ILLINOIS STATE BAR ASSOCIATION

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Workers' Compensation Law

The newsletter of the Illinois State Bar Association's Section on Workers' Compensation Law

Editor's Note

BY CAMERON B. CLARK

On behalf of the newsletter editors, I would like to extend our apology to our colleague and council member, Gregory Keltner of Litchfield Cavo LLP. Erroneously, Greg's name was not included in the last newsletter with the list of colleagues that were inducted this year into the College of Workers' Compensation Lawyers. We congratulate Greg on his accomplishment.

For those of you who do not know me, I have been proud to serve as a co-editor of the ISBA Worker's Compensation Law Newsletter for over 17 years. Most recently, I was asked by our former CLE Coordinator, John Adams, and the ISBA to take over the reins in 2022. I want to personally say "Thank You" to John for the incredible work he did for years on behalf of the section council. John had a knack for putting together phenomenal programs that had a history of selling out and being amongst some of the most attended seminars presented by any of the ISBA section councils. I have some big shoes to fill. There certainly was a learning curve, but I have officially completed my first year as the CLE coordinator. The section council had two very well attended

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To Be or Not to Be an Employee?

BY ROBERT J. FINLEY

That is the question answered in ***Tile Roofs, Inc. v. The Illinois Workers' Compensation Comm'n, et al.*, 2022 IL App (1st) 210819WC-U (Ill. App. Ct. 2022).** The First District Appellate Court gives pause in nobly deciding the determinative factors of an employee-employer relationship under a manifest weight of the evidence standard.

Prior to his association with Respondent Tile Roofs, Inc., Petitioner worked for Mortenson Roofing Company as a foreman/superintendent managing roofing projects. Respondent and Mortenson are related companies with the same owner. Petitioner's job duties include ordering materials for projects, setting up job sites, scheduling employees for projects, managing those employees, interacting with general contractors, and recordkeeping of employee hours worked. Petitioner had little control over who worked on the crew and did not have authority to hire/terminate employees. Mortenson provided Petitioner with a

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seminars this year in February and October. Our next seminar is scheduled to take place on President's Day, February 20, 2023. By request of the membership, this seminar will also take place virtually. Further details regarding the topics and speakers will be forthcoming from the ISBA.

This issue of the newsletter includes five articles on a wide range of topics. Robert J. Finley's (Hinshaw & Culbertson) article reviews the issues that come into play in dealing with employer/employee relationship, which was addressed in *Tile Roofs, Inc. v. IWCC*. Jim Babcock (GWC Injury Lawyers LLC) reviews the *Cummings v. IWCC* decision and exclusion of medical evidence by an arbitrator. Alexis Ferracuti (Law Offices of Peter F. Ferracuti, P.C.) analyzes the court's decision in *Lewis v. IWCC* and the concept of collateral estoppel. Anita DeCarlo (Ankin Law Office LLC) discusses the burden of proof required in Occupational Disease claims and the court's opinion in *City of Springfield v. IWCC*. Finally, Derek Dominguez (Hughes, Socol, Piers, Resnick & Dym, Ltd.) reviews the court's decision in *Hoots v. IWCC* and the discusses the elements required to be considered a "traveling employee." I thank these section council members for their time and contribution to this newsletter.■

To Be or Not to Be an Employee?

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company-owned vehicle and paid for gas, hotel stays, and essential tools. Petitioner was a labor union member. Taxes were deducted from his paycheck. Mortenson paid the union directly for Petitioner's insurance. After Petitioner retired from the union, he worked on smaller projects for Tile Roofs, Inc.—not Mortensen. Petitioner formed an Illinois limited liability company, Quantum Edge LLC. Petitioner's LLC received revenue from Tile Roofs, Inc. in the form of payment from Tile Roofs, Inc. at the corporation's request. Quantum Edge invoiced Tile Roofs, Inc. and payments for a gross amount showing no payroll tax or benefit deductions were sent by Tile Roofs to Quantum Edge. Nevertheless, Petitioner's job duties and responsibilities were apparently the same as a foreman/superintendent with Mortenson Roofing. On April 13, 2017, the date of the accident, Petitioner was working on a roofing project utilizing skills developed in training paid for by Mortenson.

