2019 IL App (1st) 181519WC

Opinion filed September 13, 2019

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

| | | |
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| WALKER BROTHERS, INC., | ) | Appeal from the Circuit Court |
| | ) | of the First Judicial Circuit |
| Appellant, | ) | Cook County, Illinois |
| | ) | |
| v. | ) | Appeal No. 1-18-1519WC |
| | ) | Circuit No. 17-L-51020 |
| THE ILLINOIS WORKERS' | ) | |
| COMPENSATION COMMISSION *et al.* | ) | Honorable |
| | ) | James M. McGing, |
| (Clarette Ramsey, Appellee). | ) | Judge, Presiding. |

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justices Hoffman, Hudson, Cavanagh, and Barberis concurred in the judgment and opinion.

## OPINION

¶ 1 The employer, Walker Brothers, Inc., appeals an order of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission) awarding the claimant, Clarette Ramsey, medical, temporary total disability (TTD), and permanent partial disability (PPD) benefits pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2016)).

¶ 2 FACTS

¶ 3 The following factual recitation is taken from the evidence presented at the arbitration

hearing on November 19, 2015, and the Commission's decision dated November 9, 2017.

¶ 4 The claimant testified that he had worked for the employer as a cook since 1978. On February 13, 2013, at around 5:50 a.m., he parked in the Ace Hardware (Ace) parking lot near the employer's restaurant and waited for another worker to arrive before exiting his car because he did not have a key to unlock the restaurant doors. The claimant explained that he parked at the Ace parking lot because "[t]hat's where they give us permission to park." Further, the claimant testified that the employer's supervisors posted a note in the employee break room stating, "we can only park at Ace but not between Thanksgiving and Christmas, park on the street." However, there were no signs in the Ace parking lot reserving parking spots for the employer's employees. The claimant then saw Jesus Salanas, a colleague, arrive and walk toward the restaurant. At that time, the claimant exited his vehicle and rushed to follow him because the employer had a policy of disciplining employees who clocked in even two minutes late. The claimant slipped and fell on Ace's snowy and icy parking lot surface. He recalled that he screamed and Salanas came back to attend to him and help him locate his cell phone.

¶ 5 The claimant testified that he felt pain in his shoulder, hip, and back after his fall. He reported the accident to his manager and went to the emergency room for treatment. Medical records indicated that he complained of left hip and left shoulder pain from slipping on ice and denied back pain. X-rays of the claimant's hip and shoulder were negative for fractures and dislocations, but he was diagnosed with left hip and left shoulder contusions and was instructed for follow-up treatment. The emergency room report stated that the claimant reported that the accident was not witnessed. The claimant also saw his primary care provider, Dr. Jonathan Littman, who diagnosed him with contusions on the left shoulder and left hip. He prescribed the claimant pain medication and instructed him not to work from February 15, 2013, to February

19, 2013. The claimant visited Dr. Littman again in March and was referred to physical therapy.

¶ 6 In April 2013, the claimant was referred to Dr. Gregory Dairyko, an orthopedic surgeon, who ordered spine, hip, pelvis, and shoulder x-rays. The x-rays revealed evidence of arthritis in the lumbar spine and mild degenerative changes in the left shoulder. The claimant reported 10/10 pain and Dr. Dairyko administered a cortisone injection to the claimant's left shoulder. Dr. Dairyko ordered the claimant to continue physical therapy, but believed that surgery may become necessary. A month later, the claimant reported continued pain. Dr. Dairyko recommended an MRI of the left shoulder. The MRI showed that the claimant suffered from tendinosis, a partial thickness tear in the distal insertion, and marked degenerative hypertrophic changes in the acromioclavicular (AC) joint. Dr. Dairyko noted that the claimant had aggravated preexisting AC joint arthritis due to the February 13, 2013, fall. Based on these positive findings and the failed physical therapy and cortisone injection, Dr. Dairyko recommended surgery.

¶ 7 On August 14, 2013, the claimant underwent a left should arthroscopy, subacromial decompression, distal clavicle excision, limited debridement, and rotator cuff repair. The claimant's postoperative diagnosis was a left shoulder rotator cuff tear and left shoulder AC joint arthritis. Following this surgery, the claimant continued physical therapy and followed up with Dr. Dairyko. The claimant testified that he stopped working for the employer after his surgery and did not return to work until November 4, 2013, when Dr. Dairyko allowed him to work with restrictions of no pulling, pushing, or lifting greater that five pounds with the left arm. The claimant returned to work on November 5, 2013, and the employer honored his restrictions. Dr. Dairyko released the claimant to full duty work as of November 25, 2013. In November 2013, Dr. Dairyko's last treatment note indicated that there were some improvements in the claimant's left shoulder, but some pain continued. The claimant's last physical therapy note from December

2013 noted similar progress. The claimant stated that he was subsequently terminated from his employment because he was unable to perform his job functions. It is undisputed that the claimant's average weekly wage was $576.10 while he worked for the employer.

