WCLA NEWSLETTER
CASE LAW UPDATE February 2021

I. EMPLOYER/EMPLOYEE RELATIONSHIP

***Muniz v. Routine Maintenance,* 10 WC 39469, 20 IWCC 651**

This is an Injured Workers' Benefit Fund case so all issues were in dispute. Petitioner testified he was hired to clean gutters by the Respondent, Routine Maintenance. Petitioner responded to an ad in the paper and met with Carlos, the office manager, who hired him to clean gutters at a residential complex. Petitioner had no experience cleaning gutters. Petitioner was a union bricklayer and had been laid off when he answered the ad.

Petitioner signed a job application on the date of hire. He testified that if he refused to sign anything given to him by the Respondent he would not be allowed to work. Petitioner drove his own vehicle to job sites and used his own ladder for "small homes," but the Respondent provided him with ladders if Petitioner's ladders were too short. Respondent would set the rate of pay for a job and pay Petitioner after the job was complete. Petitioner received checks from the Respondent and worked a total of three days prior to his accident. Respondent also chose the job sites where Petitioner worked.

On the date of the accident, Petitioner met the crew at the Respondent's office. Carlos loaded up a company vehicle, rented ladders from a hardware store and drove to the job site. Carlos advised the crew what to do once they arrived at the job site. The weather was "cold and windy." Carlos told the crew, including Petitioner, to climb up the ladders and clean the gutters.

As Petitioner was coming down a ladder, a gust of wind caught him in the back. No one was steadying the ladder. Petitioner felt the ladder slip from the gutter so he jumped off the ladder and caught a balcony with his armpits. Petitioner could not keep a hold of the balcony and fell another 30 feet. Petitioner fractured his pelvis in three places, suffered a fractured hip, fractured vertebrae, fractured collarbone, and bilateral shoulder injuries requiring surgical repair.

On cross-examination Petitioner admitted the application he signed stated it was a "contract" and that it listed Petitioner as an independent contractor. The "contract" required Petitioner to carry his own workers' compensation insurance. Petitioner claimed he never read the agreement and did not understand the agreement. Petitioner received a check in the mail for the days worked. He never received a W-2, never received a set number of jobs, and admitted he could decline jobs.

The "contract" executed by the parties, identified by Mr. Majernik, the owner of the Respondent, was submitted into evidence. It provided that Petitioner (contractor) was an independent contractor hired by Carlos (contractee). The document specified that no employment relationship was established. Petitioner represented that he owned a business. While Carlos had the right to "control the results to be accomplished," Petitioner had the right to control the "manner or means by which the task" was to be performed. Petitioner was free to take work from other entities. However, Petitioner was not allowed to solicit Respondent's customers while working on a job for Respondent. Petitioner could refuse any job offered by Carlos that he not already accepted in

writing and was responsible for all taxes. He was also required to have workers' compensation insurance. Either side could terminate the contract upon completion of a contemplated job or after a 30-day notice. Carlos would send Petitioner an invoice for fees and Petitioner had the obligation to pay the fees.

The Arbitrator found an employer-employee relationship existed between Petitioner and the Respondent. The Arbitrator focused on the activities of the Respondent on the date of the accident, such as Carlos overseeing the job site, overseeing Petitioner's work, and supplying the 40-foot ladder that Petitioner used that day. The Arbitrator also noted Petitioner's nature of the work was as an unskilled laborer and had nothing to do with Petitioner's prior skills as a bricklayer. Finally, the Arbitrator noted that the Supreme Court has held that the parties' description of the relationship between them is only factor to consider.

The Commission affirmed the Arbitrator's decision and found Petitioner more credible than the Respondent's owner, who attempted to downplay the nature of the employment relationship. The Commission noted that "(i)t makes little sense for Petitioner to set up an independent company to perform professional activities he had never done before. His testimony that he had no expertise in gutter cleaning was not rebutted and it would appear likely that Carlos would have in some way directed his work."

II. ACCIDENTAL INJURIES ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

***Burnett v. Windmill Nursing Pavilion,* 17 WC 2548, 20 IWCC 0633**

Petitioner, a 51-year-old certified nursing assistant, testified she felt a cramp in her left foot on December 12, 2016 while walking. Petitioner presented to Ingalls Memorial Hospital the next day "complaining of left foot pain and swelling for one day. She denied any injury. The onset was gradual. The mechanism of injury was listed as "none." And "it occurred-at home." On the second visit to Ingalls, Petitioner reiterated that the injury occurred at home and that she was unsure of how she was injured. At a subsequent medical appointment, Petitioner advised the physician that she had severe pain and swelling of her left foot which began on December 13, 2016,the day after the accident, following a period of prolonged walking.

The Arbitrator denied the claim and found that Petitioner did not sustain a compensable accident. The Arbitrator found that Petitioner's claim of sustaining an injury through prolonged walking was a neutral risk such that the Petitioner must prove either quantitively or qualitatively of an increased risk. The Arbitrator was willing to consider a qualitative increased risk if the injury occurred at work. However, Petitioner provided a history that the injury occurred at home, so the Arbitrator did not consider whether Petitioner was subjected to an increased risk qualitatively.

The Commission, although affirming and adopting the Arbitrator's decision, acknowledged that the *McAllister* decision of the Illinois Supreme Court was issued after the Arbitrator's decision and so the Commission wanted to clarify the issue. The Commission noted that Petitioner's work as a certified nursing assistant required her to walk. Petitioner testified she would be

required to be on her feet from the time she arrived to do her job duties until she left. On the date of the accident, Petitioner went to the laundry area to get a bedsheet and began having a cramp in her foot while walking back to her unit.

The Commission noted since transporting laundry was one of petitioner's job duties, *walking to the laundry might reasonably be expected to be incidental to her job duties.* However, the Commission found that Petitioner's testimony was contradicted by the initial medical records, which did not indicate the walking occurred at work. The Commission therefore found the Petitioner was not credible.

***Rees v. Buffalo Grove Park District,* 17 WC 34480, 20 IWCC 0722**

Petitioner worked in maintenance for the Respondent. On the date of accident, Petitioner claimed a work-related injury after closing a van door on his right index finger. Respondent disputed liability and claimed that Petitioner's accident was not "peculiar to the employment" and slamming a finger in the door of a vehicle was a "neutral risk."

Petitioner testified on the date of the accident he completed a job at the Respondent's golf dome and drove his vehicle back to the Respondent's yard to unload equipment. Petitioner opened the passenger door to retrieve a bucket filled with his tools when another of the Respondent's work vehicles started to pull in the yard. Petitioner began to rush. With the bucket in his left hand, he closed the right passenger door with his right hand and the door slammed into his right index finger.

The Arbitrator found that Petitioner was in a crowded terminal, a place he had a right to be, unloading his truck when the accident occurred. The Commission interpreted the Arbitrator's decision as finding the Petitioner's accident involved an "employment related risk" activity. The Commission noted the *McAllister* Supreme Court decision and concluded that under *McAllister* the Commission reached the same decision as the Arbitrator.

The Commission noted Petitioner was unloading his work van and parking his van in the employer's garage. He used his right hand to close the passenger door of one of Respondent's vans in response to a big truck with a trailer pulling in and approaching his van. The video surveillance confirmed Petitioner's testimony that he noticed the truck. The act of closing the door to move the van so that the truck could park is "within the reasonable contemplation of what the employee may do in the service of the employer." Respondent's Superintendent of Facilities and Planning agreed that the trucks park in that area every night, are required to park in that location due to space constraints, and that Petitioner would have to move his vehicle for the truck to park in its designated spot. Thus, Petitioner was injured while performing an act the Respondent might reasonably expect him to perform to fulfill his job duties.

***Tabb v. Chicago Transit Authority,* 14 WC 11506, 20 IWCC 0735**

Petitioner was employed as a bus driver for the Respondent. On the date of accident, Petitioner was driving northbound on her route. The Lincolnwood Mall was at the end of her route. When the bus arrived at the Mall, Petitioner allowed her passengers to exit the bus. Petitioner needed

to use the restroom, which was located in the Mall. Petitioner testified she was always punctual and on this day she was "kind of in a rush, because was already a little late- some minutes late." As Petitioner was exiting the bus and reached the last stair her foot went between the bus and the curb, a seven to eight-inch gap. Petitioner grabbed the railing on the bus door and her body turned as she fell. The history provided to Petitioner at Concentra indicted "I was getting off the bus and stepped on the curb and twisted my ankle."

