STATE OF ILLINOIS)
) SS.
COUNTY OF WILL)

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mario Marrero,

Petitioner,

vs. NO: 16 WC 24292
21 IWCC 0016

Islamorada Fish Company,

Respondent.

ORDER OF RECALL OF DECISION UNDER SECTION 19(f)

Pursuant to Section 19(f) of the Act, the Commission, upon motion of the Respondent filed January 22, 2021, finds that a clerical error exists in the Decision and Opinion on Review dated January 11, 2021 in the above captioned matter, as the body of that Decision finds that Petitioner did not provide proper notice of his accident to Respondent and the conclusion of the Decision incorrectly states that Petitioner provided timely notice of his accident to Respondent. Petitioner does not object to Respondent's motion.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision and Opinion on Review dated January 11, 2021 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 26 2021
o: 11/19/20
BNF/kcb
45

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 WILL)	☐ Reverse	☐ Second Injury Fund (§8(e)18)
		☐ PTD/Fatal denied
	☒ Modify ☐	☒ None of the above

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Mario Marrero,

Petitioner,

vs.

NO: 16 WC 24292
21 IWCC 0016

Islamorada Fish Company,

Respondent.

CORRECTED DECISION AND OPINION ON REVIEW

Timely Petition for Review under §§ 19(b) and 8(a) having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of medical expenses, permanent disability, and penalties and fees, 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 Commission modifies the Decision of the Arbitrator with respect to the issues of accident, notice, and causal connection.

I. Accident

Regarding whether Petitioner sustained an accident that arose out of and in the course of his employment, the Commission notes that the Decision of the Arbitrator in this matter was issued prior to the Illinois Supreme Court decision in *McAllister v. Illinois Workers' Compensation Comm'n*, 2020 IL 124828, which reversed the Commission's determination that the claimant, a restaurant employee whose knee "popped" after kneeling to look for carrots at work, failed to show that his injury arose out of his employment. *Id.* ¶ 2. Our supreme court found that the claimant's knee injury "arose out of" an employment-related risk because the evidence established that at the time of the occurrence his injury was caused by one of the risks distinctly associated with his employment as a sous-chef. *Id.* ¶ 47.

The *McAllister* court further confirmed that *Caterpillar Tractor v. Industrial Comm'n*, 129 Ill. 2d 52 (1989), prescribes the proper test for analyzing whether an injury "arises out of" a

claimant's employment when the claimant is injured performing job duties involving common bodily movements or routine "everyday activities." *McAllister*, 2020 IL 124828, ¶ 60. The court overruled *Adcock v. Illinois Workers' Compensation Comm'n*, 2015 IL App (2d) 130884WC and its progeny "to the extent that they find that injuries attributable to common bodily movements or routine everyday activities, such as bending, twisting, reaching, or standing up from a kneeling position, are not compensable unless a claimant can prove that he or she was exposed to a risk of injury from these common bodily movements or routine everyday activities to a greater extent than the general public." *McAllister*, 2020 IL 124828, ¶ 64. That is, "[o]nce it is established that the injury is work related, *Caterpillar Tractor* does not require claimants to present additional evidence for work-related injuries that are caused by common bodily movements or everyday activities." *Id.*

Accordingly, a risk is distinctly associated with an employee's employment if, at the time of the occurrence, the employee was performing (1) acts he or she was instructed to perform by the employer, (2) acts that he or she had a common-law or statutory duty to perform, or (3) acts that the employee might reasonably be expected to perform incident to his or her assigned duties. *Id.* ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

In this case, Petitioner does not allege that any particular event or acute incident caused his symptoms and, as suggested in the Decision of the Arbitrator, Petitioner may be considered as having alleged a repetitive trauma injury. Petitioner testified that he worked as a cook, spending almost his entire shift in a confined space, spinning back and forth between cooking and preparing plates. Petitioner added that he wore ankle-high non-slip kitchen shoes, which hurt his feet immediately, but which he was required to wear. Although Petitioner later testified that he was not required to buy these shoes from a particular store, Respondent provided him with the name of the company from which to buy the shoes. Petitioner also testified that sometimes, he would stand in front of the sink and wash dishes for the entire shift, both manually and feeding dishes into a dishwashing machine. He testified that he was supposed to receive breaks during his shift, but occasionally could not take them if the restaurant was too busy. Petitioner further testified that he began working double-shifts, approximately 12 hours long. According to Petitioner, as he worked the double-shifts, his feet began to hurt "really bad." He later added that the pain came on gradually over time, continued from day-to-day, and worsened to the point where he could not walk. He explained that his feet would begin hurting incredibly approximately an hour or two into his shift.

The Commission also notes that Petitioner's claim rests on a repetitive trauma theory, and the manifestation date of his injury was alleged to be December 15, 2015, the date that he required medical treatment from Dr. Jennifer Fuehrer at the Foot and Ankle Wellness Center. See *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 72 (2006).

