FILED
April 24, 2019
Carla Bender
4th District Appellate
Court, IL

2019 IL App (4th) 180702WC-U

Workers' Compensation
Commission Division
Order Filed: April 24, 2019

No. 4-18-0702WC

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

NATHAN BENSON,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Piatt County
	)	
v.	)	
	)	Nos. 17 MR 82
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*,	)	Honorable
	)	Bradford A. Rau,
(Kirby Medical Center, Appellee).	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the judgment of the circuit court, confirming a decision of the Illinois Workers' Compensation Commission denying the claimant benefits pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2012)).

¶ 2 The claimant, Nathan Benson, appeals from a judgment of the circuit court of Piatt County, confirming a decision of the Illinois Workers' Compensation Commission (Commission) which denied the claimant benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)). For the reasons which follow, we affirm the judgment of the circuit court.

¶ 3 The facts relevant to our disposition of this appeal are not in dispute.

¶ 4 The claimant was employed by Kirby as a janitor. His duties included transporting linens to off-site locations. On September 11, 2014, he was assigned to transport linens via a company truck to the Old Kirby Hospital and a nursing home. The truck was parked by a ramp-like loading dock which had stairs at one end leading to the ground level, a wheelchair ramp on the other side also leading to the ground, and a hydraulic lift used for the movement of freight to or from the loading dock which was located on the length-wise side of the loading dock. The plaintiff testified that, when he discovered that the company truck was low on fuel, he went to the office of his supervisor, Jody Bettis, Kirby's Director of Environmental Services, to obtain a company credit card to purchase gas for the vehicle. Bettis's office was located adjacent to the loading dock. Bettis gave the claimant the credit card and told him to fill the truck with gas and return the credit card and receipt to her. According to the claimant, Bettis told him to hurry as she was about to leave work for the day. The claimant exited Bettis's office onto the loading dock. Rather than use the stairs or the wheelchair ramp to reach the ground level where the truck was located, the claimant decided to jump off of the loading dock. When he did so, his right foot and leg struck the hydraulic lift and he fell to the ground, inverting his left foot, resulting in a closed fracture of the fifth metatarsal bone. The claimant testified that jumping off of the loading dock was his routine way of exiting the dock and that he jumped off of the loading dock 3 or 4

times each day. According to the claimant, Bettis and one other supervisor, Drew Kessler, had seen him jump from the dock to reach the ground and never told him not to exit the dock in that manner. Bettis denied having ever having witnessed the claimant jump from the loading dock. The claimant admitted that no one ever told him to jump off of the loading dock to reach the ground level. A surveillance video depicting the incident was admitted into evidence. The claimant testified to the video's accuracy.

¶ 5 Following the arbitration hearing held on January 29, 2016, the arbitrator issued a written decision on March 29, 2016, finding both that, at the time of his injury, the claimant was not fulfilling the duties required by his employment and that he voluntarily exposed himself to an unnecessary personal danger solely for his own convenience. The arbitrator concluded, therefore, that no employee/employer relationship existed between the claimant and Kirby at the time of the claimant's injury and that the claimant's injury did not arise out of his employment. As a consequence, the arbitrator denied the claimant any benefits under the Act.

¶ 6 The claimant filed a petition for review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). On November 30, 2017, the Commission issued a unanimous decision modifying the arbitrator's decision as it relates to the employer/employee relationship existing between the claimant and Kirby at the time of the accident. The Commission found that the claimant did establish the existence of an employer/employee relationship at the time of his injury. However, the Commission found, as did the arbitrator, that the claimant's injury did not arise out of his employment with Kirby and affirmed and adopted the denial of benefits under the Act.

¶ 7 The claimant sought a judicial review of the Commission's decision in the circuit court of Piatt County. On September 20, 2018, the circuit court confirmed the Commission's decision,

and this appeal followed.

¶ 8 Before addressing the claim of error raised by the claimant in this appeal, we again find it necessary to admonish a litigant for failure to comply with the requirements for briefs filed with this court. Illinois Supreme Court Rule 341(h)(9) (eff. Nov. 1, 2017) requires that an appellant's brief contain an appendix as required by Rule 342. Illinois Supreme Court Rule 342 (eff. July 1, 2017) requires that the appendix to an appellant's brief contain a complete table of contents, with page references, of the record on appeal which is to include the nature of each exhibit introduced along with the names of all witnesses and the pages on which their direct examination, cross-examination, and redirect examination appear. Rather than enumerating the exhibits introduced at the arbitration hearing with page references or setting forth the names of the witnesses and the page references of their testimony, the table of contents to the record contained in the claimant's brief contains an entry of "TRANSCRIPT" page numbers C20-C300, requiring this court to search through 280 pages of the record to find the exhibits and witness testimony relevant to the disposition of this appeal. Supreme Court rules "are not suggestions;" rather, they are rules which have the force of law, and the presumption is that they will be followed as written. *Bright v. Dicke*, 166 Ill. 2d 204, 210 (1995). This court has the discretion to strike an appellant's brief for failure to comply with the supreme court rules and dismiss the appeal. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 77. We elect not to do so in this case and will address the issue raised on the merits.