The Arbitrator denied the claim and found that Petitioner's fall did not arise out of or in the course of her employment. The Commission reversed. The Commission found that Petitioner was a traveling employee. The Commission found that Petitioner's fall occurred in the "course of her employment" as her fall occurred at a place she might reasonably have been while performing her duties. The Commission also found petitioner's fall arose out of her employment. The Commission cited *Nee v. Illinois Workers' Compensation Commission* and noted that Petitioner "tripped on a curb while alighting from her assigned bus." The Commission referred to the "street risk" doctrine that when, as in this case, the claimant's job requires [her] to travel the streets, the risks of the street become one of the risks of[her] employment. [citations omitted]." *Nee* at, 26. As the Supreme Court of Illinois held in *C.A. Dunham Co. v. Industrial Commission*, 16 Ill. 2d 102, 111, 156 N.E.2d 560 (1959), "where the street becomes the milieu of the employee's work, [s]he is exposed to all street hazards to a greater degree than the general public."

***Brustin v. (Brustin & Lundblad, Ltd.),* 14 WC 2328, 19 IWCC 0220**

Petitioner was an attorney and president of the Respondent. Petitioner was 81 years of age and supervised the office, although he did not do day-to-day legal work, he tried a jury case earlier in the year. On the date of accident, Petitioner received a call from his office that a client and important referral source arrived early for an appointment. Petitioner therefore dressed and left his home in a high-rise apartment. He proceeded to walk to his bus stop to take the bus to his office for his client meeting.

As petitioner walked on a public sidewalk, he tripped and fell forward onto the sidewalk. Petitioner attributed the fall to an elevation issue with the sidewalk. Petitioner admitted he filed a civil suit against the City of Chicago and the case had been dismissed on summary judgment. The affidavit supporting the summary judgment motion indicated that the discrepancy in the sidewalk was approximately 1 1/8 to 1 7/18 inches.

The Arbitrator found that Petitioner's fall did not arise out of or in the course of Petitioner's employment. The Arbitrator found that Petitioner was not a traveling employee as he was on his way to his office where he performed all of his work duties. While the firm supplies a CTA bus pass to its employees, no evidence revealed that the Petitioner was paid for his travel time from his home to the office. *Public Service Company v. Industrial Commission,* 370 Ill. 334 (1938). The Arbitrator also denied Petitioner's claim that he was on a "special mission" because the client he was meeting was not only a current client but a major source of referrals and considered a unique client. The Arbitrator noted that the "special mission" has to be extraordinary in relation to routine duties. The Arbitrator found this not to be the case. The Commission affirmed and adopted the decision of the Arbitrator.

***Brueggemann v. Mueller Water Products, Inc.*, 17 WC 4842, 20 IWCC 0654**

Petitioner, 63 years of age, alleged a repetitive trauma injury. Petitioner's job required him to use a machine and assemble ¾ inch and 1-inch valves by hand. The job required him to use a machine to create the bodies and keys, and assemble all the parts, test them, put the finishing goods on the parts, and then box them. He would have to twist the valves together, drill a hole, and tap them with a hammer. Petitioner would also rotate the machine twice to make sure the valve was lubricated. He would make about 130 valves per day. Petitioner testified that the larger the valve, the more pressure that was required to open and close the valve because of the key size. The assembled valve weighed about 2.875 pounds. Between 2003 and 2011, he worked on heavier valves and would only work on a certain part of the process. The employees rotated the process daily during that period.

Ms. Horath testified on behalf of the respondent. She was the lead production supervisor. She stated that completing 130 valves per day would be a high average.

Petitioner presented to Dr. Peterson at HSHS Medical Group on November 1, 2016 for right wrist pain. The injury date was listed as October 26, 2016. Petitioner reported a 6-month history of right wrist pain. He recalled that his right wrist was hurting in December 2015, but he was going to be off work for two weeks and thought the wrist pain would resolve. The pain improved but worsened over the last six months. His wrist pain was located in the right and left dequervains' s area. He reported that his issues began on December 1, 2015. It was now constant and made worse by repetitive use. The examination revealed tingling, although negative for numbness, clumsiness, and weakness. The diagnosis was synovitis and tenosynovitis of the left and right hand, and ankylosis. The records indicated that **the medical causation was listed as related to work activities**. (emphasis added). Petitioner received work restrictions to avoid forceful gripping and repetitive flexion and extension of the wrists. He was to wear a wrist brace while working and sleeping. Therapy was recommended.

Respondent obtained a musculoskeletal investigation report from Dr. Richard Wyatt on January 25, 2017. The report indicated that the time Petitioner spent performing his tasks were varied, cycle times were expanded, forces were below the referenced levels and no extreme deviated postures were observed. There was no increased likelihood of developing bilateral carpal tunnel from the job. The nature, duration and frequency of his job would not qualify as repetitive or traumatic. The weight was less than 2 pounds and the cycle time was 4.32 minutes. Petitioner was provided breaks. Petitioner's job did not meet the level for NIOSH standards for repetition. There was no force/repetition, or posture present in the job. **The work processes as analyzed were well within the ergonomic levels and did not present risk factors at a level to result in a cumulative trauma or repetitive motion injury to the hands, wrists, or fingers.** (emphasis added).

Dr. Jeffrey Smith, a board-certified orthopedic surgeon with an added certification for hand problems, testified on April 11, 2019. He saw the Petitioner on January 17, 2017 for right wrist pain. Petitioner was a machinist and his wrist had been bothering him for a

year or two. He could not recall if the Petitioner described his specific duties. Dr. Smith noted that Petitioner's condition could be caused by a host of different things, including repetitive motion and an acute injury. He stated that over time as the ligament stretches and does not function with motion, the wrist moves in an out of its balanced situation. This causes an increased wear to the joint between the scaphoid and the radius and leads to premature wear to the point of painful arthritic condition. **He stated that repetitive motion, when the wrist is loaded of a flexion-extension nature, could contribute to the condition.** (emphasis added).

Dr. Wyatt, a board-certified in CPE ergonomics, testified on July 29, 2019. He performed an ergonomic assessment of a valve assembler or angle meter coordinator in January 2017. He observed the posture of the employee performing the job and asked about the workspace. He measured a lot of the forces with a force gauge. They also tried to get the actual production rates to determine the repetitiveness of the job. He had production data from November 2016. The production sheet revealed that an employee built about 14 valves per hour. He determined that this was not repetitive as the NIOSH standard for repetitive is a cycle time of less than 30 seconds and using the same motion.

In the instant case, a person was using a lot of different motions in a 4-minute cycle. This was a lot slower than a faster pace position. Dr. Wyatt stated that the valve bodies weighed one pound. He stated that the only forceful portion of the job was using wrenches; however, when measured, the force was not high because of the valve size. The wrench pull force was less than three pounds. There was no high force required to perform his job . He stated a high force would be 30 to 40 pounds with a bad posture. He stated that there were really good ergonomic futures in the work cells. The valves were located in a tipper which eliminated a lot of the awkward posture and bending over to obtain the parts. There was also no exposure to vibration. The completed box of parts weighed 36 pounds but this was only moved a few times per shift and was a horizontal move. Dr. Wyatt did not find any evidence that would lead to a hand or wrist disorder. **He stated that the job was not repetitive and there was no evidence this job would lead to a musculoskeletal disorder**. (emphasis added).

The Arbitrator found that Petitioner failed to prove by a preponderance of credible evidence that his right hand/wrist condition arose out of and in the course of his employment. Based on the records and opinions of Dr. Petersen, Dr. Smith, Dr. Wyatt and Dr. Brown, the Arbitrator found the only doctors that had any details and an accurate understanding of Petitioner's work activities were Dr. Wyatt and Dr. Brown. The Arbitrator found no credible evidence to support a finding that Dr. Petersen or Dr. Smith had a detailed and accurate understanding of Petitioner's work activities.

