2017 IL App (3d) 160363WC

Opinion filed June 16, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SCOTT HOLOCKER, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Komatsu America Corporation), Defendants-Appellees).	)	Appeal from the Circuit Court of the Tenth Judicial Circuit Peoria County, Illinois Appeal No. 3-16-0363WC Circuit No. 15-MR-343 Honorable Katherine Gorman, Judge, Presiding.

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

OPINION

¶ 1 The claimant, Scott Holocker, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)), seeking benefits for work-related injuries he sustained on September 11, 2012, while he was working for Komatsu America Corporation (employer). Following a hearing, an arbitrator found that the claimant was entitled to receive temporary total disability (TTD) benefits from the time he was terminated by the employer until the date of arbitration, a period of 15 and 1/7 weeks. The arbitrator denied the claimant's claims for penalties and attorney fees.

¶ 2 The claimant and the employer each sought review of the arbitrator's decision before the Illinois Workers' Compensation Commission (Commission). The claimant appealed the arbitrator's calculation of his average weekly wage and the denial of his claims for penalties and attorney fees. The employer appealed the arbitrator's award of TTD benefits and also appealed the arbitrator's calculation of the claimant's average weekly wage. The Commission unanimously reversed the arbitrator's award of TTD benefits and its calculation of the claimant's average weekly wage, and affirmed the arbitrator's denial of penalties and attorney fees.

¶ 3 The claimant then sought judicial review of the Commission's decision before the circuit court of Peoria County. The circuit court reversed the Commission's denial of TTD benefits and adopted the arbitrator's award of TTD benefits. The court also reversed the Commission's calculation of the claimant's average weekly wage and affirmed the Commission's denial of penalties and attorney fees.

¶ 4 This appeal followed.

¶ 5 BACKGROUND

¶ 6 The claimant worked for the employer as a "transportation operator" at the employer's manufacturing facility in Peoria, Illinois. His duties included operating a 40-ton overhead crane. On September 11, 2012, the claimant was operating the crane, placing together heavy steel sections for an oversized mining truck. Each of the steel sections weighed several tons, and they were secured by a chainmail strap. After placing a steel section on the mining truck, the claimant was retracting the loosened chainmail strap when it got stuck. As the claimant looked up at the crane to identify the problem, the chainmail strap snapped loose and hit the claimant, striking him in the face and chest. The blow knocked him backwards, knocked out four of his teeth (including three of his upper front teeth and one lower tooth), loosened other teeth, and caused multiple facial fractures and chest contusions.

¶ 7 After the accident, the claimant was taken by ambulance to St. Francis Medical Center where he was noted to have facial and dental fractures and a large laceration of his lower lip extending into his chin. Diagnostic studies showed multiple fractures of his right maxillary sinus and right maxilla, as well as hemorrhage within the right maxillary sinus, the loss of four teeth, and a left chest wall contusion. The claimant's mouth laceration was repaired and he was discharged with prescriptions for pain medications and follow-up recommendations.

¶ 8 The claimant was off work from September 12, 2012, until October 16, 2012, when he returned to work under light duty restrictions. On December 14, 2012, the claimant was released to work full duty with no restrictions. He was still undergoing treatment for his work-related injuries at that time. During the next 13 months, the defendant underwent four surgical procedures to his face and mouth to correct his pallet and maxilla and to prepare for the insertion of permanent dental implants. The claimant also treated with a dentist and underwent several attempts at restoring his teeth. Prior to the claimant's termination in October 2013, the employer paid the claimant TTD benefits while he was off work following surgeries.[1]

¶ 9 After his return to work in October of 2012, the claimant felt uncomfortable operating cranes and he asked his supervisor not to assign him any crane duties. For the most part, the employer accommodated the claimant's request. The claimant was reassigned to work a different shift in another building where there were no overhead cranes. The claimant testified that he "may have" operated a large, overhead crane a few times in late 2012 and early 2013.

[1] For example, the employer paid the claimant TTD benefits while he was off work following dental surgery from May 23, 2013 through June 12, 2013. However, the employer did not pay the claimant TTD while he was off work following another dental surgery from November 13, 2013, through November 20, 2013 (after the claimant's termination). Those TTD benefits are at issue in this case.

Nevertheless, although the claimant was still classified as a transportation operator, operating cranes was no longer part of his regular duties at that time. He primarily operated a fork truck.

¶ 10 In May 2013, however, the claimant was reassigned to his former job in the building where his work accident had occurred. The claimant discussed his fear of operating cranes with his new foreman, Ken Hoppe. Hoppe generally cooperated with the claimant's request to avoid working with cranes. Eventually, however, the claimant was required to operate a crane on two or three occasions. Each time he did so, the claimant experienced considerable anxiety, his chest tightened, and his heart raced. On July 3, 2013, the claimant experienced a panic attack while operating the same 40-ton overhead crane that had injured him. He was so shaken afterwards that he immediately visited the onsite occupational nurse, Lori Akers, and asked to be sent to the emergency room. Another nurse diagnosed an anxiety attack and took the claimant off work until he was cleared by his primary care physician, Dr. Alain Vilatte.

¶ 11 On July 11, 2013, the claimant treated with Dr. Vilatte. The claimant reported that, during the six weeks following his return to the same job that had caused his work injury, he had been experiencing increasing anxiety with palpitations, agitation, racing thoughts, feelings of losing control, and difficulty concentrating. Dr. Vilatte noted that the claimant was experiencing panic attacks and anxiety while doing his job. He prescribed an anti-anxiety medication and recommended that the claimant undergo counseling. He also recommended that the claimant be placed at another job while he adjusted to the medication.

¶ 12 Thereafter, the claimant asked the employer to reassign him to a different position. The employer offered the claimant a full-time janitorial position at its Peoria facility, which would not require the claimant to work on or near cranes. The claimant declined that position and continued to work for the employer as a transportation operator. He was not required to operate cranes.

¶ 13 On July 22, 2013, the claimant was evaluated by Dr. Edward Moody, a physician at OSF Occupational Health who had previously served as the employer's company doctor. Dr. Moody concluded that it was "the operation of the crane in question" that was provoking the claimant's anxiety. He cleared the claimant for full duty janitorial work and recommended a restriction of no crane operation for six to eight weeks if he returned to his previous position as a transportation operator. Thereafter, the claimant returned to work as a transportation operator primarily driving fork trucks. He was not required to operate overhead cranes.

¶ 14 On August 13, 2013, the claimant began counseling sessions with Jennifer Boehs, a Licensed Clinical Social Worker, for his crane-related anxiety. On September 18, 2013, Boehs diagnosed the claimant with post-traumatic stress disorder as a result of his work injury. She recommended that the claimant avoid operating a crane for at least one year. Boehs opined that, if the claimant did need to operate a crane, he should do so gradually in order to build his tolerance.

¶ 15 In early October 2013, the claimant took a scheduled vacation to Mexico. When he returned, he was ill with severe nausea and diarrhea. He missed work from Tuesday, October 8, 2013, through Friday, October 11, 2013. He also missed the first four hours of his shift on Monday, October 14, 2013. Although he called in sick on October 8, he failed to notify the employer that he was unable to work his scheduled shifts from October 9 through October 11.[2] The collective bargaining agreement (CBA) between the employer and the claimant's union provided that an employee's failure to call in or report to work for three consecutive days is grounds for termination of employment. On October 15, 2013, the employer terminated the claimant pursuant to this contractual provision. During the arbitration hearing, the claimant

[2] The claimant testified that he did not call in sick from October 9 through October 11 because he was under the impression that his doctor's office had faxed an off-work slip to the employer. He did not bring a doctor's note to the employer until October 12.

testified that he was aware of the terms contained in the CBA, including the provision authorizing termination for three consecutive days of "no call, no show."

¶ 16 The claimant underwent another dental surgery on November 13, 2013. His dental surgeon, Dr. John Otten, took the claimant off work completely from November 13, 2013, through November 20, 2013.

¶ 17 On January 9, 2014, the claimant underwent a psychological evaluation with Dr. Nancy Landre, a clinical psychologist who served as the employer's section 12 examiner. After ruling out any malingering or exaggeration of symptoms by the claimant, Dr. Landre opined that the claimant satisfied the criteria for an adjustment disorder with mixed anxiety and depression. She further opined that it was reasonable to conclude that the claimant's current anxiety symptoms were attributable to his injury on September 11, 2012. Based on an oral description of the claimant's job duties, Dr. Landre concluded that the claimant was able to perform all of the duties required in his usual occupation except for operating a crane. Dr. Landre placed the claimant on full duty with the restriction that he not be required to operate a crane for six months.

¶ 18 An arbitration hearing took place on January 29, 2014. During the hearing, the claimant testified that he continued to treat with a dentist and was in the process of obtaining dental implants. He was still missing his top three center teeth and one lower tooth. He had an appointment scheduled with Dr. Otten on February 7, 2014. Dr. Otten was considering extracting an additional bottom tooth that had been loosened and moved during the work accident. The claimant also stated that he was still attending counseling sessions with Jennifer Boehs.

¶ 19 The claimant testified that, since his termination, he had been actively seeking work for positions within his union. He stated that he had some promising leads out of state, in San Diego, but had made no effort to find employment near his home in central Illinois.

¶ 20 The claimant further testified that, from the time he returned to work on July 23, 2013, until his termination October 15, 2013, the employer did not require him to operate an overhead crane.

¶ 21 Chris Dubois, the employer's Human Resource Manager, testified on behalf of the employer. Dubois stated that the employer allowed its employees to request reassignment for different positions that matched their qualifications. Dubois testified that, following the claimant's appointment with Dr. Villate in July 2011, the claimant requested reassignment and was offered a janitorial position that would not require him to work on or near cranes. The janitorial position was permanent, full-time, and unionized, and it paid the same wage as the claimant's previous position as a transportation operator. However, according to Dubois, the claimant declined to accept the janitorial position.

¶ 22 Dubois testified that the claimant's work restriction barring him from operating cranes did not preclude the claimant from performing the regular duties of the transportation operator position. Dubois stated that there were 40 positions at the employer's Peoria manufacturing facility that were classified as "transportation operator" positions. Approximately one-third of these positions required crane operation as a regular job duty. The remaining two-thirds of the transportation operator positions primarily involved package handling and did not include crane operation as a regular job duty. Dubois testified that, when the claimant returned to work on July 23, 2013, under the "no crane operation" work restriction, he was still classified as a "transportation operator" but he was not required to operate a crane as part of his regular duty.

¶ 23 Alia Massat, a certified rehabilitation counselor, also testified on behalf of the employer. Massat testified that, based on the claimant's job experience, job description, and medical evaluations, the claimant's restriction of no crane operation did not preclude the claimant from reentering the work force. Based on a labor market survey she conducted, Massat opined that there were various employers in Peoria who were hiring for positions that matched the claimant's qualifications, salary, and restriction of no crane operation.