¶ 8 At the time of the arbitration hearing, the claimant was 63 years old. He had difficulty sleeping on his left shoulder and hip, difficulty raising items with his left shoulder, and back pain with extended sitting. He stated that he was not seeking treatment for his back and hip pain, but instead was managing his pain with medications.

¶ 9 Dr. Kevin Walsh testified by deposition that he conducted an examination of the claimant by the employer's request on December 17, 2013. He reviewed the claimant's medical records, including the initial emergency room records, treatment with Drs. Littman and Dairyko, and physical therapy records. Dr. Walsh opined that the claimant suffered a contusion to the shoulder as a result of his fall. He concluded that the claimant did not suffer a rotator cuff tear and that the rotator cuff tear described by Dr. Dairyko was more likely than not degenerative in origin and "quite small," measuring only a few millimeters. Dr. Walsh concluded, that while it was reasonable for the claimant to be evaluated in the emergency room and seek treatment from his primary care provider and an orthopedic surgeon, the need for arthroscopic intervention was not clearly established in the claimant's medical records. Thus, he opined that the claimant did not require additional treatment and did not require any work restrictions.

¶ 10 Dr. Guido Marra testified by deposition that he conducted an examination of the claimant by the claimant's request on April 8, 2014. He testified that he reviewed the claimant's May 2013 MRI and agreed that it showed a small rotator cuff with arthritic changes in the AC joint and anterior acromial spurring. Dr. Marra stated that he could not say whether the rotator cuff was caused by the accident, but opined that the claimant's left shoulder condition was causally

related to the alleged accident and his treatment was reasonable and necessary. He opined that his causation opinion was based on the claimant not having shoulder pain prior to the accident and subsequently complaining of pain after the accident.

¶ 11 Salanas, the claimant's colleague, testified that he worked for the employer for about 15 years at the time of the claimant's accident. Salanas stated that he saw the claimant in his car on the morning of February 13, 2013, but he did not see him fall or see him on the ground. Salanas stated that the employees were not allowed to park in the employer's parking lot because it was too small. Salanas normally parked in either the Ace parking lot, which was a two or three minute walk from the employer's restaurant, or on a side street. Salanas stated that the employees were not required to park in the Ace parking lot and that most employees park on side streets because parking at Ace requires them to cross a street to reach work. Additionally, some employees parked in the Subway sandwich shop parking lot. Salanas explained that the employer's employees were only allowed to use a certain part of the Ace parking lot and that they were not allowed to park there during November and December.

¶ 12 Kevin Donoghue, the director of human resources for the employer, testified that the employer had no designated employee parking lot. Further, pursuant to an "informal agreement with Ace," some employees parked in the Ace parking lot "across the street and down half a block." However, the employer did not pay Ace for use or maintenance of the lot. Donoghue testified that the employer's employees were allowed to use only the section of parking spots furthest away from Ace's entryway and that the employees do not receive any priority over Ace customers. Donoghue explained that the employer's employees have other options for parking, such as side street parking that requires no payment or permit, and that not all of the employer's employees park in Ace's parking lot. Donoghue said that the arrangement with Ace alleviated

complaints resulting from the employees' cars crowding a side street (not the side street the employees were directed to park on) or a nearby store. Additionally, Donoghue stated that a sign was posted in the employer's restaurant stating that employees were not allowed to park in the employer's lot or next door at the ski shop, but that parking was available at Ace.

¶ 13 Donoghue also stated that the claimant was terminated on January 15, 2015, for several reasons, including performance issues, insubordination, harassment, and making threats to the general manager. Donoghue explained that the claimant had significant performance issues on several occasions prior to the February 13, 2013, accident, which required disciplinary action to be taken. These problems included keeping up, difficulty with good quality, trouble working in a fast-paced environment, and making mistakes. For example, the claimant was disciplined on November 11, 2012, for suspicion of being under the influence of alcohol or a drug. Donoghue concluded that the claimant was not meeting the employer's standards, he was not cooking food, and he left the kitchen while orders were being called out.

¶ 14 John Weiss, the owner of the Ace store and parking lot located near the employer's restaurant, also testified by deposition. He estimated that the distance between his store and the employer's restaurant was one to two blocks and a two to three minute walk. Weiss stated that the employer's employees were allowed to park in his lot, but he said that the arrangement was so longstanding he could not remember exactly how it originally came about, but believed a manager from the employer's restaurant approached him and asked if their employees could park in his parking lot. Weiss stated that he allows the employer's employees to use the lot free of charge, as a courtesy, so long as there is no special event occurring in the parking lot. He explained that there were 13 spaces in his parking lot that the employer's employees could use, but noted that the general public is also allowed to use those spots. Weiss stated that he alone

paid for snow removal and maintenance costs for the parking lot.

¶ 15 On December 31, 2015, the arbitrator denied the claimant's request for benefits finding that he failed to prove that he sustained an accident that arose out of and in the course of his employment with the employer. The claimant sought review by the Commission.