The Commission *reversed* the Arbitrator's decision and found that Petitioner sustained a compensable accident. The Commission noted that there was conflicting evidence as to the frequency of Petitioner's job duties. Petitioner testified that he assembled about 130 valves per day while Ms. Horath testified that the 130-figure was on the higher end. Dr. Wyatt based his opinion on an even lower production rate.

The Commission, however, was not persuaded by Dr. Wyatt's opinion. Dr. Wyatt was not aware of the production rates during the first ten years of Petitioner's employment. Further, Dr. Wyatt was unaware of the fact that the valves would not always fit together properly, which could change the force required to work on the ill-fitting valves.

The Commission found that the evidence supported that Petitioner's job duties required him to use his hands consistently on a daily basis and that his duties were forceful in nature. The Commission found Petitioner's job duties were repeated sufficiently enough to cause his injury.

The Commission found the evidence supported a finding that Petitioner's pre-existing condition was aggravated by his job duties. Petitioner testified that his condition improved while he was off work for eleven days and then progressively worsened upon his return to work. Respondent's company physician indicated that the work activities were a cause in his condition. Dr. Smith, who performed the surgery, also testified that the work activities were a cause in his condition. Dr. Smith explained that repetitive motion, when the wrist is loaded in a flexion-extension nature, can contribute to Petitioner's condition. The Commission found the opinion of Dr. Smith more persuasive than Dr. Brown's opinion. Dr. Brown performed a record review only and his opinion was premised, in part, upon the accuracy of the musculoskeletal investigation report prepared by Dr. Wyatt. As stated above, the Commission found Dr. Wyatt's opinions were based upon an incomplete understanding of Petitioner's work history. Based upon the evidence as a whole, the Commission found that Petitioner established accident and causal connection.

***Martin v. Holland Trucking,* 17 WC 18743, 20 IWCC 0696**

Petitioner worked as a long-haul truck driver for the Respondent and claimed that his over the road truck driving duties caused injury to his low back conditions. Petitioner, a 46-year-old truck driver, testified that he worked for the respondent as a city and road truck driver for 21 years. He usually worked 10-12 hours per shift, driving for around 8 hours, and then loading trailers on the docks for 2-3 hours. His duties included pulling up dock plates that weighed 50-75 lbs., and sometimes restacking 25-50 lb. freight pieces which had fallen over. Prior to 2017, Petitioner would sometimes drive older tractors. Although the newer tractors, which he had driven more recently, were equipped with air ride seats to provide more cushioning, not all of the cushions worked as well as the others and some would still "bottom out" on rough roads. Petitioner testified that 2-4 times per month, the trucks he operated would bottom out. When that happened, his back would hurt, his legs would go numb and his feet would tingle. While driving, the truck's vibrations would also cause those symptoms.

The Arbitrator found Petitioner failed to prove he sustained a repetitive accident, and failed to prove any causal connection of his current condition to his work activities. Although the Arbitrator found Petitioner truthful in most respects, he found that Petitioner's testimony regarding the problems with the trucks' air ride seats and air suspensions was not corroborated by written documentation, specifically, that Petitioner's daily Driver Vehicle Inspection Reports ("DVIR's") did not mention problems with the seats or air suspensions. The Arbitrator also found that the causation opinion of Respondent's Section 12 expert, Dr. Van Fleet, was more persuasive than the treating opinions of Dr. McAskill and Dr. Sasso. The Arbitrator noted that Dr. Van Fleet had more personal knowledge of the physical requirements of driving a truck

because of his own prior truck driving experience. The Arbitrator found Dr. Sasso's opinions were, "quite limited," because he did not obtain a history from Petitioner of the specific work duties he performed and was unaware of Petitioner's claims regarding inadequate air cushioning or air suspensions.

The Commission *reversed* the decision of the Arbitrator. The Commission found the causation opinions of Petitioner's treating physicians, Drs. McAskill and Sasso, to be credible. Dr. McAskill had knowledge of Petitioner's job duties and testified that Petitioner's duties contributed to and aggravated his current spine condition. Contrary to the Arbitrator's finding, Dr. McAskill did not testify that he would defer his causal connection opinion to a spine surgeon; only that he would consider doing so. Also, the Commission found that Dr. Sasso obtained a history from Petitioner. Dr. Sasso also had experience treating long-haul delivery drivers who developed low back conditions. Dr. Sasso testified that Petitioner's repetitive work as a long-haul driver exacerbated his symptoms and contributed to his need for low back surgery. He found Petitioner's complaints were consistent with L4-5 stenosis, and that while his job duties did not cause his degenerative conditions, they exacerbated them.

The Commission noted that under Illinois law, an injury need not be the sole factor, or even the primary factor of an injury, as long as it is "a" causative factor. *Sisbro Inc. v. Industrial Commission*, 207 1,11.2d 193, 205 (2003). Dr. Sasso testified that the treatment Petitioner received was reasonable and related to his condition, and that surgery would improve his function and reduce his pain. Dr. Van Fleet only examined Petitioner once, on September 6, 2017. Then, he noted Petitioner's difficulty walking and standing up straight. Dr. Van Fleet did not believe Petitioner exaggerated his symptoms, although he found Petitioner to be credible. Dr. Van Fleet agreed Petitioner would likely need surgery to decompress at L4-5 and likely L5-S-1. He did not believe that the need for surgery was related to Petitioner's job duties. However, Dr. Van Fleet admitted that Petitioner's duties could have exacerbated his preexisting degenerative disc disease, and that repetitive trauma can aggravate spinal stenosis. Dr. Van Fleet acknowledged that he did not know what type of seats Petitioner sat on while driving during the 20 years prior to his accident. He did not know how often Petitioner drove trucks with bad suspension systems or how much bouncing Petitioner experienced while driving his trucks. Dr. Van Fleet admitted he was not a truck expert. The Commission did not find his prior experience driving trucks, which were not semi-trailers that Petitioner operated on a daily basis, made his causation opinion more credible than Dr. McAskill' s or Dr. Sasso's. The Commission adopted the causation opinions of Dr. McAskill and Dr. Sasso

III. MEDICAL CAUSATION

Walquist Farm Partnership v. IWCC, (January 11, 2021)

This is a Rule 23 Illinois Appellate Court decision. However, since it was issued after January 1, 2021 the decision may be cited for its persuasiveness, but not as precedent.

Petitioner was a farm hand for the Respondent. On March 5, 2014, he and another person were unloading a 55-gallon drum of iodine that weighed over 400lbs. While unloading the drum from a truck, the drum "jerked" as it slid off the truck. Petitioner claimed he "jerked (my) back out of

whack." Petitioner admitted at arbitration that he underwent back surgery in 2004 and experienced "on and off" back pain. On cross-examination, Petitioner admitted he sustained several work injuries on the farm and because he was worried about his job he did not report the injury until the next day. Petitioner also admitted that in the year or two before his injury he would take Aleve for back pain. However, he never missed more than three days of work as a result of the back pain

At the initial medical visit, the physician ordered an MRI of Petitioner's back. The physician did not mention any accidental injury. At Petitioner's request, the doctor corrected the "error" and issued a supplemental report stating that Petitioner did mention the work accident. Petitioner later sought consultation with a neurosurgeon, who, after injections failed, performed back surgery on Petitioner.

The Appellate court reviewed the medical records and found the following:

- Prior medical records of July 25, 2012 indicated that Petitioner had chronic back pain, but this was the last note of any back issues prior to the injury despite Petitioner having medical visits for other reasons.
- The first note post-injury was dated March 7, 2014 and stated in part, "he states that for about 3 months, his feet have been numb. It started in his right foot with his right 3 toes and now it has progressed to both feet. He is having trouble walking. He said that his feet is [sic] getting worse. He said he is having a little bit of back pain. He did have back surgery in 2004 . . . ."
- An MRI of the lumbar spine dated March 18, 2014 showed L3-4 level microdiscectomy on the left with grade 1 spondylolisthesis at L4 on L5 and L5 on S1 with severe bilateral foraminal narrowing at L5-S1 level. There is moderate bilateral narrowing at the L4-5 level.

On April 16, 2014, Petitioner presented for an initial consultation with Dr. Fonn at Midwest Neurosurgeons, LLC. Petitioner completed a patient medical history form, which indicated that his back problems began on March 5, 2014, when he "helped lift" a 55-gallon drum of iodine at work.