¶ 24 The arbitrator found that the claimant was entitled to receive TTD benefits from the time he was terminated by the employer until the date of arbitration, a period of 15 and 1/7 weeks. The arbitrator noted that, as of the date his employment was terminated by the employer, the claimant had not been released to unrestricted full duty work. Although the claimant had been released to return to work with restrictions and he was able to perform that work, the arbitrator stressed that none of the physicians who examined or treated the claimant indicated that he had reached maximum medical improvement (MMI). Moreover, the arbitrator found that the medical evidence established that the claimant "continue[d] to be treated for his injuries and * * * continue[d] to experience symptoms connected with his work related injury." Thus, the arbitrator concluded that the claimant's condition had not stabilized as of the date his employment was terminated by the employer, and awarded TTD benefits on that basis.

¶ 25 The arbitrator determined that, in the year preceding the injury, the claimant earned an average weekly wage of $982.78. The arbitrator declined to impose attorney fees and penalties under sections 16, 19(k), and 19(l) of the Act (820 ILCS 305/16, 19(k), 19(l) (West 2012)) because it found that the employer's failure to pay TTD "was not unreasonabe and vexatious or without good and just cause."

¶ 26 The claimant and the employer each sought review of the arbitrator's decision before the Commission. The claimant appealed the arbitrator's calculation of his average weekly wage and

the denial of his claims for penalties and attorney fees. The employer appealed the arbitrator's award of TTD benefits and also appealed the arbitrator's calculation of the claimant's average weekly wage. The Commission unanimously reversed the arbitrator's award of TTD benefits and its calculation of the claimant's average weekly wage,[3] and affirmed the arbitrator's denial of penalties and attorney fees.

¶ 27 As to TTD benefits, the Commission noted that the claimant had sought TTD benefits after he was terminated for reasons unrelated to his work injury pursuant to the Illinois Supreme Court's decision in *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Commission*, 236 Ill. 2d 132 (2010) "on the basis that his work-related condition had not yet stabilized." The Commission acknowledged *Interstate Scaffolding*'s holding that an employer's obligation to pay TTD benefits to an injured employee does not cease because the employee had been discharged—whether or not the discharge was for "cause." However, relying upon *Interstate Scaffolding*, the Commission noted that: (1) when an injured employee has been discharged by his employer, "the determinative inquiry for deciding entitlement to [TTD] benefits remains, as always, whether the claimant's condition has stabilized";and (2) an injured employee is entitled to TTD benefits after termination "if [he] is able to show that he continues to be temporarily totally disabled as a result of his work-related injury."

¶ 28 The Commission found *Interstate Scaffolding* to be distinguishable from the claimant's case in several material respects. In *Interstate Scaffolding*, "the claimant's ability to find work in the open labor market was significantly limited or precluded by his work-related condition." Here, by contrast, the Commission noted that the claimant had "offered no evidence that he was significantly limited or precluded from reentering the labor market because he needed to

[3] The Commission found that the claimant's average weekly wage was $1,008.34, not $982.78, as the arbitrator had found.

temporarily avoid cranes." The claimant offered "no explanation at all for why he had been unable to secure employment since termination, despite testifying that he performed a self-directed job search and locating potential employers." The Commission found it significant that the employer's vocational expert testified that a labor market survey "found several employers within the Peoria area who were hiring for positions that matched [the claimant's] qualifications and salary and did not involve crane usage." Furthermore, the Commission noted that neither the claimant nor the employer's vocational expert had "indicated that [the claimant's] need for dental care had any impact on his employability in his usual and customary field of employment."

¶ 29 Although the Commission acknowledged that, like the employee in *Interstate Scaffolding*, the claimant "had yet to reach [MMI] at termination,"[4] it concluded that "[MMI] is not alone dispositive on the issue of whether a claimant's condition has stabilized." The Commission found that: (1) the claimant was working full duty within his job classification of "transportation operator" until he was terminated;[5] (2) he performed one of the numerous jobs that did not involve any crane usage; (3) it was not necessary for the employer to either modify an existing job or create an accommodating job on account of the claimant's work restrictions; (4) after he returned to work following his panic attack, the claimant "continued working for [the employer] as a transportation operator while entirely avoiding cranes"; and (5) "the employer's representative, Mr. Dubois, testified credibly that [the claimant] could have continued to work for [the employer] indefinitely without any mandatory crane exposure." Accordingly, the

[4] The Commission observed that the claimant had not been placed at MMI by the date of his termination because he required additional dental work and continued to have symptoms of anxiety.

[5] The Commission noted that it was undisputed that "transportation operator" is a job classification that "encompasses many different jobs within [the employer's] company" and that many such jobs "do not involve any work with cranes."

Commission found that "[t]he evidence shows that at termination, [the claimant's] work related injuries had stabilized and had no impact on his employment."

¶ 30 The claimant then sought judicial review of the Commission's decision before the circuit court of Peoria County. The circuit court reversed the Commission's denial of TTD benefits and adopted the arbitrator's award of TTD benefits. The court also reversed the Commission's calculation of the claimant's average weekly wage[6] and affirmed the Commission's denial of penalties and attorney fees.

¶ 31 This appeal followed.

¶ 32 ANALYSIS

¶ 33 On appeal, the employer argues that the Commission's denial of TTD benefits after the claimant's termination was not against the manifest weight of the evidence and that the circuit court therefore erred in reversing the Commission's decision on that issue.

¶ 34 An employee is temporarily totally incapacitated from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990); *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 45. To be entitled to TTD benefits, it is the claimant's burden to prove not only that he did not work but also that he was unable to work. *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45; *McDaneld v. Industrial Comm'n*, 307 Ill. App. 3d 1045, 1053 (1999). A TTD award is proper when the claimant cannot perform any services except those for which no reasonably stable labor market exists. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d at 118; *Zenith Co. v. Industrial Comm'n*, 91 Ill. 2d 278, 287 (1982); *McDaneld*, 307 Ill. App. 3d at 1053; *Ingalls*

[6] The circuit court concluded that the claimant's average weekly wage was $1,063.91.

Memorial Hospital v. Industrial Comm'n, 241 Ill. App. 3d 710, 716 (1993). "The fundamental purpose of the Act is to provide injured workers with financial protection until they can return to the work force." *Interstate Scaffolding*, 236 Ill. 2d at 146; *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 556 (2004). "Therefore, when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury and whether the employee is capable of returning to the work force." *Interstate Scaffolding*, 236 Ill. 2d at 146.

¶ 35 Whether a claimant is entitled to TTD benefits and for how long are questions of fact to be determined by the Commission, and a reviewing court will not disturb the Commission's determination of these issues unless they are contrary to the manifest weight of the evidence. *Archer Daniels Midland*, 138 Ill.2d at 119–20; *Shafer*, 2011 IL App (4th) 100505WC, ¶ 45; *McDaneld*, 307 Ill. App. 3d at 1053. A factual finding is contrary to the manifest weight of the evidence only when an opposite conclusion is clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). The test is whether there is sufficient factual evidence in the record to support the Commission's determination, not whether this court, or any other tribunal, might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d at 828, 833 (2002); *Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 450 (1995). The determination of witness credibility and the weight to be accorded the evidence are matters within the province of the Commission. *Pietrzak*, 329 Ill. App. 3d at 833; *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 880 (1985).

¶ 36 Applying these standards, we cannot say that the Commission's decision to deny TTD benefits after the claimant's termination on October 15, 2013, was against the manifest weight of the evidence. It is undisputed that, at the time of his termination, the claimant had not reached MMI and he was still undergoing dental treatments and attending counseling sessions for his

crane-related anxiety. (The claimant testified that he was still undergoing dental treatments and counseling at the time of arbitration.) However, it is also undisputed that, from the time he returned to work for the employer after his panic attack in July 2013 until his termination on October 15, 2013: (1) the claimant had been released to work fully duty with only one work restriction, *i.e.,* that he not operate a crane; (2) the claimant continued to work full duty as a "transportation operator" within his original job classification without being required to operate a crane; and (3) it was not necessary for the employer to either modify an existing job or create a "light duty" job to accommodate the claimant's work restrictions. Moreover, DuBois, the employer's Human Resources Manager, testified that the claimant could have continued to work for the employer in his current position without being required to operate a crane.

¶ 37 In addition, the employer's vocational expert testified that, based on the claimant's job experience, job description, and medical evaluations, the claimant's restriction of no crane operation did not preclude the claimant from reentering the work force. Based on a labor market survey she conducted, the employer's vocational expert opined that there were various employers in Peoria who were hiring for positions that matched the claimant's qualifications, salary, and restriction of no crane operation. The claimant did not dispute that he was employable despite his current work-related physical and psychological conditions. To the contrary, he testified that he had been actively conducting a job search and already had some promising leads in San Diego.

¶ 38 Accordingly, there was ample evidence to support the Commission finding that, at the time of his termination, the claimant's work-related injuries had stabilized to the extent that he was able to reenter the workforce and his injuries had no impact on his employment. The Commission's decision to deny the claimant's claim for TTD benefits after his termination was not against the manifest weight of the evidence, as the opposite conclusion is not "clearly

apparent." *See, e.g., Lukasik v, Industrial Comm'n*, 124 Ill. App. 3d 609, 615 (1984) (holding that the Commission's decision to terminate TTD benefits after two doctors released the claimant for light-duty work was not against the manifest weight of the evidence, even though "the record reflect[ed] that the claimant may not have fully recovered" from his work-related injuries, because the Commission "could properly have determined that he was no longer totally disabled and unable to work" at that time); see also *Gallentine v. Industrial Comn'n*, 201 Ill. App. 3d 880, 887 (1990); *Rambert v. Industrial Comm'n*, 133 Ill. App. 3d 895, 902-03 (1985).

¶ 39 Relying on *Interstate Scaffolding* and *Matuszczak* v. *Illinois Workers' Compensation Comm'n*, 2014 IL App (2d) 130532WC, the claimant argues that: (1) the only dispositive question is whether the claimant had reached MMI prior to his termination; and (2) because he had not, the Commission erred as a matter of law in denying him TTD benefits after his termination. We disagree. It is true that *Interstate Scaffolding* and *Matuszczak* each state that "when a claimant seeks TTD benefits, the dispositive inquiry is whether the claimant's condition has stabilized, *i.e.*, whether the claimant has reached maximum medical improvement." *Interstate Scaffolding*, 236 Ill. 2d at 142; *Matuszczak*, 2014 IL App (2d) 130532WC, ¶ 14. It is also true that, in each of those cases, the reviewing court held that TTD benefits be continued after the claimant's termination for cause even though the claimant was working light duty at the time. However, *Interstate Scaffolding* and *Matuszczak* are each distinguishable from the instant case in material respects. In both *Interstate Scaffolding* and *Matuszczak,* the question was whether the claimant's termination for conduct unrelated to the claimant's injury cut off the claimant's preexisting entitlement to TTD benefits. In each of those cases, it was undisputed that, at the time of termination, the claimant's condition had not stabilized, that the claimant was unable to perform the job he had been performing for the employer prior to the work accident, and that when the claimant returned to work after the accident, it was in a light duty capacity.

