the employment. Employment related risks are those to which the general public is not exposed, such as "the risk of tripping on a defect at the employer's premises, falling on uneven or *slippery ground* at the work site..." *First Cash Financial Services*, 367 Ill. App. 3d 102, 853 N.E.2d 799, (2006). In the instant matter, the record as a whole supports a finding that the accident sustained by Petitioner arose of her employment. Petitioner provided direct evidence in the form of her credible testimony, as buttressed by the video, that she slipped on the wet concrete walkway located on Respondent's premises resulting in her fall. The Arbitrator further notes that Petitioner was in fact exposed to an increased risk as the wet concrete area where she slipped and fell is a Respondent-controlled designated pathway specifically for Petitioner to reach her employee designated parking spot.

With respect to issue (F), whether Petitioner's condition of ill-being is causally related to the accident, the Arbitrator finds as follows:

Given the chain of events, the Arbitrator finds that Petitioner's condition of ill-being is causally related to the accident of February 23, 2012. Petitioner testified that prior to her work accident of February 23, 2012, she did have a prior medical issue involving her right arm in 2008. She testified that she received eight weeks of physical therapy and that her condition fully resolved. Immediately following her accident of February 23, 2012, Petitioner sought treatment with Elmhurst Memorial Hospital Emergency Department. The doctors at the emergency room primarily treated Petitioner's nasal fracture and headaches. The following day she followed up with her primary care doctor and complained of upper back/neck pain, in addition to her headaches and vertigo. Four day later, she sought treatment with Dr. Milet who noted right shoulder pain and right hip pain in addition to the neck and head pain. Petitioner's headaches and hip pain resolved with the treatment provided to her by Dr. Milet. Since her shoulder pain persisted, she sought treatment with Dr. Freeburg, an orthopedist who, after reviewing an MRI of Petitioner's right shoulder, diagnosed Petitioner with a rotator cuff tear. Respondent offered no medical opinion regarding causation to the contrary.

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With respect to issues (J), whether the medical services rendered to Petitioner were reasonable and necessary, (K), whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Based on the Arbitrator's findings on the issues of accident and causation, the Arbitrator further finds that the Respondent shall pay Petitioner for medical expenses incurred by Petitioner in the care and treatment of her casually related injuries pursuant to Sections 8 and 8.2 of the Act. ARB EX 1. Respondent's objection was based on liability. Respondent shall receive credit for amounts paid and shall hold Petitioner harmless from any claims by any providers of the services for which Respondent receives credit pursuant to Section 8(j) of the Act. ARB EX 1.

The Arbitrator further finds that Petitioner is entitled to temporary total disability benefits from February 24, 2012 through March 19, 2012, that being the period in which Petitioner was off work per her treating doctors, a period of 3-4/7 weeks pursuant to Section 8(b) of the Act. Respondent shall receive credit for amounts paid, if any.

With respect to issue (M), whether Petitioner is entitled to penalties, the Arbitrator finds as follows:

The Arbitrator notes Respondent's reliance on its witnesses, the video and its investigation in denying the claim. The Arbitrator finds that the Respondent's conduct was not so unreasonable or vexatious so as to justify the imposition of penalties and fees in this matter under Sections 19(k) or 16 of the Act.

With respect to issue (L), the nature and extent of Petitioner's condition, the Arbitrator finds as follows:

In considering permanent disability in this matter, the Arbitrator shall base the determination on the following factors pursuant to Section 8.1b(b) of the Act: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. No single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician are explained below. The Arbitrator initially notes that no reported level of impairment pursuant to Section 8.1b(a) was provided. The remaining enumerated factors were considered as follows.

The 62 year old Petitioner suffered a nasal fracture, right hip contusion, and right rotator cuff tear as a result of this accident as reflected in her treating medical records. She received conservative treatment and returned to work in her full duty capacity with the Respondent. The record does not support any finding that Petitioner sustained any impairment to her future earning capacity.

Currently, Petitioner notices pain in her right arm, especially at the end of the workday. She uses either ice or Advil to alleviate the pain. In some circumstance she will lie down to address the pain. Accordingly, the Arbitrator finds that Petitioner sustained an injury equal to 10% loss of use of person as a whole pursuant to Section 8(d)(2) of the Act.

Illinois Official Reports

Appellate Court

***Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC**

Appellate Court Caption	BARBARA J. DUKICH, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Fenton Community High School District 100, Appellee).
District & No.	Second District, Workers' Compensation Commission Division Docket No. 2-16-0351WC
Filed Rehearing denied	September 19, 2017 December 1, 2017
Decision Under Review	Appeal from the Circuit Court of Du Page County, No. 15-MR-358; the Hon. Paul M. Fullerton, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	John W. Powers of Cullen, Haskins, Nicholson & Menchetti, P.C., of Chicago, for appellant. Kelly M. Wiggins, of Brady, Connolly & Masuda, P.C., of Chicago, for appellee.
Panel	PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion. Justices Hoffman, Hudson, Harris, and Moore concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Barbara J. Dukich, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), seeking benefits for injuries she allegedly sustained while working for respondent Fenton Community High School District 100. The claimant sustained injuries to her face, right shoulder, and right hip when she fell on wet pavement at the employer's premises while walking to her car on her way to lunch. After conducting a hearing, an arbitrator found that the claimant had sustained accidental injuries arising out of and in the course of her employment with the employer and awarded the claimant temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits for 10% loss of the person as a whole, and medical expenses.

¶ 2 The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission), which reversed the arbitrator's decision. The Commission found that the claimant's injury "did not result from an employment-related risk or from a neutral risk to which [the claimant] was at increased exposure as a result of her employment." Accordingly, the Commission concluded that the claimant had failed to prove that her injuries arose out of her employment with the employer and denied benefits.

¶ 3 Commissioner DeVriendt dissented. Commissioner DeVriendt concluded that the claimant was exposed to a greater risk than that faced by the general public at the time of her injury because her accident was the result of a hazardous condition (wet pavement due to rain) that the claimant regularly had to traverse in order to access her car, which was parked in a designated parking space in a lot controlled by her employer.

¶ 4 The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling.

¶ 5 This appeal followed.

¶ 6 FACTS

¶ 7 The claimant worked for the employer as an attendance clerk. She drove to work on a daily basis and usually drove home for lunch. The employer provided the claimant a designated parking space (space No. 48) in the school parking lot, which was adjacent to the school.

¶ 8 At approximately 1 p.m. on February 23, 2012, the claimant exited the school building to go home for lunch. Because it was raining hard at the time, the claimant was carrying an umbrella as well as her purse. After exiting the building, the claimant began walking toward the parking lot where her car was parked. As she walked down a handicap ramp between the building's entrance and the street level, the claimant lost her footing on the wet ramp and fell face first onto the pavement of a crosswalk in an adjacent bus run, striking her head and nose. When asked during the arbitration hearing what caused her to fall, the claimant responded, "[t]he rain. The water." During cross-examination, the claimant acknowledged that, at the time of her fall, she was wearing open-back, clog-like shoes, which had no strap or support on the back of them.

¶ 9 The claimant's fall was recorded on the employer's security video, which was introduced into evidence. The video shows the claimant walking out of the school on the cement pavement between the school building and the parking lot. The claimant stumbles or slips and then struggles to regain her footing before she falls face first onto the pavement. The video depicts

raining conditions and obviously wet pavement. The arbitrator viewed the video both during and after the arbitration hearing. The claimant identified herself as the person falling in the video.

¶ 10 Immediately after the incident, the claimant was taken to the school nurse's office in a wheelchair.[1] She was complaining of a headache, and the nurse noticed some bleeding in her mouth. When paramedics from the Bensenville fire department arrived on the scene, they found the claimant sitting in a chair in the school nurse's office complaining that her head hurt. The claimant stated that she was walking to her car when she slipped on wet pavement and hurt her head. A golf-ball-sized hematoma was noted on the claimant's forehead, and a one-inch laceration was noted on the bridge of her nose.

¶ 11 The claimant was taken by ambulance to the emergency room at Elmhurst Memorial Hospital. Dr. Jeffrey Bohmer, the examining physician, noted that the claimant had arrived via ambulance after slipping on a wet surface. The claimant was diagnosed with a contusion/hematoma on her head and was referred for a computed tomography (CT) scan of her brain and facial bones. The brain CT scan was normal, but the maxillofacial CT scan revealed a nasal bone fracture. The claimant was taken off work and instructed to follow up with her primary care physician, Dr. Dorothy Prusek.

¶ 12 On February 27, 2012, the claimant treated with Dr. Prusek. The claimant told Dr. Prusek that she had suffered an injury when she was walking out of work and fell in the rain. She complained of severe headaches and cervical spasms with episodic vertigo. Dr. Prusek diagnosed the claimant with a nasal bone fracture, severe headaches, and post-concussive syndrome. She ordered the claimant off work until March 5, 2012.[2] Dr. Prusek referred the claimant to Dr. Jolanta Milet, a chiropractor, for physical therapy.

¶ 13 The claimant began treating with Dr. Milet on February 28, 2012. The claimant complained of severe headaches and pain and stiffness in her upper neck and back. She also reported experiencing pain in her right elbow, right shoulder, low back, and both hips. The claimant continued to receive therapy from Dr. Milet through May 9, 2012. On that date, Dr. Milet noted that the claimant's condition was improving. The claimant did not follow up with Dr. Milet thereafter.

¶ 14 On August 6, 2012, the claimant was evaluated by Dr. Howard Freedburg, an orthopedic specialist. Dr. Freedburg noted that the claimant had suffered a right shoulder injury three years earlier, which resolved after eight weeks of physical therapy. Dr. Freedburg suspected that the claimant had now suffered a rotator cuff tear. He ordered an MRI of the claimant's right shoulder, which was performed on September 6, 2012. The MRI showed probable posterior labral tearing and interstitial tearing of the supraspinatus and infraspinatus tendons, as well as moderate acromioclavicular (AC) degenerative change. Dr. Freedburg diagnosed a right rotator cuff tear with AC joint degenerative joint disease. He administered an injection to the claimant's right shoulder. The claimant reported 50 to 60% improvement following the first injection. She told Dr. Freedburg that she did not have time for additional physical therapy because she was currently working two jobs. On December 27, 2012, the claimant returned to

[1]The school nurse's notes reflect that the claimant was "assisted in with [a] wheelchair and escorted to [the] health office" "due to rain/safety concerns."

[2]On March 5, 2012, Dr. Prusek noted that the claimant's post-concussive syndrome was improved but continued her off work until March 19, 2012.

Dr. Freedburg and reported that her shoulder was still bothering her. Dr. Freedburg noted that additional therapy, injections, or even surgery might be warranted if her complaints continued. However, the claimant did not subsequently return to Dr. Freedburg or seek any further treatment for her right shoulder.

¶ 15 During the arbitration hearing, the claimant testified that she continued to work for the employer in the same position. She noticed some pain in her right shoulder at the end of the work day and either took Advil or iced it to relieve the pain. On cross-examination, the claimant admitted that she had sustained a work injury to her right shoulder three years before the incident in question.

¶ 16 Walter Glomp, a former groundskeeper for the employer who worked in that capacity for 34 years, testified on behalf of the employer. Mr. Glomp stated that he recalled the claimant's February 23, 2012, work accident. Glomp testified that, during the winter months, his job duties including removing all ice and snow from sidewalks and parking lots on the employer's premises. On the morning of February 23, 2012, Glomp arrived to work at 6 a.m. and checked all 35 entrance doors to the school for ice before the buses arrived with students. Glomp found no ice or snow at that time. He checked again at approximately 11:30 a.m., and there was still no ice. Glomp testified that the temperature that day was cool but above freezing, and it was raining. He noted that the snow had melted. He estimated that the temperature may have been between 35 and 40 degrees Fahrenheit.

¶ 17 Glomp testified that, at approximately 1 p.m., he was directed to go the "Door 2" sidewalk. Door 2 was at the front of the school building. According to Glomp, in order to reach the parking lot after exiting Door 2, a person must first walk down a handicap ramp, cross the bus run (which is a two-lane road), walk along a 15-foot sidewalk, and then enter the parking lot. When he arrived at Door 2 after the claimant's accident, Glomp walked from Door 2 to the parking lot, checking the premises for ice and snow. He found no ice and no snow. Glomp also inspected the sidewalk for defects, seams, or splits in the concrete and found none. However, Glomp noted that it was raining and the sidewalk in front of Door 2 was damp and wet from the rain.

¶ 18 Ruben Angel Perez, another groundskeeper for the employer, also testified. Perez testified that, on February 23, 2012, he was working with Glomp at approximately 1 p.m. when he was directed to inspect Door 2. When he arrived, Perez noticed blood on the sidewalk between the bus run and Door 2. He inspected the sidewalk in front of Door 2 and did not see any ice or snow. The sidewalk was wet because it had rained that day. Perez inspected the area for ice, snow, puddles, or defects and found none. Perez testified that the weather was "misty" with drizzle at the time.[3]

¶ 19 Officer Matthew Nelson, a police officer for the city of Wood Dale, also testified on behalf of the employer. At the time of the claimant's accident, Nelson was assigned to the employer as a school resource officer. Nelson recalled the February 23, 2012, incident and testified that,

[3]Approximately seven months after the claimant's accident, Glomp and Perez each prepared written statements describing the results of their contemporaneous inspections of the area where the claimant fell on February 23, 2012. Glomp wrote that he and Perez inspected the sidewalk near Door 2 for ice and for any other loose materials, and found none. He indicated that the sidewalk was clear from Door 2 to the parking lot. Perez wrote that he and Glomp had walked from the student drop-off point to Door 2 and found no ice.

although he did not witness the claimant's fall, he responded to the incident nearly 30 seconds after it happened. Nelson helped the claimant get back into the building and out of the rain. According to Nelson, the claimant told him that she had fallen but did not say that she slipped on ice or snow or that she tripped on a crack or defect in the pavement. Nelson stated that the area in which the claimant fell (a long walkway leading from the door to the parking lot) was wet and the ground was moist because it was raining. Nelson did not inspect the area where the claimant fell.

¶ 20 The arbitrator found that the claimant had sustained accidental injuries arising out of her employment on February 23, 2012. Citing our appellate court's decision in *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106 (2006), the arbitrator noted that employment related risks are those to which the general public is not exposed, such as "the risk of tripping on a defect at the employer's premises" or "falling on uneven or slippery ground at the work site." The arbitrator found that, in the instant case, "[t]he [claimant] provided direct evidence in the form of her credible testimony, as buttressed by the video, that she slipped on the wet concrete walkway located on [the employer's] premises resulting in her fall." The arbitrator noted that "[the employer] does not dispute that the accident occurred in a wet area" and that "[a]ll of the [the employer's] witnesses support [the claimant's] account that the area was wet." In addition, the arbitrator found that the claimant was exposed to an increased risk because the wet concrete area where she slipped and fell was "[an employer]-controlled designated pathway specifically for [the claimant] to reach her employee designated parking spot." The arbitrator further found that the claimant's current conditions of ill-being were causally related to her February 23, 2012, work accident. The arbitrator awarded the claimant TTD benefits, PPD benefits for 10% loss of the person as a whole, and medical expenses.

¶ 21 The employer appealed the arbitrator's decision to the Commission, which reversed the arbitrator's decision. The Commission began its analysis by rejecting the arbitrator's reliance on *First Cash Financial Services*. The Commission noted that, in *First Cash Financial Services*, our appellate court characterized employment-related risks as those risks "to which the general public is not exposed," such as the risk of tripping on a defect at the employer's premises, "falling on uneven or slippery ground *at the work site*," or performing some work-related task which contributes to the risk of falling. (Emphasis added.) *First Cash Financial Services*, 367 Ill. App. 3d at 106. The Commission found that the risk confronted by the claimant in this case "[did] not meet the *First Cash* definition of employment risk" because, at the time of her fall, the claimant "had left her office and the building," "[s]he alleged no defect in the cement's surface or accumulation of ice or snow, and she was performing no work-related task that contributed to her risk of falling."[4]

¶ 22 The Commission also rejected the arbitrator's finding that the claimant's accident arose out of her employment under neutral risk principles. The Commission found that claimant "slipped on water and fell forward onto the pavement." The Commission acknowledged that, if the risk of falling on wet cement were deemed a neutral risk, and if claimant were exposed to a "greater risk of falling on wet cement than the general public due to her employment with the employer," then "the neutral risk could be compensable under the Act." However, the

[4]The Commission noted that the result "might be different if [the claimant] had fallen on an uneven or slippery floor inside the school building."

Commission found that such was not the case here. The Commission noted that (1) "[a]t the time of her accident, [the claimant] was not carrying anything other than her own purse and umbrella," (2) "[s]he was not hurrying to complete an assigned task," (3) "[t]he walkway where [the claimant] fell was not defective," (4) "[t]here was no accumulation of ice or snow that caused her to fall," and (5) "the walkway was open to the public." Accordingly, the Commission found that the claimant "was not at an increased risk for injury over that faced by any member of the general public in traversing wet pavement." The Commission therefore found the claimant's injuries (which were caused by the neutral risk of walking on wet pavement) to be noncompensable.

¶ 23 In sum, the Commission found that the claimant's injuries "did not result from an employment-related risk or from a neutral risk to which [the claimant] was at increased exposure as a result of her employment with [the employer]." The Commission stated that, given the evidence presented, the claimant's risk of injury in this case was "personal." The Commission found that the claimant failed to prove by a preponderance of the evidence that her February 23, 2012, fall arose out of and in the course of her employment, and it denied all benefits.

¶ 24 Commissioner DeVriendt dissented. Commissioner DeVriendt concluded that the arbitrator correctly found that the claimant's fall arose out of and in the course of her employment. He noted that the claimant gave a consistent history to her treaters that she slipped on wet asphalt and the employer's witnesses testified that it was raining at the time of the incident. Moreover, Commissioner DeVriendt found it significant that the claimant "had an employee designated parking space and had to walk past the area of the entranceway to get to and from the school building on a regular basis." Commissioner DeVriendt concluded that the claimant "was exposed to a greater risk than the general public because she regularly passes the entranceway where she fell to access her vehicle in her designated parking spot." The Commissioner relied upon *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1042 (2004), in which we noted that "[b]y restricting where claimant could park her vehicle, the employer exercised control over its employees' actions," causing the employee to face risks to a greater extent than the general public. In sum, Commissioner DeVriendt concluded that the claimant was placed "at a greater risk than that of the general public" because (1) her fall "was a result of wet pavement which was a hazardous condition" and (2) the claimant "had to use that hazardous parking lot to access her car which was placed in an employee assigned spot." Accordingly, Commissioner DeVriendt would have affirmed and adopted the arbitrator's decision.

¶ 25 The claimant sought judicial review of the Commission's decision in the circuit court of Du Page County, which confirmed the Commission's ruling. The circuit court found that the wet pavement upon which the claimant fell was not a "hazardous condition" on the employer's premises that would render her injuries compensable. The circuit court found (as did the Commission) that there was no defect in the sidewalk where the claimant fell and no ice, snow, or puddled rain that would constitute a hazardous condition. The court concluded that the cases relied upon by the claimant to establish a hazardous condition were distinguishable because those cases either involved indoor wet surfaces or natural accumulations of snow and ice (as opposed to merely wet pavement). The court noted that, unlike rain, snow and ice "can be made safer by plowing or laying down salt," whereas "[t]here is no such option for rain."