Dr. Fonn offered his opinion that, within a reasonable degree of medical certainty, the March 5, 2014 accident was a cause of claimant's pathology and symptoms that required corrective surgery and postoperative care at L5-S1. (Authors Note – from the decision it does not appear a Section 12 examination occurred).

Despite finding that Petitioner sustained a work accident on March 5, 2014, the Arbitrator determined that he failed to prove that his condition of ill-being in his low back, or his need for surgery, were causally related to the work accident. In support, the Arbitrator reasoned that Petitioner's preexisting back problems and three-month history of foot numbness prior to the accident precluded a chain of events analysis to prove a causal connection. While acknowledging that Petitioner presented the opinion and testimony of Dr. Fonn to show causal connection, the Arbitrator noted that Dr. Fonn "readily admitted" his opinion might change if Petitioner provided an inaccurate or incomplete history and "acknowledged he had never seen or reviewed the Rural Health Clinic records."

The original decision of the Commission affirmed and adopted the decision of the Arbitrator. The Commission found that Petitioner's preexisting back problems and three-month history of foot numbness prior to the accident ***precluded a chain of events analysis*** to prove a causal connection.

The Appellate Court disagreed. In *Price v. Industrial Comm'n*, 278 Ill. App. 3d 848, 853-54, 663 N.E.2d 1057, 215 Ill. Dec. 543 (1996), the Appellate Court considered the applicability of this principle to a case involving a preexisting condition and reasoned as follows:

"The employer also contends that the facts of the present case do not support the Commission's 'chain of events' analysis because [the claimant] had a preexisting condition. The employer cites no authority for the proposition that a 'chain of events' analysis cannot be used to demonstrate the aggravation of a preexisting injury, nor do we see any logical reason why it should not. The rationale justifying the use of the 'chain of events' analysis to demonstrate the existence of an injury would also support its use to demonstrate an aggravation of a preexisting injury."

***Castro v. Pepper Construction,* 19 WC 7757, 20 IWCC 0719**

On February 7, 2019, Petitioner was working as a carpenter putting up drywall ceilings at UIC. Petitioner stepped off a lift, or an elevator with two steps. While placing his right foot on the floor, his left foot slipped causing his right knee to hit the step of the lift. He also twisted his right knee at the time of the accident.

The initial Physician Immediate Care medical records state that Petitioner reported “his right knee was caught between a forklift, he tried to get out and twisted his knee.” The Petitioner testified through an interpreter at the arbitration hearing. He apparently did not speak English. Petitioner claimed there was no interpreter at Physicians’ Immediate Care. An MRI, taken on March 8, 2019, showed medial meniscus tear, tricompartmental degenerative joint disease, most prominently in the patellofemoral joint space, mild strain of the popliteus myotendinous junction without discrete tear, and a large joint effusion.

The history Petitioner provided to a chiropractor on March 12, 2019 indicated that he was "walking backwards down the steps of an elevated lift, he slipped on the last step and struck his right knee causing him to fall forward while striking the ground." On March 14, 2019, Petitioner presented to Dr. Koutsky and relayed the same history that he gave to the chiropractor. Dr. Koutsky recommended arthroscopic surgery to repair the meniscal tear.

Respondent sent Petitioner for a Section 12 examination with Dr. Nho. Dr. Nho indicated a history that “petitioner reported that on February 7, 2019 he was at work coming down from a lift slipping and landing on the ledge with his right knee."

Dr. Nho diagnosed a right knee strain. He noted that Petitioner’s symptoms were consistent with his underlying condition of degenerative joint disease, and not related to the work accident. He noted that the MRI did not show evidence of bone edema, bone bruise, stress reaction, or insufficiency fracture that would suggest worsening of the pre-existing condition. While treatment to date was not unreasonable or excessive, he needed only occasional anti-

inflammatories, he had no permanent disability or impairment from the work injury and required no work restrictions.

The Arbitrator found that Petitioner's condition of ill-being was not causally related to an accidental injury. He relied on Petitioner's inconsistent histories to providers and to Dr. Nho. The Arbitrator also relied on Dr. Nho' s conclusion that the MRI did not show any traumatic condition or any evidence that the work injury aggravated the underlying arthritic condition.

On review, Petitioner argued that the Arbitrator erred in finding that the accident did not cause his current condition of ill-being. He acknowledged his histories were not entirely consistent, but emphasized that those inconsistencies were minor, all the elements of banging and twisting the knee were always included, and that some of the inconsistencies could be attributed to language issues. In addition, Petitioner argued that the Arbitrator should have relied on the opinions of Dr. Koutsky over those of Dr. Nho.

The Commission reversed the decision of the Arbitrator. The Commission agreed with Petitioner that the inconsistencies in his histories were relatively minor, and that he consistently reported that his knee was both struck and twisted. In addition, the MRI showed a meniscus tear and there was no evidence that Petitioner had any such condition before the accident. He apparently worked with his degenerative condition without difficulty until the instant accident, and the instant accident at least caused the condition to become sufficiently symptomatic to interfere with his ability to work. Finally, the Commission did not find Dr. Nho's opinions particularly persuasive. Dr. Nho opined that the MRI did not show any significant traumatic injury, but the MRI showed large joint effusion a month after the accident, confirming a relatively substantial traumatic injury. Also, Dr. Nho's report appeared somewhat inconsistent. He opined that Petitioner sustained only a strain of the knee in the accident but nevertheless he also opined that the treatment provided, including about 45 chiropractic/physical therapy sessions at the time, was reasonable for Petitioner's work injury.

IV. INTOXICATION

***Pozzie v. Exterior Clean G Services,* 15 WC 27146, 20 IWCC 0739**

Respondent power washes trucks and houses. Petitioner was employed as a washer and brusher for the Respondent for four-months power washing trucks. Conflicting testimony was presented at hearing. The testimony involved whether or not Petitioner was properly trained on fueling/refueling the pumps that operated the power washers. On August 5, 2015, one of the pumps ran out of fuel and Petitioner proceeded to fill the gas tank for the pump. When the gas tank was filled over halfway, Petitioner experienced a burst of flames in his face and he was covered in flames. Petitioner suffered burns on his face, eyes, arms, hands, and legs.

Petitioner was transported by ambulance to Alexian Brothers Medical Center. During the transport, the paramedics administered morphine and noted in their record that there was no apparent alcohol or drug use observable. On arrival at Alexian Brothers Medical Center, Petitioner was administered more pain medications and fluids. Once stabilized, he was

transported by Superior Ambulance to the Loyola University Medical Center, where he was admitted as an inpatient from August 5 to August 14, 2015.

On admission to Loyola University Medical Center ("LUMC"), a drug screen was performed and Petitioner tested positive for marijuana. The records of LUMC reflected a history from Petitioner of daily marijuana use. Petitioner, while admitting at trial that he used marijuana on a recreational basis, denied that he gave that history and denied he used marijuana daily. Given the strong narcotic pain medications administered to Petitioner prior to his arrival at and during his admission to LUMC and Petitioner's inability to remember much of the first inpatient days, the Arbitrator found little credibility to the history of daily marijuana use. The Arbitrator also noted at no time during his LUMC hospitalization was Petitioner ever told of the drug screen results or counseled on marijuana use.

Respondent presented evidence of a Facebook postings in or about 2012, three years prior to the accident in this case, in which Petitioner referenced sticking to the "whacky," which Petitioner denied was a reference to marijuana. The Arbitrator found the reference to "whacky" was more likely than not a reference to marijuana, but only supported Petitioner's testimony he was a recreational user. The evidence failed to address whether Petitioner was intoxicated at the time of his accident. Petitioner denied use of marijuana on the date of the accident and, at no time on that date did Petitioner's co-worker suggest to him he was impaired or not acting like himself.

The Respondent submitted an independent medical examination report of Dr. Shirley Conibear. The report was limited to the marijuana defense. Dr. Conibear testified the drug screen performed at LUMC was an immunoassay, which is a qualitative test to detect the presence of certain drugs. The doctor based her opinions on a history of Petitioner being a daily user of marijuana from the LUMC medical records. It was therefore her conclusion, based on daily marijuana use or use on the date of accident, that it affected Petitioner through increased impulsivity or impaired decision-making. She reached this decision based on her understanding a person would not pour gas into a running machine. The Arbitrator found, however, this conclusion is flawed since Petitioner did not pour gas into a running machine. Rather, he poured gas into a machine that was stopped. The doctor acknowledged that the test does not measure the level of cannaboids, but she was able to reach her opinion based on the admission of daily use. The doctor noted that even after one stops smoking marijuana, there are measurable levels of THC in the body for weeks to months.

