Illinois Official Reports

Appellate Court

***Mytnik v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152116WC**

Appellate Court Caption	MARK MYTNIK, Appellant, v, THE ILLINOIS WORKERS' COMPENSATION COMMISSION (Ford Motor Company, Appellees).
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-15-2116WC
Filed	November 10, 2016
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 14-L-50836; the Hon. Carl Anthony Walker, Judge, presiding.
Judgment	Judgment reversed, and arbitrator's decision reinstated.
Counsel on Appeal	James S. Hamman, of Newman, Boyer & Statham, Ltd., of Tinley Park, for appellant. Julie M. Tenuto and Timothy S. McNally, of Wiedner & McAuliffe, Ltd., of Chicago, for appellee.
Panel	JUSTICE HARRIS delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justices Hoffman, Hudson, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 On June 23, 2009, claimant, Mark Mytnik, filed an application for adjustment of claim pursuant to the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), seeking benefits from the employer, Ford Motor Company, for injury to his back caused by "[e]xcessive twisting and bending on job." Following a hearing, the arbitrator found claimant sustained a compensable injury and awarded him benefits under the Act. On review, the Illinois Workers' Compensation Commission (Commission) reversed the decision of the arbitrator, finding that claimant failed to establish his injury arose out of and in the course of his employment. On judicial review, the circuit court confirmed the Commission's decision. This appeal followed.

¶ 2 On appeal, claimant challenges the Commission's finding that he failed to prove an accident arising out of and in the course of his employment. We reverse the circuit court's judgment confirming the Commission's decision, reverse the Commission's decision, and reinstate the decision of the arbitrator.

¶ 3 I. BACKGROUND

¶ 4 The following evidence was elicited at the February 25, 2013, arbitration hearing.

¶ 5 Claimant testified that he had worked for the employer on the assembly line since October 1994. On May 21, 2009, he was working the "moon buggy" job, which involved installing rear suspensions on vehicles as they moved along the assembly line. The moon buggy job required the employee to stand on a platform that moved in a circular fashion, step on a foot pedal to raise the rear suspension up to the vehicle, reach back and grab an articulating arm, load the articulating arm with two bolts, and then raise the articulating arm up to the vehicle and press a button on the arm that secured the rear suspension with bolts. According to claimant, the moon buggy job required him to twist and turn to grab equipment like bolts and brackets and to reach behind him to grab the articulating arm. Claimant stated that sometimes the bolts would fall out of the articulating arm and had to be retrieved quickly to avoid the rotating platform from running over the bolts and jamming, which would result in the assembly line shutting down. When a bolt fell, claimant would have to "run down there, bend over, reach and *** pick it up before the [rotating platform] runs it over." According to claimant, if the assembly line stopped, "you would usually get reamed out by the supervisor."

¶ 6 Claimant testified the moon buggy job allowed approximately 48 to 52 seconds to install the rear suspension on one vehicle before the assembly line moved. He estimated that he installed rear suspensions on approximately 62 vehicles per hour. In addition, he had to lift approximately 20 to 25 boxes of parts per day that weighed "anywhere from 30lbs, a lot heavier if you're doubling them up, 70 pounds per box." Claimant worked on the assembly line 5 days per week, approximately 10 hours per day with two breaks.

¶ 7 Claimant further testified that he started his workday at 6 a.m. on May 21, 2009. At approximately 10 a.m., he "noticed [his] back was starting to bother [him]." Claimant explained that he had sustained a prior back injury at the employer's plant in 2002 or 2003. He continued to do his job that morning, but later, as he was reaching down to grab a bolt that had fallen on the assembly line, he felt "a real sharp, almost like needle pains down [his] right side, [he] knew something *** was just out of the ordinary." Within 10 to 15 minutes of this,

claimant flagged down his supervisor, Zack Bozanic, and informed him that his back was hurting. After Bozanic found someone to take over claimant's job, he sent claimant to the employer's medical department. Claimant testified that once at the medical department, he reported sharp pains down the right side of his leg and that his back was bothering him. As he was sitting on a table, he noticed his leg started getting "a little numb." The report from the medical department indicated claimant was seen at 12:17 p.m. and lists the time of onset of pain as 8:30 a.m. The report noted that claimant was "working on the moon buggy and [his right] leg stays on the foot paddle and as the moon buggy moves it twists [his] body and now [he] has [pain] in [his right] hip." In addition, claimant complained of "low back [pain] radiating down the right hip and back of upper leg." Claimant was diagnosed with a sprain and strain of his lumbar spine and pelvis. He was given ibuprofen and returned to work. Later that day, claimant filled out an accident report, in which he stated: "moonbuggy move[s] and you have your [right] leg on foot [pedal,] your [left] leg does not move so your body [turns.] I [felt] it when I was picking up bolts off the floor. Twisting of body felt pain in [right] hip and leg."

¶ 8 Claimant testified that he finished his shift, but when he woke up the next day, he was "in excruciating pain." He returned to work on May 26, 2009, and reported he was unable to bend, twist, or stand. Claimant was sent back to the employer's medical department, and from there, he was sent to Ingalls Urgent Care (Urgent Care). Medical reports from Urgent Care indicated that claimant noted "NO SPECIFIC TRAUMA," but reported "that he was using a foot pedal repetitively with his right foot and twisting and turning when he began with right lower back pain that radiated down the posterior lateral aspect of his right thigh to his right foot." A magnetic resonance imaging (MRI) scan of claimant's lumbar spine was performed that day and compared with a previous MRI dated December 3, 2003. The new MRI revealed a broad posterocentral and right paracentral disc herniation at L4-L5 that was not present on the 2003 MRI and a preexisting broad posterocentral disc herniation at L5-S1.

¶ 9 Claimant testified that he returned to work the following day and reported directly to the medical department. According to claimant, he stayed in the medical department for approximately six hours. At one point, Michelle Gregory, the employer's workers' compensation administrator, spoke with him. Claimant stated that he told her his back "was bothering [him]," "there [was] twisting involved, picking up of stock," and when he "pick[ed] up that bolt[, he] felt that sharp pain." Claimant testified that Gregory returned a few hours later and told him "there [was] no way [he] could have got hurt on this job" and that he needed to find his own physician. The report from the medical department stated that, upon observation of the moon buggy job, "[t]here [was] no bending, twisting or heavy lifting involved" and "[t]he case is denied as occupational after the above observation."

¶ 10 On May 27, 2009, claimant saw his primary care physician, Dr. William Luebbe, for his back pain. Dr. Luebbe referred him to Dr. Mark Chang for a surgical consultation.

¶ 11 Claimant first saw Dr. Mark Chang at Midwest SpineCare on June 4, 2009. In a letter addressed to Dr. Luebbe of the same date, Dr. Chang indicated claimant had reported pain in his low back radiating down his right leg, which began two weeks prior after a work-related accident "when he was picking up some bolts while working on an assembly line." Dr. Chang also noted claimant had a history of low back pain in 2003, but had completed physical therapy and had experienced no further back problems prior to the recent injury. Dr. Chang diagnosed claimant with an "[a]cute right L5 radiculopathy secondary to a new L4-5 disc herniation

causing significant nerve impingement, [and an] old L5-S1 disc herniation not causing radiculopathy." He recommended physical therapy and epidural injections for pain.

¶ 12 On June 8, 2009, claimant first saw Dr. Rajive Adlaka for management of his pain. At that time, Dr. Adlaka noted claimant presented with complaints of low back pain with right side-dominant radiculopathy, which began after he "ben[t] down to pick something up." On June 9 and June 30, 2009, Dr. Adlaka administered epidural steroid injections.

¶ 13 On June 16, 2009, claimant presented for an initial physical therapy evaluation at Accelerated Rehabilitation Centers. The office report from that date indicated claimant reported, "he was lifting and pulling equipment at work [on May 21, 2009, when] he started feeling a sharp pain in his [right] hip and [right] leg. *** [T]he following weekend, [he] started experiencing more pain on the quadrates lumborum and his [right] buttock."

¶ 14 On July 20, 2009, claimant saw Dr. Edward Goldberg for a second opinion. On that date, Dr. Goldberg indicated that claimant reported developing right leg radicular pain on May 21, 2009. Dr. Goldberg's records note that "[claimant] was working on the line at Ford Motor Company. He twisted an arm of a machine and developed acute low back and right leg radicular pain. *** [I]t became progressively severe over the weekend. He could not move." Dr. Goldberg's records were later corrected to state claimant "twisted his waist to reach back for the arm of a machine he uses to complete his job; then he developed acute low back right leg radicular pain." Dr. Goldberg reviewed an MRI of claimant's spine and diagnosed a disc herniation at L4-5 and a small herniation or annular bulging at L5-S1. Dr. Goldberg felt that claimant's pain was caused by the herniated disc at L4-5, and he recommended a microdiscectomy at L4-5. He also noted it would be reasonable to perform a hemilaminotomy at L5-S1. Dr. Goldberg performed these procedures on August 4, 2009. Claimant continued to treat with Dr. Goldberg postoperatively. On February 1, 2010, Dr. Goldberg found claimant had reached maximum medical improvement (MMI) and released him to return on March 1, 2010, with a permanent restriction of lifting no more than 25 pounds.

¶ 15 Claimant returned to work on March 1, 2010. However, by March 2, 2010, claimant testified he "ended up hurting [him]self again" and, thereafter, he was unable to work due to pain and an inability to stand, twist, or bend for very long.

¶ 16 On March 8, 2010, claimant saw Dr. Martin Luken, a board-certified neurologist. At his deposition, Dr. Luken testified that claimant reported having developed right-sided low back pain and sciatica while at work in May 2009 "as he engaged in his usual routine involving repetitive bending and light lifting while attending to automobiles passing him on the assembly line." Dr. Luken testified that claimant continued to have pain in his right buttock and leg, which persisted in spite of postoperative physical therapy. He further noted that claimant had suffered a work-related low back injury "a decade or more earlier," but that it had responded well to conservative treatment. Following a physical examination and a review of prior medical records, Dr. Luken diagnosed claimant with "persisting mechanical back pain and right lumbar radiculopathy status post lumbar discectomy and foraminotomy for a work-related disc herniation." Dr. Luken prescribed pain medication and physical therapy, and suggested a functional capacity evaluation. Dr. Luken felt claimant could return to work at that time in a sedentary capacity involving no bending, stooping, twisting, or lifting more than 10 pounds.

¶ 17 Dr. Luken reviewed a video of claimant's job, but based on information provided by claimant, he did not feel the video accurately portrayed claimant's job duties. For example, Dr.

Luken testified that, based on information provided to him by claimant, he understood claimant's "usual work routine involved a repetitive bending and light lifting [as well as] holding a pedal down with one foot while reaching behind him to grasp and deal with a power tool of some sort." Dr. Luken continued, "[claimant] had to keep one foot planted on a pedal while twisting to retrieve this instrument that deal[s] with each passing car." According to Dr. Luken, the activities described by claimant were not portrayed in the video. Based on the history provided by claimant, Dr. Luken opined, "the repetitive mechanical stresses which [claimant's] work likely brought to bear to his lower back, in my opinion, very plausibly accounted for lower lumbar injury and either precipitation or exacerbation of the demonstrated disc herniation which we believe was responsible for [the] symptoms [claimant] reported as having developed in the course of his work" in May 2009. Dr. Luken last saw claimant on May 17, 2010, at which time he continued to be of the opinion that claimant could return to light-duty work while waiting for a functional capacity evaluation.

¶ 18 On June 2, 2010, claimant saw Dr. Jesse Butler, a board-certified orthopedic surgeon, at the request of the employer. At his deposition, Dr. Butler testified that claimant provided a history of being an assembly line worker who, "during the course of his occupation, *** has to pick up stock for assembly and place bolts on an articulating computer arm." In addition, "he's required to push a foot pedal during the course of this assembly operation, and that there's a twisting motion involved in completing this job assignment. He states he injured his back." Dr. Butler acknowledged that claimant underwent a microdiscetomy surgery in August 2009, which improved his overall pain. However, Dr. Butler testified that as of June 2, 2010, defendant continued to complain of having low back pain "between a 5 and 6 out of 10" with minimal activity, as well has numbness in his right calf into the foot, with occasional buckling of the right leg.

¶ 19 In addition to conducting a physical examination, Dr. Butler also reviewed claimant's medical records and a video of the moon buggy job. At the time of Dr. Butler's examination of claimant, claimant had already undergone a microdiscectomy and completed several months of postoperative physical therapy. Dr. Butler reviewed claimant's May 2009 and December 2003 MRIs. He noted that the May 2009 MRI revealed a disk herniation at L4-5, which was not present on the December 2003 MRI, as well as a disk herniation at L5-S1, which was present in the December 2003 MRI. Dr. Butler opined that claimant had reached MMI as he had undergone surgery, completed "an appropriate amount of therapy," and was able to work based on "the physical therapist's determination of his functional capacities." According to Dr. Butler, the degenerative changes noticeable on the MRI "most likely, preceded the accident," but "it's difficult to know when [the disk herniation] may have occurred." Further, Dr. Butler testified that people with degenerative changes in the spine may become symptomatic by merely bending over or lifting something.

¶ 20 Regarding the video, Dr. Butler testified the moon buggy job did not appear to involve "any twisting movement during this assembly operation, and the pace with which the bolts were drilled seemed to be at a very comfortable pace for someone doing this job." Dr. Butler testified the activities depicted in the video were not sufficient to cause claimant's injury because "[t]here's really no loading of the spine, *** no occupational exposure, if you will, when you look at that job video." In his opinion, claimant had reached MMI and could perform the activities he had viewed in the video.

¶ 21 On cross-examination, Dr. Butler testified it was a possible that a herniated disc could result from bending over to pick up a bolt by someone with degenerative changes to their spine.

¶ 22 On June 1, 2011, claimant saw Dr. Andrew Zelby, a board-certified neurosurgeon, at the request of the employer. In addition to conducting a physical examination of claimant, Dr. Zelby also reviewed claimant's medical records. Dr. Zelby testified that claimant told him he was performing his regular job duties on May 21, 2009, and "did not have any specific event or injury but felt pain in the low back radiating into the right buttock and down the right leg." Claimant "notice[d] that when he bent to pick up a bolt the pain seemed sharper for a couple of seconds." Following his examination of claimant, Dr. Zelby was of the opinion that, other than self-directed stretching and core-strengthening exercise, claimant needed no further treatment and could return to work in the medium-physical-demand level without any increased risk for injury.

¶ 23 On June 26, 2011, claimant saw Dr. Michael Treister, an orthopedic surgeon, on his own accord. At his deposition, Dr. Treister testified that, in addition to performing a physical examination of claimant and obtaining x-rays of his lumbar spine, he also reviewed claimant's medical records, including those from Dr. Luken, Dr. Chang, Dr. Adlaka, Dr. Luebbe, Dr. Butler, and Dr. Goldberg; the depositions of Dr. Butler and Dr. Luken; and a report issued by Dr. Zelby. Dr. Treister stated that at the time of the examination, claimant reported he was injured while working on an assembly line. According to Dr. Treister, claimant explained that his job required him to step on a pedal with one foot while simultaneously reaching back to pull the articulating arm forward to secure the suspension with two bolts. Claimant told him that sometimes a bolt would fall and he would have to retrieve it quickly. He also had to pick up boxes of bolts, sometimes two at a time, weighing 20 to 30 pounds, so that he was frequently lifting and twisting with 40 to 60 pounds. Dr. Treister continued, claimant told him, "on the day that he was injured, he began to have sharp low back pains, not while he was standing on the job, but while he was eating lunch. Pain began in the center of his *** right lower back and radiated down into his right buttock and then into the right posterior leg." After he reported to the employer's medical clinic, he returned to his job and his pain increased throughout the day as he worked, and throughout the following days. Following his examination of claimant, Dr. Treister diagnosed failed back syndrome and opined that claimant's condition was causally related to a May 21, 2009, work accident. Dr. Treister based his causation opinion on the fact that claimant had preexisting degenerative disc disease, which put him at risk of herniation, and that he then had a sudden onset of pain while working. In Dr. Treister's opinion, it did not matter how the injury came to be, whether from twisting, lifting, or bending, because in any case, the injury was related to one of his job activities.

¶ 24 Terrance Purdy testified that he had worked for the employer for 19½ years and, most recently, had been working "general utility," which required him to be able to perform all of the jobs in the area. Purdy stated that he had worked the moon buggy job on and off for three or four years, but he had been consistently working the moon buggy job since claimant was injured. According to Purdy, the job requires twisting, bending, reaching, and lifting between 20 to 30 boxes of bolts per day. He further testified that sometimes a bolt will fall and when it does, it must be retrieved before the moving platform runs over it in order to prevent the assembly line from shutting down. In Purdy's experience, a bolt would fall twice per hour.

¶ 25 Hugh Ferguson III testified on behalf of the employer. He had worked for the employer for 44 years, most recently as the government regulation coordinator. Furguson stated he also takes videos of certain jobs within the assembly plant when requested by the employer. While he never knows the purpose of the videos, the workers' compensation department shows him exactly what to record. According to him, the employer asked him to take a video of the moon buggy job in this case, which he did during normal business hours. Prior to taking the video, he was not provided with a description of the job, given any information pertaining to the employee depicted on the video, or told how long to record for.

¶ 26 Claimant testified that the video did not accurately depict the moon buggy job. According to claimant, the line was not going nearly as fast as it should have been, and the video showed the line actually stopping. Further, he stated the person depicted in the video was not putting nearly the number of parts on the vehicle as claimant did when he performed the job. (We note that the video was not included in the record.)

¶ 27 Zachary Bozanic, testified last on behalf of the employer. He had worked for the employer for 19 years, most recently as a senior process coach. In May of 2009, he was a production supervisor who supervised the moon buggy job. Bozanic described the moon buggy job as a preferred job because it is less complex and physically demanding than other jobs. He agreed that if a bolt dropped in the middle of the track, it would stop the moon buggy and stall the line.

¶ 28 Claimant testified at arbitration that he continued to have pain in his lower back area, down the hip area, and into the leg. In addition, his right knee sometimes buckled. Claimant stated that Dr. Luken had recommended a fusion surgery, but claimant testified he did not want to undergo another surgery at that time.

¶ 29 On June 13, 2013, the arbitrator issued his decision in the matter. He found that claimant sustained an accident that arose out of and in the course of his employment and that claimant's current condition of ill-being in his back was causally related to the work accident. The arbitrator found the employer liable for claimant's medical expenses and awarded him $79^{1}/_{7}$ weeks temporary total disability (TTD) benefits and permanent partial disability (PPD) benefits to the extent of 25% of the person as a whole.

¶ 30 On October 7, 2014, the Commission unanimously reversed the decision of the arbitrator, finding that claimant failed to prove an injury arising out of and in the course of his employment. Prior to stating it reasons, the Commission noted as follows:

> "So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical/legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by [claimant] and the [employer]. And after a complete review of the record, the Commission finds that [claimant's] varied and inconsistent histories of the May 21, 2009[,] incident undermine his claim that he suffered accidental injuries arising out of and in the course of his employment with [the employer] on May 21, 2009."

The Commission then recounted all of the histories claimant had provided to the various medical providers and noted,

> "despite all of the histories provided by [claimant] through this treatment, [he] testified at hearing that his low back pain with radiation down the right lower extremity started when he reached down to retrieve a bolt that had fallen to the floor. [Claimant] chose to

> proceed to trial with this history. Accepting [claimant's] chosen history of the accident, despite the multiple accounts he had provided, the Commission finds that [claimant] failed to prove that he suffered [a compensable injury]."

While the Commission acknowledged that claimant's May 2009 MRI revealed a herniation at L4-L5 that was not present on the December 2003 MRI, it found that claimant's "degenerative lumbar discs gave way with the simple act of bending forward," demonstrating that his "lumbar condition was so deteriorated that any activity of normal life was sufficient to cause [his] spine to break down further." The Commission also found that claimant's act of bending down to retrieve a bolt did not expose him to a greater risk of injury than the general public.

¶ 31 On June 24, 2014, the circuit court of Cook County confirmed the Commission's decision.

¶ 32 This appeal followed.

¶ 33 II. ANALYSIS

¶ 34 On appeal, claimant challenges the Commission's finding that he failed to prove an accident arising out of and in the course of his employment. In contrast, the employer maintains that the Commission properly denied compensation for three different reasons, each of which it claims was sufficient on its own to support the decision.

¶ 35 Initially, the employer contends that the Commission found claimant failed to establish a work accident based on his inconsistent histories of the incident. However, we must reject the employer's suggestion that the Commission rejected the claim on this basis. Although the Commission stated, claimant's "varied and inconsistent histories of the May 21, 2009[,] incident *undermine* his claim that he suffered accidental injuries arising out of and in the course of his employment," it did not deny claimant compensation on that basis. (Emphasis added.) Rather, the Commission continued its analysis and ultimately denied the claim after finding (1) claimant "was not engaged in an activity which presented a greater risk of injury to him than to the general public" and (2) claimant had a preexisting lumbar condition that "was so deteriorated that any activity of normal life was sufficient to cause [his] spine to break down further." Accordingly, we focus our analysis on the two bases determined by the Commission to be dispositive.

¶ 36 The purpose of the Act is to protect employees against risks and hazards that are peculiar to the nature of the work they are employed to do. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44, 509 N.E.2d 1005, 1008 (1987). "To obtain compensation under the Act, a claimant bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury which arose out of and in the course of his employment." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 671 (2003). "Both elements must be present at the time of the claimant's injury in order to justify compensation." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 25, 990 N.E.2d 284. An injury occurs "in the course of employment" when it "occur[s] within the time and space boundaries of the employment." *Sisbro*, 207 Ill. 2d at 203, 797 N.E.2d at 671. An injury "arises out of" employment when "the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Id.*

¶ 37 Whether an injury arose out of and in the course of one's employment is generally a question of fact and the Commission's determination on this issue will not be disturbed unless

it is against the manifest weight of the evidence. *Brais v. Illinois Workers' Compensation Comm'n*, 2014 IL App (3d) 120820WC, ¶ 19, 10 N.E.3d 403. In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. "The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion." *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592, 834 N.E.2d 583, 592 (2005). "For the Commission's decision to be against the manifest weight of the evidence, the record must disclose that an opposite conclusion clearly was the proper result." *Id.*

¶ 38 Because we reject the employer's contention that the Commission found claimant did not suffer a work accident, we turn our focus to whether claimant's injury "arose out of" his employment. To determine whether a claimant's injury arose out of his employment, we must first determine the type of risk to which he was exposed. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478, 949 N.E.2d 1151, 1156 (2011). This court has recognized three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment; (2) neutral risks that have no particular employment or personal characteristics, such as those that the general public is commonly exposed; and (3) risks that are personal to the employee. *Springfield*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284.