The arbitrator found that (1) Petitioner *was not* an employee at the time he sustained injuries and (2) no other legal theory would impose liability on Respondent. The Commission reversed and remanded. The circuit court confirmed the Commission's decision. The appellate court affirmed the circuit court.

The appellate court held that determining the existence of the employee-employer relationship is based on the totality of the circumstances and not a strict application of any specified factors. These factors, set forth in *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159 (2007), are as follows: whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment.

The court found there was no error in the Commission's "totality-of-the-circumstances" review of the evidence. "Without the existence of a rigid rule governing the issue…" a conclusion other than the Petitioner being an employee cannot be drawn. Respondent insisted that the Commission "completely ignored" the *Roberson* factors and failed

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OFFICE
ILLINOIS BAR CENTER
424 S. SECOND STREET
SPRINGFIELD, IL 62701
PHONES: 217-525-1760 OR 800-252-8908
WWW.ISBA.ORG

EDITORS
Candice E. Drew

PUBLICATIONS MANAGER
Sara Anderson
sanderson@isba.org

to consider that Petitioner was paid on an hourly basis and did not have payroll taxes withheld. However, the court pointed to the Commission's consideration of other factors including (1) Petitioner continued to supervise crews of Mortenson employees, (2) Petitioner still ordered equipment and materials for the roofing projects either for Respondent or Mortenson, (3) Mortenson continued to provide most tools, (4) Respondent or Mortenson still provided a company vehicle and paid for its fuel, (5) Mortenson still paid for out-of-town hotel stays for projects, and (6) Mortenson provided the training needed for the roofing project at issue. Thus, a rational trier of fact certainly could agree with the Commission's conclusion.■

Cummings v. IWCC and *Sua Sponte* Exclusion of Evidence

BY JIM BABCOCK

Cummings v. IWCC, 2022 IL App (1st) 210956WC-U a Rule 23 decided August 5, 2022, arose out of an arbitration conducted by Arbitrator Ciecko on June 06, 2018, denying benefits in an occupational exposure claim. The denial of benefits was affirmed at both the Commission level and the trial court but remanded to the Commission for further consideration.

The hearing included depositions of experts but also the admission into evidence of hospital records wherein 26 pages were certified but 109 pages were not. Respondent did not object to the admission of the entire hospital chart, and it was admitted into evidence. After the close of proofs, the arbitrator decided that based upon the lack of certification, he would only consider the 26 pages of the certified record and refrained from considering the remaining 109 pages. In denying benefits, the arbitrator found respondent's expert more convincing.

The Commission affirmed the decision. Commissioner Tyrell dissented. In his dissent, the Commissioner described the exclusion of the medical records to which respondent never objected "inexplicable" and "mind-boggling."

On appeal, petitioner did not directly challenge the credibility determination of the Commission finding that respondent's expert was more credible. Rather, petitioner argued that the credibility assessment must be made in the context of all the admissible evidence. To do otherwise, would result in a manifest weight of evidence analysis.

In remanding the matter for further consideration, the court noted that in addition to the medical records certification clause of section 16, the section also provides, "This paragraph does not restrict, limit, or prevent the admissibility of records…that are otherwise admissible." The court held that evidence is admissible if the opposing party does not object to it. Once admitted, evidence is to be considered and given its natural probative effect.

The arbitrator's "inexplicable" and "mind-boggling" *sua sponte* raising of a foundation objection after conclusion of the hearing unfairly precluded petitioner from either explaining or curing the foundation issue. In remanding the matter, the court noted that although the Commission found respondent's expert more credible, the exclusion of 109 pages of records must be considered in weighing the respective experts' credibility.■

Collateral Estoppel, Consolidation of Cases, and the Importance of Explaining Changes on an MRI

BY ALEXIS FERRACUTI

Collateral estoppel is a principle most of us have not considered in our normal workers' compensation practice since law school, but recently a decision rendered by the Second District Appellate Court of Illinois affirming an appeal from the Circuit Court of Winnebago County answered the question of collateral estoppel in a consolidated workers' compensation claim.