¶ 16 On November 9, 2017, the Commission reversed the decision of the arbitrator and ordered the employer to pay the claimant TTD benefits of $384.07 per week for 12-4/7 weeks, PPD benefits of $345.66 per week for a period of 62.5 weeks, and all reasonable and necessary medical expenses as described by Dr. Marra. The Commission found that the employer provided the Ace parking lot to its employees and the claimant's accident was compensable.

¶ 17 The employer sought review of the Commission's decision before the circuit court of Cook County. The court confirmed the Commission's decision. The employer appeals.

¶ 18 ANALYSIS

¶ 19 The employer takes issue with the following determinations made by the Commission: (1) the claimant's injury arose out of and in the course of his employment with the employer, (2) the claimant proved causation between his condition of ill-being and his employment, and (3) the claimant was entitled to medical, TTD, PPD benefits. The claimant argues that the Commission's determinations were proper.

¶ 20 To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187, 194 (2002). An injury "arises out of" one's employment if it originated from a risk connected with, or incidental to, the employment and involved a causal connection between the employment and the accidental injury. *Id.* "In the course of" refers to the time, place, and circumstances of the accident. *Illinois*

*Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989). Both elements must be present at the time of the claimant's injury to justify compensation under the Act. *Id.* Usually, whether the claimant proved these elements is a question of fact for the Commission to resolve and that determination will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Joiner v. Industrial Comm'n*, 337 Ill. App. 3d 812, 815 (2003). However, where as here, the facts are undisputed and susceptible to only a single inference, the question is one of law and subject to *de novo* review. *Id.*; see *Diaz v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120294WC, ¶ 21 (when there is no question of inference or weight to be given to evidence because all the Commission did was apply the law to the undisputed facts our review is *de novo*). We note that both parties agree that our standard of review is *de novo*.

¶ 21 Generally, "when an employee slips and falls at a point off the employer's premises while traveling to or from work, the resulting injuries do not arise out of and in the course of the employment and are not compensable under the Act." *Joiner*, 337 Ill. App. 3d at 815. This is known as the "general premises rule." However, our supreme court has carved out an exception to this rule when an employer "provides" a parking lot to its employees. *De Hoyos v. Industrial Comm'n*, 26 Ill. 2d 110, 113 (1962). In *De Hoyos*, the claimant testified that he slipped and fell while he was on his employer's parking lot. *Id.* On cross-examination, the claimant stated that he did not actually know who owned the parking lot, but his employer provided the parking lot to its employees, he had parked there during the past 12 years, and it was adjacent to the employer's plant. *Id.* The supreme court outlined the "parking lot exception" and explained:

> "Whether or not the employer owned the parking lot is immaterial; for if the employer provides a parking lot which is customarily used by its employees, the employer is responsible for the maintenance and control of that parking lot.

> Therefore, the question presented to the circuit court was not one of disputed fact or whether the decision of the Industrial Commission was manifestly against the weight of the evidence, but whether, when an employer provides a parking [lot] for employees and an employee falls on the parking lot, this fact being uncontroverted on the record, the employee is entitled to recover as a matter of law." *Id.* at 113-14.

¶ 22 In sum, *DeHoyos* stands for the proposition, that if an employer provides a lot to its employees, and an employee is injured on that lot, the employee is entitled to recover under the Act. *Id.* However, this parking lot exception has been narrowed since its inception. Just four years after *DeHoyos*, our supreme court stated, "[t]he decisive issue in parking lot cases usually is whether or not the lot is owned by the employer, or controlled by the employer, or is a route required by the employer." *Maxim's of Illinois, Inc. v. Industrial Comm'n*, 35 Ill. 2d 601, 604 (1966). The employer's control or dominion over the parking lot is a significant factor in the analysis. *Joiner*, 337 Ill. App. 3d at 816. Our supreme court has also recognized that "[r]ecovery has *** been permitted for injuries sustained by an employee in a parking lot provided by *and* under the control of an employer. (Emphasis added.) *Illinois Bell*, 131 Ill. 2d at 484.

¶ 23 In determining whether the parking lot exception applies, it is clear that we must determine whether the employer "provided" the parking lot in question to its employees. We make this determination by considering: (1) whether the parking lot was owned by the employer, (2) whether the employer exercised control or dominion over the parking lot, and (3) whether the parking lot was a route required by the employer.

¶ 24 The uncontroverted evidence established that the employer had a longstanding agreement with the owner of Ace, where Ace allowed the employer's employees to park in 13 specific

parking spaces January through October. Those parking spaces were also open to the general public and there were no signs indicating that the spots were reserved for the employer's employees. It is undisputed that the employer did not own the Ace parking lot. Additionally, the evidence also showed that the employer did not control the parking lot. Weiss testified regarding his parking guidelines the employer's employees were required to follow in order to continue using the parking lot. It is also undisputed that Weiss paid for the maintenance of the Ace parking lot and the employer did nothing to contribute to the maintenance of the parking lot. There is no evidence of record that the employer controlled the Ace parking lot in any way.

