2015 IL App (2d) 130884WC
No. 2-13-0884WC
Opinion filed August 14, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

DAVID ADCOCK, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Knaak Manufacturing, Appellee).	)	Appeal from the Circuit Court of McHenry County No. 12-MR-527 Honorable Thomas A. Meyer, Judge, presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justices Hoffman and Hudson concurred in the judgment and opinion.
Justice Stewart specially concurred, with opinion, joined by Justice Harris.

OPINION

¶ 1 The claimant, David Adcock, sustained an injury to his left knee when he was working as a welder for the employer, Knaak Manufacturing. The claimant sought benefits under the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2010)). The employer disputed the claimant's assertion that he sustained an accident that "arose out of" his employment. The arbitrator found in favor of the claimant. The employer appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission reversed the arbitrator and found that the claimant failed to prove that he sustained

a workplace accident that arose out of his employment. The claimant appealed to the circuit court, which held that the Commission's decision was not against the manifest weight of the evidence. This appeal followed.

¶ 2 BACKGROUND

¶ 3 The claimant testified that, on May 10, 2010, he sat on a rolling chair that the employer provided in order to accommodate a condition of ill-being in his right knee while performing work-related tasks. He had worked in a seated capacity since May 2007. The chair that the employer provided had wheels, and the claimant sat on the chair as he welded lock systems. At the time of the accident, the claimant used his left leg to turn his stool in an attempt to turn to his right in order to perform a welding task. He was not pushing the stool, but instead, he rotated his left knee inward and turned his body to weld. When he turned, his left knee popped. At that time, he experienced immediate pain and a burning sensation in his left knee. He reported the accident to his supervisor immediately after it happened. The claimant put ice on his knee and attempted to continue working for the next three days. He then went on a three day vacation. When the claimant's symptoms did not subside thereafter, he sought treatment at an occupational health clinic on May 18, 2010.

¶ 4 At the clinic, the claimant reported that he injured his left knee when he internally rotated his left leg and left knee when he turned to weld to his right while sitting on a chair with wheels. He reported that he felt a pop and a burning sensation laterally into his patella. For the remainder of the day, he used his arms to move his chair around his work station and stayed stationary to perform welding tasks. The claimant stated that, prior to the accident, he had been working under permanent restrictions due to conditions of ill-being in his right knee. Because of these right knee conditions, the claimant was unable to twist, kneel, or walk extensively. At the clinic, Dr. Alexander Jablonowski examined the claimant and diagnosed him as having a left

knee sprain. Dr. Jablonowski placed the claimant on light duty work restrictions. Thereafter, the claimant continued to follow up with Dr. Jablonowski and worked light duty.

¶ 5 On May 28, 2010, the claimant had a follow up visit with Dr. Jablonowski. The doctor believed that the claimant's left knee sprain had worsened and ordered an MRI. The MRI showed "[f]indings suspicious for vertical tear of the medial meniscus" and "[p]artially discoid lateral meniscus." Dr. Jablonowski referred the claimant to Dr. Steven Rochell, an orthopedic surgeon.

¶ 6 The claimant saw Dr. Rochell on June 16, 2010, and the doctor diagnosed the claimant as having a probable medial meniscus tear as a result of his work history. The doctor ultimately recommended arthroscopic surgery and took the claimant off work on July 12, 2010.

¶ 7 On August 10, 2010, the claimant was examined by Dr. Preston Wolin, the employer's independent medical examiner (IME). Dr. Wolin testified at the arbitration hearing by way of an evidence deposition, and his IME report was admitted into evidence.

¶ 8 In his IME report, Dr. Wolin stated that he viewed a video that depicted the claimant's job duties. He opined: "I do not believe that the activities depicted in the video of [*sic*] sufficient loading and torque to cause a medial meniscus tear." Dr. Wolin wrote in his report that he did not believe that "the mechanics or environment in which the [claimant] was working [were] sufficient to cause or aggravate a tear." He believed that the claimant's "partially discoid lateral meniscus is a congenital condition" and was not contributing to his symptoms. At the time of his report (August 10, 2010), Dr. Wolin was "somewhat concerned" about the proposed surgery and did not believe that it would improve the claimant's symptoms. He believed that the claimant's meniscal pathology was more than likely unrelated to "the work episode of 05/10/10."

¶ 9 On September 30, 2010, the claimant underwent a left knee arthroscopy as well as medial and lateral meniscectomies performed by Dr. Rochell. The claimant then underwent a course of

physical therapy and continued to treat with Dr. Rochell until January 5, 2011, when he was released from Dr. Rochell's care and for full duty with respect to the left knee. During the arbitration hearing, the claimant testified that, although he was released to full duty, he occasionally experiences stiffness and soreness in his left knee when standing or walking for prolonged periods or when attempting to squat or kneel.

¶ 10 Dr. Wolin's evidence deposition was taken after the claimant's arthroscopic surgery. During his deposition, Dr. Wolin testified that the claimant had a body mass index of 53.3 and opined that the claimant's weight caused an increased load across the meniscal cartilage of both knees. Dr. Wolin again opined that he did not believe that the job duties demonstrated in the video depicted sufficient loading or torque to cause a medial meniscus tear. He testified that "pushing off of one foot and using a sliding chair to move from the right to the left" was not "enough of an energy to produce a meniscus tear." Dr. Wolin further opined that a lateral meniscus tear was not possible with an internal rotation of the knee because of the "screw hole mechanism of the knee." He explained that with internal rotation, if there is torque, it is going to be applied to the lateral meniscus, not the medial meniscus.

¶ 11 Dr. Wolin testified that the claimant told him that the employer's job video accurately reflected his workstation. However, Dr. Wolin acknowledged that the job video depicted an employee other than the claimant and did not appear to demonstrate the employee planting his left foot and pivoting, which was the mechanism of injury that the claimant had described to Dr. Wolin. Moreover, Dr. Wolin admitted that he did not know the condition of the concrete floor upon which the claimant rolled his chair or how much force was required to push the chair across the floor. Nor did Dr. Wolin know the condition of the chair itself or the condition of its wheels.

¶ 12 At the time of the evidence deposition, Dr. Wolin was unaware that the claimant had undergone arthroscopic surgery on his left knee. After reviewing Dr. Rochell's postoperative

findings, Dr. Wolin agreed that the claimant's complaints of medial and lateral left knee pain and the MRI films of the claimant's left knee were consistent with Dr. Rochell's postoperative diagnosis.

¶ 13 The claimant testified that his work duties required him to weld approximately 70 locks during one workday, which required more rapid movements than were depicted in the employer's job duties video. He stated that his job required nonstop movement in the chair, including moving back and forth along the length of the workstation and swiveling from one point to another. He also testified that the cement floor upon which his chair rolled was cracked, uneven, and littered with metal pieces from welding, which made it difficult to maneuver across the floor's surface. Moreover, the claimant stated that, due to his previous right knee injury, he was unable to push off with his right leg. Accordingly, the claimant used his left leg to turn the chair from side to side or when moving the chair itself.

¶ 14 Although the claimant agreed that the video viewed by Dr. Wolin showed the claimant's workstation, he testified that the person welding in the video did not perform the work duties in the same fashion that the claimant did. The welder in the video did not demonstrate how he used his left leg to maneuver the chair. Moreover, according to the claimant, the welder's pace in the video was slower that what the claimant was required to perform. However, the employer's witness, Benjamin Fisher, testified that, based upon the employer's production logs, the claimant repeatedly missed his production quotas and actually performed his job more slowly than the welder depicted in the video.

¶ 15 Dr. Rochell also testified at the arbitration hearing by way of an evidence deposition. Dr. Rochell stated that he had treated the claimant's right knee condition in 2006 and 2007 and had released him from his care with permanent work restrictions of seated work as indicated by a functional capacity evaluation (FCE) dated May 27, 2007.

¶ 16 With respect to the claimant's left knee, Dr. Rochell testified that the claimant reported that he injured his left knee while he was seated at his job and performing a twisting and turning action in order to weld at his workstation. Dr. Rochell opined that this twisting and turning caused the injury to the claimant's left knee which resulted in the tear of the medial and lateral menisci. During cross-examination, Dr. Rochell testified that a similar injury could have occurred while the claimant exited his car or got up from a table. Dr. Rochell was not aware of anything specific in the claimant's workplace that increased the risk of a left knee injury.

¶ 17 The arbitrator found that the claimant sustained an accidental injury that arose out of and in the course of his employment. In support of this finding, the arbitrator stated:

> "[The claimant] presented detailed testimony regarding his work station, including the rough and uneven surface of the concrete floor upon which his stool must roll, the debris that was routinely covering the floor, the insufficiency of the wheels on the stool and the mechanism by which he was required to move himself about on the stool. Conducting welding duties from a rolling stool would simply *not* be a risk to which the general public would likewise be exposed. Furthermore, it is clear that [the employer]'s exhibits detailing [the claimant]'s daily production quotas were irrelevant and should be given no weight, as they are not at all indicative of the mechanism of injury. Accordingly, the Arbitrator finds that [the claimant] met the burden of proving that the injury arose out of [the claimants] employment with [the employer], that his job duties went beyond normal daily activities and that the risk to which he was exposed was beyond that of the general public."

¶ 18 The arbitrator awarded the claimant medical expenses, temporary total disability benefits, and permanent partial disability (PPD) benefits to the extent of "a 20% loss of use of his left leg, or 43 weeks of PPD at the rate of $464.64 per week."

¶ 19 The employer appealed the arbitrator's decision to the Commission. The Commission disagreed with the arbitrator's analysis with respect to whether the claimant sustained an accident that "arose out of" his employment and concluded that the claimant failed to sustain his burden on this issue. The Commission, therefore, denied the claim and did not address the issues the employer raised regarding the compensation awarded to the claimant.

¶ 20 In evaluating the "arising out of the employment" element, the Commission stated as follows:

> "The evidence establishes that the [claimant] did sustain a left knee injury. The [claimant] testified that he was sitting on his swivel chair and turning when he felt a pop in his knee. The [claimant] testified specifically that at the time of his injury, he was not pushing his chair, rather he was turning his body. Furthermore, Dr. Rochell testified that there was nothing specific at [the claimant]'s workplace that increased the risk to a left knee injury as it could have happened anywhere.
>
> The act of turning, even in a chair, is an activity of everyday life and does not constitute a compensable injury under the Illinois Workers' Compensation Act. ***
>
> The Commission finds no evidence that the injury was caused by an increased risk connected with the [claimant]'s work duties, or a defect in the chair or floor. The [claimant]'s act of turning in his swivel chair did not expose him to a greater risk than that to which the general public is exposed, and it was not a risk distinctive to his employment."

¶ 21 The Commission, therefore, concluded that the claimant failed to carry his burden of proving "that his injury arose out of and in the course of his employment."

¶ 22 The claimant appealed the Commission's decision to the circuit court, which confirmed the Commission's decision. In so ruling, the circuit court noted:

> "[T]he Commission received evidence from Dr. Rochell that the injury could have happened anywhere and that he was not aware of anything that increased the [claimant]'s risk of a knee injury. Dr. Wolin testified that the mechanics of the [claimant]'s work were insufficient to cause the injury in question.
>
> Ultimately, the Commission found that there was no evidence that the [claimant]'s injury was caused by an increased risk connected to the [claimant]'s work duties. This finding was supported by the testimony of Dr. Rochell and Dr. Wolin above. The Commission's finding that the act of turning in a chair is an activity of everyday life was also supported by the testimony of Drs. Wolin and Rochell. As a result, there was competent evidence supporting the decision by the Commission that the [claimant]'s act of turning his swivel chair did not expose him to a greater risk than that faced by the general public and was not a risk unique to his employment."

¶ 23 The claimant now appeals the circuit court's judgment.

¶ 24 ANALYSIS

¶ 25 In order to recover benefits under the Act, a claimant bears the burden of proving by a preponderance of the evidence that his injury "ar[ose] out of" and "in the course of" his employment. 820 ILCS 305/2 (West 2010). Both elements must be present to justify compensation. *First Cash Financial Services v. Industrial Comm'n*, 367 Ill. App. 3d 102, 105 (2006).

¶ 26 The "in the course of employment" element refers to the time, place, and circumstances surrounding the injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). "That is to say, for an injury to be compensable, it generally must occur within the time and space boundaries of the employment." *Id.*

¶ 27 The requirement that the injury arise out of the employment concerns the origin or cause of the claimant's injury. *Id.* The occurrence of an accident at the claimant's workplace does not automatically establish that the injury "arose out of" the claimant's employment. *Parro v. Industrial Comm'n*, 167 Ill. 2d 385, 393 (1995). "The 'arising out of' component is primarily concerned with causal connection" and is satisfied when the claimant has "shown that the injury had its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the accidental injury." *Sisbro, Inc.*, 207 Ill. 2d at 203.

¶ 28 In the present case, the parties do not dispute that the claimant's injury occurred "in the course" of his employment. The disputed issue in this appeal concerns the "arising out of" element of a workers' compensation claim.

¶ 29 Whether an injury arose out of and in the course of a claimants employment is a question of fact to be resolved by the Commission, and its determination will not be disturbed on review unless it is against the manifest weight of the evidence. *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 164 (2000). For a finding of fact to be against the manifest weight of the evidence, a conclusion opposite to the one reached by the Commission must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). Although we are reluctant to disturb a factual determination made by the Commission, we will not hesitate to do so when the clearly evident, plain, and undisputable

weight of the evidence compels an opposite conclusion. *Dye v. Illinois Workers' Compensation Comm'n*, 2012 IL App (3d) 110907WC, ¶ 10.

¶ 30 In the present case, the Commission made certain factual findings that are not disputed by the parties in their briefs. Those factual findings include a finding that the claimant sustained a left knee injury when he turned in his chair to perform a welding task. Although Dr. Wolin opined that the internal rotation movement was insufficient to cause the meniscal damage, the Commission, nonetheless, disagreed and found that the claimant did sustain a left knee injury at the time and in the manner in which he testified. The parties disputed the mechanism of the claimant's injury in the proceeding before the Commission, but neither party has argued that the Commission's finding that the claimant injured his left knee when he turned to weld is against the manifest weight of the evidence.

¶ 31 After determining the mechanism of the claimant's injury, the Commission's first task in determining whether the injury arose out of the claimant's employment is to categorize the risk to which the claimant was exposed in light of its factual findings relevant to the mechanism of the injury. *First Cash Financial Services*, 367 Ill. App. 3d at 105. There are three types of risks to which employees may be exposed: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Potenzo v. Illinois Workers' Compensation Comm'n*, 378 Ill. App. 3d 113, 116 (2007); *Homerding v. Industrial Comm'n*, 327 Ill. App. 3d 1050, 1056 (2002).

¶ 32 With respect to the third category, "[i]njuries resulting from a neutral risk generally do not arise out of the employment and are compensable under the Act only where the employee was exposed to the risk to a greater degree than the general public." *Springfield Urban League v. Illinois Workers' Compensation Comm'n*, 2013 IL App (4th) 120219WC, ¶ 27. The increased

risk may be either qualitative (*i.e.*, when some aspect of the employment contributes to the risk) or quantitative (such as when the employee is exposed to the risk more frequently than members of the general public by virtue of his employment). *Metropolitan Water Reclamation District of Greater Chicago v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 1010, 1014 (2011).

¶ 33 In this case, the claimant was injured while turning in his chair, which is an activity of everyday life. There is no evidence that his injury was caused by a risk personal to the employee, such as an idiopathic fall. Moreover, the risk of injury that the claimant confronted was not "distinctly associated" with the claimant's employment; rather, it was a neutral risk of everyday living faced by all members of the general public. Thus, as the Commission noted, the claimant's injury is compensable only if the claimant was exposed to this risk to a greater degree than the general public. *Springfield Urban League,* 2013 IL App (4th) 120219WC, ¶ 27.

¶ 34 The claimant made that showing here. The claimant's work duties required him to weld approximately 70 locks during one workday. Since May 2007, the claimant had to perform his welding duties from a seated position, using a chair with wheels to maneuver as a result of a separate condition in his right knee. To perform his welding duties, the claimant had to move and turn in his chair repeatedly. The claimant testified that his job required "non-stop" movement in the chair, including "swiveling." The employer does not dispute this testimony. Moreover, the claimant performed his job duties under time constraints. Although the parties dispute how fast the claimant actually worked in comparison to the welder depicted in the "job duties" video, there is no question that the claimant's job involved time pressure. Thus, under a neutral risk analysis, the claimant's injury arose out of his employment because he was exposed to the risks inherent in an everyday activity (turning in a chair) to a greater degree than the general public by virtue of his employment. See *Illinois Institute of Technology Research*

Institute, 314 Ill. App. 3d at 163-64; see also *Springfield Urban League*, 2013 IL App (4th) 120219WC, ¶ 27; *Nascote Industries v. Industrial Comm'n*, 353 Ill. App. 3d 1056, 1061 (2004). The claimant's job required him to turn in a chair more frequently than members of the general public while under time constraints, which increased the risk of injury both quantitatively and qualitatively. The Commission's finding that the claimant's injury did not "arise out of" his employment was therefore against the manifest weight of the evidence.

¶ 35 The employer cites *Board of Trustees of the University of Illinois v. Industrial Comm'n*, 44 Ill. 2d 207 (1969), in support of its argument that the Commission's decision should be affirmed. In that case, the employee was a teaching assistant who was working at a desk preparing examination questions. He heard a noise, turned in his chair, and felt a " 'snap' " in his back. *Id.* at 208-09. The claimant then underwent a course of medical treatments for conditions of ill-being in his back. The Commission found that the employee's injury arose out of his employment, but the supreme court held that this finding was against the manifest weight of the evidence. *Id.* at 214. The supreme court reasoned as follows: "The appellant simply turned in his chair and suffered the injury. There was no suggestion that the chair was defective or unusual in any way. The medical evidence was that because of its degenerated condition any simple and normal activity would have caused the appellant's disc to rupture. The injury was not caused by a risk incidental to the employment." *Id.* at 214-15.

¶ 36 *Board of Trustees* is distinguishable from the present case. The claimant in *Board of Trustees* suffered a ruptured disc when he turned in his chair in response to a noise. There was no evidence that the claimant's job duties required him to turn in a chair on a regular basis, *i.e.*, more frequently than members of the general public. Here, by contrast, it is undisputed that the claimant's job required him to move and turn in his chair continually. Thus, unlike claimant in *Board of Trustees*, the claimant in this case confronted a neutral risk of daily living to a greater

degree than members of the general public by virtue of his employment.[1] Under such circumstances, a finding that the injury did not arise out of the employment is against the manifest weight of the evidence.

¶ 37 The special concurrence takes issue with our analysis. Specifically, the special concurrence maintains that, if an employee is injured while "performing a common bodily movement that is required by his job duties," (*infra* ¶ 57), then the injury "arose out of" his employment, even if the physical action that caused the injury is something that virtually everyone does on a daily basis (such as walking or turning while sitting in a chair). For the special concurrence, all that matters is that the physical action is required by the employee's job duties; if so, then the risk posed by the activity is assumed to be connected to the claimant's employment, and would be "improper *** to engage in a neutral-risk analysis." *Infra* ¶ 63.