In *Leroy Lewis v The Illinois Workers' Compensation Commission et. al., 2022 IL App (2d) 210779WC-U, No 2-21-0779WC,* the Respondent was not collaterally estopped from challenging the causation of a consolidated claim where the basis was not definitively decided in earlier litigation as it remained at issue on appeal due to the consolidated nature of the claim itself. There really were two issues at stake in this claim. The first issue was whether the Respondent was barred from challenging causation on the "claim they did not properly appeal". The second issue was whether or not the Commission's decision that the Petitioner had failed to prove his condition of ill-being was causally related to his employment was not against the manifest weight of the evidence was appropriate.

To understand the decision, you have to understand the background. To give you some perspective, the Petitioner, Leroy Lewis, had two filed applications of claim under the Workers' Compensation Act alleging injuries to his neck and right shoulder while working for USF Holland which are the basis for the claim at issue which were both filed in 2021. Petitioner suffered an initial injury in November of 2015 related to his right shoulder and cervical spine while working for USF Holland. This injury resulted in the filing of two claims as well- one in 2016 and one in 2017. As a result of these initial injuries, Petitioner underwent a discectomy and fusion at C3-C4 level. He remained under the treatment and care of his original treating surgeon, Dr. Broderick, until and after these claims were settled in 2017 after Petitioner was released to return to work at his own request by his treating physician, Dr. Broderick. He was not placed at maximum medical improvement at that time, but Petitioner, being back to work, was awarded 32.5 percent loss of use of a person as a whole via settlement of the claim on December 31, 2017. Petitioner was recommended to use a bone stimulator as of the time of his release. Petitioner testified at hearing that he did not use the stimulator. Petitioner confirmed at hearing that he returned to work full duty on December 11, 2017, with no symptoms in his neck or arms.

Petitioner was reinjured on January 6, 2018, less than one month after returning to full duty work. While working, Petitioner was reinjured while dropping his trailer as a result of the landing gear being frozen with ice and snow which required the Petitioner to crank the trailer down with significant force with both hands causing pain into his neck and shoulder which he described at hearing as a "burning" sensation. The injury was immediately properly reported by Petitioner who sought immediate treatment. Claimant followed up with his initial surgeon, Dr. Broderick, who instructed him that there was an injury at the C5-C6 level. He was referred for injection related to this injury and for physical therapy. He was then seen again and was instructed that there was a possibility of surgery including an artificial disk replacement procedure at C5-C6. Respondent had their original IME physician, Dr. Carl Graf, review the MRI and medical. Dr. Graf rendered an opinion that claimant could return to full duty work, which he did in November of 2018. While driving, the Petitioner was again injured when trying to close an overhead door that was jammed. Again, claimant immediately called central dispatch and reported the injury and sought treatment. Claimant was again returned to light duty. This November of 2018 accident formed the basis of the second 2021 claim which was filed and appealed by Petitioner. Petitioner was again examined by Respondent's independent medical examiner, Dr. Carl Graf, in May of 2018.

Petitioner was referred after the November of 2018 injury to Dr. Sweet whom he saw in March of 2019. Dr. Sweet rendered an opinion that he agreed with the prior recommendations of Dr. Broderick and that the claimant's problem was at C5-C6 which required surgery. Claimant underwent four MRI's between April of 2016 and after the January of 2018 injury until the date of hearing. Two of the four MRI's in question were ordered by Dr. Broderick as the result of the January 2018 injury. Dr. Broderick, at deposition, confirmed that the Petitioner was released at MMI before presenting a few months later in February of 2018 regarding a new injury at C5-C6.