¶ 39 In analyzing risk, the first step is to determine whether a claimant's injuries arose out of an employment-related risk. A risk is distinctly associated with 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." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58, 541 N.E.2d 665, 667 (1989). "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." *Id.* If a claimant's injury is determined not to have resulted from an employment-related risk, we must then consider whether it was a result of a neutral risk or a personal risk. See, *e.g.*, *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, ¶ 23, 13 N.E.3d 1252 ("when a claimant is injured due to an employment-related risk *** it is unnecessary to perform a neutral-risk analysis").

¶ 40 Injuries arising out of neutral risks, which have no particular employment or personal characteristics, are generally not compensable. *Springfield*, 2013 IL App (4th) 120219WC, ¶ 27, 990 N.E.2d 284. Neutral risks include stray bullets, dog bites, lunatic attacks, lighting strikes, bombings, hurricanes, and falls while traversing stairs, public sidewalks, and commercial driveways. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163, 731 N.E.2d 795, 807 (2000); *Village of Villa Park v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 130038WC, ¶ 20, 3 N.E.3d 885; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014, 944 N.E.2d 800, 804 (2011). However, injuries arising out of neutral risks may be compensable if the claimant can show he was exposed to a risk to a greater degree, either qualitatively or quantitatively, from that of the general public. *Id.*

¶ 41 Finally, injuries arising out of personal risks—which "include exposure to elements that cause nonoccupational diseases, personal defects or weakness, and confrontations with personal enemies"—are generally not compensable. *Illinois Consolidated Telephone Co. v. Industrial Comm'n*, 314 Ill. App. 3d 347, 352, 732 N.E.2d 49, 53-54 (2000). An exception to this general rule of noncompensability concerns injuries caused by idiopathic falls where "work place conditions significantly contribute[d] to the injury by increasing the risk of falling or the effects of a fall." *Id.* at 352-53, 732 N.E.2d at 54.

¶ 42 In this case, the Commission found that claimant failed to prove a work accident because his act of bending down to pick up a bolt did not expose him to a greater risk of injury than the general public. In other words, the Commission determined claimant's injury was the result of a noncompensable neutral risk. Implicit in its decision is a determination that claimant's injury did not result from an employment-related risk. On review, claimant contends that the Commission's decision on this issue was against the manifest weight of the evidence. According to claimant, his injury arose out of a risk distinctly associated with his employment and, therefore, a neutral-risk analysis was unnecessary.

¶ 43 In support of his contention, claimant relies on *Young*, 2014 IL App (4th) 130392WC, 13 N.E.3d 1252. In *Young*, the claimant was a parts inspector whose job, in relevant part, was to examine parts to ensure they were made according to specifications. *Id.* ¶ 4, 13 N.E.3d 1252. On the day of his work accident, the claimant was inspecting parts contained in a deep, narrow box. *Id.* ¶ 5, 13 N.E.3d 1252. As he was reaching for the last item in the box, he felt a "snap or pop" in his shoulder. *Id.* The Commission denied benefits on the basis " 'that the mere act of reaching down for an item did not increase [the claimant's] risk of injury beyond what he would experience as a normal activity of daily living.' " *Id.* ¶ 14, 13 N.E.3d 1252. On review, however, this court found, "[a]lthough the act of 'reaching' is one performed by the general public on a daily basis, the evidence in this case established the risk to which claimant was exposed was necessary to the performance of his job duties at the time of his injury." *Id.* ¶ 28, 13 N.E.3d 1252.

¶ 44 Similar to the risk involved in *Young*, in this case we find that the risk associated with the act of bending down to pick up a fallen bolt was an employment-related risk. Specifically, the evidence showed that claimant's job required him to load bolts into an articulating arm, raise the arm up to the vehicle, and press a button on the arm to secure the rear suspension with the bolts. Witness testimony established that during this process, it was not uncommon for bolts to fall out of the articulating arm and onto the floor. Claimant, along with Purdy and Bozanic, testified that if the bolts were not retrieved from the floor before the rotating platform ran them over, the rotating platform would jam which would then result in the entire assembly line shutting down. According to claimant, in the event that the assembly line stopped, he would be subject to discipline.

¶ 45 Here, we find the manifest weight of the evidence establishes claimant's injuries occurred as a result of a risk distinctly associated with his employment. While the act of "bending" may be an act performed by the general public on a daily basis, the evidence established that bolts would regularly fall out of the articulating arm during the assembly process. When a bolt would fall, claimant had to "run down there, bend over, reach and *** pick it up before the [rotating platform] r[an] it over." In other words, picking up fallen bolts was an integral part of claimant's job. Because the risk associated with claimant's act of bending to pick up the bolt was a risk distinctly associated with his employment, he established that his injury "arose out

of" his employment. The Commission's failure to find an employment-related risk is against the manifest weight of the evidence.

¶ 46 We also find that the record does not support the Commission's determination that claimant's injury was not compensable because his "preexisting back condition was so deteriorated that his back simply gave out during a basic daily activity." In reaching its decision, the Commission relied on *County of Cook v. Industrial Comm'n*, 69 Ill. 2d 10, 370 N.E.2d 520 (1977). The *Cook* court recognized a limitation to the general rule that "the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury" to be compensable under the Act. *Id.* at 17, 370 N.E.2d at 523. Specifically, the court noted, "[t]he sole limitation to the above general rule is that where it is shown the employee's health has so deteriorated that any normal daily activity is an overexertion, or where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed, compensation will be denied." *Id.* at 18, 370 N.E.2d at 523. In this case, the Commission, citing the above limitation, concluded that claimant's injuries were not compensable because his "degenerated lumbar discs gave way with the simple act of bending forward," which "demonstrate[d] that his lumbar condition was so deteriorated that any activity of normal life was sufficient to cause [his] spine to break down further."

¶ 47 Based on our review of the record, we find the manifest weight of the evidence shows that claimant's health was not so deteriorated that any normal daily activity would constitute "an overexertion." Initially, we note that the employer presented no evidence which established claimant's back condition was so deteriorated that any normal daily activity would have caused the disc herniation at L4-5. The lack of evidence on this matter is understandable because the employer did not advance this theory before the Commission. During arbitration, the closest evidence provided that would support the Commission's finding on this issue was during Dr. Butler's deposition when he testified, hypothetically, that a herniated disc could result from bending over to pick up a bolt in a person whose "spine [was] in the condition that [claimant's] spine was in." On cross-examination, Dr. Butler testified that a herniated disc could result under the above described circumstances. However, he stated, "[i]t depends on how he bent over, how often that happened. I mean, anything is possible, sure. But I don't know. It's hard to say." Dr. Butler did not specifically testify as to the type or extent of the degenerative changes in the hypothetical patient's lumbar spine or suggest that claimant's back was similarly degenerated prior to his work injury in May 2009. On the other hand, the evidence established that while claimant had suffered a previous back injury in 2003, that injury had been successfully treated using conservative modalities. Until the time of the injury at issue here, claimant worked on the assembly line 5 days per week, 10 hours per day, and he had not missed any significant amount of time from work between his 2003 injury and the May 2009 injury. Further, there is no evidence in the record that claimant sought treatment for any low back or right hip issues between his 2003 injury and the May 2009 injury or that he suffered any low back or right hip discomfort whatsoever in that timeframe.

¶ 48 Although we are reluctant to set aside the Commission's decision on a factual question, we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 119, 881 N.E.2d 523, 529 (2007). Here, the Commission's finding that claimant's lumbar spine had deteriorated to the point of collapse prior to his May

2009 accident is against the manifest weight of the evidence.

¶ 49 III. CONCLUSION

¶ 50 For the reasons stated, we reverse the circuit court's judgment confirming the Commission's decision, reverse the Commission's decision, and reinstate the decision of the arbitrator.

¶ 51 Judgment reversed, and arbitrator's decision reinstated.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mark Mytnik,

Petitioner,

vs.

NO: 09 WC 26257

Ford Motor Company,

14IWCC0865

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, medical expenses, temporary total disability benefits, and permanent disability, hereby reverses the Arbitrator's Decision and finds that Petitioner failed to prove that he sustained accidental injuries arising out of and in the course of his employment on May 21, 2009.

So that the record is clear, and there is no mistake as to the intentions or actions of this Commission, we have considered the record in its entirety. We have reviewed the facts of the matter, both from a legal and a medical / legal perspective. We have considered all of the testimony, exhibits, pleadings and arguments submitted by the Petitioner and the Respondent. And after a complete review of the record, the Commission finds that Petitioner's varied and inconsistent histories of the May 21, 2009 incident undermine his claim that he suffered accidental injuries arising out of and in the course of his employment with Respondent on May 21, 2009.

The Commission notes that at hearing, Petitioner testified that he first noted that his back had started to bother him at 10:00 a.m. on May 21, 2009. (T.22) Petitioner testified that some time later after, he bent down to retrieve a bolt that had fallen to the floor and suddenly felt a "real sharp" pain in his right side. (T.22, 24) Petitioner testified that later that day he sought treatment at Respondent's medical department. (RX6) The records from the medical department

indicate that Petitioner explained that while doing his job his right leg stays on the foot paddle on the assembly line and "as the moon buggy moves it twists my body." (RX6) Petitioner then complained of right hip pain. Following his visit to the medical department, Petitioner completed an accident report in which he stated that he felt pain in his right hip and leg when he was "picking up bolts off the floor twisting his body." (RX7)

On May 26, 2009, Respondent sent Petitioner to Urgent Care for treatment. (PX11) At Urgent Care, Petitioner reported that he developed low back pain with radiation down the right leg while twisting and turning in the "completion of his job assignments." (PX11) The triage nurse at Urgent Care noted that Petitioner reported that he was "using a foot pedal repetitively with his right foot and twisting and turning" when he felt low back pain with radiation down the right leg. (PX11)

When Petitioner saw Dr. Chang on June 4, 2009, he reported that while working on May 21, 2009, he bent down to pick up a bolt that had fallen while holding on to equipment, causing him to "twist forcefully." (PX9) Petitioner reported that after this twist, he felt immediate low back pain that "gradually radiated into the right leg." (PX9)

On June 8, 2009, Petitioner told Dr. Adlaka that he was "bending down to pick up something when he injured his back." (PX12)

On July 20, 2009, Petitioner told Dr. Goldberg that he had "twisted an arm of a machine and developed acute low back and right leg radicular pain." (PX5) Dr. Goldberg later issued an addendum to his report, explaining that Petitioner had "twisted his waist to reach back for the arm of a machine...then developed acute low back right leg radicular pain." (PX5)

On March 8, 2010, Petitioner told Dr. Luken that he developed right-sided low back symptoms "as he engaged in his usual routine involving repetitive bending and light lifting." (PX2)

On June 2, 2010, Petitioner saw Dr. Butler, Respondent's first Section 12 examiner, who took down the following history from Petitioner: "During the course of his occupation he has to pick up stock for assembly and place bolts on an articulating arm. He states that he is required to push a foot pedal during the course of this assembly operation. [Petitioner] stated that there is a twisting motion involved in completion of his job assignment." (RX3-ERX2)

On June 1, 2011, Petitioner saw Dr. Zelby, Respondent's second Section 12 examiner. (RX2-ERX2) Dr. Zelby indicated in his report that Petitioner explained that he "was doing his regular job duties, and did not have any specific incident or injury, and felt pain in the low back, radiating into the right buttock and down the right leg, although he cannot remember the distribution into the leg. He did notice that when he bent to pick up a ball, the pain seemed sharper for a couple of seconds." (RX-ERX2) At his evidence deposition on October 13, 2011, Dr. Zelby testified that Petitioner reported that he bent to pick up a "bolt" not a "ball." (RX2)

On June 16, 2011, Petitioner's Section 12 examiner, Dr. Treister, noted that Petitioner reported that he started to "have sharp low back pains while he was eating his lunch." (PX3-

EPX2)

As explained above, the Commission notes that Petitioner's histories of the May 21, 2009 incident are varied. However, despite all of the histories provided by Petitioner throughout his treatment, Petitioner testified at hearing that his low back pain with radiation down the right lower extremity started when he reached down to retrieve a bolt that had fallen to the floor. Petitioner chose to proceed to trial with this history. Accepting Petitioner's chosen history of the accident, despite the multiple accounts he had provided, the Commission finds that Petitioner has failed to prove that he suffered an injury compensable under the Illinois Workers' Compensation Act (hereinafter "Act").

The Commission notes that Petitioner testified that he had suffered a work injury to his back in 2003. (T.22-23) This was confirmed by the records of Petitioner's primary care physician, Dr. Luebbe, who noted on May 27, 2009 that Petitioner had a history of back pain. (PX13) The lumbar MRI taken on May 26, 2009, was compared to a lumbar MRI taken on December 3, 2003. It showed that Petitioner had "[p]osterocentral and right paracentral disc herniation at L4-L5, which appears to be new since the previous exam. Posterocentral and right paracentral disc herniation at L5-S1, which was described on the previous examination." (PX5) Petitioner clearly had pre-existing low back abnormalities, but the MRI also showed a new herniation at L4-L5.

Despite this diagnostic indication of a new herniation, the Commission finds that Petitioner has failed to establish that his injury arose out of his employment. As explained by the Illinois Supreme Court in *County of Cook v. Indus. Comm'n (Spiegel)*, 69 Ill. 2d 10, 17-18 (Ill. 1977)

> An accidental injury can be found to have occurred, even though the result would not have obtained had the employee been in normal health. (Republic Steel Corp. v. Industrial Com. (1962), 26 Ill. 2d 32, 43-44.) If an employee's existing physical structure gives way under the stress of his usual labor, his death is an accident which arises out of his employment. To come within the statute the employee need only prove that some act or phase of the employment was a causative factor of the resulting injury. Wirth v. Industrial Com. (1974), 57 Ill. 2d 475, 481....The sole limitation to the above general rule is that where it is shown the employee's health has so deteriorated that any normal daily activity is an overexertion, or where it is shown that the activity engaged in presented risks no greater than those to which the general public is exposed, compensation will be denied. (County of Cook v. Industrial Com. (1977), 68 Ill. 2d 24, 32-33; Rock Road Construction Co. v. Industrial Com. (1967), 37 Ill. 2d 123, 127; Illinois Bell Telephone Co. v. Industrial Com. (1966), 35 Ill. 2d 474, 477.) Whether, however, the above factors are present

is a question of fact for the Commission. Okaw Homes, Inc. v. Industrial Com. (1968), 40 Ill. 2d 81, 84.

In the case at bar, Petitioner was not engaged in an activity which presented a greater risk of injury to him than to the general public. Petitioner, by his own testimony, was simply bending down.

The record demonstrates that Petitioner suffered from long standing, pre-existing, lumbar degenerative disc disease. Petitioner testified that he experienced pain while he was bending to retrieve a fallen bolt.

Petitioner's degenerated lumbar discs gave way with the simple act of bending forward. The failure of the Petitioner's spine occurred while he was simply bending over. This demonstrates that his lumbar condition was so deteriorated that any activity of normal life was sufficient to cause Petitioner's spine to break down further.

The Commission notes that both Petitioner and Terrence Purdy, a co-worker, testified that bolts tend to fall often and they would have to pick them up to avoid jams in the machinery. The Commission also notes that when describing their work activities, both men focused on the twisting and turning involved in moving the articulating arm and grabbing bolts from the table or stock area. Their testimony and the evidence presented shows that the job required that they stand for long periods of time and move an articulating arm. The Commission finds that bending down for a fallen bolt is an intermittent act dependent solely on a bolt falling.

The Commission finds that Petitioner was simply performing the everyday activity of bending down. The Commission further finds that Petitioner was not exposed to a greater risk of injury than the general public, due to his work activities. The Commission also finds that Petitioner's pre-existing back condition was so deteriorated that his back simply gave out during a basic daily activity. Based on *County of Cook* and the requirements under the Act, Petitioner failed to establish that his injuries arose out of and in the course of his employment.

Therefore, for the reasons set forth above, the Commission finds that Petitioner has failed to establish that he sustained accidental injuries arising out of and in the course of his employment with Respondent on May 21, 2009. Accordingly, we reverse the Decision of the Arbitrator and deny compensation.

Finally, one should not and cannot presume that we have failed to review any of the record made below. Though our view of the record may or may not be different than the arbitrator's, it should not be presumed that we have failed to consider any evidence taken below. Our review of this material is statutorily mandated and we assert that this has been completed.

IT IS THEREFORE ORDERED BY THE COMMISSION that that the Decision of the Arbitrator is reversed as Petitioner failed to prove he sustained an accidental injury arising out of his employment with Respondent, and, therefore, his claim for compensation is hereby denied.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit

14IWCC0865

for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

No bond is required for removal of this cause to the Circuit Court by Respondent. 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: OCT 0 7 2014
MJB/ell
o-08/19/14
052

Michael J. Brennan

Thomas J. Tyrrell

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

Q-Dex On-Line
www.qdex.com

MYTNIK, MARK
Employee/Petitioner

Case# 09WC026257

14IWCC0865

FORD MOTOR COMPANY
Employer/Respondent

On 6/14/2013, 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 0.08% 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:

0905 NEWMAN BOYER & STATHAM LTD
JAMES S HAMMAN
18400 MAPLE CREEK DR SUITE 500
TINLEY PARK, IL 60477

0560 WIEDNER & MCAULIFFE LTD
RANDALL SLADEK
ONE N FRANKLIN ST SUITE 1900
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STATE OF ILLINOIS)
)SS.
COUNTY OF COOK)

- [ ] Injured Workers' Benefit Fund (§4(d))
- [ ] Rate Adjustment Fund (§8(g))
- [ ] Second Injury Fund (§8(e)18)
- [x] None of the above

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mark Mytnik,
Employee/Petitioner

v.

Ford Motor Company,
Employer/Respondent

Case # 09 WC 26257

Consolidated cases: none

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 **Peter M. O'Malley**, Arbitrator of the Commission, in the city of **Chicago**, on **2/25/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

A. [ ] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [ ] Was there an employee-employer relationship?
C. [x] 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. [x] 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. [x] 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. [x] What temporary benefits are in dispute?
[ ] TPD [ ] Maintenance [x] TTD
L. [x] What is the nature and extent of the injury?
M. [x] Should penalties or fees be imposed upon Respondent?
N. [ ] Is Respondent due any credit?
O. [ ] Other _____

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FINDINGS

On **5/21/09**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$58,240.00**; the average weekly wage was **$1,120.00**.

On the date of accident, Petitioner was **41** years of age, ***married*** with **2** dependent children.

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

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

Respondent shall be given a credit of **$0.00** for TTD, **$0.00** for TPD, **$0.00** for maintenance, and **$60,094.51** for other benefits, including short term disability ($51,832.26) and PPD advance ($8,262.25), for a total credit of **$60,094.51**. (See Arb.Ex.#1).

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

ORDER

Respondent shall pay Petitioner temporary total disability benefits of $746.67 per week for 79-1/7 weeks, commencing 5/23/09 through 2/28/10 and from 3/3/10 through 11/29/10, as provided in §8(b) of the Act.

Respondent shall pay Petitioner the temporary total disability benefits that have accrued from 5/22/09 through 2/25/13, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay reasonable and necessary medical expenses relating to said accident as provided in §8(a) and the fee schedule provisions of §8.2 of the Act.

Respondent shall pay Petitioner permanent partial disability benefits of $664.72 per week for 125 weeks, because the injuries sustained caused the 25% loss of the person as a whole, as provided in Section 8(d)2 of the Act.

Respondent shall pay to Petitioner penalties of **$0.00**, as provided in Section 16 of the Act; **$0.00**, as provided in Section 19(k) of the Act; and **$0.00**, as provided in Section 19(l) of the Act.

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

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

Signature of Arbitrator

5/21/13
Date

JUN 14 2013

STATEMENT OF FACTS:

Petitioner, a 41 year old assembly line worker, testified that he had worked for Respondent since October 1994. He indicated that he worked in the rear suspension area, using different types of machines. He noted that on May 21, 2009 he was doing a rear suspension "moon buggy" job. He noted that the job required that he stand on an assembly line up to nine (9) hours per day working on cars, with two (2) breaks, while twisting his body to pull and position an articulating arm tool used to drive bolts into the rear suspension of automobiles. In addition, he was required to lift packages of bolts and other items to be assembled on the vehicles weighing thirty (30) to seventy (70), sometimes lifting two at a time in setting up his work station. He noted that the assembly line ran at a rate of speed that allowed 48-52 seconds to work on each vehicle, or approximately 62 vehicles per hour.

Petitioner testified that on May 21, 2009 he started work at 6:00 am and that around 10:00 am he noticed that his back hurt. On cross examination, he noted that he felt "okay" when he arrived at work and that he had noticed pain throughout the day. He also noted that sometimes bolts would fall out and he would have to reach down and remove it before it jammed the carousel. He testified that he did just that on the date in question and that when he did so he felt sharp pain like needles on the right side. He indicated that he then flagged down a supervisor, Zack Bozanic, and asked to go to medical. Petitioner testified that he told Mr. Bozanic what had happened about ten (10) to fifteen (15) minutes after it occurred. He also noted that he went to the medical department at about noon. He indicated that he told medical department personnel that he had pain in his back and down his leg. On cross he later agreed that he may have told personnel at that time that he had pain in his right hip and that it had begun at about 8:30 am. He also noted that although he had previously hurt his back in 2003 he had not had pain down his right leg before. Petitioner testified that the medical department gave him ibuprofen and iced his back. He noted that he sat around for a couple hours until he was sent back to the line. He indicated that there were a few hours left in the day ad that he did not realize the extent of his condition, and that the group leader helped him out.

Petitioner testified that the following day was "the weekend." The Arbitrator takes judicial notice of the fact that the date of the alleged accident, May 21, 2009, was a Thursday. Petitioner indicated that he could not get up from bed that day and was in excruciating pain.

Petitioner testified that he returned to work after the weekend but was unable to move, bend, twist or even stand. He returned to the medical department and was eventually sent to Ingalls Urgent Care. He indicated that he told the doctor what had happened and how he was doing the moon buggy job, twisting and picking up stock, and how he had to hurry up to pick up a bolt. Petitioner noted that given an injection at that time and sent for an MRI.