¶ 38 We disagree. "The purpose of the Illinois Workers' Compensation Act is to protect the employee against risks and hazards which are *peculiar to the nature of the work he is employed to do.*" (Emphasis added.) *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). Accordingly, "[f]or an injury to have arisen out of the employment, the risk of injury must be a risk peculiar to the work or a risk to which the employee is exposed to a greater degree than the general public by reason of his employment." *Id.* at 45; see also *Karastamatis v. Industrial Comm'n*, 306 Ill. App. 3d 206, 209 (1999) (ruling that "in order for an injury to arise out of one's employment, the

[1]Moreover, the act that caused the claimant's injury in *Board of Trustees* (turning in his chair) was not incidental to his employment, and there was medical evidence suggesting that the injury was caused by a personal risk because, prior to the accident, the condition of the claimant's back had degenerated to such an extent that "any simple and normal activity would have caused the appellant's disc to rupture." *Board of Trustees*, 44 Ill. 2d at 215.

risk must be: (1) a risk to which the public is generally not exposed but that is peculiar to the employee's work, or (2) a risk to which the general public is exposed but the employee is exposed to a greater degree"). If neither of these factors apply, *i.e.*, if the injury is caused by an activity of daily life to which all members of the public are equally exposed (or by a risk personal to the employee), then there can be no recovery under the Act, even if the employee was required to perform that activity by virtue of his employment. See, *e.g.*, *Hopkins v. Industrial Comm'n*, 196 Ill. App. 3d 347, 348-52 (1990) (holding that claimant's back injury, which the claimant suffered at work while turning in his chair to answer a question posed by another employee the claimant was training, did not arise out of the claimant's employment, even though the employer required the claimant to train the other employee). In such cases, the risk leading to the injury is not "connected with" or "incidental to" the employment; rather, it is merely a personal risk or a risk of everyday living. See, *e.g.*, *id.* at 352.

¶ 39 In support if its analysis, the special concurrence cites *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). *Infra* ¶¶ 51-52. In that case, our supreme court ruled that "*[t]ypically*, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." (Emphasis added.) *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Although we agree that injuries caused by such acts "typically" arise out of the employment, we do not join the special concurrence's conclusion that this is *always* the case. The Commission should not award benefits for injuries caused by everyday activities like walking, bending, or turning, even if an employee was ordered or instructed to perform those activities as part of his job duties, unless the employee's job required him to perform those

activities more frequently than members of the general public or in a manner that increased the risk. In other words, a "neutral risk" analysis should govern such claims.

¶ 40 We have applied a neutral risk analysis to these types of claims in several prior decisions. For example, in *Kemp v. Industrial Comm'n*, 264 Ill. App. 3d 1108 (1994), the claimant was injured at a construction site while squatting down to read an air gauge which was 10 to 15 inches off the ground. The claimant was required to perform this task as part of his job duties. *Id.* at 1111. Nevertheless, we analyzed the claimant's claim under neutral risk principles. We affirmed the Commission's award of benefits because we found that the type of bending and squatting required by the claimant's job "differ[ed] both in type and frequency from the type of bending and stooping in which the average member of the general public could be expected to ordinarily engage." *Id.* We found the claimant's injury compensable because it was "the result of being exposed to a risk to a greater degree than the general public." *Id.*

¶ 41 Similarly, in *Komatsu Dresser Co. v. Industrial Comm'n*, 235 Ill. App. 3d 779 (1992), the claimant's job required him to lift parts weighing between 30 and 40 pounds from a box located next to a machine and place the parts into the machine for processing. The box containing the parts was on a skid, which placed the box waist high and required the claimant to bend from his waist to lift the part out of the box. *Id.* at 780-81. The claimant was injured when he bent over to pick up a part out of the box. *Id.* at 781. In affirming the Commission's award of benefits, we held that "it was a reasonable inference that the claimant's acts of bending required by his work exposed [him] to a greater degree of risk than that of the general public" because witness testimony established that "the claimant's work required him to regularly bend from the waist and lift parts weighing between 15 and 40 pounds out of a box and that the location of the box did not enable the claimant to bend his knees while doing this activity." *Id.* at 788. We noted that "[t]he frequency of this activity and the method in which the claimant had to bend and lift

without bending his knees increased the claimant's exposure to risk of injury from the bending than that of the general public, and, thus, the fact that bending is a normal activity did not preclude a finding that the claimant's injury arose out of his employment." *Id.* We have applied a similar analysis in other cases. See, *e.g.*, *Nabisco Brands, Inc. v. Industrial Comm'n*, 266 Ill. App. 3d 1103, 1107 (1994).[2]

¶ 42 In each of these cases, the claimant was injured while performing bodily movements that were required by his job duties. Nevertheless, we did not stop our analysis there and affirm on that basis alone, as the special concurrence would have us do in this case. Instead, because the bodily movements at issue could arguably be characterized as activities of everyday living (such as bending, stooping, squatting, and walking), we analyzed the claims under neutral risk principles. In each case, we affirmed the award of benefits because we determined that the claimant's employment required him to perform an everyday activity more frequently than members of the general public or in a manner that increased the risk of the activity beyond the risk normally faced by the general public.

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[2]As the special concurrence notes, we did not apply a neutral risk analysis in *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, or in *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC. See *infra* ¶¶ 58-63. In fact, those cases suggest that a neutral risk analysis is unnecessary where the employee is injured while performing his or her required work duties. *Young*, 2014 IL App (4th) 130392WC, ¶ 23; *Accolade*, 2013 IL App (3d) 120588WC, ¶ 19. We note that both of those cases would likely have been decided the same way under a neutral risk analysis (*i.e.*, a neutral risk analysis supports our judgment in each case). Nevertheless, to the extent that *Young* and *Accolade* conflict with our analysis in this case, we decline to follow them.

¶ 43 The same analysis should govern here. In the special concurrence's view, an injury suffered while performing an activity of everyday living is compensable so long as the activity is required by the employment, even if nothing about the employment increases the risk of the activity beyond that which is faced by members of the general public. In our view, this expansive interpretation of the Act departs from the precedents noted above and threatens to erode the distinction between "arising out of" and "in the course of" the employment.

¶ 44 Thus, we decline to apply the analysis endorsed by the special concurrence. However, because we hold that the claimant has established an entitlement to benefits under neutral risk principles, we agree with the special concurrence that the Commission's decision must be reversed.

¶ 45 CONCLUSION

¶ 46 For the foregoing reasons, we reverse the judgment of the circuit court of McHenry County confirming the Commission's decision, vacate the Commission's decision, and remand to the Commission with instructions to determine the compensation to be awarded to the claimant.

¶ 47 Reversed; Cause remanded.

¶ 48 JUSTICE STEWART, specially concurring.

¶ 49 I agree with the ultimate disposition reached by my distinguished colleagues in this case. However, I do not agree with the analysis the majority uses in determining whether the claimant's injuries arose out of his employment. Specifically, the majority concludes that "the risk of injury that the claimant confronted was not 'distinctly associated' with the claimant's employment; rather, it was a neutral risk of everyday living faced by all members of the general public." *Supra* ¶ 33. I disagree. The claimant's risk of injury was distinctly associated with his employment and was not simply a neutral risk. Therefore, the majority analysis improperly

saddled the claimant with the burden of proving that he was exposed to the risk of injury "to a greater degree than the general public."

¶ 50 The first step in analyzing whether the claimant's injury arose out of his employment is to determine in which of the three categories his risk fell. The three categories are: (1) risks that are distinctly associated with employment; (2) risks that are personal to the employee, such as idiopathic falls; and (3) neutral risks that do not have any particular employment or personal characteristics. *Baldwin v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 472, 478 (2011).

¶ 51 With respect to risks that are distinctly associated with employment, the supreme court has stated that an injury arises out of a claimant's employment when he is injured while "performing acts which he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 58 (1989). "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Id.*

¶ 52 The difference in my analysis and the analysis employed by the majority lies in determining the category of risk which results in a worker's injury. I would first examine the facts to determine if the acts that caused the injury were "connected with what an employee has to do in fulfilling his duties." *Id.* If so, the acts that caused the injury are an employment risk, and the claim is compensable. Thus, the first step in risk analysis should be to determine if the risk is one distinctly associated with the employment. If it is, then it cannot be either a personal risk or a neutral risk.

¶ 53 Paragraph 34 of the majority's decision establishes how the claimant's risk of injury arose directly from acts that his employer instructed him to perform. *Supra* ¶ 34. The majority

succinctly describes how the claimant's work duties required him to weld from a seated position, maneuvering in a chair, including swiveling, while under time pressure. These are the acts that resulted in the claimant's injury. Because the claimant proved that he was injured while performing acts he was expected to perform incident to his assigned duties, he proved that his risk of injury fell within the category of risks that are distinctly associated with his employment.

¶ 54 In contrast to the analysis above, the majority first examines the acts that caused the injury to determine if the worker was performing some bodily movement engaged in by the general public. If so, the majority would categorize the risk as a neutral risk and employ a neutral-risk analysis. In doing so, the majority would require the worker to prove that he was exposed to the risk, either qualitatively or quantitatively, to a greater degree than the general public, even though he was injured performing the very tasks required by his employment. In fact, the majority states that "[t]he Commission should not award benefits for injuries caused by everyday activities like walking,[3] bending, or turning, *even if an employee was ordered or instructed to perform those activities as part of his job duties*, unless the employee's job required him to perform those activities more frequently than members of the general public or in a manner that increased the risk." (Emphasis added.) *Supra* ¶ 39. That statement simply cannot be squared with our courts' long-adopted definition of a "neutral risk" as one with no particular employment characteristics.

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[3]The majority seeks to buttress its analysis by inserting "walking" into the discussion. This is a red herring. In the context of falls, we have consistently held that walking on level ground or up and down stairs is a neutral risk. I do not disagree with that analysis. My concern is isolating a specific bodily movement required by an employee's job duties, such as reaching or turning, and labeling it a neutral risk.

¶ 55 Generally, our courts have offered a far more narrow definition of neutral risks. "Neutral risks include stray bullets, dog bites, lunatic attacks, lightning strikes, bombing, and hurricanes." *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 163 (2000). These examples are true neutral risks because they clearly have no particular employment characteristics.

¶ 56 The problem with the majority's analysis is that many workers are employed for the very purpose of engaging in actions and movements performed by the general public. This method of analysis then leads us, as in this case, to perform a neutral-risk analysis when a worker has been injured performing the very tasks he was hired to perform. If workers' injuries are first examined to determine whether they were reaching, turning, bending, squatting, or engaging in other common bodily movements at the precise moment of injury, virtually all industrial injuries could be categorized as neutral risks.

¶ 57 As a result, in categorizing the risk of injury, we must first view the acts that cause an injury within the context of a worker's employment duties. If a worker is injured performing a common bodily movement that is required by his job duties, the risk of injury is an employment risk. To hold otherwise would greatly expand the number of cases subject to neutral-risk analysis and subject injured workers to a level of proof beyond evidence that they were injured performing their job duties.

¶ 58 I believe that we properly analyzed this issue recently in *Young v. Illinois Workers' Compensation Comm'n*, 2014 IL App (4th) 130392WC, and that the majority's analysis in the present case directly conflicts with our analysis in *Young*. Regrettably, the majority now disavows our unanimous analysis in *Young*.

¶ 59 In *Young*, we addressed the "arising out of" element in a case in which an employee injured his shoulder while simply reaching for an object. The employee's job duties required

him to inspect parts that he was required to retrieve from inside a box that was three feet deep. *Id.* ¶ 22. The claimant injured his left shoulder by bending over into the box and reaching down to the bottom to retrieve a spring clip for inspection. *Id.* The claimant felt a " 'pop' " in his left shoulder as he reached for the part. *Id.* With respect to the "arising out of" element of the claim, we noted that "[t]his evidence unequivocally shows claimant was performing acts that the employer might reasonably have expected him to perform so that he could fulfill his assigned duties on the day in question." *Id.*

¶ 60 The Commission in the *Young* case engaged in a neutral-risk analysis and concluded that the claimant's act of reaching down for the part did not place him at a risk of injury beyond what he would experience as a normal activity of daily living, *i.e.*, he was not exposed to a risk to a greater degree than the general public. *Id.* ¶ 23. In reversing the Commission, we unanimously held that the Commission erred in determining the category of risk to which the claimant was exposed. Because the claimant was engaged in "acts the employer might reasonably have expected him to perform incident to his assigned duties," we concluded that the risk the claimant faced had employment-related characteristics and that it was improper for the Commission to engage in a neutral-risk analysis in determining whether the injury arose out of his work for the employer. *Id.*

¶ 61 We noted that "when a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public." *Id.* We further concluded as follows: "Although the act of 'reaching' is one performed by the general public on a daily basis, the evidence in this case established the risk to which claimant was exposed was necessary to the performance of his job duties at the

time of injury. His action in reaching and stretching his arm into a deep, narrow box to retrieve a part for inspection was distinctly associated with his employment." *Id.* ¶ 28.

¶ 62 In *Young*, we also cited our recent decision in *Autumn Accolade v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120588WC, ¶ 18, in which we addressed the issue of whether a caregiver's injury arose out of her employment when she was injured while assisting one of the facility's residents in the shower. The caregiver was reaching to remove a soap dish when she felt a pop in her neck and pain down her right arm. *Id.* We held that the Commission's finding that the caregiver sustained an accident that arose out of her employment was not against the manifest weight of the evidence because the Commission properly concluded that she was injured "while engaged in activities she might reasonably be expected to perform incident to her assigned duties." *Id.* We rejected the employer's argument that a reaching injury was not peculiar to the caregiver's employment because the caregiver "was engaged in an activity she might reasonably be expected to perform incident to her assigned duties, *i.e.*, ensuring the safety of a resident of the assisted living facility." *Id.* ¶ 19. The majority also now disavows our unanimous analysis in *Accolade*.

¶ 63 The analysis used by this court in *Accolade* and *Young* applies equally in the present case. Once it is established that the risk fits within the first risk category outlined above, *i.e.*, risks that are distinctly associated with employment, then it is established that the injury "arose out of" the employment, and it is improper for the Commission to engage in a neutral-risk analysis. *Young*, 2014 IL App (4th) 130392WC, ¶ 23 ("when a claimant is injured due to an employment-related risk—a risk distinctly associated with his or her employment—it is unnecessary to perform a neutral-risk analysis to determine whether the claimant was exposed to a risk of injury to a greater degree than the general public").

¶ 64 The majority cites *Kemp* and *Komatsu Dresser Co.* as examples of precedent where our courts have applied a neutral-risk analysis when workers are injured performing a common bodily movement required by their employment. *Supra* ¶¶ 40-42. However, there are similar cases where a neutral-risk analysis was rejected. For example, in *Interlake, Inc. v Industrial Comm'n*, 161 Ill. App. 3d 704 (1987), the claimant was working with his supervisor who instructed him to get a screwdriver. When the claimant bent over to retrieve a screwdriver from his tool pouch on the floor, his back " 'snapped.' " The employer argued that "claimant's act of bending over was a routine personal activity and that therefore claimant has not shown that his injury arose out of and in the course of his employment." *Id.* at 706. Noting that the claimant "bent over to pick up a screwdriver at the explicit direction of one of his supervisors," the court held that his injury "was the result of only employment activities." *Id.* at 711. Likewise, in *O'Fallon School District v. Industrial Comm'n*, 313 Ill. App. 3d 413 (2000), the claimant was a sixth grade teacher assigned to hall duty. The employer maintained a strict rule against students running in the halls. When the claimant observed a student running, she "turned, twisted, and began to pursue the child when she felt a pain in her lower back." *Id.* at 415. The arbitrator and the Commission initially determined that the injury "did not arise out of claimant's employment, as the activities of turning, twisting, and beginning to pursue a running child did not expose her to a risk greater than that to which the general public could be exposed," but the circuit court reversed. *Id.* Noting that the claimant "was assigned specifically the task of stopping children from running in the hallways," this court affirmed the circuit court, and held that "[c]ontrary to the arbitrator's conclusion and the Commission's initial decision, claimant's injury did have an origin in a risk arising out of her employment." *Id.* at 416-17.

¶ 65 It is evident that the Commission and the courts have struggled to determine when to employ a neutral-risk analysis and clear guidelines are needed. In my view, the supreme court

has provided us with the proper method for analysis: "A risk is incidental to the employment where it belongs to or is connected with what an employee has to do in fulfilling his duties." *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Thus, we should first determine whether a worker was injured performing activities that were required by his job duties. If so, the risk of being injured performing those activities is distinctly associated with his employment, and a neutral-risk analysis is improper.

¶ 66 In the present case, since May 2007, the claimant had to perform his welding duties from a seated position, using a chair with wheels to maneuver as a result of a separate condition in his right knee. The employer provided the rolling chair to accommodate the claimant's work restrictions while performing work-related tasks. As the Commission found, on the day of the injury, the claimant worked while sitting on his chair, turned to his right in order to perform welding tasks, internally rotated his left knee, and experienced an immediate pop, pain, and a burning sensation in his left knee. Based on these factual findings, the claimant's risk of a left knee injury as a result of an internal rotation was a risk that falls squarely within the risks that are distinctly associated with his employment. The employer paid the claimant to weld lock systems in a seated position under time constraints which, in turn, required him to maneuver the chair and his body to his left and to his right. When we view the mechanism of the claimant's injury in the context of his assigned work duties, it is evident that he was injured while performing a specific movement that he was assigned to perform by his employer. Accordingly, under these facts, although I agree with the ultimate disposition in this case, I believe that the majority's neutral-risk analysis is incorrect.

¶ 67 Justice Harris joins in this special concurrence.

1 of 100 DOCUMENTS

DAVID ADCOCK, PETITIONER, v. KNAACK MANUFACTURING, RESPONDENT.

NO. 10WC 27158

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF MCHENRY

12 IWCC 1221; 2012 Ill. Wrk. Comp. LEXIS 1350

November 2, 2012

JUDGES: Michael P. Latz; David L. Gore; Mario Basurto

OPINION: [*1]

DECISION AND OPINION ON REVIEW

The Respondent appeals the Decision of Arbitrator Lee finding that the Petitioner's left knee injury arose out of his employment on May 10, 2010; that the Petitioner's left knee condition is causally related to his accident; that the treatment was reasonable and necessary; that the Petitioner is entitled to temporary total disability (TTD) benefits from July 12, 2010 through January 5, 2011; and, that the Petitioner is entitled to a permanent partial disability (PPD) award of 20% loss of use of the leg.

The Commission after hearing oral arguments, reviewing the record on appeal, and being advised of the applicable law, hereby **reverses** the Decision of the Arbitrator and finds that the Petitioner failed to prove that he sustained a work-related injury arising out of and in the course of his employment on May 10, 2010. Petitioner's claim for compensation is therefore denied.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission makes the following findings:

1. The Petitioner testified that he worked for the Respondent for 8 years welding lock systems. T.9. He would weld 70 lock systems per day to satisfy his quota. T.12. As the result of [*2] a prior right leg injury that resulted in permanent restrictions, the Petitioner performed his duties while seated in a swivel chair which had 5 wheels. T.10. The chair wheels were replaced two months prior to the accident. T.13. The Petitioner described the floor as concrete that had chips out it and welding BBs on the floor.

2. The Petitioner reviewed a DVD of his job and testified that there were differences between the video and his actual job duties. He testified that he does not use his right leg to swivel and he pushes with his left leg.

3. On May 10, 2010, the Petitioner testified that he was welding while sitting in his swivel chair when he rotated to his right causing his left knee to pop. Immediately afterwards, the Petitioner felt a burning sensation inside his left knee. T.16. He reported his injury to his supervisor who advised him to rest for an hour and ice his left knee. T.17. The Petitioner testified that he worked the next two days, May 11, 2010 and May 12, 2010 and was off May 13, 2010 and then went on a fishing trip from May 14, 2010 to May 17, 2010.

4. The Petitioner testified, on cross-examination, that at the time of his injury, he was not pushing his chair [*3] rather he was just turning his body. T.40.

5. The Petitioner returned from his fishing trip and was sent to Dr. Alexander Jablonowski of Centegra Occupational Health on May 18, 2010. The Petitioner complained of left knee pain after he internally rotated his left leg and knee when he went to perform a weld to his right. He was diagnosed with a sprain of the left knee and given light duty work restrictions. PX.1. Dr. Janlonowski referred the Petitioner to Dr. Steven Rochell.