¶ 9 The claimant asserts that the facts material to this court's analysis of whether his injury arose out of his employment are not in dispute and, as a consequence, our review is *de novo*. Kirby contends that the manifest-weight standard is to be applied. We agree with Kirby. When, as in this case, more than one inference might be drawn from the undisputed facts, we apply a

manifest-weight standard on review. *Brady v. Louis Ruffolo & Sons Construction Co.*, 143 Ill. 2d 542, 549 (1991).

¶ 10 On the merits of his appeal, the claimant argues that the Commission erred in determining that his injuries did not arise from his employment. Specifically, he asserts that his employment duties required him to transport linens by a truck provided by Kirby, and he was required to go down from the loading dock to ground level to reach that truck in order to take the vehicle for fuel. He concludes, therefore, that his injury arose out of his employment.

¶ 11 Kirby argues that the claimant's act of jumping off of the loading dock was not an act incidental to his employment. Rather, the claimant voluntarily exposed himself to an unnecessary personal danger for his own convenience. It concludes that the claimant's actions took him out of the sphere of his employment, and as a consequence, his injuries did not arise out of his employment.

¶ 12 The Commission found that the claimant's injuries "did not stem from any employment requirement such as would have exposed him to risk greater (qualitatively or quantitatively) than that faced by the general public." According to the Commission, the claimant's "fall did not stem from any dangerous conditions of his employment or work-related risk of harm, but from a fluke." The Commission concluded that the claimant's injury did not arise out of his employment. Based upon the record before us, we cannot say that the Commission's finding in this regard is against the manifest weight of the evidence.

¶ 13 To obtain compensation under the Act, the claimant must establish by a preponderance of the evidence that he suffered a disabling injury that arose out of and in the course of his employment. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 591-92 (2005). Whether a causal relationship exists between a claimant's employment and his injury is a

question of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). For the Commission's resolution of a fact question to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Tolbert v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130523WC, ¶ 39. Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence. Rather, the appropriate test is whether there is sufficient evidence in the record to support the Commission's determination. *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 14 An employee's injury is compensable under the Act only if it arises out of and in the course of the employment. 820 ILCS 305/2 (West 2012). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989).

¶ 15 "In the course of the employment" refers to the time, place, and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v. Industrial Comm'n*, 66 Ill. 2d 361, 366 (1977). Injuries sustained on an employer's premises, or at a place where the claimant might reasonably have been while performing his work duties, or within a reasonable time before and after work, are generally deemed to have been received in the course of the employment. See *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989); see also *Wise v. Industrial Comm'n*, 54 Ill. 2d 138, 142 (1973). In this case, the claimant was injured while working and on Kirby's premises. Clearly, he was injured in the course of his employment.

¶ 16 Arising out of the employment refers to the origin or cause of the claimant's injury. As the Supreme Court held in *Caterpillar*:

> "For 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. [Citations.] Typically, 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. [Citation.] 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. [Citations.]" *Caterpillar*, 129 Ill. 2d at 58.

¶ 17 The initial step in considering the "arising out of" component of a worker's compensation claim is to determine the type of risk to which the claimant was exposed at the time of his injury. *Baldwin v. Illinois Worker's Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011). "Risks to employees fall into three groups: (1) risks distinctly associated with the employment; (2) risks personal to the employee, such as idiopathic falls; and (3) neutral risks that have no particular employment or personal characteristics." *Id.* A risk "distinctly associated" with a claimant's employment is a risk that is peculiar to the claimant's work or incurred as the result of a defect in the employer's premises. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 45 (1987); *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 106 (2006). "Personal risks include nonoccupational diseases, injuries caused by personal infirmities such as a trick knee, and injuries caused by personal enemies and are generally noncompensable." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162-63 (2000). A neutral risk is one having no particular employment or personal characteristic. "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." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Worker's Compensation*

Comm'n, 407 Ill. App. 3d 1010, 1014 (2011). The increased risk may be either qualitative, in that some aspect of the employment contributed to the risk, or quantitative, in that the employee is exposed to the common risk more frequently than the general public. *Id.*

¶ 18 In this case, the claimant was injured when he jumped from a loading dock to reach ground level. There is no evidence that his injury was the result of a personal risk such as an idiopathic fall. Nor is there any evidence that the risk of injury from descending from an elevated platform to ground level was peculiar to the claimant's work or that the risk was the result of a defect in Kirby's premises. Rather, the risk of injury to the claimant in this case was a neutral risk as members of the general public encounter the risk of injury as they descend from elevated platforms or structures to ground level in their everyday living. See *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, ¶ 20 (traversing stairs is a neutral risk); *Baldwin*, 409 Ill. App. 3d at 478 (walking up stairs does not expose an employee to a risk greater than that faced by the general public). As the claimant was exposed to a neutral risk, his injury is compensable under the Act only if his employment exposed him to that risk to a greater degree than the general public.

