STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEONARD LUDTKE,

Petitioner,

vs.

NO: 16 WC 009295
19 IWCC 712

COUNTY OF DeKALB,

Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Respondent finds that a clerical error exists in the Decision and Opinion on Review dated December 31, 2019, in the above captioned.

Respondent's Motion for Corrected Decision was timely filed on January 10, 2020.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated December 31, 2019 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

DATED: JAN 16 2020
o: 12/19/19
BNF/kcb
45

Barbara N. Flores

STATE OF ILLINOIS)
) SS.
COUNTY OF KANE)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEONARD LUDTKE,

Petitioner,

vs.

NO: 16 WC 9295
19 IWCC 712

COUNTY OF DeKALB,

Respondent.

CORRECTED 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, temporary total disability, medical expenses, partial permanent disability, and penalties, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

I. FINDINGS OF FACT

A. Background

On December 30, 2015, Petitioner was employed by Respondent as a Maintenance Worker II. Petitioner testified he had been employed by Respondent for approximately 17 years. Petitioner stated his job duties included general maintenance, snow removal, light electrical and plumbing work, and cleaning. Petitioner added that he was available to assist others or fill in for unavailable co-workers. Petitioner was 56 years old at the time of his injury.

On December 30, 2015, Petitioner was generally assigned to the DeKalb County Courthouse. He could not recall how long he had been assigned to the courthouse but estimated it had been a couple of years. Petitioner testified the campus of Respondent in Sycamore, Illinois

included the courthouse at the corner of State and Main, along with the Public Safety Building (commonly known as the jail), the Legislative Center and the Administration Building. According to Petitioner, the jail was across Main Street, directly east of the courthouse, while the Legislative Center and Administrative Building were north of the courthouse. Petitioner described the campus as an L-shape, with the Administration building at the top or furthest north, with the courthouse to the west. Petitioner acknowledged there is metered parking on the public streets surrounding the courthouse.

Petitioner testified that prior to December 30, 2015, there had been a substantial improvement of the courthouse, including an addition to the north side. He later clarified that the improvements were constructed years earlier and there was no ongoing construction. Petitioner stated that after the addition was completed, additional parking was created on the north side of the building, directly adjacent to the addition. He testified that part of the street was taken as in-line parking for the courthouse. He described the parking as angled spaces just off the street, generally reserved for courthouse employees from 8:00 or 8:30 a.m. through 4:30 p.m. Petitioner stated that his department (facilities management) maintained those parking stalls, including snow removal, ice removal, salting and the like.

Petitioner also testified that the public entered the courthouse only through the main entrance on the south side of the building but there were four other entrances available for employees. According to Petitioner, there was a main employee entrance on the north side of the courthouse, as well as entrances at the east side, northwest corner, and the west side. Petitioner stated the employee entrances required entering a code into a keypad.

B. Accident

Petitioner testified that on December 30, 2015, his shift was from 7:00 a.m. to 3:30 p.m. He stated he arrived on the campus that day at approximately 6:45 to 6:50 a.m. Petitioner acknowledged he was not called into work early and was not paid for the time before his shift.

Petitioner testified he parked in one of the spaces on the north side of the courthouse. According to Petitioner, these spaces were reserved for particular employees, including judges. Petitioner stated that other employees generally parked in the main parking lot east of the Legislative Center, but to his knowledge, they were not required to do so.

Petitioner explained that he parked in a space reserved for another county employee to drop off his lunch and coffee; he wanted to avoid carrying it across the campus because he generally ate lunch at the courthouse. He explained that his coffee would have become cold carrying it from the main lot to the Public Safety Building to sign in for work before going to the courthouse. Petitioner stated he typically would deposit his lunch, drive to and park in the main lot, and enter the Public Safety Building to sign in on his time sheet.

Petitioner acknowledged he could have parked elsewhere and was not required to eat lunch at the courthouse. He later added that he had occasionally been telephoned to respond to emergencies while off-site during lunch.

Petitioner testified that after parking, he entered the courthouse through the northwest entrance and dropped off his lunch in the shop area. He stated that while entering the building, he noticed there was a thin layer of ice covering the parking lot, but the sidewalk seemed clear. According to Petitioner, it did not appear that anyone had cleared ice or snow, or salted the parking lot, but he observed ice melt on the sidewalk. Petitioner acknowledged it was icy throughout the city and there was snow around. He also acknowledged that he walked through snow to reach the public sidewalk and his shoes may have become wet.

Petitioner testified that after dropping off his lunch, he exited the building. Petitioner stated that as he was returning to his car, he slipped and fell in the parking area, approximately five or six feet away from his car. He added that his feet came out from under him and he landed heavily on his left shoulder and arm. Petitioner agreed there was no crack or defect in the sidewalk, or anything other than ice that caused him to fall.

According to Petitioner, he experienced extreme pain in his left shoulder and further examination revealed very limited mobility of the arm with extreme pain. Petitioner also testified that prior to his fall, he had never injured or received medical treatment involving his left shoulder and arm. Petitioner testified he notified his supervisor of the incident and drove himself to the emergency room at Kishwaukee Hospital.

C. Medical Treatment

On December 30, 2015, Petitioner presented to the emergency department at Kishwaukee Hospital. The medical records indicate Petitioner informed the staff he was outside at work and slipped on the ice, landing on the left shoulder/humerus; he denied any head injury, neck pain, chest pain, abdominal pain, or syncope. According to the records, two X-rays of the left shoulder showed no fracture, dislocation, focal bony abnormality or degenerative changes. Two X-rays of the left humerus showed similar results. A report on a CT scan of the head indicated no evidence of acute intracranial abnormality. Another report on a CT scan of the cervical spine indicated: no fractures; straightening of the normal cervical lordosis, which may be secondary to patient positioning or can be seen with muscle spasm; and multilevel cervical spondylosis.

Petitioner was diagnosed with a left shoulder contusion, with the notation of no obvious fracture or dislocation. The patient summary report also indicates instructions were given for a shoulder sprain. Petitioner was discharged to home care with instructions for rest, heat, ice and a shoulder sling as needed.

On January 4, 2016, Petitioner was seen at the Midwest Orthopedic Institute by Marcus Roman, assistant to Dr. Tony Choi. After providing a history of the incident, Petitioner

complained of pain with sleeping, especially on the left shoulder. Petitioner also complained of pain with overhead movements. Roman noted Petitioner previously had a right rotator cuff repair performed by Dr. Choi.

Roman's physical examination indicated the range of motion on both shoulders actively was 160/60/T9. Roman noted that on the left, he could forward elevate Petitioner to 160 degrees with a little pain. Strength was 4/5 in forward elevation on the left, 5/5 with external rotation but with pain, and 5/5 with internal rotation. Roman's impression was left shoulder pain, with suspicion of a rotator cuff tear. Roman recommended obtaining an MRI to rule out a rotator cuff tear. Roman also issued a work note stating Petitioner could not return to work.

The MRI of Petitioner's left shoulder was performed on January 7, 2016. The interpreting radiologist's impressions were: (1) complete full-thickness tear supraspinatus tendon and full-thickness tear of the anterior-most infraspinatus tendon with more mild diffuse infraspinatus tendinosis; (2) full-thickness tear of the cephalad 2/3 subscapularis tendon; (3) moderately severe acromioclavicular degenerative change; and (4) moderately large hemarthrosis freely communicating with the subacromial-subdeltoid bursa.

On January 11, 2016, Roman reviewed the MRI results and recommended surgical fixation for Petitioner's acute rotator cuff tears, to which Petitioner agreed. Roman noted that Dr. Choi also reviewed the MRI. On February 5, 2016, Petitioner saw Dr. Choi, whose notes confirm he reviewed the MRI and recommended arthroscopic rotator cuff surgery (as opposed to open surgery).

On February 11, 2016, Dr. Choi performed a left shoulder arthroscopic double row subscapularis repair and supraspinatus repair, subacromial decompression and biceps tenodesis. Dr. Choi's pre- and post-operative diagnoses were the same: left shoulder massive rotator cuff tear supraspinatus, infraspinatus, subscapularis. Petitioner was also referred to Dr. Manav Salwan on this date for post-operative medical management and diabetic management.

On February 12, 2016, Dr. Choi noted Petitioner was doing well and the plan would be to discharge him home. The doctor also noted he was trying to arrange home health therapy, as Petitioner had troubles with transportation due to living alone.

On February 19, 2016, Petitioner followed up with Roman, rating his pain at 1/10 at rest and 6/10 with activity. Petitioner also reported his pain was moderately controlled with Norco. Roman scheduled another visit in a week to remove Petitioner's sutures. Roman noted Petitioner would continue physical therapy and transition from home health to outpatient therapy the next week. Roman also continued Petitioner's use of a sling and abductor wedge. On February 24, 2016, Petitioner began twice-weekly occupational therapy. On February 26, 2016, Roman continued therapy, as well as the sling and abductor wedge, scheduling a visit with Dr. Choi in two weeks.

On March 11, 2016, Petitioner saw Dr. Choi, reporting his physical therapy was going well. Petitioner reported he was not taking Norco most days but would occasionally for neck pain. Dr. Choi noted Petitioner externally rotated passively relatively easy to 45 degrees with forward elevation of approximately 90 degrees. The doctor noted Petitioner was progressing well and removed the abduction portion of the sling. He also scheduled a follow-up visit with Roman in four weeks.

Petitioner saw Roman again on April 8, 2016. The record indicates Petitioner complained of some left shoulder pain at night. Roman's physical examination showed an active range of motion for the left shoulder of 90/45/L5, while the passive range of motion was 140/50/L5. The range of motion for the right shoulder was 170/60/T10. Roman continued Petitioner's physical therapy and ordered a follow-up visit in four weeks.

On May 6, 2016, Petitioner's only complaint to Roman was of left shoulder pain in the mornings, which improved with exercises and extra-strength Tylenol. Roman's examination showed the range of motion of the left shoulder was 150/60/L1, while the right shoulder was 170/60/T10. Petitioner's strength in forward elevation was 4/5, while his strength in internal and external rotation was 5/5. Roman again continued Petitioner's physical therapy and scheduled a visit in four weeks.

On June 3, 2016, Petitioner reported to Roman that he had no change in his shoulder pain, but felt his left shoulder was getting a little stiff. The range of motion and strength measurements were the same as his prior visit. Roman noted that in that morning's therapy, Petitioner only reached 130 degrees in forward elevation, but was able to get to 150 degrees when tested at the clinic. Roman extended Petitioner's physical therapy and scheduled another monthly visit, noting Petitioner would remain off work because there was no light duty work available.

Petitioner saw Dr. Choi on July 1, 2016. The record indicates Petitioner's range of motion for his left shoulder remained the same, but the strength in forward elevation was 4+/5. Dr. Choi noted Petitioner was still weak in forward elevation, but gradually improving. The doctor ordered continued physical therapy, with a follow-up in four weeks.

On July 9, 2016, Petitioner complained to Dr. Choi that earlier in the week, he was exercising during physical therapy and felt a pop in his neck/trapezius region, resulting in soreness around the neck which made it difficult to progress in the protocol. Dr. Choi found Petitioner's range of motion in the left shoulder was 160/60/T11, while strength in forward elevation remained 4+/5. Dr. Choi noted that Petitioner may have strained something and recommended possible deep tissue massage in addition to physical therapy. The doctor also recommended continuing strengthening exercises for endurance.

On August 26, 2016, Petitioner reported some remaining weakness to Dr. Choi, but stated the physical therapy was going well. Dr. Choi's examination found Petitioner's range of motion

in the left shoulder was 160/60/T9, while strength in forward elevation was 5-/5. Dr. Choi noted that Petitioner's residual weakness should improve with further endurance strengthening in physical therapy. The doctor also discussed work with Petitioner, who stated his boss would not let him return until he reached 100 percent. Dr. Choi hoped to return Petitioner to work after another four-week evaluation.

On September 30, 2016, Dr. Choi found Petitioner's range of motion in the left shoulder was 160/60/T9, while strength in forward elevation was 5/5. Dr. Choi noted that Petitioner still had a little endurance-limited weakness but was able to hold against forward elevation for quite some time before he fatigued. As Petitioner was not experiencing pain and his strength was near normal, Dr. Choi believed he would advance Petitioner to full-duty work and consider placing him at MMI in four weeks.

Petitioner last visited Dr. Choi on October 28, 2016. Petitioner's range of motion in the left shoulder and strength in forward elevation remained the same. Dr. Choi noted he sent Petitioner back to work after the prior visit and Petitioner reported tolerating it well, with little to no discomfort. Dr. Choi placed Petitioner at MMI and indicated he would see Petitioner on an as-needed basis.

D. Narrative Report by Dr. Choi

On June 29, 2016, Dr. Choi wrote a two-page report on his treatment of Petitioner. In the report, Dr. Choi briefly recounts Petitioner's history, the MRI results, the surgery, and the post-operative follow-up visits. Dr. Choi then opined with a reasonable degree of medical certainty that the fall on December 30, 2015 in the workplace parking lot did cause the acute rotator cuff tear on Petitioner's left shoulder.

E. Section 12 Examination by Dr. Weiss

On February 8, 2017, Petitioner was examined by Dr. Stephen Weiss, an orthopedic surgeon, at Respondent's request. Dr. Weiss prepared a report on February 17, 2017 wherein, following a review of Petitioner's medical records and a physical examination, Dr. Weiss diagnosed Petitioner with a full-thickness rotator cuff tear of the left shoulder, and a right shoulder rotator cuff repair by history (approximately seven years prior). Dr. Weiss also provided ratings according to the AMA Guides of a 7% upper extremity impairment, equivalent to a 4% whole person impairment.

F. Additional Information

Petitioner testified that between December 30, 2015 and October 3, 2016, he did not return to work, excepting a half-day on January 2 or 3, 2016. Petitioner also testified that $92,699.94 was paid by his group health insurer for treatment of his left shoulder injury, and that after his $225.00 out-of-pocket payments, there was an outstanding balance of $12,172.74.

Petitioner further testified he has returned to his full job as a maintenance worker, earning slightly more than he did prior to his injury. Petitioner stated he is right arm dominant.

Regarding his current condition of ill-being, Petitioner testified that upon returning to work for Respondent, he has had to self-modify his work to compensate for lifting and moving heavy objects such as file boxes, copy paper, and bags of ice melt or water softener salt. Petitioner acknowledged he lifts items weighing over 50 pounds himself but is more careful about how he balances the load and stacks items. Petitioner added that climbing vertical ladders on the roof of the Public Safety Building (where he now works) to check the roof and exhaust fans is difficult; shoveling snow can be painful. Petitioner testified he has continued to exercise at home, though it was not prescribed.