6. The Petitioner underwent an MRI of the left knee on June 10, 2010 which was suspicious for a vertical tear of the medial meniscus and partially discoid lateral meniscus. No discrete lateral meniscal tear was identified. PX. 1.

7. The Petitioner was seen by Dr. Rochell on June 16, 2010 with continued left knee pain. Dr. Rochell opined that the Petitioner had a tear of the medial meniscus as a result of a work injury. PX.1. He was given light duty work restrictions but was taken off work completely on July 12, 2010. Dr. Rochell recommended surgery.

8. The Petitioner underwent an IME with Dr. Preston Wolin on August 10, 2010. Dr. Wolin opined that the activities demonstrated in the DVD did not depict sufficient [*4] loading and torque necessary to cause a medial meniscus tear and the mechanics or environment was not sufficient to cause or aggravate a tear. He noted that a partially discoid lateral meniscus is a congenital condition and was not contributing to his symptoms. He further noted that if the Petitioner had meniscal pathology, it is likely unrelated to his May 10, 2010 injury. RX.5. He returned the Petitioner back to work. However, the Petitioner filed for short-term disability.

9. On September 30, 2010, the Petitioner underwent arthroscopy and surgical arthroscopic medial and lateral meniscectomies of the left knee. PX.3.

10. The Petitioner was released to full-duty work on January 5, 2011; however, the Petitioner was advised there was no work for him. T.32.

11. The Petitioner testified that his left knee feels "pretty good" and that it was pretty much back to normal. T.33.

12. The Petitioner testified that his job did not require him to kneel or squat, so it was within his restrictions. T.38. After August 30, 2010, the Petitioner was offered light duty work, but chose to go on short-term disability. *Id.*

13. The evidence deposition of Dr. Steven Rochell was taken October 27, [*5] 2010. Dr. Rochell is a licensed orthopedic surgeon and first saw the Petitioner on June 16, 2010. PX.4. pg.6. During the initial visit, the Petitioner complained of an injury to his left knee on May 10, 2010 after feeling a pop in his left knee followed by severe pain and burning. PX.4. pg.7. He stated that the cause of the Petitioner's left knee injury was a twisting and turning which resulted in a tear of the medial meniscus. PX.4. pg.10. He recommended anti-inflammatory medication, continued light duty and to avoid activities that could aggravate his condition. PX.4. pg.11.

14. Dr. Rochell next saw the Petitioner on July 12, 2010 and recommended arthroscopic surgery that was performed on September 30, 2010. PX.4. pg.11.

15. Dr. Rochell testified, on cross-examination, that a similar injury could have occurred while exiting his car or getting up from a table, and there was nothing specific in the workplace that increased the risk of a left knee injury as it could have happened anywhere. PX.4. pg.28.

16. The evidence deposition of Dr. Wolin was taken February 4, 2011. Dr. Wolin is a board certified orthopedic surgeon and performed an IME on August 10, 2010. The Petitioner reported [*6] that on May 10, 2010, he planted his left foot and turned to weld in the direction of his right when he felt an immediate pop and burning sensation in the medial to the patella of his left knee. RX.6. pg.11. He noted that the Petitioner did not indicate that he was carrying or holding anything at the time of the injury nor did he indicate whether he was welding at the time of the injury. RX.6. pg.12. He noted that the Petitioner was 5'6" tall and weighed 330 pounds. RX.6. pg.14. His examination revealed normal flexion and a non-antalgic gait. There was no increased anterior-posterior medial lateral laxity of the knee and the McMurray test was negative. RX.6. pg.16. X-rays of the left knee revealed narrowing of the medial compartment which demonstrated arthritic change. RX.6. pg.17.

17. Dr. Wolin opined that the activities depicted in the video did not show a sufficient loading and torque to cause a medial meniscus tear. RX.6. pg.21. His action of moving to the left and right had little, if any, torque as a result. He further stated that the mechanics or the environment in which the Petitioner was working would not be sufficient to cause or aggravate a meniscus tear. RX.6. pg.24. [*7] He further testified that any surgery would result in lack of improvement and the Petitioner would have been able to perform regular welding duties.

18. Dr. Wolin testified, on cross-examination, that the Petitioner had medial joint space narrowing on both knees that meant he had a problem with his left knee, which would have taken more than the three months between May 10, 2010 and August 10, 2010 to manifest on the x-ray. RX.6. pg.30. He noted that the Petitioner had not received any medical treatment prior to May 10, 2010 for his left knee and that the postoperative diagnosis was a tear to the medial and lateral meniscus of the left knee. RX.6. pg.32.

19. Dr. Wolin testified that internal rotation while placing weight on it can cause a meniscus tear. RX.6. pg.41. He stated that a person cannot suffer a tear of the medial meniscus with internal rotation because of a screw hole mechanism of the knee. With internal rotation, if there is torque then it is going to be applied to the lateral, not the medial meniscus. RX.6. pg.43.

To obtain compensation under the Act, a petitioner bears the burden of showing, by a preponderance of the evidence, that he has suffered a disabling injury [*8] which arose out of and in the course of his employment. *Baggett v. Industrial Comm'n, 201 Ill. 2d 187, 266 Ill. Dec. 836, 775 N.E.2d 908 (2002).* "In the course of employment" refers to the time, place and circumstances surrounding the injury. *Lee v. Industrial Comm'n, 167 Ill. 2d 77, 81, 212 Ill. Dec. 250, 656 N.E.2d 1084 (1995).* It is not enough, however, to simply show that an injury occurred during work hours or at the place of employment. The injury must also "arise out of the employment. *Parro v. Industrial Comm'n, 167 Ill. 2d 385, 393, 212 Ill. Dec. 537, 657 N.E.2d 882 (1995)* (the occurrence of an accident at the claimant's workplace does not automatically establish that the injury arose out of the person's employment); *Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill. 2d 52, 62, 133 Ill. Dec. 454, 541 N.E.2d 665 (1989).*

The "arising out of" component of establishing entitlement to benefits is primarily concerned with causal connection [*9] such that it must be shown that the injury had its origin in some risk connected with, or incidental to, the employment. *Sisbro, Inc. v. Industrial Comm'n, 207 Ill. 2d 193, 203, 797 N.E.2d 665, 278 Ill. Dec. 70 (2003).* If the petitioner is exposed to a risk to a greater degree than the general public, the injury is considered to have arisen out of the employment. *O'Fallon School District v. Industrial Comm'n, 313 Ill. App. 3d 413, 416, 729 N.E.2d 523, 246 Ill. Dec. 150 (2000).* If, on the other hand, the petitioner's exposure to risk is equal to that of the general public, the injury is not compensable. *Id.* In order to find that a petitioner's employment exposes him to a risk greater than that to which the general public is exposed, the hazards, dangers, or risks must be distinctive to the employment. *Illinois Institute of Technology Research Institute v. Industrial Comm'n, 314 Ill. App. 3d 149, 153, 731 N.E.2d 795, 247 Ill. Dec. 22 (2000).*

The Commission is not bound by the arbitrator's findings, [*10] and may properly determine the credibility of witnesses, weigh their testimony and assess the weight to be given to the evidence. *R.A. Cullinan & Sons v. Industrial Comm'n, 216 Ill. App. 3d 1048, 1054, 575 N.E.2d 1240, 159 Ill. Dec. 180 (1991).* It is the province of the Commission to weigh the evidence and draw reasonable inferences therefrom. *Niles Police Department v. Industrial Comm'n, 83 Ill. 2d 528, 533-34, 416 N.E.2d 243, 245, 48 Ill. Dec. 212 (1981).* Interpretation of medical testimony is particularly within the province of the Commission. *A. O. Smith Corp. v. Industrial Comm'n, 51 Ill. 2d 533, 536-37, 283 N.E.2d 875, 877 (1972).*

The evidence establishes that the Petitioner did sustain a left knee injury. The Petitioner testified that he was sitting on his swivel chair and turning when he felt a pop in his knee. The Petitioner testified specifically that at the time of his injury, he was not pushing his chair, rather he was turning his body. Furthermore, Dr. Rochell testified that there was nothing specific at [*11] Petitioner's workplace that increased the risk of a left knee injury as it could have happened anywhere.

The act of turning, even in a chair, is an activity of everyday life and does not constitute a compensable injury under the Illinois Workers' Compensation Act. *Bailey v. Cook Co. Dept. of Corrections, 12 I.W.C.C. 0399; Ikerman v. Residential Marketing, 06 I.W.C.C. 1133; Wright v. Chicago Youth Centers, 03 I.I.C. 0465; Moreland v. Midstate Core, 01 I.I.C. 0702.* The State of Illinois does not recognize the positional risk doctrine. *Brady v. Louis Ruffolo & Sons Const., 143 Ill.2d 542, 578 N.E.2d 921 (1991).* The injury does not arise out of the employment, however, if it results from a hazard to which the employee would have been equally exposed apart from the employment. *Caterpillar Tractor Co. v. Industrial Comm'n, 129 Ill.2d 52, 57, 541 N.E.2d 665, 667, 133 Ill.Dec. 454, 456* (Ill., 1989). The act of turning, whether standing or in a chair, is not a hazard [*12] greater than that faced by the general public. *Nabisco Brands, Inc. v. Industrial Comm'n, 266 Ill.App.3d 1103, 1107, 204 Ill.Dec. 354, 641 N.E.2d 578 (1994).*

The Commission finds no evidence that the injury was caused by an increased risk connected with the Petitioner's work duties, or a defect in the chair or floor. The Petitioner's act of turning in his swivel chair did not expose him to a risk greater than that to which the general public is exposed, and it was not a risk distinctive to his employment.

Therefore, the Commission reverses the Decision of the Arbitrator and finds that the Petitioner failed to prove that his injury arose out of and in the course of his employment. The Petitioner's claim for compensation is therefore denied.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's decision is reversed.

IT IS FURTHER ORDERED BY THE COMMISSION that since the Petitioner failed to prove that his injury arose out of and in the course of his employment on May 10, 2010, his claim for compensation is hereby denied.

The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable [*13] to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

Legal Topics:

For related research and practice materials, see the following legal topics:
Workers' Compensation & SSDICompensabilityCourse of EmploymentCausationWorkers' Compensation & SSDICompensabilityCourse of EmploymentPlace & TimeWorkers' Compensation & SSDICompensabilityInjuriesGeneral Overview

Illinois Official Reports

Appellate Court

***Steel & Machinery Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 133985WC**

Appellate Court Caption	STEEL AND MACHINERY TRANSPORTATION, INC., Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Radomir Cvetkovski, Appellee).
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-13-3985WC
Filed Rehearing denied	May 1, 2015 July 7, 2015
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 13-L-50386; the Hon. Patrick J. Sherlock, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Paul A. Krauter, of Roddy, Leahy, Guill & Zima, Ltd., of Chicago, for appellant. Osvaldo Rodriguez, of Law Offices of Osvaldo Rodriguez, P.C., of Elmwood Park, for appellee.
Panel	JUSTICE HUDSON delivered the judgment of the court, with opinion. Justices Hoffman, Harris, and Stewart concurred in the judgment and opinion. Presiding Justice Holdridge dissented, with opinion.

OPINION

I. INTRODUCTION

¶ 1

¶ 2 Respondent, Steel & Machinery Transportation, Inc., appeals from the judgment of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission) awarding benefits to claimant, Radomir Cvetkovski, pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)). On appeal, respondent argues that the Commission erred in finding that an employer-employee relationship existed between it and claimant. We affirm.

II. BACKGROUND

¶ 3

¶ 4 Claimant is an over-the-road truck driver who owns a tractor-trailer. Respondent is in the business of transporting machinery and metal products from sellers to purchasers. On Friday, June 10, 2005, respondent dispatched claimant to transport a shipment from Indiana to Wisconsin. After claimant picked up the load in Indiana, he drove his vehicle to a truck stop and went home for the weekend. Claimant resumed the delivery in the early morning hours of Monday, June 13, 2005. While driving in Illinois, claimant was involved in a motor-vehicle accident. As a result of the accident, claimant lost a portion of his left extremity below the knee. On October 3, 2005, claimant filed an application for adjustment of claim, seeking benefits for his injury. An arbitration hearing on claimant's application for adjustment of claim was held over two dates late in 2011. The following evidence relevant to this appeal was presented at that hearing.

¶ 5 At the time of the accident, claimant was operating under an agreement with respondent entitled "INDEPENDENT CONTRACTOR AGREEMENT" (Agreement). The Agreement classified claimant as an independent contractor. Paragraph 1 of the Agreement provided that, for the duration of the Agreement, claimant would provide respondent "transportation related services and the Equipment set forth in SUPPLEMENT A." Supplement A was an equipment schedule listing claimant's tractor and trailer. Paragraph 6(a) of the Agreement provided that the equipment described in Supplement A "shall be for [respondent's] exclusive possession, control and use for the duration of this Agreement." Paragraph 6(a) further provided, "[t]his subparagraph is set forth solely to conform with Federal Motor Carrier Safety Adm. regulations and shall not be used for any other purposes, including any attempt to classify [claimant] as an employee of [respondent]." Paragraph 8 of the Agreement provided that respondent, "having exclusive possession, control and use of the equipment covered under this lease, under it's [*sic*] sole discretion, may interchange this equipment to other authorized carriers."

¶ 6 The Agreement required respondent to maintain insurance to cover the equipment when it was being operated in respondent's service and claimant to acquire "bobtail" insurance to cover the equipment when it was not operated in respondent's service. In addition, the Agreement required claimant to notify respondent of any accident "involving operations under [the] Agreement." The Agreement provided that claimant would be compensated a specified percentage "of the transportation revenue after surcharges, if any." Under the Agreement, claimant was responsible for the cost of the equipment, including, but not limited to, necessary licenses, permits, oil, fuel, tires, highway use taxes, weight taxes, fuel taxes, and toll charges. In addition, claimant was required to keep the equipment "in clean

appearance" at his sole cost and expense. Furthermore, the Agreement required claimant to maintain the equipment in a safe condition and in compliance with all applicable laws and regulations. The Agreement provided respondent with the right to place and maintain on the equipment its name and lettering, advertisement, slogans or designs. The Agreement could be terminated for any reason after 30 days from its effective date by giving one day's written notice to the other party either personally, by mail, or by facsimile machine. In addition, the Agreement could be terminated at any time, by either party, in the event of a breach of the Agreement by the other party.

¶ 7 At the arbitration hearing, claimant, a native of Macedonia, testified through an interpreter. Claimant related that he began working for respondent in March 2005. Prior to driving for respondent, claimant completed an application, underwent a medical examination, and submitted to a drug test. Claimant testified that he paid for the medical examination, but he was not sure who paid for the drug test. During his first week of work for respondent, claimant met with Josephine Ramos, plaintiff's safety representative. Claimant testified that at this meeting, he and Ramos discussed "everything concerning *** the truck, everything about safety and avoiding accidents." Claimant related that he drove exclusively for respondent between his date of hire and the date of the accident.

¶ 8 Claimant acknowledged that while driving for respondent, he was responsible for maintaining and repairing his truck and trailer in a certain manner. For instance, claimant had to take the tractor-trailer for inspections, keep inspection and maintenance records in accordance with federal regulations, and post respondent's name on the side of the tractor-trailer. Claimant further testified that while respondent provided liability insurance to cover the equipment while he was transporting loads for respondent, he was required to provide his own insurance for the equipment when he was not delivering for respondent. Claimant also acknowledged that he was responsible for truck repairs, plates, and licenses. Claimant initially testified that he was also responsible for purchasing fuel and paying tolls while he was working for respondent. However, claimant later indicated that respondent reimbursed him for the fuel charges. Claimant also testified that respondent did not require him to wear a uniform. He stated that he was paid by respondent on a weekly basis by company checks.

¶ 9 Claimant testified that he obtained his work assignments from a dispatcher named Spiro Krlevski (Spiro), who is also a native of Macedonia. According to claimant, Spiro would provide him with "the numbers for the pick-up." Claimant would then drive to the designated pick-up location. When claimant picked up a load for respondent, he would identify himself as the driver for "SMT," the acronym by which respondent is known. After taking possession of the goods, claimant would travel to the delivery location. Claimant testified that it was Spiro's responsibility to call him every two hours "to check on [his] location, find out where [he is] and what's going on." Once claimant completed a delivery he would call Spiro to obtain a new assignment. With respect to the frequency of the calls claimant would make to respondent, claimant testified, "[i]t may happen three or five times a day that I would need to call the company, for instance, when I needed to report if I am empty, if I delivered." Claimant further testified that Spiro gave him specific instructions to the address he was delivering to on the night of the accident.

¶ 10 Claimant testified that it was not up to him to choose which loads he wanted to transport. Moreover, claimant testified that he would not "dare" refuse a load. When asked about the

consequences for declining a load, claimant responded that "there might be consequence [*sic*] such as me losing my job or not getting any loads for like two days." Claimant also testified that he was not free to take loads for other companies and he could not use another driver to transport a load for respondent. Claimant testified that respondent would provide him with a general time frame for each pick-up and that each load had a delivery deadline. If claimant delivered a load late, there would be a consequence, such as a late charge. According to claimant, he was assessed a late charge with respect to the load he was delivering when the accident at issue occurred.

¶ 11 During cross-examination, claimant initially denied entering into the Agreement with respondent. However, after being shown the Agreement, claimant identified his signature on the document. Although claimant testified through an interpreter, he acknowledged that he reads, writes, and understands English. Claimant was shown the bill of lading for the load he was carrying at the time of the accident. Claimant admitted that the bill of lading required him to deliver the load between 7:30 a.m. and 3:30 p.m., Monday through Friday.

¶ 12 Respondent called three witnesses at the hearing–Ramos, Herbert Schaffer, and Spiro. Ramos testified that, as respondent's director of safety, she "pre-qualifies" drivers, sets up contractor lease agreements, monitors maintenance files, and performs safety and compliance duties on respondent's behalf. Ramos described respondent's "pre-qualification" process in detail. She explained that this process involves having a prospective driver complete an application, undergo a physical, and submit to a drug test. In addition, Ramos reviews the applicant's motor-vehicle record and employment history. Ramos testified that the applicant pays for the physical and the drug screen. If an applicant is approved, he participates in an orientation process. Ramos testified that once an applicant is qualified and executes an independent-contractor agreement, it is respondent's responsibility to "continuously monitor" the driver's status. For instance, Ramos explained that federal regulations limit the number of hours a driver can drive and respondent monitors the number of hours driven. Moreover, under federal law, respondent is required to ensure that leased equipment is operated in compliance with federal guidelines. Thus, if a driver's equipment is not in compliance with federal standards, respondent would cancel the driver's agreement.

¶ 13 Ramos testified that respondent did not require claimant to wear a uniform, shave, or wear his hair in a particular manner. In addition, respondent had no input regarding how claimant introduced himself while picking up a load. Ramos testified that the equipment respondent leased from claimant would have had door signs with respondent's name and logo on it, as required by federal regulations. According to Ramos, claimant was required to inspect his truck and trailer before each trip pursuant to federal regulations. Respondent exercised no control over the type of fuel claimant purchased or where he parked. Moreover, respondent did not provide claimant with any tools or equipment. Ramos testified that each driver is responsible for obtaining his or her own bobtail insurance and workers' compensation coverage.

¶ 14 Ramos testified that she knows Spiro, the dispatcher referenced by claimant. Ramos described Spiro as an "independent agent" for respondent. Ramos testified that, in addition to using independent agents to dispatch, respondent has its own dispatch system within the company itself. Ramos testified that under the Agreement, claimant had the option to dispatch through Spiro or respondent's system. Ramos explained that, under either system, the dispatch process is essentially identical. Initially, the driver calls in for a job. If the agent

does not have a load the driver is interested in moving, he can contact a different agent or respondent's own dispatch. According to Ramos, a driver need only call dispatch when he would like to pick up a load. Claimant was not required to call in daily to report his status or work any particular shift, and he was not required to accept a particular shipment. Moreover, Ramos denied that respondent required claimant to take a specific route in delivering a load.