The Arbitrator found Respondent had not met the threshold standard under Section 11 to create a rebuttable presumption of intoxication. The Act provides two bases for the intoxication defense. The first is found in Section 11(i). This section requires Respondent to demonstrate that "the employee's intoxication is the proximate cause of the employee's accidental injury." In this respect, the respondent failed to demonstrate that any other employee performed differently than Petitioner in filling empty fuel tanks on the pumps.

The Arbitrator also found that the Respondent failed to produce evidence of *contemporary* use of marijuana. While Petitioner acknowledged recreational use of marijuana, which he described as once or twice a month, he denied using it on the date of the accident. As Dr. Conibear noted, once in the system, THC may remain detectable for weeks or months. Based on this, there is

nothing to confirm any contemporaneous or even recent use of marijuana by Petitioner. It is not disputed that he tested positive for THC at LUMC. However, this test did not quantify the presence of THC. It is possible it was just that, a trace level. For the Respondent to demonstrate impairment, it has a duty to show that Petitioner was actually impaired. The trace reading could just as easily reflect use of marijuana weeks or months prior to the date of accident.

On review the Commission affirmed the Arbitrator's decision. However, its analysis was different than the analysis of the Arbitrator. The Commission noted that the Arbitrator wrote, "Respondent has not met the threshold standard under Section 11 to create a rebuttable presumption of intoxication." We disagree. Section 11 (ii) of the Act, in relevant part, states, "if there is ***any evidence*** of impairment due to the unlawful or unauthorized use of ... cannabis ... then there shall be a rebuttable presumption. that the employee was intoxicated and that the intoxication was the proximate cause of the employee's injury." (Emphasis added). Therefore, Dr. Conibear's testimony qualifies as evidence of impairment such that the rebuttable presumption applies. Accordingly, it was no longer Respondent's burden to demonstrate that Petitioner's intoxication was the proximate cause of his accidental injury. The Act is very clear that 1) "any" evidence of impairment due to the unlawful or unauthorized use of cannabis triggers the rebuttable presumption that "the intoxication was the proximate cause of the employee's injury; and 2) that this presumption may be rebutted "by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries."

The Commission noted the rebuttable presumption in Section 11 of the Act is different than the one that exists in Section 6(f). Section 6(f) provides that certain impairments or conditions sustained by firefighters, emergency medical technicians and paramedics are "rebuttably presumed" to arise out of and in the course of employment. The appellate court in *Johnston v. IWCC* noted, unlike other statutes, "Section 6(f) is silent as to the amount of evidence required to rebut the presumption therein" and concluded that "the legislature intended an ordinary rebuttable presumption to apply, simply requiring the employer to offer some evidence sufficient to support a finding that something other than claimant's occupation as a firefighter caused his condition."

The Commission found, however, Section 11 relating to intoxication is not silent about "the amount of evidence required to rebut the presumption." It specifically states that "the employee may overcome the rebuttable presumption by the preponderance of the admissible evidence that the intoxication was not the sole proximate cause or proximate cause of the accidental injuries." The Commission noted the question, in the case at bar, is whether Petitioner has overcome that presumption. The Commission found that he did.

V. MEDICAL PAYMENT/AUTHORIZATION

Reed v. Summerville School District No. 79, **19 WC 14334, 20 IWCC 0688**

Choice of Physician

Petitioner sustained an undisputed accident on December 1, 2017 while working as a teacher's aide for the Respondent. Petitioner initially sought treatment with a Dr. Harrison. Petitioner had several treatment visits with Dr. Harrison who eventually ordered an MRI of the knee. The radiologist noted certain defects in the knee may have been trauma related or degenerative changes.

Petitioner sought treatment with a Dr. McIntosh. Dr. McIntosh previously provided Petitioner with medical treatment for the knee prior to the work-related accident. In prior treatment notes, Dr. McIntosh had recommended surgery to the right knee, although Petitioner elected not to undergo the surgery at that time because she was living with the condition. Prior treatment ended in October of 2012. Petitioner returned for treatment in July of 2018. Petitioner had several visits with Dr. McIntosh, including treatment of aspiration of the knee and injections. Dr. McIntosh opined "I think the fall has certainly exacerbated that arthritis, and it has been several years since she has had problems with the knee, and she was in a quiescent state of health."

On April 24, 2019, Petitioner consulted with a Dr. Bradley. After a couple of visits, Dr. Bradley recommended surgery. Dr. Bradley recommended a partial meniscectomy and chondroplasty. Dr. Bradley testified the injury Petitioner sustained at work "aggravated, if not completely caused, her current pain and etiology."

Respondent sent Petitioner for a Section 12 examination with Dr. Petkovich. Dr. Petkovich opined that the right knee contusion was causally related to her work accident on December l, 2017. Dr. Petkovich testified and believed the osteoarthritis was pre-existing and he did not believe the degenerative arthritic changes in Petitioner's knee present prior to the incident on December 1, 2017, were in any way aggravated as a result of the incident.

The Arbitrator relied on the credible opinions of Dr. Bradley, Dr. Mcintosh, and Dr. Harrison in finding a causal connection between Petitioner's right knee condition and the December 1, 2017 work accident. The Arbitrator was not persuaded by Dr. Petkovich's opinion that Petitioner simply sustained a contusion that resolved within six weeks, when Petitioner had not yet returned to her pre-injury state of wellbeing nearly two years after her work-related injury. The Arbitrator also awarded prospective medical care regarding the surgery recommended by Dr. Bradly.

The Commission modified the Arbitrator's decision finding that Petitioner exceeded her two choice of physicians when she chose to treat with Dr. Harrison, Dr. McIntosh and Dr. Bradley. Although the Commission observed that the Arbitrator did not address the issue and the issue was not noted by the Arbitrator in the decision as being in dispute. The Commission disagreed with Respondents' argument that it could not award a surgery recommended by a third choice of physician. The Act only specifically absolves employers from paying for medical services actually provided by a third or subsequent doctor outside the chain of referrals. Here, Dr. Bradley

testified by deposition. At that time he effectively became Petitioner's §12 medical examiner. While the Act precludes the Commission from awarding Dr. Bradley's medical bills, ***it does not preclude the Commission from considering his opinions concerning the efficacy of prospective treatment***." (emphasis added). The Commission noted that it agreed with the Arbitrator's determination that the prospective treatment recommended by Dr. Bradley was indicated and necessary. The Commission further recommend that Petitioner return to Dr. Harrison or Dr. McIntosh to obtain a referral to another orthopedic surgeon or back to Dr. Bradley.

VI. TEMPORARY TOTAL DISABILITY BENEFITS

***Daitchman v. Continental Express Lines, LLC.*, 19 WC 10513, 20 IWCC 0699**

Petitioner slipped and fell in the employee designated parking lot area and injured his right shoulder. The parking lot was controlled by the employer. Petitioner fractured his humerus and underwent open reduction and internal fixation for the repair of his fractures. The main issue in dispute appeared to be whether or not the petitioner's fall arose out of his employment. However in the Arbitrator's award of medical benefits and TTD benefits, the Arbitrator stated that "Respondent is ordered to authorize and pay for the medical expenses related to the right upper extremity and future medical treatment…the Arbitrator orders respondent to pay petitioner a total of $9,481.67 (11 weeks x $861.97) in back temporary total disability benefits. The Arbitrator orders respondent to issue petitioner's temporary total disability benefits until petitioner's condition stabilizes."

On review, the Commission affirmed in part and modified the Arbitrator's decision . The Commission found that the Arbitrator did not have jurisdiction to award TTD benefits extending beyond the date of hearing. Therefore, the Commission struck the language of the Arbitrator's decision on the Arbitrator Decision form and in the Findings of Fact and Conclusions of Law awarding TTD until Petitioner's condition stabilizes. The Commission also struck the language of the Arbitrator's decision ordering Respondent to authorize "future medical treatment."