II. CONCLUSIONS OF LAW

A. Petitioner's Work-Related Accident

The Arbitrator found Petitioner failed to prove by a preponderance of evidence that he sustained an accident that arose out of and in the course of his employment which resulted in a disabling injury. The Arbitrator concluded the danger of slipping on the ice was not peculiar to his work and his exposure to the risk was not greater than that of the general public.

The issue of whether an injury arose out of and in the course of employment is generally a question of fact. *Suter v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 15. "However, when the facts are undisputed and susceptible to but a single inference, the question is one of law subject to *de novo* review." *Id.* In this case, the material facts are not susceptible to a single inference, the chief examples being whether the parking lot at issue is a public lot or provided to Respondent's employees when its use is restricted to particular employees for much of the day. Accordingly, the issue remains a question of fact.

"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 (2003). 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." *Sisbro*, 207 Ill. 2d at 203.

The question of whether a claimant's injury arose out of his or her employment depends upon the type of risk to which he or she was exposed. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011). "There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the

general public is commonly exposed." *Dukich v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 31.

"[B]oth our supreme court and our appellate court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40 (and cases cited therein); see also *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038 (2004) (and cases cited therein). "The presence of a 'hazardous condition' on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40. "In other words, such injuries are not analyzed under 'neutral risk' principles; rather they are deemed to be risks 'distinctly associated' with the employment." *Id.*

The Arbitrator, in focusing on whether Petitioner's exposure to the risk of the ice was greater than that of the general public, appears to have analyzed this case as a "neutral risk" situation and did not consider whether it was a "hazardous condition" situation. The "hazardous condition" cases generally involve injuries caused by the natural accumulation of snow or ice in a parking lot or other outdoor space owned or controlled by the employer. *Dukich*, 2017 IL App (2d) 160351WC, ¶ 41; see also *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038 (2004) (and cases cited therein).

In this case, the unrebutted evidence shows that Petitioner was injured after falling due to ice and show in a parking area controlled by Respondent. Indeed, Petitioner's department was responsible for ice and snow removal in this parking area. Therefore, it cannot be said that Petitioner would never be expected to be in this parking area in the course of his work duties. Moreover, Respondent controlled when the parking lot was to be used solely by employees and when it was open to other members of the public.

Respondent argues that Petitioner fell in a public parking lot and not one designated for employees. This is not strictly true. The parking area at issue is restricted to particular courthouse employees from 8:00 or 8:30 a.m. through 4:30 p.m. Respondent also permits members of the public to park in this area during "non-business" hours, including at the time of the injury in this case. However, in *Mores-Harvey*, our appellate court considered that dual usage of a parking lot was not the issue:

> "Whether a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. If this is the case, then the lot constitutes part of the employer's premises. The presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim." *Mores-*

Harvey, 345 Ill. App. 3d at 1040 (citing *Archer Daniels Midland Co. v. Industrial Comm'n,* 91 Ill. 2d 210, 216 (1982)).

In *Wal-Mart Stores, Inc. v. Industrial Comm'n,* 326 Ill. App. 3d 438 (2001), however, the appellate court reversed an award based in part on the fact that the employer's parking lot was open to both employees and the public. See *id.* at 445 (distinguishing *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill. 2d 429, 430-31 (1968), and *American Electric Cordsets v. Industrial Comm'n,* 198 Ill. App. 3d 87, 91(1990)). Respondent also notes that the *Mores-Harvey* court, relying in part on *Homerding v. Industrial Comm'n,* 327 Ill. App. 3d 1050 (2002), ruled in favor of the claimant in part because "the general public was free to park anywhere in the lot, [but] claimant's choices were restricted. Therefore, claimant's exposure to risk was necessarily greater than that of the general public." *Mores-Harvey*, 345 Ill. App. 3d at 1042.

Respondent overlooks that the *Mores-Harvey* court, *after* concluding that a hazardous condition in the parking lot supported finding a compensable claim, discussed *Wal-Mart Stores* and *Homerding* as cases which considered *only* the second exception to the "general premises" rule. See *Mores-Harvey*, 345 Ill. App. 3d at 1040. This second exception permits recovery for off-premises injuries where "'the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons.'" *Id.* at 1038 (quoting *Illinois Bell Telephone Co. v. Industrial Comm'n,* 131 Ill. 2d 478, 484 (1989)). The *Mores-Harvey* court concluded the claimant would also recover under the second exception. *Mores-Harvey*, 345 Ill. App. 3d at 1042. But it was not required to do so, having already concluded the first exception applied because the parking lot, even if dual-use, was maintained and provided for employees' use.[1]

Respondent contends Petitioner was also required to prove he had begun his work day, and that he was required to park in the lot where the injury occurred. The latter asserted requirement is based on the discussion of *Homerding* in *Mores-Harvey*. The former asserted requirement is not entirely accurate. Rather, the injury must be sustained "within a reasonable time before or after work." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40; see also *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill. 2d 429 (1968) (affirming award where employee arrived 40-50 minutes early and slipped in parking lot before proceeding to breakfast at a nearby café). In this case, Petitioner's shift began at 7:00 a.m. He arrived on Respondent's campus at approximately 6:45 to 6:50 a.m. A gap of 10 to 15 minutes is within a reasonable time before or after Petitioner's shift.

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[1] This first exception was recently discussed by the Illinois Appellate Court in *Walker Brothers, Inc. v. Illinois Workers' Compensation Comm'n*, 2019 IL App (1st) 181519WC. The *Walker Brothers* court observed that "'[t]he decisive issue in parking lot cases usually is whether or not the lot is owned by the employer, or controlled by the employer, or is a route required by the employer.'" *Id.* ¶ 22 (quoting *Maxim's of Illinois, Inc. v. Industrial Comm'n*, 35 Ill. 2d 601, 604 (1966)). Here, the lot was controlled by Respondent.

Respondent notes Petitioner was not required to keep his lunch or coffee in the courthouse. This objection is consistent with Respondent's reliance on *Illinois Bell Telephone Co.*, but, as noted above, that case involved the second exception to the "general premises" rule, not the first. In a "hazardous condition" case, "[t]he rationale for awarding compensation is that the employer-provided parking lot is considered part of the employer's premises." *Mores-Harvey*, 345 Ill. App. 3d at 1038 (citing L. Larson, Larson's Workers' Compensation Law § 13.04[2][a], [b], at 13--40-13--41 (2002)).

The amount of control Respondent exercised over Petitioner's lunch arrangements, however, is relevant to establish that Petitioner's depositing of his lunch and coffee in the courthouse before parking in the main lot was a reasonably necessary act of personal comfort.

The personal comfort doctrine provides:

> "'Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the * * * method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.'" *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 211 (1999) (quoting 2 A. Larson & L. Larson, Workers' Compensation Law § 21.00, at 5-5 (1998)).

Moreover:

> "'If the employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment. [Citation.] The employer may, nevertheless, still be held liable for injuries resulting from an unreasonable and unnecessary risk if the employer has knowledge of or has acquiesced in the practice or custom,'" *Karastamatis*, 306 Ill. App. 3d at 211 (quoting *Eagle Discount Supermarket v. Industrial Comm'n,* 82 Ill. 2d 331, 340 (1980)).

The personal comfort doctrine generally encompasses acts such as eating and drinking, obtaining fresh air, seeking relief from heat or cold, showering, resting, and smoking. *Karastamatis*, 306 Ill. App. 3d at 211 (citing 2 A. Larson & L. Larson, Workers' Compensation Law § 21.10, at 5-5 (1998)).

In this case, Petitioner sought relief from the cold for himself, his coffee and food during the short period before his shift. Using the nearest dual-use parking lot was foreseeable, not unreasonable or unexpected; parking south or west of the courthouse was metered while the east side was bounded by a major thoroughfare with no parking. The risk of ice in the area is not outside any reasonable exercise of Petitioner's duties; his department is responsible for clearing

snow and ice in the parking area. Petitioner's morning routine was not so unusual and unreasonable that the conduct cannot be considered an incident of the employment. Rather, it was a reasonably foreseeable act of personal comfort.

Lastly, Respondent argues Petitioner was not exposed to a risk greater than that to which the general public was exposed. This is again either dependent on *Illinois Bell Telephone Co.* (which involved the common area of a mall, not a parking lot controlled by an employer) or on characterizing this case as involving a "neutral risk." Accordingly, the Commission rejects the argument for the reasons stated above. Moreover, as Petitioner notes, he was accessing the courthouse using an employee entrance from an area where the public also was permitted to park, but would not be expected to park, given that the public entrance was on the other side of the courthouse.

For all of the aforementioned reasons, the Commission concludes that Petitioner proved by a preponderance of evidence that he sustained an accident which arose out of and in the course of his employment.

B. Causal Connection

The Commission next considers whether Petitioner's current condition of ill-being is causally related to the accident. In his narrative report, Dr. Choi opined with a reasonable degree of medical certainty that the fall on December 30, 2015 in the workplace parking lot did cause the acute rotator cuff tear on Petitioner's left shoulder. In his IME report, Dr. Weiss does not offer a contrary view. Petitioner testified regarding his continuing weakness and limitations at work. Given this record, the Commission concludes Petitioner's current condition is causally connected to the accident.

C. Temporary Total Disability

Petitioner claims he was entitled to temporary total disability benefits in the amount of $508.39 per week for the 39-week period from January 4, 2016 through October 3, 2016, pursuant to §8(b) of the Act. The parties stipulated in the Request for Hearing that Petitioner's average weekly wage, calculated pursuant to section 10 of the Act, was $762.59. Accordingly, Petitioner's claim represents the statutory two-thirds of his average weekly wage. See 820 ILCS 305/8(b)1 (West 2018). Respondent disputed this claim by denying the accident arose out of the course of Petitioner's employment. Having found Petitioner's accident compensable, the Commission awards Petitioner the claimed temporary total disability benefits.

D. Medical Expenses

Petitioner claims Respondent should pay outstanding reasonable and necessary medical expenses of $12,172.74 pursuant to the fee schedule and reimburse him $225.00 for out-of-pocket medical expenses pursuant to §§8(a) and 8.2 of the Act. Petitioner also acknowledges

Respondent should be given a credit of $92,699.94 for medical benefits paid by its group medical carrier and hold Respondent harmless for any claims for which it receives credit, pursuant to §8(j) of the Act. Respondent again disputed this claim by denying the accident arose out of the course of Petitioner's employment. Having found Petitioner's accident arose out of his employment, the Commission awards Petitioner the claimed medical expenses, and awards Respondent the credit under §8(j) of the Act as stipulated by the parties in the Request for Hearing.

E. Permanent Partial Disability

Petitioner further seeks permanent partial disability benefits representing a 15% loss of the person as a whole. Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of permanent partial disability benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2018). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

Regarding the level of impairment contained within a permanent partial disability impairment report, the Section 12 examiner, Dr. Weiss, provided ratings according to the AMA guidelines of a 7% upper extremity impairment, equivalent to a 4% whole person impairment. Petitioner did not submit an impairment rating. The Commission gives some weight to this factor.

Regarding the claimant's occupation, Petitioner is employed by Respondent as a maintenance worker, a position which involves lifting and moving heavy objects such as file boxes, copy paper, and bags of ice melt or water softener salt. Some of these items weigh over 50 pounds. Petitioner's occupation also involves climbing vertical ladders to perform maintenance checks. Petitioner additionally performs light plumbing and electrical work, and shovels snow. The Commission places greater weight on this factor.

As for the claimant's age, Petitioner was 56 years old at the time of his injury. This is an age at which it may be expected that not only is Petitioner truly at MMI and unlikely to recover further, but also young enough that he may be expected to work for a number of years with lingering symptoms and the limitations he has imposed upon himself to complete his job duties. The Commission places some weight on this factor.

The claimant's future earning capacity appears to be undiminished. Petitioner has returned to his full job as a maintenance worker, earning slightly more than he did prior to his injury. Accordingly, the Commission places no weight on this factor.

Lastly, the Commission considers the evidence of Petitioner's disability corroborated by the treating medical records. Petitioner was diagnosed by Dr. Choi with left shoulder massive

rotator cuff tear supraspinatus, infraspinatus, subscapularis. Dr. Weiss also diagnosed Petitioner with a full-thickness rotator cuff tear of the left shoulder. To treat this condition, Petitioner underwent a left shoulder arthroscopic double row subscapularis repair and supraspinatus repair, subacromial decompression and biceps tenodesis. Petitioner then participated in approximately eight months of physical therapy and rehabilitation. Petitioner's medical records are entirely consistent with his lingering difficulty with job duties which include lifting and moving heavy objects, climbing vertical ladders, and shoveling snow. The Commission places greater weight on this factor.

Weighing the five factors pursuant to Section 8.1b of the Act, which does not simply require a calculation, but rather a measured evaluation of which no single factor is conclusive on the issue of permanency, the Commission agrees that Petitioner sustained a 15% loss of use of the whole person.

F. Penalties and Fees

Petitioner sought penalties from Respondent under section 19(k) of the Act, which provides:

> "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2018).

Petitioner also sought an award of attorney fees pursuant to Section 16 of the Act which provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2018). Section 19(k) penalties and section 16 fees are intended to address situations where the delay is deliberate or the result of bad faith or improper purpose. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 24. The imposition of penalties under section 19(k) and fees under section 16 is discretionary. *Id.*

The Commission has in the past vacated an award of penalties and fees where the Respondent had a good faith argument regarding liability for a fall in a parking lot, in part due to the sometimes confusing state of the law regarding such injuries. See, *e.g.*, *Plucinski v. White Castle Systems, Inc.*, 5 IWCC 456. Given the record in this case, Respondent had a good faith argument regarding liability. Accordingly, the Commission declines to award penalties and fees in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2017, is hereby reversed for the reasons stated above.

IT IS FOUND BY THE COMMISSION that Petitioner proved he sustained an accident arising out of and in the course of his employment with Respondent on December 30, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner proved his current condition of ill-being is causally connected to the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the temporary total disability benefits that have accrued from January 4, 2016 through October 3, 2016 at the rate of $508.39 per week, pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable to pay Petitioner's outstanding reasonable and necessary medical expenses of $12,172.74 pursuant to the fee schedule and also to reimburse Petitioner $225.00 for out-of-pocket medical expenses pursuant to §§8(a) and 8.2 of the Act. Respondent is awarded a credit of $92,699.94 for medical benefits paid by its group medical carrier and is held harmless for any claims for which it receives credit, pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $457.55 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 15% loss of use of Petitioner's person as a whole.

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 16 2020
d: 12/19/19
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Marc Parker

STATE OF ILLINOIS)
) SS.
COUNTY OF JEFFERSON)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth McAlexander,
Petitioner,

vs.