Given the totality of the circumstances, including Petitioner's prolonged, repetitive standing and spinning in painful non-slip shoes of the sort required by Respondent, the Commission concludes that Petitioner's acts are such that Petitioner might reasonably be expected to perform them incident to his assigned duties. Accordingly, the Commission finds

that Petitioner sustained an accident that arose out of and in the course of his employment. See *McAllister*, 2020 IL 124828, ¶ 46 (citing *Caterpillar Tractor*, 129 Ill. 2d at 58).

II. Notice

The Arbitrator ruled in the alternative that Petitioner did not provide proper notice of his accident to the Respondent. Section 6(c) of the Act requires the claimant to give notice of the accident "to the employer as soon as practicable, but not later than 45 days after the accident." 820 ILCS 305/6(c) (West 2014). Section 6(c) further provides that "[n]o defect or inaccuracy of such notice shall be a bar to the maintenance of proceedings on arbitration or otherwise by the employee unless the employer proves that he is unduly prejudiced in such proceedings by such defect or inaccuracy." *Id.* The notice is jurisdictional, and the failure of the claimant to give notice will bar his claim. *Thrall Car Manufacturing Co. v. Industrial Comm'n*, 64 Ill. 2d 459, 465 (1976). However, a claim is only barred if no notice whatsoever has been given. *Silica Sand Transport, Inc. v. Industrial Comm'n*, 197 Ill. App. 3d 640, 651 (1990). "If some notice has been given, but the notice is defective or inaccurate, then the employer must show that he has been unduly prejudiced." *Id.*

However, "the statutory element of undue prejudice to the employer is pertinent only where some notice is given in the first place." *White v. Illinois Workers' Compensation Comm'n*, 374 Ill. App. 3d 907, 910 (2007) (citing *Fenix-Scisson Construction Company v. Industrial Comm'n*, 27 Ill. 2d 354, 357 (1963)).

Our supreme court later elaborated on *Fenix-Scisson*'s treatment of the notice issue:

> "In *Fenix-Scisson Construction Co. v. Industrial Com.*, 27 Ill. 2d 354, the employer was officially notified 49 days after the accident concerned and although the claimant's wife had phoned his foreman within the 45-day period and informed him that her husband had been injured, but did not state it was work related, the award was set aside. We said at page 357: 'In the case now before us there was no disclosure at any time of the fact that an accident had occurred, although the employee knew of the occurrence at once and was informed one week later that his injury was the result of the falling board. There is no showing that the employer had actual knowledge of the accident until after the 45-day period had expired. The telephone call by the wife on November 25 did not constitute notice of an accident, defective or otherwise. Nothing whatsoever was said about an accident or any involvement on the part of the employer either then or at any other time. The element of prejudice to the employer is pertinent only where notice is given but it is indefinite or incomplete.'" *Ristow v. Industrial Comm'n*, 39 Ill. 2d 410, 413 (1968).

As noted above, Petitioner alleged a repetitive trauma theory, with the manifestation date of his injury alleged to be the date that he required medical treatment. See *Durand*, 224 Ill. 2d at 72. As the *Durand* court noted, "[r]equiring notice of only a potential disability is a useless act since it is not until the employee actually becomes disabled that the employer is adversely affected in the absence of notice of the accident." *Durand*, 224 Ill. 2d at 68.

In this case, Petitioner alleged an accident date of December 15, 2015 and did not file an Application for Adjustment of Claim until August 9, 2016, following two surgeries and the termination of his employment with Respondent. However, Petitioner testified that he informed his managers, particularly one named Mandy, that his "feet started hurting really bad" and that he could not work double-shifts, but added that he never asked Mandy to work fewer hours because of his feet. Although the exact timing is not stated in Petitioner's testimony, when read in context, these statements appear to have been made shortly after the accident date.

Given this record, as in *Fenix-Scisson*, Petitioner informed Respondent of his injury but did not timely inform Respondent that his employment had some impact on or aggravated his pre-existing foot condition. Indeed, Petitioner acknowledged that he did not inform Respondent of his pre-existing medical condition, at least not before mentioning it to his general manager, Mr. Espinosa. This conversation occurred no earlier than January 20, 2016, when Petitioner underwent a resection of the tarsal coalition with fusion of the subtalar joint of the left foot. The conversation thus occurred long after his claimed accident date and first medical treatment, and made no reference to the cause of his foot pain. Moreover, even assuming for the sake of argument that Petitioner told his manager that he should not work double-shifts, such a statement did not inform Respondent that his injury was work-related or that Petitioner was claiming that it was.

Thus, there is no showing that Respondent had knowledge of any claimed connection between Petitioner's work activities and his pre-existing ankle/foot condition until after the 45-day notice period had run. Accordingly, even though Petitioner established he sustained an accident pursuant to *McAllister*, he did not provide proper notice of that accident to Respondent.