Thus, in each case, it was undisputed that the claimant's work injury had diminished his ability to work, thereby entitling him to collect TTD benefits at the time of his termination. The only question was whether the misconduct that led to the claimant's termination in each case (writing religious graffiti in the employer's store room in *Interstate Scaffolding*, and stealing cigarettes in *Matuszczak*) justified the termination of TTD benefits. Here, by contrast, the claimant was working *full time* and *full duty* in his original job classification prior to his termination, and the employer's vocational expert testified that the claimant's work-related injuries did not affect his employability in the labor market. Thus, the dispositive question is this case is whether the claimant was entitled to TTD benefits as a result of his work injuries in the first place, irrespective of his termination or the reasons for his termination. As noted above, the Commission's finding that the claimant was not entitled to TTD benefits in this case because his work injuries had no effect on his employment was not against the manifest weight of the evidence.

¶ 40 Moreover, *Interstate Scaffolding* does not support the claimant's argument that an injured employee is entitled to TTD as a matter of law unless he had reached MMI. Near the beginning of its analysis in *Interstate Scaffolding*, the supreme court states that, when a claimant seeks TTD benefits, the "dispositive inquiry is whether the claimant's condition has stabilized," *i.e.*, whether the claimant has reached [MMI]." *Interstate Scaffolding*, 236 Ill. 2d at 142. However, later in its analysis, the supreme court clarified that an injured employee is entitled to TTD benefits "if [he] is able to show that he continues to be temporarily totally disabled as a result of his work-related injury" (*id.* at 149), and that "when determining whether an employee is entitled to TTD benefits, the test is whether the employee remains temporarily totally disabled as a result of a work-related injury *and whether the employee is capable of returning to the work force*" ((Emphasis added.) (*id.* at 146). Moreover, the supreme court also noted that, in two prior appellate court decisions

upon which it relied, "the touchstone for determining whether the claimants were entitled to TTD benefits was * * * whether the claimants' conditions had stabilized *to the extent that they were able to reenter the workforce.*" (Emphasis added.) *Id.* at 148. Thus, like *Archer Daniels Midland*, *Zenith Co.*, *Schafer*, *McDaneld*, *Lukasik*, and other cases, *Interstate Scaffolding* confirms that a claimant is not entitled to receive TTD benefits when his work injuries no longer impact his ability to work or his employability.

¶ 41 One final point bears mentioning. The claimant argues that we should review the Commission's decision *de novo* because the facts are undisputed and no conflicting inferences may be drawn from the facts. We disagree. Although the claimant was able to work within his original job classification without operating cranes when he returned to work in July 2013, he had not yet reached MMI and he continued to undergo dental treatments thereafter, including at least one dental surgery in November 2013 that kept him off work entirely for one week. Moreover, although the operation of overhead cranes was no longer part of the claimant's regular job duties after July 2013, and it was undisputed that the claimant was not required to operate a crane between July 23, 2013, and his termination, it was not undisputed that the claimant would *never* have had to operate a crane in his capacity as a transportation operator. Accordingly, the record supported conflicting inferences as to whether the claimant's injuries had stabilized to the extent that he was no longer entitled to TTD benefits. We have therefore reviewed the Commission's decision under the manifest weight of the evidence standard.

¶ 42 CONCLUSION

¶ 43 For the foregoing reasons, we reverse the judgment of the circuit court, which reversed the decision of Commission, and reinstate the Commission's decision.

¶ 44 Circuit court's judgment reversed; Commission's decision reinstated.

STATE OF ILLINOIS)
) SS.
COUNTY OF PEORIA)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Scott A. Holocker,

Petitioner,

15IWCC0315

vs.

NO: 12 WC 33397

Komatsu America Corp.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner and Respondent herein and notice given to all parties, the Commission, after considering the issues of average weekly wage, temporary total disability, §19(l) penalties and §16 attorney fees 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.

On the date of accident, Petitioner was a 46-year-old transportation operator for Respondent. Petitioner sustained an undisputed work-related injury on September 11, 2012 when he was struck in the face and chest with a crane chain, sustaining dental injuries. Petitioner attempted to operate a crane after returning to work and experienced a panic attack. Respondent's examining physician and Petitioner's physician diagnosed Petitioner with anxiety and recommended that he avoid crane work for a period of time and resume crane work at his own pace. The existence of Petitioner's anxiety condition was not disputed. Petitioner continued working for Respondent as a transportation operator while entirely avoiding cranes. It is undisputed that "transportation operator" is a job classification that encompasses many different jobs within Respondent's company and that many jobs do not involve any work with cranes.

Petitioner was discharged from his employment on October 15, 2013 for reasons unrelated to his claim. Petitioner testified that he immediately began looking for other jobs, but he also demanded temporary total disability benefits pursuant to *Interstate Scaffolding, Inc. v.*

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Illinois Workers' Compensation Commission, 236 Ill.2d 132, 337 Ill.Dec. 707 (2010) on the basis that his work-related condition had not yet stabilized. The Court in *Interstate Scaffolding* held that an employer's obligation to pay temporary total disability benefits to an injured employee does not cease because the employee had been discharged--whether or not the discharge was for "cause." When an injured employee has been discharged by his employer, the determinative inquiry for deciding entitlement to temporary total disability benefits remains, as always, whether the claimant's condition has stabilized. If the injured employee is able to show that he continues to be temporarily totally disabled as a result of his work-related injury, the employee is entitled to temporary total disability benefits. *Id.* at 149.

Petitioner claimed that he had not reached maximum medical improvement for his dental injuries and post traumatic anxiety and he remained under temporary restrictions at the time of his termination. Petitioner alleged that Respondent's refusal to pay temporary total disability benefits after October 15, 2013 was vexatious, unreasonable, and contrary to the law. Respondent refused to pay temporary total disability benefits on the contrary basis that Petitioner's condition had in fact stabilized by the date of termination. Respondent indicated that Petitioner was not temporarily totally disabled from work and his restrictions with respect to crane usage did not prevent him from obtaining employment elsewhere. At the time of termination, Petitioner was performing full duty work for Respondent within his regular job classification.

It is pertinent that in *Interstate Scaffolding*, the claimant's ability to find work in the open labor market was significantly limited or precluded by his work-related condition. After the claimant was terminated for reasons unrelated to the injury, the court found that Petitioner was entitled to temporary total disability benefits until his condition stabilized. We find that *Interstate Scaffolding* is distinguishable from the case at hand. Although both Petitioner and the claimant in *Interstate Scaffolding* had yet to reach maximum medical improvement at termination, maximum medical improvement is not alone dispositive on the issue of whether a claimant's condition has stabilized. Petitioner required additional dental work and continued to have symptoms of anxiety and therefore he had not been placed at maximum medical improvement by the date of termination. However, Petitioner was working full duty within his job classification of "transportation operator" until he was terminated; he performed one of the numerous jobs that did not involve any crane usage. The evidence shows that it was not necessary for Respondent to either modify an existing job or create an accommodating job on account of Petitioner's restrictions. Respondent's representative, Mr. Dubois, testified credibly that Petitioner could have continued to work for Respondent indefinitely without any mandatory crane exposure.

Furthermore, Petitioner offered no evidence that he was significantly limited or precluded from reentering the labor market because he needed to temporarily avoid cranes. In fact, Petitioner offered no explanation at all for why he had been unable to secure employment since termination, despite testifying that he performed a self-directed job search and locating potential employers. Respondent's vocational expert, Ms. Massat, testified that a labor market survey found several employers within the Peoria area who were hiring for positions that matched Petitioner's qualifications and salary and did not involve crane usage. Furthermore neither Petitioner nor Ms. Massat indicated that Petitioner's need for dental care had any impact on his employability in his usual and customary field of employment. The evidence shows that at

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termination, Petitioner's work related injuries had stabilized and had no impact on his employment.

We do not find that Petitioner is entitled to temporary total disability benefits beginning after his termination on September 13, 2013, therefore Petitioner's argument that the Arbitrator erred in not awarding penalties and fees on unpaid temporary total disability benefits from October 15, 2013 through January 29, 2014 is moot. Nevertheless, we find that a genuine dispute existed with respect to whether Petitioner's condition had stabilized such that he was not entitled to temporary total disability benefits after termination and we find no evidence that Respondent acted unreasonably or vexatiously in denying benefits.

Both parties also appealed the Arbitrator's decision on the issue of average weekly wage. Petitioner alleges an average weekly wage of $1,200.00. Respondent disputes Petitioner's average weekly wage and claims $1,063.81 per week. The Arbitrator found an average weekly wage of $982.78. After considering all of the evidence with respect to average weekly wage, we find that Petitioner's average weekly wage is $1,008.34. We note that there was very little testimony at arbitration with respect to Petitioner's earnings. Furthermore, the earnings-related documents submitted as Respondent's exhibit #1 were not corroborated or explained by the testimony of Petitioner or Mr. Dubois. On direct examination, Petitioner testified that between September of 2011 and September of 2012 he had to work every Saturday except for one Saturday per month. Petitioner did not recall whether there were mandatory Sundays. However, he testified that overtime was first offered to senior employees before being offered to junior employees like himself, and Petitioner further testified that some of the overtime he worked during the year was voluntary. He estimated that in the year 2012 he worked forty-eight hours per week. (T. 42-43) Mr. DuBois, did not recall Petitioner's wage rate but on cross-examination he agreed that twenty-five dollars per hour was probably a "fair" estimate. (T. 71-72)

The wage records contained in Respondent's exhibit #1 contain handwritten calculations. They purport to show that Respondent originally calculated an average weekly wage of $1,063.81 after the injury and provided that figure to the insurance company. Internal email correspondence dated September 20, 2012 estimates that eighty hours of overtime were mandatory out of 144 hours; that twenty-seven out of fifty Saturdays were mandatory, and that two Sundays were mandatory. Respondent's exhibit #1 also contains earnings records showing that for the period of September 15, 2011 through September 13, 2012 Petitioner's total pay was $72,769.98.