Petitioner was suggested to obtain a second opinion and the claimant sought that opinion from Dr. Sweet who concurred with Dr. Broderick. Dr. Graf, at evidence deposition, confirmed the Petitioner's testimony with regards to the two instances in question. Dr. Graf reviewed the MRI performed of February 5, 2018, wherein he noted that the scan was of overall poor quality. This is important as it was the same MRI that Dr. Broderick and Dr. Sweet reviewed. Dr. Graf questioned causation as there was a claimed injury with a new onset of a few weeks following the previous

release back to work. He did not offer an official causation opinion, however, until such time as a new high-quality MRI could be performed. After the subsequent MRI was performed, Dr. Graf reviewed it and authored a report wherein he stated that there was no stenosis or nerve compression at C4-C5 or C5-C6. He believed that the Petitioner's spine was essentially in the same condition as Petitioner's original spinal injury in 2016. Dr. Graf also felt that the Petitioner's new complaints did not correlate with the Claimant's subjective complaints, so the surgery was not reasonable regardless of what caused the need for the same. Dr. Graf, during his deposition, additionally testified he was unaware of any injury from November of 2018. He additionally testified that he believed that the claimant had reached MMI several months before he returned to work from the first two injuries in December of 2017. Dr. Graf did not render any opinions regarding the claimant's need for treatment following the November of 2018 injury.

Dr. Sweet authored a report in 2019 at which time he concurred with Dr. Broderick's recommendation for surgery and felt that the Petitioner' current condition of ill-being was caused by Petitioner's January of 2018 injury and was exacerbated by the November of 2018 injury. During hearing, the Arbitrator initially found that the Petitioner did suffer an injury on January 6, 2018, which was causally related to the incident at issue at hearing. As for the November of 2018 injury, the Arbitrator found that the accident resulted in a "flare up" of Petitioner's condition for which the Petitioner had no change in symptoms and his doctors' recommendations for treatment remained consistent. The Arbitrator did not find that the November 2018 injury was an intervening cause which broke the chain of causation between the January 2018 injury and the Petitioner's current condition of ill-being. The Arbitrator's decision as to the November of 2018 injury was affirmed and adopted in its entirety. The Commission, however, reversed the Arbitrator's causation finding regarding the January 2018 accident rejecting the claimant's testimony that he was asymptomatic before the January of 2018 injury noting that Dr. Broderick's medical records from that time indicated the claimant continued to treat and remained in pain at that time as he had been recommended to continue using the bone stimulator and to follow up in two months. The Commission stated in their decision that the Petitioner had still been under treatment for the 2015 injuries which were the issue and subject of the previous settlement and that he had been under continuous care since the 2015 injuries.

The Commission was unconvinced by Dr. Broderick's testimony as he stated that there were changes between the MRI's taken in January of 2017 and February of 2018 because he did not describe those changes in any detail. They were also unconvinced by the opinions of Dr. Sweet as his opinion was based on a single visit wherein he did not state which MRI he was relying on in his report. In the alternative, Dr. Graf's testimony was credited by the Commission who felt that he paid particular attention to the Petitioner as he rejected the initial MRI relating it as poor quality and asked for an additional MRI of higher quality before rendering his opinion. Dr. Graf was able to explain the MRI findings on examination at deposition and the need for the additional imaging to determine the Petitioner's condition. The Commission ruled that the January 2018 injury caused a temporary aggravation of claimant's condition given the lack of discussion by the treating and second opinion physician as to the MRI changes before and after the January 2018 accident. The Commission ruled that Petitioner failed to establish a causal connection between his condition and the accident of January 2018.

The Petitioner's first argument on appeal was that the Respondent was collaterally estopped from disputing the January of 2018 causation as a result of them not appealing the separately issued opinion regarding that January of 2018 accident. The appellate court, upon reviewing the decisions issued by the Arbitrator with regard to the January and November of 2018 accidents, found that the decisions regarding the same were substantially similar and that both accidents were listed in both decisions. The Commission affirmed and adopted the November of 2018 decision, but reversed the finding concerning the January of 2018 accident.