The Ingalls medical record for May 26, 2009, indicated that the patient described "twisting motion of the torso in completion of job." (PX11). It also stated: "Injury/accident to right hip and back" and it was also noted in the Work Status Discharge Sheet; "Off Duty (Due to Work Related Conditions)." The record also indicates "right buttock pain radiates to posterior upper leg" and below that it states: "cumulative injury." In the Emergency Record under Doctor Notes, the record for that date also states: "Mechanism of Injury: The pt. states that he was using a foot pedal repetitiously with his right foot and twisting and turning when he began with right lower back pain that radiated down the posterior lateral aspect of his right thigh to his foot." The diagnosis was lumbar radiculopathy. The Ford Motor Company Referral Form included with those records states; "eval for complaint of continued right lower back pain…"

Petitioner testified that following the MRI he was instructed to return to Respondent's medical department, which he did. He noted that he spent about six (6) hours in the medical department. He indicated that during that time he spoke to Michelle Gregory, Respondent's workers' compensation administrator. Petitioner noted that he told Ms. Gregory that his back was bothering him and about the twisting involved in his job. He also indicated that he informed her how he really felt it after picking up a bolt. Petitioner noted that after a few hours Ms. Gregory returned and told him that they had looked at the job and that there was no way he could have gotten hurt. He also noted that he was told to see his own doctor at that time.

Petitioner visited his primary care physician, Dr. William Lubbe on May 27, 2009. He indicated that he informed Dr. Lubbe about his job and the twisting involved. On that date Dr. Lubbe recorded "... radiculopathy-pt had previous report in 2003 with apparently same results however pt. has never been seen in this office for back pain for years-no back complaints in multiple visits in recent years." (PX13). Dr. Lubbe then referred Petitioner to Dr. Mark Chang.

Petitioner was examined by Dr. Chang on June 4, 2009. Petitioner indicated that he told Dr. Chang the same thing with respect to the twisting involved in his job. In a report dated June 4, 2009 Dr. Chang noted that "... the pain started after a work related injury on May 21, 2009, when he was picking up some bolts while working on an assembly line ... he had to bend down to pick up a bolt that had dropped... reach down, he had to twist forcefully." (PX9). In addition, Dr. Chang noted that Petitioner "reports that in 2003 he had an episode of lower back pain. He had an MRI done at that time and went for physical therapy which helped and he has not had any trouble since that time." Later in the report, regarding an MRI of the lumbar spine, dated May 26, 2009, he states "[a]ccording to the MRI report, those films are compared to MRI images dated December 3, 2003. According to the radiologist, the L4-5 disc herniation is new since the previous MRI, while the L5-S1 disc herniation remains the same." Dr. Chang's impression was: "Acute right L5 radiculopathy secondary to new L4-5 disc herniation causing significant nerve impingement, old L5-S1 disc herniation not causing radiculopathy." Dr. Chang concluded by stating "since I am confident this is a new disc herniation, I would consider the new herniation as definitely being work related since it would be consistent with the mechanism of injury as he described on May 21, 2009." (PX9).

Dr. Chang's records also include a #5166- Medical Certification Form, prepared by Dr. Lubbe which indicates that the condition was a "reaggravation of preexisting problem which had not caused any problems for multiple years-this is a work comp injury."

Petitioner testified that Dr. Chang referred Petitioner to Dr. Adlaka for an injection. Petitioner noted that Dr. Chang also referred him to a pain specialist, and eventually recommended surgery.

Petitioner subsequently sought a second opinion, visiting Dr. Edward Goldberg on July 20, 2009. Once again, Petitioner noted that he gave the same history regarding the twisting associated with his job that he had given the other providers. However, Petitioner noted that his description of the use of an articulating arm may have caused some confusion. He indicated that as a result Dr. Goldberg's record was wrong and he had to have Dr. Goldberg's office fix the description of the accident. Petitioner continued to treat with Dr. Goldberg from July of 2009 through February of 2010.

In his record of July 20, 2009, Dr. Goldberg reported the history of the petitioner's present illness as follows: "He twisted an arm of a machine and developed acute low back and right leg radicular pain." PX 5 A clarification was added to the record that stated: "We are correcting that by saying the patient twisted his waist to reach back for the arm of a machine he uses to complete his job; then he developed acute low back right leg radicular pain." The record for December 4, 2009, indicates: "He has been in therapy and they recommend

additional therapy, but unfortunately this has been denied. The therapy notes do indicate he is making progress." Later in that record, Dr. Goldberg notes: "My recommendation is that he have work conditioning for 4 weeks. He does heavy assembly line work. If work conditioning cannot be performed due to insurance issues, he will let us know."

Ford Form 5166, prepared by Dr. Goldberg on July 20, 2009, indicates that the petitioner's condition was due to the employee's occupation and states "work related incident caused injury to low back." A follow up Form 5166, dated January 6, 2010, stated "work injury May 21, 2009."

At the February 10, 2010, appointment Dr. Goldberg released the petitioner to return to work as of March 1, 2010, finding that he had reached maximum medical improvement. He prescribed an additional four sessions of physical therapy. He was released at light duty with maximum lifting limited to twenty-five pounds. It was noted that the restrictions were permanent "due to the chronic nature of his right L5-S1 neuropathic pain."

Dr. Goldberg performed surgery on August 4, 2009. The records from Rush University Medical Center include the report of the surgery that Dr. Edward Goldberg performed on the petitioner on August 4, 2009. (PX6). That surgery was described as a right L4-L5 hemilaminotomy and discectomy and right L5-S1 hemilaminotomy and partial facetectomy.

Following surgery, Petitioner began a program of physical therapy. However, Petitioner noted that Dr. Goldberg subsequently stopped physical therapy in February of 2010 and released him to return to work with a 25 pound lifting restriction. Petitioner thereupon returned to work on March 1, 2010. He indicated that he worked in several different types of jobs that allowed him to work an eight hour day, but that the jobs were not light duty. Petitioner testified that he worked on March 1 and March 2, 2010 and then went off work again due to radiating pain as well as an inability to stand, twist or bend for very long. Petitioner indicated that Ford had said they would try to accommodate him but that they never did.

Petitioner testified that after a visit to the St. Margaret emergency room he visited Dr. Martin Luken on March 8, 2010. On that date Dr. Luken noted that Petitioner "developed right-sided low back pain and sciatica at work one day in May 2009, while involved in regular work involving repetitive bending and light lifting while working on an assembly line. He recommended that Petitioner be off work and he prescribed suitable work conditioning culminating in a functional capacity evaluation.

Dr. Luken testified that Petitioner's work "involved holding a pedal down with one foot while reaching behind him to grasp and deal with a power tool of some sort." He went on to describe that the petitioner "had to keep one foot planted on a pedal while twisting to retrieve this instrument to deal with each passing car." (PX1, p.17). Dr. Luken further testified that "the repetitive mechanical stress which his work likely brought to bear on his lower back, in my opinion, very plausibly accounted for lower lumbar injury and with precipitation or exacerbation of the demonstrated disc herniation which we believe was responsible for the symptoms Mr. Mytnik reported as having developed in the course of his work in May of 2009." (PX1, pp.18-19) Dr. Luken agreed that Petitioner's bending over to pick up a bolt and twisting in the manner described was possible to herniate a lumbar disc. (PX1, p.22). He was also of the opinion that "those hours, those years involved with repetitive bending like lifting and twisting, those would seem to me to be the very competent causes of the anatomical and clinical problem observed." (PX1, p.23). Dr. Luken testified that "something happened during that workday with those repetitive mechanical stresses to his back to either precipitate or critically exacerbate the longstanding degenerative changes in his spine." (PX1, p.40).

Petitioner noted that Ford would not authorize the FCE and that he ended having the FCE on November 9, 2011 and paying it himself. The FCE demonstrated physical capabilities and tolerances to function at the light-medium category of work, indicative of two-hand occasional lift carry of thirty-five pounds from twelve inches to waist level and a two-hand frequent lift of fifteen pounds from twelve inches to waist level.

Petitioner noted that Dr. Luken kept him off work until his subsequent return to work with restrictions on November 30, 2010. He indicated that he returned to work for Respondent on that date doing different "made up" jobs, doing different tasks which were within the restrictions imposed by Dr. Luken. Petitioner testified that he had attempted to work several times after March of 2010 but that he was informed by Ford's labor relations department that there was no work available.

Petitioner testified that prior to date of the alleged accident he had had problems with his back while working for Ford. He noted that he had been working on the rear brake system using an articulating arm and which required overhead work. Petitioner indicated that he no other back injuries prior to working for Respondent.

At the request of Respondent, Petitioner visited Dr. Jesse Butler on June 2, 2010 for purposes of a §12 evaluation. After examination and review of the medical records, Dr. Butler diagnosed lumbar degenerative disc disease and herniation at L4-5. He found that Petitioner was at MMI with restrictions, if any, to be determined by a functional capacity evaluation. Dr. Butler testified that the video he reviewed of the assembly line job didn't seem to show any twisting movement and he stated that the pace with which the bolts were drilled seemed to be a very comfortable pace for someone doing the job. (RX3, p.11). He was also asked to assume that there was no lifting requirement for the job since it was not depicted in the video. Dr. Butler admitted that people with degenerative changes in their spines similar to the petitioner's prior to his accident at work could bend over to pick something up or reach for something and become symptomatic. (RX3, p.16). He also testified that it was possible that Petitioner could have herniated a disc if he had bent over to pick up a bolt. (RX3, pp.22-23).

In addition, Petitioner visited Dr. Andrew Zelby at the request of Respondent on June 1, 2011 for purposes of a §12 examination. Dr. Zelby testified that Petitioner told him that he noticed a sharp pain in his low back radiating to his right buttock and down the right leg when he bent over to pick up a bolt. (RX2, p.7). He also testified that an FCE was unnecessary. Dr. Zelby testified that he was never asked by Respondent to review the video that had been reviewed by the other evaluating physician. (RX2, p.16)

At the request of his attorney, Petitioner visited Dr. Michael Treister for an evaluation on June 16, 2011. Dr. Treister testified that Petitioner explained to him that he had to step on a pedal with one foot to lift the suspension while simultaneously reaching back to pull the articulating arm forward. (PX3, p.9). He also testified that Petitioner said sometimes a bolt would fall down and he'd have to grab it real quickly to prevent it from getting into the mechanism of the machine. He told him that he had 48 to 50 seconds to work on each vehicle and he typically did 67 to 70 vehicles per hour and he worked ten-hour days. He also told him that he was required to pick up boxes of bolts, sometimes two at a time, and that each box weighed between 20-30 pounds. Dr. Treister testified that petitioner lifted and twisted with 40 to 60 pounds. (PX3, p.10).

Dr. Treister further testified Petitioner had an MRI on April 9, 2010, a long time after his surgery, and the MRI showed postoperative changes at L4/L5 with some scar tissue that was causing central and bilateral foraminal stenosis, which was a basis for the ongoing discomfort on an objective basis. (PX3, p.16). Dr. Treister diagnosed Petitioner's condition as failed back syndrome noting persistent back pain and radiculopathy. (PX3, p. 21). Dr. Treister explained that Petitioner's condition is causally related to the accident that he had at work on May 21, 2009. He noted that Petitioner had preexisting degenerative disc disease in the lower lumbar area

which puts those discs at risk for herniation. Petitioner has sudden onset of pain while working. Dr. Treister testified to his opinion that whether from twisting, lifting or bending, the problem with Petitioner's back started while he was working. (PX3, p.22). He further testified that Petitioner was a candidate for further surgery, likely a fusion or arthrodesis. (PX3, p.23).

Petitioner testified that he was aware of the job video sent to Drs. Butler and Zelby. Petitioner indicated that he viewed the tape and that it did not accurately depict his job. Specifically, he noted that the assembly line did not move as fast as it normally ran, that he saw the line actually stop at one point and that the worker shown in the video was not putting on nearly as many parts as he did.

Petitioner testified that he currently takes something for the pain, and that he was feeling it in his back a little bit while sitting and testifying. He indicated that the pain is in his back and goes down his leg, and that sometimes the numbness will increase and his knee will buckle. Petitioner also stated that Dr. Luken had recommended a fusion but that he did not want anymore surgery at that time.

Petitioner indicated that he was not paid workers' compensation benefits while he was off work but that he did receive short term disability payments of around $200.00 per week for a gross amount of $675.00, or $547.00 net. He also noted that his medical bills were not paid other than what was picked up by Blue Cross Blue Shield.

Terrance Purdy testified on behalf of the Petitioner. Mr. Purdy indicated that he had worked for Ford for 19-1/2 years. Mr. Purdy noted that on the date of the incident, May 21, 2009, he was doing general utility work in the area. He testified that he was familiar with the "moon buggy" job that the petitioner was doing on the date of the accident because he worked on that job at the same time as the petitioner and took over his job after he was hurt. He further testified that the job required lifting and twisting to utilize an articulating arm and added that twisting and bending quickly was required to pick up dropped bolts. He noted that bolts were dropped fairly regularly. He testified that he was injured after he bent down to pick up a dropped bolt. He said that dropped bolts had to be quickly retrieved to avoid assembly line jams. The witness testified that the assembly line did not stop often. He said that while working on that job, he worked ten-hour days and worked 63 to 68 cars per hour. In his testimony, the witness explained that the job required twisting quickly to get the articulating arm and he noted that the arm needed to be pulled into position to work on the vehicles.

Hugh Ferguson III, the videographer for Ford, testified that he was asked by Ford's workers' compensation department to take a video of Petitioner's job. He testified that he's worked for Ford for 44 years and is currently its Government Regulations Coordination Assistant. He testified that the workers' compensation department showed him what they wanted videoed and he didn't know why the video was needed. The video was shown and he stated that six minutes of the video was the petitioner's job. He testified that he was given no written instructions and made no notes regarding the video. He further testified that he did not know the date that he took the video and he was not told how long to run the video. He testified that he was not provided with a job description, nor was he given any information concerning the petitioner. He said that he did not know if the petitioner's job was explained to him and he testified that he didn't know what he knew about the person who was in the video he took. He also testified that he recalled seeing someone drop a bolt while doing the job, but he didn't remember seeing anyone bending over while doing the job. He said that he had taken a video of that job just that one time.

Zack Bozanic appeared and testified at the request of Respondent. He testified that he was a supervisor for Ford on May 21, 2009, and had worked for Ford twelve years prior to that at its Michigan truck plant. He knew the petitioner and knew that the petitioner had reported the accident. He said that the petitioner was a good

employee. The witness testified that sixty-three vehicles were done in an hour. He said that the line stopped, but he did not have any training on the petitioner's job. He said that he had no information regarding any significant time the petitioner had off from work prior to the date of this accident. The witness testified that he didn't know how the petitioner had been injured. He didn't know anything about the petitioner's injuries or that he had surgery. He testified that he is not told anything about employees working with restrictions.

WITH RESPECT TO ISSUES (C), DID AN ACCIDENT OCCUR THAT AROSE OUT OF AND IN THE COURSE OF THE PETITIONER'S EMPLOYMENT BY THE RESPONDENT AND (F), IS THE PETITIONER'S PRESENT CONDITION OF ILL-BEING CAUSALLY RELATED TO THE INJURY THE ARBITRATOR FINDS AS FOLLOWS:

The evidence introduced at hearing established that Petitioner worked for Respondent since October of 1994 and that his work on the assembly line required him to stand for upwards of nine hours per day, performing repetitive labor involving lifting, twisting, reaching and occasional bending. Although there was some variation in the medical records concerning the details of exactly what work was being done on the date of the accident, the overwhelming medical evidence established that Petitioner was performing repetitive duties for the employer on the date and he bent over to pick up a bolt that he had dropped while performing those duties.

The facts established at hearing, through Petitioner's testimony, the testimony of the witnesses, the medical records, the medical opinions, and the other documents admitted into evidence, Petitioner had been working for years with a less than healthy spine. He had lost no significant time from work since the time he previously had trouble with his back in 2003. Petitioner testified that the problem with his back in 2003 came from the repetitive work that he had done for the respondent. On the date of the accident, Petitioner reported to his supervisor what had happened. He was sent to the employer's medical department where it was documented on that date that he was complaining of his low back pain that was radiating into his right hip and upper leg. Those documents indicate "twisting" and also "Ill/Rep. Mot.", which presumably means the "illness" relates to the "repetitive motion" related to the petitioner's position of employment. The subsequent medical records indicate, that in addition to the petitioner's repetitive duties, the petitioner more likely than not aggravated his preexisting degenerative disc disease when he bent over to retrieve a bolt that he had dropped on the assembly line.

The Arbitrator is not persuaded by the opinions of the Section 12 examiners for the respondent given the facts of the accident, the course of the treatment and the overall medical evidence introduced at hearing. The Arbitrator finds the opinions of the petitioner's treating and evaluating physicians more persuasive than those of Drs. Butler and Zelby. Likewise, the Arbitrator is not persuaded by a six minute video of an assembly line job that runs at least ten hours per day and which petitioner testified did not accurately depict the entirety of his duties on the assembly line, including those instances wherein he would have to bend down in order to pick up bolts from off the line.

The Arbitrator finds that the evidence, taken as a whole, supports his decision that the petitioner has established that an accident occurred that arose out of and in the course of his employment and that his current condition of ill being is related to the accident that occurred on May 21, 2009, including the need for the surgery that was performed on August 4, 2009.

WITH RESPECT TO ISSUE (J), WERE THE MEDICAL SERVICES THAT WERE PROVIDED TO PETITIONER REASONABLE AND NECESSARY AND HAS RESPONDENT PAID ALL APPROPRIATE CHARGES FOR ALL REASONABLE AND NECESSARY MEDICAL SERVICES, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds, based upon the evidence introduced at hearing, that the medical services provided to the petitioner for treatment of his back injury, as indicated in the medical records admitted into evidence and as delineated in petitioner's group exhibit (PX15), were reasonable and necessary to cure or relieve the petitioner from the condition caused by the work accident. The Arbitrator finds respondent liable for the medical bills related to the foregoing related treatment contained in petitioner's Exhibit 15 and supported by the corresponding medical records. Payment of the bills by the respondent is to be consistent with the provisions of Section 8.2 of the Workers' Compensation Act or the Workers' Compensation Commission Medical Fee Schedule.

WITH RESPECT TO ISSUE (K), WHAT AMOUNT OF COMPENSATION IS DUE FOR TEMPORARY TOTAL DISABILITY, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds, based upon the evidence introduced at hearing, including the testimony of the petitioner, the medical records, and the testimony of Dr. Martin Luken and Dr. Michael Treister, that the petitioner did not return to work and was unable to return to work, except for two (2) days, March 1 and March 2, 2010,. Along these lines, Petitioner testified that he worked on March 1 and March 2, 2010 and then went off work again due to radiating pain as well as an inability to stand, twist or bend for very long.

Based on the above, and the record taken as a whole, the Arbitrator finds that the respondent is liable for temporary total disability benefits from May 23, 2009 through February 28, 2010 and from March 3, 2010 through November 29, 2010, for a period of 79-1/7 weeks.

WITH RESPECT TO ISSUE (L), WHAT IS THE NATURE AND EXTENT OF THE INJURY, THE ARBITRATOR FINDS AS FOLLOWS:

As a result of the accident, Petitioner underwent surgery on August 4, 2009 consisting of a hemilaminotomy and discectomy at L4-L5 on the right, necessitated by a herniated disk at the level, and a "generous" hemilaminotomy and partial facetectomy at L5-S1 on the right, which was necessitated by annular bulging at the level. The Arbitrator also notes that both Dr. Martin Luken and Dr. Michael Treister have recommended further surgery, including fusion and arthrodesis. The Arbitrator further finds it noteworthy that the petitioner is no longer working in a recognized regular position of employment for the respondent and is now working within significant physical restrictions ordered by Dr. Luken and pursuant to the FCE that was done.

Based on the above, and the record taken as a whole, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 25% person-as-a-whole pursuant to §8(d)2 of the Act.

WITH RESPECT TO ISSUE (M), SHOULD PENALTIES BE IMPOSED UPON THE RESPONDENT, THE ARBITRATOR FINDS AS FOLLOWS:

The Arbitrator finds that penalties and attorneys fees should not be imposed upon the respondent. Although the evidence admitted at hearing indicates that the respondent had sufficient information on the accident date regarding the details of the accident and the condition of the petitioner that would suggest benefits should have been provided pursuant to the Act, the respondent was entitled to rely on the opinions of its evaluating physicians to deny compensability. Therefore, penalties are not appropriate in this case and are therefore denied.

Illinois Official Reports

Appellate Court

***Steak 'n Shake v. Illinois Workers' Compensation Comm'n*, 2016 IL App (3d) 150500WC**

Appellate Court Caption	STEAK 'N SHAKE, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Joan Anderson, Appellee).
District & No.	Third District Docket No. 3-15-0500WC
Filed	November 17, 2016
Decision Under Review	Appeal from the Circuit Court of Peoria County, No. 14-MR-833; the Hon. James Mack, Judge, presiding.
Judgment	Affirmed as modified.
Counsel on Appeal	George F. Klauke, Jr., of Klauke Law Group LLC, of Schaumburg, for appellant. Daniel P. Cusack and Thomas M. Watson, of Cusack, Gilfillan & O'Day, LLC, of Peoria, for appellee.
Panel	JUSTICE HARRIS delivered the judgment of the court, with opinion. Justices Hoffman and Stewart concurred in the judgment and opinion. Presiding Justice Holdridge specially concurred, with opinion, joined by Justice Hudson.

OPINION

¶ 1 Claimant, Joan Anderson, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2008)), alleging she sustained injuries to her right hand and thumb and seeking benefits from the employer, Steak 'n Shake. Following a hearing, the arbitrator found that claimant sustained accidental injuries to her right hand that were causally related to her employment on May 30, 2008. The arbitrator awarded claimant (1) $152\frac{3}{7}$ weeks' temporary total disability (TTD) benefits (June 11, 2008, through January 18, 2010, and February 15, 2010, through June 9, 2011); (2) reasonable and necessary medical expenses excluding a single billing which was denied based upon evidentiary issues; and (3) $112\frac{5}{7}$ weeks' permanent partial disability (PPD) benefits, representing a 55% loss of use of claimant's right hand.

¶ 2 On review, the Illinois Workers' Compensation Commission (Commission) modified the arbitrator's decision by reducing her TTD award and ordering the employer to pay claimant $128\frac{6}{7}$ weeks' TTD benefits (June 11, 2008, through January 18, 2010, and February 15, 2010, through December 24, 2010). It otherwise affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Peoria County confirmed the Commission's decision. The employer appeals.

¶ 3 I. BACKGROUND

¶ 4 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on October 24 and 29, 2013.