III. Causal Connection

The Arbitrator ruled in the alternative that Petitioner did not establish a causal connection between his injury and his current condition of ill-being. To obtain compensation under the Act, a claimant must prove that some act or phase of his employment was a causative factor in his ensuing injuries. *Land and Lakes Co. v. Industrial Comm'n*, 359 Ill. App. 3d 582, 592 (2005). A work-related injury need not be the sole or principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003). Thus, even if the claimant had a preexisting degenerative condition which made him more vulnerable to injury, recovery for an accidental injury will not be denied as long as he can show that his employment was also a causative factor. *Id.* at 205. A claimant may establish a causal connection in such cases if he can show that a work-related injury played a role in aggravating his preexisting condition. *Mason & Dixon Lines, Inc. v. Industrial Comm'n*, 99 Ill. 2d 174, 181 (1983); *Azzarelli Construction Company v. Industrial Comm'n*, 84 Ill. 2d 262, 266 (1981).

In addition, an employee who alleges injury based on repetitive trauma must "show[] that the injury is work related and not the result of a normal degenerative aging process." *Peoria County Belwood Nursing Home v. Industrial Comm'n*, 115 Ill. 2d 524, 530 (1987); *Edward Hines Precision Components v. Industrial Comm'n*, 356 Ill. App. 3d 186, 194 (2005). In

repetitive trauma cases, the claimant "generally relies on medical testimony establishing a causal connection between the work performed and claimant's disability." *Nunn v. Illinois Industrial Comm'n*, 157 Ill. App. 3d 470, 477 (1987); see also *Johnson v. Industrial Comm'n*, 89 Ill. 2d 438, 442-43 (reversing the Commission's award of benefits where claimant failed to present any expert medical evidence supporting her claim that her injuries were caused by repetitive work activities). Thus, repetitive trauma claims involving the alleged aggravation of a preexisting condition generally cannot succeed unless the claimant presents medical testimony suggesting that: (1) he had a preexisting condition that was or could have been aggravated by his repetitive work activities; and (2) his current condition of ill-being was or could have been caused (at least in part) by this work-related trauma and is not simply the result of a normal, degenerative aging process.

In this case, there is no medical evidence to support Petitioner's repetitive trauma theory establishing that his preexisting foot condition was aggravated by his work activities. Petitioner did not submit a medical opinion supporting a finding of causal connection. Respondent offered evidence from Dr. George Holmes, the Section 12 examiner, who opined that there was no causal relationship between the current condition of Petitioner's left foot and his surgery and Petitioner's employment with Respondent. Dr. Holmes further opined that the ongoing condition of the subtalar nonunion was related to Petitioner's post-operative exposure to both Medrol Dosepak and intraarticular injections, as well as continued exposure to steroids. In the doctor's opinion, Petitioner's degenerative disorder and congenital disordered tarsal coalition is the sole cause of Petitioner's need for surgery and his symptoms, though the exposure to steroids is a known factor to decrease bone healing. Dr. Holmes also analogized Petitioner's situation to someone with asthma, noting a person without asthma should be able to walk up a flight of stairs, while a person with asthma will make their asthma worse. The doctor testified has a structural problem with his foot, a congenital process that is destined to cause a medical problem. Dr. Holmes later testified: "If he stands on his foot, it's going to hurt because he's got a nonunion. But if he stands on the foot and it hurts, it does not make the nonunion any worse. He's got a nonunion whether he stands or not."

In sum, Petitioner failed to provide the medical testimony generally required to establish repetitive trauma claims involving the alleged aggravation of a preexisting condition, while Respondent offered expert testimony opining that Petitioner's activities may have aggravated his pre-existing symptoms, but not his underlying pathology. Accordingly, the Commission concludes that Petitioner failed to prove a causal connection between his injury and his current condition of ill-being.

In all other respects, the Commission affirms and adopts the Decision of the Arbitrator.

IT IS THEREFORE FOUND BY THE COMMISSION that Petitioner sustained an accident that arose out of and in the course of his employment on December 15, 2015.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner did not provide timely notice of his accident to Respondent.

IT IS FURTHER FOUND BY THE COMMISSION that Petitioner failed to establish a causal connection between his accident and his current condition of ill-being.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed on April 23, 2019 is hereby affirmed and adopted as modified herein.

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

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

DATED: JAN 26 2021
o:11/19/20
BNF/kcb
045

Barbara N. Flores

Deborah L. Simpson

Concurrence in Part and Dissent in Part

I concur with the majority's finding that the Petitioner sustained an accident. However, I disagree with its conclusions that the Petitioner failed to provide the Respondent with sufficient notice of his accident and that his current condition of ill being is not causally related to his accident. Therefore, I respectfully dissent.