Petitioner's argument that his average weekly wage is $1,200.00 is very simply based on his testimony that he worked forty-eight hours per week in 2012, and the agreement of Mr. DuBois that twenty-five dollars per hour "sounds fair" for Petitioner's job classification. The Arbitrator and Respondent used the information in Respondent's exhibit #1 to calculate the average weekly wage, but came to different results. After considering all of the evidence, we find that Petitioner's average weekly wage is $1,008.34. This conclusion is most consistent with the credible evidence. We agree with the Arbitrator's finding with respect to mandatory overtime hours worked, 312 hours, but we find that voluntary overtime hours were not excluded from the total hours worked, 599 hours. Section 10 of the Act provides that the method for calculating a claimant's average weekly wage is to divide by fifty-two the "actual earnings" of the claimant

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over the fifty-two weeks period preceding the date of injury. It is well settled that voluntary overtime cannot be used in calculating the average weekly wage. *Airborne Express, Inc. v. Illinois Workers' Compensation Commission*, 372 Ill.App.3d, 549, 554 (2007).

Medical expenses and the nature and extent of the injury were not placed in dispute at hearing and therefore the Arbitrator did not award medical bills or permanent disability.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's award of temporary disability benefits of $612.29/week for 15 and 1/7 weeks, commencing October 15, 2013 through January 29, 2014, as provided in Section 8(a) of the Act is vacated for the reasons set forth above and no other benefits are awarded herein.

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:
RWW/plv
o-3/3/15
46

MAY 4 - 2015

Ruth W. White

Charles J. DeVriendt

Joshua D. Luskin

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STATE OF ILLINOIS)
)SS.
COUNTY OF MCLEAN)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Scott Holocker
Employee/Petitioner

Case # **12** WC **33397**

v.

Komatsu America Corp.
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 **Bloomington**, on **January 29, 2014**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **September 11, 2012**, Respondent ***was*** operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, the Petitioner's average weekly wage was **$982.78**.

On the date of accident, Petitioner was **46** years of age, ***single*** with **0** dependent children.

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

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

Respondent shall be given a credit of **$7,193.44** for TTD paid to Petitioner prior to hearing.

ORDER

Respondent shall pay Petitioner temporary partial disability benefits of $612.29/week for **15 1/7** weeks, commencing **October 15, 2013** through **January 29, 2014**, as provided in Section 8(a) of the Act.

No other 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

February 19, 2014
Date

FEB 25 2014

FACTS:

The facts of the instant matter are essentially undisputed. On September 11, 2012, the Petitioner sustained undisputed accidental injuries arising out of and in the course of his employment with the Respondent. As part of his regular job duties, the Petitioner was operating an overhead crane when the metal chain mail strap he was using snapped and hit him in the face and chest. The Petitioner testified that the blow knocked him backwards, knocked out four of his teeth, injured his cheek bone, and caused bruising to his chest.

The Petitioner was taken from the scene of the accident by ambulance to St. Francis Medical Center where he was noted to have facial and dental fractures, as well as a large laceration of his lower lip extending into his chin. Diagnostic studies showed multiple fractures of his right maxillary sinus and right maxilla, as well as hemorrhage within the right maxillary sinus, the loss of four teeth, and a left chest wall contusion. The Petitioner underwent repair of his mouth laceration that day and he was discharged with prescriptions for pain medications and follow-up recommendations.

Thereafter, the Petitioner followed up with plastic and oral surgeons and he underwent four surgical procedures to his face and mouth. The Petitioner also treated with a dentist and underwent several attempts at restoring his teeth. The Petitioner testified that he continues to treat with a dentist and is in the process of obtaining dental implants.

The Petitioner was off work from September 12, 2012, until October 16, 2012, when he returned to work under light duty restrictions. The Petitioner was then released to work full duty with no restrictions on December 14, 2012. The Petitioner was also off work following dental surgery from May 23, 2013 through June 12, 2013. The Petitioner testified that he was paid Temporary Total Disability benefits during the periods of time he was off work.

The Petitioner testified that after his return to work in October of 2012, he was uncomfortable operating cranes and he requested that he not be assigned any crane duties. This request was accommodated. The Petitioner testified that from December 14, 2012, through July 3, 2013, he was required to operate a crane on only two or three occasions. He testified that on July 3, 2013, he was again required to operate a crane and, on that occasion, he experienced a panic attack. The Petitioner testified that he immediately visited the onsite occupational nurse who took him off work until he was cleared by his primary care physician, Dr. Vilatte.

On July 11, 2013, the Petitioner was seen by Dr. Vilatte, who noted that the Petitioner was experiencing panic attacks and anxiety while doing his job and prescribed the Petitioner a non-sedating anti-anxiety medication. Dr. Vilatte then recommended that the Petitioner be placed at another job while he adjusted to his medication.

Chris Dubois, the Respondent's Human Resource Manager, testified that the Petitioner did bid for another job following his visit with Dr. Vilatte. According to Mr. Dubois, a janitorial position was offered, but Petitioner declined. According to Mr. Dubois, the janitorial position

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was permanent and full time in Petitioner's union, where Petitioner would be earning the same wage and would not require Petitioner to work on or near cranes.

On July 22, 2013, the Petitioner was evaluated by Dr. Moody, the Respondent's company doctor. Dr. Moody cleared the Petitioner without restrictions for the janitorial position and recommended a restriction of no crane operation for six to eight weeks if he returned to his previous position as a transportation utility worker.

Mr. Dubois testified that it was not difficult to let Petitioner return to his previous position as a transportation utility worker and assign him to perform the other various duties that did not require crane operation. Thus, Petitioner was able to return to work on July 23, 2013, as a transportation utility worker.

On August 13, 2013, the Petitioner began counseling sessions with Jennifer Boehs, a Licensed Clinical Social Worker, for his crane related anxiety. On September 18, 2013, Ms. Boehs diagnosed the Petitioner with post traumatic stress disorder as a result of his work injury. She recommended that the Petitioner avoid operating a crane for at least one year and indicated that if he does need to operate a crane, he should do so gradually in order to build his tolerance.

On January 9, 2014, the Petitioner underwent a psychological evaluation with Dr. Nancy Landre at the request of the Respondent. Dr. Landre opined that the Petitioner satisfied the criteria for an Adjustment Disorder with Mixed Anxiety and Depression and she opined that it was reasonable to conclude that the Petitioner's current anxiety symptoms were attributable to his injury on September 11, 2012. Dr. Landre also opined that the Petitioner was able to perform all of the duties required in his usual occupation except for the crane operation. Dr. Landre placed the Petitioner on full duty with the restriction that he not be required to operate a crane for six months.

On October 15, 2013, the Petitioner's employment with the Respondent was terminated as a result of his failure to call in or report to work for three consecutive days in violation of the terms contained in the collective bargaining agreement between Petitioner and Respondent. The Petitioner testified that since his termination he has been actively seeking work for positions within his union. He testified that he has some promising leads out of state, in San Diego, but has made no effort to find employment in Central, Illinois.

Alla Massat, a Certified Rehabilitation Counselor, testified that based on the Petitioner's job experience, job description, and medical evaluations, the Petitioner's restriction of no crane operation did not preclude the Petitioner from re-entering the work force. Ms. Massat opined that there were various employers in Peoria, Illinois who were hiring for positions that matched the Petitioner's qualifications, salary, and restriction of no crane operation.

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CONCLUSIONS:

In Support of the Arbitrator's Decision relating to (G.), What were Petitioner's earnings, the Arbitrator finds and concludes as follows:

Respondent's Exhibit # 1 reflects that during the 12 month period preceding the Petitioner's injury, he was paid $40,382.97 for regular time, $13,207.26 for overtime at time and a half pay, $10,514.80 for overtime 2 at time and a half pay, $2,661.12 for holiday pay, $863.24 for personal time, $2,544.25 for vacation, and $1,347.50 for a night bonus. The Petitioner did not testify as to what his hourly pay rate was during the period although the Respondent's H.R. Manager, Chris DuBois, estimated it to be "approximately $25.00 per hour".

The Petitioner testified that he was required to work scheduled Saturdays and that he only had one Saturday off each month for the whole year. The Petitioner acknowledged, however, that overtime was offered to employees based upon seniority and that some of the overtime he worked was voluntary. The Petitioner could not recall if he worked any mandatory Sundays during that period. Respondent's Exhibit # 1 indicates that, out of 50 weeks, the Petitioner had mandatory overtime for 27 Saturdays and 2 Sundays. During the work week Petitioner had roughly 80 mandatory hours through the whole period.

Therefore, utilizing Respondent's Exhibit # 1, out of 599 overtime hours worked by Petitioner, 216 were mandatory hours on Saturday (8 hours x 27 Saturdays), 16 mandatory overtime hours on Sundays (8 hours x 2 Sundays), and 80 hours of mandatory overtime during Petitioner's normal work week through that period. The Arbitrator finds that Petitioner has worked a total 312 mandatory overtime hours from September of 2011 to September 2012.

Respondent's Exhibit # 1 indicates Petitioner's average hourly wage to be $15 ($40,382.97 yearly wage/ 2696 standard hours worked). This provides Petitioner with $4,680 in mandatory overtime wage ($15 x 312 mandatory overtime hours) for AWW purposes. Taking into account Petitioner's yearly pay of $40, 382.97 + $4,680.00 for mandatory overtime + $2,661.12 for holiday + $2,544.25 for vacation + $836.24 for personal time gives Petitioner a yearly wage of $51,104.58. Dividing $51,104.58 by 52 weeks results in an average weekly wage of $982.78. The Arbitrator notes that, pursuant to Section 10, the Petitioner's bonus and voluntary overtime were not considered in calculation of Petitioner's average weekly wage. The Arbitrator finds that average weekly wages stipulated by Respondent and Petitioner were incorrectly calculated.

In Support of the Arbitrator's Decision relating to (K.), What temporary benefits are due, the Arbitrator finds and concludes as follows:

The Petitioner claims entitlement to Temporary Total Disability benefits based upon the Appellate Court decision in *Interstate Scaffolding, Inc. v. The Illinois Workers' Compensation*

Commission, 236 Ill.2d 132 (2010) because, at the time his employment was terminated by the Respondent, the Petitioner was still treating for his injury and he was still subject to work restrictions imposed by Jennifer Boehs, a Licensed Clinical Social Worker, as well as Dr. Moody, the Respondent's company doctor, and Dr. Nancy Landre, the Respondent's examining psychologist. The Respondent asserts that the Petitioner is not entitled to Temporary Total Disability benefits because the Petitioner's condition of ill being had stabilized and his restriction does not preclude him from re-entering the work force.

The Arbitrator notes that a review of the record demonstrates that, as of the date his employment was terminated by the Respondent, the Petitioner had not been released to unrestricted full duty work. Although the Petitioner had been released to return to work with restrictions and he was able to perform that work, none of the physicians who examined or treated the Petitioner indicated that the Petitioner had reached maximum medical improvement. The medical evidence establishes that the Petitioner continues to be treated for his injuries and that he continues to experience symptoms connected with his work related injury. Thus, the Arbitrator concludes that the Petitioner's condition had not stabilized as of the date his employment was terminated by the Respondent.