VII. PERMANENCY BENEFITS

***Spina v. State of Illinois, Department of Transportation*, 16 WC 38621, 20 IWCC 0646**

On review filed by Petitioner, the Commission re-weighed the factors of Section 8.1.(b). The Commission stated that the Arbitrator "misapplied the factors" and did not perform the correct analysis in determining the nature and extent of Petitioner's injuries. For example, although neither party submitted an impairment rating, the Arbitrator stated:

"Regarding subsection (i) of Section 8.1.(b), this Arbitrator notes that no permanent partial disability impairment report and/or opinion was submitted into evidence. However, I have considered Dr. Krcik's comments on April27, 2018, that petitioner, on occasion, will feel a bit of discomfort on the anterior aspect of his knee, as a factor in the evaluation of Petitioner's permanent partial disability. I give this factor some weight in determining the level of disability."

The Commission, using the proper analysis, increased the permanent partial disability of Petitioner from 20% loss of use of the leg awarded by the Arbitrator to 25% loss of use of the leg.

***McCanna v. Pace Heritage,* 14 WC 22581, 20 IWCC 0644**

Petitioner was a maintenance mechanic for the Respondent. On the date of injury, a bus spring blew and struck Petitioner. Petitioner complained of bleeding from his nose and head and right shoulder pain following the accident. Petitioner underwent a right shoulder partial rotator cuff tear repair, subacromial impingement release and repair of a labral tear. Petitioner also had been diagnosed with a concussion.

The Arbitrator found all of Petitioner's conditions causally related to the accident. The Arbitrator also noted that subsequent to the accident Petitioner suffered from depression that was worse than before the injury. Petitioner also suffered from anxiety.

In assessing permanency, the Arbitrator noted ***no impairment report was submitted into evidence*** and as such, ***no weight*** was accorded to this factor. As to the second consideration under 8.1b(b)(ii) [occupation of the employee], the Arbitrator gave ***some weight*** to the factor as Petitioner testified he sometimes had to lift alternators weighing over 50-75lbs. The Respondent testified Petitioner only had to do overhead work for an hour out of the whole day. With regard to 8.1b(b)(iii) [the age of petitioner at time of injury], the Arbitrator noted petitioner was 58 years of age, that he had to complete a physical examination by a company doctor before he could return to work, and that he had held jobs in the mechanical field for over twenty years. The Arbitrator gave ***greater weight*** to this factor. With regard to 8.1b(b)(iv) [employee's future earning capacity], the Arbitrator found that Petitioner was unfit to return to his employment and was forced to retire. Petitioner retied due to loss of hearing, which was an issue he had long before this accidental injury The Arbitrator gave this factor ***greater*** weight. With regard to 8.1b(b) (v) [evidence of disability corroborated by the treating medical records], the Arbitrator noted that Petitioner complained of shoulder pain, which was corroborated by the medical records and one of the treating physician notes indicated the pain disrupted the client's sleep. Noting the findings of the Section 12 examiner, the Arbitrator gave this factor ***greater*** weight.

The Arbitrator performed the same analysis for Petitioner's head trauma. Again no impairment rating submitted so no weight was accorded to the first factor. As to 8.1b(b) (ii), the Arbitrator noted Petitioner worked as a mechanic and had a talent for repairing things, including his cars and motorcycles and able to fix things around the house. Since his injury, he no longer did these tasks due to depression, anxiety, frustration, and difficulty concentrating. The Arbitrator assigned this factor ***greater*** weight. As to 8.1.b(b)(iii), the Arbitrator noted Petitioner was 58 years of age and was retired. The Arbitrator noted petitioner was no longer able to use his mechanical skills in his personal life and assigned ***some*** weight to this factor. As to 8.1b(b)(iv), the Arbitrator restated the same issues as to the shoulder and assigned ***greater*** weight to this factor. As to 8.1b(b)(v), Petitioner's spouse testified that when Petitioner attempts to fix things he makes matters worse. Both Petitioner and Petitioner's spouse testified that Petitioner avoids social situations and does not participate in social groups. The Arbitrator noted Dr. Neal, Section 12 examiner, is an orthopedic surgeon and not qualified to opine on petitioner's mental,

emotional, or psychological state. The Arbitrator found the testimony of Petitioner and his spouse were corroborated by the medical records and gave this factor ***greater*** weight.

The Arbitrator awarded 30% loss of use man as a whole for all of the injuries. On review, the Commission modified the Arbitrator's decision and lowered the award, finding that Petitioner sustained permanent partial disability to the extent of 20% loss of use man as a whole for the shoulder injury and 5% loss of use man as a whole for the head injury. The Commission noted that Petitioner retired for unrelated reasons to his injury and therefore, the Commission found this factor weighed in favor of ***decreased permanency***. The Commission also found no testimony elicited regarding Petitioner's future earning capacity so ***no weight*** was assigned this factor (8.1b(b)(iv).

Vinci v. Southwest Airlines, 16 WC 20438, 20 IWCC 6053

This matter proceeded to hearing on the sole issue of nature and extent of Petitioner's injuries. Petitioner was a 40-year-old ramp agent for Southwest Airlines. Petitioner testified that his job duties as a Ramp Agent involved heavy physical labor and consisted of frequently lifting, pushing, pulling with both upper extremities, frequent overheard reaching and lifting, and occasionally operating machinery such as forklifts. Petitioner testified that the bags he lifted weighed up to 100lbs and that on average he would have to lift up to 225 bags per plane, up to 150 bags per tote, and up to 6 planes per day.

Petitioner sustained two neck injuries. On October 15, 2015, petitioner was parked while driving a forklift when another forklift driver ran into his forklift. As a result, Petitioner felt pain in his neck. On June 21, 2016, while at work, Petitioner was lifting freight from on top of a cart when he felt a strain in the neck and pain radiating down both arms. Dr. Rinella performed surgery which consisted of anterior cervical discectomy, C3-5, anterior cervical fusion, C3-5, anterior spinal instrumentation C3/4 and C4/5, anterior interbody cage, C3-5, spinal allograft, surgical microscope, and fluoroscopy.

Dr. Rinella released him to full duty. Petitioner testified that when he returned to work full duty on May 31, 2018, he was working as a Ramp Agent. Respondent referred Petitioner for an AMA rating with Dr. Bryan Neal. Dr. Neal's report contained a 6% whole person impairment rating.

In assessing the factors under 8.1b(b) the Arbitrator made the following findings:

8.1b(b)(i):"Because of petitioner's credible testimony demonstrating that he did in fact have residual pain and limitations, Dr. Neal's impairment rating is credible, reliable, substantiated, and of a substantive impact on the arbitrator's finding as to disability. Accordingly, the arbitrator gives ***greater*** weight (to this factor)."

8.1b(b)(ii):"Petitioner still works for respondent in the same position. The arbitrator gives significant weight to the foregoing factor, and, noting that his job is a heavy level job, concludes that petitioner's permanent partial disability will be greater than an individual who performs lighter duty work."

8.1b(b)(iii):The Arbitrator considers Petitioner to be a somewhat younger individual and concludes that Petitioner's permanent partial disability will be moderately greater than that of an older individual because Petitioner will have to live with the consequences of the injuries for a longer period of time, when symptoms may increase or arthritis may set in due to age, as opposed to an older individual, who would have to work less years with the consequences of these injuries. The Arbitrator places ***greater*** weight on this factor.

8.1b(b)(iv):Petitioner testified that he would be able to work as long as he thought he would have been able to prior to the accidents. Thus, it is reasonable to infer that he may not be able to work as much overtime in the future due to the pain or be able to work for as many years into the future, thereby diminishing his future earning capacity. Because of his credible testimony, the Arbitrator therefore gives ***greater*** weight to this factor.

8.1b(b)(v): Petitioner's testimony was clear and unequivocal and corroborated by the medical records entered as exhibits. Respondent did not present any convincing evidence or witnesses to the contrary. The AMA rating of Dr. Neal agreed with all other medical records that evidenced petitioner's residual pain and limitations. Petitioner's complaints, supported by the medical records, evidences a disability as indicated by Commission decisions regarded as precedents pursuant to Section 19(e) of the Act. The arbitrator places ***great*** weight on the foregoing factor when making the permanency determination.

