**WCLA NEWSLETTER**

**CASE LAW UPDATE December 2020**

1. **EMPLOYER/EMPLOYEE RELATIONSHIP**

***Stirratt v. TRDA Wood Products, Inc, d/b/a Chicagoland Wholesale Mulch and Reasonable Tree Experts; Payroll Distribution Account 2 and Illinois State Treasurer, as ex-officio custodian of the Injured Workers’ Benefit Fund*, 11 WC 14118, 20 IWCC 0590 (IWCC Oct. 6, 2020)**

Petitioner was employed as a tree climber by TRDA Wood Products, Inc. TRDA was owed by Kurt Fife. Petitioner previously worked as a tree cutter before working at TRDA. He did not receive formal training. He testified that his job duties required him to climb, trim and cut down branches of trees. Petitioner also performed maintenance duties. TRDA provided him with his equipment. Petitioner wore a company shirt to work. Petitioner drove a company vehicle to customer’s homes. He could not drive the vehicle for personal reasons. Mr. Fife provided Petitioner instruction as to which trees he was supposed to work on.

Mr. Fife testified that Petitioner was required to sign an agreement stating that he consented to work on a part-time basis for TRDA as a subcontract laborer. Petitioner signed the agreement, but testified that he did not understand it. Petitioner testified that Mr. Fife directed his hours, negotiated with customers and dealt with customer complaints. Petitioner received hourly pay and was not paid directly by the customer.

On the date of accident, Petitioner was at a customer’s home. He was directed by Mr. Fife to trim a tree. Petitioner was coming down from the tree, lost his balance and fell 15 feet to the ground. Petitioner fractured his right ankle. Mr. Fife offered Petitioner $400 to sign a release of liability, which Petitioner accepted to help pay for medical care.

Petitioner underwent three surgeries to the right ankle. Petitioner unable to work from April 1, 2011 through October 25, 2012. Petitioner testified via deposition. When Petitioner’s evidence deposition was taken, Petitioner was serving a four-year sentence for theft and burglary.

Mr. Fife testified that he has workers’ compensation insurance. However, he could not name the carrier. A subpoena from the National Council on Compensation Insurance reflected that there was no policy for TRDA.

The Arbitrator found that Respondent was operating under and subject to the Workers’ Compensation Act. The Arbitrator also found that an employment relationship existed between Petitioner and Respondent. The Arbitrator noted that Petitioner’s work duties fell within the nature of the work performed by Respondent. The Arbitrator found it significant that Petitioner had no customers of his own, did not receive a percentage of the price that Respondent negotiated and was paid an hourly rate. Further, Respondent provided equipment to Petitioner and Petitioner was unskilled. The Arbitrator did not accord any weight to the independent contractor agreement signed by Petitioner. The Arbitrator found that an employer-employee relationship existed because TRDA controlled the manner of Petitioner’s work.

The Arbitrator noted that Respondent did not present any evidence regarding accident. It was undisputed that Petitioner fell out of a tree, which clearly arose out of and in the course of his employment. The unrebutted testified also established that timely notice was provided to Respondent. Respondent did not offer any medical evidence disputing medical causation. Based on the chain of events analysis, the Arbitrator found that the current condition of ill-being of the right ankle was causally connected to the work-related accident.

The Arbitrator noted that neither Petitioner nor Respondent submitted any wage documentation. However, both parties’ witnesses testified that Petitioner earned $20 per hour and worked between 15-20 hours per week. Accordingly, the Arbitrator found that the average weekly wage was $300 per hour, or $20 per hour, 15 hours per week. The Arbitrator found there was no dispute as to Petitioner’s age, marital status and payment of medical bills. He found that Petitioner was entitled to receive TTD benefits and found that Petitioner was permanently and partially disabled to the extent of 35% loss of use of the leg. The Arbitrator found that a $400 credit existed for the payment made by Respondent to release liability. the award was entered against the Injured Workers’ Benefit Fund. The Commission affirmed the decision of the Arbitrator.