¶ 19 Although the claimant's work duties on September 11, 2014, required that he descend from the loading dock to ground level where the truck he was to use was parked, the Commission, nevertheless, found that his injury "did not stem from any employment requirement such as would have exposed him to risk greater (qualitatively or quantitatively) than that faced by the general public." We agree.

¶ 20 The record establishes that there were stairs and a wheelchair ramp leading from the loading dock to ground level. The claimant admitted that his supervisors at Kirby did not require him to descend from the dock by jumping. He testified that he purposefully jumped off of the

loading dock, and it would only have taken him 30 seconds longer to reach the ground if he had used the stairs and 60 seconds longer if he had walked down the wheelchair ramp.

¶ 21 An injury to an employee arises out of his employment if it "has its origin in some risk so connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury." *Orsini*, 117 Ill. 2d at 45. That causal connection is established when, at the time of his injury, the employee was performing acts which he might reasonably be expected to perform incident to his assigned duties. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204 (2003). Stated otherwise, the risk that produced the injury must be causally connected to the employment. *Id.*

¶ 22 In this case, the neutral risk attendant to the claimant's descending from the loading dock to the ground level was no greater than the risk to which the general public is exposed as they descend from elevated platforms or structures to ground level in their everyday living. The risk that resulted in the claimant's injury was that of jumping off of the loading dock, an act which was not reasonably expected to be performed in connection with the claimant's assigned duties.

¶ 23 Whether the claimant's injury arose out of his employment with Kirby was a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶ 29. The Commission found that the claimant's injury "did not originate in any cognizable employment risk and therefore did not 'arise out of' employment." Based upon the foregoing analysis, we cannot say that the Commission's finding in this regard is against the manifest weight of the evidence.

¶ 24 For the reasons stated, we affirm the judgment of the circuit court which confirmed the Commission's denying the claimant benefits under the Act.

¶ 25 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF CHAMPAIGN)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan Benson,
Petitioner,

No. 14 WC 036242

vs.

Kirby Medical Center,
Respondent.

17IWCC0770

DECISION AND OPINION ON REVIEW

Timely Petition for Review under having been filed by Petitioner herein and notice given to all parties, the Commission, after considering issues including employee-employer relationship, accident, and causal connection, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below, but otherwise affirms and adopts the Decision of the Arbitrator, a copy of which is attached hereto and made a part hereof.

Petitioner, a 24-year-old janitor, asserted that he broke his left foot "pinky toe" on September 11, 2014 when, while on a work-related errand, he jumped off a loading dock instead of taking the available stairs. The Arbitrator denied the claim in its entirety on the overlapping grounds that: (1) an employee-employer relationship did not exist (that is, Petitioner took himself out of the scope of his employment when he jumped off the loading dock, purportedly in violation of rules and for his own benefit); and (2) his injury did not "arise out of" nor was it "in the course of" employment.

The Commission finds that Petitioner did establish an employee-employer relationship at the time of the injury. The Commission does not disturb the Arbitrator's ultimate determination, however, that the injury is not compensable insofar as it did not "arise out of" his employment.

17IWCC0770

BACKGROUND

Petitioner, 24, was hired as a janitor at Respondent, Kirby Medical Center, in March 2014. His duties included transporting hospital linens via company truck. These duties had him, on a daily basis, ascending and descending a ramp-like loading dock, which dock was immediately adjacent to the office of his supervisor, Jody Bettis. On the afternoon of September 11, 2014, Petitioner discovered that the linens truck was out of gas. He went to Ms. Bettis' office to ask for the company credit card so that he could buy gas. Ms. Bettis gave him the card and directed that he go fill the truck's gas tank and return with the credit card. Petitioner exited Ms. Bettis' office. While on his way back to the truck, he used the "shortcut" of jumping off the loading dock instead of taking the stairs at the end of the dock. As depicted in security video of the incident, while hopping off the dock, his right foot and leg made contact with the side of a piece of equipment -- a hydraulic lift -- that was abutting the dock. Instead of landing on the ground (which appeared to be about 3 feet below) on both feet, he tumbled and fell to the ground, inverting his left foot. (RX 1).

Petitioner was immediately in pain but got up and finished his errand of filling the truck and returning to Ms. Bettis' office with the credit card and gas receipt. He testified that, by the time he got back to Ms. Bettis' office, his left foot was throbbing and he could not put weight on it. Ms. Bettis instructed him to get checked out at the Emergency Department. There, Petitioner was assessed with a closed fracture of the fifth metatarsal bone, put in a soft cast, and referred to Carle Orthopedics, where he treated conservatively through October 23, 2014.