¶ 5 The employer operates a chain of casual fast-food restaurants. In March 2004, claimant began working for the employer as a waitress. On the date of her alleged accident, May 30, 2008, her position with the employer was best described as waitress/trainer/manager. Claimant testified that, on that date, the restaurant was very busy and she was trying to keep the dining room cleaned up to keep the flow of customers moving as quickly as possible. Although she was a manager of that shift, she started bussing tables and carrying tubs of dirty dishes out of the dining room to help keep the customer flow moving. Claimant testified they were "busy as all get out." Further, she testified that she was moving very swiftly, and, as she was wiping down a table, she felt and heard a loud "pop" in her right hand. Claimant testified she immediately felt an excruciating pain (like she had never felt before) that began in her thumb and shot all the way across her hand. She stated, prior to that moment, she had never experienced any pain in her right hand and had never treated for pain to her right hand or any joints in her body.

¶ 6 Claimant testified she immediately informed one of the other managers on duty about the accident. The next day, she informed the appropriate district manager. This testimony was unrebutted.

¶ 7 After going home, claimant sought an appointment with her primary care physician. However, because she could not be seen that day, she obtained an appointment with her husband's physician, Dr. Daniel Hoffman.

¶ 8 Dr. Hoffman's treatment notes establish that claimant presented with symptoms of right hand swelling. He noted tenderness and swelling over the dorsal aspect of the right hand.

Dr. Hoffman diagnosed a soft tissue injury, prescribed pain medication, and referred claimant to Dr. Jeffrey Traina, an orthopedic specialist.

¶ 9 On June 11, 2008, claimant was examined by Dr. Traina. She gave a history of cleaning a table while at work and experiencing sudden and intense pain in her right hand. A physical examination revealed tenderness at the base of the second metacarpal, localized swelling in the same area, and otherwise normal symptoms. Dr. Traina gave an initial impression of edema with pain over the second metacarpal suggestive of overuse. He ordered claimant off work, prescribed a wrist brace and anti-inflammatory medication, and ordered her to return in 10 days.

¶ 10 On June 23, 2008, claimant followed up with Dr. Traina, who observed that claimant's symptoms had improved, but still remained. He continued his order that claimant remain off work and ordered her to follow up with him in three weeks.

¶ 11 On July 24, 2008, Dr. Traina ordered a magnetic resonance imaging (MRI) scan, the results of which he read to show a mild chronic injury to the base of the first metacarpal joint (*i.e.*, the thumb), with some evidence of degenerative changes in the same area. Following the MRI, Dr. Traina allowed claimant to return to work with a restriction of not using her right hand, prescribed physical therapy, and continued anti-inflammatory medication and the use of a hand brace.

¶ 12 On August 12, 2008, claimant was again examined by Dr. Traina. She reported continued symptoms of right hand and thumb pain. Dr. Traina ordered continued physical therapy, continued use of a hand brace, and anti-inflammatories.

¶ 13 From August until October 13, 2008, Dr. Traina ordered a series of treatments, including a special thumb brace and cortisone injections, all of which were reported to be unsuccessful in relieving claimant's symptoms. At that point, Dr. Traina referred claimant to a hand surgeon.

¶ 14 The next recorded treatment for claimant occurred on June 29, 2009, approximately eight months after her last appointment with Dr. Traina, when claimant returned to Dr. Hoffman. Claimant reported continuing pain in her right hand and thumb. Dr. Hoffman observed swelling and tenderness. He diagnosed possible tendonitis and advised claimant to remain off work and to follow up with Dr. Traina.

¶ 15 The record contains a treatment report indicating that, on August 31, 2009, claimant sought treatment from her primary care provider, nurse practitioner Debbie Hayes. The record also established that nurse Hayes referred claimant to Dr. James Williams, an orthopedic hand surgeon at Midwest Orthopedic Center.

¶ 16 On October 22, 2009, claimant was examined by Dr. Williams. She gave a history of pain after wiping tables at work in May 2008. After reviewing all medical treatment records, Dr. Williams recommended a right thumb joint arthroplasty. The surgical procedure was performed on November 13, 2009.

¶ 17 A few days after the surgery, claimant injured her thumb when it was caught in a door at her house. She sought treatment at the emergency department of the local hospital. She was treated and released. Claimant testified that, after the door incident, her postoperative pain increased for a short period of time. She further testified that her pain did not significantly lessen after her surgery.

¶ 18 On February 25, 2010, claimant underwent a surgical procedure to remove one of the pins that had been implanted in the previous surgery. On March 4, 2010, she underwent a second procedure, performed by Dr. Traina, to remove the remaining pins and secure a surgical implant near the base of her thumb. Follow up surgical procedures were performed on June 18, 2010, and June 24, 2010. On July 19, 2010, claimant began a regimen of postoperative physical therapy and reported some relief from her pain. On December 14, 2000, she was discharged from therapy.

¶ 19 Claimant testified that Dr. Traina relocated out of the area. She then attempted to find another orthopedic specialist, but for various reasons was unable to find one in the Peoria area. Ultimately, she began treatment with Dr. James Rhodes, an orthopedic specialist associated with Rush Hospital in Chicago.

¶ 20 On April 6, 2011, Dr. Rhodes first examined claimant. His impression was that claimant's continuing symptoms were the result of her surgical procedures. He recommended further surgery to alleviate her symptoms. Several attempts to schedule an appointment with a surgical specialist were unsuccessful.

¶ 21 On October 19, 2011, claimant was examined by Dr. Robert Wysocki, a board certified orthopedic specialist, at the employer's request. Dr. Wysocki attributed the onset of claimant's symptomology to the table wiping incident on May 30, 2008. However, he opined that, while the symptoms manifested as a result of claimant's table wiping, her current condition of ill-being was not causally related to her work activities on May 30, 2008. He reasoned that he would not expect the wiping motions claimant engaged in on that date would be significant enough to alter the natural progression of a likely degenerative arthritic condition in her thumb. As to whether claimant's activities on May 30, 2008, aggravated claimant's existing arthritic condition, Dr. Wysocki opined that he did not view the wiping motion as "significant enough trauma" to aggravate a preexisting condition. Dr. Wysocki placed claimant at maximum medical improvement (MMI) and believed an appropriate permanent restriction would be no lifting, pushing, or pulling of more than five pounds with the right hand, and no fine motor use of the right hand. He suggested a functional capacity evaluation (FCE) to more accurately set claimant's permanent restrictions.

¶ 22 At the time of the hearing, claimant testified she continued to suffer near constant pain in the thumb area of her right hand. When told that the only surgical procedure that might alleviate her condition involved the amputation of the thumb, she elected to forego further surgical treatment.

¶ 23 Regarding her daily activities, claimant testified that her employment with the employer was terminated on September 30, 2008. She received short and long term disability income through the employer from June 2008 through July 2009. In June 2011, she began working as a supervisor of a commercial/residential cleaning service where she remained until, December 2011, when that company relocated. In January 2012, she started her own cleaning business, supervising the work of two employees. Her employment activities included scheduling appointments, handling bookkeeping and banking activities, client relations, and occasionally traveling with her employees to supervise their activities.

¶ 24 Regarding her current physical limitations, claimant testified that her right thumb was useless, she experienced a constant dull aching sensation, and any bumping of her thumb caused sharp pain. She further testified that she could "sometimes" use her right hand, occasionally carrying a book or a tool. She took daily pain medication prescribed by Hayes.

¶ 25 The employer introduced video of claimant engaged in utilizing her right hand in activities such as putting a key in a car door, opening a bottle, carrying small objects, mopping a floor, and carrying garbage bags and paper towel rolls. The employer also introduced business logs from cleaning business customers purporting to establish that claimant herself engaged in cleaning activities rather than merely supervising others. On rebuttal, claimant testified that she could, occasionally, lift and carry small objects by avoiding the use of her thumb and utilizing her index finger as a replacement for her thumb. Additionally, a local television news reporter testified for claimant that, in her opinion, the employer's video tape had gaps and other signs of possible editing.

¶ 26 The arbitrator found that claimant established she suffered an industrial accident on May 30, 2008, which aggravated the preexisting arthritic condition of her thumb. The arbitrator noted that the action of wiping down tables so as to keep the flow of customers moving in a busy restaurant exposed the claimant to a risk of injury greater than that of the general public. In finding claimant's injuries were causally related to her employment, the arbitrator noted that "injuries resulting from a neutral risk are not generally compensable and do not arise out of the employment, unless the employee was exposed to the risk to a greater degree than the general public." The arbitrator noted that, given claimant's role in supervising the dining room operation, it would be reasonable to expect that she would perform the task of cleaning off tables in an expeditious manner to facilitate the efficient flow of customers. Thus, claimant's job duties required her to "hurriedly" wipe down multiple tables. The arbitrator further found that claimant had established she suffered from a preexisting arthritic condition, which was asymptomatic prior to her activities on May 30, 2008. Additionally, she found claimant's work activities on that date were clearly a causative factor in her current condition of ill-being. In doing so, the arbitrator referred to Dr. Wysocki's observation that claimant's work activities on May 30, 2008, caused "a manifestation of symptoms" while acknowledging that Dr. Wysocki did not believe that claimant's current condition was causally related to her movements on that date. Despite Dr. Wysocki's ultimate opinion regarding causation, the arbitrator determined that the sequence of events established a sufficient causal link between the May 30, 2008, accident and claimant's subsequent condition of ill-being.

¶ 27 Regarding the nature and extent of claimant's permanent injuries, the arbitrator made note of claimant's work restrictions last imposed by Dr. Traina, as well as Dr. Wysocki's recommendations regarding the limited use of her right hand. Additionally, the arbitrator made note of her own observations of claimant at the hearing, pointing out that it was obvious claimant "suffered significant atrophy and deformity in her right thumb and hand as a result of the treatment for her right thumb condition that would reasonably inhibit the functionality of her right hand." Based upon all the evidence, the arbitrator awarded claimant a PPD award for a 55% loss of use of her right hand.

¶ 28 The employer sought review by the Commission, which modified the arbitrator's award of TTD benefits, but otherwise affirmed and adopted the arbitrator's decision. Regarding causation, the Commission adopted the arbitrator's neutral-risk analysis. It further noted that the absence of symptoms prior to May 30, 2008, and the extensive testimony of symptoms and medical treatment manifesting after that accident date, was sufficient to support a finding of causation. The Commission further noted that, while there was no express medical opinion testimony that the May 30, 2008, accident aggravated claimant's preexisting condition, Dr.

Wysocki's opinion that the incident was not causative of claimant's condition was contradicted by all the medical evidence reflecting an ongoing condition that began on the date of the accident. Regarding the arbitrator's permanency award, the Commission noted that the award was supported by the evidence, particularly in view of claimant's multiple surgeries and postoperative complications.

¶ 29 The employer sought judicial review in the circuit court of Peoria County, which confirmed the Commission's decision. This appeal followed.

¶ 30 II. ANALYSIS

¶ 31 A. Arising out of Employment

¶ 32 On appeal, the employer challenges the Commission's finding that claimant's injuries were causally related to her employment. It argues that wiping tables was not within the purview of claimant's job duties as a manger and that such an activity did not create an increased risk of injury for claimant over that experienced by the general public.

¶ 33 To recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his or her injury "arose out of" and "in the course of" the employment. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). Whether a claimant's injury arose out of and in the course of her employment is a question of fact for the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1056, 1059-60 (2004). "A finding of fact is contrary to the manifest weight of the evidence only where an opposite conclusion is clearly apparent." *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013 (2011).

¶ 34 A claimant's injury "arises out of" employment if it "had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). This court has held there are three types of risks to which an employee might be exposed: (1) risks distinctly associated with the employment; (2) risks that are personal to the employee; and (3) neutral risks that have no particular employment or personal characteristics. *First Cash Financial Services*, 367 Ill. App. 3d at 105.

¶ 35 Injuries resulting from a risk distinctly associated with employment, *i.e.*, an employment-related risk, are compensable under the Act. Risks are distinctly associated with employment when, at the time of injury, "the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). "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." *Id.*

¶ 36 Conversely, "[i]njuries 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*, 407 Ill. App. 3d at 1014. "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is

exposed to a common risk more frequently than the general public." *Id.* "Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163 (2000). As stated, neutral risks have no particular employment-related characteristics. *First Cash Financial Services*, 367 Ill. App. 3d at 105.

¶ 37 In this case, the Commission employed a neutral-risk analysis and determined claimant's injury was compensable because she was exposed to a risk to a greater degree than the general public. As indicated, the employer challenges the Commission's decision, arguing that merely wiping a table at work does not create an increased risk of an accident greater than that to which the general public might be exposed while wiping a table in their own home. After reviewing the record, we agree with the Commission's ultimate conclusion that claimant sustained a compensable injury; however, we find it was unnecessary for the Commission to reach a neutral-risk analysis as claimant's injury stemmed from a risk distinctly associated with her work for the employer.

¶ 38 Our first step in analyzing risk is to determine whether the claimant's injuries resulted from an employment-related risk. See *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, ¶ 23 (stating "when a claimant is injured due to an employment-related risk *** it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public"). In this case, claimant was injured while wiping down a table at work. Her unrebutted testimony established that her duties as a manager were to keep the flow of customers moving in an efficient manner. She credibly testified that, to that end, she would on occasion clean and bus tables if necessary to keep the customer flow moving. The employer provided no evidence to rebut claimant's credible testimony. Thus, the record establishes that claimant was injured while engaged in an activity that the employer might reasonably have expected her to perform in the fulfillment of her job duties. Claimant's injury, therefore, resulted from a risk distinctly associated with her employment, and the manifest weight of the evidence supports the Commission's ultimate finding of a compensable injury.

¶ 39 B. Causation—Preexisting Condition

¶ 40 The employer next argues that the Commission's finding that claimant's current condition of ill-being was causally related to her employment was against the manifest weight of the evidence. It maintains that claimant's condition was solely related to her preexisting degenerative arthritis and not her employment.

¶ 41 To obtain compensation under the Act, a claimant must prove that some act or phase of her employment was a causative factor in her ensuing injuries. *Land & Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro*, 207 Ill. 2d at 205. A finding by the Commission that a claimant's injuries are causally related to employment activities is a question of fact, and the Commission's finding will not be overturned unless it is against the manifest weight of the evidence. *Id.*

¶ 42 Here, the Commission found claimant's asymptomatic condition prior to May 30, 2008, followed by the immediate onset of symptoms after the work accident was sufficient to

establish a causal relationship between her subsequent condition of ill-being and her work accident. The Commission further noted that the medical evidence established that claimant suffered from a degenerative arthritic condition with symptoms manifesting only after the May 30, 2008, accident. It is well-settled that the Commission may infer causation from a sequence of lack of symptoms prior to an industrial accident, with symptom manifestation immediately following the accident. *Id.* at 207-08; *Freeman United Coal Mining Co. v. Industrial Comm'n*, 318 Ill. App. 3d 170, 175 (2000). That particular sequence of events occurred in the instant matter and it was within the Commission's purview to find that the sequence established the causative link necessary for awarding compensation.

¶ 43 The employer argues that Dr. Wysocki's causation opinion that claimant's condition was not causally related to her employment was the only evidence regarding causation that the Commission should have considered. We disagree. It is within the Commission's purview to weigh medical testimony and its decision will not be overturned unless it is against the manifest weight of the evidence. *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 506 (2004). Moreover, as the Commission noted, even Dr. Wysocki acknowledged that claimant was symptom free prior to the alleged accident, and the table wiping caused "symptom manifestation." Given the undisputed record regarding the sequence of events, it cannot be said that the Commission's finding that claimant's current condition of ill-being was causally related to the May 30, 2008, accident was against the manifest weight of the evidence.

¶ 44 C. Medical Expenses

¶ 45 The employer further contends that the Commission's award of medical expenses was against the manifest weight of the evidence. However, since this argument is based solely upon the premise that the Commission's finding on causation was erroneous, a premise which we have rejected, we also reject this contention without the need for further analysis. *Tower Automotive v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 427, 436 (2011).

¶ 46 Additionally, the employer points out that the Commission awarded a double recovery for a bill submitted by Comprehensive Solutions, which was included in a Medicaid lien previously paid. Claimant agrees that the medical benefit award should be modified to reflect the prior payment to Comprehensive Solutions.

¶ 47 D. TTD Benefits

¶ 48 The employer also maintains that the Commission's award of TTD benefits was against the manifest weight of the evidence. In this regard, the employer alleges claimant failed to establish causation between her condition of ill-being and her employment. Having previously rejected the employer's contention that the Commission's finding on causation was erroneous, we decline to overturn the Commission's award of TTD benefits on this basis. *Id.*

¶ 49 Alternatively, the employer maintains that the Commission erred in awarding TTD benefits for periods where the claimant failed to establish that she was unable to work. TTD benefits are available from the time an injury incapacitates an employee from work until such time as the employee is as far recovered or restored as the permanent character of the injury will permit. *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 542 (2007). Our review

of the record establishes that the Commission's award of TTD benefits corresponded to time periods when claimant was under a work restriction that prevented her from returning to work. The Commission's TTD award was not against the manifest weight of the evidence.

¶ 50 E. PPD Benefits

¶ 51 Finally, the employer argues that the Commission's award of PPD benefits was against the manifest weight of the evidence. 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. *Pemble v. Industrial Comm'n*, 181 Ill. App. 3d 409, 417 (1989). Because of the Commission's expertise in the area of workers' compensation, its finding on the question of the nature and extent of disability should be given substantial deference. *Id.* It is for the Commission to assess the credibility of the witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). As such, the Commission's decision regarding the nature and extent of a claimant's disability will not be set aside on review unless it is contrary to the manifest weight of the evidence. *Pemble*, 181 Ill. App. 3d at 417.

¶ 52 Here, in reaching its permanency determination, the Commission relied upon the credible testimony of claimant regarding the restrictions to her work and daily activities; the medical opinions as to claimant's permanent restrictions; and to a significant degree, the arbitrator's observation of claimant's "significant atrophy and deformity in [claimant's] right thumb and hand." Based upon the totality of the record, we cannot say that the Commission's finding on permanency was against the manifest weight of the evidence.

¶ 53 III. CONCLUSION

¶ 54 The judgment of the circuit court of Peoria County, confirming the decision of the Commission, is modified by agreement to reflect that the medical expense incurred for services rendered by Comprehensive Solutions was paid. The judgment as modified is affirmed.

¶ 55 Affirmed as modified.

¶ 56 PRESIDING JUSTICE HOLDRIDGE, specially concurring.

¶ 57 I join in the majority's judgment. I write separately to clarify what I consider to be the proper analysis governing claims like those presented in this case. The majority concludes that the claimant's injury was compensable because the act of wiping tables was "distinctly associated with [her] employment." I disagree. I would uphold the Commission's analysis of the claim under neutral risk principles. In my view, a neutral risk analysis is required by our recent decision in *Adcock v. Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC, ¶¶ 38-44 and other precedents.

¶ 58 As we noted in *Adcock*, our supreme court has ruled that the purpose of the Act is to protect the employee against risks and hazards which are "peculiar to the nature of the work he is employed to do." *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). Accordingly, "[f]or an injury to have arisen out of the employment, the risk of injury must be a risk

peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment." *Id.* at 45; see also *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 209 (1999) (ruling that "in order for an injury to arise out of one's employment, the risk must be: (1) a risk to which the public is generally not exposed but that is peculiar to the employee's work, or (2) a risk to which the general public is exposed but the employee is exposed to a greater degree"). If neither of these factors apply, *i.e.*, if the injury is caused by an activity of daily life to which all members of the public are equally exposed (or by a risk personal to the employee), then there can be no recovery under the Act, even if the employee was required to perform that activity by virtue of his employment. *Adcock*, 2015 IL App (2d) 130884WC, ¶ 38. In such cases, the risk leading to the injury is not "connected with" or "incidental to" the employment; rather, it is merely a personal risk or a risk of everyday living. *Id.*

¶ 59 Applying these principles in *Adcock*, we held that, where an employee is injured on the job while performing an activity of everyday living (such as bending, stooping, walking, or reaching), a neutral risk analysis governs the employee's claim, even if he was required to perform the act at issue as part of his employment duties. *Id.* ¶¶ 38-44. We have applied a neutral risk analysis to similar claims in other cases. See *id.* ¶¶ 40-42 (citing *Kemp v. Industrial Comm'n*, 264 Ill. App. 3d 1108 (1994); *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779 (1992); *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103 (1994)).

¶ 60 Moreover, as we noted in *Adcock*, our supreme court's decision in *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989) does not require a different conclusion. See *Adcock*, 2015 IL App (2d) 130884WC, ¶ 39. In *Caterpillar*, our supreme court ruled that "[t]ypically, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Although we agreed that injuries caused by such acts "typically" arise out of the employment, we noted in *Adcock* that this is not always the case. We ruled that "[t]he Commission should not award benefits for injuries caused by everyday activities like walking, bending, or turning, even if an employee was ordered or instructed to perform those activities as part of his job duties, unless the employee's job required him to perform those activities more frequently than members of the general public or in a manner that increased the risk." *Adcock*, 2015 IL App (2d) 130884WC, ¶ 39. In other words, we held that a neutral risk analysis should govern such claims. *Id.*

¶ 61 In the instant case, the claimant was injured while performing an activity of everyday living (wiping a table). Thus, pursuant to *Adcock*, *Orsini*, and other precedents, she may recover benefits under the Act only if she can show that she faced the risk of injury posed by wiping tables more frequently or in a qualitatively greater manner than do members of the general public. We may not award benefits merely because wiping tables was part of her job duties. In other words, we must apply a neutral risk analysis to her claims.

¶ 62 Applying a neutral risk analysis, the Commission correctly found that the claimant was exposed to a risk greater than that encountered by the general public. The Commission adopted the arbitrator's finding that the claimant had established both a quantitative and qualitative degree of increased risk. As to the quantitative degree of increased risk, the

claimant's unrebutted testimony was that she engaged in wiping down "tables" on May 30, 2008. That distinguishes the claimant from a typical member of the general public, who might wipe down a single table in his or her own kitchen or dining room. As to the qualitative degree of increased risk, the record clearly supports the Commission's finding. The record established that, at the time of her injury, the claimant was working at a hurried pace because the restaurant was "busy as all get out." It was the claimant's unrebutted testimony that the injury occurred while she was in a hurried state, attempting to clean the tables as quickly as possible in order to keep the flow of customers moving. Accordingly, the Commission reasonably concluded that the hurried nature of the claimant's activities might increase the risk that an injury would occur while she was performing her job duties.

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

¶ 64 JUSTICE HUDSON joins in this special concurrence.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Joan Anderson,

Petitioner,

14IWCC1012

vs.