¶ 25 Last, the evidence demonstrated that the Ace parking lot was not part of a route required by the employer. Although the claimant testified that he was required to park in the Ace parking lot, there was no evidence to support this contention. Instead, the record contained evidence of the contrary. For instance, Salanas, the claimant's coworker, stated that the employees were not required to park in the Ace parking lot and that most employees park on side streets. The evidence also showed that the Ace parking lot was not part of a route *required* by the employer. Donoghue, the director of human resources for the employer, testified that the Ace parking lot was "across the street and down half a block." Also, Weiss estimated that the distance between the Ace store and the employer's restaurant was one to two blocks and a two to three minute walk. Salanas also stated that most employees park on the side street because parking at the Ace parking lot required crossing the street. Additionally, the Ace parking lot was not part of a required route as the employer communicated various other optional parking solutions, such as side street parking or other establishments' parking lots.

¶ 26 In conclusion, the claimant was injured in a parking lot that was not provided by the employer as the employer did not own the Ace parking lot, control the Ace parking lot, nor did it

require its employees to park or travel through the Ace parking lot for their employment. Thus, the injuries suffered by the claimant did not arise out of or in the course of his employment with the employer. Based on our conclusion, we need not address the employer's other arguments.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, the Commission's finding that the claimant sustained accidental injuries arising out of and in the course of his employment with the employer on February 13, 2013, was erroneous as a matter of law, and we reverse the judgment of the circuit court confirming the Commission's decision.

¶ 29 Reversed.

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| STATE OF ILLINOIS ) | ☐ Affirm and adopt (no changes) | ☐ Injured Workers' Benefit Fund (§4(d)) |
| ) SS. | ☐ Affirm with changes | ☐ Rate Adjustment Fund (§8(g)) |
| COUNTY OF COOK ) | ☒ Reverse Choose reason: Employment | ☐ Second Injury Fund (§8(e)18) |
| | ☐ Modify | ☐ PTD/Fatal denied |
| | | ☐ None of the above |

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Clarette Ramsay,

Petitioner,

vs.

NO: 13 WC 15481
17IWCC0717

Walker Brothers, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering all of the issues, and being advised of the facts and law, reverses the decision of the arbitrator, and substitutes the facts and findings that follow.

Facts

The following factual recitation is derived from evidence presented at the November 19, 2015, arbitration hearing on Petitioner's claim for benefits following shoulder, hip, and back injuries related to his fall on ice in an Ace Hardware parking lot near his work on February 13, 2013.

*Evidence Regarding Parking*
Petitioner testified that, on the morning of his accident, he parked in the Ace Hardware parking lot near Respondent's restaurant, because "[t]hat's where they give us permission to park." (Arb. Trans. P25). He said that supervisors for Respondent posted a note in the employee break room stating that "we only can park at Ace but not between Thanksgiving and Christmas, park on the street." (Arb. Trans. P26). On cross-examination, Petitioner agreed that there were no signs in the Ace Hardware parking lot reserving spots for Respondent's employees. (Arb. Trans. P43).

Jesus Salanas, like Petitioner, a cook for Respondent, testified that he had worked for Respondent for approximately 15 years at the time of Petitioner's accident. (Arb. Trans. P11). He said that workers are not allowed to park in Respondent's parking lot because it is too small.

Salanas normally parks either in an Ace Hardware parking lot, which is a two- to three-minute walk from Respondent's restaurant (Arb. Trans. P15), or on a side street. (Arb. Trans. P12). On cross-examination, Salanas said that employees are not required to park in the Ace Hardware parking lot, that "most of the employees" park on side streets because parking at Ace Hardware requires them to cross a street to reach work, and that some employees park in a Subway sandwich shop parking lot. (Arb. Trans. P17). He also testified that Respondent's employees are allowed to use only a certain part of the Ace Hardware lot and that they are not allowed to use it during holiday seasons. (Arb. Trans. P18-19).

John Weiss, the owner of the Ace Hardware store and parking lot located near Respondent's restaurant, testified via evidence deposition. He estimated that the distance between his store and Respondent's was one to two blocks, a two- to three-minute walk. (PX9 P13). Weiss said that Respondent's employees were allowed to park on his parking lot, but he said that the arrangement was so longstanding he could not remember how it originally came about. (PX9 P14-15). Weiss testified that he allows Respondent's employees to use the lot free of charge, as a courtesy, so long as there is no special event going on in the parking lot. (PX9 P15-16). He said that there are 13 spaces in his parking lot that Respondent's employees are allowed to use, but he noted that the general public is also allowed to use those spots. (PX9 P18). Weiss agreed that he alone pays for snow removal and maintenance costs for the parking lot. (PX9 P21-22).