At hearing, Petitioner testified that taking the "shortcut" of jumping off the loading dock was his usual, routine way of exiting the loading dock. He testified that this was the quickest way off the dock and he took this route because "every day I was under heavy time constraints." (Tr. 34-35). According to Petitioner, he exited the dock in this manner at least 3 or 4 times per day and his employer acquiesced in his action inasmuch as Ms. Bettis (and at least one other superior) had witnessed him jumping off the dock a "half dozen times or so" prior to the accident without ever instructing him against doing this. (Tr. 39-41). Ms. Bettis denied ever witnessing Petitioner jumping off the dock. (Tr. 65-66).

DISCUSSION

As mentioned above, the Arbitrator found that: (1) there was no employer-employee relationship, and (2) the injury did not "arise out of" nor was it "in the course of" employment. His reasoning is summarized in the concluding paragraph of his decision, where he wrote:

> "[T]he Arbitrator finds that when Petitioner ventures from a safe route provided by the employer for ingress/egress and instead, purposefully jumps from a loading dock onto a hydraulic lift thus falling off to the ground, he has exposed himself to an unnecessary personal risk for his own personal convenience.[1] Therefore, any left foot claim sustained while performing this activity is not within the employee/employer relationship and does not arise out of or in the course of the employment with Respondent."

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[1] The Commission notes that the assertion that Petitioner's choice of route off the loading dock was strictly "for his own personal convenience" is not sound. As Petitioner testified, on the date of accident, he was finishing his errand pursuant to the instruction of his supervisor.

Regarding the Arbitrator's finding that there was no employer-employee relationship inasmuch as Petitioner took himself out of the course of employment – the Commission does not take so draconian a view. Case precedent finds that for conduct to produce severance from employment, such conduct must be egregious, reckless, or unrelated to the claimant's employment; mere negligence or violation of a safety rule will not in and of itself suffice to sever an employee from the employment risk when an employee's actions were otherwise aimed at the furtherance of his employment duties. See, e.g., *Chadwick v. Industrial Commission*, 179 Ill.App.3d 715 (4th Dist. 1989) (an employee who fell to his death because he had not tethered himself to a scaffold was nevertheless held to be within the course and scope of his employment). Here, even assuming *arguendo* that Petitioner's action on September 11, 2014 violated a safety rule, it was nonetheless neither egregious nor done for personal convenience. As such, Petitioner's injury occurred while he was acting within the course and scope of his employment.

Nevertheless, Petitioner's injury is not compensable under the Act. While his injury occurred "in the course of" his employment, it did not "arise out of" the employment. The "arising out of" component is primarily concerned with causal connection between the employment and the accidental injury, and the mere fact that an incident occurred on the premises of the employer is not sufficient to fulfill the "arising out of" requirement. *Builders Square v. Industrial Commission*, 339 Ill. App. 3d 1006, 1010-11, 791 N.E.2d 1308, 274 Ill. Dec. 897 (2003). "The words 'arising out of' refer to the origin or cause of the accident and presuppose a causal connection between the employment and the accidental injury." *Jones v. Industrial Comm'n*, 78 Ill.2d 284 (1980) (citations omitted).

In the instant case, Petitioner has not proven causal connection between his employment and his injury insofar as his injury did not stem from any employment requirement such as would have exposed him to risk greater (qualitatively or quantitatively) than that faced by the general public. Petitioner acknowledged that his employer had never required him to exit the dock by jumping off it. He testified that, on the date of accident, while Ms. Bettis told him to do his task quickly, she did not direct him to jump off the dock. (Tr. 51-52).

Further, Petitioner's preferred route off this particular dock – a dock not too far off the ground, and free of any debris or premises defect -- was not especially risky. While the parties may assume reasonably that the stairs would have been a less risky route than the non-stairs option selected by Petitioner, the proposition that Petitioner's chosen route (regardless of whether Respondent acquiesced in this choice) was inherently dangerous is not warranted. The reality is that, on September 11, 2014, Petitioner's fall did not stem from any dangerous conditions of his employment or work-related increased risk of harm, but from a fluke – video of this incident shows that he was intending to clear the side of the lift, but inexplicably, one foot was caught on the lift and caused him to fall. As he testified, he just took a misstep; "my foot slipped out from under me." (Tr. 45-46).

In conclusion, Petitioner's accident, while unfortunate, did not originate in any cognizable employment risk and therefore did not "arise out of" employment. The Commission finds that an employee-employer relationship did exist between Petitioner and Respondent on the date of asserted accident, but affirms the Arbitrator's decision as to the non-compensability of the accident for the reasons stated above.

17IWCC0770

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on March 29, 2016 is hereby modified as stated herein and otherwise affirmed and adopted.

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: NOV 30 2017

o-10/03/17
jdl/ac
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Joshua D. Luskin

Charles J. DeVriendt

L. Elizabeth Coppoletti

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

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BENSON. NATHAN
Employee/Petitioner

Case# 14WC036242

KIRBY MEDICAL CENTER
Employer/Respondent

17IWCC0770

On 3/29/2016, 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 0.47% 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:

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17IWCC0770

STATE OF ILLINOIS)
)SS.
COUNTY OF Champaign)

☐ 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

Nathan Benson
Employee/Petitioner

Case # 14 WC 36242

v.