¶ 26 The circuit court found that the claimant was injured while walking to her car, which is an "activity of daily living." The court noted that there was no evidence that the claimant's injury was caused by a risk personal to her, such as an idiopathic fall, or by a risk "distinctly associated with her employment." The court concluded that the risk of injury that the claimant confronted was a "neutral risk of everyday living faced by all members of the general public." Whether an injury caused by exposure to such a neutral risk is compensable depends upon whether the claimant was exposed to a risk greater than that to which the general public is exposed. The court found no such increased risk in this case. The court rejected the claimant's argument that she confronted an increased risk because she "regularly passes the entranceway where she fell to access her vehicle in her designated parking spot." The court agreed with the Commission's assessment that this argument is "akin to a positional risk theory, which has been expressly rejected in Illinois." Moreover, the circuit court found that the claimant was "exposed to the same risk the general public was exposed to when traversing across wet pavement" because (1) the claimant "fell outside the front door of the school, a place where the general public would be expected to traverse as well as employees"; (2) while the claimant may regularly walk across this pavement to reach her car, "there is nothing in the record to distinguish this part of the pavement from any other part of the pavement"; and (3) the employer did not require the claimant to have an umbrella and purse at the time of her fall.

¶ 27 This appeal followed.

¶ 28 ANALYSIS

¶ 29 The claimant argues that the Commission's finding that she failed to prove that she sustained an accident arising out of her employment is against the manifest weight of the evidence.

¶ 30 "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that [s]he has suffered a disabling injury which arose out of and in the course of h[er] employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). The phrase "in the course of employment" refers to the time, place, and circumstances of the injury. *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 338 (1980). If the injury occurs within the time period of employment, at a place where the employee can reasonably be expected to be in the performance of his duties and while he is performing those duties or doing something incidental thereto, the injury is deemed to have occurred in the course of employment. *Id.*; see also *Sisbro*, 207 Ill. 2d at 203 (ruling that an injury occurs "[i]n the course of employment" when it "occur[s] within the time and space boundaries of the employment"). In this case, the parties agree that the claimant's accidental injuries occurred in the course of her employment with the employer. The contested issue is whether her injuries "arose out of" her employment.

¶ 31 An injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203. To determine whether a claimant's injury arose out of her employment, we must first determine the type of risk to which she was exposed. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011). There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or

personal characteristics, such as those to which the general public is commonly exposed. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Id.*; see also *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987) ("For an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment."); *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 59 (1989) ("[I]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable.").

¶ 32 Whether an injury arose out of and in the course of one's employment is generally a question of fact and the Commission's determination on this issue will not be disturbed unless it is against the manifest weight of the evidence. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 19. "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Johnson v. Industrial Comm'n*, 278 Ill. App. 3d 59, 63 (1996).

¶ 33 The claimant argues that a *de novo* standard applies since the material facts related to claimant's fall in this case are not in dispute. However, the material facts in this case are subject to more than a single inference.[5] Under these circumstances, the Commission's determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Mansfield v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120909WC, ¶ 28; see also *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279 (2011) ("Even in cases where the facts are undisputed, this court must apply the manifest-weight standard if more than one reasonable inference might be drawn from the facts."). The claimant argues that our review should be *de novo* because the Commission found that the claimant's fall was caused entirely by the wet surface. However, because the Commission was not *required* to reach that finding based on the evidence (*i.e.*, because the evidence supported more than one reasonable inference regarding the cause of the claimant's fall), we should review the case under the manifest-weight standard. *Mansfield*, 2013 IL App (2d) 120909WC, ¶ 28; *Baumgardner*, 409 Ill. App. 3d at 279.

¶ 34 "For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal." *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009); see also *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). The test is whether the evidence is

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[5]For example, the claimant testified that her fall was caused by "[t]he water, [t]he rain." Shortly after the accident, she told the school nurse and Dr. Bohman, the emergency room physician, that she had "slipped" on a wet surface. However, on cross-examination, she admitted that, at the time of her fall, she was wearing open-back, clog-like shoes, which had no strap or support on the back of them. The video of the claimant's accident does not conclusively establish whether and to what extent the wet surface contributed to the claimant's fall. As the claimant's legs come into view, her left leg appears to buckle or slip, and she then appears to stumble and possibly also slip as she attempts to regain her footing before falling. Accordingly, there was evidence in the record supporting at least two reasonable inferences as to the cause of the claimant's fall.

sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 35 In this case the Commission found that the claimant slipped and fell on wet pavement located on the employer's premises. The claimant fell as she was walking from the school building where she worked to her car, which was parked in a designated parking space in a nearby parking lot controlled by the employer. It is undisputed that there were no defects on the paved surface where the claimant fell at the time of her fall (*e.g.*, there were no holes, depressions, uneven surfaces, loose gravel, or puddles of rainwater). It is also undisputed that the area was free of any ice or snow. The surface was merely wet from the rain. There is no evidence that the employer required the claimant to walk in the particular area where she fell or otherwise controlled the route that she took to her car. Nor is there evidence that some aspect of the claimant's employment enhanced the risk in some way. For example, the claimant was not rushing to complete a work task at the time of her accident. Although she was carrying an umbrella and a purse at the time, the employer did not require her to carry those items. Accordingly, the risk that the claimant confronted at the time of her accident was the risk of walking on wet pavement in the rain on property owned and controlled by her employer. The question presented in this case is whether an injury caused by an exposure to that risk, standing alone, is compensable under the Act.

¶ 36 We agree with the Commission that the claimant's accident is not compensable. The dangers created by rainfall are dangers to which all members of the public are exposed on a regular basis. These dangers, unlike defects or particular hazardous conditions located at a particular worksite, are not risks distinctly associated with one's employment. Accordingly, the claimant's claim in this case should be analyzed under neutral risk principles; *i.e.*, recovery should be allowed only if the claimant can establish that she was exposed to the risks of injury from rainfall to a greater degree than the general public by virtue of her employment. The claimant presented no such evidence in this case. Although the employer provided the claimant a designated parking space, there is no evidence that the employer exercised any control over the particular route the claimant took to her car or required the claimant to traverse the particular handicap ramp on which she was injured. Nor is there any evidence suggesting that the claimant's employment duties somehow contributed to her fall or enhanced the risk of slipping on wet pavement. For example, the claimant was not carrying any work-related items or hurrying to complete a work-related task at the time she slipped and fell.

¶ 37 Even assuming *arguendo* that the claimant had to traverse the same path twice or more per day to get to her car, she still could not recover benefits because there is no evidence that the wet pavement she encountered on that path was any different or more dangerous than any other wet pavement regularly encountered by members of the general public while walking in the rain. See *Caterpillar Tractor Co.*, 129 Ill. 2d at 62-63. In *Caterpillar*, our supreme court denied benefits to a claimant who twisted his ankle while stepping off of a curb as he was walking from his workplace toward the employee parking lot on his employer's premises. Although our supreme court acknowledged that the claimant "regularly crossed" the curb upon which he was injured "to reach his car," it denied benefits because "[c]urbs, and the risks inherent in traversing them, confront all members of the public" and there was "nothing in the record to distinguish [the curb upon which the claimant was injured] from any other curb." *Id.* Thus, the

supreme court found that the claimant was no more likely to twist his ankle at his workplace than he would have been had he been engaged in any other business. *Id.*

¶ 38 The same analysis applies here. The wet pavement upon which the claimant fell was no different from any other wet pavement. There were no defects, holes, depressions, uneven surfaces, or puddles on the pavement's surface. The paved surface was merely wet from the rain. The surface was sloped because it was a handicap ramp. However, the claimant presented no evidence suggesting that the paved handicap ramp upon which she fell was somehow different from or more hazardous than any other wet handicap ramp that members of the general public traverse every day. She did not argue that the ramp upon which she fell was unusually slippery when exposed to rainfall. Thus, there was no evidence suggesting that the claimant was more likely to slip and fall on her employer's premises than she or any other member of the public would be likely to fall on any other paved, wet, and sloped surface. The Commission properly rejected the claimant's claim under a neutral risk analysis. *Id.*

¶ 39 The claimant argues that the risk she encountered was distinctly associated with her employment because the wet pavement that caused her fall was located on her employer's premises. She contends that her injuries are therefore compensable as a matter of law and that, because her injuries were caused by an employment-related hazard (rather than a neutral risk), her claim should not be analyzed according to neutral risk principles.

¶ 40 We acknowledge that both our supreme court and our appellate court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises. See, *e.g.*, *Archer Daniels Midland Co. v. Industrial Comm'n*, 91 Ill. 2d 210, 216 (1982) ("Where the claimant's injury was sustained as a result of the condition of the employer's premises, this court has consistently approved an award of compensation."); see also *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill. 2d 429 (1968) (holding that claimant's fall in employer's ice-covered parking lot was compensable); *Carr v. Industrial Comm'n*, 26 Ill. 2d 347 (1962) (same); *De Hoyos v. Industrial Comm'n*, 26 Ill. 2d 110 (1962) (same); *Caterpillar Tractor Co.*, 129 Ill. 2d at 62 (suggesting that an injury is causally related to the employment if the injury occurs "as a direct result of a hazardous condition on the employer's premises"); *Mores-Harvey* , 345 Ill. App. 3d at 1040 (the presence of a "hazardous condition" on the employer's premises that causes a claimant's injury, including a hazardous condition located in a parking lot the employer provides for its employees, "supports the finding of a compensable claim"); *Suter v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 40 (where the claimant slipped on ice in a parking lot furnished by her employer shortly after she arrived at work, the claimant was entitled to benefits under the Act "as a matter of law"). The presence of a "hazardous condition" on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public. *Archer Daniels Midland Co.*, 91 Ill. 2d at 216; *Mores-Harvey*, 345 Ill. App. 3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, ¶ 40. In other words, such injuries are not analyzed under "neutral risk" principles; rather they are deemed to be risks "distinctly associated" with the employment.

¶ 41 However, we find the above-references cases to be distinguishable from this case for one principal reason. In this case, unlike in those cases, the claimant's injury was not caused by a "hazardous condition" on the employer's premises. As noted, the claimant's injury was apparently caused by a paved surface that was wet due to *rainfall*. Each of the "hazardous condition" cases cited above involves injuries caused by the natural accumulation of *snow and/or ice* in a parking lot or other outdoor space owned or controlled by the employer (see, *e.g.*, *Archer Daniels Midland Co.*, 91 Ill. 2d at 216; *Hiram Walker & Sons, Inc.*, 41 Ill. 2d 429; *Carr*, 26 Ill. 2d 347; *De Hoyos*, 26 Ill. 2d 110-11; *Mores-Harvey*, 345 Ill. App. 3d at 1040; *Suter*, 2013 IL App (4th) 130049WC, ¶ 40). Other cases have ruled that injuries may be deemed to arise out of the employment if they are caused by defects or slippery *indoor* surfaces at the worksite. See, *e.g.*, *First Cash Financial Services*, 367 Ill. App. 3d at 106. However, the claimant cites no published case that holds or suggests that an outdoor, paved surface wet from rainfall constitutes a "hazardous condition" absent ice, snow, or some other defect or hazard. Nor have we found any such case.

¶ 42 That is not surprising. The rule urged by the claimant would hold an employer liable whenever one of its employees is injured by exposure to the elements or some other natural occurrence that occurs on the employer's property, even where the claimant's employment does not heighten the risk in any way. That is not the law. Our supreme court has squarely rejected the positional risk doctrine. See *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 552-53 (1991). Moreover, injuries caused by exposure to the elements or by "acts of God" such as lightning strikes and tornados are compensable only if the claimant is exposed to the risk of injury from such occurrences to a greater degree than the general public or if the employment somehow enhances or "accentuate[s] the natural hazard from the elements." *American Freight Forwarding Corp. v. Industrial Comm'n*, 31 Ill. 2d 293, 294 (1964); see also *Alzina Construction Co. v. Industrial Comm'n*, 309 Ill. 395, 401 (1923) (denying compensation for injuries caused by a lighting strike where claimant's work did not make it more likely that he would be struck by lightning, and ruling that while an employer "cannot ordinarily be held liable to pay compensation for injury caused by forces of nature which he cannot reasonably foresee and guard against, where the employee is no more subject to injury from such forces than others," "the employer is liable where the work or method of doing it exposes the employee to the forces of nature to a greater extent than he would be exposed if not so engaged or to a greater extent than others in the community are exposed"); *Decatur-Macon County Fair Ass'n v. Industrial Comm'n*, 69 Ill. 2d 262 (1977) (holding that the widow of a fairgrounds caretaker killed by tornado that struck the fairgrounds could not recover benefits without showing that the decedent's employment duties exposed him to some special or heightened danger from the elements). In other words, when analyzing the risks posed by exposure to the elements or "acts of God," we apply neutral risk principles. The employee's injuries in such cases are compensable only if the claimant shows that he was exposed to some increased risk by virtue of his employment.

¶ 43 As noted above, the claimant has made no such showing in this case. Accordingly, the Commission's finding that the claimant failed to prove that she sustained accidental injuries

arising out of her employment was not against the manifest weight of the evidence.[6]

¶ 44 CONCLUSION

¶ 45 For the reasons set forth above, we affirm the judgment of the circuit court of Du Page County, which confirmed the Commission's decision.

¶ 46 Affirmed.

[6]The claimant notes that the Commission erred by characterizing the risk of injury encountered by the claimant as a "personal" risk. Although the Commission did make one passing statement to that effect, it also conducted a neutral risk analysis and found that the claimant's injuries "did not result from an employment-related risk or from a neutral risk to which [the claimant] was at increased exposure as a result of her employment with [the employer]." When the Commission's decision is read in its entirety, it appears that the Commission found that the risk involved was neutral rather than personal. In any event, we may affirm the Commission's decision on any basis supported by the record regardless of the Commission's findings or its reasoning. *General Motors Corp. v. Industrial Comm'n*, 179 Ill. App. 3d 683, 695 (1989). Accordingly, we affirm the Commission's denial of benefits under a neutral risk analysis without concluding that the claimant's fall was the result of a personal risk.

Illinois Official Reports

Appellate Court

***Eddards v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 150757WC**

Appellate Court Caption	ASHLEY EDDARDS, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Heritage Manor Streator, Appellee).
District & No.	Third District, Workers' Compensation Commission Division Docket No. 3-15-0757WC
Filed	September 28, 2017
Decision Under Review	Appeal from the Circuit Court of La Salle County, No. 14-MR-239; the Hon. Joseph P. Hettel, Judge, presiding.
Judgment	Circuit court judgment reversed; decision of the Commission vacated, and arbitrator's corrected decision reinstated.
Counsel on Appeal	Emmanuel F. Guyon, of Streator, for appellant. Peter A. Donahue, of Ripes, Nelson, Baggot & Kalobratsos, P.C., of Itasca, for appellee.
Panel	JUSTICE HUDSON delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justices Hoffman, Harris, and Moore concurred in the judgment and opinion.

OPINION

¶ 1 Claimant, Ashley Eddards, sought benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)) for an injury she allegedly sustained to her right shoulder on November 21, 2010, while working for respondent, Heritage Manor Streator. Following a hearing, the arbitrator found that claimant sustained an injury arising out of and in the course of her employment with respondent and that her present condition of ill-being was causally related to the injury. The arbitrator awarded claimant temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, and medical expenses. Thereafter, respondent filed a timely motion pursuant to section 19(f) of the Act (820 ILCS 305/19(f) (West 2012)) to recall the arbitrator's decision to correct a clerical error. The arbitrator issued a corrected decision, and respondent filed a petition for review.

¶ 2 The Illinois Workers' Compensation Commission (Commission) reversed the decision of the arbitrator, finding that claimant failed to sustain her burden of proving that her injury arose out of and in the course of her employment with respondent. On judicial review, the circuit court of La Salle County confirmed the Commission's decision. Thereafter, claimant filed a notice of appeal. On appeal, claimant argues that respondent failed to properly perfect review of the arbitrator's decision before the Commission by seeking review of the arbitrator's original decision rather than the corrected decision. Alternatively, claimant argues that the Commission's finding that she failed to prove that she sustained an injury arising out of and in the course of her employment was against the manifest weight of the evidence. We agree with claimant's first contention. Accordingly, we reverse the judgment of the circuit court, vacate the decision of the Commission, and reinstate the corrected decision of the arbitrator.

¶ 3 ### I. BACKGROUND

¶ 4 On January 31, 2011, claimant filed an application for adjustment of claim seeking workers' compensation benefits for an injury she suffered to her right shoulder on November 21, 2010, which she alleged arose out of and in the course of her employment with respondent. The claim proceeded to arbitration on May 8, 2013. The arbitrator issued a decision on August 29, 2013, finding that claimant's injury arose out of and in the course of her employment and that claimant's current condition of ill-being was causally related to the injury. The arbitrator awarded claimant TTD benefits of $286 per week for 6 weeks (see 820 ILCS 305/8(b) (West 2010)) and PPD benefits of $286 per week for 63.25 weeks (representing 12.65% loss of the person as a whole) (see 820 ILCS 305/8(d)(2) (West 2010)). Additionally, the arbitrator ordered respondent to pay "reasonable and necessary medical services of $34,177.75, subject to the lien claim of the State of Illinois for expenses advanced, as provided in Section [*sic*] 8(a) and 8.2 of the Act [(820 ILCS 305/8(a), 8.2 (West 2010))]."

¶ 5 Respondent received the arbitrator's decision on September 13, 2013. On September 26, 2013, respondent filed a motion pursuant to section 19(f) of the Act (820 ILCS 305/19(f) (West 2012)) to recall the arbitrator's decision to correct a clerical error. Specifically, respondent requested a recall of the arbitrator's decision and a clarification regarding the amount of medical expenses payable. Respondent asserted that the language of the arbitrator's decision regarding the award of medical bills was confusing as to the amount payable by respondent under the award. Respondent maintained that the amount of medical expenses payable under the award was $5163.20, the total amount paid by the Illinois Department of Public Aid, as the

remaining charges were adjusted by the medical providers. On October 7, 2013, the arbitrator granted respondent's request for recall under section 19(f) of the Act (820 ILCS 305/19(f) (West 2012)). On October 9, 2013, the arbitrator issued a corrected decision. The corrected decision ordered respondent to pay "reasonable and necessary medical services of $5,163.20, as provided in Section [*sic*] 8(a) and 8.2 of the Act [(820 ILCS 305/8(a), 8.2 (West 2012))]." On November 5, 2013, respondent filed a petition for review of the arbitrator's decision. The petition requested the Commission "to review the arbitration decision for this case filed on 8-29-13 and received on 9-13-13."

¶ 6 On August 20, 2014, the Commission entered an order reversing the arbitrator's decision. The Commission determined that claimant failed to prove that she sustained an injury arising out of and in the course of her employment with respondent. Thereafter, claimant sought judicial review. The circuit court of La Salle County confirmed the decision of the Commission. This appeal ensued.

¶ 7 II. ANALYSIS

¶ 8 On appeal, claimant argues that the Commission lacked jurisdiction over this matter because respondent failed to properly perfect review of the arbitrator's decision before the Commission by seeking review of the arbitrator's original decision rather than the corrected decision.[1] Alternatively, claimant argues that the Commission's finding that she failed to prove that she sustained injuries arising out of and in the course of her employment with respondent was against the manifest weight of the evidence. Respondent contends that the Commission properly exercised jurisdiction over this case because it (respondent) filed a timely petition for review after it received the arbitrator's corrected decision. On the merits, respondent argues that the Commission's decision must be affirmed because the Commission's finding that claimant failed to prove that she sustained an injury arising out of and in the course of her employment with respondent was not against the manifest weight of the evidence.

¶ 9 Initially, we note that although claimant raises the jurisdictional issue for the first time before this court, we may address the matter, for the lack of subject-matter jurisdiction may be raised at any time. *Millennium Knickerbocker Hotel v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161027WC, ¶ 17; *Jones v. Industrial Comm'n*, 335 Ill. App. 3d 340, 343 (2002); *Campbell v. White*, 187 Ill. App. 3d 492, 504 (1989).