Kevin Donoghue, Petitioner's former supervisor for Respondent, testified at the hearing that Respondent has no designated employee parking lot and that, pursuant to an "informal arrangement with Ace," some employees park in the Ace Hardware lot "across the street and down half a block." (Arb. Trans. P71). Donoghue testified that Respondent's employees are allowed to use only the section of parking spots farthest from Ace's entryway and that the employees do not receive priority over Ace customers. (Arb. Trans. P72). Donoghue also explained that Respondent's employees "have other options," including side street parking that requires no payment or permit. (Arb. Trans. P72-73). He said that not all of Respondent's employees park in the Ace Hardware lot and that Respondent does nothing to maintain or repair the lot. (Arb. Trans. P78-79). When asked to explain why Respondent arranged access to the Ace Hardware parking lot for its employees, Donoghue responded that the arrangement alleviated complaints resulting from employees' cars crowding a side street (not the side street he said employees may now park on) or a nearby store. (Arb. Trans. P.103).

*Medical and Treatment Evidence*

Petitioner said that, on the morning of the accident, he waited for another worker to arrive in the parking lot before exiting his car, because he did not have a key to unlock the restaurant doors. When he saw Salinas arrive and start to walk toward the restaurant, Petitioner got out of his car and rushed to follow Salanas, knowing Respondent's policy of disciplining employees who clock in even two minutes late. (Arb. Trans. P31). Petitioner slipped and fell on the snowy and icy parking lot surface. (Arb. Trans. P30-31). Petitioner recalled that he screamed and that Salanas came back to attend to him. (Arb. Trans. P32). On re-direct examination, Petitioner testified that Salanas was "beside" him when he fell. (Arb. Trans. P54). In his testimony, Salanas said that he saw Petitioner in his car on the morning of February 13, 2013, but did not see him fall or see him on the ground. (Arb. Trans. P15).

According to Petitioner, he felt pain in his shoulder, hip, and back after his fall. (Arb. Trans. P33). He testified that he reported his accident and went to the emergency room that day for treatment. At the emergency room, he was released home with a diagnosis of left hip and left shoulder contusions, and instructions for follow up treatment. (PX5 P7). He visited Dr. Jonathan Littman that same day (PX10 P84) and again in March, when he was referred for physical therapy (PX10 P87). In the meantime, on Dr. Littman's order, Petitioner did not work from February 15, 2013, through February 19, 2013.
In April 2013, Petitioner was referred to Dr. Gregory Dairyko. After an April 26, 2013, treatment visit, Dr. Dairyko ordered spine, hip, pelvis, and shoulder x-rays; he ordered continued physical therapy but commented that surgery may become necessary. (PX3 P58-60). The x-rays revealed evidence of arthritis in the lumbar spine and mild degenerative changes in the left shoulder. (PX3 P61-64).

A report of a May 31, 2013, MRI of Petitioner's left shoulder includes the conclusions that Petitioner suffered from tendinosis and a partial thickness tear at the distal insertion, and marked degenerative hypertrophic changes in the AC joint. (PX3 P47).

By August 2013, Petitioner reported to Dr. Dairyko that he continued to experience shoulder, hip, and back pain and that physical therapy was not resolving his issues. (PX3 P42). Dr. Dairyko recommended surgery.

On August 14, 2013, Petitioner underwent a left shoulder arthroscopy, subacromial decompression, distal clavicle excision, limited debridement, and rotator cuff repair. (PX3 P34-36). His post-operative diagnosis was left shoulder rotator cuff tear and left shoulder AC joint arthritis. (PX3 P34). Petitioner pursued a course of physical therapy following the surgery and continued to follow up with Dr. Dairyko. Dr. Dairyko's last treatment note, dated November 22, 2013, notes improvement in Petitioner's left shoulder but still some continued pain. (PX3 P6-8). His last physical therapy note, dated December 26, 2013, notes similar progress. (PX6 P93-94).

Petitioner testified that he took one week of vacation from work immediately following his injury, returned on February 20, did not stop work again until after his surgery on August 14, 2013, and then returned to work again on November 4, 2013. (Arb. Trans. P46). Petitioner said that Respondent terminated his employment because he was unable to perform his job functions. Donoghue, his former supervisor, testified that Petitioner was terminated for misconduct and earlier cited for mental lapses. (Arb. Trans. P93). Personnel records support Donoghue's account of mental lapses. (RX4B).

As of the time of his testimony, Petitioner had difficulty sleeping on his left shoulder and hip or raising items with his left shoulder, and back pain with extended sitting. (Arb. Trans. P37-38). He said that he is not seeking treatment for his back and hip pain, but instead managing it with medications. (Arb. Trans. P53).

Dr. Kevin Walsh, who examined Petitioner at Respondent's request on December 17, 2013, opined in his report that Petitioner had reached maximum medical improvement following his surgery. (RX1 P7). He further opined that Petitioner's shoulder problems were "more likely than not" degenerative and not traumatic, and that it was "not at all likely" that his current

problems are related to his February 13, 2013, fall. (RX1 P7).

In his report of an April 8, 2014, examination of Petitioner at Petitioner's attorney's request, Dr. Guido Marra recounted his physical examination results and treatment history before opined that, as a result of his February 13, 2013, fall, Petitioner suffered an exacerbation of preexisting AC joint arthritis and either an aggravation of a rotator cuff tear or an acute rotator cuff tear. (PX2 P4-5). Dr. Marra based this opinion on Petitioner's lack of prior shoulder complaints. (PX2 P4). He testified consistently in his October 31, 2014, evidence deposition.