Based upon the foregoing, and having considered the totality of the credible evidence, the Arbitrator finds that the Petitioner is entitled to Temporary Total Disability benefits from October 15, 2013, the date the Petitioner's employment with the Respondent was terminated, through January 29, 2014, the date of Arbitration, a period of 15 1/7 weeks.

In Support of the Arbitrator's Decision relating to (M.), Should penalties or fees be imposed upon Respondent, the Arbitrator finds and concludes as follows:

With regard to the issue of whether penalties and fees under sections 19(k), 19(l) and section 16 should be imposed, the Arbitrator finds that Respondent's failure to pay temporary total disability was not unreasonable and vexatious or without good and just cause. Therefore, the Arbitrator declines to impose such penalties and fees.

2017 IL App (1st) 160756
Opinion filed: June 30, 2017

SIXTH DIVISION

Nos. 1-16-0756, 1-16-0954, 1-16-0955, & 1-16-0956, consolidated

No. 1-16-0756

MARQUE MEDICOS FULLERTON, LLC; MEDICOS PAIN & SURGICAL SPECIALISTS, S.C.; AMBULATORY SURGICAL CARE FACILITY, LLC; and MARQUE MEDICOS KEDZIE, LLC, for Themselves and All Others Similarly Situated, Plaintiffs-Appellants, v. ZURICH AMERICAN INSURANCE COMPANY, AMERICAN ZURICH INSURANCE COMPANY, ASSURANCE COMPANY OF AMERICA, and MARYLAND CASUALTY COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 4580 Honorable Rita M. Novak, Judge Presiding.

No. 1-16-0954

MARQUE MEDICOS FULLERTON, LLC; MEDICOS PAIN & SURGICAL SPECIALISTS, S.C.; and AMBULATORY SURGICAL CARE FACILITY, LLC, for Themselves and All Others Similarly Situated, Plaintiffs-Appellants, v. TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, TRAVELERS INDEMNITY COMPANY OF AMERICA, TRAVELERS CASUALTY INSURANCE COMPANY OF AMERICA, TRAVELERS CASUALTY AND SURETY COMPANY OF AMERICA, THE PHOENIX INSURANCE COMPANY, FARMINGTON CASUALTY COMPANY, THE STANDARD FIRE INSURANCE COMPANY, and THE CHARTER OAK FIRE INSURANCE COMPANY, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 4946 Honorable Rita M. Novak, Judge Presiding.

No. 1-16-0955

MARQUE MEDICOS FULLERTON, LLC; MEDICOS PAIN & SURGICAL SPECIALISTS, S.C.; and AMBULATORY SURGICAL CARE FACILITY, LLC, for Themselves and All Others Similarly Situated, Plaintiffs-Appellants, v. HARTFORD UNDERWRITERS INSURANCE COMPANY; HARTFORD INSURANCE COMPANY OF THE MIDWEST; HARTFORD ACCIDENT AND INDEMNITY COMPANY; HARTFORD INSURANCE COMPANY OF ILLINOIS; HARTFORD FIRE INSURANCE COMPANY; HARTFORD CASUALTY INSURANCE COMPANY; TWIN CITY FIRE INSURANCE COMPANY; TRUMBULL INSURANCE COMPANY; and SENTINEL INSURANCE COMPANY, LTD., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 4949 Honorable Rita M. Novak, Judge Presiding.

No. 1-16-0956

MARQUE MEDICOS FULLERTON, LLC; MEDICOS PAIN & SURGICAL SPECIALISTS, S.C.; and AMBULATORY SURGICAL CARE FACILITY, LLC, for Themselves and All Others Similarly Situated, Plaintiffs-Appellants, v. AIG INSURANCE COMPANY, f/k/a Chartis Casualty Company; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH; ILLINOIS NATIONAL INSURANCE COMPANY; COMMERCE & INDUSTRY INSURANCE COMPANY; NEW HAMPSHIRE INSURANCE COMPANY; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA; AMERICAN HOME ASSURANCE COMPANY; and AIG PROPERTY CASUALTY COMPANY, f/k/a Chartis Property Casualty Company, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15 CH 4951 Honorable Rita M. Novak, Judge Presiding.

JUSTICE ROCHFORD delivered the judgment of the court, with opinion.
Presiding Justice Hoffman and Justice Delort concurred in the judgment and opinion.

OPINION

¶ 1 In these consolidated appeals, plaintiffs-appellants[1] appeal from the dismissal, with prejudice, of four separate putative class-action lawsuits filed against defendants-appellees.[2] For the following reasons, we conclude that the circuit court had subject-matter jurisdiction to consider plaintiffs' claims and that those claims were properly dismissed with prejudice.

¶ 2 I. BACKGROUND

¶ 3 In March 2015, plaintiffs filed four putative class-action lawsuits, one each against the Zurich, Travelers, Hartford, and AIG defendants (collectively, defendants). On June 16, 2015, the suits against the Travelers, Hartford, and AIG defendants were reassigned, as related cases, to the courtroom where the initially-filed suit against the Zurich defendants was pending. The complaints filed in each lawsuit generally seek redress for defendants' alleged failure to comply

[1]Plaintiffs-appellants in each appeal include Marque Medicos Fullerton, LLC; Medicos Pain & Surgical Specialists, S.C.; and Ambulatory Surgical Care Facility, LLC, for themselves and all others similarly situated. In addition, Marque Medicos Kedzie, LLC is also a plaintiff-appellant in appeal No. 1-16-0756.

[2]Defendants-appellees in appeal No. 1-16-0756 (Zurich defendants) are Zurich American Insurance Company, American Zurich Insurance Company, Assurance Company of America, and Maryland Casualty Company. The defendants-appellees in appeal No. 1-16-0954 (Travelers defendants) are Travelers Property Casualty Company of America, Travelers Indemnity Company of America, Travelers Casualty Insurance Company of America, Travelers Casualty and Surety Company of America, The Phoenix Insurance Company, Farmington Casualty Company, The Standard Fire Insurance Company, and The Charter Oak Fire Insurance Company. The defendants-appellees in appeal No. 1-16-0955 (Hartford defendants) are Hartford Underwriters Insurance Company; Hartford Insurance Company of the Midwest; Hartford Accident and Indemnity Company; Hartford Insurance Company of Illinois; Hartford Fire Insurance Company; Hartford Casualty Insurance Company; Twin City Fire Insurance Company; Trumbull Insurance Company; and Sentinel Insurance Company, LTD. The defendants-appellees in appeal No. 1-16-0956 (AIG defendants) are AIG Insurance Company, f/k/a Chartis Casualty Company; National Union Fire Insurance Company of Pittsburgh; Illinois National Insurance Company; Commerce & Industry Insurance Company; New Hampshire Insurance Company; Insurance Company of the State of Pennsylvania; American Home Assurance Company; and AIG Property Casualty Company, f/k/a Chartis Property Casualty Company.

with requirements contained in the Workers' Compensation Act (Act). 820 ILCS 305/1, *et seq.* (West 2014).

¶ 4 More specifically, plaintiffs allege that they—and a class of similarly situated others—had provided medical services to employees for work-related injuries. Pursuant to the Act, the employers of those employees had the responsibility to timely pay for those medical services, with those employers being insured for that responsibility by identical workers' compensation insurance policies issued by defendants. Noting that the Act requires that late payments to providers, such as plaintiffs, "shall incur interest at a rate of 1% per month payable to the provider" (820 ILCS 305/8.2(d)(3) (West 2014)), contending that this statutory provision was incorporated into the standard policies issued by defendants, and further contending that defendants had in fact made "many" untimely payments for such services without also paying interest, plaintiffs' complaints sought relief in four counts.

¶ 5 In each complaint, count I contends that plaintiffs were third-party beneficiaries of the standard policies defendants issued to employers and that plaintiffs were therefore entitled to recover for defendants' breach of those policies. Count II alleges that plaintiffs had an implied private right of action to recover for defendants' violation of section 8.2(d)(3) of the Act. Count III asserts that defendants had breached contracts with plaintiffs that were implied-in-fact. Finally, count IV seeks an award of attorney fees and statutory damages for defendants' vexatious and unreasonable refusal to pay accrued interest for late payments, pursuant to section 155 of the Illinois Insurance Code (Insurance Code) (215 ILCS 5/155 (West 2014)). The complaints seek "the statutory interest that accrued and is payable to them on bills that were paid by Defendants but after the Due Date, for services covered by the Act," attorney fees, prejudgment interest, and injunctive relief mandating that defendants "institute, maintain and

follow" procedures that will ensure that, in the future, defendants will timely comply with the requirements of section 8.2(d)(3) of the Act.

¶ 6 Motions to dismiss each suit for failure to state claims were filed by defendants, pursuant to section 2-615 of the Code of Civil Procedure (Code). 735 ILCS 5/2-615 (West 2014). The motion to dismiss filed by the Travelers' defendants asserted, *inter alia*, that the circuit court lacked subject-matter jurisdiction over plaintiffs' claims because the Act vested exclusive jurisdiction to consider those claims with the Illinois Workers' Compensation Commission (Commission). The Hartford defendants had additionally sought to strike the class allegations, pursuant to section 2-619 of the Code. 735 ILCS 5/2-619 (West 2014).

¶ 7 On February 19, 2016, following a prior hearing on the motions, the circuit court entered a memorandum opinion and order in which it dismissed each of the plaintiffs' lawsuits with prejudice. In reaching that result, the circuit court concluded (1) plaintiffs were not third-party beneficiaries of the policies, (2) plaintiffs had no implied private right of action for a violation of section 8.2(d)(3) of the Act, (3) the facts alleged in plaintiffs' complaints did not support the imposition of an implied-in-fact contract, and (4) the remedies contained in section 155 of the Insurance Code do not extend to purported third parties such as plaintiffs. The circuit court's order did not specifically address the Travelers defendants' challenge to the court's subject-matter jurisdiction or the Hartford defendants' challenge to the class allegations.

¶ 8 Plaintiffs filed timely notices of appeal from the dismissal of each of the four lawsuits on March 15, 2016. This court consolidated the appeals in an order entered on May 11, 2016.

¶ 9 II. ANALYSIS

¶ 10 On appeal, plaintiffs contend that the circuit court improperly dismissed their lawsuits, with prejudice, for failure to state claims. Before we can address the substantive merits of the

circuit court's dismissal of plaintiffs' complaints, however, we must first address defendants' contention that the circuit court lacked subject-matter jurisdiction to consider plaintiffs' claims because the Act "vests exclusive jurisdiction in the Commission to hear and determine direct claims under the Act."