NO: 11 WC 02786

Steak-N-Shake,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, temporary total disability, medical expenses, prospective medical care, and permanent partial disability and being advised of the facts and law, modifies temporary total disability and otherwise, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner was a 45 year old employee of Respondent, who described her job as waitress/trainer/manager. Petitioner began working for Respondent as a waitress in March 2004 and was promoted to trainer before she became manager. Petitioner testified she had worked since she was 15, always in the food industry. She had gone to beauty school and became a licensed beautician, but she always did something with her hands. On the date of accident, May 30, 2008, Petitioner testified that they were busy and she was trying to keep the dining room cleaned up. Petitioner stated she was bussing tables and carrying back bus tubs. Petitioner testified she was wiping off the table and she was in a hurry and she had wiped off the table and felt and heard a pop in her right hand. Petitioner stated that it was really loud and the pain was excruciating like she had never

felt before; it just shot up all the way across her hand. Petitioner testified that she had never experienced any type of pain in her right hand prior to that and she had never before then received any treatment with a doctor for that. Petitioner testified of no prior treatment for pain in any joints in her body prior to this accident.

- Petitioner testified she told the managers on duty (either Matt Boyer or Paul Shaffer - she did not recall exactly) of the accident and she went home. Petitioner testified she had also told Brooke Tucker (the general manager) and other managers. She believed that Ms. Tucker was off until that Monday and she stated that she had also advised Dan Roark the district manager, of the incident. Petitioner again indicated that she felt the pop in her right hand when she was wiping off a table (indicating some movement). Petitioner testified that she was in a hurry that day because they were busy. Petitioner stated that as she was wiping the table she felt and heard the pop in her hand around the thumb joint around her wrist and she felt excruciating pain. She again indicated they were busy "as all get out." Petitioner subsequently did seek medical treatment that afternoon, May 30, 2008. Petitioner went to Dr. Hoffman; she could not get in to see her doctor so she saw her spouse's doctor. Dr. Hoffman examined Petitioner and referred her to Dr. Triana, an orthopedic surgeon, about June 10-11, 2008. Petitioner saw Dr. Triana who ordered an MRI and examined Petitioner. Petitioner had the MRI and returned for a follow up with Dr. Triana; in the interim Petitioner had seen her family doctor, Debbie Hayes, whom Petitioner had been seeing for 20 years. Petitioner testified her doctor referred her to Dr. Williams, another orthopedic surgeon. Petitioner indicated she went to the other orthopedic doctor because Dr. Triana said the condition was out of his realm, out of his specialty and he was not comfortable with it. Petitioner testified that Dr. Triana stated that the condition was more complicated than what he felt comfortable with and he wanted Petitioner to see a hand specialist. Petitioner had first seen Dr. Williams in October 2009 and subsequently had surgery to the thumb area of her hand on November 13, 2009. Petitioner understood the surgery was to replace the thumb joint. Post surgery, Petitioner was placed in an Ace bandage and then into ma cast. She had treated with him until January 2010 and was released. Petitioner stated then the pain had increased and was a little bit worse, the surgery had not helped; it was bad. Petitioner indicated in November (November 2009, shortly after the surgery) she had gone to the emergency room. Petitioner indicated she had been letting the dog out (big black lab) and was not going fast enough for the dog. The dog hit the door and the door hit her hand. Petitioner stated that she was worried that she had messed it up and that was why she had gone to the emergency room; to get her hand checked out to be sure it was okay. Petitioner had been examined at the ER and released. Petitioner testified that the incident did increase the pain in her thumb for a little while. She indicated that the dog incident had made it a little bit worse but then it went back to her normal level of pain. Petitioner testified she did not go back for treatment for that particular incident.

- Petitioner testified in February 2010 she had a subsequent surgery. Petitioner stated at that time her body started to reject the joint and the pin that was holding the joint in actually came out through her hand. Petitioner testified she had gone back to Dr. Triana and the doctor said he had to take the joint back out because Petitioner's body was rejecting it. The replacement of the thumb joint had been done by Dr. Williams but she

had gone back to Dr. Triana to have him look at it when the pins were coming out. Petitioner indicated Dr. Triana went in and took the joint out and the hardware and put a spacer in. Petitioner indicated there was an abscess around the bone so the doctor wanted to test it to make sure it was okay and he went in again about a week later and put in another joint (around March 5-6, 2010). Post surgery, Petitioner was referred for physical therapy at Atrium at Methodist, and she went and had completed that. Petitioner testified her pain had gotten no better at all post surgery and the more she moved it, the more it hurt. Petitioner stated that it would cramp and she noted that it shrank, the muscle was gone, and it was disfigured. Petitioner had another surgery with Dr. Triana in late June 2010. Petitioner indicated that she understood that the scar was too wide and had deep tissue growing out of it and they had to go in and cut that off that tissue. Petitioner had further therapy after that surgery at Atrium at Methodist.

- Petitioner testified after that, Dr. Triana left town so she did not have a doctor and she had tried calling other orthopedic doctors. Petitioner stated that she had called Dr. Mitzelfelt; however, when he found out about the surgery Dr. Triana had performed, he refused to see her. Petitioner testified she tried to return to Dr. Williams but he also refused to see Petitioner as she had gone to Dr. Triana. She indicated she had tried every doctor in Peoria. Petitioner testified that she eventually found Dr. Rhode, from Rush in Chicago. Petitioner stated that Dr. Rhode would come down there every other week so she went to see him April 6, 2011 (Dr. Rhode deposition was noted). Petitioner believed she had seen Dr. Rhode about 10 times.

- Petitioner testified that she was still in pain and that was when the muscle atrophied even more and became more disfigured. Dr. Rhode wanted Petitioner to see Dr. Frederick at Rush as he is a hand specialist who deals with more complicated cases. Petitioner indicated they had been trying to make an appointment and get it approved through WC, but she did not see him as Respondent sent Petitioner to see Dr. Wysocki (for a §12 examination [IME], October 19, 2011) who was in the same group. After the IME she received a call from Dr. Frederick's nurse saying they could not see Petitioner. She indicated that was kind of the end of things. Petitioner had not seen any other doctors since. Petitioner testified that she understood her options for treatment was either leave it as is and deal with the pain, or have her thumb cut off and have her index finger moved there, but that did not guarantee the pain would go away. She indicated the Dr. could not say if it would be any better with that surgery. The other option was getting the joint fused so it looked normal, but again, that would not take the pain away. Petitioner indicated at her age (51) she did not care how her hand looked. She had been through 4 surgeries and had enough and they could not say further care would make it any better. Petitioner testified that it hurts all of the time; it is a dull ache all the time. Petitioner stated that if she bumps it or strains it, it will hurt and now her whole hand is starting to cramp up. Petitioner testified the doctor said her thumb was of no useful consequence and she agreed pretty much with that.

- Petitioner stated that she was taken off work when she initially saw Dr. Hoffman, May 30, 2008 and then Dr. Triana kind of went back and forth. Dr. Triana would sometimes say she could do one handed work (work left handed only) but that was about it.

Petitioner indicated that if she would be in more pain he would take her back off of work. Petitioner was terminated by Respondent on September 30, 2008. Petitioner did not work again until June 2011 because she had to. She indicated her teen son had committed suicide in their backyard and she needed money. Petitioner testified she had a neighbor who had a cleaning business and she offered Petitioner some things to take up Petitioner's time to get out of the house. Petitioner testified at that point Dr. Rhode had released Petitioner to one handed work and Petitioner worked for her neighbor (Linders Cleaners). Petitioner testified she worked one handed as more of a supervisor, she would dust occasionally with her left hand, but it was more supervisory. Petitioner no longer worked for them as the Linder's had moved to Iowa. Petitioner currently does work as she owns her own cleaning business with two employees. Petitioner sets the appointments and takes the checks and goes with the employees to make sure they are doing the job, and she talks to the customers to make sure they are happy. She is still released to only one hand work. Petitioner testified she does try sometimes to use her right hand; she had learned to adapt. Petitioner indicated you cannot get dressed with one hand and you cannot do a lot of things; you cannot tie your shoes with one hand; with no right thumb use she indicated she had learned to manipulate with getting dressed and cooking. She can use her fingertips but that is causes pain; she can lift with her fingertips as she does not have a choice. Petitioner stated that she does garden as her spouse will till and she tries to use her left hand. She may have to balance with her right hand, but nothing heavy. She indicated she can steady a pan with her hand when cooking an egg, but she cannot pick up the pan and move it. Petitioner testified her hand was atrophying, fading away from non-use. Petitioner stated that she takes Norco occasionally for the pain (prescribed by her primary doctor); however, she tries not to take it because it is addictive. Petitioner indicated that if she is in a lot of pain and cannot sleep it will dull the pain, but does not really take the pain away. Petitioner indicated she had taken it for so long that it only dulls the pain a little. Other than her primary doctor, she was not seeing any other doctors. Petitioner stated that she had been on short term and long term disability. Petitioner agreed there is an itemization of outstanding medical bills (PX17) and she indicated it was accurate and up to date. Petitioner had no plans of seeking additional medical care as there was nothing else they could do.

The Commission finds that there is no evidence Petitioner had any problems of significance with her right hand or thumb prior to this reported incident. The medical records support her ongoing complaints and symptoms since the date of accident throughout her treatment and is consistent with Petitioner's testimony. The surveillance video does not reveal anything to be contrary to Petitioner's testimony. Petitioner had some apparent pre-existing mild arthritic condition, but again there was no evidence of symptoms prior to this incident. The evidence and testimony appears consistent and supportive that Petitioner had sustained an accident May 30, 2008 and there is evidence in support of a causal relationship with the medical records noting her history of injury on the job similar to her testimony. There was a period from October 13, 2008 through June 29, 2009 where there is no evidenced treatment, which raises the issue of an ongoing causal connection given the approximate 8 month gap in treatment. Petitioner's complaints, symptoms and findings thereafter are still consistent with the 2008 treatment and then throughout the remainder of her treatment (through injections and the multiple surgeries) up to her testimony at

hearing. Petitioner clearly evidenced and the Arbitrator had the opportunity to view Petitioner's right hand and thumb to see the end result. While there is no explanation for the break in treatment, everything is still consistent and supportive of an ongoing causal connection to Petitioner's current condition of ill-being, despite Respondent's IME's (Dr. Wysocki) opinion that the incident did not cause or aggravate a pre-existing condition, given the treating medical records clearly reflecting the ongoing condition since the date of this incident. Petitioner's testimony is really unrebutted and the evidence and testimony does support a finding that Petitioner sustained an accident that arose out of and in the course of her employment with the evidence further supporting a causal connection (cause or aggravation of a pre-existing condition) to her current condition of ill-being. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence and, herein, affirms and adopts the Arbitrator's finding of accident, as well as, affirms and adopts the Arbitrator's finding as to causal connection.

The Commission notes, regarding the issue of temporary total disability (TTD) that the Arbitrator found that Petitioner was entitled to an award of 152-3/7 weeks of temporary total disability benefits (6/11/08-1/18/10 & 2/15/10-6/9/11) at a rate of $442.31 per week under §8(b) of the Act ($67,420.68 total TTD). Respondent paid $-0- in TTD benefits and received a credit of $19,083.60 for Long & Short term disability paid to Petitioner. The Commission finds the first awarded period of TTD fully supported by the evidence presented by Petitioner. After the initial surgery and some recovery time, Petitioner was released from the care of Dr. Williams. Petitioner did remain symptomatic and Petitioner had evidenced post-operative complications and sought further care which required additional surgical procedures and, unfortunately complications, the final surgery being irrigation and debridement and wound closure June 24, 2010. The medical records indicated a three to six month recovery period post surgery. Given Petitioner's apparently poor recovery rate the Commission considers her recovery at six months, December 24, 2010 (as the assumed MMI date). At that point Petitioner's condition appeared to have stabilized/plateaued. Medical records are rather silent as to stating specifically her work status, but there is no evidence Petitioner had reached maximum medical improvement or that her condition had in any way stabilized prior to that point. It is also clear that Petitioner did not first see Dr. Rhode until April 6, 2011, when he then took Petitioner off of work, and it is not clearly evidenced what went on during that interim period. The appointments with Dr. Rhode give no indication of any real treatment which further supports the position that Petitioner's condition had by then stabilized. Given the documentation of the expected recovery period, and the gap in documented treatment, it is difficult to find Petitioner entitled to any lost time benefits with the start of seeing Dr. Rhode in April 2011 when then there was no clear treatment provided. Additionally, Dr. Rhode was also Petitioner's third choice of 'treaters'. The Commission, therefore, modifies the TTD award to find Petitioner proved entitlement to benefits June 11, 2008 through January 18, 2010 and February 15, 2010 through December 24, 2010 (128-6/7 weeks at $442.31 per week [total TTD=$56,994.80] with Respondent entitled to the disability credits totaling $19,083.60). The Commission finds the decision of the Arbitrator not totally contrary to the weight of the evidence and herein modifies the Arbitrator's finding as to total temporary disability as noted above.

14IWCC1012

The Commission further finds, with the above finding of accident and causal connection to Petitioner's condition of ill-being, that the medical records of her treatment consistent with the testimony. Accordingly the Commission finds that Petitioner met the burden of proving entitlement to the awarded benefits and affirms the award as is regarding medical expenses. The Commission finds Dr. Rhode as a third choice of medical providers and that there had been a significant gap in treatment before Petitioner even sought out his care. The Commission can find the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to medical expenses/prospective medical care.

The Commission, with the above finding of accident and causal connection to her condition of ill-being, finds regarding permanent partial disability (PPD), the medical records of Petitioner's treatment consistent with testimony and affirms the award as is to find Petitioner met the burden of proving entitlement to the awarded PPD benefits. The awarded PPD benefits are well supported with the evidence, especially given the multiple surgeries and post-operative complications. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and, herein, affirms and adopts the Arbitrator's finding as to Permanent partial disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed January 3, 2014, (other than the below noted TTD modification), is hereby affirmed and adopted.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $442.31 per week for a period of 128-6/7 weeks, that being the period of temporary total incapacity for work under §8(b) of the Act. Respondent entitled to a credit of $19,083.60 for short term and long term disability benefits paid to Petitioner.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $398.08 per week for a period of 112.75 weeks, as provided in §8(e)(9) of the Act, for the reason that the injuries sustained caused the 55% loss of use of Petitioner's right hand.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay all reasonable and necessary medical bills for services, with the exception of the medical bills from Dr. Blair Rhode, as provided in §8(a) and §8.2 of the Act, subject to the fee schedule. Respondent is not liable for medical bills incurred by Petitioner for the services of Dr. Rhode.

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

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

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

DATED: NOV 2 4 2014
o-9/24/14
DLG/jsf
45

David L. Gore

Stephen Mathis

Mario Basurto

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

ANDERSON, JOAN
Employee/Petitioner

Case# **11WC002786**

14IWCC1012

STEAK N SHAKE
Employer/Respondent

On 1/3/2014, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

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

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

0192 CUSACK GILFILLAN & O'DAY
DANIEL P CUSACK
415 HAMILTON BLVD
PEORIA, IL 61602-1102

1832 ALHOLM MONAHAN KLAUKE ET AL
GEORGE F KLAUKE JR
221 N LASALLE ST SUITE 450
CHICAGO, IL 60601

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION

ARBITRATION DECISION 14IWCC1012

JOAN ANDERSON
Employee/Petitioner

Case # 11 WC 02786

v.

Consolidated cases: _____

STEAK N SHAKE
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 Molly Dearing, Arbitrator of the Commission, in the city of Peoria, on October 24, 2013 and October 29, 2013. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On May 30, 2008, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned $34,499.92; the average weekly wage was $663.46.

On the date of accident, Petitioner was 45 years of age, *single* with 1 dependent children.

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

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

Respondent shall be given a credit of $0.00 for TTD, $0.00 for TPD, $0.00 for maintenance, and $19,083.60 for short term and long term disability benefits, for a total credit of $19,083.60.

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

ORDER

Respondent shall pay all reasonable and necessary medical services, with the exception of medical bills from Dr. Blair Rhode, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent is not liable for medical bills incurred by Petitioner for the services of Dr. Rhode.

The parties stipulated that Respondent is entitled to a credit of $19,083.60 for short term and long term disability benefits paid to Petitioner. Respondent shall pay Petitioner temporary total disability benefits of $442.31 per week for a total period of 152 3/7 weeks, representing June 11, 2008 through January 18, 2010, and February 15, 2010 through June 9, 2011, less Respondent's credit of $19,083.60. Respondent shall pay Petitioner the temporary total disability benefits that have accrued from May 30, 2008 through October 29, 2013, and shall pay the remainder of the award, if any, in weekly payments.

Respondent shall pay Petitioner permanent partial disability benefits of $398.08/week for 112.75 weeks, because the injuries sustained caused the 55% loss of use of the right hand, as provided in Section 8(e) of the Act.

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

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

Signature of Arbitrator

JAN 3 - 2014

Date

STATE OF ILLINOIS)
)SS.
COUNTY OF PEORIA)

14IWCC1012

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

JOAN ANDERSON,
Employee/Petitioner

v. Case 11 WC 02786

STEAK N SHAKE,
Employer/Respondent.

MEMORANDUM OF DECISION OF ARBITRATOR

FINDINGS OF FACT

At the time of her accident, Petitioner was forty five years of age. She began working for Respondent in March 2004 as a waitress. Petitioner was then promoted to a trainer before becoming a manager. On May 30, 2008, Respondent's restaurant was busy. Petitioner was attempting to keep the dining room clean by bussing and cleaning tables. She was hurriedly wiping down a table when she felt a pop in her right thumb followed by excruciating pain shooting up through her hand. Petitioner immediately told the manager on duty, who, according to Petitioner, would have been Matt Boyer or Paul Shaffer. Petitioner testified that she also told Brooke Tucker, the General Manager, the following Monday, and Dan Roark, a district manager. Petitioner had never experienced pain in her right hand prior to the work incident, nor had she been treated by a physician for any right hand symptoms.

Because she could not get in to see her primary care provider, Petitioner presented to Dr. Daniel Hoffman, on May 30, 2008. Petitioner presented to Dr. Hoffman with symptoms of right hand swelling. Dr. Hoffman noted tenderness and swelling over the dorsal aspect of the right hand, and assessed Petitioner's condition as a soft tissue injury versus ganglionic cyst. Dr. Hoffman prescribed medication and referred her to Dr. Jeffrey Traina. PX 1.

Petitioner presented to Dr. Traina on June 11, 2008 complaining of a problem in her wrist. She reported that she was at work a week and a half prior when she was cleaning a table and had immediate pain in her hand. Petitioner reported to Dr. Traina "one episode of previous pain before in her hand but it has never been as severe as it was ten days ago." A physical examination revealed tenderness over the base of the second metacarpal, some localized swelling in the area, relatively little pain in her wrist, no swelling at the carpal joint, and a normal carpometacarpal joint. Dr. Traina's impression was edema with pain over the second metacarpal secondary to overuse. He ordered her off work, prescribed a wrist brace and anti-inflammatory medication, and ordered her to return in ten days. PX 2.

Petitioner returned to Dr. Traina on June 23, 2008, at which time she reported doing better, but still symptomatic. He ordered her to return in three weeks, and continued her off work status until that time. PX 2. Subsequently, Petitioner continued to treat with Dr. Traina, wherein Petitioner continued to experience symptomatology at the base of the second metacarpal of her right hand with little improvement utilizing the brace. Dr. Traina ordered an MRI. PX 2.

The MRI of July 24, 2008 revealed no acute abnormality within the base of the right second digit, mild thickening and findings suggestive of chronic injury to the first metacarpal joint, and mild degenerative changes of the first CMC and MTP. Following her MRI, Petitioner followed-up with Dr. Traina on July 28, at which time he ordered her to one-handed work only, prescribed therapy and anti-inflammatory medication.

Petitioner again saw Dr. Traina on August 12, 2008 with continued symptomatology and reported that she was unable to attend therapy as of yet due to a family emergency. He ordered her to continue use of the brace, and indicated if there was no improvement with same, then he would try a cortisone injection. PX 2. Continued modalities of treatment were attempted, including a thumb spica brace and a cortisone injection in the CMC joint with Celestone, all of which were unsuccessful in relieving her pain. Dr. Traina referred Petitioner to a hand surgeon. PX 2.

On June 15, 2008, Petitioner completed a Short Term Disability Claim Form, wherein she alleged that her disability was due to an illness. Dr. Traina completed the physician's portion of the disability form on June 20, 2008. In response to the question, "Is condition work related?" he checked the box 'Nd'. RX 3.

The Arbitrator finds no treatment records in evidence between Petitioner's treatment with Dr. Traina on October 13, 2008, and treatment with Dr. Hoffman on June 29, 2009, an approximately eight month gap in treatment.

Petitioner returned to Dr. Hoffman on June 29, 2009 with continued complaints of pain on the dorsal aspect of her right hand, which showed tenderness and swelling upon examination. Dr. Hoffman's impression was tendonitis or possible RSD. He ordered her to remain off work and advised her return to Dr. Traina for additional studies. PX 1.

Petitioner testified that in the meantime, she sought treatment with her primary care provider, Debbie Hays, a nurse practitioner, who referred her to Dr. James Williams. A singular treatment record from Debbie Hayes with a date of service of August 31, 2009 appears amongst the records of Dr. Williams.

On October 22, 2009, Petitioner presented to Dr. Williams at the Midwest Orthopaedic Center with complaints of right thumb basilar joint pain, which reportedly began in May while wiping up a table as a manger at Steak N Shake. After reviewing her MRI and radiographs, and performing a physical examination of her showing tenderness over the joint, Dr. Williams recommended a right thumb CMC joint arthroplasty as an outpatient procedure. Petitioner underwent that procedure on November 13, 2009 at Methodist Medical Center of Illinois. PX 4.

Seven days after surgery, on November 20, 2009, Petitioner presented to the Emergency Department at Methodist Medical Center of Illinois with a history of catching her thumb in a door, feeling a pop, and experiencing pain. Radiographs were taken, which showed surgical placement of K-wire across the carpometacarpal junction of the right wrist at the level of the trapezium and base of the second metacarpal. Petitioner was given pain medication and discharged. PX 5.

Post-operatively, Petitioner experienced pain with finger movement, which resolved. Dr. Williams noted that her post-operative radiographs looked fantastic. Petitioner underwent therapy, and was released to work without restrictions on December 1, 2009. At her final visit with Dr. Williams on January 18, 2010, Petitioner was experiencing some residual tenderness, which Dr. Williams thought would resolve, and she reported an inability to fully lay her thumb flat or hyperextend her thumb. Dr. Williams believed both limitations were due to the increased laxity at Petitioner's metacarpophalangeal joint. He indicated that both limitations could only be prevented by a complete fusion to that joint, but he did not recommend that procedure. Dr. Williams released her from his care on that date. PX 4.