The Petitioner argued that Respondent did not appeal the decision concerning the November of 2018 accident and asserts that that stopped the Respondent from challenging the reversal concerning the January of 2018 accident stating that because they did not appeal the decision, it constituted a final order. The Respondent reasoned that because the cases were consolidated, the decision was appealed for the November of 2018 accident when the decision was appealed for the January of 2018 accident.

The elements of collateral estoppel are: 1) the issue decided in the prior action was identical to the one presented in the suit in question, 2) a court of competent jurisdiction rendered a final judgment on the merits in the prior action, 3) the party against whom the doctrine is asserted was a party to the prior action or in privity with the party and 4) the factual issue against which the doctrine was interposed has actually and necessarily been litigated and determined in the prior action which was laid out in 2005 in the *LaSalle National Bank Ass'n v. Village of Bull Valley,* 355 Ill. App. 3d 629 case. The entire purpose is to stop the same issues from being litigated time and time again when they have already been decided. The cases in question were consolidated in January of 2019. The hearing for arbitration of these cases was held in October of 2019. The Commission issued decisions in March of 2021. Both decisions on both cases, in all appeals through the Commission, were issued on the same day. The appellate court found, on review, that there was a no prior litigation that would prevent the relitigation of any issue in the case and that the arbitrator's mention of the causal relationship between the condition of ill-being of the Petitioner and the January of 2018 incident was not material to the Arbitrator's findings on that November of 2018 accident and was merely dicta in that decision. It was not litigated and finally determined in a prior action merely because the one decision was not solely appealed. The matters were consolidated. The Respondent filed an appeal which included both case numbers as a matter of the claim being consolidated. That meant, in turn, that no such claim was finally

litigated as both remained at issue, even on appeal, given the consolidation in question.

Upon review of the manifest weight of the evidence in this case, the Appellate court again affirmed the Commission and circuit court opinions as the Commission is the primary decider of credibility of witnesses and resolving conflicts in the record. The appellate court held that the Courts owe deference to the Commission on decisions including those concerning medical questions and that the only time to overturn a Commission's decision on the same is if it is against the manifest weight of the evidence or a conclusion opposite of the Commission's is clearly apparent to the normal eye. Unfortunately, the evidence in the case was conflicting. The Commission did not find the Petitioner credible when compared to the medical records in the claim, and the Commission gave deference to the IME physician who took additional time and required additional imaging to render a decision. The second opinion treater for the Petitioner only saw Petitioner one time and did not do a thorough explanation at deposition as to the MRI films and what the findings were in the same as well as the differences between prior films and the films post accident in January of 2018. The only explanation of the films prior to the 2018 accident and the MRI taken after the 2018 accident occurred by Dr. Graf, who, by his own account, placed Petitioner at MMI in 2017, but explained that the films had not changed post-accident meaning his current condition was still the same as the injury films prior to the January of 2018 accident.

What does this mean for Petitioner's attorneys? I think this clearly makes a few points for us as we carry on in our practice: 1) I think this very clearly shows us that if a case is consolidated, regardless of whether separate decisions are issued by the Commission, if one case is appealed, so is the other. The Commission's "separate decision" rule is clearly just for administrative purposes and not for the purpose of appealing or arguing the claims on appeal.

2) A second opinion physician must be just that, a second opinion physician. Treating your claimant one time is not a second opinion necessarily. They must do a thorough review of the prior records and films, provide basis for their opinions, and then be able to explain the basis for the same at deposition. If a second opinion physician is only seeing your claimant one time, I think it's clear as Petitioner's counsel you need to give them the same type of background records and review the previous history with them at deposition the same way you would with an independent medical evaluator,

3) MMI is important, and so is not rushing to settlement. After a serious injury or surgery, it is imperative to take the time to ensure the person can actually return to work. If they return and have no issues after a few months, then it may be time to consider settlement or litigation of the issues allowing them some open medical following that decision. Don't let your Petitioners dictate a full duty return, allow the providers to treat them as they see fit, and

4) Your treating physicians must be deposed thoroughly and must explain the difference in each individual imaging taken by Petitioner. If they cannot, certainly it raises an issue for your Petitioner moving forward on aggravations or new accidents. Even more important, it seems, is that future medical is accounted for even when it does not appear that there is future medical immediately recommended. Perhaps those letters to doctors asking them to address these issues and clarify their findings on imaging in writing and at deposition are now even more important than what we originally believed. In a time where most physicians are using "check box" software programs, it is imperative to advocate even more staunchly for your client's rights to ensure proper notes are being taken by their physicians and nurses on their claim. The explanations are imperative and are often what the case turns on as we saw here.