¶ 15 Ramos testified that once a load is delivered and the driver presents proof of delivery and log sheets, he receives payment. Payment is made by check or via a "ComData" card, which Ramos likened to a debit card. According to Ramos, claimant elected to receive his payments on a ComData card. Ramos stated that respondent did not withhold income taxes or any other type of government deduction from claimant's settlements. Respondent provided claimant with a 1099 tax form at the end of the calendar year. Ramos acknowledged that a deduction to claimant's pay was made after the June 2005 accident. According to Ramos, however, the deduction had nothing to do with the accident, but constituted charges for the late delivery of a different load.

¶ 16 Ramos testified that it is respondent's responsibility to observe and enforce all applicable federal and state regulations in transporting goods. Ramos testified that respondent monitored "paperwork" while claimant's equipment was under lease pursuant to federal regulations. Ramos testified that pursuant to a federal requirement, claimant's equipment must meet state and federal regulations before respondent can enter into a lease agreement. According to Ramos, under the Agreement, respondent did not impose any requirements above and beyond those of the federal Department of Transportation. Respondent could cancel a lease agreement if the lessor is in violation of federal regulations.

¶ 17 Ramos testified that the Agreement allowed claimant to transport goods for another company "through a brokerage operation." Under such an arrangement, the other motor carrier would pay respondent and respondent would then settle with claimant. Ramos testified that, to her knowledge, claimant did not drive for anyone except respondent between the time he first transported for respondent and the date of the accident.

¶ 18 Herbert Schaffer testified that he has been the vice-president of business development for Transportation Employment Services (TES) for four years. Schaffer related that respondent and TES are affiliated entities and that he "represent[s]" respondent as well. Schaffer testified that he has worked in the trucking industry for 41 years.

¶ 19 Schaffer testified that under an independent contractor agreement, respondent does not require drivers to wear any kind of uniform, to take a specific route to the delivery destination, or to introduce themselves to customers in any particular way. Respondent does not train the independent contractors. Moreover, the driver pays for the licensing of the equipment leased to respondent. Schaffer also testified that under an independent contractor agreement, respondent does not require drivers to shave or otherwise wear their hair in a particular manner, clean their equipment on a specified schedule, or purchase a particular type of fuel. Respondent does not instruct drivers where to park their equipment or how to inspect or maintain the equipment in cold weather. Schaffer also related that respondent does not provide drivers with any kind of tools or equipment. In addition, the drivers do not have specific work shifts, and they are not required to call in daily to report their status. Schaffer stated that a driver is not subject to any adverse consequences from respondent if he is late with a delivery. Schaffer added that respondent does not impose any requirements above and

beyond that which the federal government imposes pursuant to Department of Transportation regulations.

¶ 20 Schaffer did not work for respondent at the same time as defendant. Nevertheless, Schaffer testified that he had no reason to believe that the current dispatch process is any different than the process used in 2005, when claimant was injured. Schaffer related that under the dispatch system, a customer calls an agent and provides delivery information. A driver then contacts dispatch to inquire about an available load, where it is going, and what it pays. The driver then decides whether to take the load. If the driver does not want to take a particular load, he is free to call back later or contact another carrier that respondent will "broker freight to."

¶ 21 With respect to the process for a driver to transport freight for a carrier other than respondent, Schaffer explained as follows:

> "If we did not have a load the [driver] wanted, he could let dispatch know that he's going to go look for a load from another carrier, and then we in turn–once he did find one, he would call dispatch, say I have a load with this other carrier. We then would reach out to that carrier, make sure that we have an agreement, do credit checks, et cetera and so forth, and then release him to go haul that load for the other carrier."

Schaffer stated that he has no personal knowledge of whether claimant drove for any other carrier during the time he drove for respondent.

¶ 22 Schaffer testified that Spiro's relationship with respondent is that of an "agent" or "independent contractor." Schaffer testified that once Spiro dispatches a driver, it is entered into respondent's computer system, known as the AS-400. According to Schaffer, the AS-400 allows respondent to "know what the driver is doing and who's moving what load." The AS-400 also indicates the time and the identity of the dispatcher.

¶ 23 Schaffer testified that a "bill of lading" is a contract of carriage. He explained that the document authorizes the driver to possess the freight being transported. The bill of lading also identifies the shipper, the destination of the goods, and any special instructions, such as delivery times or if a delivery appointment is required. The driver presents the bill of lading to the recipient of goods for signature to indicate that the freight was received. Respondent then uses the bill of lading to settle payment with the driver. Schaffer noted that the bill of lading for the load claimant was delivering on the date of the accident included special shipping instructions. In particular, it stated that the recipient's receiving hours were from 7:30 a.m. through 3:30 p.m., Monday through Friday, with no appointment required. According to Schaffer, this meant there was no set time for the goods to be delivered.

¶ 24 Spiro testified that he has been an "agent" for respondent since January 2005 and that his position consists of finding loads and assigning them to drivers. Spiro testified that, typically, claimant would initiate contact with him by requesting a load to transport. Spiro denied that it was his responsibility to check on claimant's location during the delivery process. Nevertheless, Spiro acknowledged that once claimant accepted a load, he might contact claimant to check on the delivery status at the customer's request. Spiro related that claimant would also call him if he was "empty" and needed a new load. Spiro testified that claimant was free to accept or decline a load and was not subject to any adverse consequences for declining a load.

¶ 25 Spiro testified that pick-up and delivery times are dictated not by respondent, but by the customer's needs. Spiro stated that some customers have delivery windows, while others do not. Spiro noted that the bill of lading controls the time and place of delivery. Spiro testified that the bill of lading for the load claimant was delivering on the date of the accident provided that deliveries were accepted between 7:30 a.m. and 3:30 p.m., Monday through Friday, with no appointment necessary. Spiro denied telling claimant that the load had to be delivered at a particular time. Spiro further testified that under the Agreement, respondent did not impose or in any way threaten to impose any monetary fines or consequences on claimant for late deliveries.

¶ 26 Spiro testified that claimant was not required to wear a uniform, shave, or wear his hair in a particular style. In addition, claimant was not required to take a specified route to a delivery destination. Spiro stated that claimant was not required to call in daily to report his status. Spiro denied that a driver would receive fewer loads in the future if he or she declined a load. Spiro testified that he never instructed claimant where to park his equipment. Spiro testified that under the Agreement, claimant had the option of hauling for other motor carriers. However, Spiro was not aware of claimant driving for any other company between March and June 2005.

¶ 27 Based on the foregoing evidence, the arbitrator awarded benefits. Relevant here, the arbitrator determined that the record contained some evidence indicative of an independent-contractor status, such as the method of payment, the lack of a dress code, and claimant's ownership of the tractor-trailer. Nevertheless, the arbitrator concluded that claimant ultimately established that he was respondent's employee on the date of the accident. In so finding, the arbitrator initially addressed the credibility of the parties, noting that, although claimant was argumentative and "reversed himself" when confronted with the Agreement, he was "credible overall." In contrast, the arbitrator concluded that all three of respondent's witnesses "exhibited some degree of bias." On the specific issue of the employment relationship, the arbitrator relied primarily on the level of control respondent exercised over claimant's work and the nature of claimant's work in relation to the general business of respondent. With respect to the issue of control, the arbitrator found that: (1) claimant drove exclusively for respondent; (2) claimant would have been subject to a number of conditions if he hauled for another entity; (3) respondent monitored the whereabouts of its drivers on its computer system; (4) claimant would be subject to reprisal for refusing a load; (5) respondent's hiring process required prequalification and participation in an orientation program; and (6) respondent had the right to disqualify a driver for safety reasons. The arbitrator also concluded that claimant owned the tractor-trailer "in name only" because, under the Agreement, respondent had exclusive possession, control, and use of the equipment for the duration of the Agreement and could, at its sole discretion, interchange the vehicle to other authorized carriers. A majority of the Commission affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Cook County confirmed the decision of the Commission. This appeal by respondent followed.

¶ 28 III. ANALYSIS

¶ 29 On appeal, respondent argues that the Commission's finding that an employment relationship existed between it and claimant at the time of claimant's accident is against the manifest weight of the evidence.

¶ 30 Whether a claimant is classified as an independent contractor or an employee is crucial, for it is the employment status of a claimant which determines whether he is entitled to benefits under the Act. *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309, 314 (1990); see also *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 174 (2007) (noting that an employment relationship is a prerequisite for an award of benefits under the Act). For purposes of the Act, the term "employee" should be broadly construed. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000). Nevertheless, the question of whether a claimant is an employee remains one of the most vexatious in the law of workers' compensation. *Roberson*, 225 Ill. 2d at 174. The difficulty arises from the fact-specific nature of the inquiry. *Roberson*, 225 Ill. 2d at 174. Notably, many jobs contain elements of both an employment and an independent-contractor relationship. *Kirkwood v. Industrial Comm'n*, 84 Ill. 2d 14, 20 (1981). Since there is no clear line of demarcation between the status of an employee and an independent contractor, no rule has been, or could be, adopted to govern all cases in this area. *Roberson*, 225 Ill. 2d at 174-75; *Kirkwood*, 84 Ill. 2d at 20.

¶ 31 To assist in determining whether a person is an employee, the supreme court has identified a number of factors. Among the factors cited by the supreme court are: (1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer compensates the person on an hourly basis; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment. *Roberson*, 225 Ill. 2d at 175. Another relevant factor is the nature of the work performed by the alleged employee in relation to the general business of the employer. *Roberson*, 225 Ill. 2d at 175; *Ware*, 318 Ill. App. 3d at 1122. The label the parties place on their relationship is also a consideration, although it is a factor of "lesser weight." *Ware*, 318 Ill. App. 3d at 1122. The significance of these factors rests on the totality of the circumstances, and no single factor is determinative. *Roberson*, 225 Ill. 2d at 175. Nevertheless, the right to control the work and the nature of the work are the two most important considerations. *Kirkwood*, 84 Ill. 2d at 21; *Ware*, 318 Ill. App. 3d at 1122.

¶ 32 The existence of an employment relationship is a question of fact for the Commission. *Ware*, 318 Ill. App. 3d at 1122. In resolving questions of fact, it is solely within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). We will overturn the Commission's resolution of a factual issue only if it is against the manifest weight of the evidence. *Ware*, 318 Ill. App. 3d at 1122. A factual finding is contrary to the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Freeman United Coal Mining Co. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (5th) 120564WC, ¶ 21. Consequently, when the evidence is "well balanced," it is the Commission's province to weigh the evidence and decide among competing inferences, and its decision will be upheld. *Roberson*, 225 Ill. 2d at 187; see also *Kirkwood*, 84 Ill. 2d at 20 ("[W]hen the facts of a particular case are susceptible to either interpretation, it is within the Industrial Commission's province to draw inferences and evaluate the credibility of the witnesses in arriving at a decision.").

¶ 33 We begin our analysis by addressing the right to control. Initially, we agree with the Commission that, while claimant owned the tractor-trailer he used to transport loads for respondent, claimant's ownership was in name only and the control respondent had over the equipment is indicative of an employment relationship. Significantly, the Agreement expressly provided that claimant's equipment was for respondent's "exclusive possession, control and use for the duration of [the] Agreement." While respondent purported to include this language in the Agreement solely to conform to federal regulations, it does not diminish the fact that respondent had the right to control claimant's activities. See *Ware*, 318 Ill. App. 3d at 1124 ("[T]he fact that [the employer] was acting to ensure compliance with federal regulations *** does not diminish the fact that it exercised control over [the employee]."). In this regard, we note that the Agreement allowed respondent, at its "sole discretion," to interchange the equipment respondent leased from claimant to other authorized carriers. Further, while respondent's witnesses testified that claimant was free to transport goods for other companies, it is undisputed that, between his date of hire and the date of the accident, claimant never actually hauled goods for any carrier other than respondent. More important, the evidence shows that claimant's ability to haul for another carrier was subject to a number of conditions imposed by respondent. According to Schaffer, to seek approval to transport goods for another company, the driver had to first notify respondent. Upon notification, respondent would contact the other carrier, ensure that there was "an agreement" between it and respondent, and conduct a credit check of the other carrier. The driver would then have to be "release[d]" by respondent to haul for the other carrier. That the other motor carrier had to have an "agreement" with respondent, the fact that a driver had to obtain a "release" from respondent to haul for another carrier, and respondent's right to interchange are strong indications that respondent had the right to control claimant's activities.

¶ 34 Other indicia of control evincing an employment relationship include the following. Prior to hire, respondent subjected prospective drivers to a "pre-qualification" process, which involved completing an application, undergoing a medical examination, and submitting to a drug test. Once hired, respondent required claimant to attend an orientation program. Further, respondent required claimant to display its name on his tractor while working for respondent, maintain the equipment in clean appearance, and inspect the equipment prior to each trip. The Agreement required claimant to notify respondent if an accident occurred, and respondent restricted the number of hours claimant could drive. While some of these requirements were mandated by federal regulations, as noted earlier, this does not diminish the fact that respondent had control over claimant's activities. See *Ware*, 318 Ill. App. 3d at 1124.

¶ 35 With respect to other indicia of control, we note claimant's testimony that Spiro called him every two hours to check on his location, that Spiro provided him specific instructions to the address he was delivering on the night of the accident, and that respondent imposed delivery deadlines. Claimant also indicated that he would not "dare" refuse a load or he would face consequences such as termination or not being allowed to haul for respondent for a period of time. Respondent's witnesses disputed claimant's testimony that respondent regularly monitored the location of its drivers, required its drivers to take a particular route when making a delivery, dictated delivery times, and punished drivers for rejecting a job. We also note that there was conflicting evidence regarding whether claimant was responsible for all costs and expenses associated with operating the tractor-trailer. In this regard, we noted

that the Agreement provided that claimant was responsible for the operating expenses. However, claimant testified that respondent reimbursed him for the cost of fuel, which is undoubtedly one of the most expensive operating expenses. In any event, this dueling evidence merely created a conflict for the Commission to resolve. See *Hosteny*, 397 Ill. App. 3d at 674 (noting that it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicts in the evidence). The arbitrator concluded that although claimant was occasionally argumentative at the arbitration hearing and changed his testimony when confronted with the Agreement, he was "credible overall." The arbitrator also found that all three of respondent's witnesses exhibited some degree of bias. For instance, the arbitrator noted that Ramos was a long-time employee of respondent and testified in "a somewhat robotic and 'coached' manner as to the driver application and termination process." The arbitrator also pointed out that, although Schaffer has extensive experience in the trucking industry, he did not work for respondent during claimant's tenure. Finally, the arbitrator noted that Spiro "admitted to a fairly lengthy and ongoing relationship" with respondent. Ultimately, a majority of the Commission affirmed and adopted the decision of the arbitrator, including her credibility assessment. Thus, to the extent that claimant's testimony conflicted with that of respondent's three witnesses, it was within the prerogative of the Commission to credit claimant's testimony over that of Ramos, Schaffer, and Spiro. See *Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC, ¶ 33.

¶ 36 Of course, there was also control-related evidence suggesting independent contractor status. For example, respondent did not impose a dress code and it did not require claimant to shave or wear his hair in a particular manner. In addition, respondent exercised no control over the type of fuel claimant purchased or where he parked, and respondent did not instruct drivers to clean their equipment on a specified schedule. However, where, as here, there is conflicting evidence regarding a particular factor, we defer to the Commission's findings. *Roberson*, 225 Ill. 2d at 187; *Kirkwood*, 84 Ill. 2d at 20. Accordingly, we agree with the Commission that the indicia of control point to an employment relationship.

¶ 37 Next, we examine the nature of the work performed by claimant in relation to the general business of respondent. "Regarding this factor, our supreme court noted 'because the theory of workmen's compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act.' " *Ware*, 318 Ill. App. 3d at 1124 (quoting *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71 (1982)). Respondent's business was transporting machinery and metal products between sellers and buyers. Claimant's job was transporting goods for respondent's customers. Although Schaffer testified that claimant could carry freight for others, his ability to do so was subject to various conditions, and the evidence clearly demonstrates that claimant hauled exclusively for respondent between his date of hire and the date of the accident. Accordingly, we find that this factor points to an employment relationship.

¶ 38 With respect to the remaining factors, there are aspects of both an employment relationship and independent contractor status. Pointing to an independent contractor relationship is the fact that claimant was paid a per-job commission rather than on an hourly

basis, neither income nor social security taxes were withheld from claimant's payments, respondent did not provide any equipment or tools, and the Agreement referred to claimant as an independent contractor. Pointing to an employment relationship is the right to discharge. As noted above, here two clauses of the Agreement related to termination. One of those provisions provided that either party could terminate the Agreement for any reason at any time after 30 days after its effective date. This is indicative of an employment arrangement. *Ware*, 318 Ill. App. 3d at 1125-26 (noting that an at-will employment arrangement, which generally permits termination for any reason, is suggestive of an employment relationship).

¶ 39 In short, the foregoing evidence establishes that there are factors that weigh both in favor of and against a finding that claimant was an employee of respondent. However, it was the Commission's province to determine claimant's employment status. See *Roberson*, 225 Ill. 2d at 186-87; *Kirkwood*, 84 Ill. 2d at 20; *Earley*, 197 Ill. App. 3d at 318. Ultimately, the Commission concluded that an employment relationship existed between claimant and respondent. Based on an analysis of the relevant factors, and in light of the totality of the circumstances, we find that a conclusion opposite that of the Commission is not clearly apparent. Thus, we reject respondent's argument that the Commission's determination that an employment relationship existed between respondent and claimant at the time of the latter's injury is against the manifest weight of the evidence.

¶ 40 IV. CONCLUSION

¶ 41 For the reasons set forth above, we affirm the judgment of the circuit court of Cook County, which confirmed the decision of the Commission.

¶ 42 Affirmed.

¶ 43 PRESIDING JUSTICE HOLDRIDGE, dissenting.

¶ 44 I dissent. In my view, the manifest weight of the evidence in this case establishes that the claimant was an independent contractor, not an employee. The Commission's finding to the contrary (and the majority's affirmance of that finding) demonstrate that, under our court's current interpretation of the law, it has become virtually impossible for a trucking company and an independent driver/lessor to structure their relationship in a way that reliably precludes a finding of an employment relationship, even if that is the clear and expressed intent of both parties. Under our court's current approach, the Commission can almost always find an employment relationship and, once the Commission had made such a finding, we will affirm the Commission's determination so long as there is *any* evidence that even arguably suggests an employment relationship. Thus, we will defer to the Commission's finding of an employment relationship even if the weight of the evidence supports the opposite conclusion and even if the "evidence" in favor of an employment relationship consists primarily of acts the trucking company was required to perform by law. I do not believe that this expansive definition of "employment" or this undue deference to the Commission is mandated by Illinois law. In any event, I find our current approach to be unwise, unsound, and unfair. I write separately to suggest a different way forward.

¶ 45 In this case, the overwhelming weight of the evidence suggests that the claimant was an independent contractor. The claimant owned his tractor-trailer and leased it to the respondent.

The respondent did not provide the claimant with any tools or equipment and did not withhold income taxes on the claimant's behalf. The respondent did not control the work performed by the claimant by specifying the routes to be taken or by requiring the claimant to wear a uniform, shave, or wear his hair in any particular manner. Any required delivery times were established by the customers, not the respondent. Moreover, the written Agreement between the parties contains several hallmarks of an independent contractor relationship. For example, the agreement provided that: (1) the claimant would be compensated a specified percentage of the transportation revenue rather than paid a salary; (2) the claimant was responsible for the cost of the equipment, including (but not limited to) necessary licenses and permits, fuel, oil, tires, highway use taxes, weight taxes, fuel taxes, and toll charges; (3) the claimant was required to acquire "bobtail" insurance to cover the equipment when it was not operated in respondent's service; and (4) the claimant could drive for other carriers, subject to a credit check by the respondent.