On February 15, 2010, Petitioner returned to Dr. Traina, and reported no relief from the surgery performed by Dr. Williams. A physical examination revealed tenderness over the CMC joint with motion of the thumb, some swelling, no redness, heat or warmth, diffuse tenderness without apparent abnormality, and a well-healed incision. Dr. Traina's assessment was a questionable problem versus infection, for which he ordered radiographs to ascertain questionable fracture of the metacarpal and blood work. He applied a short-arm thumb spica and asked her to return in one week. RX 2.

Radiographs of the right hand obtained on February 15, 2010 revealed postoperative changes and a vertical fracture line extending along the shaft of the proximate first digit metacarpal. PX 8.

Petitioner returned to Dr. Traina on February 22 with complaints of feeling like the pin in her hand was coming out. Dr. Traina noted that radiographs confirmed showed the pin to be migrating, and a bone scan obtained on February 18, 2010 was abnormal and showed increased uptake, but did not reveal any fracture. RX 2, 9. Petitioner was having significant pain and some tinting of the skin. Dr. Traina recommended removing the pin and exploration of the CMC joint. RX 2.

On February 23, 2010, Petitioner presented to the Emergency Department at Methodist Medical Center of Illinois with complaints of a pin protruding out of her right wrist. She reported that she had difficulties with one of the pins coming out of her wrist following her surgery with Dr. Williams, and that Dr. Traina had scheduled her for surgery to remove the pin, but she indicated the pin seemed to be protruding farther than normal on this date. A physical examination revealed that the pin was not "through and through, but it is quite pronounced." Radiographs obtained showed a metallic pin tenting the skin. The Emergency Department personnel spoke with Dr. Traina, who recommended her wrist be splinted with a dressing, and Petitioner was discharged. PX 11.

On February 25, 2010, Dr. Traina performed a removal of carpometacarpal implant of the right thumb with irrigation and debridement and insertion of antibiotic cement spacer and removal of retaining pins. PX 2, PX 12. One week later, on March 4, 2010, Dr. Traina performed a carpometacarpal reconstruction of the right wrist at the first metacarpal with a graft jacket implant. PX 13. Post-operatively, she was placed in a thumb spica cast, but developed an open area with deep tissue coming out. Dr. Traina attempted to excise this in the office on June 18, 2010 without success secondary to discomfort. He scheduled her for surgery to further excise the tissue. On June 24, 2010, Dr. Trina performed a right thumb irrigation and debridement. Petitioner did well post-operatively with the aid of a thumb splint. PX 2.

Petitioner began therapy on July 19 and reported some relief from treatment. She was discharged from therapy on December 15, 2010. PX 15.

On August 4, 2010, Petitioner returned with complaints of a burning sensation in her hand, which Dr. Traina noted to be a relatively new finding. Petitioner had a significant contracture of the MCP joint. Petitioner was undergoing therapy, and Dr. Traina recommended continued aggressive therapy. She thereafter failed to present to her office visit of August 25, 2010. Dr. Traina noted on September 17, 2010 that physical therapy wanted to restart therapy, which Dr. Traina could not order until Petitioner re-presented to him. Dr. Traina was leaving the Peoria area and indicated she would need to find another orthopedic provider. PX 2.

Petitioner returned to Dr. Traina on October 23, 2010 and reported an inability to continue therapy due to the recent suicide of her son. She complained of pain over the CMC joint and weakness bilaterally. Dr. Traina restarted physical therapy, ordered pain medication, and referred her to Great Plains Orthopedics. PX 2.

After concluding treatment with Dr. Traina, Petitioner testified that she attempted to seek treatment with other doctors, such as Dr. Mitzelfelt of Pekin, and attempted to return for treatment with Dr. Williams, but both physicians declined to treat her because of her previous treatment with Dr. Traina. She stated that she "tried every doctor in Peoria", but without success. Eventually, she saw Dr. Rhode, who was referred to her by her attorney.

Petitioner presented to Dr. Rhode on April 6, 2011. His impression was that she suffered from a painful CMC graft jacket. Dr. Rhode believed this to be a "complicated condition that I believe requires a subspecialist in hand surgery." He recommended Petitioner follow-up with Dr. John Fernandez at Rush, and ordered her off work until she was evaluated by a hand specialist. PX 16.

Before Petitioner could secure an appointment with Dr. Fernandez, she was scheduled for a Section 12 examination with Dr. Wysocki at Rush Hospital. Due to the Section 12 examination, Dr. Fernandez's office would not see Petitioner because she had already seen another physician within the group. Dr. Rhode referred Petitioner to Dr. Mark Cohen, who refused to see her for similar reasons as Dr. Fernandez. Dr. Rhode then referred her to Dr. Oakey. PX 16.

On March 7, 2012, Petitioner presented to Dr. Rhode with no reported change in symptoms. He believed that she had plateaued secondary to her inability to gain access to

medical treatment. Dr. Rhode opined that Petitioner's right wrist would not improve and would likely worsen without further medical treatment. He stated that she had essentially lost all opposition and key pinch strength, and continued to experience debilitating pain at the first CMC joint. He recommended she take oral pain medication indefinitely and indicated she may benefit from steroid injections into the first CMC joint. PX 16.

On April 18, 2012, Petitioner followed-up with Dr. Rhode, who indicated that Petitioner's treatment options consisted of a revision fusion versus a foam amputation. Dr. Rhode ordered permanent restrictions on Petitioner of no use of the right upper extremity, and placed Petitioner at maximum medical improvement. PX 16.

Dr. Rhode testified by way of evidence deposition. Dr. Rhode felt that because Petitioner's case was a complex hand case, he did not want to "do something that I felt was outside the scope of my practice, which I felt this was, so I felt most appropriate to refer her to a subspecialist." PX 19, Pg. 10. He recommended Petitioner see Dr. John Fernandez at Rush Hospital, a hand specialist, but because Petitioner was scheduled for a Section 12 examination with one of Dr. Fernandez's partners, she was unable to see Dr. Fernandez. Even after Petitioner was unable to treat with Dr. Fernandez, Dr. Rhode did not want to surgically treat Petitioner because "[a]gain this is out of the scope of practice for what I do." PX 19, Pg. 11. Dr. Rhode then referred her to Dr. Mark Cohen, a hand specialist, who was unable to treat Petitioner for a similar reason. Dr. Rhode hoped that someone would do a fusion with bone graft on Petitioner, but stated "I would hope – and it's out of the scope of my practice. As I said before, I don't feel comfortable treating this patient surgically." PX 19, Pg. 13.

Dr. Rhode indicated that Petitioner has a painful "floppy finger" that could benefit with a higher level of function and a lower impairment and disability if the thumb was linked back to the wrist. If she were to undergo an amputation of the thumb, Dr. Rhode indicated that it would be devastating to her function in that wrist. Absent any surgery, Dr. Rhode did not anticipate Petitioner being able to resume using her right hand for work. With regard to causation, Dr. Rhode opined that Petitioner aggravated her pre-existing arthritis, causing her thumb to become symptomatic and precipitated surgery. In formulating his opinion, Dr. Rhode testified that he reviewed an MRI of July 24, 2008, a verbal history from Petitioner, radiographs obtained in his office, and a Section 12 examination report from Dr. Wysocki. He did not have the records of Dr. Hoffman, Dr. Traina or any other physicians. Dr. Rhode acknowledged that he did not treat Petitioner, other than having discussions with her regarding an injection and an assessment with a hand specialist. PX 19.

Petitioner was examined by Dr. Wysocki at the request of Respondent on October 19, 2011 pursuant to Section 12. Dr. Wysocki reviewed the treatment records of Dr. Hoffman, Deborah Hayes, Dr. Williams, and Dr. Traina as well as operative reports from Methodist Hospital. Dr. Wysocki also reviewed radiographs, the MRI and a bone scan. He performed a physical examination, performed radiographs in his office, and took a history from Petitioner. Petitioner described wiping down a table with a relatively sudden onset of pain in the right thumb. She did not recall having any problems in her hand prior to the May 30 incident, and at the time she saw Dr. Wysocki, she reported that her hand was essentially useless to her in that she did not use her right thumb whatsoever. The only way she utilized her hand was to perform

a small amount of pinching between any combination of the index through small fingers with no use of the thumb. Dr. Wysocki's assessment was right thumb pain, stiffness, and dysfunction stats post surgical treatment of CMC arthritis. Based on his review of records, the history obtained from Petitioner, and the physical examination, Dr. Wysocki opined that Petitioner's current thumb condition was not casually related to the work injury of May 30, 2008, reasoning that he would not expect performing wiping motions over a table would be significant enough injury to alter the natural history of underlying thumb CMC arthritis or cause a new onset of thumb CMC arthritis. Dr. Wysocki stated that he would recommend a thumb MCP arthrodesis, thumb MCP joint fusion, a ligament reconstruction suspensionplasty, or thumb amputation. Dr. Wysocki placed her at maximum medical improvement barring any further surgical intervention to the right hand, and he believed an appropriate work restriction would be no lifting, pushing, pulling greater than five pounds with the right hand for gross motor only, with no fine motor use. Dr. Wysocki also suggested a functional capacity evaluation to more accurately set her permanent restrictions. RX 1.

Dr. Wysocki testified by way of evidence deposition on February 1, 2013 concomitantly with his report. Dr. Wysocki testified that with regard to causation, he did not expect a low energy activity and mechanism such as wiping down a table to be significant enough trauma to a thumb CMC joint to either generate CMC arthritis or serve as a significant trauma to cause an aggravation of a pre-existing condition. He defined "aggravation" to be performing an activity or sustaining trauma such that it alters the natural history of whatever the underlying process is. "If someone undergoes an activity or undergoes a trauma that is so intense that it alters the natural history of it and causes almost irreversible damage to that underlying condition, that would be considered a kind of permanent and an effective aggravation of that preexisting condition, something more than just something that brings out manifestations." RX 1, Pg. 45.

Dr. Wysocki attributed the onset of symptomatology following the May 30, 2008 accident to a manifestation of symptoms. He testified that the accident manifested a potentially mild underlying CMC thumb arthritis, and that the pain Petitioner experienced following the accident drove her to have the surgical procedures she underwent prior to presenting to him. He indicated that the symptoms she was currently experiencing could be triggered by a reaction to the graft jacket implant, symptomatic impingement as the metacarpal approaches the scaphoid, or pain upon substantial hyperextension at the MCP joint. Dr. Wysocki testified that the restrictions he recommended for Petitioner were not caused or aggravated by the events of May 30, 2008. Dr. Wysocki noted that Petitioner was primarily problematic in the radial side of the right hand and in the right thumb, and testified that Petitioner's right hand had significant restrictions with thumb movement. Dr. Wysocki stated that even if Petitioner were to undergo additional surgery, she still had a guarded prognosis. RX 1.

At Arbitration, Petitioner testified that she has been given three options for treatment. She can leave her hand and thumb as they are, have the thumb amputated and move her index finger to the location of her thumb, or have the thumb joint fused. If her physician was confident that her thumb would work and be less painful, she indicated that she may undergo surgery. However, her physician has indicated that the thumb amputation may not alleviate her pain, and the fusion may not provide her additional functionality. As such, she has elected to forego any further treatment.

During her treatment, Petitioner testified that Dr. Hoffman took her off work on May 30, 2008. Petitioner stated that Dr. Traina "went back and forth" regarding her off work status, taking her off work when her hand became painful, and returning her to restricted work of one-handed work only at other times. Although Petitioner initially testified Respondent could not accommodate her restrictions, she later testified that she does not remember if she returned to Respondent after her accident to request employment within her restrictions.

Petitioner was terminated from her employment with Respondent on September 30, 2008. She received short term and long term disability from Respondent from June 2008 until July 10, 2009. She did not work again until June 10, 2011, when she began working for Linder's Cleaning Service in a one-handed capacity in what Petitioner described as a supervisory position. Linder's Cleaning moved out of state, and in December 2012, Petitioner began her own cleaning company. She employs two other individuals. Petitioner testified that she sets appointments, takes checks, accompanies her employees to cleaning jobs to ensure their performance, talks to the customers, and ensures the happiness of the customers.

Regarding her limitations in her right hand, Petitioner testified on direct examination that her thumb is of no useful consequence. She presently experiences a dull ache sensation all of the time, and if she bumps or strains it, it causes pain. Petitioner also experiences cramping in her entire right hand. She indicated that she has to use her right hand "sometimes", and she has learned to manipulate her right hand to get dressed or cook. Petitioner can pick up objects using her fingertips, and may steady a pan with the right hand, but she cannot pick it up and move it with her right hand. She continues to garden with her wife using her left hand. Petitioner takes Norco for pain relief, which is prescribed by Debbie Hayes.

On cross examination, Petitioner testified that in her supervisory capacity for Linder's Cleaning, she would only lift things using her right fingertips. Petitioner acknowledged that she can drive as long as she does not have to make any sharp moves. Although she indicated that she cannot carry things, such as a plate or cup of coffee, because her hand cramps up, she testified that she can "sometimes" carry paper or a folder, and "on a good day" carry a binder. According to Petitioner, she cannot carry a tray, a spatula, turn a key, or vacuum with her right hand. She has no problems with her left hand, and her right arm is well. On redirect examination, Petitioner indicated that when she visits her cleaning sites, she pitches in and helps her staff carry in items.

Respondent admitted Restroom(s) Daily Cleaning Checklist and Service Work Verification Sheet forms as RX 4. The Restroom Daily Cleaning Checklists include Petitioner's signature as the cleaning service representative, and indicate twelve items that are checked off by both the cleaning service and the General Manager. The Service Work Verification Sheets represent the date, time, and vendor performing the cleaning service and the service performed, as well as the signature of the servicers and the general manager. RX 4.

Chad Wahl testified for Respondent. He is employed by Menards as a General Manager. Mr. Wahl testified as to RX 4, documents that require a manager's signature to verify that the restrooms at Menards were cleaned as indicated. Mr. Wahl testified that he is familiar with Linder's Cleaning Service, as they performed cleaning services for Menards. He indicated that several individuals have cleaned the bathrooms, and he personally observed Petitioner cleaning

the bathrooms "quite frequently." Although he could not give dates of service, he saw her mop, wipe down the restrooms, and sweep on several occasions. He could not attest to whether he was using one hand or two.

Petitioner was called as a witness by Respondent. Petitioner testified that her signature appears in RX 4, and that the "JA" is her signature as well. When asked if Petitioner cleaned at Menards or simply signed the records in RX 4 in a supervisory capacity, Petitioner stated that she "occasionally would clean a mirror or wipe off the counter. I always had someone with me that would mop, that would do the sweeping. There was [sic] always two of us. I signed in a supervisory role." Petitioner indicated that Menards' managers rarely saw what she did, and she would often have to track one down to sign the verification.

Four surveillance videos with dates of September 13 through September 20, 2011, October 5 through October 7, 2011, April 23 through April 25, 2012, and July 16 through July 17, 2012 were admitted into evidence by Respondent. The videos reflect Petitioner using her right hand to open a car door with a key, open a bottle of motor oil, and lift, carry and push objects. They also reflect Petitioner entering individual homes and Menards to perform cleaning services. On some occasions, she is accompanied by another individual and on others, she cleans by herself. On the videos, Petitioner can be seen mopping utilizing both hands, and lifting and gripping objects with her right hand, such as a vacuum, bottles, garbage bags, buckets, brushes, cleaning supplies, pieces of paper, and rolls of paper. RX 7-10.

Steven White, Ryan Bordis, and Terry Norwicki testified as to the surveillance videos on behalf of Respondent. All gentlemen work for Robison Group as private investigators, and all were assigned to survey Petitioner on various dates. Mr. White, Mr. Bordis and Mr. Norwicki testified that their respective cameras were in good working condition during the surveillance of Petitioner, that the videos depict what each individual saw through their camera lens, and that the video tapes were not edited. Mr. Norwicki testified that he had a trainee with him during his surveillance activities, and both he and the trainee show the same video from different angles, which he reviewed. He indicated that although the video he took and that of the trainee are meshed together to constitute the videos that are admitted into evidence. He is unfamiliar with the process of meshing the two videos together, as he does not perform that activity himself.

Ashley McNamee, a news anchor for a local NBC affiliate, testified for Petitioner in rebuttal to the surveillance video. She stated that the surveillance videos were edited as evidenced by jump cuts, referring to the displaced timing sequences in the videos. On cross examination, Ms. McNamee stated that a jump cut could be due to the camera person stopping and starting the camera.

Petitioner was recalled as a witness on her own behalf after having viewed the surveillance videos admitted as RX 7-10. She testified that the videos were filmed after June 10, 2011, the date in which she began working for Linder's Cleaning, and after she was released to one-handed duty. Petitioner acknowledged that she can lift the vacuum, but stated she can do so only by utilizing her knee and the fingertips of her right hand while lifting the heavy part with her left hand. She also acknowledged her ability to use a "small mop" and to utilize a key to open a door with two fingers of her right hand.

CONCLUSIONS OF LAW

In regard to the disputed issue (C), Respondent disputed that Petitioner suffered an accident arising out of her employment.

To obtain compensation under the Illinois Workers' Compensation Act, a claimant must show by a preponderance of the evidence that he has suffered a disabling injury arising out of and in the course of his employment. 820 ILCS 305/2; *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1013 (1st Dist. 2011). The "arising out of" component refers to an origin or cause of the injury that must be in some risk connected with or incident to the employment, so as to create a causal connection between the employment and the accidental injury. *Id.* Courts have recognized three general types of risks to which an employee may be exposed: (1) risks distinctly associated with the employment; (2) risks personal to the employee; and (3) neutral risks, which have no particular employment or personal characteristics. *Id.*; *Illinois Institute of Technology v. Industrial Comm'n*, 314 Ill. App. 3d 149, 162 (2000). Injuries resulting from a neutral risk are not generally compensable and do not arise out of the employment, unless the employee was exposed to the risk to a greater degree than the general public. *Metropolitan Water Reclamation District of Greater Chicago*, 407 Ill. App. 3d at 1014. "It is the function of the Commission to judge the credibility of witnesses, determine the weight to be given to their testimony, and to draw reasonable inferences from that testimony." *Nunn v. Industrial Comm'n*, 157 Ill. App. 3d 470, 478 (4th Dist. 1987).

In the present case, the Arbitrator finds that the risks to which Petitioner was exposed on May 30, 2008 were distinctly associated with her employment for Respondent. Petitioner testified that on May 30, 2008, the restaurant was especially busy and she, as a manager, was attempting to keep the dining room clean by bussing tables and then wiping them down. She was hurriedly wiping off a table with her right hand when she felt a pop around her thumb joint. Although Petitioner's job duties were not elicited during testimony, the Arbitrator reasonably infers that wiping down tables was within the purview of Petitioner's job duties that she may reasonably be expected to perform as manager in order to keep the dining room clean to facilitate an expeditious flow of diners. The Arbitrator finds that Respondent's daily operations, namely serving its dining customers, of its restaurant on the date of accident created an increased risk of injury, as it caused Petitioner to hurriedly wipe down the table at issue. Therefore, the Arbitrator finds that Petitioner has sustained an injury that arose out of and in the course of her employment with Respondent.

In regard to disputed issue (E), Respondent disputed that timely notice of the accident was given to Respondent, and Petitioner alleged that notice was given to Brooke Tucker with the job title of General Manager on May 30, 2008. Arb. X 1. Petitioner testified at Arbitration that on her date of accident, Petitioner told Matt Boyer or Paul Shaffer. Petitioner testified she also told Brooke Tucker, the General Manager, the following Monday, and Dan Roark, a district manager. Based upon Petitioner's unrebutted testimony, the Arbitrator finds that Petitioner has proven that notice of the accident was given within the time limits stated in the Act.

In regard to disputed issue (F), it is well settled in Illinois that employers take their employees as they find them. *Sisbro v. Industrial Commission*, 207 Ill.2d 193, 205 (2003). An employee will not be denied recovery simply because of the presence of a pre-existing condition so long as it can be shown that the employment was also a causative factor. *Id.* Recovery will depend on the employee's ability to show that a work-related accidental injury aggravated or accelerated the preexisting disease such that the employee's current condition of ill-being is causally connected to the work-related injury. *Id.* at 204-205. Further, the Workers' Compensation Act is a remedial statute and should be liberally construed to effectuate its main purpose–providing financial protection for injured workers. *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill.2d 132, 149 (2010); *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill.2d 364 (2009)(the Workers' Compensation Act is a remedial statute intended to provide financial protection for injured workers and it is to be liberally construed to accomplish that objective).

The Arbitrator notes that no causation opinion appear in the records of Dr. Traina or Dr. Williams, both of whom surgically treated Petitioner's thumb. The solitary mention of work-relatedness from either physician appears in the Short Term Disability Claim Form of June 2008, in which Dr. Traina checked the box "No" in response to the question, "Is condition work related?" RX 3. The Arbitrator declines to find this response dispositive of the issue of causation, given the lack of explanation or basis for same.

In support of their respective causation positions, Petitioner tendered the opinions of Dr. Rhode, and Respondent proffered those of Dr. Wysocki. The Arbitrator finds the opinions of Dr. Wysocki to be more credible than that of Dr. Rhode, and accordingly gives the opinions of Dr. Wysocki more weight. Dr. Wysocki reviewed substantially more treatment records and studies than did Dr. Rhode. Dr. Rhode testified that in formulating his opinions, he reviewed the MRI of July 24, 2008, a verbal history from Petitioner, radiographs obtained in his office, and a Section 12 examination report from Dr. Wysocki. PX 19. He did not have the records of Dr. Hoffman, Dr. Traina, Dr. Williams, Deborah Hayes, or any additional studies. Dr. Wysoki, however, had reviewed all of the medical records as did Dr. Rhode, but also had reviewed the records of Dr. Hoffman, Deborah Hayes, Dr. Williams, Dr. Rhode, operative notes from November 13, 2009, February 25, 2009, March 4, 2010 and June 24, 2010, records from emergency department visits at Methodist Hospital on November 20, 2009 and February 23, 2010, and multiple imaging studies, including radiographs, MRI and bone scan dated June 11, 2008 through April 6, 2011. RX 1.

Additionally, Dr. Rhode did not render any actual, substantive treatment to Petitioner. Although Dr. Rhode saw Petitioner on nine separate occasions, he acknowledged that he did not render any treatment to Petitioner, other than referring her to physicians more specialized than him, because he stated that he did not want to "do something that I felt was outside the scope of my practice, which I felt this was." RX 19. As such, the medical monitoring and proffering of opinions that Dr. Rhode performed and proffered for Petitioner is not far afield from the services performed of Dr. Wysocki. As such, the persuasiveness of Dr. Rhode's opinions as a treating physician is limited by the lack of treatment actually rendered to Petitioner.