¶ 10 "While Illinois courts are courts of general jurisdiction and are presumed to have subject-matter jurisdiction, this presumption does not apply to workers' compensation proceedings." *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502 (2007); *Sprinkman & Sons Corp. of Illinois v. Industrial Comm'n*, 160 Ill. App. 3d 599, 601 (1987). Rather, on appeal from a decision of the Commission, the circuit court obtains subject-matter jurisdiction only if the appellant complies with the statutorily mandated procedures set forth in the Act. See *Residential Carpentry, Inc.*, 377 Ill. App. 3d at 502. "[T]o vest the courts with

[1]Prior to briefing, claimant filed a "Petition to Dismiss the Appeal to the Appellate Court and Petition to Adopt the Arbitrator's Decision Awarding Benefits." We entered an order taking the motion with the case, allowing the parties to address the jurisdictional issue in their respective briefs. Because the parties address their respective positions in their briefs, and we decide the issue in this disposition, we now deny the petition as moot.

jurisdiction to review Commission decisions, strict compliance with the provisions of the Act is necessary and must affirmatively appear in the record." *Illinois State Treasurer v. Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 15; see also *PPG Industries, Inc. v. Industrial Comm'n*, 91 Ill. 2d 438, 442-43 (1982) (requiring strict compliance with provisions of the Act related to review of the arbitrator's decision); *Northwestern Steel & Wire Co. v. Industrial Comm'n*, 37 Ill. 2d 112, 115 (1967) (noting that the right of review of the arbitrator's decision is entirely statutory and that the procedural steps with respect to perfecting this right must be followed strictly).

¶ 11 Under the Act, an arbitrator's decision becomes the final decision of the Commission unless a petition for review is filed by either party within 30 days after the receipt of the arbitrator's decision. 820 ILCS 305/19(b) (West 2012). Further, section 19(f) of the Act provides in relevant part as follows:

> "[T]he Arbitrator or the Commission may on his or its own motion, or on the motion of either party, correct any clerical error or errors in computation within 15 days after the date of receipt of any award by such Arbitrator or any decision on review of the Commission and shall have the power to recall the original award on arbitration or decision on review, and issue in lieu thereof such corrected award or decision. Where such correction is made the time for review herein specified shall begin to run from the date of the receipt of the corrected award or decision." 820 ILCS 305/19(f) (West 2012).

Thus, where an arbitrator corrects a decision upon a motion for recall, a party must file a petition for review within 30 days after the receipt of the arbitrator's corrected decision. 820 ILCS 305/19(b), 19(f) (West 2012); *Residential Carpentry, Inc.*, 377 Ill. App. 3d at 503 (noting that where a correction is made pursuant to section 19(f) of the Act, the time for review begins to run from the date of the receipt of the corrected award); *Campbell-Peterson v. Industrial Comm'n*, 305 Ill. App. 3d 80, 84 (1999) (same). If the party fails to file the petition for review within the specified time, the arbitrator's decision "shall become the decision of the Commission and in the absence of fraud shall be conclusive." 820 ILCS 305/19(b) (West 2012); *Garcia v. Industrial Comm'n*, 95 Ill. 2d 467, 469 (1983) ("Since neither [the employee] nor her employer filed a petition for review of the corrected decision, it became the decision of the Commission without review and is 'conclusive' of the dispute between the parties."); *Smalley Steel Ring Co. v. Illinois Workers' Compensation Comm'n*, 386 Ill. App. 3d 993, 995 (2008). At issue in this case is whether respondent properly perfected review of the arbitrator's decision before the Commission.

¶ 12 Instructive to our analysis is *Campbell-Peterson*, 305 Ill. App. 3d 80. In that case, the arbitrator filed a decision on September 27, 1996, denying the employee benefits. The parties received the decision on October 22, 1996. On October 24, 1996, the employer filed a motion to correct the arbitrator's decision based on a "clerical/computer error" that omitted certain portions of the decision it received from the arbitrator concerning entitlement to TTD benefits. *Campbell-Peterson*, 305 Ill. App. 3d at 81. On October 29, 1996, the employee filed a petition for review of the arbitrator's September 27, 1996, decision. Thereafter, the arbitrator granted the employer's motion to correct, and, on January 15, 1997, the arbitrator issued a corrected decision, which the employee received on January 24, 1997. The employee did not file a petition for review with the Commission from the corrected decision. In December 1997, the Commission determined that it lacked jurisdiction over the employee's case due to his failure

to perfect review following the issuance of the arbitrator's corrected decision. Accordingly, the Commission dismissed the employee's claim.

¶ 13 On appeal, the employee argued that the corrections made to the arbitrator's original decision were technical, were not made for the purpose of correcting an error or inconsistency, did not materially affect the rights of the parties, and were made only for the purpose of providing the employer with a "clean copy" of the initial decision. Under these circumstances, the employee maintained that strict compliance with the section 19(f) requirement of filing a petition for review from a corrected decision was unnecessary and that no purpose would be frustrated in allowing his initial petition for review to stand. In rejecting the employee's position, we emphasized that strict compliance with section 19(f) is required, explaining:

> "In the instant case, the goal and purpose of section 19(f), *i.e.*, notice to the Commission and the parties, was not satisfied, considering that the Commission had not shown claimant's claim as a pending matter.
>
> Importantly, claimant acknowledged that two versions of the arbitrator's original decision were issued. When the employer realized that the original arbitrator's decision it received omitted certain portions concerning entitlement to temporary total disability benefits, it had no way of knowing which version of the arbitrator's decision was received by claimant. This inconsistency warranted correction in order to prevent confusion. Therefore, we believe that the clerical error made in issuing the arbitrator's original decision was not merely technical but, instead, was substantial.
>
> The fact that claimant filed a petition for review from the arbitrator's original decision is irrelevant. The language of section 19(f) is clear: where, as here, a correction is made for a clerical error ***, the time for review *** begins to run from the date of the receipt of the corrected award or decision. Claimant failed to comply with section 19(f) when he omitted filing a petition for review within 15 days of the arbitrator's January 15, 1997, corrected decision.
>
> In adhering to strict compliance with section 19(f), we conclude that the Commission correctly determined that it lacked jurisdiction over claimant's case due to his failure to perfect review following the issuance of the arbitrator's corrected decision, and its dismissal of claimant's claim was proper." *Campbell-Peterson*, 305 Ill. App. 3d at 84.[2]

¶ 14 More recently, in *Schulz v. Forest Preserve District*, 344 Ill. App. 3d 658 (2003), which claimant cites in support of her argument, we reinforced the notion that strict compliance with section 19(f) is required. In *Schulz*, the arbitrator filed a decision on June 29, 2001, finding that the employee sustained a compensable injury. On July 17, 2001, the employee filed a petition to recall stating that her name was misspelled in the caption of the case and requesting the error be corrected. On July 26, 2001, the employer filed a petition for review of the arbitrator's decision dated June 29, 2001. The arbitrator filed a corrected decision on July 27, 2001. The employer did not file a petition for review from the arbitrator's corrected decision. On October 11, 2001, the employee filed a motion to dismiss employer's petition for review. The Commission granted the employee's motion, finding that it lacked jurisdiction over the case

[2]As noted above, sections 19(b) and 19(f) now require a petition for review to be filed within 30 days after receipt of the corrected decision. See 820 ILCS 305/19(b), 19(f) (West 2012).

due to the employer's failure to file a petition for review after the arbitrator issued the corrected decision. The circuit court confirmed the Commission's decision, and the employer appealed.

¶ 15 On appeal, the employer argued that it substantially complied with section 19(f) of the Act by filing a petition for review of the arbitrator's original decision and that substantial compliance is sufficient. *Schulz*, 344 Ill. App. 3d at 660. We disagreed. Citing *Campbell-Peterson*, 305 Ill. App. 3d at 84, we held that section 19(f) requires strict compliance to perfect an appeal. *Schulz*, 344 Ill. App. 3d at 661-62. Furthermore, we determined that the goal and the purpose of the statute, *i.e.*, notice to the Commission and the parties, was not satisfied as a result of the employer's failure to file a petition for review within 30 days of the arbitrator's corrected decision. *Schulz*, 344 Ill. App. 3d at 662.

¶ 16 In the present case, respondent too failed to strictly comply with the requirements of section 19(f). Although respondent filed a petition for review within 30 days of receipt of the arbitrator's corrected decision, the petition requests review of the arbitrator's original decision. However, because the Commission issued a corrected decision, the original decision was not a final, appealable decision. See *Garcia*, 95 Ill. 2d at 469 ("The claimant's petition for review of the original decision was without effect because the issuance of the corrected decision made the original decision a nullity."); *International Harvester v. Industrial Comm'n*, 71 Ill. 2d 180, 186 (1978) (noting that where a party files a petition to correct pursuant to section 19(f) of the Act, the Commission's decision is not final until the Commission determines whether or not to correct such errors); *Residential Carpentry, Inc.*, 377 Ill. App. 3d at 503 (noting that an appeal from a decision of the Commission that is commenced prior to the resolution of a motion to correct is premature). Moreover, respondent never filed a petition requesting review of the arbitrator's *corrected* decision within the statutorily required period. Respondent's failure to file a petition for review from the arbitrator's corrected decision divested the Commission of jurisdiction to consider respondent's appeal. *Schulz*, 344 Ill. App. 3d at 661-62; *Campbell-Peterson*, 305 Ill. App. 3d at 84.

¶ 17 Respondent nevertheless maintains that the Commission had jurisdiction to review the arbitrator's decision. Respondent contends that *Schulz* is distinguishable. According to respondent, *Schulz* and the cases cited therein illustrating the requirement of strict compliance (including *Campbell-Peterson*) involved situations where no petition for review was filed within 30 days after the date of the corrected decision. Here, in contrast, respondent argues that it was "within strict compliance of Section 19 of the Act" by filing a petition for review within 30 days after the arbitrator's corrected decision. Respondent further asserts that it "substantially complied in the form of the petition for review, except for a typographical error in the dates of the decision."

¶ 18 We do not dispute that *Schulz* and *Campbell-Peterson* are factually distinguishable on the ground cited by respondent. However, the import of those cases is that the Act requires strict compliance with the requirements for filing a petition for review of the arbitrator's decision to the Commission. By requesting review of the arbitrator's original decision rather than the corrected decision, respondent has not strictly complied with the Act. Stated differently, in contravention of sections 19(b) and 19(f) of the Act (820 ILCS 305/19(b), 19(f) (West 2012)), respondent failed to seek review of the arbitrator's *corrected* decision within 30 days after the date of that decision. Moreover, we disagree with respondent's characterization of the error as a mere "typographical error."

¶ 19 A "typographical error" or "scrivener's error" has been defined as "a clerical error resulting from a minor mistake or inadvertence when writing or when copying something on the record, including typing an incorrect number." *In re Marriage of Crecos*, 2015 IL App (1st) 132756, ¶ 17. Thus, in *Crecos*, the appellant's notice of appeal sought review of orders entered September 24, 2013, and July 27, 2013. However, no orders were actually entered on either of those dates, and the notice of appeal should have referenced the dates of September 24, *2012*, and July *26*, 2013. The *Crecos* court found that the incorrect dates on the notice of appeal constituted a mere scrivener's error and did not create a fatal defect. *Crecos*, 2015 IL App (1st) 132756, ¶ 17. Similarly, in *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, a case cited by respondent, the employer sought review of the arbitrator's decision in two cases. The petition for review incorrectly identified one of the case numbers as 07-WC-*4*6127, instead of 07-WC-*5*6127. This court concluded that the Commission had jurisdiction to address the appeal because the incorrect case number constituted a "clerical, typographical error" consisting of "one incorrect digit in the second case number." *Shafer*, 2011 IL App (4th) 100505WC, ¶ 31. While acknowledging that the Act requires strict compliance with the statute conferring jurisdiction upon the Commission, we also pointed out that the Act did not prescribe any specific requirements regarding the form of a petition for review and the petition for review at issue did not involve the failure to comply with a specific, express statutory requirement for review. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 32.

¶ 20 Here, in contrast, the date on respondent's petition for review does not consist merely of an error in "form" or a "scrivener's error" such as one incorrect number in the year or day of the order being appealed. Rather, it references a nonfinal order entered on an entirely different date. More significant, section 19(f) expressly provides that, where the arbitrator issues a corrected decision, the time for review "shall begin to run from the date of the receipt of the corrected award or decision." 820 ILCS 305/19(f) (West 2012). Thus, unlike *Shafer*, respondent failed to comply with a specific, express statutory requirement for review. Under these circumstances, we cannot characterize the alleged error as "a minor mistake or inadvertence when writing or when copying something on the record."

¶ 21 Respondent asserts that to reverse the decision of the Commission because of a "technicality" would put form over substance and violate the spirit of the law that the Act should be liberally construed. As noted above, however, the error in this case was more than a scrivener's error and to allow it to stand would ignore not only the requirement that the Act be strictly construed but the express language of section 19(f) of the Act (820 ILCS 305/19(f) (West 2012)) as well. Respondent also asserts that the goal and purpose of the statute, *i.e.*, notice to the Commission and the parties, was satisfied. However, given that the petition for review references the date of the arbitrator's original decision instead of the date of the arbitrator's corrected decision, we cannot say that the petition for review adequately notified the opposing party and the Commission regarding which decision was being appealed. See *Schulz*, 344 Ill. App. 3d at 662; *Campbell-Peterson*, 305 Ill. App. 3d at 84.

¶ 22 In short, respondent failed to file a petition for review to the Commission within 30 days after the arbitrator issued his corrected decision. As a result, the Commission lacked jurisdiction to consider respondent's petition for review and the arbitrator's corrected decision became the decision of the Commission. Accordingly, we reverse the judgment of the circuit court, vacate the decision of the Commission, and reinstate the corrected decision of the

arbitrator. See *Garcia*, 95 Ill. 2d at 469 (noting that since the Commission was without jurisdiction to review the corrected decision, the circuit court also lacked jurisdiction).

¶ 23 III. CONCLUSION

¶ 24 For the reasons set forth above, we reverse the judgment of the circuit court of La Salle County, vacate the decision of the Commission, and reinstate the corrected decision of the arbitrator.

¶ 25 Circuit court judgment reversed; decision of the Commission vacated, and arbitrator's corrected decision reinstated.

Illinois Official Reports

Appellate Court

***Joiner v. Illinois Workers' Compensation Comm'n*, 2017 IL App (1st) 161866WC**

Appellate Court Caption	ALFRED JOINER, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Ceco Concrete Construction, Inc., Brill & Fishel, P.C., Sostrin & Sostrin P.C., and Leonard Law Group, Appellees).
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-16-1866WC
Filed	September 29, 2017
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 16-L-50142; the Hon. Alexander P. White, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Mark Whiteside, of Chicago, for appellant. Francine R. Fishel, of Brill & Fishel, P.C., of Chicago, for appellees.
Panel	PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion. Justices Hoffman, Hudson, Harris, and Moore concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Alfred Joiner, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)), seeking benefits for various injuries he allegedly sustained while working for respondent Ceco Concrete Construction, Inc. (employer). The claimant also filed a common law claim related to the same accident against the employer and a third-party defendant in the circuit court of Cook County (civil action). The parties entered into a global settlement agreement in the civil action, which purported to settle both the claimant's workers' compensation claim and the civil action. The employer submitted the settlement agreement to the Illinois Workers' Compensation Commission (Commission) for approval. The arbitrator approved the parties' settlement agreement and ordered the claimant to pay attorney fees to the three attorneys who had represented him at various times during the Commission proceedings.

¶ 2 The claimant appealed the arbitrator's award of attorney fees to Commission, which unanimously affirmed the arbitrator's decision.

¶ 3 The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County. The claimant did not post an appeal bond when filing his petition for judicial review. The claimant's former workers' compensation counsel filed a motion to quash summons and to dismiss the claimant's petition for judicial review, arguing that the claimant's failure to post an appeal bond as required by section 19(f)(2) of the Act (820 ILCS 305/19(f)(2) (West 2016)) deprived the circuit court of subject-matter jurisdiction to review the Commission's order. The circuit court granted the claimant's counsels' motion and dismissed the claimant's petition for judicial review with prejudice.

¶ 4 This appeal followed.

¶ 5 FACTS

¶ 6 The claimant filed an application for adjustment of claim on November 21, 2008, seeking benefits under the Act for injuries he allegedly sustained while working for the employer when he tripped and fell at a construction site. At the time, attorney Neal Wishnick of Sostrin & Sostrin, P.C. (Sostrin) represented the claimant in connection with his workers' compensation claim. On June 24, 2010, the claimant discharged Sostrin and retained Andrew Leonard of the Leonard Law Group (Leonard). One week later, Sostrin filed a petition for attorney fees and costs. The arbitrator continued the hearing on Sostrin's fee petition until disposition of the case.

¶ 7 On September 9, 2014, the claimant filed a stipulation to substitute attorneys. The stipulation discharged Leonard and indicated that the claimant would now be represented by Francine Fishel of Brill & Fishel, P.C. (Fishel). Leonard filed a petition for attorney fees, which the arbitrator deferred until the disposition of the case.

¶ 8 On June 29, 2015, Fishel received a settlement offer of $290,000 from the employer. Fishel conveyed the settlement offer to the claimant. On July 9, 2015, the claimant terminated Fishel. That same day, Fishel filed a petition for attorney fees with the arbitrator.

¶ 9 While his Commission proceeding was pending, the claimant filed a civil action in the circuit court of Cook County, seeking damages for the injuries he sustained in the same accident that was the subject of the workers' compensation proceeding. The civil action

included several defendants, including the employer. Thomas Plouff of Costello, McMahon, Burke & Murphy, Ltd. (Plouff), represented the claimant in the civil action.

¶ 10 On July 21, 2015, nine days after the claimant had discharged Fishel as his workers' compensation counsel, the claimant entered into a "Global Settlement Agreement and Release" in the civil action (global settlement agreement). The global settlement agreement purported to resolve the civil action for $750,000, with $430,000 to be paid by the third-party defendant and $320,000 to be paid by the employer. The global settlement agreement also purported to resolve the claimant's pending workers' compensation claim for one dollar. In the global settlement agreement, the claimant agreed to "execute a lump sum settlement contract" (settlement contract) "in the form attached hereto as Exhibit A," which purported to settle the claimant's pending workers' compensation claim for the sum of one dollar. The global settlement agreement provided that the claimant and the employer "acknowledge[d] that the settlement contract must be approved by the [Commission] and that this settlement agreement is void unless and until the [Commission] approves the lump sum settlement contract." The global settlement agreement further provided that the claimant "acknowledged that he must resolve all attorney fee petitions and issues" and that "[n]o additional sums will be paid by [the defendants] for attorney fees which are solely [the claimant's] responsibility." The global settlement agreement further stated that, "as set forth in the settlement contract," the employer agreed to waive its workers' compensation lien against the claimant. In exchange for the employer's lien waiver and settlement payment to the claimant, the claimant agreed to (1) "hold harmless and indemnify" the employer and the other defendants from "all claims, damages, costs, expenses, attorney's fees, demands, liens, actions, subrogation or suit" brought by the claimant or by anyone on the claimant's behalf and (2) "pay his own attorney's fees in this matter." The global settlement agreement was attached to, and made part of, the settlement contract, which the employer's counsel subsequently submitted to the arbitrator for approval.