¶ 46 In my view, the Commission's finding of an employment relationship is flawed in several respects. First, there was very little evidence suggesting that the respondent controlled the work performed by the claimant. The Commission found that the claimant owned the tractor-trailer "in name only" because, under the parties' Agreement, the respondent had "exclusive possession, control, and use" of the equipment for the duration of the Agreement. The majority agreed with this finding. However, as the Agreement states, the respondent was required by federal law to include this exclusivity provision in the Agreement. In fact, the Agreement explicitly states that this provision was included "*solely* to conform with" federal regulations and "shall not be used for any other purposes, *including any attempt to classify [claimant] as an employee of [respondent].*" (Emphases added.) Most of the other acts that purportedly demonstrate the respondent's control over the claimant's work in this case (*e.g.*, the respondent's "pre-qualification" process, its monitoring of the claimant's hours and driving status, and its requirement that the claimant inspect his truck) were also mandated by federal law. Because the respondent was required to perform these actions by law, I believe that they should not be taken as evidence of control by the respondent.

¶ 47 As the majority notes, we have previously ruled that a trucking company's compliance with regulations that require it to exercise control over a driver may be taken as evidence of the company's control, regardless of the company's motivations in doing so. See, *e.g.*, *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1124 (2000) ("[t]he fact that [the company] was acting to ensure compliance with federal regulations *** does not diminish the fact that it exercised control over [the claimant]"); see also *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309, 315 (1990). However, our supreme court has cautioned that a trucking company's compliance with such federal regulations, standing alone, does not compel a finding of an employment relationship. *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 177-79 (2007). Although compliance with such regulations is mandatory, "the federal requirements are not so radically intrusive as to absolve lessors *** of otherwise existing obligations under *** contracts allocating financial risk among private parties." (Emphasis and internal quotation marks omitted.) *Id.* at 178. "Freedom of contract requires that parties may structure their relationship as they see fit, provided they do not neglect the requirements of federal law." *Id.* Indeed, the governing regulations themselves make clear that a trucking company's compliance with the written lease requirements of the Federal Motor Carrier Safety

Regulations does not resolve the question of a driver's employment status. Section 376.12(c)(4) of those regulations provides:

> "Nothing in the provisions required by paragraph (c)(1) of this section[1] is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee. An independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements." 49 C.F.R. § 376.12(c)(4) (2005).

Accordingly, our supreme court has ruled that a trucking company's compliance with federal regulations is "merely a factor that may be considered in a common law analysis of whether a driver is an employee of [the] trucking company." *Roberson*, 225 Ill. 2d at 178. It should not be given undue weight or deemed dispositive particularly where, as here, there is ample evidence (including a written contract) suggesting that the parties intended the driver to be an independent contractor. See *id.* at 177-79.

¶ 48 Courts in other jurisdictions have taken an even stricter approach. These courts have held, as a matter of law, that a trucking company's compliance with federal regulations should *not* be considered evidence of the company's control over a driver's work for purposes of determining the driver's employment status. For example, in *Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board*, 762 A.2d 328 (Pa. 2000), a Pennsylvania Workers' Compensation Judge found that a trucking company had exercised sufficient control over a driver's work to give rise to an employment relationship where, *inter alia*, the parties signed a Contractor Operating Agreement providing that the company "took exclusive control" over the driver's tractor-trailer and the company performed other actions required by federal regulations. The Workers' Compensation Appeals Board and the trial court affirmed. However, the Supreme Court of Pennsylvania reversed. The court ruled that "[b]ecause a motor carrier has no ability to negotiate aspects of the operation of leased equipment that are regulated, these factors may not be considered in resolving whether an owner-operator is an independent contractor or employee." *Id.* at 334. The court reasoned that "[n]either party has bargaining power, or the ability to control the work to be done, when dealing with matters subject to regulation." *Id.* at 334-35. Moreover, the court ruled that "[t]he obligations imposed by law upon a motor carrier *** when leasing equipment from an owner-operator are not probative of the question of whether the carrier exercises control over the manner of the work to be performed by the owner-operator" because "[t]he regulations reflect the control of the government, not the motor carrier." *Id.* at 336.

¶ 49 Other courts have reached the same conclusion. See, *e.g.*, *Hernandez v. Triple Ell Transport, Inc.*, 175 P.3d 199, 205 (Idaho 2007) ("[Respondent trucking company's] adherence to federal law is no evidence of its control over [claimant driver]. The federal government–not [respondent]–exerted control over [claimant]."); *National Trailer Convoy, Inc. v. Employment Security Agency*, 360 P.2d 994, 997 (Idaho 1961) ("Requirements that truck and driver meet Interstate Commerce Commission standards *** point toward compliance with governmental regulations, and are not indicia of an employer-employee

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[1]Section 376.12(c)(1) provides that "[t]he lease shall provide that the authorized carrier lessee shall have exclusive possession, control, and use of the equipment for the duration of the lease. The lease shall further provide that the authorized carrier lessee shall assume complete responsibility for the operation of the equipment for the duration of the lease." 49 C.F.R. § 376.12(c)(1) (2005).

relationship."). Similarly, in an appeal of a National Labor Relations Board decision finding that a trucking company committed an unfair labor practice, the United States Court of Appeal for the District of Columbia Circuit ruled that:

> "[R]estrictions upon a worker's manner and means of performance that spring from government regulation (rather than company initiatives) do not necessarily support a conclusion of employment status. [Citation.] Indeed, employer efforts to ensure the worker's compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status. [T]he employer cannot evade the law *** and in requiring compliance with the law he is not controlling the driver. It is the law that controls the driver. [Citation.]" (Internal quotation marks omitted.) *North American Van Lines, Inc. v. National Labor Relations Board*, 869 F.2d 596, 599 (D.C. Cir. 1989).

¶ 50 I find these decisions to be well reasoned. A trucking company cannot choose to disregard or negotiate its way around the requirements of federal law. These requirements are mandatory and binding upon the company and the driver alike. Accordingly, a company's compliance with regulations that require it to exercise control over a driver do not evidence the *company's* control over the driver. Rather, they evidence the *government's* control over the both the driver and the company. As such, they should not be considered evidence of the company's control for purposes of determining the driver's status as an employee or an independent contractor.

¶ 51 I acknowledge that our supreme court has not adopted these sound principles. I hope that it will do so in the near future. However, even under our supreme court's current approach, the evidence in this case does not establish that the respondent controlled the claimant's work. The vast majority of acts that the majority and the Commission have relied upon to establish the respondent's control were mandated by federal law.[2] The Commission and the majority have placed undue emphasis on these factors and ignored the overwhelming weight of the evidence suggesting an opposite conclusion. For example, the Commission and the majority declined to enforce the plain terms of the parties' written Agreement which stated that: (1) the claimant was an independent contractor; and (2) the respondent's compliance with a federal regulation requiring it to assert exclusive control over the claimant's

[2]In concluding that the claimant was an employee, the Commission relied upon certain facts aside from the respondent's compliance with federal regulations. However, several of these facts are either irrelevant or highly suspect. For example, the Commission noted that the claimant drove exclusively for the respondent between his date of hire and the date of the accident. However, this proves very little, because the accident occurred only two months after the claimant was hired. Moreover, the Commission relied on the claimant's testimony that he was not free to drive for other carriers and that he "dared not" refuse loads from the respondent for fear of adverse consequences. These claims were refuted by several of the respondent's witnesses. Although it is for the Commission to resolve conflicts in the evidence and determine the credibility of witnesses, the Commission's credibility determinations in this case were inexplicable. The Commission found the claimant to be more credible than the respondent's witnesses (whom the Commission assumed were "biased") even though: (1) it acknowledged that the claimant was "argumentative" and that he "reversed himself" when confronted with the Agreement; and (2) as the dissenting Commissioner noted, there is no reason to suspect that the respondent's witnesses were any more "biased" than the claimant, who stood to gain financially from a finding that he was an employee.

equipment could not be taken as evidence of an employment relationship. Even assuming that the respondent's compliance with federal regulations has some minimal probative value under *Roberson*, this does not change the fact that the manifest weight of the evidence established that the claimant was an independent contractor rather than an employee. Thus, under *Roberson*, the Commission's decision should be overturned.

¶ 52 In support of its holding, the majority also stresses the connection between the nature of the work performed by the claimant and the nature of the respondent's business. *Supra* ¶ 38. The majority concludes that, because the respondent's business was transporting machinery and metal products and the claimant transported the same type of goods exclusively for the respondent and its customers, this factor weighs in favor of finding an employment relationship. *Id.* I disagree. As the majority notes, our supreme court has ruled that:

> "because the theory of workmen's compensation legislation is that the cost of industrial accidents should be borne by the consumer as a part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71 (1982).

See also *Ware*, 318 Ill. App. 3d at 1124. Applying this rule, our supreme court and our appellate court have repeatedly found an employment relationship where, *inter alia*, the claimant performs work that is "an integral part of" or is "intimately related to" the respondent's business. *Ware*, 318 Ill. App. 3d at 1125.

¶ 53 I question the logic of these decisions. The purpose of finding an employment relationship under such circumstances is, purportedly, to ensure that that "the cost of industrial accidents [is] borne by the consumer as a part of the cost of the product." *Ragler Motor Sales*, 93 Ill. 2d at 71. However, that result could be achieved just as effectively without finding an employment relationship. A driver may obtain his own workers' compensation insurance as an independent contractor. Presumably, the cost of such insurance would be reflected in the price that he charges the trucking company for his services and then passed on to the company's customers. Thus, the cost of the accident will be "borne by the [trucking company's] consumers as part of the cost of the product" regardless of whether the claimant is deemed an employee or an independent contractor. Moreover, under the rule currently applied by our courts, this factor will *always* cut in favor of finding an employment relationship in cases involving truck drivers because the driver's work will always be "an integral part of" the trucking company's business. Because of the importance that our courts attach to this factor, this stacks the deck heavily in favor of an employment relationship in every instance. Thus, in my view, courts should stop considering this factor in trucking industry cases like the case at bar.

¶ 54 One final point bears mentioning. As I mentioned above, I am concerned that we are applying an overly deferential standard of review to Commission determinations regarding a claimant's employment status. In this case, the majority appears to take the position that we must affirm the Commission's finding of an employment relationship if there is *any* conflicting evidence in the record. *E.g.*, *supra* ¶ 37. That is not what manifest weight of the evidence review requires. It is true that, under manifest weight review, we must affirm the Commission's decision if there is "sufficient evidence" to support it, and we will overturn the

decision only if "an opposite conclusion [is] clearly apparent." *Dig Right In Landscaping v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 130410WC, ¶ 27. However, although we are reluctant to set aside the Commission's decision on a factual question, "we will not hesitate to do so when the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion." *Id.*; *Montgomery Elevator Co. v. Industrial Comm'n*, 244 Ill. App. 3d 563, 567 (1993). Thus, we need not affirm a Commission's decision merely because there is *some* evidence, however slight, that arguably supports the Commission's decision. Even if some such evidence exists, we should reverse if "the clearly evident, plain, and indisputable weight of the evidence compels an opposite conclusion."

¶ 55 The same rule applies to Commission determinations of a claimant's employment status. We must uphold the Commission's decision in such cases when the evidence is "well balanced" (*Roberson*, 225 Ill. 2d at 187), *i.e.*, "when the facts of a particular case are susceptible to either interpretation" (internal quotation marks omitted) (*Earley*, 197 Ill. App. 3d at 314). However, we may overturn the Commission's decision where, as here, the opposite conclusion is "clearly apparent," even if there is some small amount of evidence that arguably supports the Commission's decision. We should not affirm where the overwhelming weight of the evidence supports the opposite conclusion.

¶ 56 A contrary rule would unduly restrict our review by according greater deference to the Commission than is required under manifest weight review. It would also make it virtually impossible for a party to obtain reversal of a Commission decision regarding a claimant's employment status.

1 of 100 DOCUMENTS

RADOMIR CVETKOVSKI, PETITIONER, v. STEEL & MACHINERY TRANSPORTATION, INC., RESPONDENT

NO. 05WC 43637

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

13 IWCC 275; 2013 Ill. Wrk. Comp. LEXIS 248

March 19, 2013

JUDGES: Charles J. DeVriendt; Yolaine Dauphin

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issues of accident, employer-employee relationship and being advised of the facts and law, affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 3, 2012 is hereby affirmed and adopted.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT:

CORRECTED ARBITRATION [*2] **DECISION**

Radomir Cvetkovski
Employee/Petitioner

v.

Steel & Machinery Transportation, Inc.
Employer/Respondent

Case # **05 WC 43637**

Consolidated cases:

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **November 30, 2011 and December 20, 2011**. 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. [X] Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?
B. [X] Was there an employee-employer relationship?
C. [X] Did an accident occur that arose out of and in the course of Petitioner's employment by Respondent?
E. [X] Was timely notice of the accident given to Respondent?
F. [X] Is Petitioner's current condition of ill-being causally related to the accident?
G. [X] What were Petitioner's earnings?
J. [X] Were the medical services that were provided to Petitioner reasonable [*3] and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?
K. [X] What temporary benefits are in dispute?
[X] TTD
L. [X] What is the nature and extent of the injury?

FINDINGS

On **June 13, 2005,** 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 accidental injury in the course of and arising out of employment.

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

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

Based on Respondent's oral stipulation, which the Arbitrator views as binding under *Walker v. Industrial Commission, 345 Ill.App.3d 1084 (4th Dist. 2004),* Petitioner's earnings were sufficient to qualify him to receive temporary total disability and permanency benefits at the applicable maximum weekly rate. In this case, the applicable maximum weekly rate for both TTD and permanency is $ 1,051.99.

On the date of the alleged accident, Petitioner was **34** [*4] years of age, ***single*** with **0** dependent children.

Petitioner ***has not*** received all reasonable and necessary medical services.

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

Respondent shall be given a credit of $ **0.00** for TTD, $ **0.00** for TPD, $ **0.00** for maintenance, and $ **0.00** for other benefits, for a total credit of $ **0.00**.

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

ORDER

RESPONDENT SHALL PAY PETITIONER TEMPORARY TOTAL DISABILITY BENEFITS AT THE RATE OF $ 1,051.99 PER WEEK FROM JUNE 14, 2005 THROUGH FEBRUARY 13, 2006, A PERIOD OF 35 WEEKS, AS PROVIDED IN SECTION 8(B) OF THE ACT.

RESPONDENT SHALL PAY PETITIONER MEDICAL EXPENSES IN THE AMOUNT OF $ 24,907.65 (PX 10), WITH THOSE EXPENSES THAT STEM FROM TREATMENT PROVIDED ON OR AFTER FEBRUARY 1, 2006 SUBJECT TO THE STATUTORY FEE SCHEDULE.

RESPONDENT SHALL PAY PETITIONER PERMANENT PARTIAL DISABILITY BENEFITS AT THE RATE OF **$ 1,051.99** PER WEEK FOR A PERIOD OF 200 WEEKS (BASED ON THE DATE OF ACCIDENT, 6/13/05, AND PETITIONER'S BELOW THE KNEE AMPUTATION) BECAUSE [*5] THE INJURIES SUSTAINED RESULTED IN 100% LOSS OF USE OF PETITIONER'S LEFT LEG, AS PROVIDED IN SECTION 8(E)(12) OF THE ACT.

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

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

March 26, 2012

Date

IWCC Arb.Dec p. 2; **05 WC 43637**

Radomir Cvetkovski v. Steel & Machinery Transportation, Inc.
05 WC 43637

ARBITRATOR'S FINDINGS OF FACT

The central issue in this case is whether an employment relationship existed between Petitioner and Respondent as of June 13, 2005, the date on which Petitioner suffered a traumatic amputation of his lower left leg in a motor vehicle accident. Most of the remaining issues are also technically in dispute but, [*6] at the initial hearing, Respondent clarified that the dispute as to those issues is premised on its claim that Petitioner was an independent contractor. T. 11/30/11 at 6-8.

Petitioner, a truck driver who was born on May 14, 1971, testified through an interpreter.

Petitioner testified he was driving a tractor-trailer in Chicago, Illinois, early in the morning on Monday, June 13, 2005, while transporting a load for Respondent, when he was involved in an accident. The accident occurred on the Dan Ryan at 63rd. He lost his lower left leg in the accident. After the accident, he was transported to Cook County Hospital, where he underwent surgery to remove additional bone from his leg.

Petitioner testified that Respondent's business consists of transporting steel and machinery. Respondent does not manufacture any goods. Petitioner carried loads for Respondent throughout the Midwest.

Petitioner testified that, to the best of his recollection, he began driving for Respondent a little more than two months before his accident. Petitioner testified he drove exclusively for Respondent between his hiring and his accident. Before Petitioner started driving for Respondent, he drove a truck for other [*7] companies in his native Macedonia and the United States. He spent five and a half years driving a truck in Europe. After he came to the United States, he underwent about ten days of training before obtaining his CDL license.

Petitioner testified he completed an application prior to being hired by Respondent. During the first week of his employment, he met with Josephine Ramos, Respondent's safety representative. At this meeting, Ramos and he discussed "everything concerning . . . the truck, everything about safety and avoiding accidents." Only Ramos and Petitioner were present at this meeting.

Petitioner owned the tractor-trailer he drove for Respondent. He had to take this tractor-trailer for inspection in order to drive for Respondent. He had to keep inspection and maintenance records to meet federal regulations. He was also required to post Respondent's name on the side of the tractor-trailer. Respondent's name was posted on the side of the tractor-trailer at the time of the accident.

Petitioner testified Respondent provided liability insurance to cover the tractor-trailer when he transported loads. When he was not transporting loads, he was required to provide his own insurance. [*8]

Petitioner testified he obtained work assignments from Respondent through a dispatcher named "Spiro." Spiro speaks Macedonian, Petitioner's native language. Spiro would provide Petitioner with "the numbers for the pick-up." Petitioner would then drive to the designated location, pick up a load of steel coils or bars and travel on to the delivery destination. Once Petitioner completed a delivery and was "empty," he would call Spiro again to obtain a new assignment. With respect to the frequency of such calls, Petitioner testified as follows: "it may happen three or five times a day that I would need to call the company, for instance, when I needed to report if I am empty, if I delivered." Spiro typically assigned only one trip at a time.

Petitioner described his interaction with Spiro as follows:

> "Spiro would call us, in the beginning of the week, and when I deliver the first load, I'm expected to call him so that he can then direct me to the next load. So but other than that, every two hours it is his responsibility to check on my location, find out where I am and what's going on."

Petitioner testified it was not up to him to select which loads he wanted to transport. Petitioner [*9] also testified he never declined a load:

> Q. If you did refuse to pick up a load, were there any consequences to you?
>
> A. I just wouldn't refuse it, so I did not dare.
>
> Q. Okay, but were there any consequences?
>
> A. Yes, there might be consequence [sic] such as me losing my job or not getting any loads for like two days."

When Petitioner picked up a load for Respondent, he would say, "I'm the driver for SMT [the acronym by which Respondent was known]."

Petitioner testified Respondent provided him with a general time frame for each pick-up. Each load had a delivery deadline: "for instance, if I was to pick up a load today, today would be the delivery day, if possible." If Petitioner delivered a load late, there would be a consequence, such as a late charge. Petitioner testified he received a bill for a late charge after the accident.

Petitioner testified that Respondent paid him weekly, on Thursday or Friday, via a company check.

On June 13, 2005, Petitioner picked up a load at Steel Dynamics, a company located in the Fort Wayne/Butler area in Indiana. Petitioner was supposed to deliver this load to a location in Wisconsin that was approximately twenty miles south of Milwaukee. [*10]

Petitioner testified that, while he did not notify Respondent of his accident, he "believe[d] they knew [of the accident] that evening." Initially, Petitioner testified no one from Respondent came to see him at the hospital. Petitioner then clarified that he later learned Spiro came to see him, although he had no recollection of this visit. About two months after the accident, Petitioner received notice of a "late load" charge of $ 450 or $ 550. This charge stemmed from the delivery he was making at the time of the accident. He called Respondent to discuss this charge.