Petitioner's undisputed average weekly wage was $576.10.

Findings

On review, the parties agree that Petitioner fell on February 13, 2013. They dispute (1) whether Petitioner's fall arose out of and in the course of his employment with Respondent; and (2) whether his condition of ill-being is causally connected to the accident. In the event those questions are answered in the affirmative, the parties further dispute (3) whether Petitioner's medical expenses were related to the accident, necessary, and reasonable; (4) the extent of temporary total disability (TTD) benefits Petitioner should be awarded; and (5) the extent of permanent partial disability (PPD) Petitioner should be awarded.

The Commission begins with the first issue, regarding whether Petitioner's fall on ice in the parking lot arose out of and in the course of his employment with Respondent. To obtain compensation under the Act, a claimant must show, by a preponderance of the evidence, that he suffered a disabling injury that arose out of and in the course of his employment. *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1037 (2004). An injury arises out of one's employment if it originates from a risk connected with, or incidental to, the employment and creates a causal connection between the employment and the accidental injury. *Mores-Harvey*, 345 Ill. App. 3d at 1037. An injury occurs in the course of employment when it occurs during employment and at a place where the claimant may reasonably perform employment duties, and while a claimant fulfills those duties. *Mores-Harvey*, 345 Ill. App. 3d at 1037. Generally, injuries sustained on an employer's premises within a reasonable time before or after work are deemed to arise in the course of employment, while injuries sustained off premises while travelling to or from work are not so deemed. *Mores-Harvey*, 345 Ill. App. 3d at 1037-1038. In this case, the Ace Hardware parking lot was situated across the street from and thus not directly a part of the employer's premises. Therefore, absent some exception, Petitioner's alleged fall in that lot would not arise out of and in the course of his employment with Respondent.

As an exception to the above "general premises rule," however, recovery is permitted where the employee has sustained injuries in a parking lot provided by an employer (*Mores-Harvey*, 345 Ill. App. 3d at 1038; see also *Illinois Bell Tel. Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483-84 (1989)), where the parking lot poses some unusual hazard such as the ice Petitioner slipped on in this case (see *Dukich v. Ill. Workers' Compensation Comm'n*, 2017 IL App (2d) 160351WC ¶41). Although the neighboring Ace Hardware store, and not Respondent, maintained and operated the parking lot, our supreme court has held the question of ownership to be "immaterial" so long as the employer provides the lot. *De Hoyos*, 26 Ill. 2d at 113. Here, it is

undisputed that Respondent entered into an agreement with Ace Hardware to "provide" the lot for its employees' use. When it did so, Respondent made the parking lot part of its premises for purposes of this dispute. See *Mores-Harvey*, 345 Ill. App. 3d at 1090-91 (if a parking lot is provided by the employer, "the employer-provided parking lot is considered part of the employer's premises"). For that reason, the Commission finds that Petitioner's fall on ice in the Ace Hardware parking lot, on his way to work for Respondent, arose out of and in the course of his employment with Respondent.

The parties' second dispute whether Petitioner's condition of ill-being is causally connected to his parking lot fall. The burden of proof is on a claimant to establish the elements of his right to compensation, and unless the evidence considered in its entirety supports a finding that the injury resulted from a cause connected with the employment, there is no right to recover. *Hansel & Gretel Day Care v. Industrial Commission*, 215 Ill. App. 3d 284, 294 (1991) (citing *Board of Education v. Industrial Commission*, 44 Ill.2d 207, 214 (1969)). The parties focus their competing causal connection evidence on Petitioner's left shoulder injury. For its part, Respondent presented the conclusions of Dr. Walsh, who opined that Petitioner's shoulder injury was degenerative and not the acute result of a fall; Petitioner, on the other hand, presented the conclusions of his treating physician, Dr. Marra, who offered the opposite opinion. The Commission finds Dr. Marra's opinion to be the more credible, largely based on his observation that, even if Petitioner had preexisting rotator cuff problems, they were asymptomatic until his fall. Petitioner reported shoulder pain to medical professionals immediately after his fall. For that reason, the Commission finds that Petitioner's condition of ill-being is causally related to his workplace fall.

The third issue—whether Petitioner's medical expenses are compensable—turns entirely on the question of whether those expenses are related to a workplace accident. Because the Commission finds that his injury was tied to a workplace accident, the Commission also finds that the related medical expenses are compensable. In so doing, the Commission credits the testimony of Dr. Marra that the medical expenses are reasonable, necessary, and related to Petitioner's injury.