¶ 11 Also, on July 21, 2015, Plouff sent a letter to Fishel regarding the settlement contract and global settlement agreement, as well as Fishel's attorney fees. In the letter, Plouff stated that it was in the claimant's "best interests to settle the workers compensation case for $1.00, with a lien waiver." Plouff then asserted that, under the terms of a fee agreement that Fishel had previously executed with the claimant, Fishel "would be entitled to 20% of $1.00." Plouff also informed Fishel that the employer's counsel "will appear this Friday at 9:00 a.m." before the arbitrator to obtain approval of a "lump sum settlement contract for $1.00, with a hearing at a later date on filed fee petitions." Plouff stated that, although Fishel was legally entitled to collect only twenty cents in attorney fees, Plouff would offer to pay Fishel and her firm $10,000 in attorney fees out of the attorney fees Plouff collected in the civil action as a "professional courtesy." Plouff offered this amount "in full satisfaction of any attorney fees [Fishel] claim[ed] because of working for [the claimant]." Plouff stated that his offer would expire at 5 p.m. on July 23, 2015, and that, should Fishel decline the offer, the claimant would argue before the arbitrator that Fishel's attorney fee should be limited to twenty cents.

¶ 12 On July 24, 2015, the arbitrator held a hearing on the settlement contract submitted by the employer's counsel and on the fee petitions filed by the claimant's former attorneys. The claimant appeared at the hearing *pro se*. The employer's counsel and each of the claimant's former workers' compensation attorneys also appeared. The employer's counsel informed the arbitrator that, "pursuant to the settlement agreement, we are actually paying a dollar for

workers' compensation; but part of the overall settlement agreement in the civil case, which totaled $750,000, included a $320,000 contribution from Workers' Comp" (*i.e.*, from the employer's workers' compensation insurer). The arbitrator ruled that the award of attorney fees would be determined on the basis of the $320,000 workers' compensation payment. The arbitrator further stated that he had spoken with the claimant off the record before the hearing began and asked him whether he was "in agreement with the settlement contract and the fees and the division of fees" and that the claimant had indicated that he was "in agreement." The claimant acknowledged that the arbitrator's statement on this matter was correct.

¶ 13 During questioning by Fishel, the claimant testified that (1) he was responsible to pay the attorney fees in his workers' compensation case, (2) he had signed a fee agreement with each of his prior workers' compensation attorneys (Sostrin, Leonard, and Fishel) in which he had agreed to pay "20 percent of the recovery" as attorney fees, and (3) 20% of $320,000 is $64,000.

¶ 14 The parties then went off the record to discuss the terms of a proposed order regarding the payment and distribution of attorney fees in the workers' compensation matter. When the parties came back on the record, the claimant agreed to pay Sostrin, Leonard, and Fishel attorney fees "as set forth in the [arbitrator's] order" upon receipt of the settlement payment. The arbitrator noted that, because the circuit court's order in the civil action required the employer to pay the settlement directly to Plouff and the claimant, the arbitrator could not order the employer to pay Sostrin, Leonard, and Fishel directly. Accordingly, the arbitrator noted that he had changed his prior proposed order to reflect that the claimant and Plouff must pay the attorney fees to Sostrin, Leonard, and Fishel as set forth in the arbitrator's order upon receipt of the settlement payment from the employer's counsel. Both the claimant and the employer explicitly agreed with this change.

¶ 15 The arbitrator then approved the settlement contract and issued a written order directing the claimant and Plouff to pay Sostrin, Leonard, and Fishel $21,333.33 each within 30 days of receipt of the settlement proceeds. The arbitrator's Order expressly found that (1) the employer had "tendered $320,000 on the settlement at mediation to resolve their liability" in the instant workers' compensation action and (2) the claimant's prior workers' compensation attorneys were entitled to attorney fees in the amount of 20% of the amount tendered, or $64,000 (collectively), for their efforts in the workers' compensation matter.

¶ 16 Despite the entry of the approved settlement and the agreed attorney fee order, the claimant retained a new workers' compensation attorney and filed a petition for review of the arbitrator's order with the Commission. The claimant appealed only the arbitrator's award of attorney fees; he did not otherwise challenge the arbitrator's approval of the settlement. In response, Sostrin, Leonard, and Fishel filed a motion to vacate the settlement contract approved by the arbitrator, and Fishel filed a petition for penalties and fees.

¶ 17 The Commission affirmed the arbitrator's order and denied Sostrin, Leonard, and Fishel's motion to vacate the approved settlement agreement. After reviewing the arbitrator's order and the settlement contract, the Commission noted that "while the total amount of settlement is listed as $1.00 on one page of the Lump Sum Settlement and Order, the Terms of the Settlement are listed on the Lump Sum Settlement and Order as totaling $750,000.00, $430,000.00 of which was paid by [the third-party defendant] and $320,000.00 of which was paid by *** [the employer] in the workers' compensation claim." The Commission further noted that the $320,000 paid by the employer "was paid by [the employer's] workers'

compensation insurer for the settlement of the claimant's workers' compensation claim, which was verified both at the July 24, 2015 hearing and at oral argument by [the employer's] counsel." The Commission concluded that "[t]he Terms of Settlement and the Global Agreement, both of which are within the "four corners" of the Lump Sum Settlement and Order, and the actions of [the employer] and its workers' compensation carrier indicate that the workers' compensation claim was settled for $320,000.00 and not $1.00."

¶ 18 Moreover, the Commission rejected what it called "[the claimant's] attempts to renege on the contract he entered into on July 24, 2015 before [the arbitrator] when he agreed to pay [Sostrin, Leonard, and Fishel] upon receipt of the settlement proceeds as set forth in [the arbitrator's] order." The Commission noted that, during the arbitration hearing, the claimant "agreed that he was responsible for attorney's fees regarding his workers' compensation case, that he had signed three separate fee agreements with his three prior attorneys in the workers' compensation claim and that he agreed with the Settlement Contract, the attorney's fees, and the division of attorney's fees"; however, "now that the settlement monies have been paid, [the claimant] has decided to question the order that was entered based on his declarations at hearing and under oath." The Commission further noted that the claimant had signed the settlement contract, including the global settlement agreement, which provided that the claimant "was responsible for and agreed to pay all of his attorney's fees." The Commission stressed that the arbitrator "made it very clear that he was approving the Settlement Contract based on [the claimant's] agreement to pay the attorneys' fees," and "at no point during the hearing did [the claimant] indicate that he did not *** understand or that he was confused." The Commission found it "wholly disingenuous" for the claimant to claim that he did not understand what he was agreeing to now." Further, the Commission found that the claimant was barred from claiming that he is not required to pay the attorneys' fees per the arbitrator's order under the doctrine of estoppel because such a claim contradicts the claimant's prior testimony that he was required to and would pay those fees and because the arbitrator relied upon the claimant's prior testimony in approving the settlement.[1] The Commission characterized the claimant's current argument as "buyer's remorse" which was "[a]t best *** disingenuous and at worst *** a fraud upon the Commission." The Commission concluded that, if it were to ratify the claimant's actions, "it would result in a miscarriage of justice and allow [the claimant's] greed to absolve him of his legal responsibilities."

¶ 19 The Commission found that, although evidence established that the claimant's workers' compensation claim was settled for $320,000 and that the claimant agreed to pay Sostrin, Leonard, and Fishel $21,333.33 each within 30 days of receipt of the settlement proceeds, the settlement contract was "inartfully drafted to show two settlement amounts." Accordingly, the Commission amended the Settlement Contract Lump Sum Petition and Order approved by the arbitrator to reflect that the workers' compensation claim was settled for $320,000 and that the claimant shall pay Sostrin, Leonard, and Fishel $21,333.33 each, for a total of $64,000 in attorney fees.

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[1]The Commission found that the settlement contract and the arbitrator's attorney fee order "are so inextricably intertwined that they are in fact one in the same document" and that "[n]either the settlement contract nor the fee Order would have been entered and approved by the arbitrator without the other."

¶ 20 The claimant sought judicial review of the Commission's order in the circuit court of Cook County. When filing its petition for review and request for summons, the claimant did not file an appeal bond pursuant to section 19(f)(2) of the Act. Sostrin, Leonard, and Fishel filed a motion to quash summons and to dismiss the claimant's petition for judicial review, arguing that the claimant's failure to post an appeal bond as required by section 19(f)(2) of the Act deprived the circuit court of jurisdiction to review the Commission's order. The circuit court granted the claimant's counsels' motion and dismissed the claimant's petition for judicial review with prejudice.

¶ 21 This appeal followed.

¶ 22 ANALYSIS

¶ 23 Before addressing the issues raised by the claimant in this appeal, we note that the claimant failed to file a brief in compliance with Illinois Supreme Court Rule 342(a). That rule provides, in relevant part, that

> "[t]he appellant's brief shall include, as an appendix, *** a copy of the judgment appealed from, [and] any opinion, memorandum, or findings of fact filed or entered by the trial judge or by any administrative agency or its officers ***.
>
> * * *
>
> In addition, in cases involving proceedings to review orders of the Illinois Workers' Compensation Commission, the appellant's brief shall also include as part of the appendix copies of decisions of the arbitrator and the Commission." Ill. S. Ct. R. 342(a) (eff. Jan.1, 2005).

¶ 24 Although the claimant included a copy of the circuit court's order in his appendix, he failed to include copies of the decisions of the arbitrator and the Commission, in violation of Rule 342(a). This court may summarily dismiss an appeal for failure to comply with Rule 342. *Pecyna v. Industrial Comm'n*, 149 Ill. App. 3d 97, 101 (1986). However, absent aggravating circumstances, a harsh construction of the rule is to be avoided. *Id.* Because we find no such aggravating circumstances here, we will not dismiss the claimant's appeal. However, we admonish the claimant and all appellants to ensure that their briefs on appeal are in full compliance with Rule 342(a).

¶ 25 Turning to the merits, the claimant argues that the circuit court erred in ruling that it lacked jurisdiction to consider the claimant's petition for judicial review of the Commission' s order because the claimant did not file an appeal bond as required by section 19(f)(2) of the Act. For reasons addressed in detail below, the claimant maintains that section 19(f)(2)'s bond requirement does not apply to him.

¶ 26 Whether a court has jurisdiction to review an administrative decision presents a question of law that we review *de novo*. *Illinois State Treasurer v. Illinois Workers' Compensation Comm'n*, 2015 IL 117418, ¶ 13. *De novo* review is also appropriate in this case because resolution of the jurisdictional question turns solely on the construction of section 19(f) of the Act (820 ILCS 305/19(f)(2) (West 2012)), and statutory construction is likewise a question of law. *Illinois State Treasurer*, 2015 IL 117418, ¶ 13; see also *People ex rel. Director of Corrections v. Booth*, 215 Ill. 2d 416, 423 (2005).

¶ 27 Judicial review of decisions by the Commission is governed by section 19(f)(2) of the Act (820 ILCS 305/19(f)(2) (West 2016)). Section 19(f)(2) provides that no summons authorizing

a circuit court to review a decision issued by the Commission shall issue "unless the one against whom the Commission shall have rendered an award for the payment of money shall upon the filing of his written request for such summons file with the clerk of the court a bond conditioned that if he shall not successfully prosecute the review, he will pay the award and the costs of the proceedings in the courts." 820 ILCS 305/19(f)(2) (West 2012). This requirement is jurisdictional. *Berryman Equipment v. Industrial Comm'n*, 276 Ill. App. 3d 76, 78-79 (1995) (noting that because the bond requirement is statutory, strict compliance is required to vest subject-matter jurisdiction in the circuit court); see also *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502-03 (2007); *Illinois State Treasurer*, 2015 IL 117418, ¶ 15 (ruling that "in order to vest the courts with jurisdiction to review Commission decisions, strict compliance with the provisions of the Act is necessary and must affirmatively appear in the record"). "[F]iling a bond as set forth in section 19(f)(2) *** is a prerequisite to invoking the reviewing court's subject-matter jurisdiction," and "[i]n the absence of a bond which conforms to the statute's requirements, the [circuit] court has no jurisdiction to review the Commission's decision." *Illinois State Treasurer*, 2015 IL 117418, ¶ 18.

¶ 28 As noted, section 19(f)(2) requires a party "against whom the Commission [has] rendered an award for the payment of money" to file an appeal bond in order to invoke the circuit court's jurisdiction to review the Commission's decision. 820 ILCS 305/19(f)(2) (West 2016). In this case, the Commission entered an award for the payment of money against the claimant. Specifically, the Commission ordered the claimant to pay $64,000 in attorney fees to his three prior workers' compensation attorneys upon receipt of the settlement proceeds from the employer's counsel. The Commission did not order the employer to pay a portion of its settlement payment to Sostrin, Leonard, and Fishel as attorney fees.[2] Rather, it ordered the claimant to pay the attorney fees. In his brief on appeal, the claimant acknowledged that the Commission ordered him to pay the $64,000 attorney fee award "from his personal assets to [his] three former workers compensation attorneys." Thus, by its plain terms, section 19(f)(2)'s bond requirement applies to the claimant in this case because he was seeking judicial review of a Commission decision ordering him to pay money to another party.

¶ 29 The claimant argues that section 19(f)(2)'s appeal bond requirement does not apply to him for several reasons. First, relying upon our decision in *Celeste v. Industrial Comm'n*, 205 Ill. App. 3d 423 (1990), the claimant argues that he was not required to file an appeal bond because he was an employee, not an employer. In *Celeste*, the claimant filed a motion for interest on remand before the Commission which was not heard prior to the time the employer paid the compensation award. *Id.* at 424. Included in the sum tendered by the employer and accepted by the claimant was an amount specifically designated to cover interest. *Id.* Nevertheless, the Commission subsequently ruled that the claimant was not entitled to interest. *Id.* The claimant filed a petition for judicial review of the Commission's ruling on the interest issue, but did not file an appeal bond. On the employer's motion, the circuit court quashed the summons because of the claimant's failure to file an appeal bond as required by section 19(f)(2). *Id.*

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[2]As the arbitrator noted, the Commission could not order the employer to pay the attorney fees to the claimant's workers' compensation counsel because the circuit court presiding over the civil action had already ordered the employer to pay the entire $750,000 global settlement amount directly to the claimant and Plouff, the claimant's counsel in the civil action.

¶ 30 We reversed the circuit court's decision. We ruled that, "[b]y the express terms of [section 19(f)(2)], an employee is not one against whom an award of money has been rendered." *Id.* at 426. Reasoning that "[t]he bond protects the employee from having to execute against an employer's assets" and protects employers from having their assets encumbered by "liens of potentially indefinite duration," we concluded that the bond requirements apply "only to those employers against whom liability for payment of a compensation judgment may attach." *Id.* at 427. Because "[e]mployees are not within that class," we held that the circuit court erred in quashing the summons. *Id.*

¶ 31 This case is distinguishable from *Celeste* in material respects. In *Celeste*, the only "order for the payment of money" issued by the Commission was the compensation award. Thus, the employer was the only party that was ordered to pay any money. The claimant in *Celeste* appealed only the Commission's determination that he was not entitled to interest. The claimant did not appeal an order requiring him to pay money to another party; rather, he argued that he was entitled to receive more compensation than the Commission had ordered. Here, by contrast, the Commission entered an order requiring the claimant to pay money to his former workers' compensation attorneys, and the claimant sought judicial review of that order. Thus, by the plain terms of section 19(f)(2), the claimant was required to post an appeal bond.

¶ 32 We acknowledge that, when taken out of context, some of the statements we made in *Celeste* might appear to suggest that section 19(f)(2)'s bond requirement applies only to employers and that employees are categorically exempted from the bond requirement. The claimant relies upon those statements in arguing that employees are *never* subject to the bond requirement, even when they appeal a Commission order requiring them to pay money to other parties. However, as noted above, *Celeste*'s actual holding does not require or support such a narrow construction of section 19(f)(2)'s bond requirement.

¶ 33 More importantly, the plain language of section 19(f)(2) does not bear such a construction. Section 19(f)(2) provides that "*the one against whom the Commission shall have rendered an award for the payment of money*" must file an appeal bond. (Emphasis added.) 820 ILCS 305/19(f)(2) (West 2016). It does not state that only *employers* ordered to pay money must file a bond. "[A] statute must be enforced as written, and a court may not depart from the statute's plain language by reading into it exceptions, limitations, or conditions not expressed by the legislature." (Internal quotation marks omitted.) *State Bank of Cherry v. CGB Enterprises, Inc.*, 2012 IL App (3d) 100495, ¶ 28. Our supreme court recently rejected the argument that the bond requirement applied only to employers or insurers because the plain terms of section 19(b)(2) contain no such limitation. As our supreme court explained,

> "[t]he terms employer and insurer are used throughout the Act, including section 19. Had the legislature intended to confine the bond requirement in section 19(f)(2) to those two specific groups, it could easily have done so by using those same terms. But that is not the language it chose. Instead, it drafted the law more broadly to specify that, except for the particular government entities enumerated in the law, bond must be posted by 'the one against whom the Commission shall have rendered an award for the payment of money' as a prerequisite to issuance of summons and invocation of the court's jurisdiction. 820 ILCS 305/19(f)(2) (West 2012)." *Illinois State Treasurer*, 2015 IL 117418, ¶ 27.

Our supreme court's holding in *Illinois State Treasurer* precludes any argument that section 19(f)(2)'s bond requirement is limited to employers because the plain language of section

19(f)(2) contains no such limitation. For the same reason, it would be equally inappropriate to read into section 19(f)(2) a categorical exemption for employees. By its plain terms, section 19(f)(2) applies to all individuals or entities "against whom the Commission shall have rendered an award for the payment of money" (820 ILCS 305/19(f)(2) (West 2016)); it does not exempt employees ordered to pay money by the Commission from having to file an appeal bond. Accordingly, we may not read any such exemption into section 19(f)(2)'s unambiguous terms.

¶ 34 The claimant also argues that section 19(f)(2)'s bond requirement does not apply to him because the Commission's order requiring him to pay attorney fees cannot be classified as an "award of money." Relying on our supreme court's decision in *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469 (1994), the claimant maintains that only *compensation awards* constitute "awards" or "decisions" under the Act. Accordingly, the claimant argues that only parties who have been ordered to pay compensation benefits must file an appeal bond under section 19(f)(2).

¶ 35 We disagree. The claimant misreads *Nickum*, which does not support his position. In *Nickum*, the claimant filed a workers' compensation claim and the employer began paying her temporary total disability (TTD) benefits. The arbitrator later found that the claimant had failed to prove a compensable claim. *Id.* at 473. The Commission affirmed and stated that the employer " 'shall have credit for all amounts paid' " " 'on account of [the alleged] accidental injury.' " *Id.* at 474. However, the claimant later refused to reimburse the employer for the TTD benefits the employer had paid her. *Id.* The employer then filed a complaint in the circuit court asking the court to enter a judgment in accordance with the Commission's decision pursuant to section 19(g) of the Act (820 ILCS 305/19(g) (West 2016)). *Nickum*, 159 Ill. 2d at 474. The circuit court granted the claimant's motion to dismiss the employer's complaint with prejudice because it found that no "award" capable of being reduced to judgment had been entered by the Commission. *Id.* at 475. We affirmed the circuit court's judgment. *Id.* at 475-76.

¶ 36 Our supreme court reversed because it found that the employer had stated a common law cause of action for the recovery of the voluntary TTD payments due to a mistake of fact. *Id.* at 484-98. However, our supreme court agreed that the Commission's statement purporting to grant the employer a "credit" for the TTD benefits it had paid to the claimant was incapable of being reduced to a judgment under section 19(g) of the Act. *Id.* at 479-83. The supreme court based this conclusion on the "plain language of section 19(g)," which states that the Commission's "decision," on which any judgment is based, must be one " '*providing for* the *payment of compensation according to this act.*' " (Emphases in original.) *Id.* at 480. Because the Commission decision at issue did not provide for the payment of workers' compensation benefits, it could not be reduced to judgment under section 19(g). Moreover, the supreme court noted that the granting of credit for benefits paid "make[s] sense only if an award ha[s] been granted based on the arbitrator's finding of a compensable injury," which did not occur in the case before it. *Id.* at 478. Thus, the supreme court noted that the Commission's statement concerning a credit appeared to be an "inadvertency" rather than an "adjudication of liabilities" that would be capable of being reduced to judgment under section 19(g). *Id.* at 479.