Best practices should dictate having the complete charts certified prior to hearing. This includes Section 12 IME reports for which your opponent has no objection. If that is not practicable, and evidence otherwise not objected to by your opponent is objected to by an Arbitrator *prior* to the close of proofs, then the partying offering the evidence must make an offer of proof to preserve issues for appeal.■

Firefighter Proves Entitlement to Benefits Under the Occupational Disease Act

BY ANITA M. DECARLO

In *City of Springfield v. IWCC*, 2022 IL App (4th) 210604WC-U, Matt Wood sought benefits under the Occupational Disease Act for kidney cancer. The arbitrator awarded medical; TTD (09/27/2013-10/27/2013) and 10 percent PAW. The Commission affirmed and adopted. The circuit court confirmed. The appellate court affirmed.

Wood began working as a firefighter in 1998. Despite promotions, his job duties remained the same: fighting fires in residential homes, structures, buildings, cars, rubbish, and brush. When responding to a fire, he wore bunker gear: fire suit, pants, coat, helmet, gloves, hat, mask, and self-contained breathing apparatus (SCBA), which is a backpack that carries a cylinder holding air. In 2015 new procedures were introduced to increase the length of time firefighters wore SCBAs.

On July 29, 2013, Wood complained of lower left quadrant abdominal pain. The CT performed that day identified a right renal hypodense lesion. He was referred to his primary care physician, Dr. Sandercock. Dr. Sandercock prescribed a CT that was performed on August 30, 2013, and found kidney cancer. On September 5, 2013, Wood saw Dr. Gillison, an oncologist. The medical history reveals Wood's maternal grandmother had breast cancer and his maternal grandfather had colon cancer. Dr. Gillison referred to Dr. Lieber, a urologist.

Wood saw Dr. Lieber on September 6, 2013, and a right laparoscopic partial nephrectomy was performed on September 27, 2013. Wood returned to full duty work on October 28, 2013.

Dr. Sandercock continued to treat Wood postop. He noted a family history of: maternal grandmother (breast cancer); maternal grandfather (colon cancer). Wood was diagnosed with renal cell carcinoma.

The City scheduled an examination with Dr. Eggener on February 17, 2015. Dr. Eggener opined there was no definitive causation for firemen being at risk of developing kidney cancer. For most people, there is no explanation as to why the kidney cancer develops. He focused on a small percentage of patients with familial or genetic predisposition to kidney cancer, which Wood did not have. Lastly, he opined that there is a very modest increased risk to kidney cancer to metal, chemical, rubber and printing industry workers only. Dr. Eggener focused on the fact that there is nothing to suggest that being a fireman "conclusively" leads to an increased risk of developing kidney cancer. His opinions were based on a variety of medical literature.

In 2015-2016 Wood treated with Dr. Pacheco for diverticulitis. The family medical history reveals colon cancer and bladder cancer. Genetic testing was recommended but never performed.

On June 7, 2017, Wood saw his own examiner, Dr. Orris. Dr. Orris opined that it was more likely than not Wood's 17 years of firefighting contributed to his kidney cancer diagnosis. He focused on the fact that Wood had no history or risk factors for kidney cancer such as: smoking, hypertension, diabetes, or family history of kidney cancer. His opinions were based on a variety of medical literature. Orris opined that Eggener's "report's exclusion of firefighting as a causative factor was based on a selective reading of the literature and a misunderstanding as to how an etiologic causation conclusion is arrived at based upon the medical literature." Dr. Orris provided great detail as to the "inconsistencies between Dr. Eggener's conclusions of the literature and the statements actually provided in the literature."