The majority has found that Petitioner informed the Respondent of his injury but did not timely inform the Respondent that his employment had "some impact on or aggravated his pre-existing foot condition." The Act does not require an employee to be aware of or inform the employer that he or she has a pre-existing condition. A Petitioner simply needs to notify the Respondent that he has been injured and that the injury was work related. In this case Petitioner's unrebutted testimony was that he told his assistant manager that:

> "My feet started hurting *really bad* and I couldn't do *doubles back to back* like *they* had me doing because *it* was causing me *extreme* amount of *pain*." (Emphases added.)

Petitioner's statement to his assistant manager was not one simply relaying day to day complaints of pain. The back to back doubles were causing him extreme pain. Additionally, Petitioner informed Respondent's general manager that he was having foot surgery. These conversations occurred within 45 days of Petitioner's December 15, 2015 manifestation date.

Therefore, in my opinion, Petitioner provided Respondent sufficient notice of his accident under the Act.

I also believe Petitioner established a causal connection between his injury and his current condition of ill being. While Dr. Holmes testified that there was no such causal connection and that Petitioner was "destined" to have surgery, he did admit that Petitioner's work activities would place additional stress on Petitioner's feet and increase his symptoms. In the years prior to his manifestation date, Petitioner had worked for other restaurants and played sports with minimal discomfort and had not required medical treatment. Only after working the "back to back doubles" for weeks did he suffer extreme pain causing him to undergo surgery shortly thereafter.

Dr. Holmes's testimony and the chain of events evidence in this case established that Petitioner's work activities aggravated his pre-existing condition and accelerated his need for surgery. I would have found Petitioner established a causal connection between his injury and his current condition of ill being.

For the forgoing reasons, I respectfully dissent from the decision of the majority.

Marc Parker

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

21IWCC0016

MARRERO, MARIO
Employee/Petitioner

Case# **16WC024292**

ISLAMORADA FISH COMPANY
Employer/Respondent

On 4/23/2019, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 2.40% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

1886 LEAHY EISENBERG & FRANKEL LTD
SANTIAGO ECHEVESTE
33 W MONROE ST SUITE 1100
CHICAGO, IL 60603

2542 BRYCE DOWNEY & LENKOV LLC
TIMOTHY FURMAN
200 N LASALLE ST SUITE 2700
CHICAGO, IL 60601

21IWCC0016

STATE OF ILLINOIS)
)SS.
COUNTY OF WILL)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Mario Marrero
Employee/Petitioner

Case # **16** WC **24292**

v.

Islamorda Fish Company
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Anthony C. Erbacci**, Arbitrator of the Commission, in the city of **New Lenox**, on **March 12, 2019**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **December 15, 2015**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

Timely notice of this accident ***was not*** given to Respondent.

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

In the year preceding the injury, Petitioner earned $**11,804.52**; the average weekly wage was $**227.01**.

On the date of accident, Petitioner was **22** years of age, ***single*** with **0** dependent children.

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

Respondent ***has*** paid all reasonable and necessary charges for all reasonable and necessary medical services.

Respondent shall be given a credit of $**0** for TTD, $**0** for TPD, $**0** for maintenance, and $**0** for other benefits, for a total credit of $**0**.

Respondent is entitled to a credit of $**0** under Section 8(j) of the Act.

ORDER

The Arbitrator finds that the Petitioner failed to meet his burden of proof with regard to the issues of accident, notice and causation. The Petitioner's claim for compensation is, therefore, denied.

No benefits are awarded herein.

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

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

Arbitrator Anthony C. Erbacci

April 15, 2019
Date

APR 23 2019

FACTS:

Petitioner testified that he began working for Respondent, Islamorada Fish Company, in December 2014. On cross-examination, however, Petitioner identified Respondent's Exhibit 2 as the Employment Application he completed and he acknowledged that he did not apply to, or work for, Respondent until May of 2015. Petitioner worked part time as a cook and dish washer, and he worked approximately 35 to 37 hours per week. Petitioner testified that his normal shift was 6 hours long and he worked five days per week.

Petitioner testified that his work station while cooking was approximately 5 feet by 3 feet and that he would remain at his station unless he was going to the cooler for additional items. When working as a dish washer, Petitioner would stand in front of a sink and either manually wash dishes or load them into a machine. Petitioner testified that he worked on concrete floor with non-slip ridges cut into it and there were no mats on the floor. Petitioner testified that he was required to wear non-slip kitchen shoes, chef's pants, a shirt and a hat.

Petitioner testified that he was supposed to get breaks, however sometimes the restaurant got too busy and he didn't get to take one. Petitioner testified that during the Christmas holidays, he began to work double shifts on occasion, which would require him to work 12 hours instead of his usual 6 hours. Petitioner testified that double shifts were sometimes voluntary and sometimes scheduled. On cross-examination, Petitioner testified that it was possible that he worked less than 10 double shifts throughout the entire holiday season.

Petitioner testified that he began to notice that his feet were hurting him and he told "Mandy", the assistant manager, that his feet hurt and that he did not want to work back to back double shifts anymore. No incident report or accident report was completed at that time.