¶ 37 *Nickum* is distinguishable from this case. *Nickum* did not address the bond requirement under section 19(f)(2). Rather, it addressed a different section of the Act (section 19(g)), a section which expressly applies only to Commission awards "providing for the payment of compensation" under the Act. 820 ILCS 305/19(g) (West 2016). Section 19(f)(2)'s bond

requirement, by contrast, contains no such limitation. As noted, the bond requirement applies to all parties against whom the Commission has entered an "award for the payment of money." 820 ILCS 305/19(f)(2) (West 2016). Thus, *Nickum* does not support the claimant's argument.

¶ 38 To the contrary, *Nickum* undermines the claimant's position. As *Nickum* notes, the legislature explicitly limited section 19(g) to awards providing for the payment of compensation. *Nickum*, 159 Ill. 2d at 480. The fact that the legislature chose not to include a similar express limitation in section 19(f)(2) strongly suggests that no such limitation was intended. *Illinois State Treasurer*, 2015 IL 117418, ¶ 28 ("Where *** the legislature uses certain language in some instances and wholly different language in another, settled rules of statutory construction require us to assume different meanings or results were intended."). No rule of statutory construction authorizes us to declare that the legislature did not mean what the plain language of the statute imports, and we may not rewrite a statute to add provisions or limitations the legislature did not include. *Id.* That is particularly true in cases involving statutory jurisdiction, for which the provisions must be strictly adhered to and may not be extended by implication. *Id. Nickum* confirms that, absent a patent ambiguity, reviewing courts must confine themselves to the plain language of the relevant statute. The plain, unambiguous terms of section 19(f)(2) do not limit the bond requirement to parties against whom an award of "compensation" has been entered. Thus, neither may we.

¶ 39 The claimant also argues that the Commission's order regarding attorney fees is "void" for lack of subject-matter jurisdiction. The claimant maintains that the Act caps a claimant's attorney fees at 20% of the settlement award and that the Commission exceeded its statutory jurisdiction by awarding attorney fees of $64,000 on an agreed settlement award of one dollar. The claimant contends that, under the Act, the Commission had no jurisdiction to award attorney fees of more than 20 cents. He argues that any legal responsibilities that the claimant has to his former workers' compensation attorneys "can be resolved in a court of general jurisdiction that has subject-matter jurisdiction over any potential equitable attorneys' fees owed." (For example, the claimant suggests that Sostrin, Leonard, and Fishel could file claims for attorney fees based on *quantum meruit* in the circuit court.) However, the claimant contends that, unlike a court of general jurisdiction, the Commission's jurisdiction to award attorney fees was limited by the Act, which capped attorney fees at 20 cents on a settlement award of $1.

¶ 40 The claimant's jurisdictional argument is predicated on his assertions that (1) the parties agreed to settle the workers' compensation claim for $1 and (2) the Commission misconstrued the parties' settlement contract and erred by concluding that the parties had agreed to settle the workers' compensation claim for $320,000. However, the trial court lacked jurisdiction to consider these challenges to the Commission's decision because the claimant failed to file an appeal bond. Thus, we need not address the claimant's arguments.

¶ 41 Although we do not decide the issue, we note that the Commission's award of $64,000 in attorney fees might well have been within its statutory jurisdiction. The Act authorizes the Commission to award attorney fees and to resolve fee disputes. For example, section 16 of the Act provides that "[t]he Commission shall have the power to determine the reasonableness and fix the amount of any fee of compensation charged by any person, including attorneys, *** for any service performed in connection with this Act, or for which payment is to be made under this Act or rendered in securing any right under this Act." 820 ILCS 305/16 (West 2016); see also *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547, 554 (2005). Although the Act generally

limits a claimant's attorney fees to 20% of the compensation award (820 ILCS 305/16a(B) (West 2016)), the Commission may award additional fees following a hearing under certain circumstances (*id.*). Here, with the express assent of both the employer and the claimant, the arbitrator awarded Sostrin, Leonard, and Fishel 20% of the amount the employer's workers' compensation carrier had paid pursuant to the global settlement agreement. In affirming the arbitrator's attorney fees award, the Commission held that the parties had settled the claimant's workers' compensation claim for $320,000 and awarded Sostrin, Leonard, and Fishel 20% of that amount as attorney fees. It is far from clear that the Commission exceeded its statutory jurisdiction in issuing this attorney fee award.

¶ 42 Moreover, section 16a(J) of the act provides that

> "[a]ny and all disputes regarding attorneys' fees, whether such disputes relate to which one or more attorneys represents the claimant or claimants or is entitled to the attorneys' fees, or a division of attorneys' fees where the claimant or claimants are or have been represented by more than one attorney, or any other disputes concerning attorneys' fees or contracts for attorneys' fees, shall be heard and determined by the Commission after reasonable notice to all interested parties and attorneys." 820 ILCS 305/16a(J) (West 2016).

Thus, contrary to the claimant's argument, the Commission has exclusive jurisdiction to resolve disputes as to attorney fees arising out of the representation of a claimant in a workers' compensation case. *Muller v. Jones*, 243 Ill. App. 3d 711, 713-14 (1993). If the Commission did not resolve the attorney fees issue in this case, Sostrin, Leonard, and Fishel would have been unable to obtain a judgment for reasonable attorney fees in any other forum.

¶ 43 CONCLUSION

¶ 44 For the reasons discussed above, we affirm the judgment of the circuit court of Cook County dismissing the claimant's petition for judicial review for lack of subject-matter jurisdiction.

¶ 45 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

☐ Affirm and adopt	☐ Injured Workers' Benefit Fund (§4(d))
☐ Affirm with changes	☐ Rate Adjustment Fund (§8(g))
☐ Reverse	☐ Second Injury Fund (§8(e)18)
	☐ PTD/Fatal denied
☒ Modify	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEROY WATTS,

Petitioner,

16IWCC0409

vs.

NO: 14 WC 10644

PRAIRIE FARMS DAIRY,

Respondent.

DECISION AND OPINION ON REVIEW

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

Based upon a review of the record as a whole, and taking into account the criteria and factors pursuant to Section 8.1b of the Act, the AMA impairment rating of 2% loss of use of the lower extremity or 1% man as a whole provided by Dr. Russo, Petitioner's return to work full duty as a box crew/stacker, Petitioner's age of 48, the lack of evidence of any impact on his ability to earn wages in the future, and the evidence of some disability contained within the medical records, the Commission modifies the Arbitrator's permanent partial disability award from 22.5% loss of use of the right leg to 15% loss of use of the right leg under Section 8(e) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed November 10, 2015, is hereby modified for the reasons stated herein, and otherwise affirmed and adopted.

16IWCC0409

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $8,591.74 for medical expenses under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is given a credit of $8,810.42 for temporary total disability benefits paid to date.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $498.82 per week for a period of 32.25 weeks, as provided in §8(e)2 of the Act, for the reason that the injuries sustained caused the permanent partial disability to the extent of 15% loss of use of the right leg.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is entitled to a credit in the amount of $7,492.63 under §8(j) of the Act; provided that Respondent shall hold Petitioner harmless from any claims and demands by any providers of the benefits for which Respondent is receiving credit under this order.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $17,300.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUN 17 2016
KWL/kmt
06/07/16
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

16IWCC0409

LEROY WATTS
Employee/Petitioner

v.

PRAIRIE FARMS DAIRY
Employer/Respondent

Case # **14** WC **10644**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **GREGORY DOLLISON**, Arbitrator of the Commission, in the city of **PEORIA, ILLINOIS**, on **09/25/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

16IWCC0409

On **11/30/2013**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.

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

Petitioner's current condition of ill-being ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned **$43,231.00**; the average weekly wage was **$831.37**.

On the date of accident, Petitioner was **48** years of age, ***single*** with **0** dependent children.

Petitioner ***has*** received all reasonable and necessary medical services.

Respondent ***has not*** paid all appropriate charges for all reasonable and necessary medical services.

Respondent shall be given a credit of **$8,810.42** for TTD, **$-0-** for TPD, **$-0-** for maintenance, and **$-0-** for other benefits, for a total credit of **$8,810.42**.

Respondent is entitled to a credit of **$7,492.63** under Section 8(j) of the Act. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to extent of such credit.

ORDER

Respondent shall pay reasonable and necessary medical services of $8,591.74, as provided in Section 8(a) of the Act. Said services are to be paid consistent with the medical fee schedule.

Respondent shall pay Petitioner permanent partial disability benefits of **$498.82**/week for 48.375 weeks, because the injuries sustained caused the 22-1/2% loss of **use of the right leg**, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

11/6/15
Date

ICArbDec p. 2

NOV 10 2015

ATTACHMENT TO ARBITRATOR'S DECISION
(14 WC 10644)

STATEMENT OF FACTS:

Petitioner is a fifty (50) year old "box crew/stacker" or a warehouseman for Respondent, Prairie Farms, where he has worked continuously on a full time basis since December 2008. His job duties are to box-up gallon milk jugs, stack them, and load them into trucks.

According to Petitioner, on November 30, 2013 he was walking backwards in a cooler pulling a stack of milk when he slipped and fell forwards, striking his chest and his right knee. Petitioner gave immediate notice and a written "Incident Report" was completed which Petitioner wrote, "stacking gallons fell forward landing on chest and knee was injured." (PX 6)

Records submitted show Petitioner sought immediate medical attention, going to the Methodist Medical Center emergency room that night. (PX 4, pp.2-16) There, his history in the "Triage" portion of the records show, "Patient states that while at work he fell and now has pain to right knee. Patient states that he works at Prairie Farms." (p.3) In the "Clinician History of Present Illness" portion of the record it's noted, "...The patient states that this problem is job related...Injured in a fall...Lost balance and fell...Patient complains of pain over the right knee. Local soft tissue swelling over the right knee...Suffered a "twisting" knee injury. (p.4) An examination revealed mild to moderate swelling of the right knee. Petitioner was diagnosed with a sprain of the right knee. (p.5) Petitioner returned to regular duty work.

Petitioner was evaluated at IWIRC on January 10, 2014. (PX 3) He gave a history that on November 30, 2013 at 1:00 a.m. he was pulling a stack of milk out of the cooler, lost his footing, and fell forward striking his right knee on a crate and the floor. IWIRC diagnosed a right knee contusion/strain, ordered physical therapy, and allowed Petitioner to continue working with self-modifications to his job. (PX 3, p.2)

Petitioner returned to IWIRC on January 17, 2014 with continuing right knee complaints. It was noted he was working on regular duty work restrictions. Also noted was that physical therapy was pending authorization. By February 27, 2014, Petitioner reported that his right knee symptoms had not improved and that he thought the right knee was getting worse. The medical provider noted that Petitioner missed three office visits and refused to go to physical therapy since he "knows" it will not help. Physical therapy recommendation was continued and a MRI of the right knee to rule out ligamentous pathology was prescribed. (PX 3, p.5)

On March 4, 2014 it was recorded that Petitioner indicated his knee pain was getting worse. It was noted that neither the MRI nor the physical therapy had been performed as IWIRC continued to wait for authorization from Respondent's carrier. Petitioner was given activity restrictions of light duty with occasional lifting up to 20 pounds. (PX , p.7) Petitioner testified that he was not offered restricted duty and began receiving temporary total disability benefits.

On March 12, 2014, the right knee MRI was performed. (PX 5) The study demonstrated a horizontal tear of the body and posterior horn of the medial meniscus; diffuse chondromalacia, and a small joint effusion. On March 13, 2014, Petitioner was assessed with right knee medial meniscal tear and referred for an orthopedic consult at Midwest Orthopedic. (PX 3, p.9)

Petitioner initially saw Dr. Mike Gibbons on April 10, 2014. He gave a history of slipping and falling on a wet floor on November 30, 2013 while stacking boxes. Petitioner thought he twisted and landed on his right knee, but since the accident happened so fast, he was not 100% sure. Petitioner reported immediate medial pain in the knee and had subsequent swelling. Dr. Gibbons diagnosed Petitioner with a right knee medial meniscus

tear and mild medial compartment chondrosis. Dr. Gibbons concluded that conservative treatment had failed, and recommended right knee arthroscopy. (PX 2, pp. 60-61)

On May 23, 2014 Petitioner underwent surgical repair of his torn medial meniscus in the form 1.) right knee arthroscopy with partial medial meniscectomy; and 2.) chrondroplasty medial femoral condyle. (PX 2, pp.55-56) On June 2, 2014, Dr. Gibbons saw Petitioner post-operatively and recommended physical therapy "since he is a little behind as far as range of motion and overall rehab is concerned." (PX 2, p.25) On July 3rd, a physician's assistant saw Petitioner and kept him off work until July 14, 2014 so that he could complete his physical therapy. (PX 2, pp.10-11)

Petitioner testified that he did return to work, full duty, on July 14, 2014. He testified that initially upon returning to work he had knee pain and difficulty performing his job, but that his supervisor "worked with him."

Petitioner was evaluated at his attorney's request by Dr. Frank Russo on February 23, 2015. (PX 1, dep. p.7) His history to Dr. Russo was consistent with the prior medical records and his arbitration testimony. Dr. Russo opined that horizontal meniscus tears are more commonly associated with trauma. (dep. p.13) Dr. Russo testified that he reviewed all of the treatment records from Methodist Hospital, IWIRC, and Midwest Orthopedic. (dep. p.14) In his exam that day, Dr. Russo noted obvious swelling of the right knee (2 cm circumference greater than the uninjured left knee), tenderness in the medial compartment, limited range of motion with flexion in the right knee, and an altered gait with reduction of weight bearing on the right foot. (dep. p.18) Dr. Russo diagnosed Petitioner with right medial meniscus tear status post arthroscopic partial meniscectomy and a small chondral lesion of the right medial femoral condyle, status post chondroplasty. (dep. p.20)

Dr. Russo opined that the November 30, 2013 work accident caused the meniscal tear and either caused or aggravated the condylar condition. He also opined that the November 30, 2013 accident necessitated the surgery in May 2014. Dr. Russo did an impairment rating which yielded a 2% impairment to the lower extremity. (dep. pp. 21-23)

Petitioner denied any prior injuries to his right knee. He testified on direct that he had several other work-related injuries in the past 7 years but none involving his right knee. Records submitted show that he prepared an "Incident Report" claiming that he injured his right knee on November 23, 2013 when he "...was stacking gallons of HOMO and was walking backwards and fell with product." (RX 4, p.1) On November 25, 2014, Petitioner prepared an "Incident Report" indicating, "I was pulling stacks across the moving chains and slipped when putting product away. Kyle Henderson seen the incident and helped me off the floor on the chains." Petitioner indicated his right knee has "tightened up." (PX 6, p.2) On July 16, 2015, Petitioner reported a work injury to the knee. A "Workers' Compensation Claim Form" prepared show Petitioner indicated that his "foot slipped off moving chain allowing knee to twist." (RX 4, p.2)

Petitioner testified as to his current symptoms in his right knee. He has pain with walking, especially when he walks backwards while pulling milk crates. He occasionally wears a knee brace. He takes over-the-counter "Aleve" for pain. His right knee now bothers him at work, but he works through the pain. On cross-examination, Petitioner denied that he was non-compliant with his physical therapy, although he admitted that he probably re-scheduled a few times. He admitted to being in a car accident in August 2015 but denied injuring his right knee. Petitioner stated he injured his right middle shin. Records submitted show Petitioner was seen in the emergency room at Unity Point where it was recorded Petitioner "...hit the back of his head on the seat and also suspected he hit his right anterior shin because he now has swelling and pain to this area."(RX 5, p.29)

In Support of the Arbitrator's decision regarding (F) Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds as follows:

Petitioner's testimony shows that on November 30, 2013 he was walking backwards in a cooler pulling a stack of milk when he slipped and fell forwards, striking his chest and his right knee. Petitioner gave immediate notice and a written "Incident Report" was completed. Petitioner wrote, "stacking gallons fell forward landing on chest and knee was injured." Petitioner sought immediate medical attention, going to the Methodist Medical Center emergency room that night. The "Triage" portion of the records show, "Patient states that while at work he fell and now has pain to right knee. Patient states that he works at Prairie Farms." The "Clinician History of Present Illness" portion of the record show "...The patient states that this problem is job related...Injured in a fall...Lost balance and fell...Patient complains of pain over the right knee. Local soft tissue swelling over the right knee...Suffered a "twisting" knee injury." Petitioner began treating at IWIRC on January 10, 2014 where he provided a history that on November 30, 2013 at 1:00 a.m. he was pulling a stack of milk out of the cooler, lost his footing, and fell forward striking his right knee on a crate and the floor. IWIRC diagnosed a right knee contusion/strain. Due to continual complaints, a MRI of the right knee to rule out ligamentous pathology was ordered. The MRI when completed demonstrated a horizontal tear of the body and posterior horn of the medial meniscus; diffuse chondromalacia, and a small joint effusion. After an assessment of right knee medial meniscal tear, Petitioner was referred for an orthopedic consult at Midwest Orthopedic.

Petitioner initially saw Dr. Mike Gibbons on April 10, 2014. He gave a history of slipping and falling on a wet floor on November 30, 2013 while stacking boxes. Petitioner thought he twisted and landed on his right knee, but since the accident happened so fast, he was not 100% sure. Dr. Gibbons diagnosed right knee medial meniscus tear and mild medial compartment chondrosis. The doctor recommended right knee arthroscopy which was carried out on May 23, 2014.

The only medical opinion specifically addressing the issue is that of Dr. Russo, who found a causal connection between the torn meniscus and chondral injury and the November 30, 2013 accident. Dr. Russo opined that horizontal meniscus tears are more commonly associated with trauma. Dr. Russo testified that he reviewed all of the treatment records from Methodist Hospital, IWIRC, and Midwest Orthopedic. This opinion is consistent with the treatment records and Petitioner's testimony.

Based on the above, the Arbitrator finds that the preponderance of evidence dictates that a causal relationship exists between Petitioner's right knee condition of ill-being and accident sustained on November 30, 2013.

In Support of the Arbitrator's decision regarding (L) What is the nature and extent of the injury, the Arbitrator finds as follows:

Pursuant to Section 8.1b of the Act, the following criteria and factors must be weighed in determining the level of permanent partial disability, for accidental injuries occurring on or after September 1, 2011:

(a) A physician licensed to practice medicine in all of its branches preparing a permanent partial disability impairment report shall include an evaluation of medically defined and professionally appropriate measurements of impairment that include, but are not limited to: loss of range of motion; loss of strength; measured atrophy of tissue mass consistent with the injury; and any other measurements that establish the nature and extent of the impairment.

(b) Also, the Commission shall base its determination on the following factors:

(i) The reported level of impairment;

(ii) The occupation of the injured employee;
(iii) The age of the employee at the time of the injury;
(iv) The employee's future earning capacity; and
(v) Evidence of disability corroborated by medical records.

With regards to paragraph (i) of Section 8.1(b) of the Act:

i. Petitioner presented an AMA report which indicated a 2% impairment rating of the lower extremity and 1% of a person indicating residual loss of function with normal range of motion. The AMA evaluator noted his physical examination grade modifier was a +1 based on findings of significant tenderness and swelling at the knee joint. The Arbitrator accords weight to this factor

With regards to paragraph (ii) of Section 8.1(b) of the Act:

ii. Petitioner returned and continues to perform his full duty work, albeit with discomfort. The Arbitrator accords some weight to this factor.