The fourth issue in this case is the amount of TTD to which Petitioner is entitled. An injured employee is entitled to TTD "from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of injury will permit. [Citations.] To be entitled to TTD benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work." *Holocker v. Ill. Workers' Comp. Comm'n*, 2017 IL App (3d) 160363WC, ¶ 34. As with the previous issue, the parties' dispute regarding TTD centers on whether Petitioner is entitled to any benefits at all or whether his condition is not work-related. Because the Commission finds that it was, Petitioner is entitled to TTD benefits for the time the injury left him was unable to work. The evidence shows that Petitioner missed work from February 13, 2013, through February 19, 2013 (5 days), then again from the date of his surgery on August 14, 2013, through November 4, 2013 (11 weeks, 6 days). In total, then, Petitioner is entitled to 12 4/7 weeks of TTD, at a rate of $384.07 per week, a figure that represents the equivalent of 66 2/3% of his $576.10 average weekly wage. See 820 ILCS 305/8(b).

The final issue in this case is the extent to which Petitioner is entitled to PPD. The accident at issue occurred on February 13, 2013. Effective September 1, 2011, section 8.1b of the Act requires that the Commission base its determination of permanent partial disability on five factors: (i) the reported level of impairment pursuant to subsection (a); (ii) the occupation of the injured employee; (iii) the age of the employee at the time of the injury; (iv) the employee's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. The Act states that "... [n]o single enumerated factor shall be the sole determinant of disability. In determining the level of disability, the relevance and weight of any factors used in addition to the level of impairment as reported by the physician must be explained in a written order." 820 ILCS 305/8.1b(b). The relevance and weight of each of the factors is explored below.

The first factor receives no weight, because there was no impairment rating in this case. The second factor, the occupation of the injured employee, weighs strongly in Respondent's favor. Petitioner was a chef and was able to return to work without restrictions. Likewise, Petitioner's age—he was 60 years old at the time of his fall—weighs in Respondent's favor. On the fourth factor, there was no evidence that Petitioner will suffer decreased earning capacity as a result of his injury; the Commission therefore accords this factor significant weight in Petitioner's favor. The fifth factor, however, weighs strongly in Petitioner's favor. Petitioner's disability is well corroborated by treating medical records, which include a post-operative diagnosis of a left rotator cuff tear.

The determination of permanent partial loss of use of a member is not capable of a mathematically precise determination, and estimation of partial loss is peculiarly the function of the Commission. *Steak 'N Shake v. Illinois Workers' Compensation Commission*, 2016 IL App (3d) 150500WC (citing *Pemble v. Industrial Commission*, 181 Ill.App.3d 409, 417 (1989)). In all, Petitioner's injury has left him with continued back, hip, and shoulder pain, and an inability to raise his left arm. In light of the statutory factors, the Commission finds that Petitioner is permanently disabled to the extent of 12.5% of his person as a whole. That percentage triggers benefits in the amount of 60% of his average weekly wage (see 820 ILCS 305/8(b)2.1) for 12.5% of 500 weeks (see 820 ILCS 305/8(d)2), or, in this case, $345.66 per week for a period of 62.5 weeks.

## Conclusion

The Commission finds:

- On February 13, 2013, Respondent was operating under and subject to the provisions of the Act.
- On that date, an employer-employee relationship did exist between Petitioner and Respondent.
- On that date, Petitioner did sustain an accident that arose out of and in the course of his employment with Respondent.
- Timely notice of the 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 $29,957.20; the average weekly wage

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was $576.10.

- At the time of the injury, Petitioner was 60 years of age, married with no children under 18 years of age.
- 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.
- Respondent shall pay Petitioner TTD benefits of $384.07 per week for 12 4/7 weeks, for the periods covering February 13, 2013, through February 19, 2013, and August 14, 2013, through November 4, 2013.
- Respondent shall pay Petitioner PPD benefits of $345.66 per week for a period of 62.5 weeks.
- Respondent shall pay all reasonable and necessary medical expenses as described by Dr. Marra.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision dated 1/4/16 is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner TTD benefits of $384.07 per week for 12 4/7 weeks.

IT IS FUTHER ORDERED BY THE COMMISSION that Respondent pay Petitioner PPD benefits of $345.66 per week for 62.5 weeks.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay all reasonable and necessary medical expenses.

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $28,900.00. 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.

NOV 9 - 2017

DATED:
o:9/27/2017
TJT/knc
51

Thomas J. Tyrrell

Michael J. Brennan

17IWCC0717

DISSENT

I respectfully dissent from the decision of the majority. I would affirm and adopt Arbitrator Williams' well-reasoned decision.

Kevin W. Lamborn

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

STATE OF ILLINOIS )
)
COUNTY OF COOK )

**ILLINOIS WORKERS' COMPENSATION COMMISSION**

**ARBITRATION DECISION**

CLARETTE RAMSAY
Employee/Petitioner

Case #13 WC 15481

V

WALKER BROTHERS, INC.
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 Robert Williams, arbitrator of the Workers' Compensation Commission, in the city of Chicago, on November 19, 2015. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues, and attaches those findings to this document.