Petitioner testified that, prior to his employment with the Respondent, he worked at several other restaurants and that he had no issues with his feet while working for any of these employers. Petitioner also testified that he played baseball in high school and had no problems with his feet. Petitioner acknowledged that he was born with a foot condition and that he had experienced problems with his feet before, but he testified that he had never sought any medical treatment for his feet. Petitioner testified that his pain gradually worsened while working for Respondent and was made worse when he began working back to back double shifts.

On December 15, 2015, Petitioner sought treatment for his foot complaints with Dr. Jennifer Fuhrer at the Foot and Ankle Wellness Center. A history of "bilateral ankle pain for 12 months" is noted as well as bilateral ankle pain which "has been hurting for years." Petitioner was noted to report that he had pain in his ankles since he was a child and that "he has been working doubles . . . and the pain has been getting worse." Dr. Fuhrer diagnosed tarsal coalitions, congenital pes cavus, and foot pain, and she administered steroid injections into both of Petitioner's ankles. On December 29, 2015, Dr. Fuhrer noted that the Petitioner was suffering severe pain in his feet "secondary to tarsal conditions in both feet."

On January 20, 2016, Petitioner underwent a fusion surgery on his left foot. On January 27, 2016, Petitioner underwent a revision surgery on his left foot surgery to replace one of the screws that had been placed during the initial surgery. Petitioner was noted to do well following surgery, and on

March 19, 2016, Petitioner began therapy at Achieve Manual Physical Therapy. The initial physical therapy note indicates "Prior to surgery patient was in constant pain all day, every day, since about age 10." Petitioner continued to treat and on May 26, 2016, Dr. Fuhrer released him to return to work with light duty restrictions.

Petitioner testified that he presented his light duty restrictions to Respondent but they were not accommodated. Petitioner was terminated by Respondent on July 27, 2016 for failing to return from his medical leave of absence.

Petitioner continued to treat for his left foot and underwent a third surgery on September 14, 2016. Dr. Fuhrer released Petitioner to full duty and placed him at maximum medical improvement as of October 17, 2016. After being released from Dr. Fuhrer's care, Petitioner worked in a warehouse and then at Valley View Transportation, where he is currently working. Petitioner currently earns over $16 per hour and he works 7.25 hours a day and 5 days per week.

Petitioner testified that he continues to have pain in his left foot, is unable to run or play sports and can't walk on uneven surfaces without pain. Petitioner is not currently taking prescription medication or any pain medication. Petitioner testified that he also has pain in his right foot.

Daniel Espinosa, Respondent's General Manager, testified that Petitioner was a cook and dish washer for Respondent from May 2015 through January 2016. Mr. Espinosa testified that he was personally familiar with all jobs within the restaurant and regularly performs each of the jobs himself. He testified that the areas that Petitioner worked in had tile floor that was flat and level and there was no change of elevation between the work areas. Petitioner was not required to overcome obstacles, step over anything, or go up or down stairs as part of his job. Mr. Espinosa testified that employees can sometimes work double shifts, however it is not a common occurrence.

Mr. Espinosa testified that employees are to inform management of any work accidents or injuries. Once management is notified, they immediately call their insurance carrier and determine if the injured employee needs to be transported to the doctor or hospital. Mr. Espinosa testified that this procedure is always followed and that he would be contacted by the insurance carrier, even if another manager reported an employee's injury to them. Managers do not notify the insurance carrier if an employee injures themselves outside of Respondent's restaurant or if they merely complain of typical day-to-day pains.

Mr. Espinosa testified that Petitioner did tell Respondent that he was undergoing surgery on his foot, but indicated that it was the due to problems that he had had since birth. Mr. Espinosa testified that Petitioner never indicated that his injuries or need for treatment were related to, or caused by, his work for Respondent. After Petitioner's surgery he was placed on a medical leave of absence and did not return to work when he was released to light duty. Mr. Espinosa testified that had Petitioner attempted to return to work, Respondent would have attempted to accommodate his restrictions, however Petitioner never attempted to return in any capacity. Mr. Espinosa testified that Petitioner was terminated in July 2016 for failing to return from his medical leave.

At the request of Respondent, Petitioner was examined by Dr. George Holmes, a board certified orthopedic surgeon, on December 14, 2017. Dr. Holmes testified that Petitioner had congenital foot deformities prior to any alleged December 15, 2015 injury. Dr. Holmes diagnosed

Petitioner as having congenital pes cavus deformity and a tarsal coalition of both feet. Dr. Holmes indicated that congenital pes cavus is a condition that one is born with, as opposed to being acquired through age, wear, and tear. Similarly, a tarsal coalition is a birth defect that leads to bones failing to separate completely, which leaves a remaining bridge between the bones.

Dr. Holmes testified that Petitioner's conditions were not causally related to his work or employment with Respondent; prolonged standing could aggravate Petitioner's pain, but would not aggravate his underlying birth conditions; Petitioner's degenerative conditions would have independently caused his symptoms and need for surgery; the only way Petitioner would not have needed surgery would be if he never walked whatsoever; Petitioner's work history did not increase his pathology; and any use of the term aggravation is confined to symptomology, not to a structural aggravation.

