2019 IL App (2d) 180090WC
No. 2-18-0090WC
Opinion filed February 25, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

EUCLID BEVERAGE, Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (John Bohentin, Appellant).	)	Appeal from the Circuit Court of Du Page County. No. 17-MR-1080 Honorable Paul Fullerton, Judge, Presiding.

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

OPINION

¶ 1 The claimant, John Bohentin, appeals the circuit court's order setting aside the Illinois Workers' Compensation Commission's (Commission) decision to award maintenance benefits, finding that the record did not demonstrate that the claimant participated in a vocational rehabilitation program or self-directed job search between April 25, 2012, and June 8, 2015, and confirming the Commission's decision to award permanent partial disability benefits as a percentage of the person as a whole.

I. Background

¶ 2

¶ 3 At the arbitration hearing on September 28, 2015, the parties stipulated that the claimant had sustained a workplace accident on May 24, 2011, arising out of and in the course of his employment with Euclid Beverage (Euclid) and that he had provided timely notice. The issue before the arbitrator was whether a causal relationship existed between the accident and the claimant's current condition of ill-being. The parties also disputed the claimant's entitlement to benefits.

¶ 4 As a condition of his employment with Euclid, the claimant testified that he underwent a physical examination and functional screening test to demonstrate his ability to lift 50 pounds. He was subsequently hired by Euclid in 1999 as a sales supervisor and held that position until November 2011. In his capacity as sales supervisor, the claimant called various retailers, such as Jewel-Osco, and took orders for beer sales on a handheld device, filled shelves, and built displays to hold anywhere from 10 to 1000 cases of beer. The claimant testified that he performed repetitive lifting of up to 50 pounds, as well as bending, twisting, and reaching throughout the day.

¶ 5 The claimant next testified regarding his previous employment. Prior to Euclid, the claimant worked for Courtesy Distributors for approximately 18 years, first as a delivery driver and then as a delivery manager for four months. As delivery manager, he supervised multiple delivery drivers and ensured proper display and rotation of merchandise. According to the claimant, he was not required to operate a computer; manage inventory or sales; or hire, evaluate, or terminate employees.

¶ 6 The claimant testified that on May 24, 2011, he experienced a sharp pain in his back that radiated down his right leg and "knocked [him] down" while stocking a cooler at a Jewel-Osco

location. Following this incident, the claimant contacted Sonia Madalinski, Euclid's human resources director, before a coworker transported him to Tyler Medical Services (TMS).

¶ 7 Shortly thereafter, the claimant presented to TMS and was examined by Dr. George Pappas. After Dr. Pappas documented the claimant's symptoms as "pain radiating into the right leg with tingling," he diagnosed the claimant with a "lumbar sprain with spasms." Dr. Pappas recommended chiropractic treatment and light-duty work restrictions, which included bending, as tolerated, and lifting no more than 10 pounds.

¶ 8 The claimant testified that he received medical attention for a low back injury prior to the May 24, 2011, accident, although it was asymptomatic prior to the 2011 accident. The claimant's June 2011 MRI of the lumbar region showed a degenerative change in the lumbar spine with disc disease at L2-L3 to L5-S1 and associated lower lumbar ligamentum flavum and facet hypertrophy, which further contributed to central canal and foramina narrowing at L4-L5 and L5-S1. The claimant was referred to a neurosurgeon, Dr. Matthew Ross.

¶ 9 On September 14, 2011, Dr. Ross diagnosed the claimant with lumbar radiculopathy, likely due to disc disease at L5-S1. Dr. Ross recommended nonsurgical treatment with lumbar epidural and transforaminal cortisone injections. Dr. Ross also recommended the claimant avoid lifting over 20 pounds and begin a gradual decrease in work activities.

¶ 10 On September 30, 2011, the claimant presented to Dr. Christopher J. Bergin, an orthopedic surgeon, for a medical evaluation pursuant to section 12 of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/12 (West 2010)) at Euclid's request. Because the claimant's earlier low back injury had been asymptomatic prior to the May 24, 2011, accident, and the mechanism of injury was consistent with aggravation of an underlying degenerative condition, Dr. Bergin concluded that the claimant's condition of ill-being was causally related to

the May 24, 2011, accident. Dr. Bergin recommended physical therapy, lumbar epidural injections, and light-duty work restrictions.

¶ 11 On November 22, 2011, Madalinski and Emmett McEnery, Euclid's president, terminated the claimant after informing him that his light-duty work restrictions would no longer be accommodated. The claimant did not seek or gain employment following termination. As such, from November 23, 2011, through April 24, 2012, the claimant received temporary total disability (TTD) benefits. According to the claimant, although he requested, Euclid refused to provide vocational rehabilitation services.

¶ 12 On February 6, 2012, Larry McGrail, Euclid's vice president of operations, invited the claimant to interview for a warehouse manager position. McGrail's letter stated, in part:

> "As you know, the position does not rely on physical ability but rather on the ability to manage people and processes. This Warehouse Manager is responsible for the staff, protecting the integrity of inventory, equipment and the facility and ensuring the trucks get loaded."

Although the claimant received McGrail's letter, he did not interview because he did not feel qualified for the position, given his highest level of education was a high school diploma. Specifically, the claimant believed he lacked the appropriate training and education in warehouse management, inventory control and management, employee scheduling, product shipment, equipment and property management, as well as bills of lading. The claimant used a computer for e-mail and Internet usage, although he described his keyboarding skills as "hunting and pecking," and he lacked training in database programs or Excel spreadsheets.

¶ 13 On February 7, 2012, the claimant presented to Dr. Bergin for a second section 12 evaluation. According to Dr. Bergin's report, the claimant refused epidural injections and

declined a surgical procedure. Dr. Bergin diagnosed the claimant with degenerative disc disease of the lumbar spine with a right synovial cyst at L4-L5 and right L5 radiculopathy. Dr. Bergin opined that the claimant's May 24, 2011, accident had aggravated a preexisting degenerative condition and that he was at maximum medical improvement (MMI) and should undergo a functional capacity evaluation (FCE).

¶ 14 On April 12, 2012, the claimant presented to Dr. James Kelly. Dr. Kelly administered two injections, which, according to the claimant, offered several years of pain relief. Dr. Kelly noted that the claimant had a 50% to 60% improvement in pain but still experienced numbness that was unaffected in his right leg. Specifically, the claimant's pain had improved to a 3 on a 10 scale. Dr. Kelly recommended repeat lumbar epidural cortisone injections, pending authorization, and to follow up with Dr. Ross to increase his work activities.

¶ 15 On April 24, 2012, Dr. Ross released the claimant to work with restrictions to "lift up to 15 lbs. Alternate sit/stand as needed." Following his release to work, Euclid terminated the claimant's TTD benefits on April 24, 2012, after informing him that future employment was unavailable with the above restrictions. The claimant testified that he did not look for work after this date, but he received social security disability (SSD) benefits starting in May 2012.

¶ 16 On January 10, 2014, 20 months after his last medical visit, the claimant presented to Dr. Ross. Dr. Ross noted that the injections administrated by Dr. Kelly provided the claimant with a "lengthy duration of relief," and that Dr. Kelly was in agreement with the claimant's request to complete a FCE. The claimant testified, however, that Euclid never authorized the recommended cortisone injections and the FCE was never scheduled because the insurance company refused to reimburse payment. The claimant testified that his last medical appointment before the arbitration hearing was on January 10, 2014.

¶ 17 On April 27, 2015, the claimant presented to Lisa Helma, certified rehabilitation counselor at Vocamotive Vocational Rehabilitation Services. In preparing an evaluation report, labor market survey, and rehabilitation plan, Helma interviewed the claimant and reviewed his medical and personnel records, McGrail's invitation to interview for warehouse manager, and the Dictionary of Occupational Titles. Helma noted that the warehouse manager position was skilled at the sedentary level of physical demand and that the claimant "does not have previous experience in this capacity. Based upon the results of the Labor Market Survey, [he] would not be a qualified candidate." Helma opined that, although the claimant lost access to his usual and customary line of occupation, he was employable in prior-held positions with the potential to earn $9 and $12 per hour. In forming her opinion, Helma was unaware that the claimant had placed orders with a handheld device while employed with Euclid and that he had previously worked for Courtesy Distributors as a delivery manager where he supervised multiple employees.

¶ 18 McEnery testified to the following. Euclid hired the claimant, a good employee with numerous positive performance appraisals, in 1999. The claimant was required to have a thorough knowledge of essential trade practices because he was responsible for increasing beer sales and distribution, thus, his compensation was tied to his performance. The software used in the claimant's handheld device did not require advanced training, but the claimant had completed mandatory training prior to starting his position as a sales supervisor. According to McEnery, the claimant was a good fit for the warehouse manager position because he had acquired a variety of special skills over 30 years in the industry. In fact, although there were over 150 capable employees, McEnery had recommended the claimant interview for the position.

¶ 19 McGrail testified to the following. McGrail was very familiar with the claimant and his skill set, which included use of Euclid's software system. McGrail invited the claimant to interview because he believed the claimant was capable of managing and supervising employees, McGrail acknowledged that the claimant did not have experience as an assistant warehouse manager. McGrail also explained that Euclid had terminated the claimant due to his permanent light-duty work restrictions and that he did not offer the claimant a permanent job with work restrictions because the claimant did not interview.

¶ 20 The arbitrator's decision, issued on April 6, 2016, determined that (1) there was a causal connection between the May 24, 2011, work accident and the claimant's current condition of ill-being; (2) the claimant was entitled to TTD benefits of $713.91 per week for 22 weeks from November 23, 2011, through April 24, 2012, with Euclid receiving a credit of $13,360.71 for previously paid TTD benefits; (3) the claimant was entitled to maintenance benefits of $713.91 per week for $162^{6}/_{7}$ weeks from April 25, 2012, through June 8, 2015; and (4) the claimant was entitled to permanent partial disability (PPD) benefits, specifically wage differential benefits, for $433.91 per week from June 9, 2015, through the duration of his disability, pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2010)), because his injuries caused an impairment of earnings.

¶ 21 On April 20, 2016, Euclid filed a petition for review before the Commission. On June 27, 2017, the Commission adopted in part and modified in part the arbitrator's decision. The Commission affirmed the arbitrators' award of maintenance and TTD benefits, however, it modified the PPD award from wage differential to a percentage of the person as a whole award, pursuant to section 8(d)(2) of the Act, for $642.52 per week for a period of 200 weeks for 40% loss of man as a whole. The Commission determined that the claimant's "election not to work

after being medically cleared to work again prevented him from establishing what he is capable of earning."

¶ 22 On August 7, 2017, Euclid filed for review in the circuit court of Du Page County. On January 9, 2018, the circuit court, without hearing, confirmed in part and set aside in part the Commission's decision. The court confirmed the Commission's decision to award PPD benefits based on a percentage of the person as a whole under section 8(d)(2) of the Act but set aside the Commission's decision to award maintenance benefits, finding that the record did not demonstrate that the claimant participated in a vocational rehabilitation program or self-directed job search between April 25, 2012, and June 8, 2015. On January 31, 2018, the claimant filed a timely notice of appeal.

II. Analysis

¶ 23

¶ 24 This appeal is limited to the propriety of the various types of compensation awarded. In particular, the claimant contends that the Commission's decision to award maintenance benefits was not against the manifest weight of the evidence because Euclid denied the claimant's request for vocational rehabilitation services in violation of section 8(a) of the Act and Illinois Commission Rule 7110.10(a) (50 Ill. Adm. Code 7110.10(a), amended at 30 Ill. Reg. 11743 (eff. June 22, 2006))[1] and he experienced a reduction in earning capacity after Euclid terminated his employment. The claimant also argues that the Commission's percentage of the person as a whole PPD award was against the manifest weight of the evidence.

¶ 25 In response, Euclid argues that the claimant was not entitled to maintenance benefits because he was not enrolled in a vocational rehabilitation program or engaged in a self-directed

[1]This rule has since been recodified to Commission Rule 9110.10(a) (50 Ill. Adm. Code 9110.10(a) (eff. Nov. 9, 2016)).

job search after April 24, 2012, and he failed to present credible evidence demonstrating a reduction in earning capacity.

A. Maintenance Benefits

¶ 26

¶ 27 The claimant argues that Euclid violated section 8(a) of the Act and Commission Rule 7110.10 (50 Ill. Adm. Code 7110.10), amended at 30 Ill. Reg. 11743 (eff. June 22, 2006)) by failing to provide him with vocational rehabilitation services.

¶ 28 "[T]he determination of whether a claimant is entitled to maintenance benefits is a question to be decided by the Commission, and its finding will not be reversed unless it is against the manifest weight of the evidence." *W.B. Olson, Inc. v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113129WC, ¶ 39. For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent from the record on appeal. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009).

¶ 29 Under section 8(a) of the Act (820 ILCS 305/8(a) (West 2010)), an employer "shall *** pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." Since maintenance is awarded incidental to vocational rehabilitation, an employer is obligated to pay maintenance only "while a claimant is engaged in a prescribed vocational-rehabilitation program." *W.B. Olson, Inc.*, 2012 IL App (1st) 113129WC, ¶ 39. "A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in his earning power and there is evidence that rehabilitation will increase his earning capacity." *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1019 (2005). Because the primary goal of rehabilitation is to return the injured employee to work (*Schoon v. Industrial*

Comm'n, 259 Ill. App. 3d 587, 594 (1994)), if the injured employee has sufficient skills to obtain employment without further training or education, that factor weighs against an award of vocational rehabilitation. *National Tea Co. v. Industrial Comm'n*, 97 Ill. 2d 424, 432 (1983). Moreover, an injured employee is generally not entitled to vocational rehabilitation if the evidence shows that he does not intend to return to work, although able to do so. *Schoon*, 259 Ill. App. 3d at 594.

¶ 30 Vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising job search programs, and vocational retraining, which includes education at an accredited learning institution. See 820 ILCS 305/8(a) (West 2010). An employee's self-directed job search or vocational training may constitute a vocational-rehabilitative program. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004). Additionally, "rehabilitation efforts may be undertaken even though the extent of the permanent disability cannot yet be determined." *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 180 (2000).

¶ 31 Commission Rule 7110.10(a) provided as follows:

> "The employer or his representative, in consultation with the injured employee and, if represented, with his or her representative, shall prepare a written assessment of the course of medical care, and, *if appropriate*, rehabilitation required to return the injured worker to employment when it can be reasonably determined that the injured worker will, as a result of the injury, be unable to resume the regular duties in which engaged at the time of injury, or when the period of total incapacity for work exceeds 120 continuous days, whichever first occurs." (Emphasis added.) 50 Ill. Adm. Code 7110.10(a), amended at 30 Ill. Reg. 11743 (eff. June 22, 2006).

Thus, the rule required the employer to provide rehabilitation only if "appropriate." (50 Ill. Adm. Code 7110.10(a), amended at 30 Ill. Reg. 11743 (eff. June 22, 2006)). As noted above, rehabilitation is neither mandatory for the employer nor appropriate if an injured employee does not intend, although capable, to return to work. *Schoon*, 259 Ill. App. 3d at 594.

¶ 32 We are unpersuaded by the claimant's arguments. First, the claimant never sought or gained employment following termination from Euclid on November 22, 2011. As such, rehabilitation would be neither mandatory nor appropriate because the claimant did not show an intention to return to work, although he was capable, as evidenced by Dr. Ross's notes releasing the claimant to work with work restrictions on April 24, 2012, to "lift up to 15 lbs. Alternate sit/stand as needed." Moreover, it is undisputed that the claimant did not enroll in a vocational rehabilitation program or engage in a self-directed job search after Euclid terminated his TTD benefits on April 24, 2012. In fact, the Commission concluded that the claimant abandoned the job market on that date. On that basis, contrary to the Commission's decision, Euclid's obligation to provide maintenance was never triggered, and the claimant failed to cite authority to support that notion.

¶ 33 Even assuming the claimant was entitled to rehabilitative services, he could have requested an expedited hearing under section 19(b) of the Act (820 ILCS 305/19(b) (West 2010) ("the employee may at any time petition for an expedited hearing by an Arbitrator on the issue of whether or not he or she is entitled to receive payment of the services or compensation")). The claimant failed to request such a hearing.

¶ 34 Furthermore, we cannot find that the claimant proved a reduction in his earning capacity after he was terminated from Euclid. First, the Commission found that he had failed to prove his earning capacity because his reliance on Helma's labor survey was "unacceptable speculation."

In rejecting Helma's opinions, the Commission concluded that Helma's report was completed in anticipation of litigation, just four months prior to the arbitration hearing, and that Helma lacked knowledge regarding the claimant's previous employment managing employees as a delivery manager, which would have likely broadened the scope of possible employment opportunities. Thus, the Commission concluded that the claimant was prevented from establishing "what he is capable of earning." In light of the foregoing, we find that the Commission's decision, awarding the claimant maintenance benefits from April 25, 2012, to September 28, 2015, was against the manifest weight of the evidence. Accordingly, the circuit court's decision setting aside the Commission decision to award maintenance benefits is affirmed.

B. PPD Award

¶ 35

¶ 36 There are two distinct types of PPD awards under section 8(d) of the Act. *Gallianetti v. Industrial Comm'n*, 315 Ill. App. 3d 721, 727 (2000). Section 8(d)(1) of the Act provides for a wage differential benefit (820 ILCS 305/8(d)(1) (West 2010)), and section 8(d)(2) of the Act provides for a percentage of the person as a whole award (820 ILCS 305/8(d)(2) (West 2010)).

¶ 37 To qualify for wage differential benefits, a claimant must prove (1) a partial incapacity that prevents claimant from pursuing his usual and customary line of employment and (2) an impairment of earnings. 820 ILCS 305/8(d)(1) (West 2010). The purpose of a wage differential award is to compensate an injured claimant for his reduced earning capacity. *Jackson Park Hospital v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 142431WC, ¶ 39. The amount of a wage differential benefit is

> "equal to $66^2/_3$% of the difference between the average amount which [the claimant] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is

able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2010).

¶ 38 Conversely, section 8(d)(2) of the Act provides for a PPD award based on a percentage of the person as a whole. 820 ILCS 305/8(d)(2) (West 2010). A percentage of the person as a whole award is appropriate in three circumstances: (1) when a claimant's injuries do not prevent him from pursuing the duties of his employment but he is disabled from pursuing other occupations or is otherwise physically impaired, (2) when a claimant's injuries partially incapacitate him from pursuing the duties of his usual and customary line of employment but do not result in an impairment of earning capacity, or (3) when a claimant, having suffered an impairment of earning capacity, elects to waive his right to recover. 820 ILCS 305/8(d)(2) (West 2010).

¶ 39 Our supreme court has expressed a preference for wage differential benefits over a scheduled award, noting "the basis of the workers' compensation system should be earnings loss." *General Electric Co. v. Industrial Comm'n*, 89 Ill. 2d 432, 438 (1982). Thus, where a claimant proves he is entitled to wage differential benefits, the Commission is without discretion to impose a section 8(d)(2) award except where a claimant waives his right to recover under section 8(d)(1). See *Gallianetti*, 315 Ill. App. 3d at 729. The issue of whether a claimant is entitled to a wage differential award is generally a question of fact for the Commission to determine. *Dawson v. Illinois Workers' Compensation Comm'n*, 382 Ill. App. 3d 581, 586 (2008). We review the Commission's factual findings under the manifest-weight-of-the-evidence standard. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 434 (2011).

¶ 40 In reversing the arbitrator's wage differential award, the Commission determined that a percentage of the person as a whole award was more appropriate because the claimant had failed

to establish entitlement to a wage differential award. In particular, the Commission determined that, although the claimant was unable to return to Euclid as a sales supervisor, a finding uncontested on appeal, the claimant did not establish an impairment of earnings. Therefore, the crucial issue in determining whether the claimant was entitled to a wage differential award is whether he proved that he suffered impairment in his "earning capacity." *Jackson Park Hospital*, 2016 IL App (1st) 142431WC, ¶ 42. If the claimant proved a loss in his earning capacity, then the Commission's PPD award, based on a percentage of the person as a whole, was against the manifest weight of the evidence. *Gallianetti*, 315 Ill. App. 3d at 728 ("the plain language of section 8(d) prohibits the Commission from awarding a percentage-of-the-person-as-a-whole award where the claimant has presented sufficient evidence to show a loss of earning capacity").

¶ 41 The Commission found that the claimant had abandoned the job market on April 24, 2012, and failed to prove his earnings capability. Specifically, the Commission stated that the claimant's reliance on Helma's labor survey to establish his earnings potential was "unacceptable speculation." In particular, the Commission noted that Helma's reports were completed in anticipation of litigation, just four months prior the arbitration hearing, and she lacked an understanding regarding the claimant's previous work managing multiple employees, which could have broadened the scope of possible employment opportunities. Thus, the Commission concluded that the claimant was prevented from establishing "what he is capable of earning."

¶ 42 Based on the foregoing, we cannot say that the opposite conclusion is clearly apparent regarding the Commission's determination to award a percentage of the person as a whole benefits rather than wage differential benefits. Accordingly, the decision of the circuit court, confirming the Commission's decision to award PPD benefits based on a percentage of the person as a whole, is affirmed.

III. Conclusion

¶ 43

¶ 44 We affirm the circuit court's order setting aside in part and confirming in part the Commission's decision.

¶ 45 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF DUPAGE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN BOHENTIN,
Petitioner,

vs.

EUCLID BEVERAGE,
Respondent.

17IWCC0393

NO: 11 WC 45957

DECISION AND OPINION ON REVIEW

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

The issues decided in the Decision of the Arbitrator were causal relationship between Petitioner's current condition of ill-being and his injury, temporary benefits, and the nature and extent of his injury. Petitioner's current condition of ill-being was found to be causally related to his injury and temporary total disability and maintenance benefits under Section 8(a) of the Act and a permanent partial disability benefit under Section 8(d)1 of the Act were awarded. The Commission finds it is more appropriate to award Petitioner the permanent partial disability benefit under Section 8(d)2 of the Act rather than Section 8(d)1 and modifies the Decision of the Arbitrator accordingly.

Entitlement to a wage differential award requires a claimant to prove: "(1) a partial incapacity that prevents him from pursing his usual and customary line of employment and (2) an impairment of earnings." Copperweld Tubing Products v. Illinois Workers' Compensation Commission, 402 Ill.App.3d 630, 633, 931 N.E.2d 762, 341 Ill.Dec. 865 (1st Dist. 2010).

Petitioner satisfies the first prong of Copperweld as the imposed permanent restrictions placed upon him preclude him from resuming his career as a sales supervisor in the beverage delivery industry. As a sales supervisor, he was responsible for delivering and stocking cases of beer and, when necessary, erecting displays. The imposed permanent restrictions of no lifting in

excess of ten pounds and bending and/or stooping only as tolerated would prevent Petitioner from these tasks.

Petitioner, however, failed to satisfy the second prong of Copperweld. "[S]ection 8(d)(1) of the Act instructs the Commission to look that the amount the claimant 'is earning or *is able to earn* in some suitable employment or business after the accident.'" Copperweld Tubing Products, 402 Ill.App.3d at 634. (Emphasis in the original.) He, personally, cannot demonstrate how much he is earning or could earn in some suitable employment or business because, he, per his own testimony, has not sought employment since he was released to return to work on April 24, 2012. The Arbitrator, citing Copperweld, found Petitioner's "voluntary decision to remove himself from the work force" was not an impediment to him being eligible for an award under Section 8(d)1 of the Act. The Commission finds Copperweld inapplicable to Petitioner's situation.

The claimant in Copperweld, at the time of his arbitration hearing, was not employed. Copperweld Tubing Products, 402 Ill.App.3d at 634. At the arbitration hearing, however, "the claimant testified that he conducted a self-directed job search and obtained a position within his physical capabilities, a job as a security guard at Securatex. The claimant states he was paid $8 per hour and worked forty hours each week." Copperweld Tubing Products, 402 Ill.App.3d at 634. The court noted the claimant's rate of pay fell within the range of pay the claimant's vocational rehabilitation counselor believed the claimant was capable of earning without his professional assistance and subsequently upheld the Commission's awarded benefit under Section 8(d)1 of the Act as "the Commission could reasonably rely on the claimant's job at Securatex in determining that he had proven that his earnings were impaired." Copperweld Tubing Products, 402 Ill.App.3d at 634-635. The Commission finds it is able to differentiate Copperweld from the present case.

In the present case, Petitioner abandoned the job market on April 24, 2012. As noted above, he testified that he did not look for work after that day. Petitioner also testified that he did not interview with Respondent for an internal position that was within his restrictions. The claimant in Copperweld, if he abandoned the job market, did so only after he returned to work as a security guard and only after he demonstrated what he was capable of earning. Had Petitioner obtained any employment within his restrictions and then ceased working, then his circumstances would be within the orbit of Copperweld.