NO. 12 WC 31793
14 WC 21613
19 IWCC 711

Mt. Vernon School District #80,

Respondent.

ORDER OF RECALL UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission *sua sponte* finds that a clerical error exists in the Decision and Opinion on Review dated January 8, 2020. Specifically, the Commission recognizes the omission of language awarding possible cost-of-living adjustments to Petitioner, paid by the Rate Adjustment Fund, pursuant to section 8(g) of the Act.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated January 8, 2020 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

IT IS FURTHER ORDERED BY, THE COMMISSION that a Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

DATED: JAN 2 1 2020
o:11/7/19
BNF/wde
45

Barbara N. Flores

STATE OF ILLINOIS)
) SS.
COUNTY OF)
JEFFERSON

☐ 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 up	☐ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Elizabeth McAlexander,

Petitioner,

vs.

NO: 12 WC 31793
14 WC 21613
19 IWCC 711

Mt. Vernon School District #80,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petitions for Review having been filed by both the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, medical expenses, temporary total disability, Section 19(d) of the Act, permanent disability and Respondent's credit and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The underlying claim arises out of an accident[1] involving Petitioner's right ankle on March 13, 2012. Petitioner claimed that she was injured when, hurrying to a class, she tripped on stripping between carpet and tile. Petitioner tumbled forward landing on her hands and knees with her ankles and feet turned underneath her. Several witnesses testified regarding the school and condition of the flooring. The Arbitrator ultimately found that the stripping was higher than the carpet and tile and that Petitioner did sustain an injury arising out of and in the course of her employment with Respondent on March 13, 2012 as a result. He determined that Petitioner

1 The parties' request for hearing form at arbitration included both case numbers, but only referenced the March 13, 2012 accident claimed in Case No. 13 WC 31793. At the hearing, Petitioner testified that she suffered a second accident affecting the right ankle on November 12, 2012 (as claimed in Case No. 14 WC 21613). The Arbitrator did not reach any conclusions in his decision related to the second claimed accident. Neither party appealed the lack of findings or conclusions in the arbitration decision for the consolidated cases related to the latter November 12, 2012 accident claim.

suffered a right ankle sprain which aggravated her pre-existing arthritis and accelerated her need for a right ankle fusion performed on April 5, 2013. However, the Arbitrator concluded that Petitioner was noncompliant with treatment after her surgery severing causal connection effective April 16, 2013 pursuant to Section 19(d) of the Act. He awarded benefits commensurate with his conclusions of law. Thereafter, Petitioner and Respondent filed cross petitions for review of the arbitration decision filed on July 5, 2018.

I. FINDINGS OF FACT

A. Background

Petitioner was employed by Respondent as an Individual Aide at the time of her March 13, 2012 accident. In this position she taught special education students one-on-one ensuring their work was completed and that the students had the proper books and made it to their classes. If the child was disabled, Petitioner would have to feed him or her, change diapers, and lift the child from the floor to a chair and vice versa. Petitioner would also accompany students on field trips. Depending on what school she was assigned to, she may have to traverse three flights of stairs. Petitioner worked 23 years for Respondent.

Prior to her employment with Respondent, Petitioner had obtained a high school diploma, an associate in arts degree from Rend Lake College, and took several nursing classes. Her degree and nursing classes were completed in the 1970's. Petitioner also held several waitress jobs, nurse's aide jobs at two hospitals, and worked at a day care center.

Petitioner owns a computer but testified that she only used it for social media and searching the internet. She has no training in Microsoft or Excel and does not consider herself to be a good typist. While working for Respondent, Petitioner used a computer when working with 6th and 7th grade students.

B. Accident

On March 13, 2012, Petitioner was at Casey Middle School. She was walking to the science building where her student was located. Just inside the doors of the science building was a transition from carpet to tile flooring. A transition strip was used to separate the carpet and tile. While hurrying back to her child's class, Petitioner tripped on the strip, tumbled forward and landed on her hands and knees with her ankles and feet turned underneath her. Petitioner felt pain in her hands, wrists, knees and ankles. She was not carrying anything at the time.

Petitioner testified that she reported the injury to the Nurse, Lisa Tucker. Petitioner knew there would be a video recording of her fall because there was a camera at the end of the hall recording everything that came through the area. She requested to see a playback of the incident on video, which was granted by the substitute secretary. The video was requested by Petitioner's Counsel but was never provided.

Petitioner had pain and swelling in her feet and ankles prior to the accident. However, she testified that her right ankle became more swollen and painful following the accident.

C. Pre-injury Medical Treatment

Prior to the accident, Petitioner sought right ankle treatment with Dr. Gunzel in February of 2011 due to neuropathy and swelling in her feet and arthritic ankles. Petitioner also testified regarding prior treatment with a pain doctor, Dr. Juergens, for her feet on one occasion in February 2012.

On February 4, 2011, Petitioner presented to Dr. Gunzel for bilateral foot and right ankle pain, gradually worsening. She informed Dr. Gunzel that she had been diagnosed with osteoarthritis approximately 10 years ago. Petitioner's diagnosis included pain in the joint involving the ankle and foot, and osteoarthritis localized primarily involving the ankle and foot.

On May 20, 2011, Petitioner indicated to Dr. Gunzel that her foot pain had not improved. She received bilateral injections at the tarsal sinus and was placed on restrictions of no walking more than one block or standing over 20 minutes at a time. At this time her diagnoses included degenerative joint disease, unspecified inflammatory or toxic neuropathy, metatarsalgia bilateral, hallux limitus left, valgus bilateral and bunion deformity bilateral.

On December 9, 2011, Petitioner informed Dr. Gunzel that her condition was worsening. Another injection was performed, and shoe selection was discussed to minimize discomfort. Petitioner was told to follow up in four weeks. However, Petitioner cancelled her January 6, 2012 visit and her records were sent to Dr. Juergens.

On February 29, 2012, Petitioner's complaints to Dr. Juergens included pain in her neck, bilateral shoulders, bilateral hands, low back and bilateral feet. She was able to stand on her heels and toes bilaterally. Petitioner was diagnosed with unspecified hereditary or idiopathic peripheral neuropathy, prescribed medication and recommended to follow-up with a neurologist.

An October 2012 report by Section 12 examiner Dr. Schmidt later indicated that Petitioner denied any trauma or injury to her right ankle prior to March 2012.

D. Post-injury Treatment, Section 12 Examinations and Employment

On March 13, 2012, Petitioner presented at the Good Samaritan Hospital emergency room ("ER") with complaints of injury to her knees bilaterally and right ankle and foot. Abrasions were noted on the left knee and ankle and there was tenderness and swelling to her right foot and ankle. Bilateral knee x-rays revealed moderate osteoarthritic changes of the left knee. Right ankle x-rays revealed extensive soft tissue swelling and osteochondral defect and impacted fracture of the talus of indeterminate age and etiology, a healed displaced fracture of the anterior aspect of the tibia of indeterminate age, degenerative changes of the tarsal bones, and enthesophyte at the insertion of the plantar aponeurosis in the calcaneus. Right foot x-rays revealed a question of bony demineralization and osteonecrosis of the talus, and arthritic changes at the first metatarsophalangeal joint. Prescription medication was provided, and Petitioner was given an ace bandage and crutches. She was taken off work for three days.

Petitioner then presented to Dr. Freehill at the Orthopedic Center of Southern Illinois on March 27, 2012. She indicated that she had tripped over loose stripping on the floor and fell on both knees, both hands and her feet were bent underneath her. Petitioner had significant swelling over her lateral ankle ligaments. After a physical exam and review of x-rays, she was diagnosed with an acute right ankle sprain with evidence of old injury. Physical therapy was ordered and pain medication and a lace up brace were prescribed after Petitioner indicated she did not want a CAM walker boot. Petitioner was placed on light duty and was to avoid prolonged standing and walking.

On May 1, 2012, Dr. Freehill diagnosed Petitioner with a right ankle sprain with persistent pain and swelling. He was concerned about the swelling and possible osteonecrosis of the talus. Petitioner was also concerned that her cervical fusion with hardware would interfere with an MRI, thus she was sent for continued therapy while on light duty restrictions instead. The prescribed therapy at Physical Rehab Center in May and June of 2012 was unsuccessful and ultimately put on hold pending a follow up with Dr. Freehill due to Petitioner's persistent ankle pain. However, she was able to complete her work that school year.

On June 12, 2012, Dr. Freehill still noted a large amount of swelling over the lateral ankle ligaments, with tenderness over the ankle, ankle ligaments and tightness in the achilles tendon. Therapy was discontinued, and Petitioner was referred to an ankle specialist.

Petitioner also testified that she returned to work for the school year, but was working with a high functioning, older autistic child who did not require much physical aid. Petitioner still had pain and swelling and kept her ankle propped up on a chair during the school day.

Upon Dr. Freehill's recommendation, Petitioner underwent a right ankle MRI on September 17, 2012. On September 28, 2012 Dr. Freehill noted that the MRI revealed evidence of central collapse of the central and lateral talar articular cortex, degenerative changes of the anterior and posterior tibia and tibiotalar joint effusion with loose bodies. Petitioner was again referred to a foot and ankle specialist.

Petitioner underwent a Section 12 examination at Respondent's request with Dr. Schmidt, an orthopedic surgeon, on October 22, 2012. Petitioner complained of a painful and swollen right ankle and indicated difficulty with prolonged standing, walking and driving. A physical exam showed the circumference of her right ankle at the malleolar to be 31cm, while it was 29cm on the left side. Petitioner was unable to do a double-limb heel rise. Dr. Schmidt reviewed Petitioner's x-rays and diagnosed osteochondral lesion, osteonecrosis of the talus and osteoarthritis of the ankle. Dr. Schmidt agreed that Petitioner's current condition was related to the accident in question and recommended a CT scan. Dr. Schmidt further opined that Petitioner would likely require an ankle replacement.

Dr. Schmidt offered deposition testimony on December 20, 2017. He testified that Petitioner told him she spent 85% of her day lying down. He stated that his objective findings supported Petitioner's objective complaints, and that Petitioner had not reached maximum medical improvement ("MMI") at that time. Dr. Schmidt testified that his causal connection opinion was due to an absence of previous trauma to Petitioner's ankle. He stated Petitioner's osteochondral

lesion and osteoarthritis were long-standing but had been accentuated by the accident in question.

Petitioner suffered a second accident[2] affecting the right ankle on November 12, 2012. Petitioner testified that at the end of a class period some students were horse-playing. One student was then pushed into Petitioner's right ankle and kicked it. Petitioner felt pain and reported it to the Assistant Principal. Petitioner testified that she underwent x-rays at Good Samaritan and followed up with Dr. Freehill, who referred her to Dr. Klein at Washington University.

On November 21, 2012, Petitioner presented to another orthopedic surgeon, Dr. Aubuchon, for a second opinion. He noted significant right ankle swelling along with significant grinding with flexion and extension of the ankle. He diagnosed end stage arthritis of the ankle and recommended an ankle fusion and restricted Petitioner to sedentary work through December 1, 2012.

Petitioner testified that her student moved over Christmas Break of that school year. Upon returning in January, Petitioner was assigned to a child at the Early Childhood Center. This child was wheelchair-bound and could not speak. The child was the size of a 5 or 6-year-old, and Petitioner was tasked with lifting her regularly. Petitioner worked with the child for three days before deciding her ankle was too painful to assist this child. Petitioner spoke with the Superintendent about being assigned a new child, but none was available. Subsequently, Petitioner did not receive temporary total disability ("TTD") benefits, was denied disability benefits through the school district and ultimately went on FMLA. She did not receive payment, however, as she had no sick time available.

On January 18, 2013, Petitioner returned to Dr. Freehill who noted her persistent pain. He diagnosed right ankle arthritis and talar collapse and recommended an ankle fusion. Petitioner was placed on light duty and referred to Dr. Klein.

Petitioner underwent a second Section 12 examination at Respondent's request with Dr. Schmidt on February 4, 2013. Dr. Schmidt noted the November 12, 2012 injury, but maintained his prior causal connection opinions as unchanged.

Petitioner then began treatment with Dr. Klein on February 12, 2013. Severe pain and swelling were noted in her right ankle and a physical exam revealed a severely antalgic gait as well as Petitioner having difficulty bearing weight on her right foot. Dr. Klein reviewed x-rays and diagnosed severe right ankle arthritis, right ankle valgus deformity and idiopathic peripheral neuropathy. He also recommended a CT scan and explained to Petitioner that if she were to undergo surgery, she would be required to use a cast and boot. Dr. Klein cautioned against surgery if Petitioner did not think she would be able to adhere to post-operative restrictions.

The CT scan performed on February 28, 2013 revealed a large osteochondral lesion of the lateral right talar dome with articular collapse involving 2/3 of the talar articular surface, severe secondary right tibiotalar and tibiofibular joint osteoarthritis and mild right posterior subtalar joint

[2] The Arbitrator made no ruling relative to this accident in his Decision and the accident was not raised as an issue on appeal to the Commission.

osteoarthritis.

On February 28, 2013, Petitioner also presented to Dr. Klein who noted Petitioner's difficulty with wearing a walking boot in the past, as well as Petitioner's concern about surgical recovery. Dr. Klein indicated that post surgically Petitioner would be non-weight bearing in a cast for six weeks, followed by four weeks in a weight-bearing cast. After that, Petitioner would be allowed to bear weight in a walking boot.

On March 28, 2013, Petitioner returned to Dr. Klein for a pre-operative follow-up and was apprised of the risks and benefits of surgery. Dr. Klein recommended that Petitioner practice non-weight bearing at home prior to surgery.

Regarding her employment, Petitioner testified that she decided to retire effective April 10, 2013. She sent an e-mail to that effect on April 2, 2013, three days prior to her scheduled surgery date. Prior to e-mailing her resignation, Petitioner testified that she phoned the school district and informed them that she did not want to retire, but she had to due to financial reasons. She has not been employed since. Had she continued her employment, Petitioner explained that she would have been taken off work for at least six months to recover.

On April 5, 2013, Petitioner underwent surgery. Specifically, Dr. Klein performed a right ankle complex arthrodesis with interposition wedge allograft and a right iliac crest bone graft. The post-operative diagnosis was right ankle arthritis, right ankle valgus deformity, and obesity.

Post-operatively, Petitioner saw Dr. Klein on April 16, 2013. She reported that she was "doing her best" to non-weight bear. Dr. Klein noted it sounded like "she is putting her foot on the ground several times" and she reiterated the importance of non-weight bearing to give her the best chance for success. Petitioner was placed in a short leg non-weight bearing cast.