Setting Lee/Urbana

Kirby Medical Center
Employer/Respondent

An Application for Adjustment of Claim was filed on this matter and Notice of Hearing was mailed to each party. The matter was heard by the Honorable Arbitrator Lee of the Workers' Compensation Commission, in the City of Urbana on January 29, 2016. After reviewing all evidence presented, the Arbitrator makes the following findings of fact and rulings on the disputed issues below.

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

17IWCC0770

FINDINGS

On September 11, 2014, Respondent *was* operating under and subject to the provisions of the Act.

On these dates, an employee-employer relationship *did not* exist between Petitioner and Respondent.

On these dates, Petitioner *did not* sustain an accident that arose out of and in the course of employment.

Petitioner's current condition of ill-being **is not** causally related to the accident.

Petitioner is not entitled to medical and TTD benefits.

ORDER

No benefits are awarded.

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.

Edward Lee 3/19/16

Signature of Arbitrator Date

MAR 29 2016

17IWCC0770

ILLINOIS WORKERS' COMPENSATION COMMISSION

Nathan Benson
Employee/Petitioner
v.
Kirby Medical Center
Employer/Respondent

Case # 14 WC 36242

Setting Lee/Urbana

ARBITRATION DECISION

An Application for Adjustment of Claim was filed on this matter and Notice of Hearing was mailed to each party. The matter was heard by the Honorable Arbitrator Lee of the Workers' Compensation Commission, in the City of Urbana on January 29, 2016. After reviewing all evidence presented, the Arbitrator makes the following findings of fact and rulings on the disputed issues below.

DISPUTED ISSUES:

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. Was there an 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?

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 total benefits are due?

L. What is the nature and extent of the injury?

FINDINGS OF FACT

Petitioner is a twenty-five year old, male, janitor who filed an application for adjustment of claim to the left foot for an incident alleged on September 11, 2014. Kirby and Carle medical records confirmed treatment for a non-operated left fifth metatarsal (the "pinky toe") fracture with casting and release to full duty/MMI approximately two months later. (Px. A, B). On October 25, 2014 Petitioner related in Carle medical records to "having zero pain" and x-rays showed healed fracture of the base of the fifth metatarsal compared with September 25, 2014 - otherwise no acute findings. (Px. B). Petitioner testified to returning to work elsewhere as a roofer with extensive time spent on his feet as a laborer without significant complaints other than the need to take occasional over the counter pain medication.

In advance of testimony, Petitioner was provided with a copy of a surveillance video by Kirby Medical Center depicting the alleged incident on September 11, 2014. Petitioner established the video was accurate and did not appear altered in any way. It was admitted into evidence without objection. (Rx.1).

The surveillance video showed Petitioner jumping from a loading dock onto a hydraulic lift and falling to the ground. Petitioner testified he purposefully jumped from the loading dock in order to get down to the ground quicker so he could enter a company vehicle parked in the loading dock bay area. Petitioner testified there were stairs to the immediate right he could have taken which he estimated would have taken an extra 30 seconds to get off the loading dock. Petitioner also testified there were another set of stairs on the other end of the loading dock he could have taken which he estimated would have taken an extra 60 second to get off the loading dock.

Petitioner testified the hydraulic lift was for the transportation of linens and other freight and not for employees to get down off the loading dock, like an elevator. Petitioner also testified his supervisor did not direct, nor had ever previously directed, him to jump off the loading dock. Petitioner testified he had jumped off the loading dock before, approximately a dozen times, and other supervisors had observed this and allowed him to do it – Petitioner did not call any other witnesses or supervisors to support this testimony that he had been observed previously jumping off the loading dock, or using the hydraulic system other than for the movement of freight.

In reviewing a job description on cross-examination, Petitioner admitted his job duties had him on the loading dock for the transportation of linens on a daily basis but that he was not directed, either verbally or in writing, to ever jump from the loading dock or use the hydraulic lift to get down off the loading dock. Petitioner

admitted, as the job description established, that safety comes first and "not to jeopardize one's own or other's safety". (Rx. 3).

Petitioner testified Jodie Bettis was his direct and only supervisor, Jodie Bettis, Director of Environmental Services, testified she was Petitioner's only supervisor and had been the one to hire him. Ms. Bettis testified she had never observed Petitioner jump from the loading dock before and if she had she would have advised him to take the stairs. Ms. Bettis laid a foundation for an incident report admitted into evidence which confirmed Petitioner was advised to use the stairs following the alleged incident. (Rx. 2).

Ms. Bettis also laid a foundation for a job description admitted into evidence which confirmed Petitioner's job duties did not direct him to jump from the loading dock or use the hydraulic lift to get down off the loading dock, and Petitioner was to observe all safety protocols. Ms. Bettis testified she had requested Petitioner go to a company vehicle parked in the loading dock bay area to get gas for the vehicle and return with the company credit card before she had to leave for the day but she did not direct Petitioner to jump from the loading dock.