The Commission notes Petitioner retained the services of Lisa Helma, a certified rehabilitation counselor with Vocamotive Vocational Rehabilitation Services, and met with Ms. Helma on June 9, 2015. This one meeting occurred more than three years after Petitioner was released to return to work and less than four months before the September 28, 2015, arbitration hearing. The Commission finds both the evaluation report and the labor market survey created by Ms. Helma on Petitioner's behalf were done so in anticipation of litigation and are given no weight. Furthermore, it appears Ms. Helma was not made aware of Petitioner's previous employment as a Delivery Manager, a position that included possible responsibilities that would have allowed Ms. Helma to broaden the scope of employment opportunities she sought for Petitioner.

Petitioner unquestionably lost the ability to work at his usual and customary line of employment as a sales supervisor not only for Respondent but also any potential employer that would require him to lift in excess of ten pounds and require him to bend and/or stoop with any

17IWCC0393

regularity. His election not to work after being medically cleared to work again prevented him from establishing what he is capable of earning. His election to rely on Ms. Helma's labor market survey to establish what he may be capable of earning resulted in unacceptable speculation, particularly given that Ms. Helma was not given a complete accounting of Petitioner's work history. For these reasons, the Commission finds it more appropriate to compensate Petitioner for the loss of his trade under Section 8(d)2 of the Act than for a presumptive diminution of earning capacity.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator, filed with the Commission on April 6, 2016, is modified to vacate the permanent partial disability benefit awarded under Section 8(d)1 and award the permanent partial disability benefit under Section 8(d)2.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $713.91 per week for a period of 22 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner maintenance benefits of $713.91 per week for a period of 162-6/7 weeks, commencing April 25, 2012, through June 8, 2015, as provided for under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $642.52 per week for a period of 200 weeks, as provided in §8(d)2 of the Act, for the reason that the injuries sustained caused the 40% loss of man as a whole

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit in the amount of $13,360.71for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JUN 27 2017
KWL/mv
O-5/2/17
42

Kevin W. Lamborn

Thomas J. Tyrrell

Michael J. Brennan

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

17IWCC0393

Case# 11WC045957

BOHENTIN, JOHN
Employee/Petitioner

EUCLID BEVERAGE
Employer/Respondent

On 4/6/2016, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0276 BURNETT & CARON LTD
ROBERT W BURNETT
1776 LEGACY CIRCLE SUITE 116
NAPERVILLE, IL 60563

5001 GAIDO & FINTZEN
ROBERT L SMITH
30 N LASALLE ST SUITE 3010
CHICAGO, IL 60602

STATE OF ILLINOIS)
)SS.
COUNTY OF DuPage)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

17IWCC0393

Case # 11 WC 45957

Consolidated cases: N/A

John Bohentin
Employee/Petitioner

v.

Euclid Beverage
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Brian Cronin**, Arbitrator of the Commission, in the city of **Wheaton**, on **September 28, 2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

17IWCC0393

FINDINGS

On **May 24, 2011**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$55,684.72**; the average weekly wage was **$1,070.86**.

On the date of accident, Petitioner was **57** years of age, ***married*** with **0** dependent children.

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

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

Respondent is entitled a credit of **$13,360.71** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$0.00** for other benefits, for a total credit of **$13,360.71**.

Respondent is entitled to a credit of **$0.00** under Section 8(j) of the Act.

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of **$713.91**/week for **22** weeks, commencing **November 23, 2011** through **April 24, 2012**, pursuant to Section 8(b) of the Act.

Respondent shall be given a credit of **$13,360.71** for temporary total disability benefits that they have been paid Petitioner.

Maintenance

Respondent shall pay Petitioner maintenance benefits of **$713.91**/week for **162-6/7** weeks, commencing **April 25, 2012** through **June 8, 2015**, as provided in Section 8(a) of the Act.

Permanent Partial Disability: Wage differential

Respondent shall pay Petitioner permanent partial disability benefits, commencing on **June 9, 2015**, of **$433.91**/week and continuing for the duration of the disability, because the injuries sustained caused an impairment of earnings, as provided in Section 8(d)1 of the Act.

Respondent shall pay Petitioner compensation that has accrued from **April 25, 2012** through **September 28, 2015**, and shall pay the remainder, if any, in weekly benefits.

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

17IWCC0393

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

Brian T. Cronin

Signature of Arbitrator

April 6, 2016
Date

APR 6 - 2016

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

JOHN BOHENTIN,

Petitioner

v.

EUCLID BEVERAGE

Respondent

17IWCC0393

11 WC 45957

FINDINGS OF FACT

Petitioner testified that he was injured on May 24, 2011. At that time, he was employed as a Sales Supervisor by Respondent, a beer distributor, for whom he had been employed since 1999. That position required that he call on various retailers, such as Jewel-Osco, and take orders for beer sales, fill shelves, and build displays that ranged from ten to one thousand cases of beer. He further testified that the job required repetitive lifting of up to fifty pounds and an ability to bend, twist and reach all day long.

Before Respondent hired him, they required him to pass a functional screen and demonstrate an ability to lift fifty pounds. (Px.5)

At 8:00 a.m. on the date of accident, Petitioner was working his regular-duty job and was filling a cooler at Jewel-Osco in Lombard, IL. At that time, he experienced a sharp pain in his back that radiated all the way down his right leg. Petitioner testified that such pain "knocked [him] down." Petitioner then contacted Respondent's Human Resources Director, who instructed him to go to Tyler Medical Services, which he did that same day. (Px.3) Petitioner was given light-duty restrictions, which Respondent accommodated through November 22, 2011.

Petitioner testified that prior to May 24, 2011, he never had a low back injury and never received medical care for a low back injury.

Petitioner was seen by several physicians at Tyler and continued on restrictions during that time period. (Px.3) Medications and physical therapy were provided, and ultimately an MRI of the lumbar region was carried out on June 15, 2011. The radiologist's impression of such images is, as follows:

(1) Degenerative change in the lumbar spine with disc disease at the L2-L3 to L5-S1 levels.

(2) Associated lower lumbar ligamentum flavum and facet hypertrophy further contributes to central canal and foraminal narrowing especially at the L4-L5 and L5-S1 levels as described. (Px.10)

On September 30, 2011, Christopher J. Bergin, M.D., Respondent's Section 12 examining physician, saw Petitioner. He presented treatment options to Petitioner and provided a causation opinion. Dr. Bergin also imposed activity restrictions on Petitioner at that time. Those restrictions were "no lifting greater than 10-20 pounds with limited bending and twisting." (Rx.1)

On February 6, 2012, Larry McGrail, Vice President of Operations for Respondent, authored a letter to Petitioner in which he invited Petitioner to interview for the position of Warehouse Manager that had just become available. The letter states that the position requires the Warehouse Manager to have the ability "to manage people and processes", and that the Warehouse Manager "is responsible for the staff, protecting the integrity of inventory, equipment and the facility and ensuring the trucks get loaded". (Rx.3)

Petitioner acknowledged receiving the letter from Mr. McGrail. Petitioner testified that he did not respond to the offer of an interview for the Warehouse Manager position because he did not feel he was qualified for the job.

On February 7, 2012, Dr. Bergin examined Petitioner, found him to be at maximum medical improvement and recommended that Petitioner undergo a functional capacity evaluation ("FCE"). Dr. Bergin restated his causation opinion at that time. (Rx.2)

The Tyler physicians referred Petitioner to neurosurgeon Mathew J. Ross, M.D., with whom Petitioner continued to treat. Dr. Ross first saw Petitioner on February 28, 2012. The doctor offered treatment options, which included injections and a surgical decompression. Petitioner has not undergone surgery, though it was presented as a treatment option by both Dr. Ross and Dr. Bergin if the injections did not provide lasting relief. Dr. Ross referred Petitioner to Dr. James Kelly at Du Page Pain Center for injections. (Px.2)

Petitioner underwent two injections (Px.2), which, per Petitioner's testimony, resulted in long-term pain relief for a couple of years.

On April 19, 2012, Dr. Ross saw Petitioner and recommended another injection. (Px.1) Such injection was not authorized by Respondent.

On April 24, 2012, Dr. Ross issued the following permanent work restrictions for Petitioner: "May lift up to 15 lbs. Alternate sit/stand as needed." (Px.1)

On January 10, 2014, Dr. Ross saw Petitioner and recommended another cortisone injection as well as an FCE. Such injection was not authorized by Respondent.

An FCE was never scheduled. Petitioner testified that he agreed to have the FCE, but that the insurance company would not pay for it.

Petitioner testified that following his accident, he continued to work for Respondent through November 22, 2011. On that date Respondent's Human Resources Director, Sonia Madalinski, and Respondent's President, Emmett McEnery, informed Petitioner that the light-duty restrictions would no longer be accommodated. For several weeks prior to such meeting, Petitioner assisted another driver by providing guidance and advice only; Petitioner did not perform any of the lifting activities of the job during those weeks.

Petitioner has remained off work from November 23, 2011 through September 28, 2015.

Petitioner testified that he requested vocational rehabilitation services from Respondent, but that such services were never provided.

Petitioner testified that at no point did he look for work.

Petitioner applied for, and then began receiving, social security disability benefits, retroactive to May 2012. The Social Security Decision is dated September 22, 2012. (Px.8)

Respondent terminated Petitioner's temporary total disability benefits on April 24, 2012.

Petitioner testified that the position of Warehouse Manager was never offered to him, only the offer of an interview. Respondent did not offer him any work within his restrictions of after April 24, 2012. Petitioner testified that he possessed no training, education or skills in managing a warehouse. He further testified that he had no experience or training in inventory control and management, employee scheduling, or product shipment and scheduling. He also stated that he has no experience or training in equipment and property management, or in dealing with bills of lading.

Petitioner testified as to his educational and vocational background. He has a high school diploma and one uncompleted non-credit course in finance at a community college. He testified that Respondent and prior employers did not provide Petitioner with any additional

training or education, other than the occasional one-hour sales presentation that some of Respondent's suppliers conducted. Petitioner uses a computer for email and internet searches, and describes his keyboarding skills as hunting and pecking. He has no training or education in the use of database programs or Excel spreadsheets.

Petitioner testified that Respondent provided Petitioner with a hand-held device to place orders of customers. He described the process as scrolling down to the customer name and putting in the quantity of product to be ordered. He had no other use for the device, and testified that someone else at the company had programmed the device and would take the order information from the device after he entered the quantity to be ordered.

Prior to his employment with Respondent, Petitioner worked for Courtesy Distributors. He held the position of Delivery Manager for four months, and prior to that, he held the position of Delivery Route Driver for eighteen years. During the four months he was Delivery Manager, he would check on the work of Delivery Drivers, and would make sure they were properly displaying and rotating the merchandise. He recorded this information on a form in a clipboard, and would then submit the form to his supervisor. He did not use a computer in that position and did not manage inventory or sales. He also testified that in that role, he did not hire, evaluate or terminate any employees.

At the request of Petitioner, Petitioner met with and was interviewed by a Certified Rehabilitation Counselor at Vocamotive vocational rehabilitation services on April 27, 2015. Lisa Helma, C.R.C., of Vocamotive interviewed him and authored the Initial Evaluation Report, Labor Market Survey and Rehabilitation Plan. (Px.4) Petitioner's Exhibit #4 is the only expert vocational evidence provided.

Ms. Helma stated in her Initial Evaluation Report that she had reviewed the February 6, 2012 correspondence form Respondent to Petitioner regarding the Warehouse Manager position as well as several other documents and records, including Petitioner's personnel and medical records, as well as the Dictionary of Occupational Titles ("DOT"). After interviewing Petitioner and researching these issues, she inserted in her report DOT's job description of a Distribution Warehouse Manager:

> Directs and coordinates activities of wholesaler's distribution warehouse: Reviews bills of lading for incoming merchandise and customer orders in order to plan work activities. Assigns workers to specific duties, such as verifying amounts of and storing incoming merchandise and assembling customer orders for delivery. Establishes operational procedures for verification of incoming and outgoing shipments, handling and disposition of merchandise, and keeping of warehouse inventory. Coordinates activities of distribution warehouse with activities of sales, record control, and purchasing departments to ensure availability of merchandise. Directs reclamation of damaged merchandise. (Px.4)

Ms. Helma wrote that Distribution Warehouse Manager is classified as a skilled (SVP-6) position at the Sedentary level of physical demand. Ms. Helma concluded:

"It is noted that based upon his previous reported job duties, Mr. Bohentin does not have previous experience in this capacity. Based upon the results of the Labor Market Survey, Mr. Bohentin would not be a qualified candidate for current Warehouse Manager positions at other entities." (Px.4)

The vocational expert went on to provide her opinions regarding Petitioner. "First, it is the opinion of this consultant that Mr. Bohentin has lost access to his usual and customary line of occupation of Malt Liquor Sales Representative. Second, it is the opinion of this consultant that Mr. Bohentin remains employable at this time. He should be able to locate employment in any position congruent with his previous experiences and physical capabilities. Third, and with

regard to wage earning potential, it is the opinion of this consultant that Mr. Bohentin's most probable wage earning potential at this time is between $9.00 and $12.00 hourly". (Px.4)

On cross-examination, Petitioner testified that he did not explain to Ms. Helma that he used a hand-held computer when he worked for Respondent.

Emmett McEnery, president and CEO of Euclid Beverage, testified at trial. Mr. McEnery testified with regard to Petitioner's resume', which Petitioner presented to Euclid Beverage in 1999 at the time he was hired. Mr. McEnery was part of the hiring team in 1999 and it was his recommendation that John Bohentin be hired based upon the resume'. (Px.6) Mr. McEnery went on to testify that John Bohentin had been a good employee at Euclid Beverage, and was given positive performance appraisals. John's responsibilities included increasing sales and distribution in his area. He could not sell to anyone who did not have a liquor license, and he had to apply the proper discount to each customer. Different metrics are used for customers in order to determine the proper discount. John Bohentin's pay was tied to how well he did his job. Given the highly-regulated nature of the business, Mr. McEnery testified, a thorough knowledge of on-the-job trade practices was essential.

Mr. McEnery also testified about Euclid Beverage's special software for beer distribution, which was programmed into the hand-held device that John Bohentin used. This device was used for orders, inventory management and other information. According to Mr. McEnery, Sales Supervisor such as Mr. Bohentin would use the hand-held device for many purposes, in addition to orders. This computer software system for sales was on the same platform as the warehouse inventory system, and did not require advanced training. Mr. McEnery further testified that Respondent provided training for Petitioner to become Sales Supervisor. It was important to Mr. McEnery was John Bohentin's had 30 years of experience in the alcohol sales business. It was

Mr. McEnery's testimony that John Bohentin would be a good fit for the February 2012 Warehouse Manager position. It was Mr. McEnery's recommendation, at the time, that Mr. Bohentin be considered for the job. Mr. McEnery testified that the special skill set possessed by Mr. Bohentin would suit him well for the different facets of the job.

Mr. McEnery testified that there are 150 full-time employees in the warehouse.

On cross-examination, Mr. McEnery testified that he himself was not a Certified Rehabilitation Counselor. He also testified that the position of Warehouse Manager was never offered to Petitioner, and that no offers of permanent employment within the medical restrictions were ever offered to Petitioner. He testified that he was aware that Petitioner worked for four months as Delivery Manager for Courtesy Distributors. He testified that he is aware that Respondent's Section 12 physician imposed permanent restrictions and that due to such restrictions, Petitioner has permanently lost the Sales Supervisor position.

Larry McGrail, the Vice-President of Operations for Euclid Beverage, also testified at trial. He testified that there are fifteen managers and 130 other employees at the company. Mr. McGrail had direct supervision over the Warehouse Manager position. He testified that there were three shifts. Each shift had a Warehouse Manager. The Warehouse Managers worked as a team, and under them were personnel management employees, such as in quality control. Each Warehouse Manager is like "the captain, the boss of the ship." The responsibilities of this position included being in charge of the inventory, as well as "overseeing the teams and groups and the managers, supervisors, employees that are doing these functions". Mr. McGrail testified that he himself started at the ground level, first as a Merchandiser, then as a Sales Supervisor, a Warehouse Manager, and then to the Director of Operations. He knew Petitioner well, and knew Petitioner's skill set. He felt Petitioner had a lot of things that a good candidate would have and

that he would get along with the group. Mr. McGrail was not aware, however, that Petitioner worked as Delivery Manager for Courtesy Distributors for only four months.

Mr. McGrail testified that any training Petitioner would need in the inventory software system that Warehouse Managers use would be available.

Mr. McGrail also testified to Petitioner's familiarity with the computer system, his background, and his suitability for the Warehouse Manager job. This was the basis for the February 6, 2012 letter to Mr. Bohentin in which he invited him to interview for the Warehouse Manager position.

Mr. McGrail testified that John Bohentin did not reply to the letter in which he invited him for an interview. Mr. McGrail testified that when he did not hear from John Bohentin after he sent the February 6, 2012 letter, he had his staff make efforts to reach Mr. Bohentin by phone.

Mr. McGrail then needed to move forward with the hiring process, and reviewed applications for more than 40 individuals. He eventually hired a permanent Warehouse Manager. That job paid approximately $50,000.00 at the time, but the salary ranged from the high thirties to low seventies.

Mr. McGrail testified that different Warehouse Managers brought different skill sets.

Mr. McGrail testified that the person Respondent hired for the position of Warehouse Manager he had approximately five years of experience working in the warehouse and had been working as an assistant to the Warehouse Manager. He agreed that Petitioner had never worked in that position. Yet, the new Warehouse Manager previously worked in sales for Respondent and had no experience with a computer other than his work at Euclid Beverage.

Mr. McGrail agreed that the Warehouse Manager position was an "at will" position, so that if Petitioner had been offered the position and hired, he could have been terminated at any time. Mr. McGrail also agreed that Petitioner's had permanently lost his job of route salesman due to the work restrictions imposed on him by Respondent's Section 12 examining physician, Dr. Bergin.

Mr. McGrail testified that sales employees were provided with a hand-held device with all the software already installed for them and the supervisor would instruct them how to use it. There was no classroom training for the hand-held computer.

Mr. McGrail testified that he did not offer Petitioner a permanent job within his restrictions because Petitioner did not even come in for an interview.

Mr. McGrail is not a Certified Rehabilitation Counselor or a vocational rehabilitation expert.

Both McGrail and McEnery testified that it was their strong preference to hire from within.

Mr. McEnery and Mr. McGrail testified that they were not contacted by Vocamotive about the operations at Euclid Beverage or the job requirements of the Warehouse Manager position.

CONCLUSIONS OF LAW

In support of his decision with regard to issue (F) "Is Petitioner's current condition of ill-being causally related to the injury?", the Arbitrator concludes as follows:

Petitioner's treating physician, Matthew J. Ross, M.D., opined that Petitioner had an L5-S1 disc herniation and foraminal stenosis. (Px.1)

Respondent's Section 12 examining physician, Christopher J. Bergin, M.D., wrote that Petitioner stated that on May 24, 2011, he injured his low back while lifting at work, and that he was asymptomatic prior to the lifting injury. Dr. Bergin opined that this lifting mechanism "is reasonable to aggravate an underlying degenerative condition, namely the synovial cyst and degenerative process at L4-5." Dr. Bergin further opined that if, indeed, John Bohentin was asymptomatic prior to this incident, then there is a causal relationship. (Rx.1)

Petitioner provided unrebutted testimony that prior to May 24, 2011, he never had a low back injury and never received medical care for a low back injury.

Therefore, the Arbitrator finds that a causal relationship exists between Petitioner's current condition of ill-being of his low back and the accidental injury of May 24, 2011.

In support of his decision with regard to issue (K) "What temporary benefits are in dispute? TTD and Maintenance", the Arbitrator concludes as follows:

Petitioner testified that he continued to work for Respondent from the date of the accident through November 22, 2011. On November 22, 2011, Petitioner attended a meeting with Emmett McEnery, Respondent's President and CEO, and Sonia Madalinski from Human Resources. At that meeting, Petitioner was told that light-duty work was no longer available. Respondent began to pay TTD benefits.

On February 6, 2012, Larry McGrail, Vice President of Operations for Respondent, authored a letter to Petitioner in which he invited Petitioner to interview for the position of Warehouse Manager that had just become available. (Rx.3)

Petitioner acknowledged receiving the letter from Mr. McGrail. Petitioner testified that he did not respond to the offer of an interview for the Warehouse Manager position because he did not feel he was qualified for the job.

On February 7, 2012, Respondent's Section 12 physician, Dr. Bergin, saw Petitioner for a follow-up evaluation. (Rx.2) After conducting a physical examination, Dr. Bergin reiterated his prior diagnosis that Petitioner had sustained an aggravation of the pre-existing degenerative conditions. Dr. Bergin presented the option of an epidural injection or a surgical procedure that would include a laminotomy and foraminotomy. The doctor noted that surgery would be "very elective." Petitioner "adamantly refused any further care." Dr. Bergin found that Petitioner "has clearly reached maximum medical improvement" and recommended a functional capacity evaluation and a return to work with those restrictions. Such restrictions would be permanent. (Rx.2)

Petitioner testified that he was willing to undergo the functional capacity evaluation, but that such test was never scheduled.

Respondent's third party administrator followed up with Petitioner's attorney with letters of March 1 and March 8, 2012. (Rx.5, Rx.6)

Petitioner returned to his treating physician, Dr. Ross, on February 28, 2012. Per Dr. Ross' report, Petitioner had not seen him since September 2011. Petitioner told Dr. Ross that his right leg symptoms had worsened. Dr. Ross prescribed a Medrol Dosepak. Petitioner agreed to

undergo a nerve block and transforaminal cortisone injection of the right L5 nerve root, and possibly the L4 nerve root. (Px.1) Dr. Ross referred him to the Du Page Pain Center. (Px.2)

Petitioner underwent two injections, which, per Petitioner's testimony, resulted in long-term pain relief for a couple of years.

Petitioner then returned to Dr. Ross on April 19, 2012. Dr. Ross recommended one more injection, but stated that if he did not experience any improvement, he recommended that Petitioner consider surgical decompression. Such injection was not authorized.

On April 24, 2012, Dr. Ross released Petitioner to return to work, effective April 25, 2012, with the following restrictions: "May lift up to 15 lbs. Alternate sit/stand as needed." (Px.1)

Accordingly, the Arbitrator finds that Petitioner is entitled to temporary total disability benefits from November 23, 2011 through April 24, 2012. Respondent is entitled to a credit in the amount of $13,360.71 for TTD benefits previously paid. (Ax.1, Section 9)

Petitioner claims that he is entitled to maintenance benefits from April 25, 2012 through June 8, 2015.

Section 8(a) of the Act, states, in pertinent part, the following:

"The employer shall also pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto. If as a result of the injury the employee is unable to be self sufficient the employer shall further pay for such maintenance or institutional care as shall be required *** The maintenance benefit shall not be less than the temporary total disability rate determined for the employee."

The Arbitrator notes that Section 8(a) requires the employer to pay only those maintenance costs and expenses that are incidental to rehabilitation. That means that an employer is obligated to pay maintenance benefits only "while a claimant is engaged in a prescribed vocational rehabilitation program." W.B. Olson, Inc. v. Illinois Workers' Compensation Commission, 981 N.E.2d 25, 366 Ill. Dec. 960 (1st Dist. 2012)

The Arbitrator notes that the Appellate Court has construed the statutory term "rehabilitation" broadly to include an injured employee's self-initiated and self-directed job search. Please see Roper Contracting v. Indus. Comm'n, 812 N.E.2d 65, 285 Ill. Dec. 476 (5th Dist. 2004) If a claimant is not engaged in some type of "rehabilitation" (i.e., physical rehabilitation, formal job training, or self-directed job search), the employer's obligation to provide maintenance is not triggered.

In the case at bar, Petitioner provided unrebutted testimony that he requested that Respondent provide vocational rehabilitation. Respondent did not provide vocational rehabilitation and did not draw up a vocational rehabilitation assessment or plan, pursuant to Section 7110.10 of the Rules Governing Practice Before the Illinois Workers' Compensation Commission.

Respondent did invite Petitioner to interview for the position of Warehouse Manager that had just become available. The physical requirements of the Warehouse Manager position were within Petitioner's work restrictions.

Petitioner testified that he declined to respond to Euclid Beverage and the opportunity to interview for the Warehouse Manager position.

Petitioner testified that at no point did he look for work.

Petitioner applied for, and then began receiving, social security disability benefits, retroactive to May 2012. The Social Security Decision is dated September 22, 2012. (Px.8)

A claimant is generally entitled to vocational rehabilitation when he sustains a work-related injury which causes a reduction in earning power and there is evidence rehabilitation will increase his earning capacity. National Tea Co. v. Indus. Comm'n, 454 N.E.2d 672, 73 Ill. Dec. 575 (1983). If an injured employee has sufficient skills to obtain employment without further training or education, that is a factor that weighs against an award of vocational rehabilitation. (Ibid.) Another factor to consider is the "trainability" of an injured employee, given his age, education, prior training and occupation. (Ibid.)

In Schoon v. Indus. Comm'n, 630 N.E.2d 1341, 197 Ill. Dec. 217 (3d Dist. 1994), the Appellate Court held that as the claimant did not want to return to work, an effort to rehabilitate him was not logical and therefore, rehabilitation is neither mandatory nor appropriate if an injured worker shows no intention of returning to work. However, Schoon is distinguishable from the case at bar in that the respondent there had initiated a vocational rehabilitation program and claimant chose not to participate in such program.