¶ 11 A. History and Scope of the Act

¶ 12 We first provide some context with respect to the history and scope of the Act, which will guide both our jurisdictional analysis and our subsequent discussion of the merits of the circuit court's dismissal of plaintiffs' claims.

¶ 13 In general terms, the Act:

> "substitutes an entirely new system of rights, remedies, and procedure for all previously existing common law rights and liabilities between employers and employees subject to the Act for accidental injuries or death of employees arising out of and in the course of the employment. [Citation.] Pursuant to the statutory scheme implemented by the Act, the employee gave up his common law rights to sue his employer in tort, but recovery for injuries arising out of and in the course of his employment became automatic without regard to any fault on his part. The employer, who gave up the right to plead the numerous common law defenses, was compelled to pay, but his liability became fixed under a strict and comprehensive statutory scheme, and was not subjected to the sympathies of jurors whose compassion for fellow employees often led to high recovery. [Citation.] This trade-off between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them with prompt and equitable compensation for their injuries." *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-81 (1978).

¶ 14 These purposes and goals have been effectuated in the various provisions of the Act, which when taken together represent a "comprehensive statutory administrative scheme." *Bradley v. City of Marion, Illinois*, 2015 IL App (5th) 140267, ¶ 15. Thus, the Act creates a new administrative agency, the Commission, and provides that the "Commission shall administer this Act." 820 ILCS 305/13 (West 2014). "All questions arising under [the] Act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the Commission." 820 ILCS 305/18 (West 2014). This authority includes resolution of "[a]ny disputed questions of law or fact," which the Act provides will be initially decided following an administrative hearing before an arbitrator assigned by the Commission. 820 ILCS 305/19 (West 2014). Any decision entered by such an arbitrator is subject to review, first by the Commission and then by the circuit court. 820 ILCS 305/19(b), (f)(1) (West 2014).

¶ 15 The "compensation" allowed under the Act for accidental, non-fatal injuries includes both payment of lost wages (820 ILCS 305/8(b) (West 2014)), and payment for "all the necessary first aid, medical and surgical services, and all necessary medical, surgical and hospital services thereafter incurred, limited, however, to that which is reasonably required to cure or relieve from the effects of the accidental injury" (820 ILCS 305/8(a) (West 2014); *Bayer v. Panduit Corp.*, 2016 IL 119553, ¶ 30).

¶ 16 In order to protect an injured employee's ability to recover, an employer must demonstrate to the Commission sufficient proof of its financial ability to pay the compensation required by the Act. 820 ILCS 305/4 (West 2014). One way of doing so is for an employer to "[i]nsure his entire liability to pay such compensation in some insurance carrier authorized, licensed, or permitted to do such insurance business in this State." 820 ILCS 305/4(a)(3) (West 2014). "Every policy of an insurance carrier, insuring the payment of compensation under this

Act shall cover all the employees and the entire compensation liability of the insured ***." *Id.* Furthermore, "[i]n the event the employer does not pay the compensation for which he or she is liable, then an insurance company, association or insurer which may have insured such employer against such liability shall become primarily liable to pay to the employee, his or her personal representative or beneficiary the compensation required by the provisions of this Act to be paid by such employer. The insurance carrier may be made a party to the proceedings in which the employer is a party and an award may be entered jointly against the employer and the insurance carrier." 820 ILCS 305/4(g) (West 2014).

¶ 17 In addition to generally providing for the payment of compensation to employees, the Act also contains a number of provisions designed to encourage the "prompt" payment of compensation by an employer or insurer and to penalize any failure to make such prompt payment of compensation. See 820 ILCS 305/19(*l*), (k), 4(c) (West 2014). Additional such measures were included in amendments to the Act enacted in 2005 and 2011, to be discussed below.

¶ 18 In turn, the Act also contains the protections for employers discussed above. As such, it specifically states that "[n]o common law or statutory right to recover damages from the employer [or] his insurer" is available to "any employee who is covered by the provisions of this Act, to any one wholly or partially dependent upon him, the legal representatives of his estate, or any one otherwise entitled to recover damages for such injury." 820 ILCS 305/5(a) (West 2014). The Act therefore "provides that the statutory remedies under it shall serve as the employee's exclusive remedy if he sustains a compensable injury." *McCormick v. Caterpillar Tractor Co.*, 85 Ill. 2d 352, 356 (1981). "Under this comprehensive statutory administrative scheme, the legislature has vested exclusive original jurisdiction in the Commission over matters involving

an injured worker's rights to benefits under the Act and an employer's defenses to claims under the Act." *Bradley*, 2015 IL App (5th) 140267, ¶ 15. "The role of the circuit court in compensation proceedings is appellate only." *Hartlein v. Illinois Power Co.*, 151 Ill. 2d 142, 157 (1992).

¶ 19 In 2005, the Act "was amended, bringing significant changes to the Act which resulted from an extended negotiation between labor and business." Brad A. Elward, *Survey of Illinois Law: Workers' Compensation*, 34 S. Ill. U. L.J. 1107, 1110 (2010); Pub. Act 94-277 (eff. July 20, 2005). Of particular relevance here, the 2005 amendments included changes with respect to the payment for medical services for injured workers, implementing a medical fee schedule limiting the maximum amount that could be charged by a provider for covered medical services. Pub. Act 94-277, § 10 (eff. July 20, 2005) (adding 820 ILCS 305/8.2(a)).

¶ 20 The 2005 amendments also included relevant new procedures with respect to how and when medical services provided pursuant to the Act would be paid for, and the consequences for any late payments. Central to the claims at issue here, section 8.2(d) was added to that Act, which provided:

> "When a patient notifies a provider that the treatment, procedure, or service being sought is for a work-related illness or injury and furnishes the provider the name and address of the responsible employer, the provider shall bill the employer directly. The employer shall make payment and providers shall submit bills and records in accordance with the provisions of this Section. All payments to providers for treatment provided pursuant to this Act shall be made within 60 days of receipt of the bills as long as the claim contains substantially all the required data elements necessary to adjudicate the bills. In the case of nonpayment to a provider within 60 days of receipt of the bill which contained

> substantially all of the required data elements necessary to adjudicate the bill or nonpayment to a provider of a portion of such a bill up to the lesser of the actual charge or the payment level set by the Commission in the fee schedule established in this Section, the bill, or portion of the bill, shall incur interest at a rate of 1% per month payable to the provider." Pub. Act 94-277, § 10 (eff. July 20, 2005) (adding 820 ILCS 305/8.2(d)).

¶ 21 Additional procedures were included in a new section 8.2(e) of the Act, which set limits upon the ability of providers to attempt to collect from injured employees while the compensability of medical services was being disputed before the Commission while also protecting providers' ability to ultimately receive payment by tolling any statute of limitations during any proceeding pending before the Commission. Pub. Act 94-277, § 10 (eff. July 20, 2005) (adding 820 ILCS 305/8.2(e)). Finally, a new section 8.2(e-20) provided:

> "Upon a final award or judgment by an Arbitrator or the Commission, or a settlement agreed to by the employer and the employee *** the employee shall be responsible for payment of any outstanding bills for a procedure, treatment, or service rendered by a provider as well as the interest awarded under subsection (d) of this Section" Pub. Act 94-277, § 10 (eff. July 20, 2005) (adding 820 ILCS 305/8.2(e-20)).

¶ 22 In 2011, "significant statutory amendments were enacted to help reduce the overall cost of workers' compensation, which has been identified as a goal by the Illinois General Assembly to improve the business climate in the state." Brad A. Elward & Dana J. Hughes, *Survey of Illinois Law: Workers' Compensation*, 38 S. Ill. U. L.J. 775, 776 (2014); Pub. Act 97-18 (eff. June 28, 2011). Of relevance here, a significant portion of the cost reduction came by way of a 30% reduction in the amounts medical service providers were allowed to charge pursuant to the

medical fee schedule. Pub. Act 97-18, § 15 (eff. June 28, 2011) (amending 820 ILCS 305/8.2); 97th Ill. Gen. Assem., Senate Proceedings, May 28, 2011, at 34 (statements of Senator Raoul) (noting that changes to medical fee schedule represented "the most significant savings").

¶ 23 In order to alleviate concerns about the impact this reduction might have on medical service providers, the 2011 amendments also "shortened the period of time when interest and penalties can be assessed to employers that aren't paying medical bills on time." 97th Ill. Gen. Assem., Senate Proceedings, May 28, 2011, at 37 (statements of Senator Raoul). Thus, the Act was amended to provide that 1% interest would now begin to accrue on medical bills left unpaid after only 30 days and that "[a]ny required interest payments shall be made within 30 days after payment" of the unpaid bill. Pub. Act 97-18, § 15 (eff. June 28, 2011) (amending 820 ILCS 305/8.2(d)(3)).

¶ 24 B. Subject-Matter Jurisdiction

¶ 25 We now turn to the question of the circuit court's jurisdiction to consider plaintiffs' claims. While only the Travelers defendants raised the issue of the circuit court's subject-matter jurisdiction below, and the circuit court did not address this argument in its order granting defendants' motions to dismiss, we are obligated to independently analyze the issue of the circuit court's subject-matter jurisdiction over plaintiffs' claims because the issue of subject-matter jurisdiction "cannot be waived, stipulated to, or consented to by the parties." *Bradley*, 2015 IL App (5th) 140267, ¶ 13.

¶ 26 1. Standard of Review

¶ 27 "Subject-matter jurisdiction refers to a tribunal's power to hear and determine cases of the general class to which the proceeding in question belongs." *J&J Ventures Gaming, LLC v. Wild, Inc.*, 2016 IL 119870, ¶ 23. Under the Illinois Constitution of 1970, the circuit courts have

original jurisdiction over all justiciable matters, with the following two general exceptions: (1) the circuit courts have only such power to review administrative action as is provided by law, and (2) our supreme court has exclusive and original jurisdiction over questions relating to the redistricting of the General Assembly and the ability of the Governor to serve or resume office. Ill. Const. 1970, art. VI, § 9; *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 27.

¶ 28 "The Illinois Constitution does not define the term 'justiciable matters.' " *McCormick v. Robertson*, 2015 IL 118230, ¶ 21. Nevertheless, it is generally understood that a " 'justiciable matter' is a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A., Inc.*, 199 Ill. 2d 325, 335 (2002).

¶ 29 The "legislature may create new justiciable matters by enacting legislation that creates rights and duties that have no counterpart at common law or in equity." *Id.* Conversely, "our General Assembly may vest *original jurisdiction* in an administrative agency rather than the courts when it enacts a *comprehensive statutory scheme* that creates rights and duties that have no counterpart in common law or equity." (Emphases added.) *Zahn v. North American Power & Gas, LLC*, 2016 IL 120526, ¶ 14.