On June 28, 2018, Dr. Eggener drafted a report in response. He opined "there was no evidence in the medical literature or elsewhere to suggest that the development of this kind of kidney cancer is associated with being a firefighter."

The arbitrator found the kidney cancer "shall be rebuttably presumed to (1) arise out of and in the course of his employment and (2) to be causally connected to the hazards or exposures of the employment based upon his 16-year history of being a firefighter. The arbitrator noted that Wood "need not prove 'conclusively' that his work as a firefighter exposed him to an elevated risk of developing kidney cancer or a 'significant' increased risk of developing kidney cancer." The arbitrator further found "persuasive that the procedures for the SCBA equipment changed resulting in firefighters wearing equipment longer, and prior to this change, the claimant was exposed to smoke and perhaps gas levels that were not yet back to normal." As such, the arbitrator found the City "failed to overcome the rebuttable presumption" because they "failed to offer some evidence sufficient to support a finding that something other than the claimant's occupation as a firefighter caused his condition."

The Commission affirmed but based upon a different analysis. First, the Commission found that the City successfully rebutted the presumption by submitting Dr. Eggener's opinions into evidence. None-the-less, Wood proved, by a preponderance of the evidence, he suffered an occupational disease through Dr. Orris's opinions. All other findings were adopted by the Commission.

The circuit court confirmed the decision leading to the appellate court decision herein. The appellate court reminds us that "[t]he claimant in an occupational disease case has the burden of proving both that he suffers from an occupational disease and that a causal connection exists between the disease and his employment." The questions of (1) whether a claimant suffers from an occupational disease and (2) whether there is a causal connection between the disease and occupation are questions of fact. The

Commission determines questions of fact, judge the credibility of the witnesses, and resolve conflicting evidence. The Commission's findings of a question of fact will not be disturbed unless it is against the manifest weight of the evidence. "For a finding to be contrary to the manifest weight of the evidence, the opposite conclusion must be clearly apparent."

The City characterizes the Commission's decision as "disturbing." The City argues the Commission did not explain why it found Dr. Orris's opinion or the claimant's testimony to be persuasive. The appellate court opined that the Commission "need not reiterate or bolster the arbitrator's findings when adopting the arbitrator's decision."

The City next argues Wood offered no specific causal connection evidence between chromophobe renal cell carcinoma and his work as a firefighter. The appellate court was unimpressed. Both experts drafted their reports about kidney cancer in general. Neither made any distinction between different forms of kidney cancer. The City's expert detailed Wood's cancer (chromophobe renal cell carcinoma) was rare. The appellate court believed this was why the experts reviewed studies based in kidney cancer in general. This was a factor the Commission considered when weighing the evidence.

Lastly, the City argues Dr. Orriss' opinion was flawed based upon incomplete information. Specifically, Dr. Orris was not advised of: (1) the family medical history of colon cancer; (2) Dr. Lieber's report that Wood did not have "a lot of chemical exposure"; and (3) Dr. Pacheco's note indicating Wood met criteria for genetic testing.

The experts agreed that smoking, obesity, and hypertension are risk factors that do not apply to Wood. Dr. Eggener conceded that only a small percentage of patients have genetic abnormalities that predispose them to kidney cancer and Wood had none of them. Dr. Eggener's report was seeking to find an absolute causation explanation, which is not the standard. The standard is if firefighting was ***a*** causative factor not, the principal or sole causative factor. Dr. Orris reviewed the same literature and interpreted it differently. He found a connection between firefighting and kidney cancer. Dr. Orris commented that Wood had no history or risk factor for kidney cancer. "Dr. Orris made his findings based on known exposures of firefighting and the literature that has evidence confirming the causative relationship between firefighters and kidney cancer on a more likely than not basis." Based on this finding, the appellate court found there was "sufficient evidence of record to support the Commission's decision." ■