In the case at bar, Lisa Helma, C.R.C., opined that Petitioner did not have previous experience in the capacity of warehouse management, and, based upon the results of the Labor Market Survey, would not be a qualified candidate for current Warehouse Manager positions at other entities. The qualifications listed for Warehouse Manager or Warehouse Supervisor at NFI Industries, Sterling Engineering, and SD Wheels exceed John Bohentin's qualifications. Moreover, the fact that from the pool of 40 candidates considered for the Warehouse Manager position Respondent ultimately hired a man with five years of experience as an assistant

warehouse manager demonstrates that Respondent would, in all likelihood, not have offered the position to Petitioner if he had interviewed for it.

Ms. Helma opined that following the accidental injury, Petitioner was unable to return to his job of Sales Supervisor for Respondent due to his work restrictions and that he experienced a reduction in his earning power.

The Arbitrator finds the opinions of Ms. Helma to be more persuasive than the opinions of Messrs. McEnery and McGrail. Respondent did not offer the opinions of a vocational rehabilitation expert.

The Arbitrator likens Respondent's invitation to interview for the Warehouse Manager position to an invitation to interview for a position in which the physical requirements exceed Petitioner's work restrictions.

The Arbitrator concludes that as Petitioner was not qualified for the position of Warehouse Manager at Respondent, and as he was unable to return to his old job for Respondent and thus experienced a reduction in his earning power, he was entitled to receive vocational rehabilitation services and, consequently, maintenance benefits after he reached maximum medical improvement.

Petitioner has a high school education and, other than an incomplete class at a community college, denied any advanced education, trade or vocational school, military service or union apprenticeship. He denied having any mechanical, carpentry, electrical or plumbing skills. Petitioner completed formal, on-the-job training in sales. He has worked as a Delivery Driver and Sales Supervisor for 30 years. Such positions required him to lift up to 50 pounds and to bend, stoop and reach all day long. He worked four months as a Delivery Manager. He

previously had a CDL A driver's license, but as of April 27, 2015, had only a standard Illinois driver's license. He denied having any other licenses, certifications or skills of any kind.

Based on the facts and the law, the Arbitrator finds that Petitioner is entitled to maintenance benefits from April 24, 2012 through June 8, 2015.

In support of his decision with regard to issue (L) "What is the nature and extent of the injury?", the Arbitrator concludes as follows:

Petitioner's resume' indicates that from "1999-July", Petitioner worked as a Delivery Manager for Courtesy Distributors. (Px.6) He wrote in such resume' that he has hands-on experience in the wholesale to retail delivery of merchandise and on-the-spot problem solving for both on and off premises accounts. He further wrote that he is an enthusiastic team player and manager of delivery staff of 40 with a proven track record of maintaining superb customer satisfaction. Petitioner then identified his key areas of strength:

- Ability to manage all aspects of union delivery staff derived from 18 years experience in industry
- Employee scheduling, training, supervision and evaluation
- Managed customer complaint resolution and mechanisms for long (sic) solution implementation
- Developed programs and processes to monitor and control inventory shrinkage
- Consult daily with Director of Operations (Px.6)

Petitioner's position of Delivery Manager for Courtesy Distributors, which he held for four months, ended when Courtesy Distributors was purchased by another entity.

Petitioner began working for Respondent on December 6, 1999. He was hired as a Merchandiser.

Within the subpoenaed personnel file is the following February 22, 2007 entry that addresses Petitioner's abilities:

"John, if desired, has the ability to move up to management. John does a great job and is very organized. He is looked up to in the group." (Px.6)

On May 24, 2011, Petitioner held the position of Sales Supervisor for Respondent.

The Arbitrator notes that Petitioner used Respondent's hand-held computer when he worked as Sales Supervisor. Mr. McGrail testified that any training Petitioner would need in the inventory software system that Warehouse Managers use would be available. The Arbitrator further notes that Petitioner had a great deal of experience in sales and merchandising.

Notwithstanding, the Arbitrator has found the opinions of Lisa Helma, C.R.C., to be more persuasive than the opinions of Messrs. McEnery and McGrail.

Respondent argues that even though Petitioner was able to work, he voluntarily took himself out of the work force by declining the offer of an interview for Respondent's Warehouse Manager position, by not looking for a single job in over three years, and by applying for and receiving SSDI benefits, effective May 1, 2012.

A claimant's voluntary decision to remove himself from the work force does not preclude a wage differential award. Copperweld Tubing Products Co. v. Illinois Workers' Compensation Commission, 402 Ill. App. 3d 630, 634, 931 N.E.2d 762, 341 Ill. Dec. 865 (1st Dist. 2010) Instead, a wage differential award is determined by comparing the claimant's prior earning capacity to the amount he "is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2008); see Copperweld Tubing Products, 402

Ill. App. 3d at 634. Wood Dale Electric v. Illinois Workers' Compensation Commission, 986 N.E.2d 107, 369 Ill. Dec. 158 (1st Dist. 2013)

To receive a section 8 (d) (1) wage differential award, "an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she is able to earn". Cassens Transport Co. v. Indus. Comm'n, 218 Ill. 2d 530 (2006)

In regard to the differential rate per week, Respondent presented no vocational rehabilitation opinions or evidence. Petitioner had been compensated at the rate of $1,070.86 per week. (Ax.1) Petitioner retained a vocational rehabilitation expert, Lisa Helma, C.R.C., of Vocamotive. She submitted her opinions in the Initial Evaluation Report, the Labor Market Survey, and the Rehabilitation Plan. (Px.4) She opined that Petitioner would be expected to earn in a range of $9.00 to $12.00 per hour. Respondent presented no vocational rehabilitation evidence in opposition to the findings of Vocamotive as to the expected wage differential.

The Arbitrator selects the mid-point of this range, or $10.50 per hour, which equates to $420.00 for a 40-hour week. Thus, pursuant to Section 8(d)1 of the Act, the wage differential per week is ($1,070.86 – $420.00) x 2/3 = $433.91.

The Arbitrator finds that Petitioner is entitled to permanent partial disability benefits of $433.91/week, commencing on June 9, 2015 and continuing for the duration of the disability, because the injuries sustained caused an impairment of earnings, as provided in Section 8(d)1 of the Act.

Brian T. Cronin
Arbitrator

April 6, 2016
Date

Lawyers

2019 IL App (1st) 162747WC

FILED: March 22, 2019

NO. 1-16-2747WC

IN THE APPELLATE COURT

OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

KEVIN McALLISTER,	)	Appeal from
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 16L50097
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (North Pond, Appellee).	)	Honorable
	)	Ann Collins-Dole,
	)	Judge Presiding.

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

OPINION

¶ 1 Claimant, Kevin McAllister, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)), seeking benefits for a knee injury he sustained on August 7, 2014, while he was working as a sous chef for the employer, North Pond. Following a hearing, an arbitrator found that claimant sustained an accidental injury arising out of and in the course of his employment and awarded him temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits, and medical expenses. Additionally, the arbitrator imposed penalties under sections 19(k) and 19(*l*) of the Act (*id.* § 19(k), (*l*)) and attorney fees under section 16 of the Act (*id.* § 16), finding the employer's prior

refusal to pay TTD and medical expenses related to the August 7, 2014, work accident was dilatory, retaliatory, and objectively unreasonable.

¶ 2 The employer sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). The Commission, with one commissioner dissenting, found that claimant had failed to prove that his August 7, 2014, knee injury arose out of his employment and reversed the arbitrator's decision. Claimant appealed the Commission's decision to the circuit court of Cook County, which confirmed the Commission's decision.

¶ 3 This appeal followed.

¶ 4 I. BACKGROUND

¶ 5 Claimant worked for the employer as a sous chef. His job duties included checking orders, arranging the restaurant's walk-in cooler, making sauces, "prepping," and cooking.

¶ 6 On August 7, 2014, claimant was at work getting ready for service while the other restaurant employees were beginning to set up their stations. One of the cooks was looking for a pan of carrots he had cooked earlier in the day. Claimant testified that the cook was "busy doing other things" and claimant "had some time," so claimant began looking for the carrots. Claimant began his search in the walk-in cooler because that was where the cook said he had put the carrots. He checked the top, middle, and bottom shelves in the cooler, but he was unable to locate the carrots. Claimant testified that he then knelt down on both knees to look for the carrots under the shelves because "sometimes things get knocked underneath the shelves *** on[to] the floor." He did not find anything on the floor. As claimant stood back up, his right knee "popped" and locked up, and he was unable to straighten his leg. He "hopped" over to a table where he stood "for a second," and then hopped another 20 or 30 feet to the office where he told his boss about the injury.

¶ 7 During cross-examination, claimant testified that he was not carrying or holding anything when he stood up from a kneeling position and injured his knee. Nothing struck his knee or fell on his knee. He did not trip over anything, and he noticed no cracks or defects on the floor. Although claimant testified that it was "always wet" in the walk-in cooler, he did not notice "anything out of the ordinary" at the time of his injury. He did not claim that he slipped on a wet surface. Rather, he was simply standing up from a kneeling position when he felt his knee pop. Claimant agreed that the kneeling position he assumed while looking for the carrots was similar to the position he would be in while "looking for a shoe or something under the bed."

¶ 8 Shortly after the accident, the employer's general manager took claimant to the emergency room (ER) at St. Joseph's Hospital. Claimant reported experiencing a pop in his knee and a sudden onset of right knee pain after rising from a kneeling to standing position. After taking X-rays and evaluating claimant, the ER physicians assessed claimant as suffering from right knee pain and a possible ligamentous injury. They provided claimant with crutches and an Ace bandage and advised him to follow up with an orthopedic doctor and obtain a magnetic resonance imaging (MRI) scan.

¶ 9 On August 11, 2014, claimant saw Dr. David Garelick, an orthopedic surgeon at the Illinois Bone and Joint Institute. Dr. Garelick noted that he had surgically repaired the medial meniscus of claimant's right knee approximately one year earlier, on August 26, 2013. The doctor noted that claimant was doing well following that surgery until August 7, 2014, when he reinjured his right knee while standing up from a squatting position. Dr. Garelick diagnosed a possible recurrent medial meniscus tear of the right knee and ordered an MRI of that knee.

¶ 10 Two days later, an MRI was performed on claimant's right knee. The MRI showed a low-grade injury of the ACL without any complete disruption. There was also a buck-

et-handle tear of the medial meniscus and moderate knee joint effusion. Dr. Garelick opined that the recent MRI showed a re-tear of medial meniscus consistent with a bucket-handle medial meniscus tear. He recommended surgery.

¶ 11 On August 15, 2014, Dr. Garelick performed an arthroscopy and a partial medial meniscectomy on claimant's right knee. Dr. Garelick removed approximately 80% of claimant's medial meniscus because he concluded that the meniscal tear was not repairable. The postsurgical diagnosis was a bucket-handle medial meniscal tear of the right knee.

¶ 12 After the surgery, Dr. Garelick prescribed medication and physical therapy. Claimant testified that he attended only four of eight therapy sessions because therapy was expensive and he had to pay out of pocket, and because he was already familiar with the exercises from undergoing physical therapy in the past.

¶ 13 On September 15, 2014, Dr. Garelick released claimant to work without restrictions. He discharged claimant from care one week later. Claimant did not return to Dr. Garelick or to any other doctor for further treatment to his right knee.

¶ 14 As a result of the accident and his subsequent surgery, claimant was taken off work from August 8, 2014, until September 15, 2014, and he incurred $10,454.25 in medical expenses. Claimant paid out of pocket for his surgery, medication, and physical therapy. The employer took the position that claimant's right knee injury did not arise out of his employment, and it refused to pay claimant TTD benefits or medical expenses.

¶ 15 Claimant returned to work on September 15, 2014, and was working at the time of the arbitration hearing. He testified that he typically worked no more than 10 hours per day but that he sometimes worked up to 16 hours. His job required him to stand for all but one hour of each workday. Claimant's right leg felt sore and achy at times, and he sometimes experienced

sharp pain after working all day. His leg felt sore after work. Claimant took Ibuprofen or aspirin for his pain three or more days per week.

¶ 16 The arbitrator found claimant sustained an accidental injury arising out of and in the course of his employment on August 7, 2014. She determined claimant was injured due to an employment-related risk because he "was injured while performing his job duties, *i.e.*, looking for food products to prepare the food for service that evening." The arbitrator found that "[t]he act of looking for a food product was an act that the employer might reasonably have expected [claimant] to perform so that he could fulfill his assigned duties as a sous chef." She also found that claimant's current condition of ill-being was causally related to the work-related injuries he sustained on August 7, 2014, and awarded him TTD benefits, PPD benefits, and medical expenses. As stated, the arbitrator further imposed penalties under sections 19(k) and 19(*l*) of the Act and awarded claimant attorney fees under section 16 of the Act.

¶ 17 The employer sought review of the arbitrator's decision before the Commission. Ultimately, the Commission reversed, finding claimant failed to prove that he sustained an accidental injury arising out of his employment. It determined claimant's injury did not result from an employment-related risk as claimant was injured after "simply standing up after having kneeled one time" and such activity "was not particular to [claimant's] employment." The Commission, instead, found that claimant had been subjected to a neutral risk, "which had no particular employment or personal characteristics." Further, it found that the evidence failed to show that claimant was exposed to that neutral risk to a greater degree than the general public. Thus, it determined claimant was not entitled to compensation under the Act. On judicial review, the circuit court of Cook County confirmed the Commission's decision.

¶ 18 This appeal followed.

¶ 19 II. ANALYSIS

¶ 20 On appeal, claimant argues that the Commission erred in finding that he failed to prove that he sustained an accidental injury arising out of his employment.

¶ 21 As an initial matter, the parties dispute the standard of review that should govern our analysis. Claimant argues that we should review the Commission's decision *de novo* because the relevant facts are undisputed and susceptible to only one reasonable inference. The employer contends that the undisputed facts give rise to multiple reasonable inferences. Thus, the employer argues that we should affirm the Commission's decision unless it is against the manifest weight of the evidence. We agree with the employer.

¶ 22 "Whether a claimant's injury arose out of or in the course of his employment is typically a question of fact to be resolved by the Commission, and the Commission's determination will not be reversed unless it is against the manifest weight of the evidence." *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13, 991 N.E.2d 868. "However, when the facts are undisputed and susceptible to but a single inference, the question is one of law subject to *de novo* review." *Suter v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 15, 998 N.E.2d 971.

¶ 23 In this case, the facts relating to the circumstances and mechanics of claimant's injury are undisputed, *i.e.*, the parties agree that claimant injured his right knee at work while standing up from a kneeling position after looking for a missing pan of carrots in the walk-in cooler. However, those undisputed facts were subject to more than a single inference. Specifically, the facts could support different inferences as to whether looking for the misplaced carrots was required by or incidental to claimant's job duties. The facts could also support different inferences as to whether the risk of injury that claimant confronted at the time of his injury was

peculiar to or enhanced by his employment. Accordingly, we review the Commission's decision under the manifest weight of the evidence standard. See *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, ¶ 18, 13 N.E.3d 1252 (applying a manifest weight standard of review where the facts presented were subject to more than a single inference as to whether the claimant's act of reaching into a box was "one to which the general public was equally exposed or whether claimant was exposed to an increased risk by reaching beyond normal limits by virtue of his employment"). For a finding of fact to be against the manifest weight of the evidence, a conclusion opposite to the one reached by the Commission must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291, 591 N.E.2d 894, 896 (1992).

¶ 24 We now turn to the merits of claimant's argument. To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "ar[ose] out of" and "in the course of" his employment. 820 ILCS 305/1(d) (West 2014). Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105, 853 N.E.2d 799, 803 (2006). In the present case, the parties do not dispute that claimant's injury occurred "in the course" of his employment. The disputed issue in this appeal concerns the "arising out of" element of a workers' compensation claim.

¶ 25 The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 672 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393, 212 N.E.2d 882, 885 (1995). Rather, "[t]he 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has

"shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro*, 207 Ill. 2d at 203.

¶ 26 After determining the mechanism of a claimant's injury (which is undisputed in this case), the Commission's first task in determining whether the injury arose out of the claimant's employment is to categorize the risk to which the claimant was exposed in light of its factual findings relevant to the mechanism of the injury. *First Cash Financial Services*, 367 Ill. App. 3d at 105. There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116, 881 N.E.2d 523, 527 (2007); see also *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 552, 578 N.E.2d 921, 925 (1991) (noting that "neutral" in workers' compensation terms means "neither personal to the claimant nor distinctly associated with the employment" (internal quotation marks omitted)).

¶ 27 "Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act." *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC, ¶ 35, 67 N.E.3d 571. "Risks are distinctly associated with employment when, at the time of injury, 'the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.' " *Id.* (quoting *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989)); see also *The Venture—Newberg-Perini, Stone & Webster v. Illi-*

nois Workers' Compensation Comm'n, 2013 IL 115728, ¶ 18, 1 N.E.3d 535 (stating the supreme court "has found that injuries arising from three categories of acts are compensable: (1) acts the employer instructs the employee to perform; (2) acts which the employee has a common law or statutory duty to perform while performing duties for his employer; (3) acts which the employee might be reasonably expected to perform incident to his assigned duties"). "A risk is incidental to the employment when it belongs to or is connected with what the employee has to do in fulfilling his duties." *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45, 509 N.E.2d 1005, 1008 (1987).

¶ 28 Alternatively, neutral risks—risks that have no particular employment characteristics—"generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800, 804 (2011). "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Id.*; see also *Campbell "66" Express, Inc. v. Industrial Comm'n*, 83 Ill. 2d 353, 357, 415 N.E.2d 1043, 1045 (1980) (finding the Commission could reasonably conclude from the evidence presented "that the necessity for a truck driver to be on the highway at all times of the day and night, and in all kinds of weather, subjected the claimant *** to a greater risk of injury from [a] tornado than that to which the general public in that vicinity was exposed"); *Chmelik v. Vana*, 31 Ill. 2d 272, 280, 201 N.E.2d 434, 439 (1964) (stating that "[t]he regular and continuous use of the parking lot by employees, most particularly at quitting time when there is a mass and speedy exodus of the vehicles on the lot, would result in a degree of exposure to the common risk beyond that to which the general public would be subjected").

¶ 29 When categorizing risk, the "first step *** is to determine whether the claimant's injuries resulted from an employment-related risk." *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 38. "[W]hen a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Young*, 2014 IL App (4th) 130392WC, ¶ 23.

¶ 30 Here, the Commission determined claimant was not injured as the result of an employment-related risk. That finding is supported by the record and an opposite conclusion from that reached by the Commission is not clearly apparent.

¶ 31 The record shows claimant worked for the employer as a sous chef. His job duties included checking orders, arranging the employer's walk-in cooler, making sauces, "prepping," and cooking. Claimant was injured as he stood up from a kneeling position after volunteering to look for a misplaced pan of carrots for a coworker. However, he did not establish that he was instructed to perform, or that he had a duty to perform, that particular activity. Further, it does not appear the activity was incidental to his employment, in that it was not necessary to the fulfillment of his specific job duties. Ultimately, it was for the Commission to decide whether the risk to which claimant was subjected was incidental to his work for the employer. In this instance, the record was such that the Commission could properly find that the risk to claimant was too far removed from the requirements of his employment to be considered an employment-related risk. We find no error in the Commission's determination that the activity at issue had no particular employment characteristics and, therefore, claimant was not injured as the result of an employment-related risk.

¶ 32 Next, the Commission did characterize the risk to which claimant was exposed as a neutral risk; however, it also found that claimant failed to establish that he was exposed to that neutral risk to a greater degree than the general public and, therefore, his injury was non-compensable. Again, the record contains support for that decision, and an opposite conclusion is not clearly apparent.

¶ 33 Claimant testified that he was not carrying or holding anything when he stood up from a kneeling position and injured his knee. Nothing struck his knee or fell on his knee. Claimant did not trip over anything, and he did not notice any cracks or defects in the floor. Although claimant testified that it was "always wet" in the walk-in cooler, he did not notice "anything out of the ordinary," and he did not claim that he slipped on a wet surface. Rather, he was simply standing up from a kneeling position when he felt his knee pop. Claimant agreed that the kneeling position he assumed while looking for the carrots was similar to the position he would be in while "looking for a shoe or something under the bed." Ultimately, claimant failed to establish that his employment increased or enhanced his risk of injury in any way. See *Caterpillar Tractor*, 129 Ill. 2d at 62-63 (finding the claimant, who was injured while traversing a curb to reach his vehicle, was subjected to a noncompensable neutral risk); *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 30, 65 N.E.3d 530 (finding the claimant was not exposed to the neutral risk of reaching to retrieve a dropped pen to a greater degree than the general public); *Dukich v. Illinois Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC, ¶ 36, 86 N.E.3d 1161 (denying compensation where the claimant, who fell on pavement that was wet from rainfall, presented no evidence suggesting her employment duties contributed to her fall or enhanced her risk of slipping).

¶ 34 We hold the Commission's determination that claimant failed to show that his injury arose out of his employment was not against the manifest weight of the evidence. Although that holding is dispositive of claimant's appeal, we take this opportunity to address the special concurrence's contention that only a neutral-risk analysis should govern claims like the one in the case at bar, *i.e.*, those that involve "everyday activities" or common bodily movements. For the reasons that follow, we find that proposition of law is flawed and reject its application in both this case and those cases that are similarly situated.

¶ 35 As support for its contention, the special concurrence relies heavily on this court's decision in *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, 38 N.E.3d 587. There, the claimant welded locks while seated on a rolling chair. *Id.* ¶ 3. "He stated that his job required nonstop movement in the chair, including moving back and forth along the length of [his] workstation and swiveling from one point to another." *Id.* ¶ 13. Ultimately, the claimant injured his left knee as he attempted to turn his chair and his body to perform a welding task. *Id.* ¶ 3. The Commission denied the claimant benefits under the Act, finding his injury did not arise out of his employment as the claimant's " 'act of turning in his swivel chair did not expose him to a greater risk than that to which the general public is exposed, and it was not a risk distinctive to his employment.' " *Id.* ¶ 20.

¶ 36 On review, a divided panel of this court characterized the mechanism of the claimant's injury—turning in a chair—as "an activity of everyday life." *Id.* ¶ 33. Further, it held the claimant's risk of injury was not one that was distinctly associated with his employment but, instead, "a neutral risk of everyday living faced by all members of the general public." *Id.* As a result, to obtain compensation, the claimant had to show that he was exposed to that neutral risk to a greater degree than the general public. *Id.* In the end, the majority held the claimant made

such a showing by presenting evidence that his job "required him to turn in a chair more frequently than members of the general public while under time constraints" and reversed the Commission's decision. *Id.* ¶ 34.

¶ 37 In reaching its decision, the *Adcock* majority set forth the following proposition of law:

> "The Commission should not award benefits for injuries caused by everyday activities like walking, bending, or turning, even if an employee was ordered or instructed to perform those activities as part of his job duties, unless the employee's job required him to perform those activities more frequently than members of the general public or in a manner that increased the risk. In other words, a 'neutral risk' analysis should govern such claims." *Id.* ¶ 39.

Under the *Adcock* majority's rule, a claimant who is injured while performing "everyday activities" or common bodily movements can only obtain compensation under the Act by comparing his or her activities or movements to those of the general public. Per *Adcock*, this is true even in situations where the activity or movement is directly related to the specific duties of employment. Accordingly, pursuant to *Adcock* (and the special concurrence), bodily movements, including turning, bending, kneeling, pushing, pulling, reaching, stretching, *etc.*, must always be viewed as common to the general public and cannot be considered distinct or peculiar to the nature of an individual's employment. *Infra* ¶ 88 ("the risks presented by such everyday activities [(such as bending or kneeling)] are not peculiar to any particular line of employment").

¶ 38 Here, the special concurrence proposes adherence to the neutral-risk definition and analysis adopted by the majority in *Adcock*. *Infra* ¶ 80. However, we note that *Adcock's* analysis is at odds with other decisions of this court—decided both before *Adcock* (*Young*, 2014

IL App (4th) 130392WC; *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, 990 N.E.2d 901; *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 729 N.E.2d 523 (2000)) and after that decision was issued (*Steak 'n Shake*, 2016 IL App (3d) 150500WC; *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC, 67 N.E.3d 946; *Noonan*, 2016 IL App (1st) 152300WC). In particular, the risk analysis utilized in those cases does not automatically exclude from the definition of an employment-related risk activities that might involve common bodily movements or which *Adcock* terms "everyday activities." Accordingly, we reject *Adcock* and its legal analysis. In doing so, we hold that the definition of a neutral risk as set forth in *Adcock* is inconsistent with the purpose of the Act, overly broad, and unsupported by supreme court precedent.