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RULING

In support of the Arbitrator's decision regarding the question of whether Petitioner and Respondent were operating under the Illinois Workers' Compensation or Occupational Diseases Act, and their relationship was one of employee and employer, the Arbitrator finds the following facts and makes the following rulings:

The Illinois Supreme Court has held where an employee incurs a danger of his own choosing, outside of any reasonable exercise of his employment, the act is not an incident to employment. *Lumaghi Coal Co. v. Industrial Commission et al. 318 Ill. 151, No. 16627 (June 18, 1925).* The employer is not liable for every accidental injury which may happen to an employee during his employment. *Id.* The employer is not liable where the employee exposes himself to a danger which is not one arising from the employee's employment. *Id.*

In *Lumaghi*, a mine inspector used an electric motor which hauled coal to the bottom of the shaft and sustained a non-compensable injury. The claimant, as a mine examiner, had nothing to do with operating the motors. *Id.* The claimant used the motor for the purpose of riding on it to the place on the other side of the mine as it was a quicker route. *Id.* Similarly, here Petitioner's injury were not a result of fulfilling any duties required of his employment but according to his own testimony "hopping off" a hydraulic system by means of the loading dock was for the purpose to get down quicker rather than using the stairs that would have taken an extra 30-60 seconds. (Rx. 2).

It is clear from the surveillance video, Petitioner actions took him entirely out of the sphere of his employment and he was injured while violating common sense safety rules. (Rx. 1, 3). It cannot be then said that any accident was due to employment and in such a case no compensation can be recovered. *Id.* Petitioner seeking an award before the Commission must prove by a preponderance of credible evidence each element of the claim. *Illinois Institute of Technology v. Industrial Commission, 68 Ill.2d 236, 369 N.E.2d 853 (1977).* The facts of each case must be closely analyzed to be fair to the employee, the employer, and to the employer's workers' compensation carrier. *Three "D" Discount Store v. Industrial Commission, 198 Ill.App. 3d 43, 556 N.E.2d 261, 144 Ill.Dec. 794 (4th Dist. 1989).*

Petitioner chose to voluntarily, without the knowledge of Respondent, engage in a hazardous method of taking him off the loading dock when his duties required him to make the trip in a safer manner. (Rx. 1,2,3). In doing so he voluntarily went

outside of the reasonable sphere of his employment, and put himself beyond the protection of any implied undertaking of his job duties.

Petitioner was leaving the premises to get gas in a company vehicle. He testified had jumped off the loading dock before and other supervisors had observed this and allowed him to do it. Petitioner did not call any other witnesses or supervisors to support that the route of jumping off the loading dock, or using the hydraulic lift other than for the movement of freight, was a customary or permitted route. In fact, Petitioner admitted the hydraulic lift was not for getting down off the loading dock. Also, Petitioner testified he had only jumped off the loading dock a dozen or so times, and thus it was not an everyday occurrence despite the fact he was on the loading dock transporting linens on a daily basis.

The Arbitrator finds the testimony of Jodie Bettis, Director of Environmental Services, to be more credible than Petitioner. Ms. Bettis confirmed she had never observed Petitioner jump from the loading dock before and if she had, as his direct supervisor, she would have advised him to take the stairs. This is supported by an incident report admitted into evidence which confirmed Petitioner was advised to use the stairs following the alleged incident. (Rx. 2). Ms. Bettis also laid a foundation for a job description admitted into evidence which confirmed Petitioner's job duties did not direct him to jump from the loading dock or use the hydraulic lift to get down off the loading dock. (Rx. 3). Petitioner admitted on cross examination he was aware he was to observe safety protocols as part of his job duties. Ms. Bettis testified she had never and did not direct him to jump off the loading dock.

The facts here are on point with those in *Lumaghi* and others cases mentioned in further detail below when a claimant takes an alternative route or shortcut. In those cases, it was found to be irrelevant that other employees took the same route, or claimant had done it before, or the employer was aware of this practice and never attempted to stop it. "Employer acquiescence alone cannot convert a personal risk into an employment risk." *Orsini, 117 Ill.2d at 47, 109 Ill.Dec. 166, 509 N.E.2d 1005, citing Yost v. Industrial Comm'n, 76 Ill.2d 548, 31 Ill.Dec. 812, 394 N.E.2d 1189 (1979), and Lynch Special Services v. Industrial Comm'n, 76 Ill.2d 81, 27 Ill.Dec. 738, 389 N.E.2d 1146 (1979).* Accordingly, Illinois courts have 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." *Orsini, 117 Ill.2d at 47, 109 Ill.Dec. 166, 509 N.E.2d 1005.*