Based upon all of the above the Arbitrator entered an award of 40% loss of use man as a whole. On review the Commission modified the decision of the Arbitrator and reduced the award to 35% loss of use man as a whole. The Commission disagreed with the Arbitrator on the future earning capacity factor since Petitioner testified he did not think he could work this job much longer but the Commission found this was not corroborated by the medical records. Also, the Commission found the Arbitrator's finding of Petitioner's inability to work overtime as speculative as no testimony supported this finding. The Commission gave this factor ***little*** weight.

The Commission further explained when a PPD award begins to accrue. The Arbitrator stated that "Respondent shall pay Petitioner compensation that has accrued from the **date of accident** through **2/20/2020**, and shall pay the remainder of the award, if any, in weekly payments." (Emphasis in original.) After citing prior Commission decisions and the Appellate Court decision of *Bell v. IWCC*, 392 Ill. Dec. 396 (4th D. 2015), the Commission stated:

"In other words, we find that Bell stands for the proposition that PPD benefits begin to accrue on the date of MMI. If the date of MMI was irrelevant and PPD began to accrue on the date of accident, as Petitioner argues, the court in Bell would have simply found that Ms. Nash's estate was entitled to PPD from the date of accident through the date of her death. Although there may be some ambiguity in the Order sections of certain Commission decisions, as cited by Petitioner, those decisions did not specifically address the issue of when PPD begins to accrue. We agree with the Commission decisions that did address the issue and, other than statutory loss cases, found that PPD begins to accrue at MMI. This is most consistent with the Appellate Court's decision in Bell. . . Since this is not a statutory loss case, Petitioner is not entitled to simultaneous

temporary-total-disability benefits and permanent-partial-disability benefits. Therefore, we find that the PPD award began to accrue when Petitioner reached MMI on July 5, 2018."

Isley v. State of Illinois Department of Police, 10 WC 7041, 20 IWCC 0712

This matter proceeded to hearing on the sole issue of nature and extent of Petitioner's disability. Petitioner filed three Applications for Adjustment of Claim, each alleging an injury to her lumbar spine: 10 WC 31984 for a repetitive trauma injury manifesting on October 5, 2007; 10 WC 7041 for an acute trauma accident which occurred on July 9, 2009; and 14 WC 4027 for an acute trauma accident which occurred on January 14, 2014. The matters were consolidated for hearing and the Arbitrator thereafter issued three separate decisions apportioning Petitioner's permanent disability between her three claims. In one claim the Arbitrator awarded 22.5% loss of use person as a whole for her two-level lumbar surgical procedure, which included a total disk replacement at L4-5 and a vertebral fusion procedure at L5-Sl. The Arbitrator also awarded17% loss of use person as a whole for two lumbar spine discectomies and 2% person as a whole using the 8.1b(b) factors for the last case.

The Commission noted that "apportioning permanent disability among claims is permissible in only limited circumstances (w)here a claimant has sustained 'separate and distinct injuries to the same body part and the claims are consolidated for hearing and decision, unless there is some evidence presented at the consolidated hearing that would permit the Commission to delineate and apportion the nature and extent of permanency attributable to each accident, it is proper for the Commission to consider all the evidence presented to determine the nature and extent of the claimant's permanent disability as of the date of the hearing. **See** *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, (1st D. 2011). *City of Chicago v. Illinois Workers' Compensation Commission*, 409 Ill. App. 3d 258, (1st D. 2011).' We do not find this to be such an instance."

The Commission modified the award to equal 35% loss of use person as a whole for the 2009 accident and nothing awarded on the other two claims.

Jordan v. City of Peoria, 19 WC 11557, 20 IWCC 0708

The parties proceeded to hearing on the issue of nature and extent of Petitioner's injuries. Petitioner worked as a patrol officer for the City of Peoria. On March 18, 2019, Petitioner was speaking with a parent about her son running away. The boy, approximately 12 years old, was present for this conversation. During this conversation, the boy kicked the Petitioner in his left knee, causing the left knee to buckle. Petitioner then wrestled the boy to the ground and placed handcuffs on him. Petitioner immediately noticed pain in the left knee, mostly in the lateral lower left portion of the left knee, near his patella. Petitioner eventually saw Dr. Adam Yanke at Midwest Orthopaedics for a Section 12 examination From the decision, it is unclear whether the Respondent or Petitioner requested the examination. Dr. Yanke diagnosed Petitioner with an anterolateral knee contusion related to the incident of March 18, 2019, with a secondary diagnosis of aggravation of patellofemoral arthritis. Petitioner was released to full duty by one of his treating physicians. The Arbitrator made the following findings:

8.1b(b)(i):No AMA impairment report or opinion was submitted into evidence. The Arbitrator therefore gives ***no weight*** to this factor.

8.1b(b)(ii): Police work is a physically demanding and dangerous occupation. Petitioner testified that he must be prepared for physical confrontations, making arrests, detaining people, and placing himself in dangerous situations and places while performing his duties on street patrol. The City of Peoria Police Officer Job Description, RX. 1, also noted the job requirements of frequent standing and walking, detaining suspects, and dealing with a variety of other situations that require an officer. The Arbitrator therefore gave ***significant*** weight to this factor.

8.1b(b)(iii):Petitioner was 54 years of age at the time of the accident. The Arbitrator found petitioner still had a number of years to work as a police officer and placed ***considerable*** weight to this factor.

8.1b(b)(iv): Petitioner did not lose any earnings and presented no evidence that the injury affected his future earning capacity so the Arbitrator gave ***no weight*** to this factor.

8.1b(b)(v): As the treating medical records corroborate Petitioner's traumatic knee injury, subsequent six-month course of conservative treatment and return to full duty work, the Arbitrator gave ***significant*** weight to this factor.

The Arbitrator awarded 6.5% loss of use of Petitioner's left leg. The Commission on the Respondent's review affirmed and adopted the decision of the Arbitrator.

VIII. PROCEDURAL ISSUES

Powell v. Manchester Tank & Equipment, 15 WC 29725, 20 IWCC 0637

Petition to Reinstate

On September 14, 2015, Petitioner filed an Application for Adjustment of Claim alleging he sustained injuries due to an accident arising out of and in the course of his employment with the respondent on April 8, 2015. The case proceeded to hearing on June 1, 2016, pursuant to Petitioner's 19(b) petition. The Arbitrator found in favor of Petitioner and awarded benefits including medical expenses and temporary total disability benefits. On April 7, 2017, the Commission affirmed and modified the Decision of the Arbitrator. The Commission also remanded the case to the Arbitrator.

On December 5, 2018, the case appeared on the Quincy status call. As Petitioner failed to appear, Arbitrator Pulia dismissed the case pursuant to Section 9020.60(2)(D) of the IWCC Administrative Rules. The Commission issued a Notice of Case Dismissal on December 11, 2018. On December 18, 2018, Petitioner filed a Motion to Reinstate, but failed to attach a Notice of Motion as required by Section 9020.90(b) of the IWCC Administrative Rules. On February 1, 2019, Petitioner filed a Notice of Motion with the original Motion to Reinstate attached. The motion was set to be heard on March 6, 2019. It is undisputed that Petitioner did not appear on that date. Petitioner then refiled the notice and motion on May 15, 2019 and set the

matter to be heard on June 5, 2019. The respondent filed an objection to the Motion to Reinstate the morning of the hearing.

The Arbitrator found that "although all the rules were not exactly adhered to in this matter, I do have some discretion whether or not this case should be reinstated. This case has never been dismissed at any time prior and the parties have appeared to have been working cohesively with respect to this matter. I feel that the biggest fault with this reinstatement, they actually did get the reinstatement filed timely in February; however, no one appeared in March here on that motion; however, as I stated, nobody came to me on either side of this motion for any type of on-the-record statement to be made. I am going to reinstate the matter at this time because I do feel that the prejudice to the petitioner would outweigh a dismissal at this point, however, this will be the one and only Motion to Reinstate on this matter."