¶ 39 Initially, we find *Adcock's* statement of law is contrary to the intentions of the Act, as well as the requirement that it must be liberally construed. "The purpose of the Workmen's Compensation Act is to protect the employee against risks and hazards which are peculiar to the nature of the work he is employed to do." *Fisher Body Division, General Motors Corp. v. Industrial Comm'n*, 40 Ill. 2d 514, 517, 240 N.E.2d 694, 696 (1968); see also *Ceisel v. Industrial Comm'n*, 400 Ill. 574, 582, 81 N.E.2d 506, 511 (1948) ("What the law intends is to protect the employee against the risks and hazards taken in order to perform the master's task ***."). As stated, "[t]o obtain compensation under th[e] Act, an employee bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment." 820 ILCS 305/1(d) (West 2014). Further, the Act is "a remedial statute," which "should be liberally construed to effectuate its main purpose—providing financial protection for injured workers." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 149, 923 N.E.2d 266, 275 (2010).

¶ 40 The special concurrence concludes that *Adcock* is more consistent with the Act's purpose than the rationale applied in this case. However, the manner in which *Adcock* addresses "the arising out of" element gives the Act a narrow construction by broadening the definition of a neutral risk. Such a broad definition bears little resemblance to supreme court precedent (see *infra* ¶ 62 of this opinion for supreme court cases applying a neutral-risk type of analysis). Again, injuries resulting from a neutral risk do not have any particular employment characteristics. *Potenzo*, 378 Ill. App. 3d at 116. They generally do not arise out of the employment and, for such injuries to be compensable, a claimant must establish exposure to the neutral risk to a greater degree than the general public. *Metropolitan Water*, 407 Ill. App. 3d at 1014. An *Adcock* analysis will, in effect, place an extra evidentiary burden on many employees who are injured while performing their job duties or activities closely connected with the fulfillment of their assigned duties by requiring those employees to present evidence comparing their activities with those of the general public. In addition, as pointed out by the special concurrence in *Adcock*:

> "The problem with the majority's analysis is that many workers are employed for the very purpose of engaging in actions and movements performed by the general public. This method of analysis then leads us *** to perform a neutral-risk analysis when a worker has been injured performing the very tasks he was hired to perform. If workers' injuries are first examined to determine whether they were reaching, turning, bending, squatting, or engaging in other common bodily movements at the precise moment of injury, virtually all industrial injuries could be categorized as neutral risks." 2015 IL App (2d) 130884WC, ¶ 56 (Stewart, J., specially concurring, joined by Harris, J.).

¶ 41 Further, our supreme court has set forth, without qualification, the following prin-

ciples for determining whether an injury arises out of employment:

> "The 'arising out of' component is primarily concerned with causal connection. To satisfy this requirement it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury. [Citation.] Stated otherwise, 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. [Citations.] A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties. [Citation.]' " *Sisbro*, 207 Ill. 2d at 203-04.

See also *Ace Pest Control, Inc. v. Industrial Comm'n*, 32 Ill. 2d 386, 388, 205 N.E.2d 453, 454 (1965) ("The *** Act was not intended to insure employees against all accidental injuries but only those which arise out of acts which the employee is instructed to perform by his employer; acts which he has a common law or statutory duty to perform while performing duties for his employer [citations]; or acts which the employee might be reasonably expected to perform incident to his assigned duties."); *Venture—Newberg-Perini*, 2013 IL 115728, ¶ 18 ("This court has found that injuries arising from three categories of acts are compensable: (1) acts the employer instructs the employee to perform; (2) acts which the employee has a common law or statutory duty to perform while performing duties for his employer; (3) acts which the employee might be reasonably expected to perform incident to his assigned duties."); *Caterpillar Tractor*, 129 Ill. 2d at 58 ("[f]or an injury to 'arise out of' the employment its origin must be in some risk connected

with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury" and "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties").

¶ 42 Thus, supreme court precedent makes clear that an injury should be deemed to have resulted from an employment risk when the risk causing the injury originates from one of the following three types of acts—acts (1) the claimant was instructed to perform by his employer, (2) the claimant had a common law or statutory duty to perform, or (3) that were incidental to the claimant's assigned duties. Risks attendant to these categories of activities have their origin in the claimant's employment. When an employee is injured while performing such acts it cannot be said that he is subject to a neutral risk, *i.e.*, a risk that has no particular employment characteristics and is common to the general public.

¶ 43 The special concurrence suggests that, while proof that an act falls within one of the three categories of acts identified by the supreme court is *necessary* to establish the "arising out of" requirement, such proof alone is not *sufficient* to satisfy that requirement. *Infra* ¶ 87. According to the special concurrence, once one of the above three types of acts is established, supreme court precedent requires an additional analysis be undertaken to determine whether the case involves a risk that is distinct or peculiar to the employment versus a risk that is common to the general public. *Infra* ¶ 88. Our research reveals no supreme court decision that supports such an analysis. In fact, *Sisbro* itself contradicts the special concurrence's interpretation of its language:

"[W]hether 'any normal daily activity is an overexertion' or whether 'the activity

> engaged in presented risks no greater than those to which the general public is exposed' are matters to be considered when deciding whether a sufficient causal connection between the injury and the employment has been established in the first instance. We have never found a causal connection to exist between work and injury and then, in a further analytical step, denied recovery based on a 'normal daily activity exception' or a 'greater risk exception.' " 207 Ill. 2d at 211-212.

¶ 44 We find that it is when any of the aforementioned three categories of acts are determined to be present that the risk resulting in injury is "distinctly associated with the employment," *i.e.*, not a neutral risk that is subject to a neutral-risk analysis. See *Brady*, 143 Ill. 2d at 552. For example, in *County of Peoria v. Industrial Comm'n*, 31 Ill. 2d 562, 564, 202 N.E.2d 504, 505 (1964), an off-duty sheriff's deputy was struck by a vehicle and killed while attempting to push a car from a ditch. The employer argued the decedent was not entitled to compensation, in part, because "he was subjected to the accident by virtue of risks to which the general public is exposed and not by reason of his employment." *Id.* The supreme court disagreed, stating that "[w]hile there is no legal duty upon a member of the general public to stop and give aid [citation], the proof [in the case before it] established the existence of such duty upon all deputies in the *** sheriff's office." *Id.* It then held as follows: "It is the *presence of that duty* here which, in our judgment, distinguishes decedent from a member of the general public in his assistance at the scene of this accident, and exposed him to a risk greater than that faced by the public generally." (Emphasis added.) *Id.* at 564-65. Stated another way, the fact that the employee had a legal duty to act, *i.e.*, a common law or statutory duty to act (category number two in the three aforementioned categories specified in *Venture—Newberg-Perini*), means that his injury was the result of an employment-related risk—a risk that was distinct to his employment.

¶ 45 The nature of an employee's work and the specific duties he or she is required to perform are what determine whether an employee is subjected to an employment risk rather than a neutral risk. In fact, in *County of Peoria*, the supreme court distinguished cases where "the risk in which the accident had its origin was not connected with [the employee's] employment in any manner" and where the employee was injured while "not performing any of the duties of his employment." (Internal quotation marks omitted.) *Id.* at 565. The analysis employed by both *Adcock* and the special concurrence is flawed because it would require injuries resulting from "everyday activities" or common bodily movements to automatically be deemed to have resulted from neutral risks, *i.e.*, those that have no particular employment characteristics and are common to the general public, without any inquiry into, or consideration of, the nature of an employee's work for the employer and his specific job duties.

¶ 46 The special concurrence suggests that the phrase "incidental to" employment (the phrase used by the supreme court to describe the third category of compensable acts) is excessively vague and renders the majority analysis in this case unworkable. *Infra* ¶ 80. It asserts courts will struggle to determine what actions are "incidental to" employment without any evidence on the subject. However, our supreme court instructs that "[a] risk is incidental to the employment when it belongs to or is connected with what the employee *has to do* in fulfilling his duties." (Emphasis added.) *Orsini*, 117 Ill. 2d at 45. Contrary to the special concurrence's argument, there is no guesswork here. The Commission, in exercising its judgment, may determine what acts are incidental to a claimant's employment by considering evidence of the nature of the employment and the claimant's specific job duties. If the act the claimant is performing at the time of injury was not necessary to the fulfillment of his specific job duties, then the act is not incidental to the employment.

¶ 47 Conversely, an *Adcock*-type analysis presents its own definitional problem and invites decisions by the Commission based on speculation or gut level assumptions in the absence of evidence. Under *Adcock*, the Commission would be called upon to determine whether the claimant's risk of injury stems from an "everyday activity," a term that is left undefined in *Adcock* and by the special concurrence, and, if it does, whether there is some feature of the employment that enhances the common risk, either quantitatively or qualitatively, beyond that faced by the general public. Under *Adcock*, an employee whose injury involves a common bodily movement must always establish that he was exposed to an increased risk of injury, either quantitatively or qualitatively, as compared with the general public. However, on what evidence would the Commission be able to deem an employee's common bodily movements, or their frequency, the same as or different from the common bodily movements engaged in by the general public? What sort of evidence would be necessary to establish how often and in what manner members of the general public typically reach, bend, turn, or twist? Would the parties routinely be required to hire expert witnesses to address the *Adcock* neutral-risk analysis? In none of our previous decisions involving employment-risk versus neutral-risk alternatives was evidence presented that would have allowed the Commission to gauge the general public's common bodily movements. Without such evidence, an *Adcock* analysis will necessarily rest on speculation and conjecture, an infirmity that is not present under the majority analysis.

¶ 48 Ultimately, we find it is clearer and more straightforward to focus the employment risk inquiry on whether the injury-producing act was required by the claimant's specific job duties and not whether it could further be considered an "activity of everyday living." Activities necessary to the fulfillment of a claimant's job duties present risks that are distinct or peculiar to the employment and, as a result, are not common to the general public. In our previous appellate

court decisions addressing this issue—*Steak 'n Shake*, *Mytnik*, *Young*, and *Autumn Accolade*—the claimants were performing activities required by their employment and best characterized as employment-related risks. Although the special concurrence suggests each of these claimants might "arguably" have been held entitled to benefits under a neutral-risk analysis (*infra* ¶ 105), there is no indication in any of these cases that evidence existed which would have supported an *Adcock*-type neutral-risk analysis, such as evidence of the general public's frequency of wiping tables (*Steak 'n Shake*), bending (*Mytnik*), or reaching (*Young* and *Autumn Accolade*).

¶ 49 The special concurrence further cites our decision in *Noonan*, 2016 IL App (1st) 152300WC, as an example of how the majority standard is unworkable. *Infra* ¶ 107. In that case, the claimant worked for the employer as a clerk, and his job duties included filling out forms. *Noonan*, 2016 IL App (1st) 152300WC, ¶ 4. Evidence showed the claimant injured his wrist when he reached to retrieve a dropped pen while seated in a rolling chair and fell out of his chair. *Id.* ¶ 5. Employing the same analysis we employ here, we agreed with the Commission's determination that the claimant's injury did not arise out of his employment. *Id.* ¶ 36.

¶ 50 The special concurrence suggests that, under the majority analysis, there was no basis to deny benefits in *Noonan* because the claimant was injured while performing an act incidental to his job duties. *Infra* ¶ 107. We disagree with that characterization. The special concurrence essentially defines "incidental to employment" in a way that is the equivalent of the "positional-risk doctrine," in that it would require no more than that a claimant be present at work to support a finding of compensability. See *Brady*, 143 Ill. 2d at 552 ("Under the positional risk doctrine, an injury may be said to arise out of the employment if the injury would not have occurred but for the fact that the conditions or obligations of the employment placed claimant in the position where he was injured by a neutral force, meaning by 'neutral' neither personal to the

claimant nor distinctly associated with the employment." (Internal quotation marks omitted.)). That is not the majority holding. Rather, we recognize that an injury arises out of employment when the employee was performing acts "which the employee might reasonably be expected to perform incident to his assigned duties" and that "[a] risk is incidental to the employment where it belongs to or is connected with what an employee *has to do* in fulfilling his duties." (Emphasis added and internal quotation marks omitted.) *Sisbro*, 207 Ill. 2d at 204. In *Noonan*, the claimant was reaching to retrieve a pen that he dropped as a result of his own clumsiness. The evidence did not establish that he was performing an act that was "incidental to," or what he had to do in, the fulfillment of his specific job duties. Thus, it was not against the manifest weight of the evidence for the Commission to find that the risk resulting injury did not "belong to" or was "connected with" what the claimant "had to do" in filling out forms. See *id.*

¶ 51 We note the special concurrence explicitly asserts that injuries involving common bodily movements can never be found to have resulted from a risk that is peculiar or distinct to a particular line of employment. *Infra* ¶ 88 ("[T]he risks presented by *** activities [(like bending or kneeling)] are not peculiar to any particular line of employment."). However, it contradicts that explicit assertion when addressing this court's decision in *O'Fallon*, 313 Ill. App. 3d 413. In that case, the claimant was a teacher who was "assigned to hall duty." *Id.* at 414. Evidence showed she experienced back pain after she "turned, twisted, and began to pursue" a child who was running in the hallway. *Id.* at 415. Initially, both the arbitrator and the Commission denied the claimant benefits on the basis that the claimant's injuries did not arise out of her employment. *Id.* at 414. This court disagreed with that conclusion, stating as follows:

> "Contrary to the arbitrator's conclusion and the Commission's initial decision, claimant's injury did have an origin in a risk arising out of her employment. [The]

> [c]laimant was ordered specifically to undertake the risk of pursuing a running student. The need to turn, twist, and pursue a child, thereby stressing her back, is a risk that would not have existed but for [the] claimant's employment obligations as hall monitor." *Id.* at 417.

Significantly, the claimant's risk of injury was not deemed to have been a neutral one—one common to the general public—and, in finding claimant's risk of injury originated in her employment, this court did not engage in any analysis to determine whether the claimant's risk of injury was either quantitatively or qualitatively enhanced by some aspect of her employment. *id.* Rather, it was because the claimant was performing acts she was instructed to perform that she was exposed to an employment-related risk and not one that was common to the general public. *Id.*

¶ 52 The special concurrence states that it agrees with the analysis employed in *O'Fallon* and finds *O'Fallon* distinguishable from *Adcock* on the basis that "the risk at issue in *O'Fallon* was distinctly associated with (*i.e.*, 'peculiar to') the claimant's employment, rendering a neutral risk analysis unnecessary and inappropriate." *Infra* ¶ 100. Again, however, *O'Fallon* involved common bodily movements like turning and twisting. How are these common bodily movements any different from the acts of bending, reaching, or kneeling, which the special concurrence suggests can never be distinctly associated with, or peculiar to, an individual's employment? Rather than distinguishable, we find *O'Fallon* and *Adcock* are factually similar in that they both involved claimants who were performing acts required by their employment and acts that also happened to involve common bodily movements. As discussed, the claimant in *O'Fallon* injured her back as she turned and twisted her body to pursue a student (313 Ill. App. 3d at 415), whereas the claimant in *Adcock* injured his left knee when he "rotated his left knee

inward and turned his body to weld" (2015 IL App (2d) 130884WC, ¶ 3).

¶ 53 Ultimately, the analysis employed in *O'Fallon* is inconsistent with the analysis employed in *Adcock*. The special concurrence's attempt to distinguish the two cases fails and will only result in confusion for those attempting to reconcile them.

¶ 54 The special concurrence in this case also maintains that the supreme court's decisions in *Caterpillar Tractor*, 129 Ill. 2d 52, and *Orsini*, 117 Ill. 2d 38, are consistent with the analysis employed in *Adcock* and contradicted by the majority holding. *Infra* ¶ 80. However, aside from stating the same well known propositions of workers' compensation law, neither supreme court decision in any way supports *Adcock* nor do they conflict with our analysis in this case.

¶ 55 In *Caterpillar Tractor*, the claimant was a carton packer who completed his shift, left his employer's building to go to his car, and was injured as he stepped off a curb on the employer's property. 129 Ill. 2d at 56. When considering whether the claimant's injury arose out of his employment, the supreme court "first consider[ed] whether the [claimant's] injury resulted from the condition of the employer's premises." *Id.* at 59. Finding that it did not, the court "next consider[ed] whether the claimant was subjected to a greater degree of risk than the general public because of his employment." *Id.* at 61. Ultimately, it determined that the claimant did not prove that he was exposed to a risk not common to the general public. *Id.* at 62.

¶ 56 *Caterpillar Tractor* is factually distinguishable from *Adcock*. In particular, the claimant in *Caterpillar Tractor* was not injured while performing his job duties and there was no apparent connection to the claimant's employment other than that he was injured while on the employer's premises. Moreover, nothing in the supreme court's analysis indicates an intention to employ an *Adcock*-like analysis for cases involving common bodily movements. *Caterpillar*

Tractor simply sets forth the same general principles of workers' compensation law as a multitude of other cases. Neither the facts of that case nor the supreme court's rationale require a different analysis than we employ here.

¶ 57 The supreme court's decision in *Orsini* is also not factually similar to *Adcock* (or the class of cases to which the special concurrence seeks to apply it), and it does not support *Adcock's* definitions of risk. In *Orsini*, 117 Ill. 2d at 41, the claimant was employed by a service station as an automobile mechanic. While awaiting the delivery of parts needed to complete work for his employer, the claimant began adjusting the carburetor on his personal automobile. *Id.* at 42. He was then injured when his car malfunctioned and suddenly lurched forward, pinning his legs between the car and a work bench. *Id.* Ultimately, the supreme court affirmed the Commission's decision that the claimant's injury did not arise out of his work for the employer. *Id.* at 49.

¶ 58 In reaching its decision, the supreme court, again, set forth several well-established principles for compensability under the Act, including that (1) an injury arises out of employment if it "has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury," (2) that to arise out of employment "the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public," and (3) that a risk is incidental to employment "when it belongs to or is connected with what the employee has to do in fulfilling his duties." *Id.* at 45. The court next noted prior, similar decisions that held "the risk of injury in repairing or working on one's personal automobile is not ordinarily related or incidental to the duties for which [a mechanic] is employed." *Id.* at 46. Further, it stated that, in those cases, the risk from repairing one's own vehicle was deemed "personal in nature" and "*totally unrelated* either

to the duties of [the mechanic's] employment or the condition of [the] employer's premises." (Emphases added.) *Id.*

¶ 59 The supreme court went on to point out that the claimant's injury in the case before it "came about solely as a result of a defect in [the claimant's] car" and was not due to the requirements of his employment. *Id.* at 46-47. The court also stated the claimant's car "served no purpose relative to his employment duties" and that he had "voluntarily exposed himself to an unnecessary danger *entirely separate* from the activities and responsibilities of his job." (Emphasis added.) *Id.* at 47. Further, the court noted as follows:

> "This court has consistently held that where the injury results from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable. [Citations.] Conversely, in those cases where liability was imposed, the injury to the employee occurred as a direct result of a defect in the employer's premises or *was directly related to the specific duties of employment*." (Emphasis added.) *Id.* at 47-48.

Ultimately, the court emphasized that the claimant's injuries were "strictly personal and *totally unrelated to the duties of employment* or the conditions of the employer's premises." (Emphasis added.) *Id.* at 48.

¶ 60 A review of the supreme court's analysis in *Orsini* in its entirety reflects that it does not stand for the proposition set forth in *Adcock* and advocated by the special concurrence in this case. First, *Orsini* is factually distinguishable from those situations addressed by *Adcock* and the special concurrence, where an employee is injured while inarguably performing his job duties and those duties involve common bodily movements or "everyday activities." In *Orsini*, the claimant was not performing any activities necessary or incidental to the fulfillment of his

job duties. There was also no "everyday activity" or common bodily movement involved in his injury. Second, the supreme court's decision demonstrates the importance that the nature of a claimant's employment and his specific job duties should play when an arising-out-of determination is made. In fact, the court in *Orsini* stated several times in its decision that the claimant's injury was in no way related to the duties of his employment. Significantly, it stated that liability is found to exist under the Act when the employee's injury "was directly related to the specific duties of employment." *Id.* 47-48.

¶ 61 We find *Orsini*, given its emphasis on the duties of a claimant's employment relative to risk, is consistent with our unanimous decision in *Young* and the following determination in that case:

> "[W]hen a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public. A neutral risk has no employment-related characteristics. Where a risk is distinctly associated with the claimant's employment, it is not a neutral risk." *Young*, 2014 IL App (4th) 130392WC, ¶ 23.

¶ 62 The special concurrence asserts that the majority analysis cannot be reconciled with at least three previous decisions of this court. *Infra* ¶ 90. Assuming, arguendo, that the special concurrence is correct, the same is true of the analysis employed by *Adcock* and the special concurrence as highlighted herein. However, while there may be a lack of complete uniformity among appellate decisions, we maintain that *Young*, the cases upon which *Young* relied (including *Autumn Accolade*), and its progeny are consistent with the manner in which the neutral-risk analysis has historically been applied. This court has stated that "[n]eutral risks include stray bul-

lets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163, 731 N.E.2d 795, 806-07 (2000). Supreme court case authority bears this out, demonstrating that it has performed a neutral-risk analysis, thereby considering whether a claimant was exposed to a common risk to a greater degree than the general public, in those circumstances which show no apparent connection to the employee's job duties. See *Brady*, 143 Ill. 2d at 545 (truck crashed into the employer's building); *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 481, 546 N.E.2d 603, 604 (1989) (slip and fall in a mall common area); *Caterpillar Tractor*, 129 Ill. 2d at 56 (stepping off a curb); *Doyle v. Industrial Comm'n*, 95 Ill. 2d 103, 104-05, 447 N.E.2d 310, 311 (1983) (vehicle accident while exiting the employer's parking lot); *Campbell "66" Express*, 83 Ill. 2d at 355 (tornado); *Jones v. Industrial Comm'n*, 78 Ill. 2d 284, 285, 399 N.E.2d 1314, 1315 (1980) (car door closed on employee's hand in the employer's parking lot); *Eisenberg v. Industrial Comm'n*, 65 Ill. 2d 232, 233, 357 N.E.2d 533, 534 (1976) (assault on employee while walking to her car after work); *Thurber v. Industrial Comm'n*, 49 Ill. 2d 561, 562-63, 276 N.E.2d 316, 316 (1971) (inexplicable attack by coworker); *Inland Steel Co. v. Industrial Comm'n*, 41 Ill. 2d 70, 71, 241 N.E.2d 450, 451 (1968) (severe storm); *J.I. Case Co. v. Industrial Comm'n*, 36 Ill. 2d 386, 387, 223 N.E.2d 847, 848 (1966) (lightning strike); *Chmelik*, 31 Ill. 2d at 274 (struck by automobile in parking lot); *Hill-Luthy Co. v. Industrial Comm'n*, 411 Ill. 201, 202, 103 N.E.2d 605, 606 (1952) (lighting cigarette and injured by a defective match head); *Permanent Construction Co. v. Industrial Comm'n*, 380 Ill. 47, 48, 43 N.E.2d 557, 558 (1942) (contraction of typhoid fever); *Borgeson v. Industrial Comm'n*, 368 Ill. 188, 189, 13 N.E.2d 164 (1938) (stray bullet).

¶ 63 In other cases, the supreme court has declined to find that an accidental injury was the result of a neutral risk when the employee was performing his job duties. As stated, in *Coun-*

ty of Peoria, 31 Ill. 2d at 564, an off-duty sheriff's deputy was found subject to an employment risk rather than a neutral risk based on his specific job duties, duties which, because of his employment, he had a legal obligation to perform.

¶ 64 Additionally, the supreme court's holding in *Memorial Medical Center v. Industrial Comm'n*, 72 Ill. 2d 275, 381 N.E.2d 289 (1978), is instructive. There, the claimant, who was employed in the housekeeping department of a hospital, was injured when she "bent over" to polish a spot on a door's kickplate. *Id.* at 278. The Commission found the claimant sustained a compensable injury, and the employer appealed. *Id.* at 277. On review, the employer argued "that the act of bending forward [was] a routine motion not peculiar to [the claimant's] work, that the true cause of her disability was her obesity[,] and that the evidence show[ed] that she was not, as a result of her employment, subjected to any greater risk than the public at large." *Id.* at 279. The supreme court rejected the employer's argument and determined the Commission's finding of compensability was not against the manifest weight of the evidence. *Id.* at 281. This decision illustrates that when given the opportunity to broadly hold that common bodily movements, such as bending, are always subject to a neutral-risk analysis, the supreme court has declined to do so.

¶ 65 The special concurrence further asserts that the majority approach is "in tension" with supreme and appellate court decisions that involve the denial of compensation where the employee's health has so deteriorated that the performance of any normal daily activity could have caused the claimant's injury. *Infra* ¶¶ 96-97; see *Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App. 3d 284, 286, 574 N.E. 2d 1244, 1245 (1991) (day-care worker who was seated in a child-sized chair and experienced pain in her knee as she attempted to stand); *Hopkins v. Industrial Comm'n*, 196 Ill. App. 3d 347, 348, 553 N.E.2d 732, 733 (1990)

(employee who turned in his chair to answer a coworker's question and felt a pop in his back); *Greater Peoria Mass Transit District v. Industrial Comm'n*, 81 Ill. 2d 38, 40, 405 N.E.2d 796, 797 (1980) (bus driver who suffered a shoulder injury after she dropped paperwork, leaned over, lost balance, and struck her shoulder); *County of Cook v. Industrial Comm'n*, 68 Ill. 2d 24, 27, 368 N.E.2d 1292, 1293 (1977) (employee who suffered a stroke as she arose from her desk to go to lunch); *Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill. 2d 207, 209, 254 N.E.2d 522, 523 (1969) (employee who turned in his chair after hearing a noise and experienced back pain). It maintains that none of the above-cited cases "makes sense" under the majority's analysis because, under our analysis, the reviewing courts in those cases "would each have found an injury arising out of the claimant's employment without any need to perform a neutral risk analysis." *Infra* ¶ 97.