Dr. Holmes testified that he understood Petitioner to have worked double shifts, which he interpreted as being up to 16 hours, and that the size of the space that Petitioner works in is not germane to his condition or injuries. Dr. Holmes opined that Petitioner's restrictions and treatment were reasonable but unrelated to his work for Respondent.

CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (C.), Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent, the Arbitrator finds and concludes as follows:

The Arbitrator finds that Petitioner failed to prove that an accident occurred, which arose out of and in the course of his employment with Respondent. Therefore, all claims for compensation are denied.

It is axiomatic that the Petitioner bears the burden of showing, by a preponderance of the evidence, that he or she has sustained accidental injuries arising out of and in the course of the employment. A petitioner must establish both the "arising out of" and the "in the course of" elements were present to prove a compensable injury. The mere fact that a petitioner was at work or engaged in some work-related activity is not sufficient to support an award under the Act.

Under the Act, an injury is "accidental" only when, "it is traceable to a definite time, place and cause, is unexpected and "without affirmative act or design of the employee." *Int'l Harvester Co. v. Indus. Comm'n*, 56 Ill. 2d 84, 89, 305 N.E.2d 529, 532 (1973). "Development of symptoms of pain, discomfort, stiffness, etc., without an accident does not meet the test." *Id.* The "arises out of" requirement mandates that the injury must have originated from some risk connected with, or incidental to, the employment so that there is a causal connection between the employment and the accidental injury. *Caterpillar Tractor Co. v. Indus. Comm'n*, 129 Ill.2d 52, 58, 541 N.E.2d 665, 667 (1989). "In the course of" employment indicates a time, place, and circumstances requirement, under which the accident must have occurred. *Knox Cty. YMCA v. Indus. Comm'n*, 311 Ill. App. 3d 880, 884–85, 725 N.E.2d 759, 762–63 (3d Dist. 2000).

If an injury results out of a hazard to which the employee would be equally exposed to regardless of their employment, or a risk personal to the employee, it is not compensable. *Caterpillar*, 129 Ill.2d 52, 58–59, 541 N.E.2d 665, 667–68 (1989). The court has established three categories of risk based on that principle: (1) risks unique to employment, (2) risks personal to the employee, and (3) neutral risks that are neither employment based nor personal. *Metropolitan Water Reclamation Dist. of Greater Chi. v. Ill. Workers' Comp. Comm'n*, 407 Ill. App. 3d 1010, 1014 (1st Dist. 2011). Employment-related risks are compensable while personal risks typically are not. *Noonan v. Ill. Workers' Comp. Comm'n*, 2016 IL App (1st) 152300WC, ¶ 19, 65 N.E.3d 530, 535 (2017). Neutral risk injuries are generally held not to arise out of employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public. *Id.* at 536. "Such an increased risk may be either qualitative, such as some aspect of the employment which contributes to the risk, or quantitative, such as when the employee is exposed to a common risk more frequently than the general public." *Metropolitan*, 407 Ill. App. 3d at 1014, 944 N.E.2d at 804.

The purpose of comparing the exposure of an employee to a risk in the course of employment and the exposure of the general public to the same risk is to isolate and identify the distinctive characteristics of the employment. *Caterpillar*, 129 Ill.2d at 62, 541 N.E.2d at 669 (Ill. 1989). The activities of walking, standing and climbing stairs are activities that the general public is constantly exposed to. *Dukich v. Ill. Workers' Comp. Comm'n*, 2017 IL App (2d) 160351WC, ¶ 26. As the Commission recently stated, "[v]oluminous case law establishes that the act of standing and walking does not constitute a risk greater than that to which the general public is exposed." *Kevin Mcallister v. North Pond*, 14 IL. W.C. 28777 (Ill. Indus. Comm'n Jan. 8, 2016) (citing *Caterpillar*, 129 Ill. 2d at 52; *Oldham v. Indus. Comm'n*, 139 Ill. App 3d 594 (2d Dist. 1985); *Elliot v. Indus. Comm'n*, 153 Ill. App 3d 238 (1st Dist. 1987); *Prince v. Indus. Comm'n*, 15 Ill.2d 607 (1959)). Therefore, the mere act of repetitive standing or walking does not constitute an accident as contemplated under the Act. *Dukich*, 2017 IL App (2d) 160351WC, ¶ 26.