¶ 30 In the past, our supreme court has indicated that "if the legislative enactment does divest the circuit courts of their original jurisdiction through a comprehensive statutory administrative scheme, it must do so *explicitly*." (Emphasis added.) *Employers Mutual Cos. v. Skilling*, 163 Ill. 2d 284, 287 (1994). More recently, however, our supreme court has recognized that "legislative intent to divest circuit courts of jurisdiction and to place exclusive original jurisdiction in an

administrative agency may be discerned by considering the statute as a whole, with the relevant provisions construed together and not in isolation and with an eye toward the reason for the law, the problems sought to be remedied, and the purposes to be achieved." *Zahn*, 2016 IL 120526, ¶ 16 (citing *J&J Ventures Gaming, LLC*, 2016 IL 119870, ¶¶ 24-25). We therefore apply the more current, broader analysis described above in considering whether defendants correctly contend that the Act "vests exclusive jurisdiction in the Commission" to consider plaintiffs' claims. "This determination is a matter of statutory interpretation." *J&J Ventures Gaming, LLC*, 2016 IL 119870, ¶ 25.

¶ 31 Questions relating to the circuit court's jurisdiction and the interpretation of a statute both present issues of law, and we therefore review such questions *de novo*. *Id.*

¶ 32 2. Discussion

¶ 33 First, there is no question that the four lawsuits at issue here generally present "justiciable matters." The question of the right and ability of plaintiffs to collect for "the statutory interest that accrued and is payable to them on bills that were paid by Defendants but after the Due Date, for services covered by the Act" is clearly "a controversy appropriate for review by the court, in that it is definite and concrete, as opposed to hypothetical or moot, touching upon the legal relations of parties having adverse legal interests." *Belleville Toyota, Inc.*, 199 Ill. 2d at 335.

¶ 34 The question thus becomes whether the legislature intended to divest circuit courts of jurisdiction and to place exclusive original jurisdiction in the Commission with respect to plaintiffs' claims. We discern no such intent.

¶ 35 It is abundantly clear that the Act represents a "comprehensive statutory administrative scheme." *Bradley*, 2015 IL App (5th) 140267, ¶ 15. It is also clear that "the legislature has vested exclusive original jurisdiction in the Commission over matters involving an injured worker's

rights to benefits under the Act." *Id.* However, this scheme is comprehensive and exclusive only with respect to the legal relationship between an injured *employee* and an *employer*. *Id.* ("Under this comprehensive statutory administrative scheme, the legislature has vested exclusive original jurisdiction in the Commission over matters involving an injured worker's rights to benefits under the Act and an employer's defenses to claims under the Act.").

¶ 36 Here, plaintiffs are medical service providers and defendants are workers' compensation insurers. Nothing in the Act, reading it as a whole and also considering the reasons for its enactment and amendment, indicates an intent that resolution of the type of claims brought by plaintiffs here was a task to be exclusively vested with the Commission. Plaintiffs' claims do not purport to seek any rights or benefits owed to an employee by an employer; rather, plaintiffs' claims purport to seek redress for the failure of defendants to fully and completely pay for services rendered by plaintiffs. See, *e.g.*, *Roche v. Travelers Property Casualty Insurance Co.*, No. 07-CV-302-JPG, 2008 WL 2875250, at *3 (S.D. Ill. July 24, 2008) (finding that the Act did not bar a lawsuit brought by a medical provider against workers' compensation insurers, because the provider was not asserting patient's right to insurance coverage under the Act; rather, lawsuit was based on providers purported right to compensation for the covered services provider had rendered).

¶ 37 In addition, "[t]he Commission is an administrative agency, and therefore, it has no general or common law powers. [Citation.] The Commission's powers are limited to those granted by the legislature, so that any action taken by the Commission must be specifically authorized by statute." *Alvarado v. Industrial Comm'n*, 216 Ill. 2d 547, 553 (2005). Moreover, "even a defectively stated claim is sufficient to invoke the court's subject-matter jurisdiction, as '[s]ubject matter jurisdiction does not depend upon the legal sufficiency of the pleadings.'

[Citation.] In other words, the *only* consideration is whether the alleged claim falls within the general class of cases that the court has the inherent power to hear and determine." (Emphasis in original.) *In re Luis R.*, 239 Ill. 2d 295, 301 (2010).

¶ 38 While we recognize that plaintiffs' claims all generally relate to and involve the interest provision contained in section 8.2(d) of the Act, we also note that—as pleaded and without any comment on the substantive merits of the claims—plaintiffs' complaint purports to assert three common law claims, as well as a statutory award of attorney fees and statutory damages pursuant to section 155 of the Illinois Insurance Code. Because those alleged claims fall within the general class of cases that the circuit court has the inherent power to hear and determine, while in contrast the Commission is not authorized to resolve such common law or statutory claims, and because we therefore discern no intent on the part of the legislature to divest the circuit court of its original jurisdiction with respect such claims, subject-matter jurisdiction is present. *Id.*

¶ 39 C. Dismissal of Plaintiffs' Claims

¶ 40 With the jurisdictional question answered, we may now address the substantive merits of the circuit court's dismissal of plaintiffs' claims with prejudice.

¶ 41 1. Standard of Review

¶ 42 "A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint based on defects apparent on its face. [Citation.] In ruling on a section 2-615 motion, only those facts apparent from the face of the pleadings, matters of which the court can take judicial notice, and judicial admissions in the record may be considered." *K. Miller Construction Co. v. McGinnis*, 238 Ill. 2d 284, 291 (2010). All well-pleaded facts must be taken as true. *Unterschuetz v. City of Chicago*, 346 Ill. App. 3d 65, 68-69 (2004). Exhibits attached to the complaint are considered

part of the pleadings. *Bajwa v. Metropolitan Life Insurance Co.*, 208 Ill. 2d 414, 431 (2004). We review an order granting a section 2-615 dismissal *de novo*. *McGinnis*, 238 Ill. 2d at 291.

¶ 43 This appeal also requires us to construe the meaning of certain provisions of the Act. The rules applicable to this task are well-established and were outlined in *Hendricks v. Board of Trustees of the Police Pension Fund*, 2015 IL App (3d) 140858, ¶ 14:

> "The fundamental rule of statutory interpretation is to ascertain and give effect to the intent of the legislature. [Citation.] The most reliable indicator of that intent is the language of the statute itself. [Citation.] In determining the plain meaning of statutory language, a court will consider the statute in its entirety, the subject the statute addresses, and the apparent intent of the legislature in enacting the statute. [Citations.] If the statutory language is clear and unambiguous, it must be applied as written, without resorting to further aids of statutory interpretation. [Citation.] A court may not depart from the plain language of the statute and read into it exceptions, limitations, or conditions that are not consistent with the express legislative intent."

However, "[w]hen a statute is ambiguous, we look to aids of statutory construction, including legislative history." *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 38. We review questions of statutory construction *de novo*. *Feltmeier v. Feltmeier*, 207 Ill. 2d 263, 267 (2003).

¶ 44 2. Count I—Third-Party Beneficiary

¶ 45 Plaintiffs first contend that the circuit court improperly dismissed their contention that defendants breached contracts to which plaintiffs were intended third-party beneficiaries.

¶ 46 The legal framework guiding our analysis of this issue has been summarized as follows:

"The construction, interpretation, or legal effect of a contract is a matter to be determined by the court as a question of law. [Citation.] Our review is *de novo*. [Citation.] An individual not a party to a contract may only enforce the contract's rights when the contract's original parties intentionally entered into the contract for the direct benefit of the individual. [Citation.] There is a strong presumption that the parties to a contract intend that the contract's provisions apply only to them, and not to third parties. [Citation.] That the contracting parties know, expect, or even intend that others will benefit from their agreement is not enough to overcome the presumption that the contract was intended for the direct benefit of the parties. [Citation.]

Whether someone is a third-party beneficiary depends on the intent of the contracting parties, as evidenced by the contract language. [Citation.] It must appear from the language of the contract that the contract was made for the direct, not merely incidental, benefit of the third person. [Citation.] Such an intention must be shown by an express provision in the contract identifying the third-party beneficiary by name or by description of a class to which the third party belongs. [Citation.] If a contract makes no mention of the plaintiff or the class to which he belongs, he is not a third-party beneficiary of the contract. [Citations.] The plaintiff bears the burden of showing that the parties to the contract intended to confer a direct benefit on him." *Martis v. Grinnell Mutual Reinsurance Co.*, 388 Ill. App. 3d 1017, 1020 (2009).

¶ 47 After considering these legal principles, it is clear that plaintiffs are not intended third-party beneficiaries of the workers' compensation policies issued by defendants. Plaintiffs are, at best, incidental and not direct beneficiaries of those policies.

¶ 48 First, plaintiffs are not mentioned explicitly by name in the "standard policy" attached to the complaint, which plaintiffs contend is representative of all of the workers' compensation insurance policies issued by defendants. Conceding as much, plaintiffs rely upon language in the standard contract providing that defendants "will pay promptly when due the benefits required by you [employer] by the workers compensation law" and that defendants "are directly and primarily liable to any person entitled to benefits payable by this insurance."

¶ 49 However, this exact policy language was rejected as supporting a claim for third-party beneficiary status made by a medical provider against a workers' compensation insurer in *Martis*, 388 Ill. App. 3d at 1017. After noting that "medical providers are generally not third party beneficiaries of insurance policies, particularly workers' compensation policies," the court rejected a contention that this exact policy language mandated a different result. *Id.* at 1022. In part, the court came to this conclusion after noting that the plaintiff-provider was not named in the policy and concluding that medical providers were not entitled to "benefits" under the Act.

¶ 50 Plaintiffs insist that *Martis* should not be followed here because it did not expressly consider the interaction of the standard policy language with the new direct payment obligations created by the 2005 and 2011 amendments to the Act, which plaintiffs contend establish providers such as plaintiffs as being among those entitled to "benefits" under the Act. We disagree.

¶ 51 The "fundamental purpose of the Act [is] to afford protection to employees by providing them with *prompt* and equitable compensation for their injuries." (Emphasis added.) *Kelsay*, 74 Ill. 2d at 180-81; *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 14 (1982). The payment of necessary medical services is included among the total "compensation" or "benefits" owed by an employer to an *employee* suffering injuries arising out

of and in the course of his employment. *Bayer*, 2016 IL 119553, ¶ 30. In turn, the direct payment obligations created by the 2005 and 2011 amendments to the Act, including the interest required to be paid by section 8.2(d)(3), are among the many other provisions in the Act designed to encourage the "prompt" payment of compensation by an employer or insurer and to penalize any failure to make such prompt payment of compensation. *Supra* ¶ 17. As such, all of the provisions regarding the payment of medical care for injured employees discussed above—from the requirement that providers bill employers directly and employers pay providers directly, to the imposition of a medical fee schedule limiting the amount providers can charge for covered services, to the provisions seeking to ensure timely payment—are designed to ensure prompt and equitable payment of an injured employee's medical bills; *i.e.*, prompt and equitable payment of "benefits" owed to injured employees. As the legislature specifically indicated, the fee schedule and the interest provision contained in section 8.2(d) of the Act were designed to "hold down the cost of *** medical costs to injured workers" while doing so "in a way that does not harm the injured workers' ability to access quality health care." 94th Ill. Gen. Assem., Senate Proceedings, May 26, 2005, at 85 (statements of Senator Cronin).