¶ 66 Again, we must disagree. First, the special concurrence seems to suggest that each of the cases it cites involved a claimant who was performing acts connected with or incidental to his or her employment, and that compensation was denied irrespective of such circumstances. *Infra* ¶ 97. However, the opposite is true. See *Board of Trustees*, 44 Ill. 2d at 214-15 (stating that the claimant's back injury, which occurred when he turned in his chair, "was not caused by a risk incidental to the employment"). In the cases cited, the injuries at issue were found to be unrelated to employment and to have arisen, instead, from a risk personal to the employee as shown by the medical evidence. See *Greater Peoria Mass Transit District*, 81 Ill. 2d at 41 ("[T]he risk of [shoulder] dislocation was personal to [the claimant] and her injury [was] thereby rendered noncompensable under the Act."). In particular, medical evidence demonstrated that each employee had prior health issues and such degenerated physical conditions that any activity could have caused the injuries the claimants ultimately experienced. However, even in the absence of

such medical evidence, the risks at issue in those cases likely would have been deemed neutral risks under the same approach that we employ in this case.

¶ 67 Second, the special concurrence ignores the fact that, in order to satisfy the "arising out of" component, a claimant bears the burden of establishing not only that a workplace accident occurred but, in addition, that it caused his injury. *Cassens Transport Co. v. Industrial Comm'n*, 262 Ill. App. 3d 324, 330, 633 N.E.2d 1344, 1348 (1994) ("The claimant in a worker's compensation proceeding has the burden of proving by a preponderance of the credible evidence that the injury arose out of and in the course of employment, and that involves as an element a causal connection between the accident and the condition of claimant."). In other words, even if a claimant can establish an accident originating from an employment-related risk, he or she must still establish a causal connection between that accident and the resulting condition of ill-being. Certainly, where the evidence presented at arbitration supports a finding that the risk of injury was due to a degenerated physical condition, or was otherwise solely personal to the employee, recovery can and should be denied.

¶ 68 Once again, "neutral risks *** have no particular employment or personal characteristics." *Illinois Institute*, 314 Ill. App. 3d at 162. In this case and the others we rely on that employ a similar analysis, issues of personal risk and degenerated physical conditions do not appear to have been at issue. Instead, the Commission and the reviewing courts were essentially presented with employment-risk and neutral-risk alternatives. Under such circumstances, it is appropriate to first consider whether the risk at issue had employment-related characteristics and evidence of such should not be disregarded in favor of automatically finding that an injury arises from a neutral risk simply because the act involves a common bodily movement or "everyday activity." This is the critical point on which we disagree with *Adcock* and the special concur-

rence.

¶ 69 Ultimately, what makes a risk distinct or peculiar to the employment is its origin in, or relationship to, the specific duties of the claimant's employment. A risk that is required by the claimant's employment and necessary to the fulfillment of the claimant's job duties removes it from the realm of what is common to the general public (a neutral risk) even if the activities attendant to the risk have neutral characteristics, *i.e.*, involve common bodily movements. Although case law has defined neutral risks as those that have no particular employment or personal characteristics, it has not similarly defined employment risks as having no particular neutral characteristics.

¶ 70 Finally, the special concurrence suggests that our analysis expands liability for benefits beyond what the legislature intended and would require a finding of compensability for all injuries simply because they occurred at work. *Infra* ¶ 113. However, as illustrated by this case and our decision in *Noonan*, that is simply not the case. It is the manner in which the special concurrence would analyze what is "incidental to" employment, essentially equating it with "positional risk," that collapses the distinction between the "arising out of" and "in the course of" components of compensation, and not the majority decision. The special concurrence appears critical of the term "incidental to," suggesting that it encompasses activities with no significant relationship to employment. *Infra* ¶ 114. However, the special concurrence ignores the fact that this term is used by supreme court in defining when a risk originates in employment. See *Sisbro*, 207 Ill. 2d at 203; *Caterpillar Tractor*, 129 Ill. 2d at 58; *Orsini*, 117 Ill. 2d at 45.

¶ 71 The special concurrence also ignores that "[a] risk is incidental to the employment when it belongs to or is connected with what the employee *has to do* in fulfilling his duties." (Emphasis added.) *Orsini*, 117 Ill. 2d at 45. If "incidental to" employment were to be defined to

include any action that occurs within the time and space boundaries of the employment, then we would agree that such a definition would "arguably authorize compensation for positional risks." *Infra* ¶ 113. However, as shown by our analysis in this case, that is not the way the term has been defined. Rather, we adhere to the supreme court's definition of the term, which does not encompass every activity or risk encountered by an employee while at work no matter how minor and separated it is from the specific duties of employment.

¶ 72 We note the special concurrence asserts that our analysis will require a finding of compensability for injuries that result from the "everyday activity" of walking. *Infra* ¶ 113. Specifically, it contends that, under our approach, "*any* injuries that occur while an employee is performing an act that is necessary to the fulfillment of the employee's work duties (even an activity of daily living such as walking to one's workstation at the employer's premises) 'arise out of' the employment and are therefore compensable if the Act's other requirements are met." (Emphasis in original.) *Infra* ¶ 113. Again, we do not hold that any particular type of injury is automatically compensable, much less any injury that is only connected to the employment by the mere fact that it occurred on the employer's premises. See *Caterpillar Tractor*, 129 Ill. 2d at 59-62 (traversing a curb on the employer's premises did not arise out of the claimant's employment); *Prince v. Industrial Comm'n*, 15 Ill. 2d 607, 611-612, 155 N.E.2d 552, 554 (1959) (stating idiopathic falls on a level floor "present no risk or hazard that is not encountered in many places" and "confront all members of the public"). But see *Rysdon Products Co. v. Industrial Comm'n*, 34 Ill. 2d 326, 330, 215 N.E.2d 261, 263 (1966) (holding that Commission's finding that an injury from an unexplained fall arose out of employment was not against the manifest weight of the evidence where it "could reasonably have inferred [from the evidence presented] that the claimant's fall was due to his having been overcome or affected by [workplace] fumes, or to his tripping on the

uneven [workplace] floor"). Without more, an injury resulting from "walking" as suggested by the special concurrence would not be due to an employment risk.

¶ 73 Here, we simply hold that an "arising out of" determination requires an analysis of the claimant's employment and the work duties he or she was required or expected to perform. Only after it is determined that a risk is not employment-related should the Commission consider and apply a neutral-risk analysis. As stated, the evidence in this case was such that the Commission could properly find that claimant's injury did not stem from an employment-related risk. The risk posed to claimant from the act of standing from a kneeling position while looking for something that had been misplaced by a coworker was arguably not distinctly related to his employment. Claimant's work for the employer did not require him to perform that specific activity. Further, it was the Commission's prerogative to find claimant's act of searching for the misplaced pan of food was too remote from the specific requirements of his employment to be considered incidental to his assigned duties. As a result, the Commission's determination that claimant was not injured due to an employment risk was supported by the record and not against the manifest weight of the evidence.

¶ 74 Certainly, categorization of risk and, ultimately, whether an injury arises out of one's employment is not always easily resolved. Factual circumstances have and will arise where the line between what constitutes an employment risk as opposed to a neutral risk is difficult to ascertain. However, as stated by the supreme court, "no all inclusive rule can be laid down" and "each case must be decided with reference to its own circumstances." *Borgeson*, 368 Ill. at 190. Ultimately, the resolution of whether an injury stems from an employment risk, a neutral risk, or a personal risk is one of fact that is within the province of the Commission to decide based on the particular circumstances of each case. On review, as always, this court should give deference to

the Commission's factual findings by employing a manifest-weight-of-the-evidence standard of review.

¶ 75 III. CONCLUSION

¶ 76 We affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision.

¶ 77 Affirmed.

¶ 78 PRESIDING JUSTICE HOLDRIDGE, specially concurring:

¶ 79 I agree that the Commission's finding that the claimant failed to prove an accidental injury arising out of his employment was not against the manifest weight of the evidence. I therefore join in the majority's judgment. However, I do so for reasons that are different from those espoused by the majority. In my view, the majority's analysis departs dramatically from governing precedent and would lead to an unwarranted and unworkable expansion of the Workers' Compensation Act (Act) (820 ILCS 350/1 *et seq.* (West 2014)). I write separately to clarify the analysis that I believe should govern claims like the claim asserted in this case.

¶ 80 The majority holds that an accidental injury "arises out of" a claimant's employment for purposes of the Act so long as, at the time of injury, the claimant was performing an act that was "incidental to" (or "necessary to the fulfillment of") his work duties, even if the act at issue was an activity of everyday living and even if the employment did not increase the risk of injury in any way. This holding contravenes a basic principle of our workers' compensation law: the rule that a claimant may not recover benefits under the Act unless his employment subjected him to some risk or hazard beyond that which is regularly faced by members of the general public. See, *e.g.*, *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 59 (1989) ("if the injury results from a hazard to which the employee would have been equally exposed apart from

the employment, *** it is not compensable"); *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987) ("If the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then [the injury] does not arise out of [the employment]."); *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶ 38 ("if the injury is caused by an activity of daily life to which all members of the public are equally exposed ***, then there can be no recovery under the Act, even if the employee was required to perform that activity by virtue of his employment"); *O'Fallon School District No. 90 v. Industrial Comm'n*, 313 Ill. App. 3d 413, 416 (2000) ("If *** the employee's exposure to the risk is equal to that of the general public, the injury is not compensable."); *Hansel & Gretel Day Care Center v. Industrial Comm'n*, 215 Ill. App. 3d 284, 293 (1991) (ruling that, to establish that an injury suffered at work "arises out of" the employment, "[a] claimant must show that the injury is due to a cause connected to the employment," and that "recovery is denied *** where the activity engaged in presents risks no greater than those to which the general public is exposed"); see also *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 209-10 (1999). By disregarding this well-established principle, the majority has essentially collapsed the distinction between "arising out of" the employment and "in the course of" the employment, thereby extending the Act well beyond its intended scope. The majority has also substantially reduced the circumstances under which a neutral risk analysis would apply. Moreover, the majority has crafted a vague and unworkable standard for determining when an injury arises out of the employment, a standard that will encourage *ad hoc* judicial decisions as courts struggle to determine which actions are "incidental to" a claimant's employment (often in the absence of any evidence on the subject). The rule we announced in *Adcock*, which the majority overturns today, is clearer and more

workable than the rule applied by the majority here. It is also more consistent with the Act's purpose and with governing precedent.

¶ 81 In order to recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "ar[ose] out of" and occurred "in the course of" his employment. 820 ILCS 305/2 (West 2014). The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393 (1995); *Adcock*, 2015 IL App (2d) 130884WC, ¶ 27. "The 'arising out of' component is primarily concerned with causal connection." *Sisbro*, 207 Ill. 2d at 203. An injury "arises out of" the employment if it "has its origin in some risk so connected with, or incidental to, the employment as to create a causal connection between the employment and the injury." *Orsini*, 117 Ill. 2d at 45; see also *Sisbro*, 207 Ill. 2d at 203.

¶ 82 To determine whether an injury arose out of a risk connected to the employment, we must first identify the risk to which the claimant was exposed when he was injured at work. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). As the majority notes, there are three types of risks to which employees may be exposed: (1) risks that are "distinctly associated" with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (2007). A risk "distinctly associated" with a claimant's employment is a risk that is "peculiar to the claimant's work" (*Orsini*, 117 Ill. 2d at 45 (1987); *Karastamatis*, 306 Ill. App. 3d at 209), *i.e.*, a risk to which the general public is not exposed (*Karastamatis*, 306 Ill. App. 3d at 209). As

noted, a neutral risk is a risk that has "no particular employment or personal characteristics," *i.e.*, a risk "to which the general public is equally exposed." *First Cash Financial Services*, 367 Ill. App. 3d at 105. Injuries resulting from neutral risks are deemed to arise out of the employment only where the employee was exposed to the risk to a greater degree than the general public, either qualitatively or quantitatively, by virtue of his employment. *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011). Injuries resulting from personal risks do not arise out of the employment and are therefore not compensable under the Act. *Orsini*, 117 Ill. 2d at 47 (noting that the Illinois Supreme Court "has consistently held that where the injury results from a personal risk, as opposed to a risk inherent in the claimant's work or workplace, such injuries are not compensable").

¶ 83 Accordingly, "[f]or an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment." *Id.* at 45; *Noonan v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152300WC, ¶ 18. "[I]f the injury results from a hazard to which the employee would have been equally exposed apart from the employment, or a risk personal to the employee, it is not compensable." *Caterpillar Tractor Co.*, 129 Ill. 2d at 59; see also *Orsini*, 117 Ill. 2d at 45; *Noonan*, 2016 IL App (1st) 152300WC, ¶ 18.

¶ 84 In this case, the claimant was injured while standing up from a kneeling position, which is an activity of everyday living. There is no evidence that his injury was caused by a risk personal to him, such as an idiopathic fall. Moreover, the risk of injury that the claimant confronted was not peculiar to his work (*i.e.*, it was not "distinctly associated" with his employ-

ment). Rather, as the Commission correctly found, it was a neutral risk of everyday living faced by all members of the general public. Thus, the claimant's injury is compensable only if the claimant was exposed to this risk to a greater degree than the general public because of his employment. *Adcock*, 2015 IL App (2d) 130884WC, ¶ 33; *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 27.

¶ 85 The claimant failed to make that showing here. The claimant testified that he was not carrying or holding anything when he stood up from a kneeling position and injured his knee. Nothing struck his knee or fell on his knee. The claimant did not trip over anything, and he noticed no cracks or defects on the floor. Although the claimant testified that it was "always wet" in the walk-in cooler, he did not notice "anything out of the ordinary," and he did not claim that he slipped on a wet surface. Rather, he was simply standing up from a kneeling position when he felt his knee "pop." The claimant agreed that the kneeling position he assumed while looking for the carrots was similar to the position he would be in while "looking for a shoe or something under the bed." Thus, the claimant's own testimony confirms that the claimant was injured while performing an activity of daily living (standing up from a kneeling position on a normal surface) and that his employment did not increase or enhance the risk of injury in any way.[1] The Commission's decision denying benefits was therefore not against the manifest weight of the evidence.[2]

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[1]The claimant argues that his testimony that he knelt down to look for the carrots under the walk-in cooler because "sometimes things get knocked underneath the shelves *** on[to] the floor" suggested that his job required him to kneel more frequently than members of the general public. However, the claimant offered no testimony as to how often he knelt down to look for food items under the cooler. He testified only about the single occasion that led to his injury. Given the evidence presented, the Commission was not required to infer that the claimant was required to kneel more often than members of the general public. The Commission's inference that the claimant knelt only once at work was reasonable and was not against the manifest weight of the evidence.

[2]As the majority notes, the undisputed facts in this case are susceptible to different reasonable inferences. Therefore, I agree with the majority that the manifest weight of the evidence standard

¶ 86 Although the majority agrees that the claimant failed to show that his injury arose out of his employment, it takes issue with my analysis. Specifically, the majority rejects *Adcock*'s ruling that claims for injuries caused by activities of daily living (such as walking, turning, bending, and kneeling), should be analyzed under neutral risk principles even if they occur while the claimant is performing acts incidental to his work duties. *Supra* ¶ 38. In rejecting *Adcock's* analysis and holding, the majority relies heavily upon our supreme court's statement that

> " 'an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties.' " (Internal quotation marks omitted.) *Supra* ¶ 41 (quoting *Sisbro*, 207 Ill. 2d at 204).

See also *The Venture—Newberg-Perini, Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2013 IL 115728, ¶ 18; *Ace Pest Control, Inc. v. Industrial Comm'n*, 32 Ill. 2d 386, 388 (1965). The majority interprets this statement as establishing that an injury results from a risk that is "distinctly associated with the employment" (and therefore "arises out of" the employment under the Act) whenever the employee is injured while performing any act that is "incidental to" with his employment duties, which the majority defines as any act that is "necessary to the fulfillment" of the employee's job duties. According to the majority, such injuries are deemed to "arise out of the employment" without the need to perform a neutral risk analysis, *i.e.*, without the employee having to show that his employment increased the risk beyond the risk faced by members of the general public.

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applies. See *supra* ¶ 23.

¶ 87 In my view, the majority misinterprets the supreme court's statement and applies it in an unduly expansive manner that contravenes the Act. In *Sisbro* and in other decisions, our supreme court has stated that "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing *** acts which the employee might reasonably be expected to perform incident to his assigned duties." (Internal quotation marks omitted.) *Sisbro*, 207 Ill. 2d at 204. However, our supreme court has made it clear that this is merely another way of stating the requirement that, for an injury to "arise out of" the employment under the Act, the risk that produced the injury must be causally connected to (or "incidental to") the employment. See *id.* Thus, in making the statement at issue, the supreme court was simply declaring that, in order to satisfy the Act's "arising out of" requirement, the claimant must have been injured while doing something incidental to his employment duties.[3] This describes a *necessary* condition for satisfying the Act's "arising out of" requirement; it does not describe a *sufficient* condition for satisfying that requirement. It means that a claimant may not prove that his injury "arose out of" his employment without showing that the injury occurred while he was doing something incidental to his job duties. However, it does not suggest that the claimant may satisfy the "arising out of" requirement in every instance *merely by making that showing*. In other words, *Sisbro* suggests that only injuries sustained during the performance of work-related acts arise out of the employment, not that all such injuries always arise out of the employment.

¶ 88 This makes perfect sense. For purposes of the Act, the dispositive question is whether the *risk* that led to the injury had its origin in the employment. *Id.* at 203. As noted above, a risk has its origin in the employment only if (1) the risk is "peculiar to the employment"

[3]Injuries caused by activities that have no such causal connection to the claimant's job duties are not compensable, even if they occur "in the course of" the employment (*i.e.*, during work hours while the claimant is at work). See, *e.g.*, *Orsini*, 117 Ill. 2d 38.

(*i.e.*, a job-related risk that is not faced by members of the general public) or (2) the risk is common to the general public but is increased or enhanced in some way by virtue of the employment, thereby exposing the claimant to hazards not shared by the public. Not all acts that are necessary to the fulfillment of an employee's job duties (or otherwise incidental to those duties) present such risks. For example, the employment might require the employee to perform activities of daily living incidental to his job duties, such as walking, bending, or kneeling. Although these everyday activities might be necessary to the fulfilment of the employee's job duties, the risks presented by such everyday activities are not peculiar to any particular line of employment. Such risks have their origin in the employment only if the employment increased the risks beyond that which is faced by members of the general public (for example, by requiring the employee to perform those activities of daily living more often than members of the general public or in a manner that enhances the risk of injury). Unless the employment increases or enhances the risk in one of these ways, injuries that occur while an employee is performing activities of daily living do not arise out of the employment, even if they are incidental to the employee's job duties.

¶ 89 The majority's expansive interpretation of our supreme court's statement in *Sisbro* and other cases is inconsistent with these principles and with governing case law. Our supreme court has never held that injuries caused by activities of daily living "arise out of" the employment merely because such activities are necessary or incidental to the claimant's work duties. To the contrary, our supreme court has made it clear that an injury sustained at work "arises out of the employment" only if the risk causing the injury originates in the employment (*id.*), *i.e.*, only if the employment exposes the claimant to a risk to which members of the general public are not equally exposed, either because the risk is peculiar to the employment or because the risk is enhanced by the employment. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58-59; *Orsini*, 117 Ill. 2d

at 45. The majority's reading of *Sisbro* and other cases contravenes this principle and extends the Act beyond what the legislature intended.[4]

¶ 90 In addition, the majority's analysis cannot be reconciled with several decisions of this court that were decided prior to *Adcock*. See, *e.g.*, *Kemp v. Industrial Comm'n*, 264 Ill. App. 3d 1108 (1994); *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103 (1994); *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779 (1992). In each of these cases, we applied a neutral risk analysis where the claimant was injured while performing an activity of daily living, even though the claimant was performing his work duties or some act incidental thereto at the time. For example, in *Kemp*, 264 Ill. App. 3d at 1109, the claimant injured his back while squatting down to read an air meter, which was one of his work duties. We affirmed the circuit court's decision awarding benefits because we held that the claimant's job required him to bend and stoop in a manner that "differ[ed] in both the type and frequency from the type of bend-

[4]The excerpt from *Sisbro* that the majority quotes (*supra* ¶ 43) neither supports the majority's expansive interpretation of the Act's "arising out of" requirement nor undermines my analysis. *Sisbro*'s holding addressed a *causation* issue; it did not address whether the claimant's accidental injury "arose out of" his employment. In *Sisbro*, our supreme court held that the evidence presented in that case supported the Commission's finding that the claimant's work-related accident aggravated or accelerated his preexisting diabetic leg condition such that the claimant's current condition of ill-being was causally related to the work accident. *Sisbro*, 207 Ill. 2d at 215. The employer in *Sisbro* "[did] not seriously dispute" the Commission's finding that the claimant had sustained an accidental injury arising out of and in the course of his employment. *Id.* at 204. Thus, our supreme court had no occasion to address that issue in *Sisbro*. In the language quoted by the majority, the *Sisbro* court merely held that, *where the evidence supports a finding of an actual causal connection between the claimant's condition of ill-being and a work accident*, causation will not be denied merely because the activity that triggered the injury presented no risks greater than those faced by the general public or because the claimant's preexisting condition was so severe that the disabling injury could have been caused by any activity of daily living. *Id.* at 211-12. Our supreme court took care to stress that the latter factors "are matters to be considered when deciding whether a sufficient causal connection between the injury and the employment has been established in the first instance." *Id.* at 212. Thus, the court made clear that these factors could, in principal, preclude a finding of causal connection between the work injury and the claimant's condition of ill-being. *Sisbro*'s holding merely establishes that, when such a causal connection has been established (*e.g.*, through competent medical testimony, as in *Sisbro*), the employer may not negate that causal connection merely by showing that the injury *might* also have occurred as a result of some normal daily activity. *Id.* at 211. Contrary to the majority's suggestion, *Sisbro* does not hold that an injury arises out of the employment if the claimant sustained the injury while performing tasks incidental to his employment, even where those tasks posed no risks beyond the risks faced by members of the general public on a daily basis.

ing and stooping in which the average member of the general public could be expected to ordinarily engage." *Id.* at 1111. In other words, we analyzed the claimant's claim according to neutral risk principles, notwithstanding the fact that the claimant was injured while performing an act that was necessary to the fulfillment of his work duties.

¶ 91 Similarly, in *Komatsu Dresser Co.*, 235 Ill. App. 3d at 780-81, the claimant injured his back as he bent over to pick up a machine part while performing his work duties. (The claimant also sneezed as he bent over. *Id.* at 781.) However, we did not stop our analysis there and find the claimant's injury was compensable merely because he was injured while performing an act incident to his employment. Instead, we applied a neutral risk analysis and affirmed the Commission's award of benefits only after we concluded that the evidence supported a "reasonable inference that the claimant's acts of bending required by his work exposed [him] to a greater degree of risk than that of the general public." *Id.* at 788. Specifically, we held that the claimant's job required him to lift 15- to 40-pound parts out of a box on a regular basis without bending his knees. Because this "increased the claimant's exposure to risk of injury from *** bending" beyond the risk faced by members of the general public (both quantitatively and qualitatively), we held that "the fact that bending is a normal activity did not preclude a finding that the claimant's injury arose out of his employment." *Id.*; see also *Nabisco Brands, Inc.*, 266 Ill. App. 3d at 1107 (affirming Commission's decision that claimant's injury arose out of his employment where the claimant slipped and fell while walking down stairs carrying three long, heavy bakery knives, an act he was required to do in fulfilling his work duties because the need to carry the knives was "unique" to the claimant's employment and it increased the impact and the dangerous effects of his fall on the stairs).[5]

[5]Significantly, each of these cases was decided after our supreme court issued its decision

¶ 92 In each of these cases, we held that it was the *origin of the risk* that produced the injury, not the fact that the claimant was performing some work-related act at the time of injury, that determined whether the claimant's injury arose out of his employment. The majority's approach contradicts this principle and cannot be reconciled with *Kemp*, *Nabisco Brands*, or *Komatsu Dresser*. If the majority's approach were correct, there would have been no need to conduct a neutral risk analysis in those cases because, in each case, the claimant was injured while performing acts that were required by or incidental to his work duties. In the majority's view, that fact alone would have established that the claimant's injury arose out of his employment.