Since the general public is universally exposed to the risks of walking and standing on a daily basis, proving that an employee is more frequently exposed to that risk would be difficult, if not impossible. In fact, recent case law establishes that repetitive walking and standing are not considered compensable accidents under the Act. *See Mcallister*, 14 IL. W.C. 28777 (Ill. Indus. Comm'n Jan. 8, 2016) ("the act of standing and walking does not constitute a risk greater than that to which the general public is exposed"); *Debbie Doggett v. State of Illinois, Dept. of Corrections*, 08 IL. W.C. 05274 (Ill. Indus. Comm'n Dec. 18, 2013) ("The Commission does not believe that the mere act of 'repetitive standing' or 'repetitive walking' constitutes an accident as contemplated under the Workers' Compensation Act."); *Lori Cady v. State of Illinois – Menard Correctional Facility*, 12 IL. W.C. 10991 (Ill. Indus. Comm'n Nov. 14, 2013) ("Simply stated, the Commission does not believe that the mere act of 'repetitive standing' or 'repetitive walking' constitutes an accident as contemplated under the Workers' Compensation Act."); *Julie A. Wright v. Chi. Youth Centers*, 03 I.I.C. 0465 (Ill. Indus. Comm'n July 9, 2003) ("Merely walking or stepping is not a compensable work accident."); *Wible v. Meijer*, 03 I.I.C. 0011 (Ill. Indus. Comm'n Jan. 14, 2003) ("Obviously, just standing and walking on smooth floors is not compensable under current case law."); *Diana Karlman v. Citibank*, 01 I.I.C. 0570 (Ill. Indus. Comm'n July 23, 2001) ("The act of standing and walking does not constitute a risk greater than that to which the general public is exposed.").

The Arbitrator notes that existing case law indicates that standing or walking, regardless of quantity, is not compensable unless there is also a qualitative risk enhancer to which petitioner was more often exposed. Even if there is an increased qualitative risk with the employee's work, the employee must also establish that the accident occurred because of that condition, and the increased risk that resulted.

The evidence in the instant matter reveals that the floor where Petitioner worked was flat, level and made of tile; there was no change of elevation between Petitioner's work areas; there were no obstacle or need to step over anything; Petitioner did not have to go up and down stairs; and it was not common for employees to work double shifts. Petitioner never alleged or testified that there was ever any qualitative risk, specific to his job, which related to his alleged accident or injuries. Instead, Petitioner attributed his injuries to repetitive standing and working double shifts.

Even if Petitioner's job required repetitive standing and walking, there must be some type of qualitative risk that he is more frequently exposed to in order for him to establish a compensable accident. Moreover, Petitioner must experience an increased risk that the general public is not exposed to in order to establish a compensable accident.

Petitioner failed to show that he was exposed to any risk beyond merely walking and standing, therefore he failed to prove his work activities constituted a compensable accident. For the foregoing reasons, all claims for compensation are denied.

In Support of the Arbitrator's Decision relating to (E.), Was timely notice of the accident given to Respondent, the Arbitrator finds and concludes as follows:

Based on the Arbitrator's finding that Petitioner failed to prove an accidental injury arising out of and in the course of his employment with Respondent, the Arbitrator finds that the issue of notice is moot.

Assuming *arguendo,* that Petitioner sustained a compensable accident, the Arbitrator nonetheless finds that Petitioner did not provide proper notice of his accident to Respondent.

Section 6(c) of the Illinois Workers' Compensation Act states that, "Notice of the accident shall be given to the employer as soon as practicable, but not later than 45 days after the accident." Illinois case law establishes that simply notifying an employer of an injury is insufficient; it is also necessary that the employer be put on notice that the injury is in some way work-related. *See White v. Workers' Comp. Comm'n*, 374 Ill. App. 3d 907, 911 (2007); *see also Fenix & Scisson Construction Co. v. Indus. Com.*, 27 Ill.2d 354 (1963) (holding that Petitioner's wife calling his employer and stating that he was injured, without any indication that the injury was from a work accident, was insufficient).

Defective or inaccurate notice of an accident is not a bar to compensability unless the employer is unduly prejudiced by said defect or inaccuracy. *Silica Sand Transport, Inc. v. Indus. Comm'n*, 197 Ill. App. 3d 640 (3rd Dist. 1990). The element of prejudice to the employer is pertinent only where notice is given but it is indefinite or incomplete. *Fenix*, 27 Ill.2d at 357.

Petitioner alleged that his accident's manifestation date was December 15, 2015. Petitioner underwent two surgeries in January of 2016 and he was terminated by Respondent on July 27, 2016. Petitioner filed his and filed his Application for Adjustment of Claim on August 9, 2016. Petitioner testified that he told an Assistant Manager, Mandy, that his feet hurt and that he did not want to work double shifts anymore. No accident report was completed, and no action was taken by Respondent or Petitioner. Respondent's witness, Daniel Espinosa, testified that Petitioner told Respondent that he was undergoing surgery on his foot, however indicated only that it was the due to problems that he had had since birth. There is no evidence that Petitioner ever indicated that his injuries or need for treatment were related to, or caused by his work for Respondent.

The Arbitrator also finds it significant that when Petitioner left work to undergo surgery, he was placed on a medical leave of absence. There was no mention of workers compensation, coverage of Petitioner's medical care, temporary total disability, or any other benefit.