The Commission upheld the reinstatement finding that "after reviewing the record and evidence, the Commission agrees with Arbitrator Pulia's decision to grant Petitioner's Motion to Reinstate. Pursuant to Section 9020.90(c) of the IWCC Administrative Rules, '(t)he Arbitrator shall apply standards of fairness and equity in ruling on the Petition to Reinstate and shall consider the grounds relied on by the Petitioner, the objections of the Respondent, and the precedents set forth in Commission decisions.' The Commission finds the Arbitrator correctly applied this standard."

IX. POST-ARBITRATION ISSUES

Hawkins v. City of East St. Louis, 13 WC 25715, 20 IWCC 0726

Petitioner filed 19(h) and 8(a) Petitions, seeking additional medical expenses, prospective medical care, and additional permanent partial disability benefits for his low back condition, allegedly due to a material increase in his disability since the Arbitrator's January 6, 2017 decision. In that decision, the Arbitrator awarded Petitioner his reasonable and necessary medical expenses through the date of arbitration, plus permanent partial disability of 20% person as a whole under §8(d)2 of the Act.

At the 19(h) and 8(a) hearing, the parties stipulated that the only remaining issue to be decided was to what extent the Petitioner's disability increased. Respondent suggests a 5% increase while Petitioner now seeks a 17.5% person as a whole increase in his permanent partial disability under 19(h), from 20% to 37.5% person as a whole.

Subsequent to the January 6, 2017 award, on February 7, 2020, Petitioner underwent revision decompressions and fusions at L3-4 and L4-5, along with a right L5-S1 microdiscectomy. On May 26, 2020, the treating surgeon reported that while Petitioner's back was achy at times, he rarely had pain in his right leg, and overall he looked good. At that time, Petitioner's surgeon released Petitioner from care with no permanent restrictions. Petitioner testified that currently, he experienced occasional numbness and soreness in his leg. His condition was now better than it was before his February 7, 2020 surgery, and that he was now able to do more than he could before it. Since retiring, Petitioner operated his own lawn service and cut grass. His pain was tolerable, and he managed it by taking rests and trying not to overdo it.

Regarding Petitioner's 19(h) Petition, the Commission noted that the Arbitrator, in his January 6, 2017 decision, set forth facts relevant to a determination of permanent partial disability as required by 8.1 b(b) of the Act. The Commission considered those same factors to determine whether petitioner's permanent partial disability had materially increased enough to justify an increase in the permanency awarded by the Arbitrator.

The Commission found the following:

8.1b(b)(i): The Commission assigned, ***no weight***, because neither party submitted an impairment rating.

8.1b(b)(ii): The Commission assigned ***no weight***, because Petitioner is currently retired from his prior occupation.

8.1b(b)(iii): The Commission assigned ***some*** weight, because Petitioner was 51 years old at the time of his original injury and Petitioner will have to deal with the effects of his injuries and surgeries for several more years.

8.1b(b)(iv) : The Commission assigned ***no weight***, because Petitioner presented no evidence of any decrease in earning capacity.

8.1.b(b)(v): The Commission assigned ***significant*** weight, because Petitioner's low back condition continued to worsen after the Arbitration hearing. Petitioner resumed treatment with his primary care physician and a pain management physician, before having to undergo a second lumbar surgery on February 7, 2020. Petitioner underwent revision decompressions and fusions at the L3-4 and L4-5 levels and a microdiscectomy at LS-S 1. Petitioner made a good recovery following that procedure, but still experienced occasional numbness and soreness in his leg.

Based upon the above factors and the record as a whole, the Commission concluded that Petitioner had proved a material increase in his disability, pursuant to 19(h), in the amount of 12.5% person as a whole.

***Drone v. State of Illinois Vienna Correctional Center,* 14 WC 12757, 20 IWCC 0725**

Petitioner filed a 19(h) Petition seeking an increase in permanent disability and an 8(a) Petition seeking additional treatment after a prior award on January 17, 2018 of 17.5% loss of use person as a whole for her right upper extremity injury. Regarding her treatment prior to the decision, Petitioner underwent a debridement of a partial thickness tear of the posterior aspect of the supraspinatus tendon and a shaving of the adhesive capsulitis and a biceps tenotomy, tenodesis, and debridement of the rotator cuff tear and subacromial space on April 7, 2015.

At the time of arbitration hearing, Petitioner testified her treating physician, Dr. Blake, prescribed Lyrica three times a day, Lidocaine topical cream and pain patches under her arm for the musculocutaneous nerve. Since the Arbitrator's Decision, Petitioner had her prescriptions for Lyrica, the compounded pain cream, and the LidoPro patch renewed.

Respondent had a record review done by Dr. Katz, who prepared a supplemental report in January of 2020. Dr. Katz challenged Dr. Blake's recommendation of compounded creams. He cited to articles finding compounded creams as "no more effective than a placebo," although he admitted that the journals publishing these articles were not authoritative. Dr. Katz also conceded that his own practice was limited to physical rehabilitation or physiatry; he was not board certified in anesthesiology or pain management.

The Commission found and Dr. Blake confirmed Petitioner achieved good pain control with the mixture of creams and oral medications prescribed, including the disputed Lyrica and compounded pain cream. Dr. Katz, the respondent's record review examiner, admitted that he did not know the formula for the pain cream prescribed, so his objections to the efficacy of the cream, including his citations to nonauthoritative literature, were not persuasive. Petitioner's clear and credible testimony that the Lyrica prescribed by Dr. Blake performed better than the generic gabapentin substituted by the respondent. The Commission awarded the medication expenses.

The Commission did not award an increase in disability under 19(h). The Commission found when comparing Petitioner's subjective complaints at the time of both the arbitration and review hearing, Petitioner's disability had not materially increased since arbitration.

X. OTHER ISSUES

Munoz v. Bulley & Andrews, LLC, 2021 Ill (1st) 200254 (1st D. 2021).

Bulley & Andrews, LLC ["Bulley LLC"] entered into a contract with building owner South Riverside, LLC to be the construction manager for a construction project at the building. Pursuant to the contract, Bully LLC purchased a workers' compensation insurance policy to provide coverage for its employees as well as employees of Bulley & Andrews Concrete Restoration, LLC, ["Bulley Concrete"] its wholly owned subsidiary. The contract had a $250,000 deductible.

Petitioner, an employee of Bulley Concrete, injured his back while working on the construction project. Bulley LLC provided workers' compensation benefits for Petitioner, including payment of $76,000 in medical bills. Petitioner later filed a lawsuit against Bulley LLC for his injuries. Bulley LLC filed a motion to dismiss Petitioner's lawsuit. The Circuit Court dismissed the lawsuit and found that Bulley LLC was immune from the lawsuit under the exclusive remedy provisions of the Workers' Compensation Act (820 ILCS 305(5)(a)). Petitioner appealed the dismissal of the lawsuit to the Appellate Court claiming that since Bulley LLC was not Petitioner's employer, Bulley LLC was not immune from a lawsuit.

The Appellate Court affirmed the decision of the circuit court. First, the Appellate Court reviewed prior case law regarding immunity of general contractors and subsidiaries. The Appellate Court concluded that this case was factually similar to the case of *Burge v. Exelon Generation Co*., 395 Ill. Dec. 71, 37 N.E.3d 907, (2nd D, 2015), where the Court found that Exelon was not immune from a lawsuit filed by an injured employee of its' wholly owned

subsidiary Exelon Nuclear Security even though Exelon paid the workers' compensation of the employee because "immunity under [exclusive remedy provisions] cannot be predicated on [a] defendant's payment of workers' compensation unless [the] defendant was under some legal obligation to pay (such as the contractual obligation imposed by the joint-venture agreement in Ioerger." [*Ioerger v. Halverson Construction Co*., 232 Ill. 2d 196, 902 N.E.2d 645, 327 Ill. Dec. 524 (2008)].

Here, the Appellate Court found that since Bulley LLC was contractually obligated to provide workers' compensation insurance to cover Bulley Concrete, including its employees, Bulley LLC could not then be sued as a third party for the injuries sustained by the employees of Bulley Concrete. The Appellate Court again cited the *Loerger* Supreme Court Decision, which held that "the immunity afforded by the Act's exclusive remedy provisions is predicated on the simple proposition that one who bears the burden of furnishing workers' compensation benefits for an injured employee should not also have to answer to that employee for civil damages in court." *Ioerger*, 232 Ill. 2d at 203.