At the hearing, Petitioner denied putting full weight on her foot and testified that she was only putting her foot down to rest it due to the heaviness of her cast. Petitioner acknowledged that Dr. Klein was adamant about how she was to protect her ankle after undergoing surgery. She testified that there would be occasions where she put her foot down, but only to balance, which she explained Dr. Klein allowed. She testified that she did not walk on it and testified that the surgery decreased, but did not eliminate, her pain and swelling. She also testified that she followed post-operative orders not to walk on her ankle and she explained that she hopped around on her left foot using a walker.

The medical records reflect that on May 16, 2013, Petitioner again followed up with Dr. Klein who noted that it sounded like Petitioner had been walking on her foot somewhat. Dr. Klein noted the lengthy prior discussions with Petitioner about post-surgical restrictions, including the recommendation that Petitioner refuse surgery if she was not willing to avoid weight bearing. Dr. Klein again stressed the importance of Petitioner complying with post-surgical restrictions in order to have a successful recovery. Notwithstanding, no evidence of hardware loosening or failure was present in Petitioner's x-rays. Petitioner was placed in a short weight-bearing cast and told that she could place weight on the extremity. She explained to Petitioner that she could weight bear but should stop walking if painful. Dr. Klein remained concerned with Petitioner's ability to

comply and warned that Petitioner risked a non-union, which could lead to chronic pain.

On June 13, 2013, Petitioner still had clinical pain and had been weight bearing in the cast. An x-ray revealed stable hardware and a progressive fusion of the ankle joint line. Dr. Klein wanted to ease Petitioner into using a walking boot and noted that her radiographs looked good. Dr. Klein also allowed Petitioner to weight bear as tolerated in her boot and instructed not to walk without it. Dr. Klein further noted that Petitioner's "previous cast became somewhat loose because of calf atrophy. That may be why the ankle has been so sore." If she had discomfort, Petitioner was also advised to use her crutches and walker to keep weight off her foot.

On June 20, 2013, Petitioner presented to the Good Samaritan emergency room with right ankle pain status post fusion. A nurse practitioner noted the mechanism of injury that Petitioner "stepped wrong, possible twist." She also noted that Petitioner had a "(recent fracture repair, cast taken off about 1 week ago)." Petitioner's right ankle was swollen and tender, and she reported pain with ambulation in the boot. When she went in for x-rays, Petitioner was "wearing a boot [reporting p]ain shooting from ankle off leg." X-rays revealed an oblique fracture with mild displacement of the distal fibula. Petitioner was released from the emergency room with medication and follow up care instructions.

A telephone note from Dr. Klein's office on June 24, 2013 indicated Petitioner called requesting pain medication after being diagnosed with a fibular fracture the previous week. Dr. Klein believed the fracture was actually an osteotomy that was done during surgery. The following day during her scheduled appointment with Dr. Klein's nurse practitioner, Petitioner complained of increased pain at the right lateral ankle. Contrary to the fracture diagnosis at the emergency room, Petitioner's x-rays revealed no new fracture. She was placed in a short leg non-weight bearing cast.

On July 11, 2013, Petitioner reported to Dr. Klein that she was having good days and bad days with complaints of moderate swelling and tenderness to palpation around her ankle. Dr. Klein noted that Petitioner "came in a couple of weeks ago complaining of a lot of pain. I'm not sure what caused it." Dr. Klein was concerned that Petitioner was developing non-union due to her pain complaints. A CT scan was recommended.

On August 1, 2013, Dr. Klein reviewed Petitioner's CT scan taken August 1, 2013, which revealed a non-union of the right ankle arthrodesis, non-union of the distal fibular osteotomy, and mild subtular osteoarthritis. A bone stimulator was ordered. In a telephone note from that day, Dr. Klein restated Petitioner's post-surgical history and restrictions and told Petitioner that her arthrodesis had not healed. Dr. Klein did not restrict Petitioner from bearing weight and placed her in a boot allowing her to bear weight as tolerated. Dr. Klein allowed Petitioner to remove it to bathe and shower and indicated that she did not need to wear it to sleep.

On August 23, 2013, Petitioner returned to the emergency room at Good Samaritan after falling in her kitchen two weeks prior with worsened pain since then. Ankle x-rays revealed no changes.

On September 26, 2013, Petitioner underwent x-rays. Dr. Klein noted early signs of non-

union in Petitioner's ankle joint. Petitioner was to transition to a solid molded AFO at the ankle to help her get back into a shoe and out of a boot. Bone stimulator usage was to continue.

As of January 16, 2014, x-rays revealed evidence of a non-union including a broken screw and a loose screw and plate fixation of the talus. A CT scan several months later on April 2, 2014 confirmed the non-union. On April 4, 2014 Petitioner was told that a revision surgery was the next step. Petitioner requested time to consider her options.

Petitioner testified that Dr. Klein informed her that her ankle was not healing properly and discussed possible additional surgery. Petitioner testified that she was given the option to forego surgery and simply deal with the symptoms. She ultimately decided to forego another surgery.

Petitioner presented then presented for an independent medical examination ("IME") with Dr. Krause on June 30, 2014, which was scheduled at her attorney's request. Dr. Krause, an orthopedic surgeon, opined that without evidence to the contrary he did not dispute the causation opinions by Drs. Schmidt and Freehill, indicating Petitioner's need for a right ankle fusion was causally related to her March 2012 accident. Dr. Krause noted a non-union of Petitioner's ankle but did not recommend another surgery at that time and placed Petitioner at MMI. Dr. Krause opined that Petitioner could work at a sedentary capacity with intermittent standing.

At a deposition on June 2, 2017, Dr. Krause acknowledged that Petitioner did not tell him about any significant problems with her ankle prior to the accident. Had she done so, Dr. Krause's opinions could have changed regarding causal connection. However, he ultimately acknowledged the possibility that the accident in question accelerated Petitioner's need for the surgery performed by Dr. Klein. Dr. Krause testified that, despite his opinions regarding treatment, Petitioner probably could not stand 8-10 hours daily.

Dr. Krause also noted that Petitioner's eventual post-surgical non-union was most commonly caused by smoking. He mentioned other common causes including premature weight-bearing and a big piece of allograft bone inserted (which Petitioner had). Notwithstanding other common or possible causes, Dr. Krause testified that Petitioner could have been at risk for a non-union regardless of weight-bearing although he opined that premature weight-bearing contributed to Petitioner's non-union in some way. Dr. Krause also testified relative to Petitioner's complaint of a twisted ankle after being placed in a boot in June of 2013. He opined that this injury suggested Petitioner was not wearing her boot at the time, as instructed by Dr. Klein.

In an October 10, 2016 addendum report, Dr. Krause noted his review of additional records dating back to 2010 but indicated that they did not provide any significant additional information. His opinions from the June 2014 IME remained unchanged.

In a July 24, 2017 addendum report, Dr. Schmidt noted his review of additional medical records received from Respondent's counsel. Therein, he opined that, although Petitioner had right ankle difficulty prior to the accident in question, he believed her condition did deteriorate due to the accident in question. As evidence, he noted that prior to the accident on February 29, 2012 Dr. Juergens indicated that Petitioner was able to lift on her toes. Conversely, during Dr. Schmidt's first examination of Petitioner on October 22, 2012, she was unable to do the same.

In his addendum report, Dr. Schmidt noted that Petitioner had been weight-bearing post-operatively in direct contradiction to Dr. Klein's recommendations. He also opined that Petitioner's non-compliance "would directly relate to her developing a non-union, especially what appears as an atrophic non-union as described in the further notes." He stated it was imperative that the ankle be non-stressed so that proper healing can take place. In his deposition, Dr. Schmidt confirmed his opinion that early weight-bearing and non-compliance would be a contributing factor to a non-union.

Notwithstanding, Dr. Schmidt admitted in his deposition that it was possible for a person to have a non-union even if they did not bear weight on a fusion. He also acknowledged that staying off a foot is very difficult for an ankle surgery patient to do, especially when that patient also has neuropathy. Dr. Schmidt also testified that he was not informed by Petitioner of her pre-accident treatment with Dr. Gunzel but testified that he likely treated Petitioner's right ankle arthritis. Ultimately, Dr. Schmidt maintained his causal connection opinion that the accident accelerated Petitioner's need for surgery, which remained unchanged.

E. Accident Investigation and Work Accommodations – Ms. Clark, Ms. McGreer, Mr. Green and Ms. Herzing

Petitioner testified that on August 9, 2012, she returned to the school so her co-employee Terri Clark could take several photographs of the stripping, which was loose where it met the tile. PX 16, Tr. 36. Petitioner testified the carpet was still in the same condition as it was at the time of accident. She stuck a ruler underneath the stripping to show how loose it was and explained that one could only see the raised area of carpet by bending down, not standing over it. She testified that the photos are not of good quality and make it seem as though the ruler is propped up. Petitioner stated that it only seems that the ruler is propped up due to the incline of the floor. She further testified that by the time the new school year started the stripping had been repaired.

Petitioner called Terri Clark as a witness. Ms. Clark is now retired, but previously served as Respondent's Committee Liaison. In 2012 she was the president of the Mt. Vernon Association of Classified Employees, the support staff union for the district.

Contemporaneous to the accident in question Ms. Clark heard about Petitioner's incident. In August 2012 Petitioner called her, and Ms. Clark suggested she take photos. Ms. Clark accompanied Petitioner to the school and took photos of the accident location. Ms. Clark testified that she could tell the carpet was loose where it joined the tile. The tack strip was not adhered to the carpet, which is why they were able to slide a ruler underneath it.

Respondent called Mary McGreer as a witness. Ms. McGreer is the Principal at Casey Middle School and was so employed on the dates in question. Ms. McGreer was notified of Petitioner's March 2012 accident by the school nurse. She did not see Petitioner that day.

Ms. McGreer testified that the hallway where Petitioner's trip and fall took place is open to the general school population, staff and faculty. Groups of 75 students would traverse the hallway, as well as classes of 6th, 7th and 8th grade students, between 12 and 18 students per

class. Visiting parents also had hallway access.

Ms. McGreer also completed an accident report on March 21, 2012 including a handwritten attachment from Petitioner describing the accident. Petitioner testified that the handwritten portion was drafted on the date of accident, so she would not forget any details, and she acknowledged that the report did not mention any defects on the floor, but she attributed this to drafting the note prior to going back and inspecting the floor later on the date of accident. Ms. McGreer testified that she examined the hallway and noted that the stripping was not loose. She stated that the hallway does have an incline, and after the incline the carpet continues for quite a while before the stripping and change to tile. Had there been any work repair orders between the accident date and March 21, 2012, Ms. McGreer would have signed it.

During the summer after the March 2012 accident, the school underwent some construction. Everything was pulled out of every classroom and placed in the hallway so that rooms could be cleaned including desks, chairs, and filing cabinets. In the process, she acknowledged that it is possible that damage could have been done to the hallway. Ms. McGreer was shown a photo of the hallway from May of 2012 and did not see any defect in the carpet. She testified that custodians maintain the hallway and, when a repair is necessary, she completes a work order and maintenance is called. Ms. McGreer testified that she is very paranoid about safety, so she inspects her school closely. However, she acknowledged that if there were small, inexpensive repairs necessary over the summer she would not be notified, and no work order would be necessary.

Ms. McGreer further testified that, as a first-year principal in 2012 and a self-proclaimed techie, she believed the school video system was grainy and antiquated. The system has since been updated, but at the time the server had a small memory, so recordings would only stay for 2-3 days. The cameras were motion-sensored, so the more traffic went through, the quicker the memory would get used up. Ms. McGreer did not view the video and stated that if the substitute secretary alluded to by Petitioner showed Petitioner the video of the fall, that would be against Ms. McGreer's instructions. She only wanted herself and her usual secretary looking at video.

Ms. McGreer was also apprised of the November 12, 2012 incident by her assistant principal, as Ms. McGreer was away at meetings on the alleged date. She was unaware of any requests for professional accommodations made by Petitioner.

Respondent also called Michael Green as a witness. Mr. Green served as Respondent's Superintendent from July 1, 2011 through June 30, 2015. Prior to that he served as the Casey Middle School principal from 2006 to 2011. He testified that Petitioner was a very good employee.

One or two days after the incident, Mr. Green visited the school and had the head of maintenance show him the incident location. Mr. Green examined the location and noted that it appeared normal to him. Upon viewing Ms. Clark's photo of the hallway, Mr. Green stated that it did not look anything like that when he inspected the location. Mr. Green testified that the hallway in question was open to students, staff and faculty, as well as parents and other individuals who were authorized admission into the school.

When Mr. Green returned to work after spring break in 2013 he spoke with Petitioner who informed him that she was going to retire. He testified that Petitioner did not mention her reasons, however. After retiring Petitioner never contacted Mr. Green about employment that could accommodate her restrictions. Mr. Green testified that it would be difficult for Respondent to accommodate a person with Petitioner's restrictions due to the steps in the schools.

When Petitioner determined that she was physically unable to work with her newly assigned student in January 2013, Mr. Green testified that she did not ask him to assign her a new student. Mr. Green stated that such a request would definitely have been looked into.

In contrast, Petitioner testified that she had two meetings with Mr. Green regarding child assignment (one prior to Christmas break and one after), and she was told that there were no alternative children available. Petitioner acknowledged being told that there could be an opportunity to aid a new child, but no timeline could be placed on it. She reiterated that she did inform Mr. Green that she did not want to retire, but that it was her last resort due to financial needs.

Respondent called Nancy Herzing as a witness. Ms. Herzing was employed by Respondent through May 2017 as its Director of Business and is now retired. She performed all initial paperwork for workers' compensation claims and received Petitioner's papers for two claims, as well as retirement papers at some point. It was her understanding that Petitioner's retirement was voluntary.

F. Vocational Rehabilitation

On September 24, 2014, Petitioner presented to Stephen Dolan for a vocational evaluation. Petitioner had a cane and stated that she used it outside of the house. During the assessment Mr. Dolan noted that, after one hour and fifteen minutes, Petitioner had to elevate her right leg to waist level on another chair where she kept it elevated for the remainder of the evaluation.

Vocational testing revealed Petitioner had good word recognition and sentence comprehension and could spell above the high school level. Her math was at a ninth-grade level and her reading and spelling were in line with her education. A depression screening indicated a moderate depression level. Mr. Dolan opined that Petitioner had no specific vocational skills for a sedentary job, or a sedentary job that would allow intermittent standing. Mr. Dolan also noted Dr. Krause's restrictions placed on Petitioner of working in a sitting capacity with intermittent standing. These restrictions in conjunction with Petitioner's age, academic skills, work history and treating records from Dr. Klein led Mr. Dolan to conclude that there was no reasonably stable labor market for Petitioner.