With regards to paragraph (iii) of Section 8.1(b) of the Act:

iii. Petitioner was 48 years old at the time of injury. Because of the length of time Petitioner will live with his permanent disabilities, the Arbitrator gives some weight to this factor

With regards to paragraph (iv) of Section 8.1(b) of the Act:

iv. There is no evidence that Petitioner's earning capacity has been affected. As such, the Arbitrator accords no weight to this factor.

With regards to paragraph (v) of Section 8.1(b) of the Act:

v. Petitioner underwent surgical repair of his torn medial meniscus in the form 1.) right knee arthroscopy with partial medial meniscectomy; and 2.) chrondroplasty medial femoral condyle. Records submitted show Petitioner was last seen by physician on February 23, 2015, that being the IME physician, Dr. Russo. At that time, Dr. Russo noted obvious swelling of the right knee (2 cm circumference greater than the uninjured left knee), tenderness in the medial compartment, limited range of motion with flexion in the right knee, and an altered gait with reduction of weight bearing on the right foot. Dr. Russo diagnosed Petitioner with a right medial meniscus tear status post arthroscopic partial meniscectomy and a small chondral lesion of the right medial femoral condyle, status post chondroplasty. Petitioner testified to residual complaints of pain, especially when he walks backwards while pulling milk crates. He occasionally wears a knee brace. He takes over-the-counter "Aleve" for pain. His right knee now bothers him at work, but he works through the pain. The Arbitrator accords weight to this factor.

The Arbitrator had the opportunity to review the medical records and observe Petitioner's testimony. The Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 22-1/2% loss of use of the right leg under 8(e) of the Act.

In Support of the Arbitrator's decision regarding (J) Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner's Exhibit 7 is a compilation of outstanding medical bills and a health insurance lien. The first balance is from Midwest Orthopedic Center, Dr. Gibbons and physical therapy; the next two bills are for the emergency room physicians on November 30, 2013 and March 3, 2014; the next bill is from DJO Global for a post-operative knee mobilizer/icer prescribed by Dr. Gibbons on May 15, 2014; the next bill is from Associated Anesthesiology for the surgery on May 30, 2014; the next bill is from OSF for pre-operative services on April 25, 2014; the next OSF bill is for a Doppler study necessary for surgical clearance, performed on May 21, 2014; the final OSF bill is the facility charge for the surgery on May 23, 2014; the next bill is from Central Illinois Radiology for the knee x-rays taken on November 30, 2013; and the next bill is for pre-operative labs done on May 15, 2014.

Having found the issue of causal connection in favor of Petitioner, the Arbitrator awards the bills enumerated above. Said bills are to be paid consistent with the medical fee schedule.

The Arbitrator notes that also included in Petitioner's Exhibit 7 is a BlueCross BlueShield lien in the amount of $7,182.63. This is Petitioner's health insurance which he has through his employment with Respondent. Respondent is entitled to an 8(j) credit for this lien. The lien includes payments to Methodist Medical Center, the emergency room physicians, Midwest Orthopedic Center, Central Illinois Pathology, Heartcare Midwest, OSF, Associated Anesthesiology, and OSF Medical Group. Respondent shall keep Petitioner safe and harmless from any and all claims or liabilities that may be made against him by reason of having received such payments only to extent of such credit.

The total medical bills and lien award is $8,591.74.

2017 IL App (3d) 160593WC-U

Workers' Compensation
Commission Division
Order Filed December 15, 2017

No. 3-16-0593WC

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

PRAIRIE FARMS DAIRY, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*, (Leroy Watts, Appellee).	)	Appeal from the Circuit Court of Peoria County No. 16 MR 558 Honorable Katherine S. Gorman, Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Justices Hudson, Harris, and Moore concurred in the judgment.
Presiding Justice Holdridge specially concurred.

ORDER

¶ 1 *Held:* We: reversed that portion of the circuit court's order which confirmed the Illinois Workers' Compensation Commission's (Commission) award of permanent partial disability (PPD) benefits to the claimant under section 8(e) of the Workers' Compensation Act (Act) (820 ILCS 305/8(e) (West 2014)), and affirmed the circuit court in all other respects; vacated the Commission's award of PPD benefits to the claimant and remanded the matter back to the Commission with directions to enter a PPD award supported by written findings as required by section 8.1b(b) of the Act (820 ILCS 305/8.1b(b) (West 2014)).

¶ 2 Prairie Farms Dairy (Prairie) appeals from an order of the circuit court of Peoria County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Leroy Watts, benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)), including permanent partial disability (PPD) benefits under section 8(e) of the Act (820 ILCS 305/8(e) (West 2014)). For the reasons which follow, we: (1) reverse that portion of the circuit court's judgment which confirmed the Commission's PPD award and affirm its judgment in all other respects; (2) vacate the Commission's PPD award; and (3) remand the matter back to the Commission with directions to enter a PPD award supported by written findings as required by section 8.1b(b) of the Act (820 ILCS 305/8.1b(b) (West 2014)).

¶ 3 The following factual recitation is taken from the evidence adduced at the arbitration hearing conducted on September 25, 2015.

¶ 4 At all relevant times, the claimant was employed by Prairie as a "box crew/stacker" and had been so employed since December 2008. His duties included boxing gallon milk jugs, stacking the boxes, and loading them onto trucks.

¶ 5 The claimant testified that, on November 30, 2013, he slipped and fell forward striking his chest and right knee as he was walking backwards in a cooler as he attempted to pull a stack of milk. According to the claimant, the floor of the cooler was wet. The claimant gave immediate notice of the occurrence and completed an Incident Report in which he wrote that he was stacking milk when he fell forward landing on his chest and right knee.

¶ 6 The claimant first sought medical care in the evening of November 30, 2013, at the emergency room of Methodist Medical Center. The records of that visit contain entries which state that the claimant reported that he fell and was experiencing pain in his right knee and that

he also stated that he lost his balance at work and fell, twisting his right knee. The records reflect that the claimant was found to have mild to moderate swelling of the right knee and was diagnosed as suffering from a right knee sprain. Following treatment, the claimant was released.

¶ 7 The claimant returned to the emergency room at the Methodist Medical Center on January 4, 2014, complaining of a headache. The records of that visit do not contain any notation that the claimant complained of right knee pain. The records state that the claimant denied any pain in his legs or difficulty walking. On examination, no tenderness or edema in the claimant's right knee was noted, and he had a full range of motion.

¶ 8 At the request of Prairie, the claimant was evaluated on January 10, 2014, at the Illinois Work Injury Resource Center (IWIRC). The records of that visit state that the claimant gave a history of having fallen forward and striking his knee on a milk crate and the cooler floor when he lost his footing as he was pulling a stack of milk. On examination, the claimant was diagnosed as having a right knee contusion/sprain and prescribed physical therapy. He was authorized to continue working with self-regulated job modifications.

¶ 9 The claimant was next seen at IWIRC on January 17, 2014. According to the notes of that visit, the claimant complained of right knee pain. He reported that he was working full duty without restrictions.

¶ 10 The claimant returned to IWIRC on February 27, 2014, and was seen by Dr. Stopka. The claimant complained of persistent right knee pain and thought that the pain was getting worse. The records of that visit note that the claimant had missed three office visits and was not attending physical therapy. On examination, Dr. Stopka noted tenderness in the claimant's right knee and a decreased range of motion. The doctor ordered an MRI of the claimant's right knee to rule out ligamentous pathology.

¶ 11 When the claimant was next seen at IWIRC on March 4, 2014, he reported that his right knee pain was getting worse. Dr. Stopka restricted the claimant to light duty work with lifting up to 20 pounds. According to the claimant, however, Prairie did not offer him work within his restrictions and commenced paying him temporary total disability (TTD) benefits.

¶ 12 On March 12, 2014, the claimant had an MRI scan of his right knee as had been ordered by Dr. Stopka. The radiologist's report noted a horizontal tear of the body and posterior horn of the medial meniscus, diffuse chondromalacia, and a small joint effusion.

¶ 13 When the claimant was seen at IWIRC on March 13, 2014, he was diagnosed with a right knee medial meniscal tear and referred to Midwest Orthopedic Center for an orthopedic consult.

¶ 14 On April 10, 2014, the claimant was seen at Midwest Orthopedic Center by Dr. Michael Gibbons. The notes of that visit reflect that the claimant gave a history of having slipped on a wet floor while stacking boxes at work on November 30, 2013, falling, and landing on his right knee. Although not 100% sure, the claimant thought that he had twisted his knee. Dr. Gibbons examined the claimant and diagnosed him as having sustained a right knee medial meniscus tear and a mild compartment chondrosis. Concluding that conservative treatment had failed, Dr. Gibbons recommended that the claimant undergo a right knee arthroscopy.

¶ 15 On May 23, 2014, the claimant had surgery to repair the medial meniscus tear. Dr. Gibbons performed a right knee arthroscopy with partial medial meniscectomy and a chrondroplasty of the medial femoral condyle.

¶ 16 Dr. Gibbons saw the claimant post-operatively on June 2, 2014, and recommended a course of physical therapy.

¶ 17 The claimant was seen at Midwest Orthopedic Center by a physician's assistant on July 3, 2014. The notes of that visit reflect that the claimant was authorized to return to work on July 14, 2014, after completing physical therapy.

¶ 18 The claimant was discharged from physical therapy on July 11, 2014, and returned to full-duty work at Prairie on July 14, 2014. According to the claimant, he initially had knee pain and difficulty performing his job, but his supervisor "worked with him."

¶ 19 On August 10, 2014, the claimant again presented at the emergency room of Methodist Medical Center, this time complaining of chest pains. The records of that visit do not contain any notation that the claimant complained of right knee pain. According to the records, the claimant's musculoskeletal examination was normal.

¶ 20 On November 25, 2014, the claimant completed an accident report at Prairie stating that he injured his right knee on that day when he slipped as he was "pulling stacks across the moving chains" and putting away products. The claimant testified that, although he aggravated his right knee, he did not require any medical treatment as a result of the incident.

¶ 21 At the recommendation of his attorney, the claimant was examined by Dr. Frank Russo on February 23, 2015. Dr. Russo testified to the history of injury that the claimant gave which was consistent with the claimant's arbitration testimony. He stated that the claimant denied injuring his right knee either before or after November 30, 2013. Dr. Russo stated that he reviewed the claimant's medical records from Methodist Medical Center, IWIRC, and Midwest Orthopedic Center, but did not review any medical records prior to November 30, 2013. According to Dr. Russo, on examination of the claimant, he noted obvious swelling of the claimant's right knee, tenderness in the medial compartment, limited range of motion with flexion of the right knee, and an altered gait, and in his opinion, the conditions are permanent.

Dr. Russo diagnosed the claimant as having a right medial meniscus tear, status post arthroscopic partial meniscectomy, and a small chrondral lesion of the right medial femoral condyle, status post chondroplasty. Dr. Russo opined that the claimant's work accident of November 30, 2013, caused the meniscal tear in the claimant's right knee and either caused or aggravated the condylar condition. Dr. Russo also opined that the claimant's November 30, 2013, accident necessitated his May 23, 2014, surgery. Dr. Russo concluded that the claimant had a rating of 2% impairment of his lower extremity as a result of his November 30, 2013, accident.

¶ 22 After completing an accident report on July 16, 2015, the claimant went to the emergency room at Methodist Medical Center, complaining of right knee pain. He gave a history of having stepped on a conveyor belt and twisting his right knee while working at Prairie. According to the record of that visit, an examination of the claimant revealed normal alignment of his right knee, decreased range of motion and medial joint line tenderness, but no swelling. The claimant was prescribed Ibuprofen and advised to seek follow-up care at IWIRC.

¶ 23 On August 10, 2015, the claimant sought treatment at the emergency room of the Methodist Medical Center, following an automobile accident. According to the records of that visit, the claimant reported that the accident caused him to hit the back of his head on the seat of his car and that he suspected that he also hit his right shin due to the swelling and pain in his leg. The claimant was diagnosed with foot and cervical strains.

¶ 24 During the course of the arbitration hearing, the claimant denied having injured his right knee before his accident of November 30, 2013. However, the record reflects that he completed an accident report on November 23, 2013, stating that he injured his right knee when he fell while stacking product. After being shown the report, the claimant admitted having completed the document. The claimant also testified that he did not injure his right knee after his accident

of November 30, 2013. However, his testimony in this regard is belied by the accident reports which he completed on November 25, 2014, and July 16, 2015, in which he claimed right knee injuries. Although the records of his physical therapist and IWIRC's records state that the claimant was noncompliant with physical therapy, he disputed the assertions that he was not compliant with the physical therapy protocol for his right knee.

¶ 25 The claimant testified that he experiences pain when walking and occasionally wears a knee brace. He stated that he takes over-the-counter Aleve for pain.

¶ 26 Following the hearing, the arbitrator found that the claimant sustained injuries to his right knee which arose out of and in the course of his employment with Prairie on November 30, 2013. The arbitrator ordered Prairie to pay $8,591.74 for reasonable and necessary medical services rendered to the claimant and granted Prairie a $7,492.63 credit under section 8(j) of the Act (820 ILCS 305/8(j) (West 2014)), with the caveat that it hold the claimant harmless from any and all claims or liabilities that may be made against him by reason of having received such payments but only to the extent of the credit. In addition, the arbitrator granted Prairie a $8,810.42 credit for TTD benefits paid to the claimant. Finally, the arbitrator awarded the claimant 48.375 weeks of permanent partial disability PPD benefits under section 8(e) of the Act (820 ILCS 305/8(e) (West 2014)), for a 22.5% loss of use of his right leg.

¶ 27 Prairie sought a review of the arbitrator's decision before the Commission. In a unanimous decision entered on June 17, 2016, the Commission reduced the claimant's PPD award to 32.25 weeks of benefits for a 15% loss of use of his right leg. In all other respects, the Commission affirmed and adopted the arbitrator's decision.

¶ 28 Prairie sought judicial review of the Commission's decision in the circuit court of Peoria County. On September 8, 2016, the circuit court entered an order confirming the Commission's decision. This appeal followed.

¶ 29 Prairie argues that the Commission's finding of a causal connection between the claimant's work-related accident of November 30, 2013, and his condition of right knee ill-being is against the manifest weight of the evidence. In support of its argument in this regard, Prairie notes that the claimant did not seek medical treatment for his right knee from November 30, 2013, when he was seen at the Methodist Medical Center and January 10, 2014, when he was evaluated at IWIRC. Prairie also contends that the claimant gave varying histories of the mechanism of his injury to his medical providers. Most significantly, Prairie asserts that the claimant's denial of any injuries to his right knee either before or after November 30, 2013, is "incredulous" in the face of the documentary evidence to the contrary. The thrust of Prairie's argument is that the claimant was not credible, and his testimony cannot support a finding of causation.

¶ 30 The claimant in a workers' compensation case has the burden of proving, by a preponderance of the evidence, all of the elements of his claim. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980). As part of his burden, the claimant must establish that his current condition of ill-being is causally connected to a work-related injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). Whether a causal relationship exists between a claimant's employment and his condition of ill-being is a question of fact to be resolved by the Commission, and its resolution of such a matter will not be disturbed on review unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). In resolving such issues, it is the function of the Commission to decide

questions of fact, judge the credibility of witnesses, determine the weight to be given their testimony, and to resolve conflicting medical evidence. *O'Dette*, 79 Ill. 2d at 253. For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 31 In that portion of his decision which the Commission adopted, the arbitrator set forth in great detail the inconsistencies between the claimant's testimony and the documentary evidence. Nevertheless, the decision states that the "preponderance of the evidence dictates that a causal relationship exists between the [claimant's] right knee condition of ill-being and accident sustained on November 30, 2013." We are not at liberty to reweigh the evidence. The fact that this court might not have reached the same conclusion as the Commission on the issue of causation is not the test of whether the Commission's determination is supported by the manifest weight of the evidence. The test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982). In this case, we believe that there is.

¶ 32 The claimant testified to the mechanism of his injury on November 30, 2013. And although the histories which he gave to his medical providers are not without some variance, they are by no means contradictory. Further, there is no dispute concerning the claimant's right knee condition of ill being: he had a horizontal tear of the body and posterior horn of the medial meniscus, diffuse chondromalacia, and a small joint effusion. The condition was established by the claimant's MRI scan, the records of Midwest Orthopedic Center and Dr. Gibbons, and the deposition testimony of Dr. Russo. As to causation, Dr. Russo's opinion is the only causation opinion in the record. We are not unmindful of the issue concerning the claimant's credibility but neither was the Commission; and it was the function of the Commission to determine the

weight to be accorded the issue. On the basis of the record, we are unable to conclude that an opposite conclusion to that reached by the Commission on the question of causation is clearly apparent. We find, therefore, that the Commission's causation determination is not against the manifest weight of the evidence.

¶ 33 Prairie next argues that the Commission's award of medical expenses, and specifically the expenses of the claimant's May 23, 2014, surgery, is against the manifest weight of the evidence. Its argument in this regard is essentially a repeat of its argument on causation. Having rejected Prairie's causation argument, we also reject its argument addressed to the Commission's award of medical expenses for the same reasons. Our conclusion in this regard is further supported by Dr. Russo's opinion that the claimant's November 30, 2013, accident necessitated his May 23, 2014, surgery and the total absence of any contrary medical opinion.

¶ 34 Prairie's final arguments are addressed to the Commission's award of PPD benefits for the claimant's 15% loss of use of his right leg. Prairie argues both that the amount of the award is against the manifest of the evidence and that, in making the award, the Commission failed to comply with the requirements of section 8.1b of the Act. As to the later argument, Prairie asserts that the Commission failed to explain in its decision the relevance and weight of any of the factors enumerated in the statute in its determination of the claimant's disability.

¶ 35 The nature and extent of a claimant's disability is a question of fact to be determined by the Commission. *Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256 (1980). However, section 8.1b(b) of the Act provides that, in determining the extent of a claimant's PPD, the Commission is to base its determination upon five enumerated factors along with the level of impairment set forth in a physician's disability impairment report and explain in its written decision the relevance and weight of the factors used in addition to the impairment report. 820

ILCS 305/8.1b(b) (West 2014); *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, ¶ 52. The question of whether the Commission complied with the requirements of section 8.1b of the Act is one of law which we review *de novo*. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 187 (1999).

¶ 36 In this case, the Commission's written decision states:

> "Based upon a review of the record as a whole, and taking into account the criteria and factors pursuant to Section 8.1b of the Act, the AMA impairment rating of 2% loss of use of the lower extremity or 1% man as a whole provided by Dr. Russo, Petitioner's return to work full duty as a box crew/stacker, Petitioner's age of 48, the lack of evidence of any impact on his ability to earn wages in the future, and the evidence of some disability contained within the medical records, the Commission modifies the Arbitrator's permanent partial disability award from 22.5% loss of use of the right leg to 15% loss of use of the right leg under Section 8(e) of the Act."

Although the cited paragraph in the Commission's decision clearly states the factors which the Commission considered in arriving at its PPD award, it does not explain the weight that the Commission placed on any of the factors enumerated in section 8.1b(b). An explanation of the weight placed upon the various factors for consideration is required under section 8.1b(b) and is of particular importance in this case in light of the fact that Dr. Russo found an impairment rating of 2% loss of use of the claimant's lower extremity; whereas, the Commission awarded the claimant PPD benefits based upon a 15% loss of use of his right leg.