No Hoots Given for Employee Who Fell in the Parking Lot After Traveling to Another Worksite While Her Own Site Was Under Construction

BY DEREK DOMINGUEZ

In Morgan County, Illinois, case *Brooke Hoots v. Illinois Workers' Compensation Commission & Dollar General*, 2022 IL App 4th 220041WC-U, an arbitrator determined that the injuries sustained by a petitioner who fell in a parking lot that was adjacent to her workplace, were not compensable under the act because they did not arise out of and in the course of her employment. When the Commission affirmed the arbitrator's decision, the petitioner appealed and refocused her argument on the issue of whether she had been a "traveling employee" at the time of the fall, a designation which would have afforded her compensation for her injuries under the act. The appellate court found the petitioner was not a traveling employee at the time of her fall and therefore affirmed the Commission's decision.

Petitioner Brooke Hoots was employed by Dollar General. On November 19, 2017, Hoots was driving from her home to the South Jacksonville Dollar General store for mandatory employee training. The store she normally worked at in Woodson, Illinois, was under construction. Therefore, she had been asked to attend mandatory training and start working her shifts at the South Jacksonville store until construction was complete at the Woodson location.

At about 7:50 a.m. she parked her vehicle in a parking lot adjacent to Dollar General's South Jacksonville store and near a strip mall that also had a close parking lot. Hoots claimed that she was permitted, though not instructed, to park in this parking lot by Dollar General, and that the parking lot was for both employees and customers of the store, as well as customers of the nearby strip mall. After Hoots began walking from her vehicle to the store she slipped on some black ice and fell injuring her left ankle. Hoots had been carrying a purse, drink, and folder containing training materials.

The arbitrator concluded that Hoots had failed to prove her injuries arose out of and in the course of her employment. Using the standard parking-lot case analysis,

the arbitrator reasoned that the parking lot where Hoots fell was open equally to both the general public and the employer's employees, thus she was not at a greater risk than the general public when she fell. Further, the arbitrator determined that there was no damage or defect noted in the lot, and that the employer did not specifically direct its employees where to park. The arbitrator also noted that there was no evidence the items Hoots was carrying contributed to her fall.

Lastly, the arbitrator noted that Hoots had failed to provide credible evidence that she was a "traveling employee" at the time of her fall. Hoots had failed to provide the distance she traveled to the South Jacksonville store compared to the Woodson store. She also failed to provide evidence showing that she was paid for her travel time and expenses.

On appeal, Hoots claimed that she had attained "traveling employee" status due to the construction at the Woodson store which forced her to attend training at the employer's South Jacksonville store instead. Hoots argued that once she left her home on the date of injury to travel to the employer's South Jacksonville store, she was acting in the course of her employment.

The 4th district appellate court disagreed with Hoots. A "traveling employee" is one who is required to travel away from her employer's premises in order to perform her job (*Jensen v. Industrial Comm'n,* 305 Ill. App. 3d 274, 278 (1999)), and for whom travel is an essential element of her employment (*Urban v. Industrial Comm'n*, 34 Ill. 2d 159, 163(1966)). As a general rule, a traveling employee is held to be in the course of her employment from the time she leaves home until she returns. *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 199 (1985).

The appeals court noted that unlike a traveling employee who travels in order to fulfill their job duties, Hoots' was merely being asked to commute to work, albeit to a different store location. The court found no significant difference between Hoots' commute to the Woodson store vs the South Jacksonville store. Moreover, there was no evidence that the employer reimbursed Hoots' for her travel expenses, nor did it assist her in making travel arrangements. Due to these facts, the Court found that Hoots' travel was not an essential element of her job, an element which would have rendered her a traveling employee.

The appeals court also affirmed the underlying arbitrator's parking-lot analysis. The court noted that the decisive issue in parking lot cases usually is whether the parking lot is owned by the employer, or controlled by the employer, or if the employee's route to work from the employee's vehicle is required by the employer. Here, the evidence showed that Dollar General did not own or control the parking lot and did not specifically instruct Hoots where to park.■