Petitioner testified he has experienced "non-stop" problems with his left leg since the accident. After the accident, he underwent treatment at three hospitals: Cook County, St. Anthony and Oak Forest. He received a prosthetic device from Merrick and saw two doctors, including Dr. Owens. He regularly develops rashes on his leg and underwent surgery on his leg as recently as ten days prior to the hearing.

Under cross-examination, Petitioner initially testified he did not enter into an "independent contractor agreement" with Respondent. After being shown this agreement (RX 2), however, Petitioner changed his testimony [*11] and identified his signature on page nine. Petitioner agreed that paragraph 20 of RX 2 states: "you have read the entire agreement." Petitioner testified he understands English and can read and write in English. Petitioner acknowledged having entered into RX 2 with Respondent on March 24, 2005. This date appears on page nine of RX 2, next to his sig-

nature. Petitioner denied transporting any loads for Respondent before March 24, 2005. Pursuant to RX 2, Respondent provided liability insurance but this insurance "applied" only when Petitioner was carrying a load for Respondent. When Petitioner was not carrying a load, the truck was covered by "bobtail" insurance.

Petitioner initially denied having to obtain workers' compensation coverage pursuant to RX 2. Respondent's counsel then showed Petitioner a one-page document (RX 4) stating Petitioner was responsible for providing both "bobtail" and workers' compensation coverage. Petitioner acknowledged having signed RX 4 but testified he did not read RX 4.

When asked whether Respondent leased his tractor-trailer pursuant to RX 2, Petitioner initially testified he did understand the term "lease." Petitioner subsequently acknowledged having [*12] rented an apartment and thus being familiar with the concept of a lease. Petitioner then acknowledged Respondent leased his tractor-trailer.

Petitioner testified he could not use another driver to transport a load for Respondent. He had to transport the load himself.

Petitioner testified that Respondent paid him 78% of the gross revenue of each load. Respondent kept the remaining 22%. Petitioner reiterated he received a check from Respondent once a week.

Petitioner acknowledged signing RX 3, a document stating settlement is payable on delivery. When Petitioner signed RX 3, he checked a box indicating he wanted to be paid via a "ComData" card rather than by check. However, Respondent paid him via checks. RX 4 incorporates a photocopy of his "ComData" card.

Petitioner reiterated he has a commercial driver's license, or "CDL." He had to undergo training to obtain this license. Respondent did not provide this training. Petitioner acknowledged he needed to be able to understand English in order to obtain a CDL.

Petitioner testified that, on June 10, 2005, a Friday, he picked up a load in Butler, Indiana, and then went home for the weekend. His home is in Crown Point, Indiana. He left his [*13] home at 12:45 AM on Monday, June 13, 2005. He kept his tractor-trailer at a truck stop over the weekend. Respondent did not direct him where to store his truck. He chose the departure time of 12:45 AM. Respondent did not instruct him to leave home at that time.

Petitioner testified he receives a bill of lading for each load he delivers. Petitioner testified the bill of lading controls, regardless of any other delivery instructions he might receive. When he is loaded, he has to have a bill of lading to show he is allowed to transport the load. If a bill of lading pays him extra to wait, that payment is referred to as an "accessorial charge." He would only receive 78% of any such charge. Petitioner identified RX 8 as the bill of lading for the load he was instructed to deliver on June 13, 2005. RX8 states that deliveries are accepted between 7:30 AM and 3:30 PM, Monday through Friday, with "no appointment required."

Petitioner testified that, when he called in for a load, it was not at his own discretion. He stated: "I am forced to take loads. I must." As an owner-operator, he was not free to take loads for other companies. He had to purchase fuel and pay tolls during the time he drove [*14] for Respondent. He was responsible for truck repairs as well as for plates and licenses.

Petitioner testified that, when he first arrived at Respondent, he had to complete a "driver qualification" form and undergo a medical examination and drug screening. He had to pay for the medical examination. He did not know who paid for the drug screening.

Petitioner testified he was not sure whether Spiro is Respondent's employee. Spiro is not an owner-operator.

Petitioner acknowledged he was not required to wear a uniform when he drove for Respondent.

On April 6, 2011, Petitioner saw Dr. Virkus for a Section 12 examination at Respondent's request. Petitioner acknowledged telling Dr. Virkus he was driving loads for a company called "Kaplan." Petitioner still owns and operates his truck.

Petitioner denied filing a lawsuit against a construction company in connection with his June 13, 2005 accident. Petitioner acknowledged receiving a settlement of approximately $ 60,000 in connection with the accident but denied receiving this settlement from a construction company.

When asked whether Respondent could have asked him to pick up a load "anywhere," Petitioner responded, "it's possible but it didn't [*15] happen." When asked whether he preferred to drive locally during the period he drove for Respondent, Petitioner responded, "I don't understand. No."

Petitioner testified Spiro was the only Respondent dispatcher "for him."

Petitioner testified it was only after his accident that a "late charge" was levied against him.

On redirect, Petitioner testified no one read RX 2 to him or explained the contents of RX 2 to him in his native language. Spiro put RX 2 in front of him at Respondent's premises. Spiro is the individual who introduced him to Respondent.

Petitioner clarified Respondent paid his fuel charges via the "ComData" card and paid his load settlements by check.

Petitioner reiterated he drove solely for Respondent between April and June of 2005. He did not allow anyone else to drive his truck for him during this period.

In response to questions about RX 8, the bill of lading, Petitioner testified Spiro specifically told him he had to deliver this load at 7:30 AM. He always and exclusively communicated with Spiro about the loads he transported for Respondent.

Petitioner testified RX 12 is not in his handwriting. He does not know who wrote RX 12.

Petitioner testified he answered [*16] Dr. Virtus's questions to the best of his ability.

Under re-cross, Petitioner acknowledged he did not ask anyone to help him understand the contents of RX 2. He signed a statement acknowledging he understood RX 2.

Petitioner testified Spiro instructed him to take the Dan Ryan expressway on June 13, 2005.

Petitioner offered his treatment records and bills (PX 1-PX 10) into evidence. Respondent did not object to any of Petitioner's exhibits. An orthopedic consultation note from Cook County (now John Stroger) Hospital dated June 13, 2005 reflects Petitioner's left leg was traumatically amputated just above the ankle. X-rays showed a "traumatic amputation of the lower leg in the region of the mid tibia and fibula." Petitioner was started on Morphine for pain. On June 13, 2005, Dr. Kapotas performed surgery consisting of "revision below-the-knee amputation left lower extremity." A consultation note from the same hospital dated June 15, 2005 reflects that Petitioner "was driving a trailer truck carrying steel rolls . . .from Gary to Wisconsin on I-57" on June 13, 2005, when he hit a concrete wall at about 2:30 AM and was ejected from his truck. The note also reflects Petitioner had worked [*17] "as a truck driver for 'Steel Machinery Transport' since last 3 months."

On June 14, 2005, Petitioner underwent a psychiatric evaluation, with the evaluating psychiatrist noting a flat affect. On June 15, 2005, Petitioner underwent a physical therapy evaluation, with the therapist describing him as speaking "min/mod English." Petitioner was discharged on June 17, 2005, with instructions to continue taking Morphine and return to the prosthetic clinic. PX 1.

The records reflect Petitioner returned to Fantus Clinic on several occasions thereafter. On June 29, 2005, a physical therapist noted Petitioner was using a walker and remained upset about the loss of his leg. On June 30, 2005, a physician removed sutures and started Petitioner on Elavil and Tylenol 3. On July 8, 2005, a physician described Petitioner's stump as "well healed" and instructed Petitioner to follow up at Oak Forest Hospital in one month. PX 1.

On August 29, 2005, Ed Roman of Merrick-Hopkins Prosthetics fit Petitioner for a prosthesis. Roman noted the foot, liner and 10% of the lock were donated by several manufacturers.

On September 1, 2005, Petitioner went to the prosthetic clinic at Oak Forest Hospital and began [*18] undergoing training in the use of the prosthesis. By September 16, 2005, Petitioner was able to walk with his prosthesis for four to five hours daily. PX 2.

On October 17, 2005, Petitioner fell at home, landing on the edge of his stump. Petitioner went to the Emergency Room at St. Anthony Hospital, where Dr. Librandi ordered X-rays and prescribed Tylenol # 3 for pain. The X-rays showed no acute abnormalities. Dr. Librandi directed Petitioner to keep his prosthesis off and rely on crutches until he could be seen by his primary care doctor. PX 9.

On December 15, 2005, Ed Roman noted shrinkage and indicated Petitioner probably required a new socket.

In April of 2007, Petitioner developed an abscess in the popliteal region of his left leg. Petitioner went to the Emergency Room at St. Anthony Hospital and underwent an incision and drainage. Petitioner was started on antibiotics.

Petitioner was admitted to St. Anthony Hospital on April 17, 2007 for further evaluation of the abscess, with the admitting physician, Dr. Schwartz, noting Dr. Vuckovic acted as an interpreter. X-rays were negative for osteomyelitis. On April 17, 2007, Dr. Safavi recommended Petitioner continue antibiotic therapy. [*19] Petitioner was discharged from the hospital on April 19, 2007. PX 9.

Petitioner's outstanding medical bills total $ 24,907.65. PX 10.

Respondent called three witnesses: Josephine Ramos, Bert Schaffer and Spiro Krlevski.

Ramos testified she has been employed as Respondent's safety director for sixteen years. Her duties include "qualifying" drivers and monitoring maintenance files. Respondent transports steel products from sellers to purchasers. In order to accomplish this, Respondent qualifies drivers and leases on equipment. Respondent does not own or operate any trailers. Respondent is required, pursuant to Department of Transportation regulations, to monitor the equipment it leases.

Ramos described Respondent's driver "pre-qualification" process in detail. Any driver who applies to haul loads for Respondent must submit to a "pre-qualification" drug test. Respondent also runs a DMV search on any applicant and reviews the applicant's past employment. Two members of Ramos's staff review this paperwork.

Ramos testified she knows Petitioner and is aware of his accident and claim. She appeared at the hearing of her own free will and did not receive any money in exchange for her testimony. [*20] She has no ownership interest in Respondent and no financial interest in the outcome of Petitioner's claim. She first met Petitioner on March 24, 2005, at which time Petitioner completed an application. Petitioner paid for his own drug screening. The screening was negative. She verified Petitioner's past driving experience and noted he met DMV approval. Once Petitioner was "approved," she conducted an orientation.

Ramos identified RX Group Exhibit 1 as a collection of documents concerning Petitioner's "qualification" process.

Ramos testified she knows "Spiro." Spiro is an "independent agent" who acts as a dispatcher for Respondent. An owner-operator calls a dispatcher when he wants to transport a load. An owner-operator is not required to call in on a daily basis. Respondent has its own dispatch department. If an independent agent such as Spiro does not have an available load, an owner-operator can call Respondent's dispatch. Petitioner was free to dispatch through Spiro or Respondent's dispatch department.

Ramos testified she is familiar with settlement payments. Once an owner-operator delivers a load and brings in his log sheets and proof of delivery to Respondent, he can be paid [*21] immediately, either via a "ComData" card or a check. A "ComData" card is similar to a debit card. Petitioner was free to choose the method by which he was paid. RX 3 reflects that Petitioner opted to be paid via a "ComData" card. Respondent issued a 1099 tax form to Petitioner at the end of 2005. The use of this form was consistent with the independent contractor agreement.

Ramos identified RX 5 as a letter her office sent to Petitioner on March 29, 2005, reminding him to purchase liability insurance for non-trucking use. The letter is not signed.

Ramos identified RX 6 as a "bobtail" insurance certificate issued on April 7, 2005. She reviews such certificates frequently in the course of her employment. RX 6 describes Respondent as the holder of the certificate. Respondent did not deduct money from Petitioner's settlements to pay for the "bobtail" coverage. Petitioner did not buy "bobtail" insurance from Respondent. Respondent provides owner-operators with literature from a couple of insurance companies. Owner-operators can purchase "bobtail" insurance from one of these companies or any other company of their choice. Ramos did not know how Petitioner went about purchasing such insurance. [*22] The absence of a check mark on RX 6 means Petitioner opted not to purchase workers' compensation coverage. Respondent never told Petitioner it would not dispatch him if he failed to procure workers' compensation coverage.

Ramos is aware that Respondent denied Petitioner's workers' compensation claim. Ramos viewed the denial as consistent with Petitioner's obligation to provide his own coverage.

Ramos testified Petitioner was not obligated to wear a uniform per the independent contractor agreement. Petitioner could wear what he wanted while driving for Respondent. Respondent did not require Petitioner to shave or wear his hair in a certain way.

Ramos testified Respondent had no say as to the manner in which Petitioner introduced himself when picking up a load.

Ramos testified Respondent required Petitioner to inspect his truck and trailer before each trip pursuant to federal regulations. Respondent exercised no control over the type of fuel Petitioner purchased. Respondent did not direct Petitioner where to park. Petitioner was not required to call in daily or work any particular shift. Nor was he required to immediately take a load. Respondent did not provide any tools or equipment [*23] to Petitioner. Respondent did not provide Petitioner with a camera and Petitioner was not required to take photographs in the event of an accident.

Ramos testified she verified Petitioner held a valid CDL during the "pre-qualification" process. Respondent would not enter into an independent contractor agreement with someone who did not hold a valid CDL. The fact Petitioner held a valid CDL gave Ramos assurance Petitioner had some fluency in English, since the CDL examination is administered in English. The state of Indiana does not administer the CDL examination in Macedonian.

Under cross-examination, Ramos testified she does not work for Spiro.

Ramos had no knowledge of Petitioner delivering a load for any company other than Respondent during the time Petitioner drove for Respondent.

Ramos admitted she does not have a CDL and does not know the level of proficiency in English required in order to obtain a CDL.

When asked whether Petitioner drove for Respondent as an individual rather than a corporation, Ramos answered, "I believe so."

The truck Petitioner drove had door signs bearing Respondent's name. Such signs are required by the federal government.

Respondent received a "charge [*24] back" for a crane-related cost. Ramos believed this cost stemmed from a late delivery Petitioner made.

On redirect, Ramos testified Respondent monitored paperwork while Petitioner was under a lease pursuant to federal regulations and not pursuant to any self-promulgated rule of Respondent. Respondent could be fined or subjected to extra scrutiny if it failed to comply with federal regulations. Respondent was not free to ignore DOT regulations.

Under the independent contractor agreement, Petitioner was not "forced" to accept a load. Petitioner was free to accept or reject a load.

Provisions in the independent contractor agreement allow Respondent to "disqualify" a driver or terminate a lease. The agreement also allows a driver to terminate his relationship with Respondent.

Under the independent contractor agreement, Respondent did not assign routes or set pick-up times.

Under the independent contractor agreement, Petitioner was free to haul a load for another company through a broker. The broker would pay Respondent and Respondent would then settle with Petitioner.

Herbert Schaffer testified he has worked in the trucking industry for forty-one years. He started as a dispatcher and [*25] "worked his way up." He began working for Respondent four years ago and is currently Vice President of Development. He technically works for an entity known as "Transportation Employment Services." This entity is affiliated with Respondent.

Schaffer testified his current job duties include negotiating contracts with shippers and handlers. He also handles certain safety-related issues.

Schaffer testified that Respondent is in the business of delivering steel products. Respondent does not employ any drivers. Respondent leases on independent contractors to transport goods. Respondent does not provide training to the independent contractors.

After Schaffer was asked about Respondent's dispatch system, Petitioner objected on the basis that Schaffer did not work for Respondent at the time of Petitioner's accident. The Arbitrator allowed Schaffer to testify with the understanding Petitioner had a continuing timeline-related relevancy objection.

Schaffer testified that Respondent's dispatch system works as follows: a shipper will call an agent or Respondent's dispatch and state where a load is going. Then an independent contractor will call in to see what loads are available. If the independent [*26] contractor does not want to take a particular load, he is "free to call back."

Schaffer testified he knows Spiro. Spiro is both an "agent for Respondent" and a dispatcher. Spiro is an independent contractor. Shippers call Spiro and Spiro dispatches their loads. Spiro receives a commission on each load he dispatches.

Schaffer testified he is familiar with independent contractor agreements. He has reviewed the independent contractor agreement Petitioner signed. The agreement Petitioner signed is similar to the agreements now in use but the current agreements are "more modernized." RX 15 is a diagram Schaffer created to show how an owner-operator handles a load. There has been "very little change" over the years as to how such loads are handled.

Schaffer testified he is familiar with bills of lading and has reviewed many such documents during his career. When a driver picks up a load, he receives a bill of lading for that load. The bill of lading allows the driver to have the load in his possession. When the driver delivers the load, he gives the bill of lading to the customer. A bill of lading controls the time at which a load must be delivered. Respondent has "nothing to do" with delivery [*27] schedules. Respondent relays delivery information to a driver but that information comes from the shipper or customer.

Schaffer reviewed RX 8 and testified he is familiar with this type of document. RX 8 relates to a shipment to Oak Creek. RX 8 states that delivery can be effected Monday through Friday, with "no appointment required." In his experience, there was no set time for Petitioner to arrive in Oak Creek. Respondent was not a party to RX 8.

Under the independent contractor agreement now in use, a driver is not subject to being disciplined by Respondent if he is late with a load.

Schaffer testified Respondent imposes only federal regulations and not its own rules. Respondent is not free to ignore federal regulations.

Under the current independent contractor agreement, no uniform is required. A driver is free to wear whatever he wants.

Under the current independent contractor agreement, an owner-operator is free to drive for other companies. The owner-operator calls dispatch and says he will be driving for another company. Respondent then calls that other company and performs a credit check. If the other company passes the credit check, Respondent "releases" the driver to work [*28] for that company.

Under the current independent contractor agreement, Respondent exerts no control over the type of fuel a driver purchases. Nor does Respondent direct a driver where to park or how to maintain his vehicle in cold weather. Respondent does not provide drivers with a CB, a camera or other equipment. If a driver is involved in an accident, he is not required to take photographs pursuant to the independent contractor agreement.

An owner-operator can choose his own route. If Spiro provided a driver with directions, that would be a "suggestion by Spiro" and not a directive of Respondent.

Schaffer testified that, when a driver calls in, an entry is made in Respondent's "main frame" indicating the name of the dispatcher and the time of dispatch.

Schaffer testified the CDL examination is not available in Macedonian, to his knowledge.

Schaffer testified he has access to Respondent's 2005 records. Petitioner signed on with Respondent on March 24, 2005. Respondent's computer records show Petitioner hauled his first load for Respondent on March 29, 2005, five days after Petitioner signed the independent contractor agreement.

Schaffer testified he has no reason to believe Respondent's [*29] current dispatch system is different from its current system.

Under cross-examination, Schaffer admitted he did not work for Respondent at the time of Petitioner's accident. Schaffer also acknowledged he has no specific knowledge concerning Petitioner's assignments. His knowledge is based solely on Respondent's computer records.

Schaffer testified he is familiar with the term "hot load." The term has both a literal and figurative meaning. If a load of steel coils is still warm, it is a "hot load" in the sense it cannot be tarped. A "hot load" can also be any load that needs to be delivered as soon as possible. Schaffer acknowledged he has no personal knowledge as to whether the load Petitioner was delivering on the date of his accident was a "hot load."

Schaffer admitted that special handling instructions do not have to be listed on a bill of lading, although "they typically are."

Schaffer testified the trucking industry is heavily regulated. In 2005, Respondent had to make sure each load was delivered per federal regulations. The same holds true today.

Schaffer testified Respondent was solely a trucking company in 2005.

Schaffer admitted he has no personal knowledge concerning Petitioner's [*30] accident other than what is reflected on RX 8, the bill of lading.