¶ 93 The majority tries to circumvent this problem by simply asserting that a risk has its origin in the employment whenever the injury resulted from the performance of an act necessary to the fulfillment of the claimant's job duties. See *supra* ¶¶ 42 (asserting that "[r]isks attendant to" acts that the employer instructs the claimant to perform, acts that the claimant had a common law or statutory duty to perform, or acts incidental to the claimant's assigned duties "have their origin in the claimant's employment," and "[w]hen an employee is injured while performing such acts it cannot be said that he is subject to a neutral risk, *i.e.*, a risk that has no particular employment characteristics and is common to the general public"); *supra* ¶ 48 ("Activities necessary to the fulfillment of a claimant's job duties present risks that are distinct or peculiar to the employment and, as a result, are not common to the general public."); *supra* ¶ 69 ("Ul-

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in *Caterpillar Tractor Co.*, which includes a statement that is substantively identical to the *Sisbro* statement upon which the majority relies. See *Caterpillar Tractor Co.*, 129 Ill. 2d at 58 (ruling that "[t]ypically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties"). (When making the same statement, the *Sisbro* court cited *Caterpillar Tractor Co.* as precedent. *Sisbro*, 207 Ill. 2d at 204.) In *Komatsu Dresser*, we cited this statement from *Caterpillar Tractor Co.* but nevertheless applied a neutral risk analysis to the claimant's claim. This demonstrates that we have already rejected the majority's unduly expansive interpretation of the supreme court's statement in *Sisbro*.

timately, what makes a risk distinct or peculiar to the employment is its origin in, or relationship to, the specific duties of the claimant's employment. A risk that is required by the claimant's employment and necessary to the fulfillment of the claimant's job duties removes it from the realm of what is common to the general public (a neutral risk) even if the activities attendant to the risk have neutral characteristics, *i.e.*, involve common bodily movements."); see also *supra* ¶ 45. That defies common sense. The risks associated with any particular activity arise from the activity itself, not from the activity's relationship to the claimant's work duties. For example, the risk of injury posed by a single act of standing up from a kneeling position remains the same regardless of whether the act is performed at work or at home, and regardless of whether the act is necessary to the fulfillment of the claimant's job duties. The fact that a particular activity is necessary or essential to the performance of a claimant's job duties, without more, has no bearing on the origin or nature of the risk presented by the activity. The risk stems from the nature of the activity itself, not from its connection to an employment-related purpose.

¶ 94 Accordingly, we may reasonably say that the risk of a particular activity "has its origin in the employment" only if (1) the activity is unique to a particular line of work (*e.g.* welding or operating dangerous machinery), such that members of the general public do not perform the activity, or (2) the employment requires the claimant to perform a common activity more frequently than members of the general public or in a manner that otherwise increases the risk of the activity. Under those circumstances (and only under those circumstances), the risk of injury associated with the activity is directly affected by the employment. Although the risks associated with an activity are always created by the activities themselves (and not by their association with an employment-related purpose), it makes sense to say that such risks "have their origin" in the

employment in the two circumstances outlined above because, in those instances, the particular risks at issue would not be encountered but for the employment.

¶ 95 By contrast, according to the majority's view, the risk of an activity of daily living is somehow deemed to originate with the employment merely because the activity is required by the employment, even though nothing about the employment creates or enhances the risk of injury associated with the activity. In my view, that position defies logic and common sense. Moreover, as I noted above, it contravenes the basic and well-established principle that a claimant may not recover benefits under the Act unless his employment subjected him to some risk or hazard beyond that which is regularly faced by members of the general public. (See, *e.g.*, *supra* ¶ 80.) The majority attempts to sidestep this principle by fiat, *i.e*, by simply asserting that the risks associated with any act necessary to the employment have their origin in the employment and are not common to the general public. That assertion cannot be reconciled with several of our prior decisions (see, *e.g.*, *Kemp*, 264 Ill. App. 3d 1108; *Komatsu Dresser Co.*, 235 Ill. App. 3d 779), and it flouts common sense by suggesting that the risk associated with an activity is somehow dependent upon whether the activity has an employment-related purpose.

¶ 96 The majority's approach is also in tension with some of the supreme court and appellate court decisions wherein compensation has been denied to claimants who were injured while performing their work duties because their health had so deteriorated that the performance of any normal daily activity could have caused the claimant's injuries. See, *e.g.*, *Greater Peoria Mass Transit District v. Industrial Comm'n*, 81 Ill. 2d 38 (1980); *County of Cook v. Industrial Comm'n*, 68 Ill. 2d 24 (1977); *Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill. 2d 207 (1969); *Hansel & Gretel Day Care Center*, 215 Ill. App. 3d at 294; *Hopkins v. Industrial Comm'n*, 196 Ill. App. 3d 347 (1990). Recovery is denied under such circum-

stances because "the injury result[s] from a hazard personal to the claimant and, therefore, [does] not arise out of [the] claimant's employment." *Hopkins*, 196 Ill. App. 3d at 352. Once again, the dispositive factor is whether the risk has its origin in the employment. If it does not, the fact that the claimant was injured while performing an act related to his work duties is immaterial and does not justify recovery under the Act. *Id.*; see also *County of Cook*, 68 Ill. 2d at 33 (holding that, because "[t]he work-connected activity (getting up from [a] chair) which *** precipitated claimant's injury subjected her to no greater risk than did *** normal daily activities," "[t]he mere fact that she was at work *or even engaged in some job-related activity* when the episode occurred is not sufficient to support an award" (emphasis added)); *Greater Peoria Mass Transit District*, 81 Ill. 2d at 43 (reversing Commission's award of benefits to claimant injured while performing a work-related task "because neither qualitative nor quantitative risks to the claimant were shown to be greater as a result of her employment").

¶ 97 None of these decisions makes sense according to the majority's analysis. If, as the majority maintains, an injury arises out of the claimant's employment whenever the act the claimant was performing at the time of injury was incidental to his employment, then the courts in *County of Cook*, *Greater Peoria Mass Transit*, and *Hopkins* would each have found an injury arising out of the claimant's employment without any need to perform a neutral risk analysis. But that is not the case. In each case, the dispositive factor was not whether the *act* the claimant was performing was necessary to the fulfillment of his job duties, but whether the *risk* that led to the injury was created (or, at least, enhanced in some way) by the employment. Where the employment subjected the claimant to no risks beyond those encountered by the general public (*i.e.*, where the claimant's claim failed under a neutral risk analysis), recovery was denied. We should deny the claimant's claim in this case for the same reason.

¶ 98 The majority contends that the analysis we employed in *Adcock* is "at odds" with certain decisions of our supreme court and of this court. *Supra* ¶¶ 38, 63-64. The supreme court cases cited by the majority are distinguishable. In *County of Peoria v. Industrial Comm'n*, 31 Ill. 2d 562 (1964), our supreme court held that an off-duty sheriff's deputy who was struck by a vehicle and killed while attempting to push a motorist's car from a ditch was entitled to benefits. The majority suggests that the fact that the supreme court did not explicitly perform a neutral risk analysis in *County of Peoria* somehow supports its argument in this case and undermines our analysis in *Adcock*. *Supra* ¶¶ 44-45, 63. I disagree. In *County of Peoria*, the supreme court found that, by virtue of his employment as a sheriff's deputy, the decedent had a duty to help motorists in distress at all times, even when he was off duty. *County of Peoria*, 31 Ill. 2d at 563-64. Members of the general public have no such duty. *Id.* at 564. Based on this fact, the supreme court held that the claimant's employment-related duty "exposed him to a risk greater than that faced by the public generally." *Id.* at 565. Accordingly, the risk that caused the fatal injury was peculiar to the decedent's employment, and there was no need to perform a neutral risk analysis.[6] Here, by contrast, the risk that led to the claimant's injury arose from an activity of daily living (standing up from a kneeling position). Such risks are common to the general public and are not peculiar to the claimant's employment. *County of Peoria* is therefore inapposite.

[6]As noted above, a neutral risk analysis is required only where the risk at issue is one "to which the general public is equally exposed." *First Cash Financial Services*, 367 Ill. App. 3d at 105. If the risk is unique to the employment and is not shared by the general public, there is no need for a neutral risk analysis. It should be noted, however, that the decedent in *County of Peoria* would have recovered benefits even under a neutral risk analysis. If the risk of assisting a stranded motorist were deemed a risk common to the general public, the decedent in *County of Peoria* was subjected to that risk more frequently than the general public by virtue of his employment. The supreme court may have actually decided the case on that basis, implicitly applying a neutral risk analysis. In either event, *County of Peoria* is distinguishable from this case.

¶ 99 The majority also relies upon *Memorial Medical Center v. Industrial Comm'n*, 72 Ill. 2d 275 (1978). *Supra* ¶ 64. In that case, the claimant worked as a housekeeper in a hospital. Her job duties including cleaning. She was injured at work when she bent over from a standing position in order to clean a spot off a kickplate on a door. *Memorial Medical Center*, 72 Ill. 2d at 278. The employer argued that "the act of bending over [was] a routine motion not peculiar to [the claimant's] work, that the true cause of [the claimant's] disability was her obesity[,] and that the evidence show[ed] that she was not, as a result of her employment, subjected to any greater risk than the public at large." *Id.* at 279. Our supreme court's cursory analysis in *Memorial Medical Center* appears to be focused entirely on the issue of causation, not the question whether the claimant's injury arose out of her employment. It is not clear whether, or to what extent, our supreme court actually considered the employer's argument that the risk leading to the claimant's injury did not arise out of the employment because it was a risk common to members of the general public. In any event, our supreme court cited *County of Cook* for the proposition that "where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed, compensation will be denied." *Id.* at 281 (citing *County of Cook*, 68 Ill. 2d at 32-33). As noted above, the majority's analysis in this case cannot be reconciled with that principle. Accordingly, *Memorial Medical Center* reaffirms a basic principle that the majority's analysis contravenes, and it does not support the majority's expansive interpretation of the Act's "arising out of" requirement.

¶ 100 The decisions of this court upon which the majority relies are, in my view, either distinguishable or wrongly decided. The majority claims that the analysis we employed in *Adcock* is "at odds with" our decisions in *O'Fallon*, 313 Ill. App. 3d 413, *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, *Young v. Illinois Workers'*

Compensation Comm'n, 2014 IL App (4th) 130392WC, *Noonan*, 2016 IL App (1st) 152300WC, *Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC, and *Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC. *Supra* ¶ 38. *O'Fallon* is distinguishable. The claimant in that case was a sixth grade teacher who was ordered to ensure the safety of children moving through the school's hallways. *O'Fallon*, 313 Ill. App. 3d at 414-15. Her duties included preventing children from running in the halls, and she "was ordered specifically to undertake the risk of pursuing a running student." *Id.* at 417. She injured her back when she turned, twisted, and began to pursue a child running in the hall. *Id.* We affirmed the Commission's award of benefits because we held that the risk that gave rise to the claimant's injury (*i.e.*, the risk of twisting, turning, and pursuing a running child) arose out of her employment, would not have existed if not for her employment duties, and exposed her to a risk greater than that faced by the general public. *Id.* at 417-18. Accordingly, the risk at issue in *O'Fallon* was distinctly associated with (*i.e.*, "peculiar to") the claimant's employment, rendering a neutral risk analysis unnecessary and inappropriate.[7] In this case, by contrast, the risk at issue did not

[7]The majority maintains that *O'Fallon* is inconsistent with *Adcock*. *Supra* ¶ 53; see also *supra* ¶¶ 51-52. I disagree. In *O'Fallon*, the claimant's employment subjected her to risks peculiar to her employment that exceeded the risks faced by members of the general public. The claimant was required to pursue running students, which required her to turn and twist quickly and then immediately run after young students. Pursuing running students in this manner is not an activity of daily living. Thus, the claimant's employment posed risks not generally faced by members of the general public. The majority's conclusion that *O'Fallon* cannot be reconciled with *Adcock* appears to be based on an overly broad reading of *Adcock*. The majority interprets *Adcock* (and my position in this special concurrence) as standing for the proposition that injuries "involving common bodily movements" can "never" be found to have resulted from a risk that is peculiar or distinct to a particular line of employment. *Supra* ¶ 51. *Adcock*'s holding is not so broad. Almost every work task involves some common bodily movements. However, some work tasks expose an employee to risks peculiar to the employment. For example, welders risk suffering burns while welding. *Adcock* acknowledges that injuries caused by such risks are "peculiar to" the employment. That is true regardless of whether the claimant was also performing common bodily movements (such as standing, bending, or turning) while he was injured. However, *Adcock* also holds that injuries *caused entirely by activities of daily living* (and not by any risks peculiar to the employment) should be analyzed under neutral risk principals. Thus, if the claimant in *Adcock* (a welder) had burned himself while welding, the Commission could have properly found that his work injury arose out of his employment without conducting a neutral risk analysis, even if he was performing certain "common bodily

originate with the employment but with an activity of daily living to which members of the general public were equally exposed. Thus, as noted, a neutral risk analysis is required in this case.

¶ 101 The remaining decisions of this court cited by the majority apply the same analysis the majority applies in this case. For the reasons I have articulated in this special concurrence and in other cases, I believe that each of those decisions was wrongly decided, and I would not follow them.[8]

¶ 102 The majority also argues that *Adcock* is contrary to the requirement that the Act must be liberally construed to effectuate its remedial purpose of providing financial protections for injured workers. *Supra* ¶¶ 39-40. The majority maintains that "the manner in which *Adcock* addresses the 'arising out of' element gives the Act a narrow construction" by "broadening the definition of neutral risk." *Supra* ¶ 40. The majority contends that *Adcock* places an added burden on claimants seeking to recover benefits under the Act. *Supra* ¶ 40.

¶ 103 Contrary to the majority's suggestion, *Adcock* does not construe the Act in an unduly narrow manner or make it more difficult for claimants to obtain benefits. The neutral risk analysis we employed in *Adcock* would have allowed the claimant to recover benefits in every case that the majority's approach has done so. For example, in *Steak 'n Shake*, the evidence es-

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movements" at the time. However, because the *Adcock* claimant was injured while turning in his chair, an activity performed by members of the general public on a daily basis that involved no risks peculiar to welding, a neutral risk analysis was required. In other words, because the *Adcock* claimant alleged an injury that was *caused entirely* by a common bodily movement (and not by any risky activity distinctly associated with welding), we correctly analyzed his claim under neutral risk principles.

[8]In my special concurrence in *Steak 'n Shake*, I applied a neutral risk analysis (following *Adcock*) and disagreed with the majority's contrary analysis. *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶¶ 57-63 (Holdridge, P.J., specially concurring, joined by Hudson, J.). In my special concurrence in *Noonan*, 2016 IL App (1st) 152300WC, ¶ 41 (Holdridge, P.J., specially concurring), I noted that I would decline to follow our prior decisions in *Young* and *Autumn Accolade* because each of those cases erroneously failed to apply a neutral risk analysis. However, I joined the majority's analysis in *Noonan* in all other respects. I also joined the majority's analysis in *Mytnik*. Upon further reflection, I now believe that both *Noonan* and *Mytnik* applied an incorrect analysis, and I disavow my concurrences in those cases. If I were to revisit *Noonan* and *Mytnik*, I would specially concur in the judgment in each of those cases, but I would apply a neutral risk analysis.

tablished that the claimant's job required her to wipe down multiple tables in a hurry in order to keep the flow of customers moving. *Steak 'n Shake*, 2016 IL App (3d) 150500WC, ¶ 62 (Holdridge, P.J., specially concurring, joined by Hudson, J.). As the Commission in that case correctly found, this exposed the claimant to a risk greater than that encountered by the general public, both quantitatively and qualitatively. *Id.* Accordingly, the claimant in *Steak 'n Shake* was entitled to compensation under a neutral risk analysis. *Id.*

¶ 104 In *Mytnik*, the claimant worked on an assembly line, and his job required him to quickly retrieve any bolts that fell on the assembly line to prevent the line from jamming. *Mytnik*, 2016 IL App (1st) 152116WC, ¶¶ 5-6. The claimant was injured as he was reaching down to grab a bolt that had fallen on the assembly line. Because the claimant's job required him to reach down to retrieve fallen bolts repeatedly and in a hurried manner (and to perform other repetitive movements which, according to one of his doctors, subjected his lower back to " 'repetitive mechanical stresses' " (*id.* ¶ 17)), the claimant's employment arguably exposed him to risks that were quantitatively and qualitatively greater than those faced by the general public. Thus, he would have recovered benefits under a neutral risk analysis.

¶ 105 Similarly, the facts presented in *Young* and *Autumn Accolade* would arguably have supported recovery under a neutral risk analysis because the claimant in each case was injured while performing a common bodily movement (reaching) in an unusual manner that increased the risk of injury beyond that posed by ordinary acts of reaching. In *Young*, the claimant was injured while reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection. *Young*, 2014 IL App (4th) 130392WC, ¶ 5. In *Autumn Accolade*, the claimant was injured while helping a resident of an assisted care facility take a shower. *Autumn Accolade*, 2013 IL App (3d) 120588WC, ¶ 4. As she held the resident with one hand to keep her from fall-

ing, the claimant turned to the left, bent forward, and reached toward a soap dish with her other hand, injuring her neck in the process. *Id.* In each case, the claimant was injured while performing everyday activities in an unusual manner that arguably exposed the claimant to a risk not faced by members of the general public by virtue of his or her employment. Accordingly, in each case, a neutral risk analysis would have supported an award of benefits.

¶ 106 The majority further maintains that "[a]n *Adcock* analysis will, in effect, place an extra evidentiary burden on many employees who are injured while performing their job duties or activities closely connected with the fulfillment of their assigned duties by requiring those employees to present evidence comparing their activities with those of the general public." *Supra* ¶ 40. This begs the question by assuming that an injury arises out of the employment whenever it occurs while the claimant is performing some act incidental to his work duties. As noted above, that is not the case. In order to prove that his injury arose out of his employment under the Act, a claimant must show that the risk giving rise to the injury had its origin in his employment, *i.e.*, that the risk was not faced by members of the general public. A claimant may make that showing either by demonstrating either that (1) the risk was peculiar to the employment, *i.e.*, not common to the public, or (2) although it was common to the general public, the risk was increased or enhanced in some way by virtue of the employment. Accordingly, under existing law, a claimant may not prove that his injury arose out of his employment without comparing the risks posed by his work duties with the risks faced by members of the general public. *Adcock* merely applies this existing law as it is; it does not add any new burden of proof for claimants or impose any new restrictions under the Act. By contrast, the majority's approach would change existing law by eliminating the claimant's burden to prove that the risk had its origin in his employment (*i.e.*,

by declaring that all injuries sustained while a claimant is performing an act incidental to his work duties arise out of the employment).

¶ 107 In addition to its fidelity to the law, *Adcock* applies a simple, analytically clear, and workable rule that that provides clear guidance to the Commission, lower courts, and members of the bar. The majority's approach, by contrast, sows confusion among the Commission and the lower courts and encourages *ad hoc* decisions based upon conjecture as to which actions are "incidental to" the claimant's employment (often without the benefit of any evidence on the subject). Our decision in *Noonan*, 2016 IL App (1st) 152300WC, provides a good example of this, in my view. In *Noonan*, we upheld the Commission's denial of benefits to a claimant who injured his wrist at work when he fell from a rolling chair as he reached to retrieve a pen he had dropped on the floor. The claimant's job required him to fill out forms by hand. Nevertheless, applying the same analysis it applies in this case, a majority of our court held that the claimant's act of bending over to pick up a dropped pen was not "distinctly associated" with his employment because it was not an act that the employer "might reasonably have expected [the claimant] to perform incident to" his job duties. *Id.* ¶¶ 26-27. That conclusion strikes me as highly implausible and counterintuitive, and it does not appear to be based on any evidence in the record. In my view, it is certainly foreseeable that an employee who spends a good portion of his workday filling out forms by hand would drop his pen periodically and would have to pick it up in order to continue performing his assigned duties. As Justice Stewart noted in his dissent in *Noonan*, the majority's contrary finding in that case "defies common sense." *Id.* ¶ 44 (Stewart, J., dissenting). Under the analytical framework that the majority has applied in this case, in *Noonan*, and other cases, there was no basis to deny the claimant benefits in *Noonan*. Because the claimant was in-

jured while performing an act that was incidental to his job duties, he should have recovered benefits pursuant to the majority's approach.[9]

¶ 108 According to the neutral risk analysis we applied in *Adcock*, however, the claimant in *Noonan* was clearly not entitled to benefits. The risk of falling while bending over in a rolling chair to pick up a pen was not peculiar to Noonan's employment, and there was no evidence that Noonan's employment increased the risk of injury in any way. Accordingly, in my view, it would have been analytically clearer, more legally sound, and more persuasive to uphold the Commission's rejection of benefits in *Noonan* based entirely upon a neutral risk analysis. If we had applied *Adcock* in that case rather than *Young* and its progeny, we would have reached the same correct result ultimately reached by the majority without having to apply tortured logic in order to conclude that reaching for a dropped pen was not incidental to the claimant's job duties.

¶ 109 In my view, the majority's analysis in this case suffers from the same flaws as the *Noonan* decision. Before correctly applying a neutral risk analysis, the majority first concludes that the act the claimant was performing at the time of his injury (looking for carrots) was "too remote from the specific requirements of his employment to be considered incidental to his assigned duties." *Supra* ¶ 73; see also *supra* ¶ 31. That conclusion strikes me as dubious. The

[9]The majority argues that the claimant in *Noonan* was not entitled to benefits because he dropped the pen "as a result of his own clumsiness" and because the evidence did not establish that his attempt to pick up the pen was " 'incidental to' *** what he had to do in[ ] the fulfillment of his specific job duties." *Supra* ¶ 50. However, as noted above, the act of picking up a dropped pen was clearly necessary to the fulfillment of the claimant's specific job duties because his job required him to fill out forms by hand. Thus, by the majority's own definition, the claimant's act of picking up a pen was "incidental to" his job duties. Further, even assuming *arguendo* that the claimant dropped the pen "as a result of his own clumsiness" (which was not a finding reached by the Commission or an issue addressed by our court on appeal), that fact would not preclude recovery so long as the clamant was required to use a pen in performing his work duties. See *Gerald D. Hines Interests v. Industrial Comm'n*, 191 Ill. App. 3d 913, 917 (1989) ("It matters not how negligently the employee acted, if at the time he was injured he was still within the sphere of his employment and if the accident arose out of it.").

claimant's job duties as a sous chef included preparing food and arranging the walk-in cooler. Looking for carrots under the walk-in cooler in order to assist another chef in preparing food seems to me to be undoubtedly "incident to" his duties as a sous chef, regardless of whether he was specifically ordered to look for the carrots by a supervisor. Thus, if the majority's analysis were correct (*i.e.*, if all injures sustained during the performance of acts incidental to one's job duties arise out of one's employment), I believe we would have no choice but to reverse the Commission's decision and award benefits to the claimant. However, because I believe that *Adcock*'s neutral risk analysis should govern the claimant's claim, I would skip the first step of the majority's analysis (which I find to be both erroneous and unnecessary), and I would affirm the Commission's denial of benefits solely under neutral risk principles for the reasons set forth above.

¶ 110 The majority contends that "an *Adcock*-type analysis" (*i.e.*, a neutral risk analysis) "invites decisions by the Commission based on speculation," conjecture, or "gut level assumptions" as to how often and in what manner members of the general public perform various activities of daily living. *Supra* ¶ 47. The majority queries whether expert testimony will always be required to establish these facts. *Supra* ¶ 47. I have no doubt that, in certain instances, the Commission may legitimately infer whether the employment increased the risk of a particular activity of daily living beyond that faced by members of the general public based entirely upon common sense and the Commissioners' life experience, without the need of expert testimony. For example, if an employee's job requires him to walk up 10 steps once or twice per shift, the Commission may reasonably infer that the employment did not increase the risk beyond that faced by members of the general public. Conversely, if the job requires the employee to climb 10 steps 50 times per shift, the Commission may reasonably draw the contrary inference. (The Commission

has drawn such inferences in prior cases, and we have upheld such inferences.) In closer cases, expert testimony may well be required. If members of the bar knew that *Adcock* provided the governing analysis in such cases, the parties in such cases would be on notice to present expert testimony supporting their respective arguments under a neutral risk analysis, where appropriate. In my view, this will place no greater burden on litigants than the majority's approach, which will require the parties to present evidence and arguments regarding which tasks are "necessary to the fulfillment of" a claimant's job duties.

¶ 111 I will close by attempting to correct some misapprehensions that the majority appears to have regarding *Adcock*. The majority suggests that *Adcock* "automatically exclude[s] from the definition of an employment-related risk activities that might involve common bodily movements or which *Adcock* terms 'everyday activities.' " *Supra* ¶ 38. I disagree. *Adcock* and the cases upon which it relies establish that a risk associated with an activity of daily living has its origin in the employment (*i.e.*, is an "employment-related risk") if the employment increases or enhances the risk in some way, either quantitatively or qualitatively. *Adcock*, 2015 IL App (2d) 130884WC, ¶ 32. In other words, a risk of everyday living may be found to be an employment-related risk under a neutral risk analysis. See *id.* ¶¶ 32-34. My disagreement with the majority on this issue appears to be based upon our differing definitions of "employment-related" risks. In my view, a risk is "employment-related" if it is peculiar to the employment *or* if it is a common risk that is enhanced by the employment beyond that which the general public faces. Put another way, in my view, a risk is "employment-related" whenever it "arises out of the employment," regardless of whether the risk is "peculiar to" the employment or merely enhanced by the employment. In the majority's view, by contrast, an injury is the result of an "employment-related" risk (*i.e.*, is "distinctly associated with" the employment) if the act the claimant is per-

forming at the time of the injury is incidental to his work duties. For the reasons set forth above, I believe that my view is more consistent with the Act and with prior precedent.