Similarly, the Arbitrator is not persuaded by the opinions of Dr. Rhode in light of his repeated testimony that "his is out of the scope of practice for what I do" (PX 19, Pg. 11) and that he did not "feel comfortable treating this patient surgically" because of same. PX 19, Pg. 13. Simply put, if Dr. Rhode felt that Petitioner's condition and requisite treatment were outside the scope of his practice and expertise, and more suited to that of a hand specialist, then the opinions of a hand specialist, such as Dr. Wysocki, should properly be given more weight.

Dr. Wysocki testified that the manifestation of symptoms following her work accident drove her to undergo surgery, but then later testified that the work injury was not a causative factor in her need for surgical intervention. RX 1, Pg. 46, 49. Dr. Wysocki further opined that Petitioner's current diagnosis was right thumb pain, stiffness and dysfunction status post surgical treatment of CMC arthritis, but also stated that her "current thumb condition" was not causally related to the work injury of May 30, 2008. RX 1. In applying the Act liberally, *see Interstate Scaffolding, Inc.*, 236 Ill.2d at 149, the Arbitrator adopts the more liberal interpretation of Dr. Wysocki's testimony and finds that as a result of the May 30, 2008 work accident, Petitioner suffered an aggravation of her pre-existing CMC joint arthritis, which caused her condition to become symptomatic and necessitated her subsequent surgical treatment.

Although the Arbitrator adopts the opinions of Dr. Wysocki, the Arbitrator notes that it is not necessary that Petitioner's work accident alter the natural state of her thumb condition to be considered a causative factor in the development of her condition, but rather, the accident need only aggravate or accelerate Petitioner's pre-existing condition such that Petitioner's current condition of ill-being can be said to be causally connected to the work injury. *See Sisbro*, 207 Ill.2d at 204-205.

In this case, Petitioner sought immediate treatment following her work accident, repeatedly gave a consistent history to her treating physician of a sudden onset of symptomatology in her right thumb and hand following the work accident, and continued to suffer constant symptomatology in same following the work accident. Additionally, Petitioner testified that she had not suffered any problems in her right hand before the work accident, nor had she been treated by a physician for any right hand symptoms. Although Respondent points to Dr. Rhode's treatment record of June 11, 2008 as evidence of prior right hand complaints, that record reveals Petitioner had a singular complaint of pain prior to May 30, 2008 that was less severe than the pain resultant from her work accident. PX 16. The Arbitrator finds that same is insufficient to negate the considerable amount of evidence that supports a finding of causation. Therefore, the Arbitrator finds that Petitioner's current condition of ill-being is causally related to the work accident of May 30, 2008.

With regard to disputed issue (J), Respondent disputed liability for medical bills based upon accident, and specifically disputed the reasonableness and necessity of the medical bills for Dr. Rhode and Comprehensive Emergency Solutions based upon an excessive choice of physicians and duplicity, respectively.

Pursuant to Section 8(a), Petitioner is entitled to two choices of "all medical, surgical and hospital services provided by the physician, consultant, expert, institution or other provider of services recommended by said initial service provider or any subsequent provider of medical

services in the chain of referrals from said initial service provider." The Arbitrator finds that Debbie Hays referred Petitioner for treatment with Dr. Williams (PX 4), as reflected in the records of Dr. Williams and per Petitioner's testimony regarding same. The Arbitrator finds that Dr. Hoffman referred Petitioner for treatment with Dr. Traina (PX 1), as reflected in the records of Dr. Hoffman and per Petitioner's testimony regarding same. With regard to Dr. Rhode, his records indicate that Dr. Hoffman referred Petitioner to him. PX 16. Dr. Hoffman's records, however, do not reflect any referral from Dr. Hoffman to Dr. Rhode. Petitioner testified that 'Penny [from her attorney's office] did tell me' to go see Dr. Rhode.

The Arbitrator finds that Petitioner's first choice of physician was Dr. Hoffman, and Dr. Traina to be in the chain of referrals with Dr. Hoffman. Debbie Hays was Petitioner's second choice of physician, with Dr. Williams in the chain of referrals with her. The Arbitrator notes that no bills appear in PX 17 from Debbie Hayes, and none of her records were offered as an exhibit into evidence. In the event that Petitioner is not tendering Ms. Hayes as a provider in this case, Dr. Williams then becomes Petitioner's second choice of physicians. Regardless, Petitioner's choice of Dr. Rhode constitutes Petitioner's third choice of physicians. Because Petitioner has exceeded her choice of physicians pursuant to Section 8(a) with the treatment with Dr. Rhode, Respondent is not liable for any medical bills associated with the services of Dr. Rhode.

Respondent also denied liability for medical bills from Comprehensive Solutions with dates of service of November 20, 2009 and February 23, 2010, contending that the bills were duplicative in that they were submitted and paid by the Illinois Department of Healthcare and Family Services, as reflected in PX 18. A review of the Department's payment information and the bills submitted in PX 17 reflect that the medical bills from Comprehensive Solutions are for emergency services rendered to Petitioner for complaints to her right hand and thumb. The Arbitrator finds the services reflected in the medical bills of Comprehensive Solutions to be reasonable and necessary in the care and treatment of Petitioner's condition.

Based upon the aforementioned findings and in light of the Arbitrator's conclusions with regard to disputed issues (C) and (F), Respondent shall pay all reasonable and necessary medical services, with the exception of bills from Dr. Rhode, as provided in Sections 8(a) and 8.2 of the Act, subject to the fee schedule. Respondent is not liable for medical bills incurred by Petitioner for the services of Dr. Rhode.

In regards to disputed issue (K), the issues of whether a claimant is temporarily totally disabled and the length of time for which he is entitled to temporary disability benefits are questions of fact to be resolved by the Commission. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118-119 (1990). In Illinois, it is well-settled that an employee is temporarily totally incapacitated from the time an injury incapacitates him from work until such time as he is far recovered or restored as the permanent character of his injury will permit. *Id.* at 118. In order to be eligible for temporary total disability benefits, a Petitioner must prove not only that she did not work but also that she was unable to work. *City of Granite City v. Industrial Comm'n*, 279 Ill. App. 3d 1087, 1090 (1996). "[W]hen an employee who is entitled to receive workers' compensation benefits as a result of a work-related injury is later terminated for conduct unrelated to the injury, the employer's obligation to pay TTD workers' compensation

benefits continues until the employee's medical condition has stabilized and he has reached maximum medical improvement." *Interstate Scaffolding, Inc.*, 236 Ill.2d at 135-136 (emphasis added).

Petitioner sought temporary total disability benefits from May 30, 2008 through June 9, 2011. Arb. X 1. Petitioner's employment with Respondent was terminated on September 30, 2008 while she was off work per Dr. Traina. PX 2.

Petitioner testified that Dr. Hoffman took her off work on May 30, 2008. However, the objective medical records of Dr. Hoffman do not indicate that he took her off work or restricted her work when she presented to him. Dr. Hoffman prescribed medication and referred Petitioner to Dr. Traina for further treatment. PX 1. In the absence of more substantive treatment to indicate that Petitioner was unable to work and without any notations from Dr. Hoffman regarding her work status, there is insufficient evidence to indicate that Petitioner was temporarily totally disabled at that time.

The records of Dr. Traina indicate that he took Petitioner off work beginning on June 11, 2008 and released her to one handed work on July 28, 2008. On August 27, 2008, Dr. Traina again took Petitioner off work until October 13, 2008, when she was released to one-handed work. PX 2.

Petitioner presented to Dr. Williams for treatment on October 22, 2009, and Dr. Williams performed surgery on Petitioner's right thumb on November 13, 2009. PX 4. Although Dr. Williams makes no mention of her work status during his treatment of her, he released her to work without restrictions on December 1, 2009, which reasonably supposes a period of temporary disability. Dr. Williams released her from his care on January 18, 2010. PX 4. The Arbitrator reasonably infers Dr. Williams intended some work restriction on Petitioner's right upper extremity until December 1, 2009 when he released her to full duty, and that her condition stabilized as of January 18, 2010 when Dr. Williams released her from his care.

Petitioner returned to Dr. Traina with continued complaints on February 15, 2010. Although Dr. Traina's records do not reflect that he restricted or removed Petitioner from work at that time, the record evidences that Petitioner's condition declined or destabilized following Dr. William's release of her from his care, given that Petitioner testified her pain increased at that time and that she subsequently underwent three additional surgical procedures to treat her right thumb condition. Specifically, Petitioner underwent a removal of carpometacarpal implant of the right thumb with irrigation and debridement and insertion of antibiotic cement spacer and removal of retaining pins on February 25, 2010. PX 2. On March 4, 2010, Dr. Traina performed a carpometacarpal reconstruction of the right wrist at the first metacarpal with a graft jacket implant, at which time she was placed in a thumb spica cast. PX 13. Petitioner underwent a third surgical procedure on June 24, 2010 to excise tissue protruding from her wound. PX 2. Considering the significant treatment she received in conjunction with Petitioner's testimony that Dr. Traina intermittently restricted her to one-handed work, the Arbitrator finds that Petitioner's condition had not stabilized nor was she at maximum medical improvement during this period of time, which the Supreme Court instructs is the determinative inquiry in ascertaining temporary total disability given Petitioner's termination on September 30, 2008. *Interstate Scaffolding, Inc.*,

236 Ill. 2d at 149. Therefore, Petitioner is entitled to temporary total disability benefits during this time period.

After concluding treatment with Dr. Traina, Dr. Rhode took Petitioner off work from April 6, 2011 through April 18, 2012, at which time he placed permanent restrictions on her of no use of the right upper extremity. PX 16. Although the Arbitrator finds the opinions of Dr. Rhode to be unpersuasive, there is nothing in the record to indicate that Petitioner's condition had stabilized and reached maximum medical improvement during the time period of April 6, 2011 until June 9, 2011 to contradict Dr. Rhode's orders for Petitioner to remain off work. Dr. Wysocki placed Petitioner at maximum medical improvement on October 19, 2011 at the time of his examination, barring any further surgical intervention, and testified that if she chose to undergo further surgical treatment, it would alter her status. Dr. Wysocki also testified that the pain she experienced following the work accident of May 30, 2008 drove her to have the four surgical procedures she underwent prior to being examined by him. RX 1. Given Dr. Wysocki's opinions and the permanent restrictions he recommended for her, it is reasonable to infer that Dr. Wysocki would not have placed Petitioner at maximum medical improvement during the time period in which Dr. Traina surgically treated Petitioner's right thumb, or between April 6, 2011 and June 9, 2011, the time period in which Petitioner was off of work per Dr. Rhode.

Based upon the foregoing, Respondent shall pay Petitioner temporary total disability benefits of $442.31 per week for a total period of 152 3/7 weeks, representing June 11, 2008 through January 18, 2010, and February 15, 2010 through June 9, 2011. By ceasing temporary total disability benefits on June 9, 2011, the Arbitrator is not concluding that Petitioner had reached maximum medical improvement on that date, but rather, June 9, 2011 is the last date in which Petitioner sought temporary total disability benefits. Arb. X 1. The parties stipulated that Respondent is due a credit of $1,674.00 for short term disability payments made to Petitioner, and $17,409.60 for long term disability payments made, for a total credit of $19,083.60 to be deducted from Petitioner's temporary total disability benefits.

In regard to disputed issue (L), based upon the foregoing and the record in its entirety, as a result of her work accident of May 30, 2008, Petitioner sustained an aggravation of her right thumb carpometacarpal joint arthritis, which necessitated a right thumb CMC joint arthroplasty and three subsequent remedial procedures, including a removal of the carpometacarpal implant of the right thumb with irrigation, debridement, and removal of retaining pins, a carpometacarpal reconstruction of the right wrist at the first metacarpal with a graft jacket implant, and a right thumb irrigation and debridement to excise tissue. Following treatment, Petitioner began working with restrictions for Linder's Cleaning Service on June 10, 2011, and thereafter became self-employed in December 2012 working in a permanently restricted capacity.

At Arbitration, Petitioner testified to severe limitations and near complete loss of use of her right hand and thumb, and she demonstrated an apparent inability to grip or lift objects. However, Petitioner's testimony is undermined by the surveillance videos admitted into evidence depicting Petitioner performing laborious activities with her right upper extremity, including cleaning the restrooms at Menards using her right hand just as often as her left, and carrying heavy objects into clients' homes with her right hand, including a fully stocked cleaning bucket and a vacuum, and other objects that require manual dexterity. The activities she is seen

performing on the surveillance videos casts into doubt her testimony that she is unable to lift basic objects with her right hand, such as a cup of coffee, paper, or a folder, or perform mundane activities. Although she testified that she "always" performed cleaning services with the aid of another individual who would mop and sweep, the surveillance videos revealed Petitioner oftentimes cleaning by herself and performing the activities she insinuated on direct examination she could not do with her right hand. Ultimately, the surveillance videos exhibit that Petitioner is physically capable of performing more activities with her right hand and thumb than what she testified to and exhibited at Arbitration.

Nonetheless, after observing Petitioner's right upper extremity at Arbitration, the Arbitrator finds that Petitioner suffered significant atrophy and deformity in her right thumb and hand as a result of the treatment for her right thumb condition that would reasonably inhibit the functionality of her right hand. Dr. Wysocki noted that Petitioner was primarily problematic in the radial side of the right hand and in the right thumb. He stated that her right hand had significant limitations with thumb movement, and recommended a work restriction of no lifting, pushing, pulling greater than five pounds for gross motor only, with no fine motor use. RX 1. Although additional surgical procedures have been recommended to Petitioner to lessen her reported pain and improve the functionality in her right thumb and hand, Petitioner has elected to forego those procedures.

In light of Petitioner's injury and the treatment it necessitated, her permanent restrictions of the right hand, Petitioner's continued complaints and limitations in her right thumb and hand, and taking into consideration the physical capabilities Petitioner exhibited on the surveillance videos, the Arbitrator finds that Petitioner sustained permanent partial disability to the extent of 55% loss of use of her right hand, pursuant to Section 8(e). Therefore, Respondent shall pay Petitioner $398.08 for 112.75 weeks, representing 55% loss of use of the right hand.

2017 IL App (3d) 160138WC
No. 3-16-0138WC
Opinion filed January 4, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

MARIE SALISBURY, widow of Charles Salisbury, Deceased, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.* (Frank's Flying Service, Inc., Appellee).	)	Appeal from the Circuit Court of Henry County. No. 13-MR-95 Honorable Terence M. Patton, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court, with opinion.

Presiding Justice Holdridge and Justices Hoffman, Harris, and Moore concurred in the judgment and opinion.

OPINION

¶ 1 I. INTRODUCTION

¶ 2 Claimant, Marie Salisbury, widow of Charles Salisbury, appeals an order of the circuit court of Henry County confirming a decision of the Illinois Workers' Compensation Commission (Commission) denying her motion for a lump-sum payout of benefits awarded in accordance with the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)). Claimant also contends that respondent, Frank's Flying Service, Inc., is not entitled to a

credit against the award based on its overpayment of benefits prior to the arbitration hearing. For the reasons that follow, we affirm.

¶ 3 II. BACKGROUND

¶ 4 Claimant's decedent died in a work-related accident on June 12, 2009, when the crop-duster he was piloting crashed. He was in respondent's employ at the time. Following the accident, respondent began paying claimant $1,231.41 per week. An arbitration hearing was held on May 8, 2012. Claimant was awarded "death benefits, commencing 6/13/09, of $461.78/week to the surviving spouse, Marie Salisbury, on his or her own behalf and on behalf of the children." Based on this ruling, respondent's initial payment of $1,231.41 per week resulted in an overpayment of $769.83 per week. Based on this overpayment, respondent was "given a credit of $00.00 for TTD, $00.00 for TPD, and $192,594.22 for other benefits."

¶ 5 Claimant filed a petition for a lump-sum payout. A hearing on that petition was heard before a commissioner on November 1, 2013. Claimant testified at the hearing. She testified that respondent began paying benefits shortly after her husband's death on June 12, 2009. She stated that she understood that she had the option of taking a $500,000 lump-sum payment or payments for 25 years, and she wished to take the "present commuted value of the 25-year payments." So far, respondent had paid her about $187,000, which she had mostly saved. She testified that she used some of it for living expenses. Claimant explained that she wanted a lump-sum payout because she did "not want to chance the loss of benefits in the future." She would be "more comfortable" having "control of the those benefits" rather than having them be contingent on "changes in the law or *** the benefits schedule." Moreover, if she passed away during the 25-year period, her benefits would cease and her "children would be deprived of the benefits from this award." On cross-examination, she agreed that $197,930.33 was "probably

close" to the amount she had so far received. She stated that she was not claiming any financial hardship as the basis of seeking a lump-sum payout. She has no minor children. On redirect-examination, she testified that she was employed at an ethanol plant and her income was sufficient to meet her needs.

¶ 6 The Commission denied claimant's petition. It first acknowledged the controlling law. Lump-sum settlements are the exception rather than the rule. See *Skaggs v. Industrial Comm'n*, 371 Ill. 535, 539 (1939). Such a settlement is appropriate only if it is in the best interests of both parties, not simply the claimant. *Bagwell v. Industrial Comm'n*, 94 Ill. 2d 101, 105 (1983); see also *Illinois Zinc Co. v. Industrial Comm'n*, 366 Ill. 480, 482 (1937). The Commission then noted that since the award to claimant was not a definite sum and could, in certain circumstances, be terminated, it was clearly not in respondent's best interests to commute the ongoing payments to a lump sum. It then found that claimant "had not indicated a basis for finding that a lump sum settlement would be in her own best interests." She has been able to save some of the proceeds of the payments, and her income is sufficient to meet her needs. Any reliance on a possible change of benefits in the future, the Commission stated, was "speculative." Moreover, claimant would lose any future increases in benefits. The circuit court of Henry County confirmed the Commission's decision, and this appeal followed.

¶ 7 III. ANALYSIS

¶ 8 On appeal, claimant raises two issues. First, she contends that the Commission lacked the authority to allow respondent a credit against the ultimate award due to its initial overpayment of benefits to claimant. Second, she contends that the Commission erred in denying her request for a lump-sum payout. We disagree with both contentions.

¶ 9 A. The Credit

¶ 10 Claimant first argues that the credit given respondent for its overpayment of benefits prior to the arbitration hearing is void because the Commission has no authority to give a credit against the subsequent award of death benefits. Resolution of this issue requires us to consider whether the Commission has authority to recognize such a credit under the provisions of the Act, so a question of law subject to *de novo* review is presented (see *Emerald Performance Materials, LLC v. Illinois Pollution Control Board*, 2016 IL App (3d) 150526, ¶ 25; see also *Outboard Marine Corp. v. Industrial Comm'n*, 309 Ill. App. 3d 1026, 1029 (2000)). Claimant points out that the Commission, a creature of statute, has only the powers granted it by the legislature. *Daniels v. Industrial Comm'n*, 201 Ill. 2d 160, 165 (2002). Any action taken outside its statutory authority is void. *Id.* According to claimant, the granting of a credit for excessive sums voluntarily paid by an employer is not specifically contemplated by statute, so the Commission has no authority to grant such a credit. Claimant concludes that the portion of the order granting that credit is void. We disagree as to the manner in which claimant frames this issue.

¶ 11 Quite simply, what is happening here is that the Commission is merely recognizing that an employer has already made a partial payment that goes to satisfying its obligation. There is no award in the sense that the Commission is not ordering the transfer of any obligations, benefits, or funds from claimant to respondent. Claimant is not being deprived of something she otherwise would have received but-for the action of the Commission. Instead, respondent has voluntarily elected to satisfy part of its obligation prior to a formal order being entered—something which accrued to claimant's benefit. In other words, the Commission did not award respondent anything, it simply factored respondent's payments into its final order.

¶ 12 In *World Color Press v. Industrial Comm'n*, 125 Ill. App. 3d 469, 471-72 (1984), this court held that in the absence of a statutory bar, an employer could receive a credit for the

overpayment of benefits. Discussing *World Color Press* in *Messamore v. Industrial Comm'n*, 302 Ill. App. 3d 351, 358-59 (1999), we stated:

> "*World Color Press* does not explicitly state the overpayment of TTD benefits is being set off against a permanent award, but instead speaks only in vague terms of credit against 'future compensation payments' and the 'total award.' However, we apply the reasoning of *World Color Press* regardless of whether the credit is sought against a permanent disability award or some other benefit paid after the TTD overpayment."

Similarly, here, the reasoning of *World Color Press* is relevant though we are confronted with the overpayment of a death benefit rather than TTD. Absent a statutory prohibition, there is no reason why the Commission cannot take into account respondent's payments that occurred prior to the arbitration hearing.

¶ 13 Indeed, we note that section 7(e) of the Act (section 7 covers the amount of compensation in cases involving a fatality) states, in pertinent part, "The payments of compensation by the employer in accordance with the order or award of the Commission discharges such employer from all further obligation as to such compensation." 820 ILCS 305/7(e) (West 2008)). It is axiomatic that we may not read into a statute any exceptions or limitations not contained in its plain language. *Isaacs v. Industrial Comm'n*, 138 Ill. App. 3d 392, 396 (1985). Nothing in the plain language of this provision indicates that an employer should only be given credit for payments made subsequent to a formal award. Clearly, the payments respondent made leading up to the arbitration hearing were made in contemplation of an award.

¶ 14 Moreover, deep policy concerns are at issue here. Encouraging employers to make prompt and voluntary payments of benefits furthers the purpose of the Act. *Messamore*, 302 Ill. App. 3d at 359. It is obvious that "[d]enying credits for errors such as the one in this case would

encourage administrative delays as employers attempt to resolve every ambiguity before paying benefits." *Id.* The primary purpose of the Act is to "provide employees with *prompt* and definite compensation." (Emphasis added.) *Mattern v. Industrial Comm'n*, 216 Ill. App. 3d 653, 654 (1991). Thus, claimant's position runs counter to the beneficent purposes of the Act.

¶ 15 In short, claimant has identified no statutory provision prohibiting the Commission from recognizing a credit in circumstances such as this. Allowing the Commission to do so is consistent with the policies underlying the Act. Accordingly, we hold that that the Commission did not err by taking into account respondent's prior overpayment of benefits in fashioning an award.

¶ 16 B. The Lump-Sum Payout

¶ 17 Claimant also contests the Commission's decision to deny her request for a lump-sum payout. Section 9 of the Act (820 ILCS 305/9 (West 2008)) sets forth the circumstances under which a lump-sum payout is appropriate. We review the Commission's decision to grant or deny such a request using the manifest-weight standard of review. *Bagwell*, 94 Ill. 2d at 106. Therefore, we will reverse only if an opposite conclusion to the Commission's is clearly apparent. *Teska v. Industrial Comm'n*, 266 Ill. App. 3d 740, 741-42 (1994).