***Cervantes v. McCann Construction and Injured Workers’ Benefit Fund, by Illinois State Treasurer, as ex-officio Custodian,* 09 WC 30437, 20 IWCC 0593 (IWCC Oct. 8, 2020)**

The main issue dispute was employer-employment relationship. Petitioner testified that he was employed by Respondent earning $14 per hour. Petitioner testified that he had been employed for two weeks prior to the alleged accident. He did not fill out an application. He further testified that he did not own his own company. Petitioner rode to work with Mr. McCann, who offered him the job. Petitioner used his own tools.

Petitioner testified that Mr. McCann offered him the job. Petitioner was not hired to be a subcontractor. Petitioner did not fill out a W-4 form or any tax forms. He denied telling Mr. McCann that he owned a handyman service.

On the date of accident, Petitioner arrived at the job site with Mr. McCann. Mr. McCann told Petitioner what work to perform. As Petitioner was removing siding from the customer’s house, his leg fell into a window well, which gave way and caused him to fall, injuring his knee. Petitioner received medical treatment for his right knee condition. At the time of the hearing, an MRI study was recommended for the right knee.

Mr. McCann also testified. He testified that he obtained employees through a staffing agency. He testified that Petitioner asked him for work and gave him a card with a real estate company on one side and a handyman service on the other side. He hired Petitioner on three occasions as a subcontractor. Petitioner was paid a percentage of the amount Mr. McCann received for each job and was paid in cash. He further testified that he never saw Petitioner crawl down a window well, did not see him ice his knee and did not have an accident reported to him. He testified that Petitioner continued to work for him on other occasions and did not have any difficulty performing his job. Further, Petitioner did not report any injury to him.

The Arbitrator found that Respondent was operating under the Act. She further found that Petitioner failed to establish an employer-employee relationship. The Arbitrator found Petitioner’s testimony was not credible. The Arbitrator noted that Mr. McCann and Petitioner’s testimony was contradictory. Further, the photographs offered into evidence did not support Petitioner’s testimony regarding the accident. Specifically, the pictures taken of the window well did not show a complete split which would have allowed Petitioner’s leg to fall through it. It was also significant that the amount paid to Petitioner for the work he performed was not consistent with his testimony regarding his earnings. Since the Arbitrator did not find that an employee-employer relationship existed, the other issues in dispute were moot and denied.

The Commission affirmed the decision of the Arbitrator. The Commission noted that Mr. McCann did not control how Petitioner performed his work or how fast he worked. Further, the Commission did not find Petitioner’s testimony that he was paid hourly to be credible. The Commission also found that Petitioner used his own tools to perform the work. Accordingly, no employee-employee relationship existed.

1. **ACCIDENTAL INJURIES “ARISING OUT OF” AND “IN THE COURSE OF” EMPLOYMENT**

***McCormick v. Francis P. O’Meara, D.D.S, P.C*, 17 WC 37946, 20 IWCC 0515 (IWCC Sept. 15, 2020)**

Petitioner slipped and fell in a bathroom while working for Respondent. The bathroom was located in a common area of the building Respondent’s office was located in. The Arbitrator found that Petitioner failed to establish that she sustained a compensable accident because the accident did not arise out of an increased risk of her employment. The Arbitrator applied a neutral risk analysis.

The Commission reversed the decision of the Arbitrator. The Commission noted that although the bathroom was located in a common area, it required a key to open it. The Commission found that the bathroom was not accessible to the general public because the general public did not have access to the area because the door was locked. The Commission also noted that the bathroom was the only option for Petitioner to use due to her employment. Since Petitioner was limited to the use of the bathroom, the Commission found that the risk should be considered distinctly associated with the employment.

The Commissions also found that the accident would be compensable under a neutral risk analysis. The Commission found that Petitioner was subject to an increase risk quantitatively and qualitatively. The Commission noted that Petitioner had to use the bathroom since Respondent did not provide a bathroom to Petitioner. Further, the owner of the building set the door to lock quickly forcing Petitioner to rush to get into the bathroom. Petitioner slipped on hand cream on the bathroom floor. Thus, she sustained a compensable accident arising out of and in the course of her employment.

The Commission also found that Petitioner’s current condition of ill-being was causally connected to the work-related accident. The Commission found that Petitioner never experienced prior neck or back complaints. The Commission rejected the opinion of the Section 12 physician due to the fact that he relied on a gap in treatment, which was credibly explained due to lack of insurance and Petitioner not knowing how to get treatment.