¶ 37 The foregoing analysis leads us to conclude that the Commission's decision fails to satisfy the requirements of section 8.1b(b) of the Act. We, therefore, vacate the Commission's

award of PPD benefits and remand this matter to the Commission with directions to comply with the requirements of section 8.1b of the Act and explain in a written order both the relevance and weight which it placed on each of the factors enumerated in section 8.1b(b) in awarding the claimant PPD benefits. Having vacated the Commission's PPD award, we decline to address Prairie's argument that a PPD award based upon a 15% loss of use of the claimant's right leg is against the manifest weight of the evidence. Whether a PPD award for 15% loss of use of the claimant's right leg is supported by the manifest weight of the evidence is dependent upon the weight that the Commission places upon each of the statutory factors for consideration, and our resolution of the question must, therefore, await the Commission's written explanation.

¶ 38 Based upon the foregoing analysis, we: (1) reverse that portion of the circuit court's judgment that confirmed the Commission's PPD award and affirm the judgment in all other respects; (2) vacate the Commission's PPD award; and (3) remand the matter to the Commission with instructions to render a PPD award supported by written findings as required by section 8.1b(b) of the Act.

¶ 39 Circuit court affirmed in part and reversed in part; Commission decision vacated in part and remanded with directions.

¶ 40 PRESIDING JUSTICE HOLDRIDGE, specially concurring:

¶ 41 I join the majority's judgment. Section 8.1b(b) of the Act provides that, if the Commission relies upon any factors in addition to the physician's impairment report in determining the level of a claimant's permanent partial disability (PPD), the Commission must "explain" the relevance and weight of any such factors in a written order. 820 ILCS 305/8.1b(b) (West 2014). In determining the level of PPD in this case, the Commission expressly relied upon factors other than the physician's impairment report but provided no written explanation of the

relevance of those factors or the weight it assigned to any of them. Accordingly, I agree with the majority that, under the facts presented here, we should remand the matter and direct the Commission to provide a written explanation in accordance with section 8.1b(b). See *Corn Belt Energy Corp. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150311WC, ¶¶ 51-52.

¶ 42 I write separately to note that, in enforcing the requirements of section 8.1b(b), we should be careful not to intrude upon the province of the Commission. The nature and extent of a claimant's disability, including the extent of a claimant's PPD, are questions for the Commission (*Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 278 (2011)), and the Commission is entitled to determine the weight that should be accorded the evidence (*Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405 (1984)). "[B]ecause of the Commission's expertise in the area of worker's compensation, its findings on the question of the nature and extent of permanent disability should be given substantial deference." *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n*, ¶ 25 (quoting *Mobil Oil Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 616, 624 (1999)). Thus, in applying section 8.1b(b) (and in reviewing the Commission's compliance with that section in future cases), we should take care not to impose overly burdensome requirements that limit the Commission's considerable discretion to conduct an independent inquiry and to weigh the evidence as it sees fit. Where, as here, the Commission provides *no* explanation of the relevance or weight of the factors at issue, we must remand for a further written explanation as required by section 8.1b(b). However, if the Commission provides some written explanation of these issues (even a minimal explanation), I believe we should tread cautiously in evaluating the sufficiency of the Commission's explanation lest we infringe upon the Commission's discretion and disregard its superior expertise in this area.

2017 IL App (1st) 170435WC

Workers' Compensation
Commission Division
Opinion Filed: December 22, 2017

No. 1-17-0435WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

SYSCO FOOD SERVICE OF CHICAGO, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*, (Michael Donohue, Appellee).	)	Appeal from the Circuit Court of Cook County Nos. 12 L 51452 14 L 50862 14 L 50908 16 L 50296 16 L 50303 Honorable Robert Lopez Cepero and James M. McGing, Judges, Presiding.

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

OPINION

¶ 1 Sysco Food Services of Chicago (Sysco) appeals from an order of the circuit court of Cook County which reversed an October 24, 2012, decision of the Illinois Workers' Compensation Commission (Commission), awarding the claimant, Michael Donohue, *inter alia*, permanent partial disability benefits under section 8(d)2 of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)2 (West 2010)) for a torn meniscus in his left knee but denying the

claimant benefits for the degenerative condition of his left knee, and remanded the matter back to the Commission with directions to award the claimant wage differential benefits under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2010)). Sysco also appeals from the Commission's decisions following remand and the circuit court's orders entered following the Commission's decisions on remand. For the reasons which follow, we: reverse the circuit court's order of December 23, 2013, which reversed the Commission's original decision of October 24, 2012; vacate the Commission's decisions of October 28, 2014, and April 15, 2016, entered following remand from the circuit court; vacate the circuit court's orders of August 10, 2015, and February 16, 2017, entered following the Commission's decisions on remand; and reinstate the Commission's original decision of October 24, 2012.

¶ 2 The following factual recitation is taken from the evidence adduced at the arbitration hearing held on September 7, 2011, and November 4, 2011.

¶ 3 At all times relevant, the claimant was employed by Sysco as a delivery driver. His duties included delivering food products to customers by truck and unloading the products from the truck using a two-wheeled dolly and a ramp. The claimant testified that, on November 6, 2009, as he was maneuvering a load of food products inside of his truck, he fell out of the back of the truck and landed on both knees.

¶ 4 On November 12, 2009, the claimant sought medical treatment from Dr. Quinn Regan at the Illinois Bone and Joint institute. Following his examination of the claimant, Dr. Regan diagnosed left knee pain and contusions following a slip and fall.

¶ 5 After again examining the claimant on November 19, 2009, Dr. Regan recorded an impression of very mild joint line narrowing of the left knee, possibly meniscal pathology and possible left knee contusion. Dr. Regan administered a Cortisone shot to the claimant's left knee.

¶ 6 When Dr. Regan examined the claimant's left knee on December 7, 2009, he noted no effusion and a range of motion from 0 to 135 degrees. He again administered a Cortisone shot to the claimant's left knee and recommended that the claimant have an MRI scan of his left knee.

¶ 7 The claimant underwent the recommended MRI on December 28, 2009. The scan revealed bone marrow edema of the medial aspect of the femoral condyle and tibial plateau, consistent with a contusion; a tear at the posterior horn of the medial meniscus; small joint effusion; and a soft tissue contusion at the medial aspect of the knee.

¶ 8 Dr. Regan's notes of a visit on January 4, 2010, state that he reviewed the MRI and diagnosed left knee pain and internal derangement, secondary to a meniscal tear and bone bruise. Dr. Regan recommended that the claimant have surgery to repair the meniscal tear.

¶ 9 On January 20, 2010, the claimant underwent surgery to repair the meniscal tear in his left knee. Dr. Regan's postoperative diagnosis was a medial meniscal tear in the posterior horn of the claimant's left knee with chondromalacia of the medial femoral condyle.

¶ 10 When he examined the claimant on January 28, 2010, Dr. Regan noted that the claimant's pain had improved and his surgical wound was progressing nicely. Dr. Regan recorded his intention to see the claimant in about three weeks with a view to returning him to work at that time.

¶ 11 According to the claimant, he remained off of work following surgery until he was given a full duty release by Dr. Regan. He returned to work at Sysco on February 22, 2010.

¶ 12 On March 29, 2010, the claimant presented to Dr. Regan complaining of significant pain in his left knee. On examination, Dr. Regan noted swelling of the claimant's left knee "2+ effusion" and flexion to 90 degrees. Dr. Regan aspirated the claimant's left knee and administered a Celestone shot. As of that visit, Dr. Regan noted his impression of "status post

knee arthroscopy with an effusion for overuse" and authorized the claimant to remain off of work.

¶ 13 When the claimant saw Dr. Regan on April 1, 2010, he reported a flare-up of his left knee symptoms after twisting his knee a week earlier. Dr. Regan recommended that the claimant remain off of work.

¶ 14 When the claimant saw Dr. Regan on April 12, 2010, he complained of left knee pain. On examination of the claimant's left knee, Dr. Regan found no erythema, no redness, no numbness, no effusion, and a range of motion from 0 to 90 degrees. In his notes of that visit, Dr. Regan wrote: "I don't think he can go back to work as a truck driver."

¶ 15 The claimant returned to see Dr. Regan on May 13, 2010, complaining of persistent pain along the medial aspect of his left knee. On examination, Dr. Regan noted no effusion, a range of motion from 0 to 135 degrees, negative Lachman's and anterior drawer, a touch of an Apley grinding test along the medial aspect, and a normal gait. The doctor again noted that the claimant re-twisted his left knee after surgery. Dr. Regan's notes contain his impression that the claimant's ongoing symptoms could be the result of a bone bruise or an aggravation of chondromalacia in the medial femoral condyle. Dr. Regan recommended an MRI and again wrote: "I don't think he can go back to work as a truck driver."

¶ 16 The report of the claimant's second MRI did not reveal a new meniscus tear, but did show a small Baker's cyst. According to Dr. Regan's notes from June 17, 2010, the MRI showed that the claimant's bone edema had resolved; however, the claimant was still experiencing pain and dysfunction. The claimant underwent a series of Orthovisc injections on the recommendation of Dr. Regan.

¶ 17 When the claimant saw Dr. Regan on July 22, 2010, he complained of pain along the medial aspect of his left knee. On examination, Dr. Regan noted no effusion, full range of motion from 0 to 135 degrees, negative Lachman's and anterior drawer, a touch of an Apley grinding test along the medial aspect, and a normal gait. According to the doctor's notes: "[the claimant] needs to go back to work." Dr. Regan recommended that the claimant wear a knee brace while working.

¶ 18 On July 31, 2010, the claimant was examined by Dr. Kevin Walsh at the request of Sysco. In his report dated that same day, Dr. Walsh opined that the claimant was able to return to work without restrictions as a result of his work-related injury. Dr. Walsh noted that the claimant had a degenerative condition of the knees which was not caused by, aggravated or accelerated by his work accident.

¶ 19 On August 5, 2010, Dr. Regan released the claimant to return to work at his regular job with a knee brace. According to the notes of that visit, the claimant felt that he was ready to go back to work.

¶ 20 The claimant returned to work on August 16, 2010, and worked a $11^1/_2$ hour shift. The claimant testified that, at the end of the day, he complained to Rick Leonard, Sysco's safety and security director, that his knee was causing him pain. When the claimant returned to work the following day, he complained of pain and swelling in his left knee. According to the claimant, when he finished training at approximately 7:30 a.m. he was told to report to Debbie Valleskey, Sysco's nurse. However, before he was able to see Valleskey, Leonard told him to go home. Leonard testified that he had been advised that the claimant had been complaining about his knees. Leonard denied that the claimant made any complaints of knee pain to him. He stated that he made the decision to send the claimant home after conferring with his boss, Bill O'Meara.

According to Leonard, in performing his job driving a stick-shift truck, the claimant's knee could give out, causing an accident. Leonard was also concerned that the claimant might injure himself or others going up or down stairs with a two-wheel dolly.

¶ 21 The claimant testified that he received a phone call from Valleskey in the afternoon of August 17, 2010, advising him that he could not return to work due to the condition of his left knee. Valleskey testified that the decision to send the claimant home was made by Leonard and O'Meara. She stated that she was instructed to arrange a "Fit for Duty Test" for the claimant.

¶ 22 When the claimant saw Dr. Regan on September 3, 2010, the doctor noted that the claimant could try to go back to work doing his regular job. On examination, the doctor noted no effusion, a range of motion greater than 135 degrees of flexion, negative Lachman's and anterior drawer, and a normal gait.

¶ 23 The claimant underwent a "Fit for Duty Test" on September 15, 2010. The report of that test states that he was capable of performing dynamic lifts and job specific tasks, but that he has physical limitations which may affect his ability to perform successfully over an entire shift. According to the report, the claimant may need to be transitioned to a full work day or tested for performing job specific tasks for a full day to determine safe functional endurance.

¶ 24 On November 18, 2010, the claimant returned to see Dr. Regan and reported improvement in his left knee symptoms. As of that date, Dr. Regan found that the claimant could function at a reasonable level and could return to his regular duties as a truck driver.

¶ 25 At the request of Sysco, the claimant was examined by Dr. Walsh for a second time on November 23, 2010. In his report of that examination, Dr. Walsh opined that the claimant did not require work restrictions as a result of his work accident, but it would be reasonable to restrict

him from work as a truck driver due to his degenerative knee condition which is unrelated to his work accident.

¶ 26 Sysco did not allow the claimant to return to work as a delivery truck driver, and as a consequence, he filed a grievance with his union, Teamsters Local 710. Charles DeCola, the Business Agent for Local 710, testified that he prepared the grievance for the claimant. According to DeCola, in all of his discussions with Sysco representatives, he was told that the claimant could not return to his duties as a delivery truck driver because of the injuries he sustained while working.

¶ 27 On January 14, 2011, the claimant was summoned to a meeting at Sysco's Human Resource Department. Present at the meeting were Dan Pasquale, the claimant's union steward, and Lee Gersch, Sysco's Human Resource Director. At that meeting, the claimant was given a letter dated January 5, 2011, drafted by Gersch which states "as a result of your work related injuries *** you are not qualified to perform the essential functions of the Delivery Driver position." However, during the arbitration hearing, Gersch stated that she made a mistake in the wording of the letter and that the claimant could not return to work as a delivery driver due to his personal medical condition, not because of a work-related injury. The claimant testified that Gersch offered him a position as a security guard and told him that, if he did not accept that position, his employment would be terminated. According to the claimant, he accepted the position as a security guard, but wrote on the letter he received that he was not waiving his rights under the union grievance. Gersch admitted that the only alternative positions which she could recall Sysco offering were to employees who had sustained work related injuries.

¶ 28 The claimant returned to work at Sysco as a security guard on January 16, 2011. He is required to work 50 hours per week at the rate of $20 per hour for the first 40 hours and $30 per hour for the remaining hours.

¶ 29 At the request of the claimant's attorneys, Dr. Regan authored a letter dated June 7, 2011, in which he stated that the symptoms for which he treated the claimant were the result of some underlying chondromalacia of the medial femoral condyle with a significant bone bruise. According to the letter, the bone bruise is the result of a direct trauma, and not degenerative in nature. Dr. Regan was also of the opinion that the meniscal tear in the claimant's left knee "was probably the result of the jump off the truck[,]" and required surgical intervention. Dr. Regan went on to state: "I believe that the accident caused the meniscal pathology, bone bruise, and probably aggravated a pre-existing chondromalacia." As to whether the claimant's degenerative condition is causally related to his work injury, Dr. Regan wrote: "whether or not degeneration is related to the aging process or [an accident] on the job, I have a more difficult time saying one verses the other. It is easy for me to say the meniscal tear and bone bruise have relationship to the job accident."

¶ 30 During the arbitration hearing on September 7, 2011, the claimant testified that his knee is "as good as it was before the operation. I have no problems with it." He stated that he is pain free and his left knee has not caused him to do anything any less or differently than he did prior to his work accident. During the arbitration hearing on November 4, 2011, the claimant admitted: "I have no restrictions on me from any doctor."

¶ 31 Following a hearing, the arbitrator found that the claimant sustained injuries to his left knee, consisting of a torn meniscus, which arose out of and in the course of his employment with Sysco on November 6, 2008. However, the arbitrator found that the then current degenerative

condition of the claimant's left knee was not causally related to his work accident. The arbitrator fixed the claimant's average weekly wage at $1592.03 and awarded him $41^{3}/_{7}$ weeks of temporary total disability (TTD) benefits under section 8(b) of the Act (820 ILCS 305/8(b) (West 2010)) at the rate of $1,061.35 per week for the periods from November 12, 2009, through November 22, 2009; January 4, 2010, through February 22, 2010; May 13, 2010, through August 16, 2010; and August 18, 2010, through January 4, 2011. The arbitrator granted Sysco a credit of $34,827.33 for TTD benefits paid to the claimant. In addition, the arbitrator ordered Sysco to pay $7242.86 for reasonable and necessary medical expenses incurred by the claimant. Finding that the claimant suffered a 30% loss of use of his left leg as the result of his work accident, the arbitrator awarded the claimant $64^{1}/_{2}$ weeks of permanent partial disability benefits at the rate of $664.72 per week pursuant to section 8(d)2 of the Act (820 ILCS 305/8(d)2 (West 2010)). Finally, the arbitrator denied the claimant's petition for penalties under sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2010)), and attorney fees under section 16 of the Act (820 ILCS 305/16 (West 2010)).

¶ 32 Both Sysco and the claimant sought a review of the arbitrator's decision before the Commission. In a unanimous decision entered on October 24, 2012, the Commission affirmed and adopted the arbitrator's decision.

¶ 33 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County. On December 23, 2013, the circuit court, Judge Lopez Cepero, reversed the Commission's determination that the degenerative condition of the claimant's left knee is not causally related to his work injury, finding that the Commission's determination in this regard is against the manifest weight of the evidence. According to Judge Lopez Cepero's order, contrary to the Commission's decision, the claimant's treating doctor, Dr. Regan, was not silent on the

issue of a causal relationship between the degenerative condition of the claimant's left knee and his work accident. In his letter of June 7, 2011, Dr. Regan stated that the claimant's work accident "probably aggravated a pre-existing chondromalacia." Judge Lopez Cepero concluded that, because the Commission had not noted Dr. Regan's letter, it ignored it, suggesting that the Commission was "determined to reach a particular outcome." Judge Lopez Cepero remanded the matter back to the Commission "for the sole purpose of calculating *** [the claimant's] wage differential award" under section 8(d)1 of the Act (820 ILCS 305/8(d)1 (West 2010)).

¶ 34 On remand, the Commission issued a decision on October 28, 2014, in which it specifically stated that, in arriving at its original decision, it had "noted, reviewed, considered, analyzed, and weighed" Dr. Regan's letter. The Commission referenced that portion of the letter which states that in terms of commenting on "whether or not degeneration is related to the aging process or [an accident] on the job, I have a more difficult time saying one verses the other. It is easy for me to say the meniscal tear and bone bruise have relationship to the job accident." According to the Commission, these statements did not establish Dr. Regan's belief that a causal nexus exists between the claimant's work accident and the degenerative condition in his left knee. Nevertheless, in compliance with the circuit court's December 23, 2013, order, the Commission found that the degenerative condition of the claimant's left knee is causally related to his work accident and awarded him a wage differential of $394.68 per week, commencing on January 16, 2012.

¶ 35 Both Sysco and the claimant sought a judicial review of the Commission's October 28, 2014, decision in the circuit court. The claimant argued that the Commission incorrectly calculated the wage differential award. Sysco argued both that the Commission's finding of a causal connection between the degenerative condition of the claimant's left knee and his work

accident and its award of wage differential benefits are against the manifest weight of the evidence.

¶ 36 On August 10, 2015, the circuit court, Judge James McGing, reversed the Commission's decision of October 28, 2014, finding that the Commission had miscalculated the claimant's wage differential award, and remanded the matter back to the Commission with directions to explain its calculation of the claimant's average weekly wage, explain its calculation of the claimant's earning capacity as of November 4, 2011, and recalculate the claimant's wage differential award.

¶ 37 On April 15, 2016, the Commission issued its decision on remand, again noting that, based upon the circuit court's order of December 23, 2013, it was required to find a causal connection between the degenerative condition of the claimant's left knee and his work accident and award the claimant wage differential benefits. As directed, the Commission explained its calculation of the claimant's average weekly wage on November 6, 2009, of $1592.03, and its calculation of the claimants earning capacity as of November 4, 2011, of $1621.80 per week. The Commission fixed the claimant's wage differential award at $347.51, commencing on January 16, 2011.

¶ 38 Both the claimant and Sysco sought a judicial review of the Commission's decision of April 15, 2016, in the circuit court. On February 16, 2017, the circuit court (Judge McGing) issued an order confirming the Commission's decision. On March 10, 2017, Sysco filed its notice of appeal.