¶ 18 Our supreme court has held that "[l]ump-sum awards are the exception and not the rule." *Bagwell*, 94 Ill. 2d at 106. A lump-sum payout will be awarded only if it is in the best interests of both parties. *Id.* at 105. As the proponent of the motion, the burden was on claimant to show that a lump-sum payout was warranted. *Skaggs*, 371 Ill. at 540.

¶ 19 The Commission found that claimant failed to carry that burden. Essentially, the Commission based its decision on a lack of evidence concerning either parties' best interests. The evidence available showed that claimant was suffering no economic hardship and had saved

most of respondent's periodic payments. Claimant sets forth three reasons she believes indicated that a lump-sum payout would be appropriate in this case. First, she states that "[r]eplacement of [i]ncome lost to the family unit by absence of decedent's income" justifies a payout. However, she does not explain why periodic payments do not ameliorate this concern. As noted, the evidence in the record shows no economic hardship. Second, she sets forth as another reason, "Replacement of the expectancy of an inheritance from the deceased person from lifetime efforts that would accrue to the family." Given that claimant is able to save most of the periodic payments she receives, we do not see this as compelling support for a lump-sum payout. Moreover, this factor would be present in virtually every case such as this, so it does not serve to distinguish this case from others and explain why this case should be an exception to the rule that lump-sum payouts are not favored. See *Bagwell*, 94 Ill. 2d at 106. Third, claimant states that the "[a]vailability of immediate financial resources to the family from invested funds if ready funds were needed" warrants a lump-sum payout. However, the evidence shows no such need, and, again, this consideration does not distinguish this case from other similar cases.

¶ 20 Furthermore, claimant does not even attempt to establish that terminating periodic payments in favor of a lump-sum payout would not be in respondent's best interests. Instead, she argues, "It is difficult to imagine any set of facts in any case involving periodic payments that could terminate by future unknown events to be in the best interest of both parties." Later, she reiterates that "it seems impossible to envision or conjure a fact situation in a *death case*, where the best interests of both surviving spouse and family surviving [*sic*] and the employer can be served at the same time." (Emphasis in original.) Perhaps so—however, that simply is consistent with the supreme court's admonition that lump-sum payouts are the exception rather than the rule. *Bagwell*, 94 Ill. 2d at 106. Section 9 clearly states that both parties interests are to

be considered: "If, upon proper notice to the interested parties and a proper showing made before such Commission or any member thereof, it appears to the best interest of the parties that such compensation be so paid, the Commission may order the commutation of the compensation to an equivalent lump sum." 820 ILCS 305/9 (West 2008). Ironically, claimant charges that the Commission has assumed the role of a "super-legislature" by "making its own determination of the wisdom of lump sum settlements" when, in fact, it is claimant who asks us to ignore a portion of the Section 9 and disregard respondent's best interests.

¶ 21 In sum, claimant has shown no particular need or compelling reason on her or her family's behalf for a lump-sum payout. Similarly, nothing indicates a lump-sum payout is in respondent's best interests. Under such circumstances, we cannot say that an opposite conclusion to the Commission's is clearly apparent and that a lump-sum payout clearly would be in the parties' best interests. As such, the Commission's decision on this issue is not against the manifest weight of the evidence. Claimant raises a number of additional points regarding the proper valuation of the lump-sum payout; however, given claimant's failure to establish that the payout would be in the parties' best interests, we need not address those arguments.

¶ 22 IV. CONCLUSION

¶ 23 In light of the foregoing, the order of the circuit court of Henry County confirming the decision of the Commission is affirmed.

¶ 24 Affirmed.

2017 IL App (1st) 160005WC

Workers' Compensation
Commission Division
Opinion Filed: January 6, 2017

No. 1-16-0005WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

ANTHONY MURFF,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	No. 15 L 50353
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION *et al.*	)	Honorable
	)	Carl Anthony Walker,
(City of Chicago, Appellee).	)	Judge, Presiding.

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justices Hudson, Harris, and Moore concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Anthony Murff, appeals from an order of the circuit court of Cook County which confirmed a decision of the Illinois Workers' Compensation Commission (Commission), denying his petition pursuant to section 19(h) of the Workers Compensation Act (Act) (820 ILCS 305/19(h) (West 2014)) by reason of his failure to present evidence demonstrating a change in his physical or mental condition. For the reasons which follow, we affirm the judgment of the circuit court.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on December 27, 2013, and at a section 19(h) (820 ILCS 305/19(h) (West 2014)) hearing conducted by the Commission on December 22, 2014.

¶ 3 The claimant was employed by the City of Chicago (City) as a laborer and worked in its streets and sanitation department. On January 23, 2009, the claimant was at work, pulling a heavy garbage container through the snow, when he felt a pop in his left shoulder. Following his work accident, the claimant sought treatment from Dr. Bush-Joseph and Dr. Phillips who diagnosed him with a C5-C6 disc herniation "with resultant cervical radiculopathy" and a partial-thickness rotator cuff tear of the left shoulder with possible radiculopathy. The claimant underwent a course of medical treatment, including physical therapy, steroid injections, and cervical spine surgery performed on August 10, 2009. The claimant, however, continued to experience left-sided neck pain and stiffness, left shoulder pain, and numbness and tingling in the left hand. Ultimately, on May 14, 2010, Dr. Bush-Joseph released the claimant to light-duty work with a restriction of no lifting greater than 20 pounds. Dr. Bleier of MercyWorks Occupational Health, the City's designated medical facility, also determined that restrictions of no lifting more than 25 pounds and limited use of the left arm were appropriate. According to a work status note dated June 3, 2010, Dr. Bleier wrote that the City was going to provide the claimant with a rodent control job as a temporary accommodation.

¶ 4 On June 8, 2010, the claimant returned to work as a sanitation laborer in the City's rodent control department. His job duties included "baiting" yards and alleys, which required him to carry a 10-pound bucket of poison in his right hand and a scooper in his left hand. He testified that his job title and pay remained the same as when he worked as a garbage man.

¶ 5 On August 7, 2011, the claimant was examined by Dr. Chmell, an orthopedic surgeon, at his attorney's request. In his report, Dr. Chmell opined that the claimant's January 23, 2009, work accident resulted in his C5-C6 disc herniation and left shoulder rotator cuff tendinopathy and that the medical treatment he received for these injuries was reasonable and necessary. Following his examination, Dr. Chmell concluded that the claimant had reached maximum medical improvement, would always require restrictions, and would never be able to resume working as a garbage collector.

¶ 6 At the original arbitration hearing, the claimant testified that he has good and bad days. He explained that he continues to experience pain in his shoulder, stiffness in his neck, and numbness and tingling in his hands. The claimant also testified that any overhead activities are "extremely hard" and he has difficulty getting dressed and applying deodorant to his left side. He used to be an avid hunter and fisherman, but is no longer able to "sport fish" with a lure. He also struggles with lifting his grandchildren, gripping pens and pencils, and driving for long periods of time. Despite these limitations, the claimant stated that he has learned to live with his condition and is able to function.

¶ 7 Following the arbitration hearing, the arbitrator issued a written decision on January 22, 2014, finding that the claimant suffered an injury to his cervical spine and left shoulder as a result of the work accident of January 23, 2009, and that the injury arose out of and in the course of his employment with the City. The arbitrator awarded the claimant temporary total disability (TTD) benefits from January 27, 2009, through June 8, 2010, and permanent partial disability (PPD) benefits in the amount of $664.72 per week for 250 weeks because the cervical spine and left shoulder injuries resulted in a 50% loss of use of a person as a whole. Neither party filed for a review of the arbitrator's decision before the Commission. Thus, pursuant to section 19(b) of

the Act, the arbitrator's decision became the conclusive decision of the Commission. 820 ILCS 305/19(b) (West 2014).

¶ 8 After the hearing, the claimant continued working for the City as a sanitation laborer in rodent control. On June 11, 2014, the claimant's supervisor, George Escavez, told him to report to 39th Street and South Iron Street, which is the City's refuse collection for garbage station. The claimant went to that location the next day and was informed by Gloria, the superintendent, that he was assigned to work as a garbage man. When the claimant told Gloria about his work restrictions, she called and spoke with Escavez in rodent control, and told the claimant that she did not know why they sent him to the sanitation station. Gloria instructed the claimant to return to the office for rodent control, which he did. There, Escavez explained to the claimant that he was supposed to be released to work as a garbage man and, if he could not perform the work, to swipe out and go home or call the union.

¶ 9 On June 20, 2014, the claimant filed a petition pursuant to section 19(h) of the Act (820 ILCS 305/19(h) (West 2014)), and section 8(a) of the Act (820 ILCS 305/8(a) (West 2014)), alleging a material increase in his disability and seeking an award of additional benefits, including maintenance and vocational rehabilitation based upon a reduction in his earning power.

¶ 10 On July 16, 2014, the claimant requested reasonable accommodations, but was told that reasonable accommodations could not be made. The claimant was also informed that, because he had permanent restrictions, the City would probably "never bring him back because they are not doing that anymore."

¶ 11 At the section 19(h) hearing held before the Commission on December 22, 2014, the claimant testified that, after he was assigned to work as a garbage man, he contacted his union but learned that it could not help him. The claimant stated that an effort was made to put him

back onto workers' compensation, but his request was denied. Instead, he was told he could go on ordinary disability, which he did.

¶ 12 The claimant further testified that he received no medical treatment for his left shoulder following the December 27, 2013, arbitration hearing. He also explained that there is nothing else the doctors can do for his neck, that his condition remains relatively the same, and that his work restrictions have not changed from when his case was tried at arbitration. He admitted that he has not returned to Dr. Phillips since July of 2010, and has not undergone any additional surgery or physical therapy. The claimant also testified that he is not currently working and has not applied for employment with any other employers.

¶ 13 On April 27, 2015, the Commission denied the claimant's section 19(h) petition. The Commission found that the term "disability" as used in section 19(h) refers only to physical and mental disability, not economic disability. Since the claimant failed to present any evidence demonstrating a material change in his physical or mental condition, the Commission found no basis to reopen or modify the benefits the claimant was previously awarded. The Commission also determined that the doctrine of *res judicata* barred the claimant from seeking maintenance and vocational rehabilitation benefits because he failed to raise the issue at the arbitration hearing. Alternatively, even if the maintenance and vocational rehabilitation benefits were available, the Commission found that the claimant failed to present sufficient evidence establishing his entitlement to those benefits.

¶ 14 The claimant sought a judicial review of the Commission's decision in the circuit court of Cook County. On December 17, 2015, the circuit court confirmed the Commission's decision, and this appeal followed.

¶ 15 We first address the claimant's argument that the Commission erred in finding that the term "disability" in section 19(h) of the Act refers only to physical and mental disability, not economic disability.

¶ 16 Initially, we note that the resolution of this issue requires this court to interpret section 19(h) of the Act, which presents a question of law that we review *de novo*. *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 402 (2005). In construing the Act, our primary goal is to ascertain and give effect to the intent of the legislature. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370 (2009). The best indication of legislative intent is the statutory language, given its plain and ordinary meaning. *Id.* "We must construe the statute so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless or void." *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524 (2006). In addition to the statutory language, courts also interpret the Act liberally to effectuate its purpose: providing financial protection to injured workers. *Beelman Trucking*, 233 Ill. 2d at 371. In light of these principles, we turn to the statutory provisions at issue.

¶ 17 Section 19(h) provides, in relevant part, as follows:

> "[A]s to accidents occurring subsequent to July 1, 1955, which are covered by any agreement or award under this Act providing for compensation in installments made as a result of such accident, such agreement or award may at any time within 30 months, or 60 months in the case of an award under Section 8(d)1, after such agreement or award be reviewed by the Commission at the request of either the employer or the employee on the ground that the disability of the employee

has subsequently recurred, increased, diminished, or ended." 820 ILCS 305/19(h) (West 2014).

¶ 18 The parties dispute the meaning of "disability" as used in section 19(h). The City contends that the term "disability" refers only to physical and mental disability, while the claimant maintains that it also encompasses economic disability. The Commission rejected the claimant's interpretation, relying on *Petrie v. Industrial Comm'n*, 160 Ill. App. 3d 165 (1987).

¶ 19 In *Petrie*, 160 Ill. App. 3d at 168, the claimant sustained injuries to his right index and middle fingers. At arbitration, the claimant requested an award for impaired earning capacity under section 8(d)(1), but was awarded an amount for percentage of loss of man as a whole under section 8(d)(2) of the Act. Thereafter, the claimant filed a petition for review under section 19(h) seeking additional compensation for impairment of earning capacity. At the hearing, the claimant testified that it took him three to four times longer to accomplish the same job and that his gross earnings had diminished. The Commission denied the claimant's section 19(h) petition, finding that there had been no medical evidence of change in his physical condition or evidence of change in circumstances since the time of arbitration. *Id.*

¶ 20 On appeal, the claimant in *Petrie* argued that he was "entitled to a more accurate award calculation for his physical disability, based on [an] increase in economic disability." *Id.* at 170. In rejecting this argument, this court noted that a review of the Act showed that "when the legislature used the term 'disability' in section 19(h) it was referring to physical and mental disability and not economic disability." *Id.* at 171. We explained:

> "This intent is evident by reference to the following sections: section 1(b)(3) refers to an employee's 'cause of action by reason of any injury, disablement or death ***'; section 8(d)(1) states that an injured employee who 'becomes partially

> incapacitated from pursuing his usual and customary line of employment *** shall *** receive compensation for the duration of his disability ***'; section 8(d)(2) refers to injuries which 'disable [the employee] from pursuing other suitable occupations'; and section 12 provides that an injured employee must submit to a physical examination on request of the employer for the purpose of determining the nature, extent, and duration of the injury and for the purpose of determining the amount of compensation due 'for disability.' [Citations.] On the other hand, when the legislature intended to refer to something other than physical and mental disability, it used different or additional language: sections 6(c)(1) and 8(h-1) refer to 'legal disability'; and section 8(d)(2) refers to 'impairment of earning capacity.' [Citation.]" *Id.* at 171-72.

Accordingly, we held that an increase in economic disability alone is not a proper basis for modification of an award pursuant to section 19(h) of the Act; rather, the claimant must present evidence establishing that his physical or mental condition has changed. *Id.*

¶ 21 Based upon the holding in *Petrie*, we conclude that the Commission did not err in finding that the term "disability" as used in section 19(h) of the Act, refers to physical and mental disabilities, not economic disabilities. See also *United Airlines v. Workers' Comp. Comm'n*, 407 Ill. App. 3d 467, 471 (2011) (noting that a change in economic circumstances is not a proper basis for modification of an award pursuant to section 19(h)); *Cassens Transport Co. v. Industrial Comm'n*, 354 Ill. App. 3d 807, 810 (2005) (the term "disability" in section 8(d)(1) refers to physical and mental disability).

¶ 22 Having found that the term "disability" in section 19(h) refers to physical and mental disability, we next consider whether the claimant's disability has "recurred, increased, diminished

or ended" since the time of the original award. *Gay v. Industrial Comm'n*, 178 Ill. App. 3d 129, 132 (1989). "To warrant a change in benefits, the change in a [claimant's] disability must be material." *Id.* In reviewing a section 19(h) petition, the evidence presented in the original proceeding must be considered to determine if the claimant's position has changed materially since the time of the original decision. *Id.* Whether there has been a material change in a claimant's disability is an issue of fact, and the Commission's determination will not be overturned unless it is contrary to the manifest weight of the evidence. *Id.* For a finding of fact to be contrary to the weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 23 Here, we cannot find that an opposite conclusion from the Commission's is clearly apparent from the record. In its decision, the Commission pointed out that the claimant testified that his physical disability has been the same since the original arbitration hearing, that he has not sought any medical treatment since that time, and that he is under the same work restrictions. We also note that the claimant did not provide any evidence that there was a mental component to his claim or that his mental condition had changed whatsoever. The claimant's sole argument is that the City's refusal to offer him work within his restrictions has resulted in economic injuries. However, as we explained above, economic injuries do not fall within the ambit of the term "disability" as used in section 19(h). Because there is evidence in the record to support the Commission's finding that the claimant failed to prove that his physical or mental condition substantially and materially changed after the original arbitration hearing, we find that an opposite conclusion is not clearly apparent.

¶ 24 We next address the claimant's contention that the Commission erred in failing to award him maintenance and vocational rehabilitation benefits under section 8(a) of the Act (820 ILCS

305/8(a) (West 2014)). In his brief before this court, the claimant acknowledges that he cannot find any cases where maintenance and vocational rehabilitation benefits were available after a final award. He argues, however, that these benefits, like medical expenses, should remain available even after the entry of a final award.

¶ 25 The question of whether section 8(a) allows a claimant to seek maintenance and vocational rehabilitation benefits after a final award is a matter of statutory construction, which is a question of law. Issues of law are considered *de novo* on review without deference to the Commission's determination. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 187 (1999). Therefore, we review *de novo* whether section 8(a) allows a claimant to seek maintenance and vocational rehabilitation benefits after a final award.

¶ 26 Our supreme court has stated that the Commission is an administrative agency, lacking general or common law powers. *Cassens*, 218 Ill. 2d at 525. As a consequence, its powers are limited to those granted by the legislature and any action taken by the Commission must be specifically authorized by statute. *Id.* "An act that is unauthorized is beyond the scope of the agency's jurisdiction." *Id.*

¶ 27 As stated, the claimant argues that section 8(a) of the Act gives the Commission the authority to consider and address his request for maintenance and vocational rehabilitation benefits. Section 8(a) states, in relevant part, that an employer "shall *** pay for treatment, instruction and training necessary for the physical, mental and vocational rehabilitation of the employee, including all maintenance costs and expenses incidental thereto." 820 ILCS 305/8(a) (West 2014). However, we find that, while section 8(a) provides general authorization for the Commission to award maintenance and vocational rehabilitation benefits, it does not authorize the Commission to award these benefits after a final decision has been entered. That is, contrary

to the claimant's assertions, section 8(a) contains no specific language authorizing the claimant to file a petition seeking a modification of a final award, nor does it permit the Commission to address the issue of maintenance and vocational rehabilitation at any time and in any manner presented by the parties. Rather, the Commission's actions must be specifically and expressly provided for by the Act.

¶ 28 Section 19 of the Act (820 ILCS 305/19 (West 2014)) provides specific procedures for determining "[a]ny disputed questions of law or fact." Under that section, an arbitrator's decision becomes the conclusive decision of the Commission "[u]nless a petition for review is filed by either party within 30 days after the receipt" of the arbitrator's decision. 820 ILCS 305/19(b) (West 2014). "[T]he Commission may modify a conclusive decision only where the Act specifically authorizes it to do so." *Cassens*, 218 Ill. 2d at 525.

¶ 29 In *Cassens*, 218 Ill. 2d at 525, our supreme court discussed the limited circumstances under which the Act authorizes the Commission to modify or reopen a final award. In particular, the court noted that section 19(f) allows modifications to correct clerical errors, section 19(h) permits the Commission to reopen an installment award for a limited time, and section 8(f) allows the reassessment of any award for total and permanent disability. *Id.* at 526-27 (quoting 820 ILCS 305/19(f), 19(h), 8(f) (West 2002)). In finding that another section of the Act did not authorize the Commission to reopen a final award, the court noted as follows with respect to the aforementioned sections of the Act:

> "Each of these provisions includes language that is tailored to authorize a review proceeding. Section 19(f) specifically gives the arbitrator and Commission the power to recall an award. Section 19(h) allows either party to petition for review of an installment award within 30 months of its issuance. Section 8(f) indicates

that employers may cease payments when a totally and permanently disabled employee returns to the workforce, giving the employee authorization to petition the Commission for a review of the award. The plain language of each section alerts employers and employees to when review may be had and how to obtain it." *Id.* at 527.

¶ 30 Here, the arbitrator issued her decision on January 22, 2014. Since neither party filed a petition for review of that decision, it became the conclusive decision of the Commission on February 22, 2014. In this case, none of the circumstances set forth in *Cassens* under which a conclusive decision of the Commission may be modified or reopened exists. Contrary to the claimant's assertions, section 8(a) does not contain any specific language authorizing a party to file a petition for review of a final award, as section 19(h) does. It does not authorize the Commission to recall an award, as section 19(f) does. Nor does it authorize a claimant to petition for review, as section 8(f) does. It would be inappropriate for us to read one of these procedures into section 8(a) when the legislature has included none of them in that section. Reading the Act as a whole, and following the reasoning in *Cassens*, we hold that section 8(a) does not authorize the Commission to address the issues of maintenance and vocational rehabilitation at any time after it has issued its final decision. Were we to adopt the claimant's position that section 8(a) allows the Commission to award maintenance and vocational rehabilitation benefits at any time, we would essentially render meaningless the requirements in section 19(h) that the claimant's disability "recurred, increased, diminished or ended" since the time of the original award. See *Cassens*, 228 Ill. 2d at 524 (when interpreting a statute, a court must avoid an interpretation that would render any portion of the statute meaningless or void).

Thus, the Commission does not have jurisdiction under section 8(a) to modify or reopen the claimant's final award.

¶ 31 In so holding, we note that we agree with the claimant's assertion that maintenance and vocational rehabilitation benefits may be available under section 19(h). As this court stated in *Curtis v. Illinois Worker's Compensation Comm'n*, 2013 IL App (1st) 120976WC, ¶ 15, "when section 19(h) is read as a whole, it is clear that the legislature did not intend to limit the scope of section 19(h) to only permanency benefits. Rather, the statute was meant to cover TTD benefits as well." As a consequence, in order for the claimant to obtain maintenance and vocational rehabilitation benefits after a final award, he must satisfy the preliminary requirements of section 19(h) by showing a substantial and material change in his disability. However, as we already discussed, the claimant failed to make this showing.

¶ 32 Finally, the claimant urges this court to interpret the Act as broadly as possible, given that it is a remedial statute intended to provide financial protection for injured workers. See *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 556 (2004). According to the claimant, to deny maintenance and vocational rehabilitation benefits following a period of reduced earning capacity would frustrate the purpose of the Act. However, as noted above, adopting the claimant's position would require us to read section 19(h) out of the Act. While the result we reach may appear harsh to the claimant, we believe that it is a concern better addressed to the legislature.

¶ 33 In sum, because the claimant failed to show a material change in his physical or mental condition since the arbitrator's January 22, 2014, decision, the Commission properly denied his request for additional benefits under section 19(h) of the Act. We, therefore, affirm the judgment of the circuit court which confirmed the Commission's decision.

¶ 34 Affirmed.