Having found that Petitioner sustained an accidental injury and that the current condition of ill-being was casually connected to the work-related accident, the Commission awarded payment of TTD benefits and medical expense. It also awarded payment for medical treatment.

***Clarke v. Evanston Skokie School District #65*, 16 WC 13114, 20 IWCC 0533 (IWCC Sept. 16, 2020)**

The Commission reversed the decision of the Arbitrator regarding accident. The Arbitrator found that Petitioner failed to establish that she sustained accidental injuries arising out of and in the course of her employment. The Commission found that Petitioner sustained a compensable accident.

Petitioner was employed by Respondent as a special education teacher. Petitioner walked through the hallway frequently. Petitioner was walking down the hallway past two water fountains when she slipped and injured her leg. Since she was in so much pain, she was not able to check to see if her clothes were wet following the fall.

A witness for Respondent testified that she did not observe any water in the hallway where Petitioner fell nor was Petitioner’s clothing wet. She acknowledged that the students used the water fountains.

The Arbitrator found that Petitioner’s accident did not have any origin in a risk connected with or incidental to her employment. The Arbitrator also found that Petitioner failed to establish there was water on the floor where she slipped.

The Commission reversed the decision of the Arbitrator. The Commission found it significant that Petitioner consistently testified that she slipped. The Commission found that water was frequently on the floor from the water fountains and it was reasonable to conclude that Petitioner slipped and fell as a result of the water on the floor. The risk of the water was a risk incidental to her employment since her job required her to water between eight classrooms through the day, which she was doing at the time of the accident.

The Commission also found that Petitioner’s current condition of ill-being was casually connected to the work-related accident. Accordingly, the Commission awarded payment of medical bills admitted into evidence. The Commission also awarded payment of TTD benefits and PPD benefits in the amount of 7.5% loss of use of the leg.

***Martinez v. General Mills,* 09 WC 09385, 20 IWCC 0546 (IWCC Sept. 21, 2020)**

Petitioner was employed by Respondent as a QRO technician. Petitioner was walking at work when she felt a pop in her left calf.

The Arbitrator found that Petitioner failed to establish that she sustained a compensable accident. The Arbitrator found that the accident was in the course of employment; however, it did not arise out of the employment. Petitioner argued that her accident was either distinctly associated with the employment or she was exposed to a risk greater than the general public since she was walking fast and stepped over a threshold. However, the Arbitrator noted that the medical records all documented that Petitioner sustained an injury while walking. Therefore, the Arbitrator found that walking did not arise out of a result of some risk of the employment. Based on the finding of accident, the Arbitrator denied benefits. The Commission affirmed the decision of the Arbitrator.

1. **MEDICAL CAUSATION**

***City of Elgin v. Illinois Workers’ Compensation Commission*, 2020 IL App (2d) 190713WC-U, unpublished opinion (2d Dist. 2020)**

Petitioner was employed as a police officer. He was assigned to transport two prisoners to the courthouse. As Petitioner was driving, one of the prisoner’s kicked out the dividing window of the car and dived out of the car. The prisoner ended up in front of the squad car and Petitioner had to drive across the traffic lanes avoid hitting him. Petitioner fired three shots at the prisoner and hit him twice in the back. The prisoner survived. Petitioner received medical treatment for acute trauma. Petitioner was on administrative leave with full salary. He was anxious, depressed and fidgety.

Petitioner received medical treatment for PTSD. A Section 12 physician concluded that Petitioner was malingering and this incident would not have been traumatic for a police officer. At the request of his attorney, Petitioner was examined by a neuropsychologist, who concluded that Petitioner had PTSD and was actively symptomatic. At the disability board hearing, two other physicians found that Petitioner had anxiety, but not PTSD. During his divorce hearing, Petitioner stated that he was mentally and physically healthy.

Petitioner was not released to return to work, but struggled to pay his bills. Accordingly, he was forced to return to work to pay the bills. He worked as a doorman and bouncer. Petitioner experienced flashbacks and had difficulty sleeping.