In *Hatfill v. Industrial Commission, 202 Ill.App.3d 547, 560 N.E.2d 369, 148 Ill.Dec.67 (1990)* the claimant stated he had jumped the ditch on the employers premises in the past, just as others had done, to get to his car in the parking lot quicker. *Id.* The claimant was unaware of anything in the employee's handbook which stated that jumping the ditch was a safety violation. *Id.* The claimant's had never been formally written up for a safety violation for jumping the ditch, and he had not been told that this practice was not allowed. *Id.* Claimant had observed 10 to 15 persons a day jumping the ditch. *Id.* Compensability was denied in *Hatfill* as there was no reason for the claimant to jump over a ditch just as likewise there was no reason for Petitioner here to jump off the loading dock onto a hydraulic lift to get down quicker. Regardless of whether Petitioner may or may not have done it before does not mean that the practice was required by the job or a reasonable expectation of the job. Choosing to work in an unsafe manner does not make such voluntary acts compensable, nor is Respondent required to police routes of ingress and egress to prevent all unsafe voluntary acts. *Id.*

Petitioner's left foot claim was not a result of fulfilling any duties required of his employment and thus there was no employee/employer relationship at the time of the accident.

In support of the Arbitrator's decision regarding the question of whether an accidental injury occurred which arose out of and in the course of the Petitioner's employment by the Respondent, the Arbitrator finds the following facts and makes the following rulings:

Under the Illinois Workers' Compensation Act, only those injuries which "arise out of" and "in the course of" the employment relationship are compensable. *820 ILCS 305/2, Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275, 241 Ill.Dec. 820 (1999).* The phrases "arising out of" and "in the course of" are used conjunctively, and thus require the existence of both elements to make the claim compensable under the Workers' Compensation Act. *Id.*

Whether an employee's injuries "arose out of" the employment may be determined under two different approaches. An injury arises out of the employment where its origin stems from a risk connected with, or incidental to, the employment. 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. *Dodson v. Industrial Commission*, 241 Ill.Dec. at 823. Also, an injury arises out of the employment where it is caused by some risk to which the employee is exposed to a greater degree than the general public by virtue of his employment *Id.* Under either approach, an injury does not

arise out of the employment where an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience. *Id.*

The "in the course of" element refers to the time, place and circumstances under which the accident occurred. *Catepillar Tractor v. Industrial Commission, 129 Ill.2d 52, 541 N.E.2d 665, 133 Ill.Dec. 454 (1989).* It is not enough Petitioner is working when an injury is realized. Petitioner must show that the injury was due to some cause connected with the employment. *Board of Trustees of the University of Illinois v. Industrial Commission, 44 Ill.2d 207, 214, 254 N.E.2d 522 (1969; see also Hansel & Gretel Day Care Center v. Industrial Commission, 215 Ill.App.3d 284, 574 N.E.2d 1244 (1991).*

First, when an employee voluntarily exposes himself to an unnecessary personal danger solely for his own convenience, then the case law is clear that such an injury does not arise out of employment. *Orsini v. Industrial Commission, 117 Ill.2d 38, 109 Ill.Dec. 166, 509 N.E.2d 1005 (1997); Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275, 241 Ill.Dec.820 (1999); and, Hatfill v. Industrial Commission, 202 Ill.App.3d 547, 560 N.E.2d 369, 148 Ill.Dec.67 (1990).*

While Petitioner was attempting to leave the premises, he voluntarily chose to take a shortcut, an alternative dangerous route, for his own convenience because it was quicker. There was no benefit to Kirby Medical Center in Petitioner jumping off the loading dock rather than taking the stairs. To the contrary, Jodie Bettis, Director of Environmental Services, rebutted Petitioner's assertions and testified he had never been observed jumping from the loading dock. Ms. Bettis testified if she had observed Petitioner jump from the loading dock, as his only direct supervisor, she would have objected to getting off the loading dock in this fashion for safety reasons. Further, Ms. Bettis actually objected to Petitioner jumping off the loading dock and directed him to take the stairs in the future upon reviewing the surveillance video. (Rx. 1, 2).

In *Hatfill*, the claimant was on the employers premises en route to his car parked in the employee parking lot. *Id.* Instead of using the walkway located fifty feet to his left and right, the claimant took a shortcut by jumping across some water that had accumulated at the foot of an incline leading to the employer's parking lot. Id. While doing so, the claimant sustained an injury. *Id.* In reviewing these facts, the Appellate Court found that the claimant's accident was not compensable because his injuries resulted from a personal risk assumed by him for his own benefit and

not that of the employer. *Hatfill, 202 Ill.App.3d at 554, 148 Ill.Dec.67 560 N.E.2d 369.*