At his deposition on June 20, 2017, Mr. Dolan indicated he had been a vocational rehabilitation counselor since 1972. He testified that Petitioner informed him that if she did not elevate her leg during the evaluation, her ankle would turn red. Mr. Dolan found this to be credible. He testified that Petitioner indicated she could only stand for five minutes before experiencing increased pain, could only walk five to ten minutes, stooping increased her pain, and she could not crouch or kneel. Mr. Dolan testified that Petitioner informed him that she avoided stairs and was

otherwise dependent on handrails, and she had fallen four times since her ankle surgery.

Mr. Dolan also testified that Petitioner had rudimentary computer skills and knew how to use e-mail, the internet and had some word processing experience. She also had superior organizational skills, good interpersonal skills, and possessed the ability to take, give and implement instructions. Mr. Dolan testified that these skills would assist someone with experience gain employment. Petitioner did not, however, have any spreadsheet software or bookkeeping software experience. Based on his testing, Petitioner would have good skills to take courses at a community college. Mr. Dolan testified that Petitioner's vocational profile was of a 60-year-old woman approaching retirement age with community college education.

Given Petitioner's limitations and complaints, Mr. Dolan testified that an employer would be more likely to hire another candidate with more vocational skills. He acknowledged that he did not check any resources for job availability in Petitioner's area, stating that he was already familiar with said availability there. Mr. Dolan testified that if he called several employers and asked if they would be willing to hire someone who needs to elevate a foot at waist-high level for much of the day, he would already know the answer. Considering all of this, in conjunction with Petitioner's medical restrictions, Mr. Dolan testified that Petitioner was not employable in the open labor market.

On cross examination, Mr. Dolan acknowledged that having an associate degree or any higher-level education makes a person more marketable in the open labor market. He also acknowledged that Petitioner's complaints regarding her symptoms and restrictions were not reflected in Dr. Krause's June 30, 2014 IME report; thus Mr. Dolan's recitation of Petitioner's complaints were based on her subjective reports. Mr. Dolan acknowledged that there were available jobs within Petitioner's restrictions, but he doubted an employer would hire an unskilled or semi-skilled worker with said restrictions.

G. Current Condition

Regarding her current condition of ill-being, Petitioner testified that she has right ankle range of motion issues. She does not feel comfortable driving anymore, and also has pain and neuropathy in her feet, so she has stopped driving. Petitioner experiences pain daily, which worsens if she stands for too long, walks too much or moves her ankle back and forth. She also props her foot up whenever she is seated to relieve swelling. Petitioner uses a cane or walker when walking and loses her balance when lifting things, although she testified that her use of the walker is not related to her right ankle. Petitioner no longer goes grocery shopping and has limited her housekeeping. After her surgery, Petitioner was given Vicodin and then Ibuprofen until she began having kidney problems, so now she just deals with the pain.

Petitioner testified that that she suffered a temporary setback when she twisted her ankle in June of 2013 getting out of bed too quickly. Another incident saw Petitioner fall while in her kitchen, but there were no significant consequences to this fall. Petitioner testified that at no point after her ankle fusion did she attempt to return to work for Respondent, nor did she apply for any other employment. Petitioner testified that she did not believe she could work any job after her surgery. She explained that she had to prop her leg on a chair to reduce swelling most of the time

and did not believe any employer would approve that. Petitioner currently receives social security disability.

II. CONCLUSIONS OF LAW

A. Accident

The Arbitrator found that Petitioner sustained an accident that arose out of and in the course of employment. "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 (2003). 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." *Sisbro*, 207 Ill. 2d at 203.

The question of whether a claimant's injury arose out of his or her employment depends upon the type of risk to which he or she was exposed. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011). "There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the general public is commonly exposed." *Dukich v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 31.

"By itself, the act of walking across a floor at the employer's place of business does not establish a risk greater than that faced by the general public." *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006). "Accordingly, for an injury caused by a fall to arise out of the employment, a claimant must present evidence which supports a reasonable inference that the fall stemmed from a risk associated with her employment." *Id.* at 106. Employment-related risks associated with injuries sustained as a consequence of a fall are those to which the general public is not exposed, including the risk of tripping on a defect at the employer's premises, or performing some work-related task which contributes to the risk of falling. *Id.*

In this case, as the Arbitrator found, the hallway where the accident occurred was not open to the general public but was open to students, staff, faculty, parents and other authorized individuals. Based on this record, the Commission agrees with the Arbitrator that Petitioner's presence in Respondent's hallway was both incidental to her employment and in the course of her employment.

The Arbitrator also concluded it was unnecessary to consider whether the stripping was defective. The Commission agrees, to the extent that the "defect" nomenclature does not entirely address the issue. "The presence of a 'hazardous condition' on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40. Thus, for example, in *University of Illinois v. Industrial Comm'n*, 365

Ill. App. 3d 906, 911 (2006), the Commission found that the claimant tripped over a metal strip connecting the employer's parking structure to a walkway into the employer's outpatient care facility and that the height of the strip constituted a hazardous condition. The Illinois Appellate Court ruled that the Commission's finding was not against the manifest weight of the evidence. *Id.* at 912.

In this case, Petitioner testified that she tripped on the stripping meant to hold the carpet down and tumbled forward while hurrying back to her child's class. She also explained that one could only see the raised area of carpet by bending down, not standing over it. Petitioner also submitted an exhibit of photographs depicting the loose, raised stripping. Ms. Clark also testified that she could tell the carpet was loose where it joined the tile. Ms. McGreer testified that she examined the hallway and noted that the stripping was not loose, while Mr. Green testified that the accident location appeared normal to him days later. The record does not indicate that Ms. McGreer or Mr. Green examined the area by bending down as Petitioner did. As the Arbitrator found, all witnesses agreed the stripping was higher than the carpet and tile.

Given the record as a whole, the Commission finds that Petitioner was engaged in a work-related task at the time of her fall and the hazardous condition of the stripping contributed to or caused Petitioner's fall. Accordingly, the Commission concludes that Petitioner's accident and injury arose out of and in the course of her employment.

B. Causal Connection/Section 19(d) of the Act

The Arbitrator found the opinions of Respondent's Section 12 examiner, Dr. Schmidt, to be more persuasive than those of Petitioner's independent medical examiner, Dr. Krause. In so concluding, the Arbitrator noted that Dr. Krause was unable to state whether Petitioner's accident aggravated or accelerated Petitioner's need for surgery. He further noted that Dr. Krause did not, like Dr. Schmidt, distinguish the localization of Petitioner's medical treatment prior to her accident and after her accident. The Arbitrator, thus, found the opinions of Dr. Schmidt to be more compelling and credible than those of Dr. Krause finding a causal connection. The Commission agrees with the Arbitrator that Petitioner established a causal connection and finds ample evidence in the record, including the opinions of Dr. Schmidt, supporting a causal connection between Petitioner's post-accident condition of ill-being and her accident on March 13, 2012.

However, the Arbitrator also found that causal connection was severed pursuant to section 19(d) of the Act. In so concluding, the Arbitrator noted that the Act does not require that an injurious practice be the sole cause of a claimant's condition of ill-being for the Commission to reduce or deny compensation. He noted that several physicians indicated that Petitioner's ongoing pain and permanent restrictions were related to the non-union that developed after her ankle fusion surgery. The Arbitrator found that Petitioner's post-surgical non-compliance with Dr. Klein's recommendations rose to the level of an injurious practice and contributed to the non-union. Pursuant to section 19(d) of the Act, all benefits were denied including treatment, TTD and maintenance subsequent to April 16, 2013.

Section 19(d) of the Act reads:

> If any employee shall persist in insanitary or injurious practices which tend to either imperil or retard his recovery or shall refuse to submit to such medical, surgical, or hospital treatment as is reasonably essential to promote his recovery, the Commission may, in its discretion, reduce or suspend the compensation of any such injured employee. 820 ILCS 305/19(d).

The Commission disagrees with the Arbitrator that Petitioner engaged in an injurious practice that should terminate her entitlement to benefits. There is no evidence in this record that Petitioner deliberately attempted to impede her recovery in any of her actions post-operatively. The cases in which section 19(d) of the Act has been invoked distinguish the intent of the conduct to determine if it is obstructing recovery. See e.g., *Global Prods. v. Illinois Workers' Comp. Comm'n*, 392 Ill. App. 3d 408, 412-13 (2009) (finding no evidence that the claimant smoked cigarettes for the purpose of retarding his recovery and, specifically, that he smoked "in spite of its potential impact on his recovery, not because of it."). The acts involved must rise above mere negligence. Larson's Workers' Compensation Treatise provides additional insight stating: "The degree of claimant misconduct required to break the chain of causation should therefore be not mere negligence, but intentional conduct that is clearly unreasonable. *Larson's Workers' Compensation-Desk Edition*, Section 10.10[1] at 10-34 (2018).

The record reflects that Dr. Klein was pre-operatively concerned with Petitioner's ability to comply with weight-bearing restrictions for optimal recovery. Petitioner was admittedly warned about the risks that might cause a non-union. Drs. Klein, Krause and Schmidt all stated that non-weight bearing was critical to recovery, and that the risk of non-union increases with premature weight-bearing. The physicians further agreed that weight-bearing and smoking were the two main factors causing a non-union of an ankle fusion. Petitioner was not a smoker, so the remaining issue rested with whether she bore weight on her foot too early in her recovery process. Petitioner maintained to both Dr. Klein and at the hearing that she would only put her foot down to balance when her cast got too heavy, which Dr. Klein characterized as weight bearing in her records.

It is reasonable that Petitioner, in particular, would have difficulty fully complying with her treating physician's instructions not to bear any weight for a time. She had been counseled by Dr. Klein pre-operatively to practice non-weight bearing to increase the likelihood of a successful surgical outcome. Dr. Schmidt also understood that it would be difficult for a neuropathic patient to fully comply with complete non-weight bearing restrictions throughout recovery. Indeed, he specified that it was harder for a neuropathic patient to do so because it doesn't hurt as much. Moreover, while the Arbitrator found that it was no coincidence that Petitioner's fusion did not take, with ample evidence in the medical records of non-compliance, no attention was paid to normal post-operative issues including an ill-fitting boot which may have contributed to Petitioner's discomfort, weight bearing, and need for emergency room care. The June 13, 2013 note from Dr. Klein, before Petitioner presented to the emergency room, reflects that Petitioner's "previous cast became somewhat loose because of calf atrophy[, which Dr. Klein believed] may be why the ankle has been so sore."

The evidence simply does not establish that Petitioner intentionally bore weight to impede her recovery, much less to do harm to herself, such that her conduct rises to the level of an injurious

practice requiring a termination of benefits. Accordingly, the Commission reverses the Arbitrator's ruling on this issue.

The Commission further finds that Petitioner's conduct does not rise to the level of an intervening cause severing Respondent's liability. The inquiry here is whether the evidence establishes that Petitioner's condition of ill-being was related, in whole or in part, to her accident. See *Dunteman v. Illinois Workers' Comp. Comm'n*, 2016 IL App (4th) 150543WC, ¶ 44 ("As long as there is a 'but-for' relationship between the work-related injury and subsequent condition of ill-being, the employer remains liable." [citation omitted]). Moreover, "an employer takes his employees as he finds them." *Global Prods.*, 392 Ill. App. 3d at 412 (quoting *Bocian v. Industrial Comm'n*, 282 Ill. App. 3d 519, 528 (1996)).

In this case, Petitioner suffered from neuropathy and degenerative conditions in the right ankle that pre-dated her accident but did not prevent her from working. The ankle fusion recommendation came only after her March 13, 2012 accident following unsuccessful treatment modalities. Petitioner eventually underwent an ankle fusion with Dr. Klein, which Respondent's examiner, Dr. Schmidt, repeatedly found necessary and related to her accident. Even if Petitioner developed a non-union, in part, as a result of premature post-operative weight bearing, her need for medical treatment including the ankle fusion would not have occurred "but for" her March 13, 2012 accident at work. See *Dunteman*, 2016 IL App (4th) 150543WC, ¶ 45. More specifically, "but for" the occupational injury there would have been no need for an ankle fusion and post-operative care of Petitioner's further debilitated right ankle. See *Id.* Thus, the Commission finds that Petitioner's employment remains a cause of her current condition of ill-being and that any premature post-operative weight bearing does not sever causal connection.

C. Medical Expenses

The Arbitrator awarded medical expenses, but only through April 16, 2013, based on his Section 19(d) analysis. In keeping with the ruling on causal connection, the Commission also modifies the Arbitrator's medical expenses award, which terminated Respondent's liability on April 16, 2013. Since the Commission has found causal connection and reversed the Arbitrator's section 19(d) ruling, it also awards all claimed reasonable and necessary medical expenses to Petitioner, pursuant to sections 8(a) and 8.2 of the Act.

D. Temporary Total Disability

The Arbitrator awarded TTD benefits from April 5, 2013 through April 16, 2013. Benefits were denied from January 11, 2013 through April 4, 2013, and from April 17, 2013 through April 4, 2014.

Regarding the period of January 11, 2013 through April 4, 2013, the Arbitrator reasoned that Petitioner voluntarily abandoned a job that was assigned to her within her restrictions. The Arbitrator noted that Petitioner was restricted to sit-down work only through December 1, 2012. Subsequently she was unrestricted until January 18, 2013, when Dr. Freehill recommended she do "absolutely no twisting, squatting, kneeling, standing, long periods of walking." However, beginning one week prior to that, the Arbitrator noted that Petitioner voluntarily removed herself

from the workforce, indicating that she was unable to physically care for the new student to whom she had been assigned after Christmas break. Respondent argues that Petitioner's voluntary removal from the workforce, coupled with Mr. Green's testimony that Respondent would have tried to accommodate any restrictions Petitioner brought to them (which he asserted Petitioner did not), thereby precludes Petitioner from receiving TTD benefits.

A claimant's stabilization is the determinative inquiry for deciding entitlement to TTD benefits. *Interstate Scaffolding, Inc. v. Illinois Workers' Comp. Comm'n*, 236 Ill. 2d 132, 149 (2010). However, the supreme court recognizes three exceptions allowing termination or suspension of TTD benefits. *Sharwarko v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 131733WC, ¶ 47 (citing *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 146-47). The relevant exception to the case at bar is the third, which states TTD benefits may be suspended or terminated if the employee refuses work falling within the physical prescriptions prescribed by his doctor. See *Sharwarko*, 2015 IL App (1st) 131733WC, ¶ 47. Respondent argues that when Petitioner left her job in January of 2013 she triggered this third exception.