The testimony demonstrates that Petitioner failed to allege that any work place accident occurred, that his job was the actual cause of any foot pain or injury. For the foregoing reasons, the Arbitrator finds that the Petitioner failed to provide notice of his alleged injury or the details surrounding his alleged injury.

In Support of the Arbitrator's Decision relating to (F.), Is Petitioner's current condition of ill-being causally related to the injury, the Arbitrator finds and concludes as follows:

Based on the Arbitrator's decision finding that Petitioner failed to prove an accidental injury arising out of and in the course of his employment with Respondent, the Arbitrator finds that determination of the issue of causation is moot.

Assuming *arguendo,* that Petitioner sustained a compensable accident, the Arbitrator nonetheless finds that Petitioner's condition is not causally related to the alleged accident.

The Supreme Court of Illinois has specifically ruled that an employee who is alleging a repetitive trauma injury carries the same burden of proof as other claimants who allege accidental injury. *Peoria Cty. Belwood Nursing Home v. Indus. Comm'n*, 115 Ill.2d 524, 530, 505 N.E.2d 1026, 1028 (1987). The Plaintiff must show that the alleged injury was caused by their work activity and "not the result of a normal degenerative process." *Id.* An employee's injury is not compensable solely because symptoms arose while the employee was at work, nor is it sufficient that the injury occurred at work, it must be proven that the injury was the result of an accident that was incidental to the employment. *Quarant v. Indus. Comm'n*, 38 Ill.2d 490, 492, 231 N.E.2d 397, 399 (1967); *see also Caterpillar*, 129 Ill.2d at 64, 541 N.E.2d at 670 ("[T]his court is not prepared to adopt the position that whenever an injury is suffered on work premises during work hours it is compensable, regardless of whether the conditions or nature of the employment increased or contributed to the risk which led to the injury.") (citing *Rodriguez v. Indus. Comm'n*, 95 Ill.2d 166, 447 N.E.2d 186 (1983)).

Where there is expert medical testimony suggesting that injuries were caused by a normal aging or degenerative process, the claimant cannot refute this testimony and establish that her injuries were caused by a work-related repetitive trauma unless she presents expert medical evidence regarding causation. *Calhoun Skilled Care v. Ill. Workers' Comp. Comm'n (Gibson)*, 406 Ill.

App. 3d 1220 (4th Dist. 2011). "Cases involving aggravation of a preexisting condition primarily concern medical questions and not legal questions," and "[t]his is especially true in repetitive trauma cases." *Nunn v. Ill. Indus. Comm'n,* 157 Ill. App. 3d 470, 478 (4th Dist. 1987).

If an employee suffers from a preexisting condition, he must show that his condition was aggravated or accelerated by his employment. *See Caterpillar Tractor Co. v. Indus. Com.*, 215 Ill. App. 3d 229, 241, 574 N.E.2d 1198, 1205 (4th Dist. 1991) (citing *General Electric Co.*, 190 Ill. App. 3d 847 (4th Dist. 1989)). Repetitive trauma claims involving the alleged aggravation of a preexisting condition cannot succeed unless the petitioner presents medical evidence that the claimant had a preexisting condition that was or could have been aggravated by the repetitive work activities, and that the current condition of ill-being was or could have been caused by the work-related trauma and was not simply the result of a normal, degenerative aging process. *Calhoun,* 406 Ill. App. 3d 1220.

The Arbitrator finds that the opinions of Dr. Holmes to be credible and persuasive in the instant matter. Dr. Holmes testified that Petitioner's conditions were not causally related to his work or employment; prolonged standing could aggravate Petitioner's pain, but would not aggravate the underlying/structural conditions of pes cavus or tarsal coalition; Petitioner's degenerative conditions would have independently caused his symptoms and need for surgery; the only way Petitioner would not have needed surgery would be if he never walked whatsoever; and Petitioner's work history did not increase his pathology. Dr. Holmes also testified that he understood Petitioner to have worked double shifts, which he interpreted as being up to 16 hours and that this, nor the size of the space that Petitioner worked in, is germane to his condition or injuries.

It is clear from the evidence presented that Petitioner had a congenital and degenerative condition that existed since birth. Petitioner offered no medical evidence to support his theory that his current condition of ill-being is causally related to his employment with Respondent. Petitioner further failed to provide evidence that his injuries were caused by his work activity and not the result of a normal degenerative process. Additionally, Petitioner has failed to in any way rebut Dr. Holmes's opinions that his employment did not cause or aggravate his underlying conditions.

Based upon the foregoing, and having considered the totality of the credible evidence adduced at hearing, the Arbitrator finds that Petitioner failed to prove that his condition of ill-being is causally related to his alleged December 15, 2015 accident.

Based upon the Arbitrator's findings and conclusions relating to the issues of accident, notice and causation, determination of the remaining disputed issues is moot.

Petitioner's claim for compensation is denied, and no benefits are awarded herein.