The Commission found that the shooting incident caused PTSD. The Commission awarded TTD benefits and medical bills. No TPD was awarded. Both parties filed a Petition for Review to the circuit court. The circuit court confirmed the decision of the Commission regarding accident, causation, TTD and medical benefits, but remanded the case to the Commission to consider TPD benefits. The Commission awarded TPD benefits. Respondent appealed and the circuit court confirmed the decision of the Commission.

Respondent argued that Petitioner did not experience a sudden, severe emotional shock because he did not witness any grave bodily harm. Respondent argued that Petitioner could not be shocked by his own actions in shooting the prisoner because he chose to shoot him. The court found that parts of the incident, including when the prisoner kicked in the window divider or when the prisoner tried to enter another car on the street and take an innocent person hostage. Further, the fact that Petitioner was forced to shoot someone indicates that he was in a highly emotional situation.

The court noted that Petitioner was functioning in his job until he was interrogated about the incident. At that time, he sought medical treatment. The court noted that while the family physician set forth that Petitioner could return to work, the specialists in the case did not agree. Further, while Petitioner could perform many mundane job functions, it could still be unsafe to allow him to work as a police officer armed with a gun. Petitioner only waited a month before seeking treatment and complained of symptoms immediately following the accident. Last, Petitioner’s self-evaluation of his mental health could easily be disregarded since self-assessments are not infallible. The court deferred to the Commission regarding credibility of the medical experts. The court held that the Commission’s finding that Petitioner sustained a sudden, severe emotional shock was not against the manifest weight of the evidence.

The court noted that since it found that Petitioner continued to experience PTSD, Respondent was liable for payment of ongoing medical bills. The court reduced the payment of TPD benefits due to a miscalculation, but did award payment of them.

***Jordan v. City of Peoria*, 16 WC 35797, 20 IWCC 0531 (IWCC Sept. 16, 2020)**

Petitioner worked for Respondent as a police office. Petitioner tripped and fell while chasing a suspect and landed on his outstretched arms. Petitioner received medical treatment for the right wrist, including surgery. He testified that while in physical therapy he experienced an increase in pain in the shoulder. He sustained an injury to the right shoulder in work conditioning. Petitioner underwent surgery for the right shoulder condition. Petitioner also began experiencing pain in the left shoulder. Surgery was recommended for the left shoulder condition. Petitioner did not report left shoulder pain until several months after the work-related accident.

The physician treating Petitioner for his shoulder condition opined that the left shoulder condition was causally connected to the work-related accident. The Section 12 physician disagreed and stated that the current condition of ill-being was not causally connected to the work-related accident.

The Arbitrator found that Petitioner’s left shoulder condition was casually connected to the work-related accident. The Arbitrator relied on the opinions of the treating physician. The Arbitrator further denied reimbursement for a no-show fee to Respondent’s Section 12 exam.

The Commission reversed the decision of the Arbitrator. The Commission noted that Petitioner received medical treatment for eight months without complaining of left shoulder pain. The Commission relied on the Section 12 examination which failed to note any significant findings regarding the left shoulder. The Commission further noted that the treating doctor’s opinions were based on the history provided by Petitioner. Based on the lack of documentation for the left shoulder complaints, the Commission found that Petitioner failed to establish medical causation.

The Commission also failed to award reimbursement for the no show fee. In the instant case, Petitioner was not aware of the examination until after the date had passed. Since there was no evidence that Petitioner refused to attend the appointment, the Commission did not award reimbursement for the no show fee.

1. **INTOXICATION**

***Green v. City of Chicago, Dept. of Aviation*, 17 WC 02494, 20 IWCC 0589 (IWCC Oct. 6, 2020)**

Petitioner was employed as a motor pool driver. Petitioner sustained an injury to his right arm when he pulled on a tractor hitch. Petitioner went to the emergency room following the accident. Petitioner testified that he was not asked to take a drug test and did not refuse to take a drug test. Billing records indicated that a drug screening was not complete and the word “refusal” appeared next to the itemization. The visit occurred several days after the alleged accident. Several days after the accident, a drug test was completed and the results were positive for cocaine. Petitioner testified that he did not use cocaine prior to the accident, but could have used it the Sunday after his accident.