The Commission finds that the facts in *Sharwarko* are distinguishable from the case at bar. In *Sharwarko*, the employer was capable of accommodating the claimant's restrictions. *Id.* ¶ 48. In the case at bar, Petitioner wanted to work past January 10, 2013, but was physically unable to perform the job offered by Respondent. A review of Dr. Freehill's restrictions clearly suggests Petitioner was unable to work with a 5 or 6-year-old wheelchair bound child who required frequent lifting. The Commission notes the difficulty in attempting to lift a 5-year-old child alone without twisting and squatting. The Commission also notes that on February 8, 2013 Dr. Schmidt placed Petitioner on restrictions of no standing or walking greater than 2 hours without 15 minutes off her feet. While these restrictions may seem less cumbersome than Dr. Freehill's, it does not circumvent the fact that Respondent had no available work for Petitioner. Mr. Green testified that it would be difficult for Respondent to accommodate a person with Petitioner's restrictions due to the steps in the schools. A March 15, 2013 e-mail from Respondent's Assistant Superintendent indicated Petitioner's desire to return to work when capable. This taken in conjunction with Mr. Green's testimony regarding Petitioner's lack of employability corroborates Petitioner's testimony that her retirement arose out of financial necessity rather than a voluntary removal. Accordingly, the Commission finds that Petitioner does not fall into any of the exceptions to *Interstate Scaffolding*, and since her condition had not stabilized during this period she remained entitled to TTD benefits.

The Arbitrator denied TTD benefits from April 17, 2013 through April 4, 2014 based on his section 19(d) analysis. In keeping with its causal connection finding and reversal of the section 19(d) ruling, the Commission modifies the TTD award and awards benefits for this period as well. Petitioner did not reach maximum medical improvement post-operatively and was not offered work within her restrictions by Respondent. Respondent argues that, even if Petitioner was entitled to TTD benefits while off work, she failed to meet her burden to prove the period in which she could not work as she provided no off work slips from providers. However, determining the TTD period is a question of fact for the Commission and its decision should not be disturbed unless it is against the manifest weight of the evidence. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256 (2008).

The Commission finds no evidence in Petitioner's treatment records that Petitioner's condition between April 17, 2013 and April 4, 2014 would have allowed her to work for Respondent. The Commission also notes the June 30, 2014 report or Dr. Krause supporting the proposition that Petitioner could not perform her duties for Respondent. Accordingly, the Commission finds that Petitioner is entitled to additional TTD benefits as claimed for the period of April 17, 2013 through April 4, 2014.

E. Permanent Disability

Despite Petitioner's argument for odd-lot permanent and total disability benefits, the Arbitrator found that Petitioner suffered a 25% loss of use of her right ankle. The Arbitrator agreed with Respondent finding that Petitioner did not meet her burden of proof for odd-lot permanent and total disablement. In so doing, the Arbitrator noted that Petitioner did not perform any job searches, nor did she look for employment after surgery. The Commission views the evidence differently and finds that Petitioner has established her entitlement to permanent and total disability benefits under an odd-lot theory.

An employee is totally and permanently disabled when she is unable to make some contribution to industry sufficient to justify the payment of wages. *A.M.T.C. of Illinois v. Industrial Comm'n*, 77 Ill. 2d 482, 487 (1979). If a claimant's disability is of such a nature that she is not obviously unemployable, or there is no medical evidence to support a claim of total disability, the burden is upon the claimant to prove that she fits into an "odd lot" category; that being an individual who, although not altogether incapacitated, is so handicapped that she is not regularly employable in any well-known branch of the labor market. *Valley Mold & Iron Co. v. Industrial Comm'n.*, 84 Ill. 2d 538, 546-47 (1981).

A claimant seeking "odd lot" status must establish it by a preponderance of the evidence. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 373 Ill. App. 3d 1080, 1091 (2007). A claimant can satisfy the burden of proving she falls into the odd-lot category in one of two ways; (1) by showing diligent but unsuccessful attempts to find work, or (2) by showing that because of her age, skills, training, and work history, she will not be regularly employed in a well-known branch of the labor market. *Alano v. Industrial Comm'n*, 282 Ill. App. 3d 531, 534 (1996); *Westin Hotel v. Industrial Comm'n*, 372 Ill. App. 3d 527, 544 (2007). Once a claimant meets her burden of proving she falls into the "odd-lot" category, the burden then shifts to the employer to prove the claimant is employable in a stable labor market and that such market exists. *Waldorf Corp. v. Industrial Comm'n*, 303 Ill. App. 3d 477, 484 (1999); *Westin Hotel*, 372 Ill. App. 3d at 544.

Under this analysis, Petitioner is eligible for PTD benefits. Petitioner was 57 years old at the time of her accident and is currently over the age of 65. She had an associate degree obtained in the 1970's and a remote work history performing duties other than those performed for Respondent in recent decades. Respondent submitted into evidence a labor market survey prepared by an individual who had never met Petitioner nor reviewed her medical records outside of the June 30, 2014 report of Dr. Krause. The survey revealed nine (9) jobs within a 50-mile radius fitting within restrictions identified by Dr. Krause. Some required the ability to type 30-40 wpm, word processing experience, excel experience, collection experience, data entry and audit experience. Petitioner did not possess most of these skills.

Contrary to the conclusions in Respondent's labor market survey, Petitioner's vocational rehabilitation counselor, Mr. Dolan, opined that Petitioner was unemployable. He admitted that he did not perform his own labor market survey, but he testified that he did not need to do so because of his familiarity with the jobs in the area and his knowledge of Petitioner's medical condition/vocational profile. He further testified regarding the positions identified in Respondent's labor market survey and explained that Petitioner would require better skills to perform sedentary office work. Petitioner's computer skills were basic, she was not a good typist, and she had never prepared reports, used a spreadsheet, or used bookkeeping software.

Petitioner did have personal care skills that Mr. Dolan indicated were transferable, but he explained that the jobs looking for these skills (home attendant, certified nursing, etc.) were ones that she could not physically perform. Mr. Dolan also noted that Petitioner would be competing with younger applicants with more recent training, without physical restrictions, making her a less desirable candidate. Additionally, Petitioner experienced daily ankle pain and difficulty with range of motion. She had difficulty driving and climbing stairs, and she could not walk for extended periods. Petitioner also experienced swelling on a daily basis that frequently required her to sit with her foot elevated. Indeed, Mr. Dolan noted that Petitioner had to elevate her foot during his meeting with her, which he found to be credible.

Ultimately, Mr. Dolan opined that there was no reasonably stable labor market for Petitioner. He explained that she would be competing with younger applicants with more recent training and who do not have restrictions. Given Petitioner's age, skills, training, and work history, the Commission finds, as Mr. Dolan opined, that Petitioner will not be regularly employable in a well-known branch of the labor market and that no stable labor market exists for Petitioner.

Respondent also asserts that Petitioner never contacted Respondent for placement any time after surgery. Respondent relies on *Sharwarko* for the proposition that employers should not be liable for benefits if accommodations could have been made but for the employee voluntarily removing himself from employment. *Sharwarko v. Illinois Workers' Comp. Comm'n*, 2015 IL App (1st) 131733WC, ¶ 49 (2015). The Commission is not persuaded by Respondent's assertion, or its claim that it would be able to accommodate Petitioner's restrictions. Respondent's witness, Mr. Green, admitted that it would be difficult to accommodate Petitioner.

Based on the totality of evidence, the Commission finds the opinions of Mr. Dolan to be persuasive. The Commission thus finds that Petitioner is permanently and totally disabled under an odd-lot theory pursuant to section 8(f) of the Act.

All else is affirmed.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner proved she sustained an accident arising out of and in the course of his employment with Respondent on March 13, 2012.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner has met her burden of proof in relation to causal connection to her work accident suffered on March 13, 2012. Moreover,

the Commission finds that Petitioner did not engage in any injurious practices pursuant to section 19(d) of the Act which would limit the duration of the causal connection period.

IT IS ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $345.33 per week from January 11, 2013 through April 4, 2013, and from April 17, 2013 through April 4, 2014, in addition to the period already awarded by the Arbitrator from April 5, 2013 through April 16, 2013. These being the periods of temporary total incapacity for work under §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner all reasonable and necessary medical expenses claimed by Petitioner in relation to her right ankle condition pursuant to sections 8(a) and 8.2 of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $483.36 (minimum rate) per week for life, beginning April 5, 2014 as provided in section 8(f) of the Act, for the reason that the injuries sustained caused Petitioner to be permanently and totally disabled.

IT IS FURTHER ORDERED BY THE COMMISSION commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund,*** as provided in Section 8(g) of the Act.

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

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 1 2020
o:11/7/19
BNF/wde
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Barbara N. Flores

Marc Parker

DISSENT

I respectfully dissent from the decision of the majority. The majority modified the Decision of the Arbitrator to award all medical bills incurred, to increase TTD from 1&5/7 weeks to 64&2/7 weeks, and to increase the PPD award from 25% loss of use of the right "ankle" [foot] to declare Petitioner permanently and totally disabled as of April 5, 2014. I would have affirmed the Decision of the Arbitrator in which he found that Petitioner's proved compensable accident caused the condition of ill-being of her right ankle, that such causation ceased after April 16, 2016, awarded TTD and medical expenses to that date, and awarded 41.75 weeks of PPD representing loss of the use of 25% of the right foot. The Arbitrator held that causation ceased on April 16, 2016 pursuant to Section 19(d) of the Act because he found Petitioner engaged in injurious practices.

Petitioner sustained a fall at work on March 13, 2012. The Arbitrator found that the accident was compensable, that it aggravated Petitioner's underlying pre-existing arthritis, and caused the need for ankle fusion surgery. The surgery was performed on April 5, 2013. Prior to surgery, her surgeon, Dr. Klein, counseled Petitioner on the need to be completely non-weight bearing after the surgery. She even indicated that she would not proceed with the surgery if Petitioner would not comply with that directive. In the initial post-surgical visit, Dr. Klein noted that it appeared to her that Petitioner was not completely complying with her non-weight bearing direction. Dr. Klein considered that to be of sufficient importance to again admonish Petitioner about the necessity of avoiding all weight bearing. She advised Petitioner that bearing weight could lead to non-fusion and chronic pain. Dr. Klein continued such admonishments in later visits. While Petitioner denied that she bore weight to Dr. Klein at the time of her visit, she acknowledged in her testimony that she was repeatedly admonished to avoid all weight bearing and that she occasionally put weight on her right foot when it became tired from the weight of the cast or to balance herself. Respondent's Section 12 medical examiners, Dr. Krause and Dr. Schmidt, concurred with Dr. Klein that avoiding weight bearing is absolutely essential to recovery from ankle-fusion surgery.

On June 13, 2013, Petitioner was put in a walking boot. She was advised that she could bear some weight on the right foot while wearing the boot. Seven days later, Petitioner presented to the emergency department at Good Samaritan Hospital reporting that she had twisted her right ankle. Dr. Krause specifically testified that it would be impossible for Petitioner to have twisted her ankle if she were wearing the boot. Thereafter, Petitioner's fusion failed resulting to a non-fusion. The non-fusion resulted in a significantly increased period of time she was off work and significantly increased permanent partial disability. As correctly noted by the Arbitrator, Section 19(d) does not mandate that the injurious practice be the sole cause of a claimant's condition of ill-being to deny benefits.

For the reasons stated above, I would have affirmed the Decision of the Arbitrator in which he found Petitioner's failure to comply with treatment directives from her treating surgeon aggravated her work-related condition of ill-being and resulted in cessation of causation. Therefore, I respectfully dissent from the decision of the majority.

DLS/dw
O-11/7/19

Deborah L. Simpson

Deborah L. Simpson

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEONARD LUDTKE,

Petitioner,

vs.

NO: 16 WC 009295
19 IWCC 712

COUNTY OF DeKALB,

Respondent.

ORDER OF RECALL OF CORRECTED DECISION UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission, *sua sponte*, finds that a clerical error exists in the Corrected Decision and Opinion on Review dated January 16, 2020, in the above captioned matter, mistakenly naming Respondent as the party filing the Motion for a Corrected Decision.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Corrected Decision and Opinion on Review dated January 16, 2020 is hereby vacated and recalled pursuant to Section 19(f) for a clerical error contained therein.

IT IS FURTHER ORDERED BY THE COMMISSION that a Second Corrected Decision and Opinion on Review shall be issued simultaneously with this Order.

DATED: JAN 24 2020
o: 12/19/19
BNF/kcb
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Barbara N. Flores

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

LEONARD LUDTKE,

Petitioner,

vs.

NO: 16 WC 9295
19 IWCC 712

COUNTY OF DeKALB,

Respondent.

SECOND CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, temporary total disability, medical expenses, partial permanent disability, and penalties, and being advised of the facts and law, reverses the Decision of the Arbitrator as stated below.

I. FINDINGS OF FACT

A. Background

On December 30, 2015, Petitioner was employed by Respondent as a Maintenance Worker II. Petitioner testified he had been employed by Respondent for approximately 17 years. Petitioner stated his job duties included general maintenance, snow removal, light electrical and plumbing work, and cleaning. Petitioner added that he was available to assist others or fill in for unavailable co-workers. Petitioner was 56 years old at the time of his injury.

On December 30, 2015, Petitioner was generally assigned to the DeKalb County Courthouse. He could not recall how long he had been assigned to the courthouse but estimated it had been a couple of years. Petitioner testified the campus of Respondent in Sycamore, Illinois

included the courthouse at the corner of State and Main, along with the Public Safety Building (commonly known as the jail), the Legislative Center and the Administration Building. According to Petitioner, the jail was across Main Street, directly east of the courthouse, while the Legislative Center and Administrative Building were north of the courthouse. Petitioner described the campus as an L-shape, with the Administration building at the top or furthest north, with the courthouse to the west. Petitioner acknowledged there is metered parking on the public streets surrounding the courthouse.

Petitioner testified that prior to December 30, 2015, there had been a substantial improvement of the courthouse, including an addition to the north side. He later clarified that the improvements were constructed years earlier and there was no ongoing construction. Petitioner stated that after the addition was completed, additional parking was created on the north side of the building, directly adjacent to the addition. He testified that part of the street was taken as in-line parking for the courthouse. He described the parking as angled spaces just off the street, generally reserved for courthouse employees from 8:00 or 8:30 a.m. through 4:30 p.m. Petitioner stated that his department (facilities management) maintained those parking stalls, including snow removal, ice removal, salting and the like.

Petitioner also testified that the public entered the courthouse only through the main entrance on the south side of the building but there were four other entrances available for employees. According to Petitioner, there was a main employee entrance on the north side of the courthouse, as well as entrances at the east side, northwest corner, and the west side. Petitioner stated the employee entrances required entering a code into a keypad.

B. Accident

Petitioner testified that on December 30, 2015, his shift was from 7:00 a.m. to 3:30 p.m. He stated he arrived on the campus that day at approximately 6:45 to 6:50 a.m. Petitioner acknowledged he was not called into work early and was not paid for the time before his shift.