¶ 112 One further clarification seems appropriate. I agree with the majority that, once we have determined that a risk is "peculiar to" the employment, the injury is thereby deemed to have arisen out of the employment, and we do not need to apply a neutral risk analysis to the claim. A risk that is "peculiar to" the employment is, by definition, one to which the general public is *not* exposed. See *Orsini*, 117 Ill. 2d at 45; *Karastamatis*, 306 Ill. App. 3d at 209.[10] Because such risks are not faced by members of the general public, we do not need to conduct a neutral risk analysis in such cases. However, I do not agree with the majority's suggestion that a risk may deemed "peculiar to" the employment (and therefore one that "arises out of the employment" under the Act) merely because the activity that caused the injury was essential to the claimant's work duties, even if that activity did not subject the employee to hazards beyond those faced by the general public. Any such suggestion flatly contradicts numerous decisions of our supreme court and of our court. See *supra* ¶ 80.

¶ 113 In sum, I believe the analysis applied in *Adcock* is sound and is preferable to the analysis applied by the majority in this case, among other reasons, because (1) it upholds the well-established principle that a claimant may not recover under the Act for risks faced by members of the general public unless those risks are somehow increased or enhanced by the employment; (2) it applies an analytically clear and workable rule that will provide clear guidance to the Commission, lower courts, and members of the bar, whereas the majority's analysis will sow

[10]The majority appears to treat the phrase "peculiar to the employment" as synonymous with "employment-related" and "distinctly associated with the employment." The majority interprets all three of these phrases to mean acts that are incidental to the employment. By contrast, following *Orsini* and *Karastamatis*, *Adcock* defines a risk "peculiar to the employment" as a risk that is unique to the employment, *i.e.*, a risk *not* faced by the general public.

confusion and encourage *ad hoc* decision-making; and (3) it would not unduly restrict eligibility for compensation under the Act, whereas the majority's analysis would expand eligibility for benefits well beyond what the legislature intended by rendering any injury directly connected to the performance of an employee's essential job duties potentially compensable, even if the employment did not increase or enhance the risk of injury in any way. Under the majority's approach, *any* injuries that occur while an employee is performing an act that is necessary to the fulfillment of the employee's work duties (even an activity of daily living such as walking to one's workstation at the employer's premises) "arise out of" the employment and are therefore compensable if the Act's other requirements are met. That would collapse the distinction between "arising out of" the employment and "in the course of" the employment and would arguably authorize compensation for positional risks.

¶ 114 The majority maintains that its analytical approach will not render positional risks compensable or otherwise unduly expand the definition of "employment-related" work injuries because (1) only injuries incurred while performing acts "incidental to" the employment are compensable and (2) an activity (and its associated risk) is "incidental to" the employment only if it "belongs to or is connected with what the employee *has to do* in fulfilling his duties" (emphasis in original and internal quotation marks omitted) (*supra* ¶ 71), *i.e.*, only if the act the claimant was performing at the time of his injury was "necessary to the fulfillment of his specific job duties." (*supra* ¶ 46). However, contrary to the majority's suggestion, the majority's definition of "incidental to" the employment is broad enough to authorize compensation for a wide variety of everyday activities that have not previously been deemed compensable. For example, under the majority's approach, if an employee has to walk across a normal surface or up and down stairs in order to perform his work duties, any injury he sustains while walking across the

floor or navigating the stairs would be deemed to arise out of his employment, even if his employment did not increase the risk of these everyday activities beyond that faced by the general public on a daily basis. Employees regularly have to perform a host of everyday actions in order to fulfill their work duties. Such actions present neutral risks that are ordinarily not compensable unless the employment somehow increased the risk quantitatively or qualitatively.[11]

¶ 115 In my view, the Commission applied the proper analysis (*i.e.*, a neutral risk analysis, as prescribed by *Adcock*) and reached the proper conclusion. The Commission's findings were not against the manifest weight of the evidence. I would therefore affirm the Commission's decision in all respects.

¶ 116 JUSTICE HOFFMAN joins in this special concurrence.

[11]Contrary to the majority's suggestion, I do not define an act "incidental to" the employment as being equivalent to a "positional risk." See *supra* ¶ 70. I define that phrase the same way the majority and our supreme court define it, *i.e.*, as a risk that is connected to what an employee has to do in fulfilling his job duties. Unlike the majority, however, I recognize that this definition will include various activities of daily living regularly performed by members of the public (such as walking across a normal surface or up and down stairs), because such activities are often necessary to the performance of an employee's job duties. If all such activities are deemed to "arise out of the employment," as the majority maintains, then such common daily activities could be compensable even if the employment does not increase the risk beyond that faced by the general public. It is that result (and not our shared definition of acts "incidental to" the employment) that threatens to collapse the distinction between "arising out of" the employment and "in the course of" the employment, and that would arguably authorize compensation for positional risks.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, LAW DIVISION

KEVIN MCALLISTER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2016 L 050097
	)	
ILLINOIS WORKERS' COMPENSATION COMMISSION and NORTH POND,	)	
	)	
	)	
Defendants.	)	

OPINION and ORDER

I. OPINION

This matter is before the Court on Plaintiff Kevin McAllister's ("Plaintiff") Complaint for Administrative Review of the decision of the Illinois Workers' Compensation Commission ("Commission"). For the reasons that follow, the Court affirms the Commission's decision.

PROCEDURAL HISTORY

Plaintiff filed his Application for Adjustment of Claim with the Commission on August 26, 2014, claiming an injury date of August 7, 2014. On March 9, 2015, the matter was heard by Arbitrator Jessica Hegarty. On April 13, 2015, the Arbitrator ruled Plaintiff had proved by a preponderance of the evidence that his injury arose out of and in the course of his employment with Defendant North Pond ("Defendant"). The Arbitrator further found a causal connection between the work accident and Plaintiff's right knee condition, awarding all lost time, medical bills and permanent partial disability ("PPD"). The Arbitrator also imposed penalties and fees on Defendant, finding its refusal to pay temporary total disability ("TTD") and medical benefits was dilatory, punitive, retaliatory and objectively unreasonable.

Defendant appealed and, on January 8, 2016, the Commission reversed the Arbitrator's decision as to accident, finding Plaintiff failed to prove he sustained an injury arising from his employment on August 7, 2014. The Commission vacated Plaintiff's award for lost time, medical bills, PPD, penalties and fees. Plaintiff timely appealed the Commission's decision to this Court.

FACTS

Plaintiff worked a sous chef for Defendant. His duties include checking orders, arranging the walk-in, making sauces, prepping and cooking.

On August 8, 2013, Plaintiff injured his right knee and needed surgery. Since his release, he has been able to work full duty. He filed a Workers' Compensation Claim and that case was settled. The settlement contract indicated Plaintiff agreed to settle for a 10% loss of use of the right leg, which equaled 21.5 weeks of PPD benefits.

Plaintiff testified that on August 7, 2014, one of the cooks had cooked a pan of carrots earlier in the day and he could not find them. The cook was busy doing other things. Plaintiff said he had some time so he looked for the cooked carrots. He looked for the carrots in the walk-in because that is where the cook put them. Plaintiff said he checked on all the shelves. Plaintiff testified sometimes things get knocked underneath the shelves and onto the floor. Plaintiff knelt down on both knees to look for the carrots on the floor. They were not there. When he stood up, his right knee popped and locked and he could not straighten his leg. When he stood up from kneeling on the ground he was not carrying or holding anything. He did not notice anything out of the ordinary such as the floor being covered with water or ice, or that the floor was defective in any way. He hopped over the table and then hopped to the office, sat down and told Bruce Sherman, his boss and the chef, what had happened. He was then driven to the emergency room by the general manager.

Plaintiff was seen at Presence Saint Joseph Hospital ("St. Joseph"). The Commission noted some of the records are dated August 7, 2014 while other records are dated August 9, 2014. While at St. Joseph, it was noted Plaintiff had right knee pain since the morning. He was at work that morning when he stood up quickly, slightly twisting his knee and heard a pop. Plaintiff reported he had a history of occasional right knee pain when standing up. He described it as a catching sensation. He also said the pain always quickly resolves. It was further noted there was no pertinent past surgical history given. In a second history, Plaintiff complained of a sudden onset of right knee pain today when rising from kneeling to standing. He reported hearing a pop and feeling sudden pain. He said it felt like his prior meniscus tear he suffered one year ago in the same knee. He reported his knee was repaired by Dr. Guelich. There were no past medical records on file. Plaintiff was diagnosed with right knee pain and a possible ligamentous injury. Right knee x-rays were taken and he was told to follow up with an orthopedic doctor.

On August 11, 2014, Plaintiff saw Dr. Garelick. Dr. Garelick noted that previously on August 26, 2013 he had performed a medial meniscus repair of Plaintiff's right knee. The doctor noted Plaintiff was doing well until August 7, 2014 when he was squatting down. Plaintiff reported he went to stand up and when he did, he heard a pop and felt a sharp sudden pain in his right knee. Dr. Garelick diagnosed Plaintiff with a possible recurrent medial meniscus tear of right knee and ordered a right knee MRI.

The August 13, 2014 right knee MRI showed a low-grade instar-substance injury of the ACL without any complete disruption. There was also a bucket-handle tear of the medial meniscus. Small para-meniscal cysts contained debris were also noted as being possibly present

along with the posteromedial aspect of the knee joint. Lastly, there was moderate knee joint effusion.

In an August 13, 2014 follow-up visit with Dr. Garelick, it was noted Plaintiff's most recent MRI showed a re-tear of medial meniscus consistent with a bucket-handle medial meniscus tear. As a result the doctor recommended surgery.

On August 15, 2015, Plaintiff underwent right knee surgery. It was noted that approximately one year ago, Plaintiff underwent an all-inside medial meniscus repair. He did well up until a week ago when he was squatting at work; he had felt a pop and he was unable to straighten his knee, The post-surgical diagnosis was a bucket-handle medial meniscal tear of the right knee.

From August 29, 2014 through September 8, 2014 Plaintiff underwent post-surgical physical therapy at Illinois Bone and Joint Institute ("Illinois Bone and Joint"). He reported to the physical therapist he injured his knee on August 7, 2014 while rising from a kneeling position while at work. He reported he heard a pop and experienced pain right away.

On September 10, 2014, Dr. Garelick indicated Plaintiff could return to work on September 15, 2014. On September 22, 2014, Dr. Garelick saw Plaintiff for a post-surgical follow-up visit. At that time, he noted Plaintiff has returned to work on September 11, 2014 and is working full time. He does not report having any significant problems. On examination, there was some trace effusion of the right lower extremity. During that visit, Dr. Garelick discharged Plaintiff from care and instructed him to follow-up as needed.

Plaintiff testified he paid for the surgery and his medicine himself. He went to four post-surgical physical therapy sessions. He only went to four sessions because he was paying out of pocket and it was not worth paying for eight sessions when he had already done this last year and he knew he could do the exercises at home for the last four. He was off work from the time of his accident through September 15, 2014. He was released from care by Dr. Garelick on September 22, 2014. He returned to work and has been working since. Currently, he works anywhere from less than 10 hours a day upwards of 15-16 hours a day. He stands all but an hour a day. Plaintiff testified he has not been paid any workers' compensation or medical benefits since he was off work. Currently his right knee feels sore and achy with occasional sharp pains while he is on his feet all day. He takes Ibuprofen or aspirin depending on how he is feeling. He would estimate he takes over-the counter medication three days a week, if not more. His leg feels sore and "used" when he comes home from work. Prior to the August 7, 2014 work accident, he used to bike and ski. He still bikes. He has not tried skiing and does not think he wants to try skiing again. He has not seen Dr. Garelick since he was released on September 22, 2014 and has not treated for his knee with anyone else since he was released.

STANDARD OF REVIEW

The Commission is the ultimate decision maker in workers' compensation cases. *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159, 159 (2009). Court's reviewing the Commission's decision will not set it aside unless its analysis is contrary to law or its fact determinations are

against the manifest weight of the evidence. *Id.* While divergent inferences may reasonably be drawn from the facts of a particular case, that is a question of fact and the court grants the Commission's findings of fact extreme deference. *Insulated Panel Co. v. Indus. Comm'n*, 318 Ill. App. 3d 100, 103 (2d Dist. 2001); *Baggett v. Indus. Comm'n*, 201 Ill. 2d 187, 193-94 (2002). A reviewing court will not reject the Commission's reasonable inferences merely because it might have drawn a contrary inference. *Parro v. Indus. Comm'n*, 260 Ill. App. 3d 551, 554 (1st Dist. 1993). In resolving questions of fact, it is the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign the weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Beattie ex. Rel. Beattie v. Indus. Comm'n*, 276 Ill. App. 3d 446, 449 (1st Dist. 1995). While courts are not easily moved to set aside a Commission decision on a factual question, courts should not hesitate to do so "where the clearly evident, plain and indisputable weight of the evidence compels an apparent, opposite conclusion." *Bocian v. Indus. Comm'n*, 282 Ill. App. 3d 519, 526 (1st Dist. 1996).

DISCUSSION

Plaintiff contends the Commission incorrectly distinguished the facts of *Young v. Ill. Workers' Compensation Comm'n* from the present case. 2014 IL App (4th) 130392WC. Plaintiff further argues the act of standing up from a kneeling position was done in furtherance of his job duties and therefore a neutral-risk analysis need not be done. For the following reasons, the Court confirms the Commission's decision.

"Whether a claimant's injury arose out of or in the course of his employment is typically a question of fact to be resolved by the Commission, and the Commission's determination will not be reversed unless it is against the manifest weight of the evidence." *Kertis v. Ill. Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶ 13. "However, when the facts are undisputed and susceptible to but a single inference, the question is one of law subject to *de novo* review." *Suter v. Ill. Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 15. The question of whether a claimant's act, standing from a kneeling position in this case, is one which the general public was equally exposed to or whether it is an increased risk reaching beyond normal limits by virtue of employment is a question of fact subject to the manifest weight of the evidence standard. *Young*, 2014 IL App (4th) 130392WC, ¶ 18.

There is no dispute that Plaintiff's injury occurred "in the course of" his employment. The "arising out of" component is concerned with causal connection, and requires a showing that the injury had its origin in some risk connected with, or incidental to, the employment. *Id.* at ¶ 20. Put another way, "an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill. 2d 52, 58 (1989). If "the injury results from a hazard to which the employee would have been equally exposed apart from the employment, then the injury does not arise out of the employment." *Autumn Accolade v. Ill. Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, ¶ 17.

Illinois courts have long held there are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics. *Springfield Urban League v. Ill. Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27. "Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Id.*

In reaching its conclusion, the Commission found the act of standing up after having kneeled on one occasion was not particular to Plaintiff's employment and it could easily have occurred while Plaintiff, similar to a member of the general public, was performing this task in any other area of his life, whether it be looking under his car in the driveway or picking up an item that dropped underneath his bed.

Plaintiff argues the present case is indistinguishable from *Young* and *Accolade* and, therefore, the Commission's decision is against the manifest weight of the evidence.

In *Young*, the claimant injured his left shoulder when "reaching into a deep box." 2014 IL App (4th) 130392 WC. The arbitrator found the injury did not constitute an increased risk peculiar to claimant's employment because it was a movement consistent with normal daily activity and it was not repetitive in nature at work. *Id.* The Commission agreed and the Circuit Court confirmed the decision. The Appellate Court reversed, finding the Commission employed the incorrect test. *Id.* at ¶ 22-23. The Appellate Court explained it was unnecessary to perform a neutral-risk analysist o determine whether the claimant was exposed to a risk of injury to a greater degree than the general public because claimant was injured due to an employment-related risk. *Id.* at ¶ 23. It defined an employment-related risk as one which is distinctly associated with his or her employment. *Id.* The court reasoned the claimant was "injured while performing his job duties, i.e., inspecting parts" that were contained in a box. *Id.* at ¶ 22. The act of reaching I the box was an act the employer might reasonably have expected the employee to perform so he could fulfill his assigned duties. *Id.*

In *Accolade*, the claimant felt a pop in her neck when she reached for a soap dish while assisting a resident during a shower. 2013 IL App (3d) 120588WC, ¶ 4. Claimant testified she felt it necessary to remove the soap dish because she was concerned for the resident's safety because the resident might slip on the soap suds. *Id.* The Arbitrator found the case compensable. The Commission and Circuit Court affirmed the decision. The respondent in *Accolade* appealed to the Appellate Court, arguing the claimant failed to prove an accident arose out of her employment because the act resulting in her injury, reaching for the soap dish, was not a risk peculiar to her employment with respondent. *Id.* at ¶ 15. The Appellate Court disagreed, finding the claimant's injury occurred while engaged in activities she might reasonably be expected to perform incident to her assigned duties. *Id.* at ¶ 19.

Plaintiff contends the Court should apply the same logic as in *Young* and *Accolade*. As part of his job, Plaintiff preps, cooks and arranges the walk-in closet at work. On August 7, 2014, he was getting ready and setting up his station when he went to the walk-in cooler at work to locate a pan of carrots for his coworker. Plaintiff checked everywhere for the carrots including

on the top, middle and bottom shelves of the cooler. When he could not locate the pan of carrots, he knelt down to see if they may have been under the cooler as sometimes things got knocked underneath there. As he stood up, his right knee popped and would not straighten. Plaintiff argues he was not kneeling on the ground at work for any reason other than to locate a specific food item for food service that evening. Plaintiff claims this is indistinguishable from the claimant in *Young* who was reaching into a box or the claimant in *Accolade* who was reaching for a soap dish in performance of his job duties. Plaintiff contends these are all acts the employer might reasonably have expected the employee to perform so that he could fulfill his assigned duties.

Defendant, relying on *Adcock v. Ill. Workers' Compensation Comm'n*, argues the Commission's decision is not against the manifest weight of the evidence. 2015 IL App (2d) 130884WC. Defendant argues the Court should apply the neutral risk analysis espoused in *Adcock*. In *Adcock*, a claimant suffered a compensable injury when he turned in a swivel chair to perform a welding activity. *Id.* In *Adcock*, the court stated that "in order for an injury to arise out of one's employment, the risk must be: (1) a risk to which the public is generally not exposed but that is peculiar to the employee's work, or (2) a risk to which the general public is exposed but the employee is exposed to a greater degree. If neither factors apply ... than there can be no recover under the Act, even if the employee was required to perform that activity by virtue of this employment." *Id.* at ¶ 38. The court explained the Commission should not award benefits for injuries resulting from everyday activities, even if the employee was ordered or instructed to perform them as part of his job duties unless his job required him to perform those activities more frequently than members of the general public or in a manner which increased the risk. *Id.* The Appellate Court specifically acknowledged the existence of *Young* and *Accolade* but noted that both of those cases would likely have been decided the same way under the neutral risk analysis. *Id.* at ¶ 41. The court specifically noted that to the extent those two cases conflict with the analysis in *Adcock*, the Appellate Court explicitly declines to follow *Young* and *Accolade*.

The Court finds the *Adcock* decision, which explicitly declined to follow the reasoning provided in *Young* and *Accolade*, applicable to the present case. Plaintiff's claim that kneeling down on both knees and standing up is not an activity of everyday life is disingenuous. While *Adcock* does contain a special concurrence which argues the court should have employed the reasoning in *Young* and *Accolade*, this Court is bound by the majority's decision.

The Commission performed a neutral risk analysis and determined Plaintiff was simply standing up after having kneeled one time. It concluded this was a risk to which the general public is exposed. It further found that Plaintiff was only required to perform this task once, per his testimony, and therefore he was not exposed to this risk to a greater degree than the general public. Therefore, the Commission found Plaintiff failed to prove he sustained an accidental injury which arose from his employment on August 7, 2014. It is the province of the Commission to resolve conflicts in the evidence and draw reasonable inferences from the evidence. *Beattie*, 276 Ill. App. 3d at 449. This Court is not permitted to overturn the Commission's decision merely because a contrary inference is equally reasonable from the facts. *Parro*, 260 Ill. App. 3d at 554. Here, the Commission's decision is not against the manifest weight of the evidence.

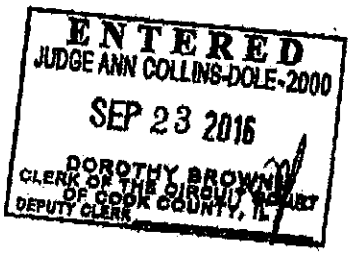
II. ORDER

This matter having been fully briefed, and the Court being fully apprised of the facts, law and premises contained herein, it is ordered as follows:

A. The decision of the Illinois Workers' Compensation Commission is affirmed.

ENTERED: _____

Judge Ann Collins-Dole #2000



STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin McAllister,
Petitioner,

vs.

NO: 14 WC 28777

16IWCC0029

North Pond,
Respondent,

DECISION AND OPINION ON REVIEW

Respondent appeals the decision of Arbitrator Hegarty finding Petitioner sustained an accidental injury arising out of and in the course of his employment on August 7, 2014. As a result Petitioner was temporarily totally disabled from August 8, 2014 through September 14, 2012 for 5-3/7 weeks under Section 8(b) of the Illinois Workers' Compensation Act. is entitled to $10,454.25 in medical expenses under Section 8(a) of the Act and permanently lost 25% of the use of his right leg/53.75 weeks minus a credit of 21.5 weeks from a prior award for a net award of 32.25 weeks under Section 8(e) of the Act. Petitioner is entitled to additional compensation in the amount of $6,420.00 under Section 19(l), $6,584.27 under Section 19(k) and $3,407.60 in attorneys' fees under Section 16 of the Act. The Issues on Review are whether Petitioner sustained an accidental injury arising out of and in the course of his employment on August 7, 2014. whether a causal relationship exists between the alleged August 7, 2014 accident and Petitioner's present condition of ill-being and whether Petitioner is entitled to additional compensation and/or attorneys' fees under Sections 19(l). (k) and 16 of the Act. The Commission. after reviewing the entire record. reverses the Arbitrator and finds that Petitioner failed to prove he sustained an accidental injury arising out of and in the course of his employment on August 7, 2014. for the reasons set forth below.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. Petitioner testified he is a 26 year old sous chef for a restaurant. His duties include checking orders, arranging the walk-in, making sauces, prepping and cooking.

2. On August 8, 2013, Petitioner said he injured his right knee and had to have to have surgery. Since his release he has been able to work full duty. He filed a workers' compensation claim and that case was settled. The settlement contract indicated Petitioner agreed to settle for a 10% loss of use of the right leg, which equaled 21.5 weeks of permanent partial disability benefits.

3. Petitioner testified that on August 7, 2014, one of the cooks had cooked a pan of carrots earlier in the day and he could not find them. The cook was busy doing other things. Petitioner said had some time so he looked for the cooked carrots. He looked for the carrots in the in the walk up because that is where the cook put them. Petitioner said he checked on all the shelves. Petitioner testified that sometimes things get knocked underneath the shelves and onto the floor. So, he knelt down on both knees to look for the carrots on the floor. They were not there. When he stood up his right knee popped and locked and he could not straighten his leg. When he stood up from kneeling on the ground he was not carrying or holding anything. He did not notice anything out of the ordinary such as the floor being covered with water or ice or that the floor was defective in any way. He hopped over to the table and then he hopped to the office, sat down and told Bruce Sherman, who is his boss and the chef, what had happened. He was then driven to the emergency room by the general manager.

4. Petitioner was seen at Presence Saint Joseph Hospital. As an aside, the Commission notes some of the records are dated August 7, 2014 while other records are dated August 9, 2014. While at Saint Joseph Hospital it was noted that Petitioner has had right knee pain since this morning. He was at work this morning when he stood up quickly, slightly twisting his knee and heard a pop. Petitioner reported he had a history of occasional right knee pain when standing up. He described it as a catching sensation. He also said the pain always quickly resolves. It was further noted there was no pertinent past surgical history given. In a second history, Petitioner complained of a sudden onset of right knee pain today when raising from kneeling to standing. He reported hearing a pop and feeling sudden pain. He said it felt like his prior meniscus tear that he had one year ago in same knee. His reported that his knee was repaired by Dr. Guelich. There were no past medical records on file. Petitioner was diagnosed with right knee pain and a possible ligamentous injury. Right knee x-rays were taken and he was told to follow up with an orthopedic doctor.

5. On August 11, 2014, Petitioner was seen by Dr. Garelick. The doctor noted that previously on August 26, 2013 he had performed a medial meniscus repair of Petitioner's right knee. The doctor noted that Petitioner was doing well until August 7, 2014 when he had been squatting down. Petitioner reports he next went to stand up and when he did so he heard a pop and felt a sharp sudden pain in his right knee. Dr. Garelick diagnosed Petitioner was a possible recurrent medial meniscus tear of right knee and he ordered a right knee MRI.

6. The August 13, 2014 right knee MRI showed a low-grade instar-substance injury of ACL without any complete disruption. There was also a bucket-handle tear of the medial meniscus. Small para-meniscal cysts contained debris were also noted as being possibly

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present along with the posteromedial aspect of the knee joint. Lastly, there was moderate knee joint effusion.