¶ 39 Sysco first argues that the circuit court erred in reversing the Commission's decision of October 24, 2012. Specifically, it argues that, contrary to the circuit court's finding in its order of December 23, 2013, the Commission's determination in its original decision that there is no

causal connection between the degenerative condition of the claimant's left knee and his work accident is not against the manifest weight of the evidence. It also argues that the claimant is not entitled to a wage differential award based upon his admission that he is under no work restrictions and is able to return to work as a truck driver. We agree with both arguments.

¶ 40 When, as in this case, the circuit court reverses the Commission's decision and the Commission, in compliance, issues a new decision on remand, this court's first inquiry on appeal from the circuit court's order confirming the Commission's decision on remand is, whether the circuit court erred in reversing the original decision. *Vogel v. Industrial Comm'n*, 354 Ill. App. 3d 780, 785-86 (2005).

¶ 41 To obtain compensation under the Act, a claimant has the burden of proving, by a preponderance of the evidence, all of the elements of his claim (*O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253 (1980)), including a causal relationship between his work accident and his condition of ill being (*Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989)). Whether a causal connection exists between a claimant work-related accident and his condition of ill being is a question of fact to be resolved by the Commission. *Certi-Serve Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). Whether a claimant's condition of ill being is attributable solely to a degenerative process of a preexisting condition or to an aggravation or acceleration of that preexisting condition caused by a work-related accident is a factual determination to be made by the Commission. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003).

¶ 42 The Commission's finding on a question of fact will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). For a factual finding made by the Commission to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *City of Springfield v. Illinois*

Workers' Compensation Comm'n, 388 Ill. App. 3d 297, 315 (2009). Whether a reviewing court might have reached the same conclusion is not the test for determining whether the Commission's finding is against the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's decision. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 43 In its original decision, the Commission affirmed and adopted the arbitrator's decision in its entirety. Based in large part on the opinions of Dr. Walsh, the Commission found that the permanent injury causally related to the claimant's work injury is the torn meniscus surgically repaired by Dr. Regan on January 20, 2010. However, according to the decision, there is no evidence to support a finding that the degenerative condition of the claimant's left knee is causally related to his work injury. In reversing the Commission's original decision, the circuit court (Judge Lopez Cepero), found that the Commission's causation determination relating to the degenerative condition is belied by the statement in Dr. Regan's June 7, 2011, letter that the claimant's work accident "probably aggravated a pre-existing chondromalacia." The circuit court concluded that the Commission ignored Dr. Regan's letter, suggesting that the Commission was "determined to reach a particular outcome." After concluding that the Commission had ignored Dr. Regan's letter, the circuit court found that the Commission's determination that the degenerative condition in the claimant's left knee is not causally connected to his work accident is against the manifest weight of the evidence. However, in its October 28, 2014, decision on remand from the circuit court, the Commission specifically stated that, in arriving at its original decision, it had "noted, reviewed, considered, analyzed, and weighed" Dr. Regan's letter. The Commission referenced that portion of the letter which states that, in terms of commenting on "whether or not degeneration is related to the aging process or [an accident] on the job, I have a

more difficult time saying one verses the other. It is easy for me to say the meniscal tear and bone bruise have relationship to the job accident." According to the Commission, these statements did not establish Dr. Regan's belief that a causal nexus exists between the claimant's work accident and the degenerative condition in his left knee.

¶ 44 Both Dr. Regan's records and Dr. Walsh's opinion establish that the claimant suffers from a degenerative condition in his left knee, and the claimant correctly asserts that causation may be based upon a medical expert's opinion that a work accident could or might have caused a condition of ill-being. See *Consolidation Coal Co. v. Industrial Comm'n*, 265 Ill. App. 3d 830, 839 (1994). However, the weight, if any, to be given to such an expert's opinion is a matter for the Commission to decide (*O'Dette*, 79 Ill. 2d at 253), not the circuit court. It is clear from the Commission's decision of October 28, 2014, that, in arriving at its original decision, it considered Dr. Regan's letter of June 7, 2011, but accorded no weight to his statement that the claimant's work accident "probably aggravated a pre-existing chondromalacia." We do not believe that the Commission's failure to make note of the letter in its original decision, standing alone, supports the circuit court's conclusion that the Commission ignored the letter. Nor do we believe that the content of Dr. Regan's letter justified the circuit court in concluding that the Commission's finding that the degenerative condition of the claimant's left knee is not causally related to his work injury is against the manifest weight of the evidence, especially in light of Dr. Walsh's opinion on causation and the claimant's own testimony that his knee "is as good as it was before the operation." In concluding that the causation determination relating to the claimant's degenerative condition contained in the Commission's original decision is against the manifest weight of the evidence, the circuit court impermissibly reweighed the evidence and usurped the Commission's fact-finding function.

¶ 45 In addition to substituting its judgment for that of the Commission on the issue of causation, the circuit court (Judge Lopez Cepero), not only reversed the Commission's original decision, it remanded the matter back to the Commission with directions to award the claimant wage differential benefits under section 8(d)1 of the Act. Sysco argues that, by his own admissions, the claimant is not entitled to a wage differential award. We agree.

¶ 46 The claimant acknowledges in his brief that he is not medically restricted from pursuing his usual and customary line of employment as a truck driver and was willing and able to return to work. Nevertheless, he argues that, despite his full duty release, Sysco's refusal to allow him to return to work as a delivery driver based on its belief that he is physically unfit which renders him partially incapacitated from pursuing his usual and customary line of employment, and entitles him to wage differential benefits as ordered by the circuit court in its December 23, 2013, order. We find no merit in the argument.

¶ 47 Section 8(d)1 of the Act provides that an injured employee is entitled to wage differential benefits if, "as a result" of a work related "accidental injury[,]" he becomes partially incapacitated from pursuing his usual and customary line of employment. 820 ILCS 305/8(d)1 (West 2010). The claimant does not assert that he is partially incapacitated from pursuing his usual and customary line of employment by reason of an injury; rather, he contends that he is entitled to a wage differential due to Sysco's refusal to allow him to return to work as a delivery driver. He admits that he is not medically restricted from working as a delivery driver and was willing and able to return to work in that capacity. Based upon his own admissions, the claimant was not entitled to a wage differential award under section 8(d)1 of the Act.

¶ 48 In reversing the Commission's decision of October 24, 2012, and ordering the Commission to award the claimant wage differential benefits, the circuit court found "that there

is no language in [s]ection 8(d)1 that requires a claimant to be *medically* incapacitated to receive a wage differential award." (Emphasis added.) Relying upon evidence that Sysco declined to allow the claimant to return to work as a delivery driver due to his work-related injuries and thereafter offered him a position as a security guard, the circuit court concluded that the claimant was incapacitated from pursuing his usual and customary line of employment, and is entitled to a wage differential award. The flaw in the circuit court's reasoning was its failure to recognize that, in order to qualify for a wage differential, the claimant must be partially incapacitated from pursuing his usual and customary line of employment "as a result" of an injury, not based on the reasons articulated by his employer for not restoring him to his pre-accident position.

¶ 49 Clearly, the reasons given by an employer for not restoring an injured employee to his pre-accident position may be relevant to the question of whether the employee is incapacitated from pursuing his usual and customary line of employment in a case where the employee's physical ability to return to his usual line of work is a disputed issue. This is not such a case. The claimant admitted that he is ready, willing, and able to return to work as a truck driver, and his treating physician authorized him to return to work without restrictions.

¶ 50 The extent of an injured employee's disability is a question of fact for the Commission to determine (*Oscar Mayer & Co. v. Industrial Comm'n*, 79 Ill. 2d 254, 256 (1980)) as is the issue of whether the employee is partially incapacitated from pursuing his usual and customary line of employment (*Morton's of Chicago v. Industrial Comm'n*, 366 Ill. App. 3d 1056, 1061 (2006)). Simply stated, the evidence in the record before us supports the conclusion that the claimant is not partially incapacitated from pursuing his usual and customary line of employment "as a result" of a work related "accidental injury."

¶ 51 Based upon the foregoing analysis, we conclude that, in reversing the Commission's original decision of October 24, 2012, the circuit court both impermissibly reweighed evidence and misapplied section 8(d)1 of the Act.

¶ 52 Lastly, we find need to comment on a gratuitous statement made by Judge Lopez Cepero in his order of December 23, 2012; a comment with which the Commission justly took umbrage. Judge Lopez Cepero wrote that, "any reasonable trier of fact" would have noted Dr. Regan's letter of June 7, 2011, and weighed it accordingly, and "[t]he fact that the Commission ignored it suggests that they were determined to reach a particular out come." First, the fact that the Commission did not mention the letter in its original decision does not support the conclusion that it ignored the letter. Second, whether or not one agrees with the Commission's causation determination, there was simply no justification for accusing the Commission of being determined to reach a particular outcome in this case, especially in light of the fact that the evidence contained in the record supports the Commission's original causation determination. The accusation is not only without support in the record, it is injudicious.

¶ 53 In summary, we conclude that: (1) the circuit court (Judge Lopez Cepero), usurped the fact-finding function of the Commission in reversing its original decision of October 24, 2012; (2) the record contains sufficient evidence to support the determination in the Commission's original decision that the degenerative condition of the claimant's left knee is not causally related to his work accident of November 6, 2009; (3) the claimant was not entitled to a wage differential under section 8(d)1 of the Act; and (4) the Commission's original decision is not against the manifest weight of the evidence.

¶ 54 Based upon the foregoing analysis, we: reverse the circuit court's order of December 23, 2013; vacate the Commission's decisions of October 28, 2014, and April 15, 2016; vacate the

circuit court's orders of August 10, 2015, and February 16, 2017; and reinstate the Commission's original decision of October 24, 2012.

¶ 55 Judgment of the circuit court of December 23, 2013, reversed; judgment of the circuit court of August 10, 2015, and February 16, 2017, vacated; Commission's decisions of October 28, 2014, and April 15, 2016, vacated; and Commission's original award of October 24, 2012, reinstated.

2018 IL App (2d) 170086WC
No. 2-17-0086WC
Opinion filed January 9, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

ROCIO PEREZ, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (TFN, Inc., d/b/a Wendy's, Appellee).	)	Appeal from the Circuit Court of Kane County. No. 16-MR-751 Honorable David R. Akemann, Judge, Presiding.

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

OPINION

¶ 1 On September 10, 2007, claimant, Rocio Perez, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2006)), seeking benefits from the employer, TFN Inc. Following a hearing, the arbitrator determined claimant's condition of ill-being in her left knee was not causally connected to her work accident on June 19, 2007.

¶ 2 In May 2012, the Illinois Workers' Compensation Commission (Commission) affirmed the arbitrator's decision. On judicial review, in January 2013, the circuit court of Kane County

confirmed the Commission's decision. In March 2014, this court reversed the circuit court's decision, finding that (1) the Commission abused its discretion in admitting the causation opinions of the employer's independent medical expert and (2) the Commission's finding that claimant failed to meet her burden of proving that her conditions of ill-being were causally connected to a workplace accident was against the manifest weight of the evidence. See *Perez v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 130220WC-U.

¶ 3 In March 2015, the Commission issued a decision on remand, awarding $4^3/_7$ weeks' temporary total disability (TTD) benefits and $288 per week for a period of 43 weeks for the loss of use of claimant's left leg. The Commission also ordered the employer to pay claimant's medical expenses in accordance with sections 8(a) and 8.2(e) of the Act, without specifying the amount. 820 ILCS 305/8(a), 8.2(e) (West 2006). In November 2015, the circuit court of Kane County entered an order remanding the matter to the Commission to determine the amount owed for medical expenses.

¶ 4 In June 2016, the Commission issued a decision on remand, ordering the employer to pay $17,857.96 for medical expenses under sections 8(a) and 8.2(e) of the Act (820 ILCS 305/8(a), 8.2(e) (West 2006)), representing the total amount of $17,597.86 paid by claimant's husband's health insurance provider under its group health insurance plan "and deductibles/copays of $260.00." On judicial review, in January 2017, the circuit court of Kane County affirmed the Commission's decision. Claimant appeals.

¶ 5 We affirm.

¶ 6 I. BACKGROUND

¶ 7 At arbitration, claimant, the assistant manager at a Wendy's restaurant, testified she sustained a workplace injury in her left knee when she slipped and fell on a wet floor on June 19,

2007. She subsequently underwent medical treatment, including physical therapy and surgery, for a lateral meniscal tear in her left knee.

¶ 8 Claimant testified that her medical expenses were either paid by Cigna, her then husband's medical insurance carrier, or paid out-of-pocket. The employer submitted an exhibit listing medical payments made by Cigna, showing payments of $17,597.96 and copayments of $260. On April 4, 2011, the parties entered into a stipulation reflecting fee schedule amounts for claimant's medical services, which totaled $37,767.32, but with the caveat that "[the employer] disputes the fee schedule is the appropriate basis for calculating [the] amount of medical, if compensable."

¶ 9 On April 25, 2011, the arbitrator issued a decision, finding claimant's condition of ill-being in her left knee was not causally connected to her work accident on June 19, 2007. The Commission affirmed the arbitrator's decision. On January 31, 2013, the circuit court of Kane County confirmed the Commission.

¶ 10 Claimant appealed to this court, which reversed the circuit court's judgment and concluded that (1) the Commission abused its discretion in admitting the causation opinions of the employer's independent medical expert and (2) the Commission's finding that claimant failed to meet her burden of proving that her conditions of ill-being were causally connected to a workplace accident was against the manifest weight of the evidence. See *Perez v. Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 130220WC-U.

¶ 11 On March 17, 2015, the Commission issued its decision on remand, awarding $4^{3}/_{7}$ weeks' TTD benefits and $288 per week for a period of 43 weeks for the loss of use of claimant's left leg. The Commission also ordered the employer to pay claimant's medical expenses in accordance with sections 8(a) and 8.2(e) of the Act, without specifying the amount. 820 ILCS

305/8(a), 8.2(e) (West 2006). On November 12, 2015, the circuit court of Kane County entered an order remanding the matter to the Commission to determine the amount owed for medical expenses.

¶ 12 On June 16, 2016, the Commission issued a decision on remand, ordering the employer to pay $17,857.96, the negotiated amount of medical expenses under sections 8(a) and 8.2(e) of the Act (820 ILCS 305/8(a), 8.2(e) (West 2006)), representing $17,597.96 paid by Cigna and claimant's out-of-pocket expenses of $260. The Commission noted that "[t]he statute does not require the employer to be a party to the rate agreement in order to receive the benefit of the agreement." Relying on this court's decision in *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 943 N.E.2d 153 (2011), the Commission accepted the employer's argument that the maximum amount of medical expenses for which it was liable was the claimant's out-of-pocket expenses and the amount actually paid by Cigna, not the amount owed under the fee schedule. On January 9, 2017, the circuit court confirmed the Commission's decision.

¶ 13 This appeal followed.

¶ 14 II. ANALYSIS

¶ 15 On appeal, claimant argues the Commission erred in ordering the employer to pay medical expenses in a lower amount negotiated and paid by a third party insurance carrier, and not the stipulated fee schedule amounts.

¶ 16 Section 8(a) of the Act provides, in pertinent part, as follows:

> "The employer shall provide and *pay the negotiated rate, if applicable, or the lesser of the health care provider's actual charges or according to a fee schedule*, subject to Section 8.2, in effect at the time the service was rendered for all the necessary first aid,

medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury." (Emphasis added.) 820 ILCS 305/8(a) (West 2006).

¶ 17 Claimant contends that, under section 8(a) of the Act, the employer pays the negotiated rate only when the rate is negotiated by the employer or its *own* insurance carrier. Here, the negotiated rate was accepted by a third-party insurance carrier, Cigna, which was claimant's then husband's health insurer. The employer argues that under the plain language of the statute, it is only liable for the amount of medical expenses actually paid pursuant to the negotiated rate, regardless of whether the employer or its insurer negotiated the rate. We agree.

¶ 18 In cases of statutory construction, the cardinal rule is to ascertain and give effect to the intent of the legislature. *People v. Johnson*, 2017 IL 120310, ¶ 15, 77 N.E.3d 615. "Where the language is clear and unambiguous, a court may not depart from the plain language by reading into the statute exceptions, limitations, or conditions that the legislature did not express." *Hayashi v. Illinois Department of Financial & Professional Regulation*, 2014 IL 116023, ¶ 16, 25 N.E.3d 570. Statutory construction issues are subject to *de novo* review. *Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 524, 844 N.E.2d 414, 418 (2006).

¶ 19 Here, under the plain language of section 8(a) of the Act, the employer is required to pay (1) the negotiated rate, if applicable, or (2) the lesser of the health care provider's actual charges, or (3) according to a fee schedule. 820 ILCS 305/8(a) (West 2006). Contrary to claimant's assertion, there is no limiting language that requires the employer to pay the negotiated rate only when it is negotiated by the employer or the employer's *own* insurance carrier. Claimant attempts to create an ambiguity where none exists. The statute clearly requires the employer to

pay "*the* negotiated rate." (Emphasis added.) Had the legislature intended to limit negotiated rates and agreements to those between the employer or the employer's own insurance carrier, it could have included this restriction; however, the legislature declined to do so.

¶ 20 Further, claimant argues that the Commission's guidelines demonstrate that the "legislature expected [the negotiated rate] to be negotiated by the parties who would owe the injured worker's medical bills under the Workers' Compensation Act." We disagree. The Commission's guidelines, which claimant points to, provide as follows:

> "The fee schedule does not preclude any privately and independently negotiated rates or agreements between a provider and a carrier, or a provider and an employer, that are negotiated for the purposes of providing services covered under the Illinois Workers' Compensation Act." Ill. Workers' Compensation Comm'n, Medical Fee Schedule Instructions & Guidelines, https://www2.illinois.gov/sites/iwcc/Documents/Instructions%20and%20guidelines.pdf (last visited January 3, 2018) (governing "procedures, treatments, and services provided on or after February 1, 2006" and before February 1, 2009).

We find that the Commission's guidelines merely clarify that the fee schedule does not preclude a negotiated rate or agreement. They are silent on the issue of who may actually pay or benefit from the negotiated rate.

¶ 21 Claimant next argues that the Illinois Administrative Code provides that only the employer or its own carrier may negotiate the reduced rate. The Illinois Administrative Code provides, in pertinent part:

> "Under the fee schedule, the employer pays the lesser of the rate set forth in the schedule or the provider's actual charge. If an employer *or* insurance carrier contracts with a

> provider for the purpose of providing services under the Act, the rate negotiated in the contract shall prevail." (Emphasis added.) 50 Ill. Adm. Code 7110.90(d), amended at 36 Ill. Reg. 17108 (eff. Nov. 20, 2012).

Here, again, the language cited by claimant is devoid of any limitation that only the employer's own insurance carrier may negotiate the reduced rate. The disjunctive term "or" indicates that either the employer *or* insurance carrier—any insurance carrier—may negotiate a reduced rate.

¶ 22 Contrary to claimant's argument, the plain language of section 8(a) of the Act indicates that the legislative intent was to provide relief to injured employees only to the extent reasonably required to cure or relieve claimant from the effects of a workplace injury. 820 ILCS 305/8(a) (West 2006). Specifically, the Act provides that the employer shall pay medical expenses "*limited*, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury." (Emphasis added.) *Id.* Here, consistent with the legislative intent of the statute, and specifically in regards to her medical expenses, claimant was cured or relieved from the effects of her injury once the employer paid the negotiated rate of $17,857.96 with a $0 balance remaining. See *Tower Automotive*, 407 Ill. App. 3d at 437 ("By paying, or reimbursing an injured employee, for the amount actually paid to the medical service providers, the plain language of the statute is satisfied."). To award claimant any amount for medical expenses beyond the amount actually paid to the medical service providers would result in a windfall to claimant.

¶ 23 III. CONCLUSION

¶ 24 For the reasons stated, we affirm the circuit court's judgment.

¶ 25 Affirmed.