Petitioner testified he parked in one of the spaces on the north side of the courthouse. According to Petitioner, these spaces were reserved for particular employees, including judges. Petitioner stated that other employees generally parked in the main parking lot east of the Legislative Center, but to his knowledge, they were not required to do so.

Petitioner explained that he parked in a space reserved for another county employee to drop off his lunch and coffee; he wanted to avoid carrying it across the campus because he generally ate lunch at the courthouse. He explained that his coffee would have become cold carrying it from the main lot to the Public Safety Building to sign in for work before going to the courthouse. Petitioner stated he typically would deposit his lunch, drive to and park in the main lot, and enter the Public Safety Building to sign in on his time sheet.

Petitioner acknowledged he could have parked elsewhere and was not required to eat lunch at the courthouse. He later added that he had occasionally been telephoned to respond to emergencies while off-site during lunch.

Petitioner testified that after parking, he entered the courthouse through the northwest entrance and dropped off his lunch in the shop area. He stated that while entering the building, he noticed there was a thin layer of ice covering the parking lot, but the sidewalk seemed clear. According to Petitioner, it did not appear that anyone had cleared ice or snow, or salted the parking lot, but he observed ice melt on the sidewalk. Petitioner acknowledged it was icy throughout the city and there was snow around. He also acknowledged that he walked through snow to reach the public sidewalk and his shoes may have become wet.

Petitioner testified that after dropping off his lunch, he exited the building. Petitioner stated that as he was returning to his car, he slipped and fell in the parking area, approximately five or six feet away from his car. He added that his feet came out from under him and he landed heavily on his left shoulder and arm. Petitioner agreed there was no crack or defect in the sidewalk, or anything other than ice that caused him to fall.

According to Petitioner, he experienced extreme pain in his left shoulder and further examination revealed very limited mobility of the arm with extreme pain. Petitioner also testified that prior to his fall, he had never injured or received medical treatment involving his left shoulder and arm. Petitioner testified he notified his supervisor of the incident and drove himself to the emergency room at Kishwaukee Hospital.

C. Medical Treatment

On December 30, 2015, Petitioner presented to the emergency department at Kishwaukee Hospital. The medical records indicate Petitioner informed the staff he was outside at work and slipped on the ice, landing on the left shoulder/humerus; he denied any head injury, neck pain, chest pain, abdominal pain, or syncope. According to the records, two X-rays of the left shoulder showed no fracture, dislocation, focal bony abnormality or degenerative changes. Two X-rays of the left humerus showed similar results. A report on a CT scan of the head indicated no evidence of acute intracranial abnormality. Another report on a CT scan of the cervical spine indicated: no fractures; straightening of the normal cervical lordosis, which may be secondary to patient positioning or can be seen with muscle spasm; and multilevel cervical spondylosis.

Petitioner was diagnosed with a left shoulder contusion, with the notation of no obvious fracture or dislocation. The patient summary report also indicates instructions were given for a shoulder sprain. Petitioner was discharged to home care with instructions for rest, heat, ice and a shoulder sling as needed.

On January 4, 2016, Petitioner was seen at the Midwest Orthopedic Institute by Marcus Roman, assistant to Dr. Tony Choi. After providing a history of the incident, Petitioner

complained of pain with sleeping, especially on the left shoulder. Petitioner also complained of pain with overhead movements. Roman noted Petitioner previously had a right rotator cuff repair performed by Dr. Choi.

Roman's physical examination indicated the range of motion on both shoulders actively was 160/60/T9. Roman noted that on the left, he could forward elevate Petitioner to 160 degrees with a little pain. Strength was 4/5 in forward elevation on the left, 5/5 with external rotation but with pain, and 5/5 with internal rotation. Roman's impression was left shoulder pain, with suspicion of a rotator cuff tear. Roman recommended obtaining an MRI to rule out a rotator cuff tear. Roman also issued a work note stating Petitioner could not return to work.

The MRI of Petitioner's left shoulder was performed on January 7, 2016. The interpreting radiologist's impressions were: (1) complete full-thickness tear supraspinatus tendon and full-thickness tear of the anterior-most infraspinatus tendon with more mild diffuse infraspinatus tendinosis; (2) full-thickness tear of the cephalad 2/3 subscapularis tendon; (3) moderately severe acromioclavicular degenerative change; and (4) moderately large hemarthrosis freely communicating with the subacromial-subdeltoid bursa.

On January 11, 2016, Roman reviewed the MRI results and recommended surgical fixation for Petitioner's acute rotator cuff tears, to which Petitioner agreed. Roman noted that Dr. Choi also reviewed the MRI. On February 5, 2016, Petitioner saw Dr. Choi, whose notes confirm he reviewed the MRI and recommended arthroscopic rotator cuff surgery (as opposed to open surgery).

On February 11, 2016, Dr. Choi performed a left shoulder arthroscopic double row subscapularis repair and supraspinatus repair, subacromial decompression and biceps tenodesis. Dr. Choi's pre- and post-operative diagnoses were the same: left shoulder massive rotator cuff tear supraspinatus, infraspinatus, subscapularis. Petitioner was also referred to Dr. Manav Salwan on this date for post-operative medical management and diabetic management.

On February 12, 2016, Dr. Choi noted Petitioner was doing well and the plan would be to discharge him home. The doctor also noted he was trying to arrange home health therapy, as Petitioner had troubles with transportation due to living alone.

On February 19, 2016, Petitioner followed up with Roman, rating his pain at 1/10 at rest and 6/10 with activity. Petitioner also reported his pain was moderately controlled with Norco. Roman scheduled another visit in a week to remove Petitioner's sutures. Roman noted Petitioner would continue physical therapy and transition from home health to outpatient therapy the next week. Roman also continued Petitioner's use of a sling and abductor wedge. On February 24, 2016, Petitioner began twice-weekly occupational therapy. On February 26, 2016, Roman continued therapy, as well as the sling and abductor wedge, scheduling a visit with Dr. Choi in two weeks.

On March 11, 2016, Petitioner saw Dr. Choi, reporting his physical therapy was going well. Petitioner reported he was not taking Norco most days but would occasionally for neck pain. Dr. Choi noted Petitioner externally rotated passively relatively easy to 45 degrees with forward elevation of approximately 90 degrees. The doctor noted Petitioner was progressing well and removed the abduction portion of the sling. He also scheduled a follow-up visit with Roman in four weeks.

Petitioner saw Roman again on April 8, 2016. The record indicates Petitioner complained of some left shoulder pain at night. Roman's physical examination showed an active range of motion for the left shoulder of 90/45/L5, while the passive range of motion was 140/50/L5. The range of motion for the right shoulder was 170/60/T10. Roman continued Petitioner's physical therapy and ordered a follow-up visit in four weeks.

On May 6, 2016, Petitioner's only complaint to Roman was of left shoulder pain in the mornings, which improved with exercises and extra-strength Tylenol. Roman's examination showed the range of motion of the left shoulder was 150/60/L1, while the right shoulder was 170/60/T10. Petitioner's strength in forward elevation was 4/5, while his strength in internal and external rotation was 5/5. Roman again continued Petitioner's physical therapy and scheduled a visit in four weeks.

On June 3, 2016, Petitioner reported to Roman that he had no change in his shoulder pain, but felt his left shoulder was getting a little stiff. The range of motion and strength measurements were the same as his prior visit. Roman noted that in that morning's therapy, Petitioner only reached 130 degrees in forward elevation, but was able to get to 150 degrees when tested at the clinic. Roman extended Petitioner's physical therapy and scheduled another monthly visit, noting Petitioner would remain off work because there was no light duty work available.

Petitioner saw Dr. Choi on July 1, 2016. The record indicates Petitioner's range of motion for his left shoulder remained the same, but the strength in forward elevation was 4+/5. Dr. Choi noted Petitioner was still weak in forward elevation, but gradually improving. The doctor ordered continued physical therapy, with a follow-up in four weeks.

On July 9, 2016, Petitioner complained to Dr. Choi that earlier in the week, he was exercising during physical therapy and felt a pop in his neck/trapezius region, resulting in soreness around the neck which made it difficult to progress in the protocol. Dr. Choi found Petitioner's range of motion in the left shoulder was 160/60/T11, while strength in forward elevation remained 4+/5. Dr. Choi noted that Petitioner may have strained something and recommended possible deep tissue massage in addition to physical therapy. The doctor also recommended continuing strengthening exercises for endurance.

On August 26, 2016, Petitioner reported some remaining weakness to Dr. Choi, but stated the physical therapy was going well. Dr. Choi's examination found Petitioner's range of motion

in the left shoulder was 160/60/T9, while strength in forward elevation was 5-/5. Dr. Choi noted that Petitioner's residual weakness should improve with further endurance strengthening in physical therapy. The doctor also discussed work with Petitioner, who stated his boss would not let him return until he reached 100 percent. Dr. Choi hoped to return Petitioner to work after another four-week evaluation.

On September 30, 2016, Dr. Choi found Petitioner's range of motion in the left shoulder was 160/60/T9, while strength in forward elevation was 5/5. Dr. Choi noted that Petitioner still had a little endurance-limited weakness but was able to hold against forward elevation for quite some time before he fatigued. As Petitioner was not experiencing pain and his strength was near normal, Dr. Choi believed he would advance Petitioner to full-duty work and consider placing him at MMI in four weeks.

Petitioner last visited Dr. Choi on October 28, 2016. Petitioner's range of motion in the left shoulder and strength in forward elevation remained the same. Dr. Choi noted he sent Petitioner back to work after the prior visit and Petitioner reported tolerating it well, with little to no discomfort. Dr. Choi placed Petitioner at MMI and indicated he would see Petitioner on an as-needed basis.

D. Narrative Report by Dr. Choi

On June 29, 2016, Dr. Choi wrote a two-page report on his treatment of Petitioner. In the report, Dr. Choi briefly recounts Petitioner's history, the MRI results, the surgery, and the post-operative follow-up visits. Dr. Choi then opined with a reasonable degree of medical certainty that the fall on December 30, 2015 in the workplace parking lot did cause the acute rotator cuff tear on Petitioner's left shoulder.

E. Section 12 Examination by Dr. Weiss

On February 8, 2017, Petitioner was examined by Dr. Stephen Weiss, an orthopedic surgeon, at Respondent's request. Dr. Weiss prepared a report on February 17, 2017 wherein, following a review of Petitioner's medical records and a physical examination, Dr. Weiss diagnosed Petitioner with a full-thickness rotator cuff tear of the left shoulder, and a right shoulder rotator cuff repair by history (approximately seven years prior). Dr. Weiss also provided ratings according to the AMA Guides of a 7% upper extremity impairment, equivalent to a 4% whole person impairment.

F. Additional Information

Petitioner testified that between December 30, 2015 and October 3, 2016, he did not return to work, excepting a half-day on January 2 or 3, 2016. Petitioner also testified that $92,699.94 was paid by his group health insurer for treatment of his left shoulder injury, and that after his $225.00 out-of-pocket payments, there was an outstanding balance of $12,172.74.

Petitioner further testified he has returned to his full job as a maintenance worker, earning slightly more than he did prior to his injury. Petitioner stated he is right arm dominant.

Regarding his current condition of ill-being, Petitioner testified that upon returning to work for Respondent, he has had to self-modify his work to compensate for lifting and moving heavy objects such as file boxes, copy paper, and bags of ice melt or water softener salt. Petitioner acknowledged he lifts items weighing over 50 pounds himself but is more careful about how he balances the load and stacks items. Petitioner added that climbing vertical ladders on the roof of the Public Safety Building (where he now works) to check the roof and exhaust fans is difficult; shoveling snow can be painful. Petitioner testified he has continued to exercise at home, though it was not prescribed.

II. CONCLUSIONS OF LAW

A. Petitioner's Work-Related Accident

The Arbitrator found Petitioner failed to prove by a preponderance of evidence that he sustained an accident that arose out of and in the course of his employment which resulted in a disabling injury. The Arbitrator concluded the danger of slipping on the ice was not peculiar to his work and his exposure to the risk was not greater than that of the general public.

The issue of whether an injury arose out of and in the course of employment is generally a question of fact. *Suter v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 130049WC, ¶ 15. "However, when the facts are undisputed and susceptible to but a single inference, the question is one of law subject to *de novo* review." *Id.* In this case, the material facts are not susceptible to a single inference, the chief examples being whether the parking lot at issue is a public lot or provided to Respondent's employees when its use is restricted to particular employees for much of the day. Accordingly, the issue remains a question of fact.

"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 (2003). 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." *Sisbro*, 207 Ill. 2d at 203.

The question of whether a claimant's injury arose out of his or her employment depends upon the type of risk to which he or she was exposed. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011). "There are three categories of risk to which an employee may be exposed: (1) risks that are distinctly associated with one's employment, (2) risks that are personal to the employee, such as idiopathic falls, and (3) neutral risks that have no particular employment or personal characteristics, such as those to which the

general public is commonly exposed." *Dukich v. Illinois Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 31.

"[B]oth our supreme court and our appellate court have repeatedly held that accidental injuries sustained on property that is either owned or controlled by an employer within a reasonable time before or after work are generally deemed to arise out of and in the course of employment when the claimant's injury was sustained as a result of the hazardous condition of the employer's premises." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40 (and cases cited therein); see also *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038 (2004) (and cases cited therein). "The presence of a 'hazardous condition' on the employer's premises renders the risk of injury a risk incidental to employment; accordingly, a claimant who is injured by such a hazardous condition may recover benefits without having to prove that she was exposed to the risk of that hazard to a greater extent than are members of the general public." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40. "In other words, such injuries are not analyzed under 'neutral risk' principles; rather they are deemed to be risks 'distinctly associated' with the employment." *Id.*

The Arbitrator, in focusing on whether Petitioner's exposure to the risk of the ice was greater than that of the general public, appears to have analyzed this case as a "neutral risk" situation and did not consider whether it was a "hazardous condition" situation. The "hazardous condition" cases generally involve injuries caused by the natural accumulation of snow or ice in a parking lot or other outdoor space owned or controlled by the employer. *Dukich*, 2017 IL App (2d) 160351WC, ¶ 41; see also *Mores-Harvey v. Industrial Comm'n*, 345 Ill. App. 3d 1034, 1038 (2004) (and cases cited therein).

In this case, the unrebutted evidence shows that Petitioner was injured after falling due to ice and show in a parking area controlled by Respondent. Indeed, Petitioner's department was responsible for ice and snow removal in this parking area. Therefore, it cannot be said that Petitioner would never be expected to be in this parking area in the course of his work duties. Moreover, Respondent controlled when the parking lot was to be used solely by employees and when it was open to other members of the public.