7. In an August 13, 2014 follow up visit with Dr. Garelick, it was noted that Petitioner's most recent MRI showed a re-tear of medial meniscus consistent with a bucket-handle medial meniscus tear. As a result the doctor recommended surgery.

8. On August 15, 2014, Petitioner underwent right knee surgery. It was noted that approximately one year ago Petitioner underwent an all-inside medial meniscus repair. He did well up until a week ago when he was squatting at work; he had felt a pop and he was unable to straighten his knee; The post-surgical diagnosis was a bucket-handle medial meniscal tear of the right knee.

9. From August 29, 2014 through September 8, 2012 Petitioner underwent post-surgical physical therapy at Illinois Bone and Joint Institute. He reported to the physical therapist that he injuring his knee on August 7, 2014 while standing from a kneeling position while at work. He reported he heard a pop and experienced pain right away.

10. On September 10, 2014, Dr. Garelick indicated Petitioner could return to work on September 15, 2014. On September 22, 2014, Dr. Garelick saw Petitioner for a post-surgical follow up visit. At that time, he noted Petitioner has return to work on September 11, 2014 and is working full time. He does not report having any significant problems. On examination, there is some trace effusion of right lower extremity. During that visit, Dr. Garelick discharged Petitioner from care and instructed him to follow-up as-needed.

11. Petitioner testified he paid for the surgery and his medicine himself. He went to four post-surgical physical therapy sessions. He only went to four sessions because he was paying out of pocket and it was not worth paying for eight sessions when he had already done this last year and he knew he could do the exercises at home for the last four. He was off of work from the time of his accident through September 15, 2014. He was released from care by Dr. Garelick on September 22, 2014. He returned to work and has been working since. Currently, he works anywhere from less than 10 hours a day upwards of 15-16 hours a day. He stands all but an hour a day. Petitioner testified he has not been paid any workers' compensation or medical benefits since he was off of work. Currently his right knee feels sore, achy with occasional sharp pains while he is on his feet all day. He takes Ibuprofen or aspirin depending on how he is feeling. He would estimate he takes over-the counter medication three days a week, if not more. His leg feels sore and "used" when he comes home from work. Prior to the August 7, 2014 work accident, he used to bike and ski. He still bikes. He has not tried skiing and does not think he wants to try skiing again. He has not seen Dr. Garelick since he was released on September 22, 2014 and has not treated for his knee with anyone else since he was released.

The Commission notes that it is the employee's burden to establish all the elements of his claim by a preponderance of the credible evidence. Illinois Bell Telephone Company v. Industrial Commission, 265 Ill. App. 3d 681 (1994). The claimant has the burden of proving that his injury arose out of and in the course of his employment. County of Cook v. Industrial Commission, 68 Ill. 2d 24 (1977). Furthermore, merely being at the place of employment when the accident occurs is not sufficient to establish

compensability. Brady v. Industrial Commission, 143 Ill. 2d 542 (1991). Arising out of means that the origin or cause of the accident presupposes a causal connection between the employment and the accidental injury. Jones v. Industrial Commission, 78 Ill. 2d 284 (1980). In order for an injury to arise out of one's employment the risk must be: 1) a risk to which the general public is generally not exposed but that is peculiar to the employee's work, or 2) a risk to which the general public is exposed but the employee is exposed to a greater degree. A peculiar risk is one that is peculiar to a line of work and not common to other kinds of work. Karastamatis v. Industrial Commission, 306 Ill. App. 3d 206 (1999); Orsini v. Industrial Commission, 117 Ill. 2d 38 (1987) Voluminous case law establishes that the act of standing and walking does not constitute a risk greater than that to which the general public is exposed. Caterpillar v. Industrial Commission, 129 Ill. 2d 52 (1989); Oldham v. Industrial Commission, 139 Ill. App. 3d 594 (1985); Elloitt v. Industrial Commission, 153 Ill. App. 3d 238 (1987); Prince v. Industrial Commission, 15 Ill. 2d 607 (1959). In the case at bar, there is no indication that Petitioner was exposed to a risk that was greater than that to which the general public is exposed when he reported a one-time instance of standing up from a kneeling position while in the course of his employment. As such the issue before the Commission is not whether the risk is a risk to which the general public is generally exposed but is a risk that is peculiar to the employee's work.

Keeping the Courts' rulings in mind and applying the same to the case at bar, the Commission finds that there is sufficient evidence to support Petitioner's claim that he was in the course of his employment on August 7, 2014. The Commission further finds that Petitioner was not exposed to a risk that was greater than that to which the general public is exposed. This, the primary question before the Commission is whether or not Petitioner's alleged accident on August 7, 2014 was a risk particular to his employment. In addressing this issue, the Commission heeds the recent ruling of the Appellate Court in Young v. Illinois Workers Compensation Commission, 13 N.E. 3d, 1252 (2014), in which the court found that it was unnecessary for the Commission to perform a neutral risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public when the claimant was injured due to an employment-related risk Id. However, in having done so, the Commission finds that the facts surrounding the case at bar are factually distinguishable from the facts contained within the Young v. Illinois Workers Compensation Commission, Id. Namely, the Appellate Court noted that the claimant in Young, Id. was reaching into a 36" deep box that was too narrow to fit both if his arms and shoulder into at the time he felt a pop in his left shoulder. The Appellate Court went on to say that although the act of "reaching" is one performed by the general public on a daily basis, the claimant action of reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment. In the case at bar, the Commission finds that Petitioner was not stretching and reaching into a deep and narrow container at the time of the incident. Rather, he was simply standing up after having kneeled one time. The Commission finds that the act of standing up after having kneeled on one occasion was not particular to Petitioner's employment and it just have easily could have occurred while Petitioner, similar to a member of the general public, was performing this task in any other area of his life whether it be looking under his car in the driveway or picking up an item that dropped underneath his bed. As such the Commission finds that Petitioner was subjected to a neutral risk which had no particular employment or personal characteristics. Springfield Urban League v. Illinois Workers' Compensation

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Commission, 990 N.E. 284 (2013). In finding so, the Commission holds Petitioner failed to prove he sustained an accidental injury arising from his employment on August 7, 2014 and his claim is not compensable.

IT IS THEREFORE ORDERED BY THE COMMISSION that since Petitioner failed to prove he sustained accidental injuries arising out of his employment on August 7, 2014 his claim for compensation is hereby denied.

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

DATED: JAN 8 - 2016

Mario Basurto

Stephen Mathis

MB/jm

O: 11/12/15

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DISSENTING OPINION

I respectfully dissent from the majority decision and would affirm the Arbitrator's well reasoned decision in its entirety.

David L. Gore

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

Case# **14WC028777**

McALLISTER, KEVIN
Employee/Petitioner

NORTH POND
Employer/Respondent

On 4/13/2015, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.09% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

A copy of this decision is mailed to the following parties:

0307 ELFENBAUM EVERS & AMARILLO PC
IAN ELFENBAUM
940 W ADAMS ST SUITE 300
CHICAGO, IL 60607

0766 HENNESSY & ROACH PC
WILLIAM F O'BRIEN
140 S DEARBORN ST 7TH FL
CHICAGO, IL 60603

STATE OF ILLINOIS)
)SS.
COUNTY OF **COOK**)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Kevin McAllister
Employee/Petitioner

v.

North Pond
Employer/Respondent

Case # **14** WC **28777**

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Jessica Hegarty**, Arbitrator of the Commission, in the city of **Chicago**, on **3/9/2015**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **8/7/2014**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$39,000.00**; the average weekly wage was **$750.00**.

On the date of accident, Petitioner was **26** years of age, ***single*** with **0** dependent children.

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

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

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

Respondent is entitled to a credit of **$0** under Section 8(j) of the Act.

ORDER

- Respondent shall pay Petitioner temporary total disability benefits of $500.00 per week for 5-3/7 weeks, commencing August 8, 2014 through September 14, 2014, as provided in Section 8(b) of the Act.

- Respondent shall pay Petitioner's medical bills totaling $10,454.25 (Px 4) directly to Petitioner as provided in Section 8(a) of the Act.

- Petitioner is awarded permanent partial disability benefits of $450.00/week for 53.75 weeks, because the injuries sustained caused the 25% loss of use of the right leg, as provided in Section 8(e) of the Act. Respondent shall be given a credit for 21.5 weeks of permanent partial disability benefits previously paid under Section 8(e)17 of the Act. After deduction of Respondent's credit, Respondent shall pay Petitioner permanent partial disability benefits of $450.00/week for 32.25 weeks.

- Respondent shall pay to Petitioner penalties of $3,407.60 as provided in Section 16 of the Act; $6,584.27 as provided in Section 19(k) of the Act; and $6,420.00 as provided in Section 19(l) of the Act.

- Respondent shall pay Petitioner benefits that have accrued from August 7, 2014 through March 9, 2015, and shall pay the remainder of the award, if any, in weekly payments.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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

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

Signature of Arbitrator

4/9/15
Date

APR 13 2015

ILLINOIS WORKERS' COMPENSATION COMMISSION

Kevin McAllister
Employee/Petitioner

Case # 14 WC 28777

v.

North Pond
Employer/Respondent

Chicago/Hegarty

ARBITRATION DECISION *ADDENDUM*

The disputed issues include:

- Whether the injury arose out of or in the course of Petitioner's employment;
- Whether Petitioner's condition of ill-being was causally connected to the injury;
- Respondent's liability for medical bills;
- Respondent's liability for lost time;
- Nature and extent of the injury;
- Penalties and fees.

FINDINGS OF FACTS

At the time of the injury, Petitioner was a 26 year-old employee of North Pond restaurant working as a sous chef. Petitioner had been employed by Respondent for a little over 2 ½ years. Petitioner's job duties consisted of checking in orders, arranging the walk-in cooler, prepping food and cooking food.

On August 7, 2014, Petitioner was at work preparing for the restaurant's evening shift. Petitioner was setting up his station when another cook mentioned to him that he had misplaced a pan of carrots. Petitioner testified he went into the walk-in cooler to find the pan of carrots. He used the walk-in cooler often as part of his job as a sous chef. On the date of accident, Petitioner looked in the cooler for the missing pan of carrots and then knelt down on both knees in order to look underneath the cooler, as sometimes food items would roll under the cooler. While attempting to stand up, Petitioner's right knee popped and locked up. He stood there for a moment because he was not sure what to do and then he hopped over to the office about 20 feet away in order to sit down and tell his boss what happened.

Petitioner was taken to St. Joseph Hospital by Respondent's general manager after the accident. The emergency room history noted Petitioner presented with a sudden onset of right knee pain after rising from kneeling to standing. (Px 1, p. 26). It further noted Petitioner heard a pop in his knee followed by sudden pain. *Id.* The ER physicians evaluated Petitioner and provided him with an Ace wrap, crutches and medication and told him to follow up with his surgeon and get an MRI. (Px 1, p. 26-28).

At trial, Petitioner testified he had previously injured the same knee in August of 2013 and underwent surgical repair. According to medical records, Petitioner's previous right knee surgery consisted of a medial meniscus repair that took place on August 26, 2013. (Px 2, p. 46). Petitioner testified he returned to work after recovering from that previous surgery and had been working full

duty without problems. Petitioner's orthopedic surgeon for both injuries, Dr. Garelick, indicated Petitioner "was doing well until August 7, 2014" when he injured himself again. (Px 2, p. 47).

On August 11, 2014, Petitioner presented to Dr. David Garelick, M.D. at Illinois Bone and Joint Institute. (Px 2, p. 47). Dr. Garelick recommended Petitioner obtain an MRI of the right knee. (Px 2, p. 47). Petitioner's MRI demonstrated a bucket handle meniscus tear. (Px 2, p. 36). Dr. Garelick indicated Petitioner sustained a re-tear of the medial meniscus and recommended surgery. (Px 2, p. 37).

On August 15, 2014, Petitioner underwent surgery consisting of right knee arthroscopy and partial medial meniscectomy. (Px 3, p. 24-25). Dr. Garelick opined Petitioner's tear was unrepairable and removed approximately 80% of Petitioner's medial meniscus. (Px 3, p. 25). Petitioner testified he paid out-of-pocket for his surgery and anesthesia. (See also Px 4). Petitioner was prescribed pain medication after his surgery. (Px 2, p. 34). Petitioner testified he paid out-of-pocket for his medication. (See also Px 4).

Petitioner followed up with Dr. Garelick approximately two weeks after his surgery on August 27, 2014. (Px 2, p. 31). Petitioner was recovering well. Dr. Garelick recommended some physical therapy. *Id.* Petitioner attended four sessions of physical therapy at Illinois Bone and Joint Institute. (Px 2, p. 8-26). Petitioner testified he attended four rather than eight sessions because he was paying out of pocket and because he knew the exercises since he underwent therapy in the past.

On September 10, 2014, Petitioner returned to Dr. Garelick who released him back to work as of September 15, 2014. (Px 2, p. 7). Petitioner testified he returned to work on September 15, 2014 and has been working full duty ever since. Dr. Garelick released Petitioner from care on September 22, 2014. (Px 2, p. 4). Petitioner testified he has not returned to see any doctor since his release.

Petitioner testified his job requires him to stand and work on his feet for approximately 9-15 hours per day. His right leg and knee is sore every day and feels "used." Petitioner takes Ibuprofen approximately 3-4 times per week for his knee pain. Petitioner testified regarding his hobbies of biking and skiing prior to his accident. Although he can still ride his bike, Petitioner is unsure if he could ski again due to his injury.

Petitioner was never paid any workers' compensation benefits while he was off work from the date of accident until September 15, 2014. Nor were any of his medical bills paid related to his August 7, 2014 accident.

ANALYSIS

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

After hearing the testimony of Petitioner and reviewing the exhibits submitted, the Arbitrator finds that Petitioner's accident arose out of and in the course of his employment with Respondent on August 7, 2014.

The Arbitrator relies on the law as outlined in *Young v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130392WC, 13 N.E. 3d, 1252, 383 Ill. Dec 131 (2014)[1]. There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics." *Springfield Urban League v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th Dist) 120219WC, 990 N.E.2d 284 (2013). Injuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. (*Id.* at 27.) However, when a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." (*Id.* at 23.)

In this case, the Arbitrator finds that Petitioner was injured due to an employment-related risk. Petitioner was in the walk-in cooler at work looking for a pan of carrots. Petitioner knelt down to see if the carrots may have been under the cooler. As Petitioner stood up, his right knee popped. Based on these undisputed facts, this is a compensable claim under the Illinois Workers' Compensation Act as Petitioner was injured while performing his job duties, *i.e.* looking for food products to prepare the food for service that evening. The act of looking for a food product was an act that the employer might reasonably have expected the employee to perform so that he could fulfill his assigned duties as a sous chef. As such, the Arbitrator finds that Petitioner's accident arose out of and in the course of his employment with Respondent on August 7, 2014.

With respect to issue "F", whether Petitioners' current condition of ill-being is causally related to the injury, the Arbitrator finds as follows:

After hearing the testimony of Petitioner and reviewing the exhibits submitted, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the injuries sustained on August 7, 2014.

In this case, the evidence shows Petitioner was in good health and not undergoing any active treatment for his right knee prior to his work accident of August 7, 2014. The Arbitrator finds that Petitioner testified credibly that he had made a full recovery following his previous surgery in 2013 and was able to return to his full duty job without seeking any treatment or taking any medication

[1] In *Young v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130392, Petitioner injured his left shoulder when "reaching into a deep box." The Arbitrator and Commission denied benefits. The Arbitrator found that Petitioner's injury – reaching for an item – did not constitute an increased risk peculiar to Petitioner's employment because it was a movement consistent with normal daily activity and it was not repetitive in nature at work. (*Id* at 13.) The Commission agreed, finding that "the mere act of reaching down for an item did not increase [claimant's] risk of injury beyond what he would experience as a normal activity of daily living." (*Id.* at 14.) The Circuit Court affirmed.

The Appellate Court reversed, finding that the Commission employed the incorrect test. (*Id* at 23.) The Appellate Court explained that it was unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public because claimant was injured due to an employment-related risk. (*Id.*) The Appellate Court defined an employment-related risk as one which is distinctly associated with his or her employment. (*Id.*at 22.) The Court reasoned that Petitioner was injured while performing his job duties, i.e. inspecting parts that were contained in a box. *Id.* The act of reaching in the box was an act that the employer might reasonably have expected the employee to perform so that he could fulfill his assigned duties. *Id.*

from the time of his medical release until his re-injury on August 7, 2014. Additionally, Petitioner's testimony was corroborated by his surgeon, Dr. Garelick, who noted that Petitioner "was doing well until August 7, 2014" when he sustained a re-tear of his medial meniscus. (Px 2, p. 37).

The Arbitrator finds that Petitioner met his burden of proof by a preponderance of the evidence that his condition of ill-being with respect to his right knee is causally related to his August 7, 2014 work accident.

With respect to issue "J", whether the medical services provided to Petitioner were reasonable and necessary and whether Respondent has paid all appropriate charges for all reasonable and necessary medical services, the Arbitrator finds as follows:

Petitioner alleges $5,532.25 in outstanding medical bills (Px 4) at the time of arbitration and $4,922.00 in out-of-pocket payments. Petitioner was billed the following for treatment related to his injury:

Presence St. Joseph Hospital:	$ 953.75
Dr. Garelick (Illinois Bone and Joint Institute):	$3,697.00
MRI (Illinois Bone and Joint Institute):	$1,296.00
Same Day Surgery:	$3,406.80
Beach Anesthesia:	$ 350.00
Walgreens	$ 75.70
Physical Therapy (Illinois Bone and Joint Institute):	$ 675.00
Total:	$10,454.25

Based on the Arbitrator's ruling regarding issues "C" and "F" above, the Arbitrator finds that Petitioner's medical care was reasonable and necessary and finds Respondent liable for all of Petitioner's medical care and expenses as set forth above pursuant to the medical fee schedule. The Arbitrator awards the outstanding medical bills totaling $5,532.25 to be paid by Respondent and the reimbursement of $4,922.00 in out-of-pocket payments made by Petitioner to be paid by Respondent for a total of $10,454.25 to be paid by Respondent directly to Petitioner.

With respect to issue "K", whether Petitioner is entitled to temporary total disability benefits, the Arbitrator finds as follows:

Petitioner alleges 5-3/7 weeks of temporary total disability from August 8, 2014 through September 14, 2014. Respondent agrees to the TTD time period in question, however, disputes payment based on liability.

Based on the Arbitrator's ruling regarding issues "C" and "F" above, the Arbitrator finds Petitioner was temporarily totally disabled from August 8, 2014 through September 14, 2014, for a period of 5-3/7 weeks.

With respect to issue "L", as to the nature and extent of Petitioner's injuries, the Arbitrator finds as follows:

Pursuant to Section 8.1b(b) of the Act, for accidental injuries occurring after September 1, 2011, permanent partial disability shall be determined using the following five enumerated criteria, with no single factor being the sole determinant of disability: (i) the reported level of impairment pursuant to subsection (a) [AMA "Guides to the Evaluation of Permanent Impairment"]; (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records.

First, the Arbitrator notes that an AMA impairment rating was not performed in this case. As such, the Arbitrator turns to the other four factors of permanent partial disability.

Petitioner was 26 years old at the time of the incident. The Arbitrator notes Petitioner is at a young age in the work force and will have to live with his disability in his chosen career as a cook/chef for another 40 years. At trial, Petitioner testified credibly that his job requires him to stand and work on his feet for approximately 9-15 hours per day. Petitioner testified that his right leg and knee is sore every day and feels "used." Petitioner takes Ibuprofen approximately 3-4 times per week for his knee pain. The Arbitrator finds while Petitioner has returned to his pre-injury employment, he now has pain after performing his daily job duties.

The Arbitrator also relies on the medical records in this case which indicate Petitioner sustained a medial meniscal tear for which he underwent surgery consisting of right knee arthroscopy and partial medial meniscectomy. (Px 3, p. 24-25). The Arbitrator finds it significant that Petitioner's tear was unrepairable and Dr. Garelick had to remove approximately 80% of Petitioner's medial meniscus. (Px 3, p. 25). The fact that Petitioner is currently only 27 years old, has a very long work expectancy, is employed in an industry that requires him to be on his feet all day, and now has had 80% of his medial meniscus removed is a significant factor in the Arbitrator's decision as to PPD.

Based on the above, the Arbitrator finds that Respondent shall pay Petitioner permanent partial disability benefits of $450.00/week for 53.75 weeks, because the injuries sustained caused the 25% loss of use of the right leg as provided in Section 8(e) of the Act.

With respect to issue "M", whether penalties and fees should be imposed on Respondent, the Arbitrator finds as follows:

Petitioner filed a timely Petition for Penalties and Fees under § 19(k), § 19(l) and § 16 of the Act. (Px 5).

The Court in *Continental Distrib. Co. v. Indus. Comm'n*, 98 Ill. 2d 407, 456 N.E. 2d 847 (1983) held that the question of whether an employer's conduct justifies the imposition of penalties is a factual question for the Commission. The employer's conduct is considered in terms of reasonableness. *Board. of Educ. v. Indus. Comm'n*, 93 Ill. 2d 1, 442 N.E. 2d 861, 885 (1982). The test is not whether there is some conflict in medical opinion. Rather, the test is whether the employer's conduct in relying on the medical opinion to contest liability is reasonable under all the circumstances presented. 456 N.E. 2d at 851.

In the instant matter, Respondent did not obtain an independent medical examination. The only medical evidence presented in this case came from Petitioner's surgeon, Dr. Garelick, who opined

that Petitioner re-tore his meniscus on August 7, 2014.

Secondly, Respondent's denial of benefits based on an accident defense was likewise unreasonable given the status of the law as outlined in *Springfield Urban League v. Ill. Workers' Comp. Comm'n*, 2013 IL App (4th Dist) 120219WC, 990 N.E.2d 284 (2013) and *Young v. Ill. Workers' Comp. Comm'n*, 2014 IL App (4th) 130392WC, 13 N.E. 3d, 1252 (2014). "There are three categories of risk to which an employee may be exposed: (1) risks distinctly associated with employment; (2) personal risks; and (3) neutral risks which have no particular employment or personal characteristics." *Springfield Urban League* at 27. When a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Young* at 23.

The undisputed facts of this case demonstrate that Petitioner was injured due to an employment-related risk. Petitioner testified that as part of his job he would often look for food/items in the walk-in cooler at North Pond. On the date of accident, Petitioner was in the walk-in cooler looking for a pan of carrots. Petitioner knelt down on the ground on both knees to see if the carrots were beneath the cooler. As Petitioner stood up, his right knee popped. Based on these undisputed facts, Petitioner's injury arose out of and in the course of his employment.

The Arbitrator finds that Respondent's refusal to pay TTD and medical benefits as required by 820 ILCS 305/8[a] is dilatory, punitive, retaliatory and objectively unreasonable based on the undisputed facts of this case, the reliable objective medical evidence, and the totality of circumstances. Respondent's refusal to pay benefits warrants the imposition of penalties equal to the following:

Section 19(k):

Pursuant to Px 4, $10,454.25 was billed in medical services for Petitioner's related medical treatment. Additionally, Petitioner is owed $2,714.29 in temporary total disability benefits from August 8, 2014 through September 14, 2015. As such, Respondent's conduct warrants the imposition of penalties equal to $6,584.27 (representing 50% of the $13,168.54 in TTD and medical expenses unpaid by the Respondent) under 820 ILCS 305/19(k) on account of the Respondent's vexatious refusal to pay such benefits in a timely manner; and

Section 19(l):

Respondent's conduct further warrants the imposition of penalties equal to $6,420.00 (representing Thirty and 00/100 Dollars ($30.00) per day for 214 days from 8/8/2014 through 3/9/2015) for the nonpayment of TTD benefits and medical bills during an interval of lawful entitlement under 820 ILCS 305/19[l]; and

Section 16:

Pursuant to Section 16, Respondent shall pay attorneys' fees calculated upon 20% of the unpaid medical expenses to date and 20% of the Section 19(k) award. (See *Tom Keenan v. Chief*

Construction, 04WC 059927, 6 IWCC 1037 (2006) and *Kevin Kreger v. Bergenson's Property Service/Administaff*, 06WC 49437, 09 IWCC 1172). The total unpaid medical expenses equal $10,454.25. 20% of $10,454.25 equals $2,090.75. The total in 19(k) penalties equals $6,584.27. 20% of $6,584.27 equals $1,316.85. As such, Respondent's conduct warrants the imposition of attorney's fees and costs of $3,407.60 pursuant to 820 ILCS 305/16.

With respect to issue "N", whether Respondent is due any credit, the Arbitrator finds as follows:

Respondent previously paid a settlement of 10% loss of use of the right leg, or 21.5 weeks of disability, for Petitioner's right knee/leg injury with date of accident 8/9/2013, IWCC case number 14WC 4043. (Rx 1). Pursuant to Section 8(e)17 of the Act, Respondent is allowed a credit for a subsequent injury to the same member. As such, Respondent will be given a credit of 21.5 weeks.