The sole issue at hearing was whether the accident arose out of and in the course of Petitioner’s employment. Respondent relied on the intoxication defense. The Arbitrator found that Petitioner failed to take a drug test when instructed and the rebuttable presumption that intoxication was the proximate cause of Petitioner’s injuries existed. The Arbitrator noted that Petitioner failed to overcome the rebuttable presumption. The Arbitrator noted that Petitioner did not provide a reason for leaving the ER. He also failed to disclose his cocaine use to the pain center and subsequently tested positive for cocaine. Petitioner failed to present any evidence that the cocaine in his system was not the proximate cause of his injuries of how long the cocaine was in his system.

The Commission reversed the decision of the Arbitrator. The Commission analyzed the rebuttable presumption differently than the Arbitrator. The Commission noted that the medical records fail to indicate that Petitioner was offered and refused a drug test. Rather, the Arbitrator relies on the billing statement which notes a refused drug test. However, the “refused” drug test was four days after the alleged accident. The Commission noted that the actions of Petitioner could be construed as a refusal and Petitioner did test positive for cocaine; however, the probative value of the refusal and test is limited due to the remoteness from the accident. There was no evidence that Petitioner was impaired near the date of accident and the medical records do not document any signs of impairment. Respondent did not submit any testimony that Petitioner was impaired at the time of the accident. The Commission found that the rebuttable presumption did not apply since the refusal was four days after the accident and did not bear on Petitioner’s condition at the time of the accident. Since the case was limited to the intoxication defense, the Commission found that Petitioner sustained a compensable accident.

1. **PERMANENCY BENEFITS**

***Patton v. State of Illinois, DOC Stateville and Michael Frerichs as State Treasurer and Ex-Officio Rate Adjustment Fund*, 11 WC 34624, 20 IWCC 0542 (IWCC Sept. 21, 2020)**

Petitioner was employed as a correctional officer by Respondent. Petitioner sustained a right knee injury when she twisted her knee exiting the tower. Petitioner underwent surgery for the right knee. Her post-operative diagnosis was medial meniscal tear, chondromalacia and partial ACL rupture. Petitioner underwent an arthroplasty of the right knee. She continued under post-operative care. Petitioner underwent a total right knee revision arthroplasty. In total, she underwent six surgical procedures to the leg. Petitioner has not been released to return to work by her treating physicians, nor has she returned to work. Petitioner performed a job search and looked for sedentary work.

The Arbitrator found that Petitioner sustained an accidental injury arising out of and in the course of her employment. Petitioner sustained an injury when she pivoted on her right knee exiting a tower. Respondent argued that Petitioner was not subjected to an increased risk greater than the general public. The Arbitrator found that Petitioner’s injury was distinctly associated with her employment. The Arbitrator noted that Petitioner sustained an injury while performing her job duties for Respondent, which included returning a key while exiting the tower. Since Petitioner injured her knee while performing her job duties and given the unique configuration of the tower, the accident was distinctly associated to employment.

The Arbitrator also found that the knee condition was causally connected to the work-related accident. The Arbitrator noted that although Petitioner had prior knee problems, she had a consistent mechanism of accident and sustained an acute meniscal tear. Petitioner submitted the opinions of three physicians who opined that the knee condition was causally connected to the work-related accident. The Arbitrator awarded TTD and maintenance benefits. The Arbitrator also awarded payment of medical bills.

The Arbitrator found that Petitioner was permanently and totally disabled. The Arbitrator noted that Dr. Coe opined that Petitioner was permanently disabled. Petitioner had persistent pain, stiffness, limited gait, weakness and overuse complaints in the left knee. Petitioner testified that she is not able to think clearly due to the pain. Respondent did not offer any opinions rebutting Dr. Coe’s opinion; nor did Respondent offer any evidence that a stable labor market existed for Petitioner. Accordingly, the Arbitrator found that Petitioner was permanently and totally disabled. The Commission affirmed the decision of the Arbitrator.