Schaffer also admitted he knows of Petitioner only as a truck driver. He has no knowledge as to whether Petitioner drove for other companies during the time Petitioner drove for Respondent.

On redirect, Schaffer testified that RX 8 does not say anything about a "hot load." Nor does it state that the load had to be delivered expeditiously. In his experience, a shipper does not typically ship a "hot load" on a Friday. RX 8 states the consignee was not open on Saturdays.

Under re-cross, Schaffer acknowledged he has no personal knowledge concerning any verbal instructions Petitioner might have received. To his knowledge, the work Petitioner performed for Respondent consisted solely of driving a truck.

On further redirect, Schaffer testified Petitioner drove his own truck for Respondent.

Spiro Krlevski [hereafter "Spiro"] testified he has been an "agent for Respondent" since January of 2005. Spiro's native language in Macedonian. He opted to testify in English but acknowledged he is not fluent in English.

Spiro testified his job consists of finding loads and assigning those loads to drivers.

Spiro testified he holds a valid [*31] CDL in Indiana. The CDL examination is administered in English. It consists of 250 or 300 questions. It is not available in Macedonian.

Spiro testified he introduced Petitioner to Respondent. He was on Respondent's premises when Petitioner signed the independent contractor agreement but he was "in and out" of the room where Petitioner was sitting because he was also dispatching at that point. It is "not his job" to take care of documents such as independent contractor agreements.

Spiro testified he believes Petitioner owned and operated his own truck.

Spiro testified Respondent has twenty or thirty agents. These agents work in different towns. Petitioner was not required to go through Spiro to get a load.

Spiro testified it was customary for Petitioner to call him to get a load. However, once Petitioner accepted a load, he would call Petitioner if the customer called to check on the status of the load. Petitioner would also call him if he was "empty" and needed a new load. If Petitioner happened to be driving near a pick-up location, Spiro would call him to see if he wanted the load. Petitioner was "free" to accept or decline a load.

Spiro testified it was "not [his] job to check [*32] on" Petitioner under the independent contractor agreement.

Respondent offered into evidence seventeen exhibits. Petitioner did not object to any of these exhibits.

RX 1 is a group exhibit consisting of a four-page pre-printed form entitled "Application for Driver Qualification" and various attachments. The first page of the Application bears Respondent's name, address and logo while the fourth page bears Petitioner's signature and the date March 17, 2005. The first three pages of the Application contain various questions concerning Petitioner's address, ability to legally work in the United States, past drug/alcohol test results, educational and employment history, criminal background, driver's license and driving experience. Petitioner listed Spiro as his emergency contact on the Application and also indicated Spiro referred him to Respondent. Page four of the Application contains lengthy text reflecting that, by signing the document, Petitioner "agree[s] to pre-employment controlled substance testing" pursuant to federal regulations and "understand[s] a positive test will medically disqualify [him] from the commercial motor vehicle for" Respondent. This text also states: "I authorize [*33] [Respondent] to make such investigations and inquiries of my personal, employment, financial or medical history and other related matters as may be necessary in arriving at a qualification decision."

RX 2 consists of a multi-page document labeled "Independent Contractor Agreement" along with "Supplements" A through D. The last page of the Agreement bears the date March 24, 2005 and the signatures of Petitioner and Josephine

Ramos. The opening paragraph of the Agreement identifies Petitioner as the "Independent Contractor" and Respondent as the "Carrier." Paragraph 4 provides that "the Agreement may be terminated for any reason by giving one (1) day's written notice to that effect to the other party either personally, by mail, or by FAX machine . . ." Paragraph 5(a) imposes a variety of responsibilities on the "Independent Contractor." Of these various responsibilities, the Arbitrator finds the following to be most significant:

> "ii. INDEPENDENT CONTRACTOR shall carry a copy of this Agreement in the Equipment at all times and file with CARRIER, on a timely basis, all log sheets, physical examination certificates, accident reports, and any other required data, documents or reports;
>
> [*34] iii. INDEPENDENT CONTRACTOR agrees that all bills of lading, waybills, freight bills, manifests, or other papers identifying the property carried on the Equipment during the period it is contracted shall be those of CARRIER, or as authorized by CARRIER . . . .;
>
> iv. INDEPENDENT CONTRACTOR further agrees not to receive any credit extension in CARRIER's name or in any way to use CARRIER's name to obtain credit, unless INDEPENDENT CONTRACTOR first receives CARRIER's written consent to do so.

Under paragraph 5(b), the "Independent Contractor" agrees to provide, fuel and maintain "all the Equipment ready to operate and fully roadworthy" at "its sole cost and expense." Pursuant to paragraph 5(f), the "Independent Contractor" is required to "immediately report any accident" to the "Carrier" and submit a "written report of such accident." In the event the "Independent Contractor" fails to report such an accident within twenty-four hours, he "shall be liable for any and all damages resulting from that failure to notify."

Paragraph 6(a) of the Agreement provides that the "Equipment shall be for Carrier's exclusive possession, control and use for the duration of the" Agreement, with the [*35] Carrier "assum[ing] complete responsibility for the operation of the Equipment." This sub-paragraph goes on to state that it is "set forth solely to conform with Federal Motor Carrier Safety Adm. Regulations and shall not be used for any other purposes, including any attempt to classify Independent Contractor as an employee of Carrier."

Under paragraph 6(c), the "Carrier" is afforded the right to place its name and any logo on the "Equipment" as it "may choose," with the "Independent Contractor" agreeing to remove such identifying information at the termination of the Agreement and further agreeing to "keep the Equipment in clean appearance."

RX 3 is a pre-printed Respondent form providing Petitioner with two payment options: ComData card versus "weekly mail check." A check mark appears next to the ComData card option.

RX 4 is a pre-printed Respondent form bearing Petitioner's signature and the date March 24, 2005. The form consists of two paragraphs written in the first person, with the signer acknowledging responsibility for providing both "non-trucking/bobtail insurance" and workers' compensation coverage for himself "and/or drivers and workers on [his] equipment while being operated [*36] in the service of [Respondent]." The second paragraph goes on to state: "I also understand that all drivers must be qualified through [Respondent] prior to operation of equipment."

RX 5 is an unsigned letter on Respondent stationery dated March 29, 2005. The letter is addressed to Petitioner. It refers to Petitioner as an "owner-operator" and states: "we require you to have NON-TRUCKING LIABILITY INSURANCE" to "cover your truck and trailer when you are not under the dispatch or direction of [Respondent]." The letter directs Petitioner to initially check with his physical damage insurer "to see if they offer non-trucking liability" and gives Petitioner two alternative contacts. The last paragraph directs Petitioner to "contact Josephine in the Safety Department" if he has questions.

RX 6 is a Certificate of Insurance concerning "non-trucking liability" coverage for Petitioner's 1995 freightliner. The policy effective date is April 7, 2005. An asterisk appears in a column labeled "expiration date," with reference to the following: "coverage applicable while permanently leased to Steel & Machinery Transportation."

RX 7 contains several pages bearing Respondent's name and the subtitle [*37] "quick settlements history." The pages list various deductions (for drug screening, fuel and toll gate permits, and cargo and auto liability deductibles) taken from Petitioner's settlement checks.

Illinois Official Reports

Appellate Court

***Burge v. Exelon Generation Co.*, 2015 IL App (2d) 141090**

Appellate Court Caption	RICK BURGE and NELDA M. BURGE, Plaintiffs-Appellants, v. EXELON GENERATION COMPANY, LLC, Defendant-Appellee.
District & No.	Second District Docket No. 2-14-1090
Filed	July 30, 2015
Decision Under Review	Appeal from the Circuit Court of Ogle County, No. 12-L-8; the Hon. John B. Roe, Judge, presiding.
Judgment	Reversed and remanded.
Counsel on Appeal	Elizabeth Uhrich and Louis F. Pignatelli, both of Pignatelli & Associates, P.C., of Rock Falls, for appellants. Daniel G. Wills and Jonathan R. Walton, both of Swanson, Martin & Bell, LLP, of Chicago, and Donna R. Honzel, of Mateer Goff & Honzel LLP, of Rockford, for appellee.
Panel	JUSTICE HUTCHINSON delivered the judgment of the court, with opinion. Justices Burke and Spence concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs, Rick Burge and Nelda M. Burge, appeal from an order of the circuit court of Ogle County granting the motion of defendant, Exelon Generation Company, LLC, to dismiss plaintiffs' two-count negligence complaint. Defendant successfully argued that plaintiffs' exclusive remedy was under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2012)). We reverse and remand for further proceedings.

¶ 2 Count I of the complaint sought recovery for injuries Rick allegedly suffered due to the unsafe condition of defendant's premises. Count II sought recovery for Nelda's loss of Rick's services and earnings and his love, affection, and companionship. It is undisputed that Rick's injuries arose out of and in the course of his employment with Exelon Nuclear Security, LLC (ENS), and that Rick filed and settled a workers' compensation claim against ENS. ENS is a Delaware limited liability company organized pursuant to an agreement (the LLC Agreement) making defendant the sole member of ENS. ENS provided security services on defendant's premises pursuant to a contract with defendant. Additional relevant facts will be set forth in our analysis of the issue raised on appeal.

¶ 3 At the outset, we note that, although defendant's motion to dismiss did not indicate that it was brought pursuant to any particular provision of the Code of Civil Procedure (Code) (735 ILCS 5/1-101 *et seq.* (West 2012)), the motion was, in substance, brought pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)). Section 2-619 provides that an action may be dismissed, on the motion of the defendant, based on various enumerated defenses (735 ILCS 5/2-619(a)(1)-(8) (West 2012)) or "other affirmative matter avoiding the legal effect of or defeating the claim" (735 ILCS 5/2-619(a)(9) (West 2012)). A section 2-619 motion must be supported by affidavits establishing grounds for dismissal that do not appear on the face of the complaint. 735 ILCS 5/2-619(a) (West 2012); *Becker v. Zellner*, 292 Ill. App. 3d 116, 124 (1997). As our supreme court has noted, "[a]n appeal from a section 2-619 dismissal is similar to an appeal following a grant of summary judgment, and both are subject to *de novo* review." *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 254 (2004). The question on appeal is "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether the dismissal is proper as a matter of law." *Id.*

¶ 4 Under section 1(a)(3) of the Act (820 ILCS 305/1(a)(3) (West 2012)), an employer "is liable to pay compensation to his own immediate employees ***, and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation." In its motion to dismiss, defendant contended that it was undisputed that it had engaged ENS as a contractor to provide security services on defendant's premises. Defendant argued that it was "the employer who paid workers' compensation benefits for the plaintiff Rick Burge" and that, pursuant to section 5(a) of the Act (820 ILCS 305/5(a) (West 2012)), plaintiffs could not maintain a common law action against defendant. Section 5(a) provides, in pertinent part:

> "No common law or statutory right to recover damages from the employer, his insurer, his broker, any service organization retained by the employer, his insurer or his broker

to provide safety service, advice or recommendations for the employer or the agents or employees of any of them for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, 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." *Id.*

¶ 5 In support of its motion, defendant submitted the affidavit of Christine M. Wendt, the workers' compensation manager of the benefits department for Exelon Business Services Company. Wendt averred that she oversaw "the entire Exelon-related system of workers' compensation benefits." According to Wendt's affidavit, defendant used a third-party administrator/payor for workers' compensation benefits and "paid all monies for the [ENS account] made to or on the behalf of Rick Burge." Wendt averred that defendant "paid the worker's compensation benefits of any/all employees of [ENS], including [Rick], *as it was obligated to do under [section 1(a)(3) of the Act]*." (Emphasis added.)

¶ 6 In their written response to defendant's motion, plaintiffs relied, in part, on *Laffoon v. Bell & Zoller Coal Co.*, 65 Ill. 2d 437, 447 (1976), where our supreme court held that section 5(a) "confer[s] immunity upon employers only from common law or statutory actions for damages by their *immediate* employees." (Emphasis added.) Confronted with that legal authority, defendant stated in its reply to plaintiffs' response that its prior reference to its " 'obligations' " under section 1(a)(3) was "merely to the fact [that] the Act requires there to be coverage for workers/employees generally and [was] in no means intended to imply that [ENS] was uninsured." Defendant claimed, however, that it had reimbursed ENS for workers' compensation payments to ENS employees. Citing *Ioerger v. Halverson Construction Co.*, 232 Ill. 2d 196 (2008), and *Villa v. Arthur Rubloff & Co. of Illinois*, 183 Ill. App. 3d 746 (1989), defendant argued that, because it had reimbursed ENS for workers' compensation payments, and because of its authority to manage ENS's affairs, it was cloaked with the same immunity as ENS. Defendant submitted a supplemental affidavit from Wendt stating that ENS was self-insured and that "[t]hrough the [LLC Agreement defendant] paid the workers' compensation benefits of any/all [ENS employees], including [Rick], on a reimbursement basis."

¶ 7 Plaintiffs filed a surreply, in which they argued that Wendt's affidavits consisted of conclusions rather than facts within her personal knowledge. Defendant responded that Wendt, as manager of "the entire Exelon-related system of workers' compensation," had personal knowledge of the matters stated in her affidavits. Defendant further argued that the evidence established that defendant and ENS were "a 'joint venture' as described in the *Ioerger* case and have an 'agency' relationship as described in the *Villa* case." Defendant reasoned that "[a]s in both [*Ioerger* and *Villa*] the Defendant and [ENS] are so closely related that both are entitled to the grant of immunity afforded by [section 5(a) of the Act] and that grant is completely consistent with the intent of the Act."

¶ 8 On appeal, plaintiffs argue that defendant was not Rick's employer and that, to enjoy immunity under section 5(a) from liability in a common law negligence lawsuit, defendant must establish at least that it was legally responsible for payment of workers' compensation benefits to Rick. Plaintiffs assert that Wendt "may be qualified to testify that Defendant actually footed the bill for [Rick's] benefits, but not that it was required to do so." Defendant responds that it is entitled to immunity as the agent of Rick's employer (ENS), regardless of

who paid or was obligated to pay workers' compensation to Rick. According to defendant, any defects in Wendt's affidavits were immaterial.

¶ 9 It is true that section 5(a) of the Act bars lawsuits against an employer's agents. 820 ILCS 305/5(a) (West 2012). However, we disagree with defendant's assertion that it was ENS's agent. Defendant relies on the powers conferred upon it by the LLC Agreement, which provides, in pertinent part:

> "Management. The Management of [ENS] shall be vested in the sole member, Exelon Generation Company, LLC. The Member shall have exclusive authority over the business and affairs of [ENS] and shall have the full power and authority to authorize, approve or undertake any action on behalf of [ENS] and to bind [ENS], without the necessity of a meeting or other consultation. In connection with the foregoing, the Member is authorized and empowered:
>
> a. to appoint, by written designation filed with the records of [ENS], one or more persons to act on behalf of [ENS] as officers of [ENS] with such titles as may be appropriate including the titles of President, Vice President, Treasurer, Secretary and Assistant Secretary, and
>
> b. to delegate any and all power and authority with respect to the business and affairs of [ENS] to any individual or entity including any officers and employees of [ENS]. In the absence of appointment of officers, agents and employees of [ENS] shall have such power and authority to act on behalf of [ENS], as shall be conferred by the Member."

Quoting *Villa*, 183 Ill. App. 3d at 750, defendant argues that "[u]nder Illinois law, an agent is one who acts under authority from another to transact business for him or manage his affairs and who is required to act for the other." The argument is unpersuasive. It is well established that "[a]n agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf." *Powell v. Dean Foods Co.*, 2013 IL App (1st) 082513-B, ¶ 65. We find nothing in the LLC Agreement that gives ENS any right to control defendant. Indeed, quite the opposite appears to be true. Because ENS has no right to control defendant, defendant is not ENS's agent.

¶ 10 The question we are left with is whether defendant's role, if any, in paying Rick's workers' compensation settlement confers immunity, pursuant to section 5(a), from a common-law action for damages. To answer this question, it is necessary first to consider the principles set forth in *Ioerger* and an earlier decision from our supreme court, *Forsythe v. Clark USA, Inc.*, 224 Ill. 2d 274 (2007).

¶ 11 In *Forsythe*, the plaintiffs brought wrongful death actions against the defendant. The decedents, who were employees of a wholly owned subsidiary of the defendant, died in a fire at a refinery. *Id.* at 278. The fire allegedly occurred when other employees of the defendant's subsidiary attempted to replace a valve on a pipe without ensuring that flammable materials within the pipe had been depressurized. *Id.* The plaintiffs alleged that the employees who attempted to replace the valve were not qualified to do so. The plaintiffs further alleged that, as part of its overall budgetary strategy, the defendant required its subsidiary to engage in cost-cutting measures that prevented the subsidiary from properly training its employees and keeping the premises in a safe condition. *Id.* The defendant argued that it was merely a holding company and owed no duty to the employees of its subsidiary. *Id.* at 279. The trial court entered summary judgment for the defendant. *Id.* Our supreme court concluded that the

defendant could potentially be held liable under a theory of active participant liability. The court held that "[w]here there is evidence sufficient to prove that a parent company mandated an overall business and budgetary strategy *and* carried that strategy out by its own specific direction or authorization, surpassing the control exercised as a normal incident of ownership in disregard for the interests of the subsidiary, that parent company could face liability." (Emphasis in original.) *Id.* at 290.

¶ 12 The *Forsythe* court concluded that there were genuine issues of material fact and the defendant was not entitled to judgment as a matter of law on the question of active participant liability. More significantly for present purposes, the *Forsythe* court rejected the defendant's argument that section 5(a) of the Act immunized it from active participant liability for injuries to workers employed by its subsidiary. In essence, the defendant asked to be treated as the decedents' employer on the basis that imposing active participant liability would be equivalent to piercing the corporate veil. The *Forsythe* court rejected the argument:

> "Direct participant liability, as we now recognize it, does not rest on piercing the corporate veil such that the liability of the subsidiary is the liability of the parent. On the contrary, this form of liability is asserted, as its name suggests, for a parent's direct participation, superseding the discretion and interest of the subsidiary, and creating conditions leading to the activity complained of. ***
>
> In essence, defendant is requesting that it be allowed to pierce its own corporate veil in order to avoid liability. Illinois courts have consistently expressed reluctance for allowing such a practice. [Citations.] The appellate court in this case recognized this point when it rejected defendant's attempt 'to have its cake and eat it too: asserting, on the one hand, that it was merely a shareholder in arguing that it owed no duty to the decedents, while, at the same time, attempting to invoke the Act's grant of immunity by characterizing itself as the decedents' employer.' [Citation.]
>
> ***
>
> *** It was [the subsidiary], not defendant, who paid workers' compensation benefits to the decedents' families. It was [the subsidiary], not defendant, who actually employed the decedents. As such it is [the subsidiary], not [the defendant], that should enjoy the exclusive remedy provision of the [Act]. We decline to allow [the defendant] to pierce its own corporate veil. Accordingly, the [Act] does not immunize defendant from liability." *Id.* at 297-98.

¶ 13 In contrast, in *Ioerger*, the court held that a joint venture was entitled to section 5(a) immunity from liability for injuries to employees of one of the two corporations engaged in the joint venture. After first concluding that the joint venture was entitled to immunity based on its agency relationship with the corporation that employed the injured workers, the *Ioerger* court held that the joint venture should also enjoy immunity because it was obligated under the joint-venture agreement to pay workers' compensation for the employees of both corporations. The *Ioerger* court reasoned as follows:

> "We observed in *Forsythe* [citation], that allowing a party who has paid nothing toward an injured employee's workers' compensation benefits to nevertheless invoke the Act's immunity to escape tort liability for the employee's injuries would be tantamount to allowing the party 'to have its cake and eat it too.' By the same token, subjecting a party to tort liability for an employee's injuries notwithstanding the fact that the party has borne the costs of the injured employee's workers' compensation insurance would

be the same as declaring that a party who has paid for the cake may neither keep it nor eat it.