¶ 52 In reaching this conclusion, we necessarily reject plaintiffs' contention that it is somehow significant that medical bills are paid directly to providers and any interest owed under section 8.2(d)(3) is also specifically "payable to the provider." 820 ILCS 305/8.2(d)(3) (West 2014). We find that what the Oklahoma Supreme Court said with respect to that state's workers' compensation statute applies equally here: "Not every valuable right under the Workers' Compensation Act is a 'benefit.' " *Holley v. Ace American Insurance Co.*, 2013 OK 88, ¶ 7, 313 P.3d 917, 920. The direct payment obligations do not alter the fact that payment for such medical services the payment of section 8.2(d)(3) interest to providers represent nothing more than the

legislature's efforts to ensure that the "compensation" or "benefits" owed to an injured employee under the Act are paid promptly.

¶ 53 Moreover, even if we accepted plaintiffs' contention that the direct payment obligations created by the 2005 and 2011 amendments to the Act entitled them to "benefits" under the Act, we would still reject their contention that they were intended third-party beneficiaries of the insurance policies issued by defendants. Again, it is not enough that "the contracting parties know, expect, or even intend that others will benefit from their agreement ***. *** It must appear from the language of the contract that the contract was made for the *direct*, not merely *incidental*, benefit of the third person." (Emphases added.) *Martis*, 388 Ill. App. 3d at 1020. From the above discussion, it is clear that any benefit granted to providers such as plaintiffs by the Act and/or the standard workers' compensation insurance policies issued by defendants was merely incidental.

¶ 54 In sum, plaintiffs had the burden of sufficiently pleading that defendants and the employers they insured intentionally entered into the standard contract for the direct, and not merely incidental, benefit of plaintiffs. Because they failed to do so, their claims that they were intended third-party beneficiaries were properly dismissed.

¶ 55 3. Count II—Implied Private Right of Action

¶ 56 Next, plaintiffs contend the circuit court improperly dismissed the contention that they had an implied private right of action for defendants' purported failure to comply with the interest provision of section 8.2(d)(3) of the Act.

¶ 57 "[A] court may determine that a private right of action is implied in a statute." *Metzger v. DaRosa*, 209 Ill. 2d 30, 35 (2004). "Implication of a private right of action is appropriate if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's

injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute." *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 460 (1999). All four factors must be met before a private right of action will be implied. *Abbasi v. Paraskevoulakos*, 187 Ill. 2d 386, 393 (1999); *McCarthy v. Kunicki*, 355 Ill. App. 3d 957, 969 (2005). Whether a private right of action is implied in a statute presents a question of law that we review *de novo. Metzger*, 209 Ill. 2d at 34.

¶ 58 With respect to the first factor, plaintiffs contend that because the payment obligations of section 8.2(d) of the Act are to medical providers such as themselves and to no one else, plaintiffs are members of the class benefited by the Act. We disagree.

¶ 59 In making this argument, plaintiffs focus solely and specifically upon the language of section 8.2(d) of the Act. However, our supreme court has made it clear that in conducting an analysis of this factor, "we must read the statute as a whole and not as isolated provisions." *Id.* at 37; *Fisher*, 188 Ill. 2d at 462-63. Where a particular provision of a statute provides incidental benefits to one class, but does so in order to benefit the "primary class" for whose benefit the statute was enacted, no private right of action will be implied in favor of the class provided such incidental benefits. *Id.*

¶ 60 This is exactly the situation presented here. As we noted above, the fundamental purpose of the Act is to afford protection to *employees* by providing them with *prompt* and equitable compensation for their injuries. *Supra* ¶ 13. And again, the interest required to be paid by section 8.2(d)(3) of the Act is but one of the many provisions in the Act designed to encourage the "prompt" payment of compensation by an employer or insurer and to penalize any failure to make such prompt payment of compensation. *Supra* ¶ 17. While providers *might* receive some

benefit from the specific interest provision contained in section 8.2(d)(3) of the Act, that benefit is *at most* incidental and was provided solely in an effort to serve the legislature's primary goal of compensating employees completely and promptly.

¶ 61 Because we conclude that plaintiffs are not members of the class for whose benefit the Act was enacted, their claim of an implied private right of action must fail due to the failure to satisfy the first factor of the analysis. *Abbasi*, 187 Ill. 2d at 393; *McCarthy*, 355 Ill. App. 3d at 969.

¶ 62 4. Count III—Implied-In-Fact Contract

¶ 63 Plaintiffs next challenge the circuit court's dismissal of their contention that defendants breached an implied-in-fact contract to comply with the interest provision of section 8.2(d)(3) of the Act.

¶ 64 As this court has explained, contracts implied-in-fact "arise from a promissory expression that may be inferred from the facts and circumstances that demonstrate the parties' intent to be bound. *** A contract implied in fact *** is a true contract. [Citation.] The elements of a contract are an offer, acceptance, and consideration. [Citation.] Thus, a contract implied in fact contains all of the elements of a contract, including a meeting of the minds." *Trapani Construction Co. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶¶ 41-42.

¶ 65 "Consideration is defined as the bargained-for exchange of promises or performances and may consist of a promise, an act or a forbearance." *Bishop v. We Care Hair Development Corp.*, 316 Ill. App. 3d 1182, 1198 (2000) (citing Restatement (Second) of Contracts § 71 (1981)). "Valid consideration, on the part of *both parties*, is one of the essential requirements for the formation of a contract." (Emphasis added.) *Agrimerica, Inc. v. Mathes*, 199 Ill. App. 3d 435, 441-42 (1990); *Moehling v. W.E. O'Neil Construction Co.*, 20 Ill. 2d 255, 265 (1960). "The

preexisting duty rule provides that where a party does what it is already legally obligated to do, there is no consideration as there is no detriment." *White v. Village of Homewood*, 256 Ill. App. 3d 354, 357 (1993). "Consideration cannot flow from an act performed pursuant to a preexisting legal duty." *Id.*; *Mulvey v. Carl Sandburg High School*, 2016 IL App (1st) 151615, ¶ 35.

¶ 66 In their complaints, plaintiffs allege that implied-in-fact contracts were formed whereby defendants "agreed to pay directly to Plaintiffs the benefits to which they were entitled from employers under the Act, including the accrued interest on Late Payments mandated by Section 8.2(d) of the Act" in exchange for plaintiffs' agreement to directly bill and communicate with defendants, as opposed to billing and communicating with the employers insured by defendants.

¶ 67 However, defendants also specifically acknowledge and assert in their complaints that under both "their insurance contracts and the Act, Defendants are obligated to comply with the prompt-pay provision and pay Providers the accrued interest to which they are entitled on late paid bills." See also *supra* ¶ 16 (discussing provisions of the Act requiring insurers such as defendants to insure the " 'entire compensation liability' " of insured employers). Plaintiffs' own complaints therefore concede that defendants' purported consideration for any asserted implied-in-fact contracts was to be performed pursuant to preexisting legal duties. Because valid consideration, on the part of *both parties*, is one of the essential requirements for the formation of a contract (*Mathes*, 199 Ill. App. 3d at 441-42), and because consideration cannot flow from an act performed pursuant to preexisting legal duty (*Mulvey*, 2016 IL App (1st) 151615, ¶ 35), the circuit court properly dismissed plaintiffs' claims that that defendants breached an implied-in-fact contracts to comply with the interest provision of section 8.2(d)(3) of the Act.

¶ 68 5. Count IV—Section 155 of the Insurance Code

¶ 69 Finally, we consider plaintiffs' challenge to the circuit court's dismissal of their claims seeking an award of attorney fees and statutory damages under section 155 of the Insurance Code.

¶ 70 Section 155 states:

> "In any action by or against a company wherein there is in issue the liability of a company on a policy or policies of insurance or the amount of the loss payable thereunder, or for an unreasonable delay in settling a claim, and it appears to the court that such action or delay is vexatious and unreasonable, the court may allow as part of the taxable costs in the action reasonable attorney fees, other costs, plus [certain penalties]." 215 ILCS 5/155(1) (West 2014).

¶ 71 However, our supreme court has recognized that "[a]s a general rule, the remedy embodied in section 155 of the Insurance Code extends only to the party insured [citation] and policy assignees [citations]. Therefore, the remedy embodied in section 155 of the Insurance Code does not extend to third parties." *Yassin v. Certified Grocers of Illinois, Inc.*, 133 Ill. 2d 458, 466 (1990); *Statewide Insurance Co. v. Houston General Insurance Co.*, 397 Ill. App. 3d 410, 426 (2009). Plaintiffs, being third-parties to the contracts between defendants and insured employers, and not named insureds or assignees, are not entitled to any recovery under section 155 of the Illinois Insurance Code.

¶ 72 In reaching this conclusion, we reject plaintiffs' reliance upon the decision in *Garcia v. Lovellette*, 265 Ill. App. 3d 724 (1994). In that case, the plaintiff argued she was a passenger in a car involved in an accident and, as a passenger, was thus an "insured" as defined in the medical payments section of an automobile insurance policy. *Id.* at 726. According to the plaintiff, she

therefore had standing to sue the insurer under section 155 of the Insurance Code for its unreasonable and vexatious delay in making such medical payments. *Id.* The court agreed, but only after concluding that: (1) plaintiff was in fact an "insured" under the applicable policy language, (2) "the insurer undertook an obligation to pay directly to those defined there[in] as insureds," (3) "the contract [there] was intended to benefit plaintiff directly as an insured and not merely incidentally" and, (4) therefore, "plaintiff, as the intended beneficiary of the insurance contract, has a sufficient legal and contractual relationship to the insurer to litigate the question whether she is entitled to the remedy provided by the statute." *Id.* at 728-29, 732.

¶ 73 The *Garcia* decision is inapposite here, where plaintiffs are not insureds or assignees under defendants' policies and, for all the reasons discussed above, they were no more than incidental beneficiaries of those policies and not intended third-party beneficiaries.

¶ 74 III. CONCLUSION

¶ 75 For the foregoing reasons, we affirm the circuit court's dismissal of plaintiffs' claims with prejudice.

¶ 76 Affirmed.