Respondent argues that Petitioner fell in a public parking lot and not one designated for employees. This is not strictly true. The parking area at issue is restricted to particular courthouse employees from 8:00 or 8:30 a.m. through 4:30 p.m. Respondent also permits members of the public to park in this area during "non-business" hours, including at the time of the injury in this case. However, in *Mores-Harvey*, our appellate court considered that dual usage of a parking lot was not the issue:

> "Whether a parking lot is used primarily by employees or by the general public, the proper inquiry is whether the employer maintains and provides the lot for its employees' use. If this is the case, then the lot constitutes part of the employer's premises. The presence of a hazardous condition on the employer's premises that causes a claimant's injury supports the finding of a compensable claim." *Mores-*

Harvey, 345 Ill. App. 3d at 1040 (citing *Archer Daniels Midland Co. v. Industrial Comm'n,* 91 Ill. 2d 210, 216 (1982)).

In *Wal-Mart Stores, Inc. v. Industrial Comm'n,* 326 Ill. App. 3d 438 (2001), however, the appellate court reversed an award based in part on the fact that the employer's parking lot was open to both employees and the public. See *id.* at 445 (distinguishing *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill. 2d 429, 430-31 (1968), and *American Electric Cordsets v. Industrial Comm'n,* 198 Ill. App. 3d 87, 91(1990)). Respondent also notes that the *Mores-Harvey* court, relying in part on *Homerding v. Industrial Comm'n,* 327 Ill. App. 3d 1050 (2002), ruled in favor of the claimant in part because "the general public was free to park anywhere in the lot, [but] claimant's choices were restricted. Therefore, claimant's exposure to risk was necessarily greater than that of the general public." *Mores-Harvey*, 345 Ill. App. 3d at 1042.

Respondent overlooks that the *Mores-Harvey* court, *after* concluding that a hazardous condition in the parking lot supported finding a compensable claim, discussed *Wal-Mart Stores* and *Homerding* as cases which considered *only* the second exception to the "general premises" rule. See *Mores-Harvey*, 345 Ill. App. 3d at 1040. This second exception permits recovery for off-premises injuries where "'the employee's presence at the place where the accident occurred was required in the performance of his duties and the employee is exposed to a risk common to the general public to a greater degree than other persons.'" *Id.* at 1038 (quoting *Illinois Bell Telephone Co. v. Industrial Comm'n,* 131 Ill. 2d 478, 484 (1989)). The *Mores-Harvey* court concluded the claimant would also recover under the second exception. *Mores-Harvey*, 345 Ill. App. 3d at 1042. But it was not required to do so, having already concluded the first exception applied because the parking lot, even if dual-use, was maintained and provided for employees' use.[1]

Respondent contends Petitioner was also required to prove he had begun his work day, and that he was required to park in the lot where the injury occurred. The latter asserted requirement is based on the discussion of *Homerding* in *Mores-Harvey*. The former asserted requirement is not entirely accurate. Rather, the injury must be sustained "within a reasonable time before or after work." *Dukich*, 2017 IL App (2d) 160351WC, ¶ 40; see also *Hiram Walker & Sons, Inc. v. Industrial Comm'n*, 41 Ill. 2d 429 (1968) (affirming award where employee arrived 40-50 minutes early and slipped in parking lot before proceeding to breakfast at a nearby café). In this case, Petitioner's shift began at 7:00 a.m. He arrived on Respondent's campus at approximately 6:45 to 6:50 a.m. A gap of 10 to 15 minutes is within a reasonable time before or after Petitioner's shift.

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[1] This first exception was recently discussed by the Illinois Appellate Court in *Walker Brothers, Inc. v. Illinois Workers' Compensation Comm'n*, 2019 IL App (1st) 181519WC. The *Walker Brothers* court observed that "'[t]he decisive issue in parking lot cases usually is whether or not the lot is owned by the employer, or controlled by the employer, or is a route required by the employer.'" *Id.* ¶ 22 (quoting *Maxim's of Illinois, Inc. v. Industrial Comm'n*, 35 Ill. 2d 601, 604 (1966)). Here, the lot was controlled by Respondent.

Respondent notes Petitioner was not required to keep his lunch or coffee in the courthouse. This objection is consistent with Respondent's reliance on *Illinois Bell Telephone Co.*, but, as noted above, that case involved the second exception to the "general premises" rule, not the first. In a "hazardous condition" case, "[t]he rationale for awarding compensation is that the employer-provided parking lot is considered part of the employer's premises." *Mores-Harvey*, 345 Ill. App. 3d at 1038 (citing L. Larson, Larson's Workers' Compensation Law § 13.04[2][a], [b], at 13--40-13--41 (2002)).

The amount of control Respondent exercised over Petitioner's lunch arrangements, however, is relevant to establish that Petitioner's depositing of his lunch and coffee in the courthouse before parking in the main lot was a reasonably necessary act of personal comfort.

The personal comfort doctrine provides:

> "'Employees who, within the time and space limits of their employment, engage in acts which minister to personal comfort do not thereby leave the course of employment, unless the * * * method chosen is so unusual and unreasonable that the conduct cannot be considered an incident of the employment.'" *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 211 (1999) (quoting 2 A. Larson & L. Larson, Workers' Compensation Law § 21.00, at 5-5 (1998)).

Moreover:

> "'If the employee voluntarily and in an unexpected manner exposes himself to a risk outside any reasonable exercise of his duties, the resultant injury will not be deemed to have occurred within the course of the employment. [Citation.] The employer may, nevertheless, still be held liable for injuries resulting from an unreasonable and unnecessary risk if the employer has knowledge of or has acquiesced in the practice or custom,'" *Karastamatis*, 306 Ill. App. 3d at 211 (quoting *Eagle Discount Supermarket v. Industrial Comm'n*, 82 Ill. 2d 331, 340 (1980)).

The personal comfort doctrine generally encompasses acts such as eating and drinking, obtaining fresh air, seeking relief from heat or cold, showering, resting, and smoking. *Karastamatis*, 306 Ill. App. 3d at 211 (citing 2 A. Larson & L. Larson, Workers' Compensation Law § 21.10, at 5-5 (1998)).

In this case, Petitioner sought relief from the cold for himself, his coffee and food during the short period before his shift. Using the nearest dual-use parking lot was foreseeable, not unreasonable or unexpected; parking south or west of the courthouse was metered while the east side was bounded by a major thoroughfare with no parking. The risk of ice in the area is not outside any reasonable exercise of Petitioner's duties; his department is responsible for clearing

snow and ice in the parking area. Petitioner's morning routine was not so unusual and unreasonable that the conduct cannot be considered an incident of the employment. Rather, it was a reasonably foreseeable act of personal comfort.

Lastly, Respondent argues Petitioner was not exposed to a risk greater than that to which the general public was exposed. This is again either dependent on *Illinois Bell Telephone Co.* (which involved the common area of a mall, not a parking lot controlled by an employer) or on characterizing this case as involving a "neutral risk." Accordingly, the Commission rejects the argument for the reasons stated above. Moreover, as Petitioner notes, he was accessing the courthouse using an employee entrance from an area where the public also was permitted to park, but would not be expected to park, given that the public entrance was on the other side of the courthouse.

For all of the aforementioned reasons, the Commission concludes that Petitioner proved by a preponderance of evidence that he sustained an accident which arose out of and in the course of his employment.

B. Causal Connection

The Commission next considers whether Petitioner's current condition of ill-being is causally related to the accident. In his narrative report, Dr. Choi opined with a reasonable degree of medical certainty that the fall on December 30, 2015 in the workplace parking lot did cause the acute rotator cuff tear on Petitioner's left shoulder. In his IME report, Dr. Weiss does not offer a contrary view. Petitioner testified regarding his continuing weakness and limitations at work. Given this record, the Commission concludes Petitioner's current condition is causally connected to the accident.

C. Temporary Total Disability

Petitioner claims he was entitled to temporary total disability benefits in the amount of $508.39 per week for the 39-week period from January 4, 2016 through October 3, 2016, pursuant to §8(b) of the Act. The parties stipulated in the Request for Hearing that Petitioner's average weekly wage, calculated pursuant to section 10 of the Act, was $762.59. Accordingly, Petitioner's claim represents the statutory two-thirds of his average weekly wage. See 820 ILCS 305/8(b)1 (West 2018). Respondent disputed this claim by denying the accident arose out of the course of Petitioner's employment. Having found Petitioner's accident compensable, the Commission awards Petitioner the claimed temporary total disability benefits.

D. Medical Expenses

Petitioner claims Respondent should pay outstanding reasonable and necessary medical expenses of $12,172.74 pursuant to the fee schedule and reimburse him $225.00 for out-of-pocket medical expenses pursuant to §§8(a) and 8.2 of the Act. Petitioner also acknowledges

Respondent should be given a credit of $92,699.94 for medical benefits paid by its group medical carrier and hold Respondent harmless for any claims for which it receives credit, pursuant to §8(j) of the Act. Respondent again disputed this claim by denying the accident arose out of the course of Petitioner's employment. Having found Petitioner's accident arose out of his employment, the Commission awards Petitioner the claimed medical expenses, and awards Respondent the credit under §8(j) of the Act as stipulated by the parties in the Request for Hearing.

E. Permanent Partial Disability

Petitioner further seeks permanent partial disability benefits representing a 15% loss of the person as a whole. Subsection (b) of section 8.1b of the Act lists five factors upon which the Commission must base its determination of the level of permanent partial disability benefits to which a claimant is entitled, including: (i) the level of impairment contained within a permanent partial disability impairment report; (ii) the claimant's occupation; (iii) the claimant's age at the time of injury; (iv) the claimant's future earning capacity; and (v) evidence of disability corroborated by the treating medical records. 820 ILCS 305/8.1b(b) (West 2018). However, "[n]o single enumerated factor shall be the sole determinant of disability." *Id.* § 305/8.1b(b)(v).

Regarding the level of impairment contained within a permanent partial disability impairment report, the Section 12 examiner, Dr. Weiss, provided ratings according to the AMA guidelines of a 7% upper extremity impairment, equivalent to a 4% whole person impairment. Petitioner did not submit an impairment rating. The Commission gives some weight to this factor.

Regarding the claimant's occupation, Petitioner is employed by Respondent as a maintenance worker, a position which involves lifting and moving heavy objects such as file boxes, copy paper, and bags of ice melt or water softener salt. Some of these items weigh over 50 pounds. Petitioner's occupation also involves climbing vertical ladders to perform maintenance checks. Petitioner additionally performs light plumbing and electrical work, and shovels snow. The Commission places greater weight on this factor.

As for the claimant's age, Petitioner was 56 years old at the time of his injury. This is an age at which it may be expected that not only is Petitioner truly at MMI and unlikely to recover further, but also young enough that he may be expected to work for a number of years with lingering symptoms and the limitations he has imposed upon himself to complete his job duties. The Commission places some weight on this factor.

The claimant's future earning capacity appears to be undiminished. Petitioner has returned to his full job as a maintenance worker, earning slightly more than he did prior to his injury. Accordingly, the Commission places no weight on this factor.

Lastly, the Commission considers the evidence of Petitioner's disability corroborated by the treating medical records. Petitioner was diagnosed by Dr. Choi with left shoulder massive

rotator cuff tear supraspinatus, infraspinatus, subscapularis. Dr. Weiss also diagnosed Petitioner with a full-thickness rotator cuff tear of the left shoulder. To treat this condition, Petitioner underwent a left shoulder arthroscopic double row subscapularis repair and supraspinatus repair, subacromial decompression and biceps tenodesis. Petitioner then participated in approximately eight months of physical therapy and rehabilitation. Petitioner's medical records are entirely consistent with his lingering difficulty with job duties which include lifting and moving heavy objects, climbing vertical ladders, and shoveling snow. The Commission places greater weight on this factor.

Weighing the five factors pursuant to Section 8.1b of the Act, which does not simply require a calculation, but rather a measured evaluation of which no single factor is conclusive on the issue of permanency, the Commission agrees that Petitioner sustained a 15% loss of use of the whole person.

F. Penalties and Fees

Petitioner sought penalties from Respondent under section 19(k) of the Act, which provides:

> "In case[s] where there has been any unreasonable or vexatious delay of payment or intentional underpayment of compensation *** then the Commission may award compensation additional to that otherwise payable under the Act equal to 50% of the amount payable at the time of such award." 820 ILCS 305/19(k) (West 2018).

Petitioner also sought an award of attorney fees pursuant to Section 16 of the Act which provides for an award of attorney fees when an award of additional compensation under section 19(k) is appropriate. 820 ILCS 305/16 (West 2018). Section 19(k) penalties and section 16 fees are intended to address situations where the delay is deliberate or the result of bad faith or improper purpose. *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, ¶ 24. The imposition of penalties under section 19(k) and fees under section 16 is discretionary. *Id.*

The Commission has in the past vacated an award of penalties and fees where the Respondent had a good faith argument regarding liability for a fall in a parking lot, in part due to the sometimes confusing state of the law regarding such injuries. See, *e.g.*, *Plucinski v. White Castle Systems, Inc.*, 5 IWCC 456. Given the record in this case, Respondent had a good faith argument regarding liability. Accordingly, the Commission declines to award penalties and fees in this case.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed June 14, 2017, is hereby reversed for the reasons stated above.

IT IS FOUND BY THE COMMISSION that Petitioner proved he sustained an accident arising out of and in the course of his employment with Respondent on December 30, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner proved his current condition of ill-being is causally connected to the accident.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the temporary total disability benefits that have accrued from January 4, 2016 through October 3, 2016 at the rate of $508.39 per week, pursuant to §8(b) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent is liable to pay Petitioner's outstanding reasonable and necessary medical expenses of $12,172.74 pursuant to the fee schedule and also to reimburse Petitioner $225.00 for out-of-pocket medical expenses pursuant to §§8(a) and 8.2 of the Act. Respondent is awarded a credit of $92,699.94 for medical benefits paid by its group medical carrier and is held harmless for any claims for which it receives credit, pursuant to §8(j) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $457.55 per week for a period of 75 weeks, as provided in §8(d)(2) of the Act, for the reason that the injuries sustained caused a 15% loss of use of Petitioner's person as a whole.

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

No county, city, town, township, incorporated village, school district, body politic or municipal corporation is required to file a bond to secure the payment of the award and the costs of the proceedings in the court to authorize the court to issue such summons. 820 ILCS 305/19(f)(2). Based upon the named Respondent herein, no bond is set by the Commission. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: JAN 2 4 2020
d: 12/19/19
BNF/kcb
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Barbara N. Flores

Deborah L. Simpson

Marc Parker