In *Dodson v. Industrial Commission*, the claimant was on the employer's premises and proceeded down several steps of concrete sidewalk leading to the employee parking area and, because it was raining hard, she left the sidewalk and walked across a grassy slope to reach the driver's side of her car. *Id.* The claimant testified that she walked across the grass because it was the most direct route to her car. *Id.* While walking on the sloping grassy path, the claimant fell and sustained injuries. *Dodson v. Industrial Commission, 308 Ill.App.3d 572, 720 N.E.2d 275, 241 Ill.Dec.820 (1999).* In analyzing these facts, the Appellate Court found that the claimant's voluntary decision to transverse the grassy slope instead of the walkway, exposed her to an unnecessary danger entirely separate from her employment responsibilities. *Id.* In addition, the Court found that the claimant's decision not to use the walkway was for her own benefit and not that of the employer's. *Id.* Consequently, the Court held that the claimant's injuries did not arise out of her employment. *Id.*

In both *Hatfill and Dodson*, the claimants attempted to argue that other employees had used the alternative routes that they had used at the time of their injury, and hence, the employer had acquiesced in the use of the route in question. In both cases, the Appellate Court rejected this argument. In *Hatfill*, the Court stated that "the fact that some people may chose to leave the work place in an unsafe manner does not make such voluntary acts compensable, nor is the respondent required to police routes to prevent all unsafe voluntary acts." *Hatfill, 202 Ill.App.3d 553, 148 Ill.Dec.67, 560 N.E.2d 369.* The Court went on to state, that to accept the claimant's arguments would require the employer to make other routes safe. *Id.* Applying the analysis of the Appellate Court in *Hatfill* and *Dodson* to the facts of the present case, it is clear Petitioner's injuries, at the very least, did not arise out of his employment. While Petitioner was leaving the premises, just as in *Hatfill* and *Dodson*, Petitioner voluntarily choose to ignore a safe route for his own personal benefit, that being that it was the shortest route. Petitioner's actions in this regard did not, in any way, benefit Respondent. Accordingly, the Arbitrator finds Petitioner's injuries did not arise out of his employment.

Further, to be compensable, the injury must have resulted from some risk of the employment, and must be incidental to the anticipated normal use. *Archer Daniels Midland Co., 91 Ill.2d 210, 62 Ill.Dec. 921, 437 N.E.2d 609; Aaron v. Industrial Comm'n (1974), 59 Ill.2d 267, 319 N.E.2d 820.* Where the injury has resulted from a personal deviation by an employee or where the injury resulted from a risk

personal to the employee and not incidental to the employment the injury is not compensable. *Aaron, 59 Ill.2d 267, 319 N.E.2d 820; Fisher Body Division, General Motors Corp. v. Industrial Comm'n (1968), 40 Ill.2d 514, 240 N.E.2d 694.* Jumping from the loading dock off a freight only hydraulic lift and falling rather than taking stairs to the either side was not incidental to arising out of the employment or the anticipated normal use of egress, Petitioner's left foot claim did not arise out of employment.

Even one prong of the "arising out of" and in the course of" employment analysis that has not been met is sufficient to justify denial of compensation. *Orsini v. Industrial Comm'n (1987), 117 Ill.2d 38, 109 Ill.Dec. 166, 509 N.E.2d 1005.* However, Petitioner's injuries also did not occur at a reasonable time, place and circumstance. Not all injuries which occur on an employer's premises are compensable. *Archer Daniels Midland Co., 91 Ill.2d 210, 62 Ill.Dec. 921, 437 N.E.2d 609.*

At the time Petitioner jumped off the loading dock he was in place outside his "course of employment", in a circumstance exposing himself to a danger which was not one "arising out of" employee's employment but rather a personal deviation resulting in a personal risk. It is not as if Petitioner slipped off, or tripped over any defect on the loading dock, which would have been a risk to which Petitioner was exposed to in a greater degree than the general public by virtue of his employment and need to be on the loading dock. *Id.* Petitioner voluntarily exposed himself to an unnecessary personal danger solely for his own convenience. *Id.* Petitioner actions took him entirely out of the sphere of his employment. *Lumaghi Coal Co. v. Industrial Commission et al. 318 Ill. 151, No. 16627 (June 18, 1925).*

This Arbitrator confirmed the issues in dispute and had the opportunity to hear and carefully consider testimony along with examination of multiple exhibits. Consequently, Petitioner's request for compensation is hereby denied. Finding no employee/employer relationship nor causal connection, all other issues including accident, notice, liability for as well as reasonableness and necessity of medical services, liability for as well as amounts charged for medical bills, liability for TTD and periods of lost time, and nature and extent are moot. Accordingly, the Arbitrator finds Respondent is not liable for temporary total disability benefits claimed by Petitioner, nor medical expenses incurred by Petitioner introduced as Petitioner's Exhibit C, D, and E, nor entitled to any permanent partial disability.

CONCLUSION

In summary, the Arbitrator finds that when Petitioner ventures from a safe route provided by the employer for ingress/egress and instead, purposefully jumps from a loading dock onto a hydraulic lift thus falling off to the ground, he has exposed himself to an unnecessary personal risk for his own personal convenience. Therefore, any left foot claim sustained while performing this activity is not within the employee/employer relationship and does not arise out of or in the course of the employment with Respondent.

Accordingly, all Petitioner's claims for benefits under the Act are hereby denied.