***Tomerlin v. Extra Help*, 14 WC 32713, 20 IWCC 0532 (IWCC Sept. 16, 2020)**

Petitioner operated a wrapping machine. He grabbed a piece of sheet metal and pushed the ends together to make a cylinder. The job required repetitive gripping, twisting, and grasping. Petitioner felt symptoms in his bilateral hands during his first shift and reported them to his supervisor. Petitioner underwent bilateral carpal release surgery. Petitioner had a positive outcome. Petitioner’s treating physician testified that the bilateral carpal tunnel was causally connected to Petitioner’s work activities. Specifically, he testified that the job duties aggravated a pre-existing carpal tunnel condition. Respondent’s Section 12 physician disagreed that the carpal tunnel was related to Petitioner’s work activities.

The Arbitrator found that Petitioner sustained accidental injuries that arose out of and in the course of his employment. Petitioner provided a consistent history of repetitive gripping and twisting linked to his employment. The Arbitrator also found that the causation opinion of Petitioner’s treating physician was more persuasive than the Section 12 physician. The Arbitrator awarded payment of medical expenses. TTD benefits were not awarded since Petitioner admitted to turning down light duty employment.

The Arbitrator also found that Petitioner was permanently and partially disabled to the extent of 12.5% loss of use of the left hand and 10% loss of use of the right hand. The Arbitrator found that there was no impairment rating submitted at hearing. The Arbitrator gave some weight to the fact that Petitioner was 53 at the time of his injury. He noted that there was no evidence that the injury impacted Petitioner’s future earning capacity. The Arbitrator gave great weight to the evidence of disability corroborated by the medical records.

The Commission modified the decision of the Arbitrator. The Commission found that Petitioner was permanently and partially disabled to the extent of 8% loss of use of the left hand and 7.5% loss of use of the right hand. The Commission noted that Petitioner was released without restrictions and had an excellent outcome from the surgery. Further, Petitioner testified that he did not experience any pain, numbness or lingering symptoms. The Commission found that this decreased the amount of permanency of the condition.

1. **DEPENDENTS**

***Johns v. Koch Foods, Inc.*, 17 WC 21116, 17 WC 21117, 20 IWCC 0538 (IWCC Sept. 18, 2020)**

Petitioner filed two applications for adjustment of claim in connection with two work related accidents. The cases were consolidated for hearing.

In the first case, Petitioner testified that he injured his back while lifting totes containing chicken products. The Arbitrator found that he sustained an accidental injury that arose out of and in the course of his employment. The Arbitrator also found that the condition was causally related to the work accident due to the chain of events analysis. Benefits were awarded in a companion case. The Arbitrator also found that Petitioner failed to establish that he had more than one dependent child under the age of 18. Petitioner had one biological child. The Arbitrator noted that Petitioner lives with his wife’s two children and that their biological fathers were deceased or incarcerated. Petitioner claims the children as dependents on his taxes. The Arbitrator noted that Petitioner needed to provide more detail such as who pays the expenses of the children before claiming them as dependents.

In the second case, the Arbitrator found that Petitioner sustained an accidental injury to his back while lifting a tote of chicken. He found that the back condition was causally connected to the work-related accident through the chain of events analysis. Further, the medical records supported a finding of causation. The Arbitrator rejected Respondent’s argument that Petitioner injured his back while incarcerated. There was no evidence that Petitioner was involved in an altercation while incarcerated or sustained an injury to his back.

The Arbitrator awarded payment of medical bills and future medical treatment, including surgery, and temporary total disability benefits. The Arbitrator made the same findings regarding Petitioner’s claim that his step children were dependents.

The Commission affirmed and adopted the Arbitrator’s decision in all aspects except regarding the claim of dependent and temporary total disability benefits. The Commission extended the period of temporary disability based on the medical records. The Commission noted that Petitioner’s disability persisted through the date of hearing. An FCE performed set forth that Petitioner was not able to return to work. Accordingly, the period of disability continued through the date of hearing.

The Commission found that Petitioner had three dependent children at the time of the accident. The Commission found that Petitioner’s biological child and two step children were dependent on him. Petitioner established that all three children were dependent on him and that he was the step children’s full-time father and they lived with him. Further, he claimed all the children on his taxes. Accordingly, the Commission found that the children were dependents of Petitioner.