**ISSUES:**

A. ☐ Was the 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 the petitioner's employment by the respondent?

D. ☐ What was the date of the accident?

E. ☐ Was timely notice of the accident given to the respondent?

F. ☒ Is the petitioner's present condition of ill-being causally related to the injury?

G. ☐ What were the petitioner's earnings?

H. ☐ What was the petitioner's age at the time of the accident?

I. ☐ What was the petitioner's marital status at the time of the accident?

J. ☒ Were the medical services that were provided to petitioner reasonable and necessary?

K. ☒ What temporary benefits are due: ☐ TPD ☐ Maintenance ☒ TTD?

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

M. ☐ Should penalties or fees be imposed upon the respondent?

N. ☐ Is the respondent due any credit?

O. ☐ Prospective medical care?

**FINDINGS**

- On February 13, 2013, the respondent was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship existed between the petitioner and respondent.
- Timely notice of this accident was given to the respondent.
- In the year preceding the injury, the petitioner earned $29,957.20; the average weekly wage was $576.10.
- At the time of injury, the petitioner was 60 years of age, married with no children under 18.

**ORDER:**

- The petitioner's request for benefits is denied and the claim is dismissed.

**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.

Robert E. Williams

Signature of Arbitrator

December 31, 2015

Date

JAN 4 - 2016

**FINDINGS OF FACTS:**

The petitioner, a cook, sought emergency care at Evanston Hospital on February 13, 2013, for left hip and left shoulder pain. He reported an unwitnessed fall on ice at work. The petitioner denied neck and back pain or any other symptoms. There was no tenderness noted with palpation or movement of his neck, lumbar and thoracic spines. X-rays of his left hip and shoulder were negative for fractures but revealed mild osteoarthritis and a marginal osteophyte formation in his left hip and mild glenohumeral and moderate AC joint osteoarthritis in his left shoulder. The diagnosis was left hip and shoulder contusions.

The petitioner started care with his primary care physician, Dr. Littman, on February 15th and reported injuries to his back, and left shoulder and hip. The doctor noted left shoulder tenderness and pain with motion and no cervical or lumbar tenderness. Dr. Littman's diagnosis was contusions of the left hip and left shoulder. The petitioner returned to work on February 20th. On March 1st, the petitioner complained of pain and soreness in his low back. Dr. Littman noted lumbar spine tenderness and a mildly reduced range of motion. The diagnosis was a left AC joint sprain, mild lumbar sprain and left hip sprain. On March 8th, he began physical therapy at AthletiCo Physical Therapy.

The petitioner saw Dr. Gregory Dairyko on April 26th, who gave him a cortisone injection into his left shoulder. A shoulder MRI on May 31st revealed significant tendinosis of the distal supraspinatus and subscapularis tendons with a superimposed partial-thickness intrinsic tear at the distal insertion, marked degenerative hypertrophic bony changes of the AC joint, subchondral bony changes, a type II acromion with

significant extrinsic compression in the supraspinatus and minimal subchondral bony degenerative changes of the humeral head.

On August 14th, Dr. Dairyko performed a left shoulder arthroscopic limited debridement, rotator cuff repair, subacromial decompression and distal clavicle excision. The petitioner received physical therapy at AthletiCo from August 23rd through December 26th. The petitioner returned to light-duty work on November 5th and to full-duty work on November 25th.

**FINDING REGARDING WHETHER THE PETITIONER'S ACCIDENT AROSE OUT OF AND IN THE COURSE OF THE EMPLOYMENT WITH THE RESPONDENT:**

Based upon the testimony and the evidence submitted, the petitioner failed to prove that he sustained an accident on February 13, 2013, arising out of and in the course of his employment with the respondent. The petitioner testified that he slipped on ice in the Ace Hardware parking lot after parking his car, that he was required to park in the Ace parking lot and that the incident was witnessed by Mr. Salanas.

Mr. Donoghue, the petitioner's manager, contradicted the petitioner's testimony. He testified that the petitioner and all the other employees could park wherever they chose but were only prohibited from parking in the respondent's lot. Also, he testified that the respondent did not own or lease any portion of the Ace Hardware parking lot, did not maintain or repair the lot and did not provide any compensation to Ace Hardware for their employee's use of the parking lot. Mr. Jon Weiss, the owner of Ace Hardware, confirmed that the respondent does not pay anything for the maintenance or use of the lot, that there is no financial arrangement with the respondent or their employees for the use of their lot, that parking spots are not reserved for respondent's employees and that their

parking lot is not available to respondent's employees throughout the Thanksgiving and Christmas holidays.

Also contrary to the petitioner's testimony, Mr. Salanas testified that he does not believe he is required to park in the Ace lot and that he and most of the other employees usually park along the side streets because they do not want to cross the street from Ace to the restaurant. In further rebuttal of the petitioner's testimony, Mr. Salanas testified that he was not a witness to the petitioner's fall. Moreover, the petitioner admitted that for ten years during the Thanksgiving and Christmas seasons he parked on side streets. The petitioner is not believable or credible. The respondent had no control and did not excerise any control over the Ace Hardware parking lot, nor did the respondent require the petitioner to park in the Ace Hardware parking lot. The petitioner's request for benefits is denied and the claim is dismissed.