As these metaphors illustrate, *the immunity afforded by the Act's exclusive remedy provisions is predicated on the simple proposition that one who bears the burden of furnishing workers' compensation benefits for an injured employee should not also have to answer to that employee for civil damages in court.*" (Emphasis added.) *Ioerger*, 232 Ill. 2d at 203.

While one of the two corporations was responsible for the performance of all labor for the joint venture and for the payment of premiums for workers' compensation insurance, that corporation was entitled to reimbursement from the joint venture pursuant to the terms of the agreement. *Id.* at 204. Because the joint venture had the "[u]ltimate responsibility" for payment of the premiums, "it was entitled to avail itself of the Act's exclusive remedy provisions." *Id.*

¶ 14 We agree with plaintiffs that the reasoning in *Ioerger* depends on the existence of some preexisting legal obligation to pay, or reimburse another payor, for compensation due under the Act or for premiums for workers' compensation insurance. The Act makes no provision for an entity that is legally distinct from the employer to unilaterally insulate itself against liability for negligence. To allow such an entity to do so would be particularly problematic where the employer is self-insured and a separate entity could thus make reimbursement decisions on a case-by-case basis. In *Forsythe*, our supreme court observed:

> "[Section 5(a)] serves a balancing function. On the one hand, the Act establishes a new 'system of liability without fault, designed to distribute the cost of industrial injuries without regard to common-law doctrines of negligence, contributory negligence, assumption of risk, and the like.' [Citation.] On the other hand, the Act imposes 'statutory limitations upon the amount of the employee's recovery, depending upon the character and the extent of the injury' and provides 'that the statutory remedies under it shall serve as the employee's exclusive remedy if he sustains a compensable injury.' [Citation.]" *Forsythe*, 224 Ill. 2d at 296.

If the system is to maintain this balance, an entity cannot be permitted to choose whether to be treated like an employer or like a third party, depending on what appears the most to its advantage in a particular case.

¶ 15 Thus, we agree with plaintiffs that immunity under section 5(a) of the Act cannot be predicated on defendant's payment of workers' compensation unless defendant was under some legal obligation to pay (such as the contractual obligation imposed by the joint-venture agreement in *Ioerger*). We also agree with plaintiffs that the evidence on this point, to wit, Wendt's affidavits, falls short of establishing such an obligation.

¶ 16 Illinois Supreme Court Rule 191(a) (eff. Jan. 4, 2013) provides that affidavits in support of a section 2-619 motion "shall be made on the personal knowledge of the affiants; shall set forth with particularity the facts upon which the claim, counterclaim, or defense is based; shall have attached thereto sworn or certified copies of all documents upon which the affiant relies; shall not consist of conclusions but of facts admissible in evidence; and shall affirmatively show that the affiant, if sworn as a witness, can testify competently thereto."

¶ 17 Wendt's initial affidavit stated that defendant paid workers' compensation benefits to ENS employees "as it was obligated to do under [section 1(a)(3) of the Act]." However, in her

supplemental affidavit she stated that ENS was self-insured but that defendant reimbursed it "through" the LLC Agreement. To the extent that the word "through" is meant to imply that the LLC Agreement imposed a legal obligation upon defendant, it is a conclusion rather than a fact admissible in evidence. Moreover, the LLC Agreement, which is part of the record on appeal, says nothing about the obligation to provide workers' compensation insurance for ENS's employees.

¶ 18 Accordingly, defendant has failed to establish a basis for claiming immunity under section (5)(a) of the Act, and it was error to dismiss plaintiffs' complaint.

¶ 19 For the foregoing reasons, we reverse the judgment of the circuit court of Ogle County and remand for further proceedings.

¶ 20 Reversed and remanded.

Illinois Official Reports

Appellate Court

***Reichling v. Touchette Regional Hospital, Inc.*, 2015 IL App (5th) 140412**

Appellate Court Caption	SHELLEY REICHLING, Plaintiff-Appellant, v. TOUCHETTE REGIONAL HOSPITAL, INC., Defendant-Appellee.
District & No.	Fifth District Docket No. 5-14-0412
Filed	July 16, 2015
Decision Under Review	Appeal from the Circuit Court of St. Clair County, No. 12-L-588; the Hon. Vincent J. Lopinot, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Roy C. Dripps and Michael T. Blotevogel, both of Armbruster, Dripps, Winterscheidt & Blotevogel, LLC, of Alton, for appellant. Charles J. Swartwout and David B. Schneidewind, both of Boyle Brasher, LLC, of Belleville, for appellee.
Panel	JUSTICE STEWART delivered the judgment of the court, with opinion. Presiding Justice Cates and Justice Welch concurred in the judgment and opinion.

OPINION

¶ 1 The plaintiff, Shelley Reichling, appeals the circuit court's order granting summary judgment in favor of the defendant, Touchette Regional Hospital, Inc. (Touchette), on the basis that her premises liability action was barred by the exclusive remedy provision of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/5(a) (West 2008)) because she was Touchette's borrowed employee at the time of her injury. On appeal, the plaintiff argues that the circuit court erred in granting summary judgment in favor of Touchette because there was a genuine issue of material fact as to whether she was Touchette's borrowed employee. Finding no such issue of material fact, we affirm.

¶ 2 BACKGROUND

¶ 3 On February 9, 2011, the plaintiff filed an application for adjustment of claim pursuant to the Act (820 ILCS 305/1 *et seq.* (West 2008)) for injuries she sustained on December 26, 2010, when she slipped and fell while working at Touchette as a registered nurse through ReadyLink Healthcare (ReadyLink), a temporary healthcare staffing agency. ReadyLink settled the workers' compensation claim on August 19, 2011, for $50,125.18. Touchette was not a party to that claim.

¶ 4 On October 30, 2012, the plaintiff filed this premises liability action against Touchette based on the same injury at issue in her workers' compensation claim, alleging that she was injured on December 26, 2010, when she slipped on a wet floor in Touchette's emergency department and fell, fracturing her knee. She alleged that Touchette was negligent in that it failed to provide adequate warnings and failed to barricade or otherwise segregate the area of the floor that had been mopped.

¶ 5 On April 30, 2014, Touchette filed a motion for summary judgment pursuant to section 2-1005 of the Code of Civil Procedure (735 ILCS 5/2-1005 (West 2008)) and memorandum in support, arguing that the plaintiff's premises liability action was barred by the exclusive remedy provision of the Act (820 ILCS 305/5(a) (West 2008)) because she was Touchette's borrowed employee at the time of her injury. Touchette attached numerous documents in support of its motion, including the plaintiff's deposition transcript and answers to interrogatories and the written temporary services agreement between ReadyLink and Touchette. After additional discovery, Touchette filed a supplemental memorandum in support of its motion, attaching additional documents in support, including portions of the deposition transcripts of two of its employees. The plaintiff filed a response in opposition to Touchette's motion for summary judgment, arguing that the motion should be denied because she was not an employee of Touchette at the time of her injury. She attached numerous documents in support of her response, including the agreement between ReadyLink and Touchette, portions of her deposition transcript, portions of the deposition transcripts of several of Touchette's employees, and three documents entitled "Touchette Regional Hospital Nursing Anecdotal Note."

¶ 6 The undisputed material facts can be summarized as follows. The plaintiff, a registered nurse, was employed by ReadyLink, a temporary healthcare staffing agency based in California. She never met anyone from ReadyLink in person. Her only contact with ReadyLink was by telephone. Through ReadyLink, she worked as a temporary registered nurse at Touchette and other healthcare facilities.

¶ 7 ReadyLink and Touchette had a written agreement whereby ReadyLink would provide temporary healthcare staffing services to Touchette. The agreement provides that workers placed at Touchette are ReadyLink employees and contains a restrictive covenant prohibiting Touchette from hiring the workers. Under the agreement, ReadyLink is responsible for paying the workers and for ensuring "that any and all State and Federal Income Tax, Social Security Tax, State and Federal Unemployment Tax, Disability Tax, Worker's Compensation coverage obligations and any other employment law requirements for personnel provided under this Agreement are complied with and paid as required by law." The agreement further provides that ReadyLink indemnifies and holds Touchette harmless from any such responsibility. Pursuant to the agreement, ReadyLink paid the plaintiff and provided her malpractice, general liability, and workers' compensation insurance.

¶ 8 The agreement provides that Touchette is responsible for scheduling, supervising, and evaluating the workers. Under the agreement, Touchette is responsible for determining the proper patient treatment. The agreement further provides that Touchette has the right to immediately terminate the services of any ReadyLink worker, if, in its sole discretion, the worker is found to be incompetent or negligent, to have engaged in misconduct, or to be unsatisfactory for any other reason.

¶ 9 The plaintiff worked at Touchette through ReadyLink during 2008, 2009, and 2010. When Touchette needed a temporary registered nurse to work a shift, it called ReadyLink. ReadyLink then called the plaintiff to see if she was available. If she was available, ReadyLink notified Touchette of her availability and then called her back to confirm that she was to show up at Touchette to work that shift.

¶ 10 On November 20, 2008, the plaintiff was given a document on Touchette's letterhead entitled "Memo of Understanding," along with other materials and information regarding her work at Touchette. The document states, in pertinent part, that "the ability to demonstrate skills and show proof of knowledge is necessary for competency of new and annual training of employees, agencies, contracted [*sic*], volunteers, and students in the hospital." The document further states that Touchette's education department was providing her information necessary to assist in her safety while in her "*tour of duty*" (emphasis in original) in its facility. The document notes that other materials provided to her include information about Touchette's mission/vision, security, ergonomics, customer service, life safety, emergency codes, hand hygiene, incident reporting, workplace harassment, electrical safety, fire safety, compliance, and "HIPPA." She signed the document, indicating that her employer was ReadyLink but acknowledging that Touchette's unit manager, education department, or house supervisor on duty would be her resource person for any questions she may have about safety information and hazard facts. She also acknowledged that she had received an orientation/clinical information packet/card on the above-listed topics and that the material was her responsibility while on duty.

¶ 11 On May 17, 2009, the plaintiff was given Touchette's job description for a registered nurse, which was on Touchette's letterhead. The job description, which the plaintiff signed, included a summary of the job, the essential functions and duties of the job, the qualifications for the job, the preferred skills and abilities for the job, the physical demands of the job, and the duties and responsibilities of the job. Above the plaintiff's signature was the following certification:

> "I certify that I am able to perform the essential duties and physical/mental functions listed above, and possess the required skills, knowledge, training, education

and experience outlined above. This document does not create an employment contract, implied or otherwise, other than an 'at will' employment relationship."

¶ 12 The plaintiff usually worked the night shift at Touchette, which was from 6:30 p.m. to 7 a.m. Her supervisor at Touchette was the house supervisor on her shift. The house supervisor would tell her which department she was scheduled to work in that day, but, other than that, she and the house supervisor had minimal contact.

¶ 13 When the plaintiff worked at Touchette, she worked with other hospital staff, including full-time doctors and nurses. Touchette's doctors gave her orders, which she followed. When she worked in the emergency room, she assisted other nurses working in the emergency room.

¶ 14 No one from ReadyLink was ever present at Touchette to supervise the temporary workers. Instead, Touchette was responsible for supervising them. The plaintiff did not have to call ReadyLink before doing a task that one of Touchette's doctors or nurses asked, or instructed, her to do.

¶ 15 Touchette provides to temporary workers, such as the plaintiff, the same supplies as any other employee, *e.g.*, syringes, IV bags, IV lines, needles, and charting materials. However, items such as scrubs, footwear, and stethoscopes are supplied by the individual nurses, whether they are full-time employees or temporary workers.

¶ 16 Temporary workers, such as the plaintiff, are required to work the same shift hours as full-time employees, and they cannot decide on their own to work over the set shift hours. Only the department director can advise a worker (whether temporary or full-time) to work over the set shift hours. The temporary agency that supplies a temporary worker cannot dictate the worker's hours.

¶ 17 As one of Touchette's house supervisors, Alice Page oversees its after-hours operations, including ensuring that it is adequately staffed to carry out its operations. As a house supervisor, Page can assign a temporary worker to a particular department. Temporary workers receive instruction, supervision, and assistance from Touchette employees. If a temporary worker is not doing what the worker is assigned to do or if the worker is acting unprofessionally, Page can ask the worker to leave the premises and can tell the worker not to return. If Page has a problem with a temporary worker and no longer wants the worker to work at Touchette, she notifies the temporary agency so the agency will not send the worker back to Touchette.

¶ 18 Lanneka White, Touchette's emergency department director, maintains overall operations of the emergency department. As emergency department director, White gave the plaintiff her schedules. As emergency department director, if White sees a temporary worker acting unprofessionally or not following orders, she can ask the worker to leave the hospital and can inform the worker's agency that Touchette does not want the worker back. A temporary worker, such as the plaintiff, is to follow Touchette's policies and protocol while interacting with patients and carrying out her duties.

¶ 19 Juanita Willis, one of the plaintiff's supervisors at Touchette, wrote her up three times in 2009 for violating Touchette's policies or protocols. In a February 4, 2009, document entitled "Touchette Regional Hospital Nursing Anecdotal Note," the plaintiff was written up for failing to administer a medication to one of her patients on January 29, 2009. On May 21, 2009, in another "Touchette Regional Hospital Nursing Anecdotal Note," she was written up for working over her shift without approval of Touchette's house supervisor or department

managers. On June 3, 2009, in a third "Touchette Regional Hospital Nursing Anecdotal Note," she was written up for failing to transcribe the physician's orders on one of her patients on May 28, 2009, and failing to document the fact that she had given the patient medication. Each of these documents concludes by noting that her agency would be notified of this occurrence and if it continued to happen it would result in her agency being informed that she may not return to Touchette.

¶ 20 On December 26, 2010, the plaintiff reported to work at Touchette as a registered nurse through ReadyLink. She was on the night shift, from 6:30 p.m. to 7 a.m., and was assigned to the emergency room. While performing her job duties that night, she slipped on a wet floor and fell, fracturing her left knee. She reported the incident to Page, Touchette's house supervisor that night, and completed an incident report on Touchette's computer system. She reported the incident to ReadyLink by telephone the next day.

¶ 21 On August 1, 2014, the circuit court granted Touchette's motion for summary judgment on the basis that the plaintiff's premises liability action was barred by the exclusive remedy provision of the Act (820 ILCS 305/5(a) (West 2008)) because she was Touchette's borrowed employee at the time of her injury. The plaintiff filed a timely notice of appeal.

¶ 22 ANALYSIS

¶ 23 The plaintiff argues that the circuit court erred in granting summary judgment in favor of Touchette because there was a genuine issue of material fact as to whether she was Touchette's borrowed employee under the Act. We disagree.

¶ 24 Summary judgment is proper when "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2008). "The purpose of summary judgment is not to try a question of fact, but to determine whether a genuine issue of material fact exists." *Illinois State Bar Ass'n Mutual Insurance Co. v. Law Office of Tuzzolino & Terpinas*, 2015 IL 117096, ¶ 14. In determining whether a genuine issue of material fact exists, the pleadings, depositions, admissions, and affidavits, if any, must be strictly construed against the moving party and liberally in favor of the nonmoving party. *Mashal v. City of Chicago*, 2012 IL 112341, ¶ 49. A genuine issue of material fact precluding summary judgment exists where the material facts are disputed or where reasonable persons might draw different inferences from the undisputed facts. *Id.* Although summary judgment can aid in the expeditious disposition of a lawsuit, it is a drastic measure and, therefore, should be allowed only where the right of the moving party is clear and free from doubt. *Williams v. Manchester*, 228 Ill. 2d 404, 417 (2008). A circuit court's order granting summary judgment is reviewed *de novo*. *Illinois State Bar Ass'n Mutual Insurance Co.*, 2015 IL 117096, ¶ 14.

¶ 25 "The Workers' Compensation Act is designed to provide financial protection to workers for accidental injuries arising out of and in the course of employment." *Meerbrey v. Marshall Field & Co.*, 139 Ill. 2d 455, 462 (1990). "Accordingly, the Act imposes liability without fault upon the employer and, in return, prohibits common law suits by employees against the employer." *Id.* The exclusive remedy provision of the Act is part of the *quid pro quo*, pursuant to which the employer assumes a new liability without fault but is relieved of the possibility of large damage verdicts. *Id.* Section 5(a) of the Act provides, in pertinent part, that "[n]o common law or statutory right to recover damages from the employer *** for injury or death

sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." 820 ILCS 305/5(a) (West 2008).

¶ 26 An employee in the general employment of one employer may be loaned to another for the performance of special work and become the employee of the special or borrowing employer while performing such special work. *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341, 346-47 (1980). Our supreme court has long recognized the borrowed-employee doctrine as being applicable to workers' compensation cases. *Id.* at 347. The borrowed-employee doctrine was specifically incorporated into our workers' compensation statutory scheme by the inclusion of section 1(a)(4) of the Act, which provides, in pertinent part, as follows:

> "Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement. ***
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> ***
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> An employer whose business or enterprise or a substantial part thereof consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers shall be deemed a loaning employer within the meaning and provisions of this Section." 820 ILCS 305/1(a)(4) (West 2008).

¶ 27 Clearly, under the express terms of the Act, ReadyLink qualifies as a "loaning employer" because its "business or enterprise *** consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers" (*id.*). However, our inquiry does not end there. See, *e.g.*, *Lanphier v. Gilster-Mary Lee Corp.*, 327 Ill. App. 3d 801, 803-04 (2002) (the statutory definition of a " 'loaning employer' " does not establish or define who shall be considered "borrowing employers" or "loaned employees," and the two-prong analysis set forth in *A.J. Johnson Paving Co.*, 82 Ill. 2d at 348, is the appropriate test); *Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 828 (2000) (same); *Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 641-42 (1995) (same).

¶ 28 The two-prong inquiry required to determine whether a borrowed-employee relationship existed is: (1) whether the alleged borrowing employer had the right to direct and control the manner in which the employee performed the work; and (2) whether there was an express or implied contract of hire between the employee and the alleged borrowing employer. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 348. Whether a borrowed-employee relationship existed is

generally a question of fact, but if the facts are undisputed and permit but a single inference, the question is one of law. *Id.* at 348-49.

¶ 29 In workers' compensation cases, the primary factor considered in determining whether a borrowed-employee relationship existed is whether the alleged borrowing employer had the right to direct and control the manner in which the work was to be performed. *Id.* at 348. In *A.J. Johnson Paving Co.*, our supreme court found that the following factors supported a determination that the borrowing employer had the right to control and direct the manner in which the employee performed the work: (1) the employee worked the same hours as the borrowing employer's employees; (2) the employee received instruction from the borrowing employer's foreman and was assisted by the borrowing employer's employees; (3) the loaning employer's supervisors were not present; (4) the borrowing employer was permitted to tell the employee when to start and stop working; and (5) the loaning employer relinquished control of its equipment to the borrowing employer. *Id.* at 349. The court found that the fact that the employee's skill as an operator permitted him to exercise control over the paving machine and the technical details of the paving operation did not preclude a finding that the borrowing employer had the right to control the manner of the work. *Id.* The court also found that it was irrelevant that the employee received his salary from the loaning employer, rather than the borrowing employer. *Id.* Illinois courts have also considered whether the alleged borrowing employer had the right to discharge the employee. See, *e.g.*, *Hastings v. Jefco Equipment Co.*, 2013 IL App (1st) 121568, ¶ 9. Although the alleged borrowing employer need not have the power to dismiss the employee from his general employment, it must have the power to dismiss him from the borrowed employment. *Id.*

¶ 30 The second factor considered in determining whether a borrowed-employee relationship existed is whether there was an express or implied contract of hire between the employee and the alleged borrowing employer. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 348. "In order to establish such a contract there must be at least an implied acquiescence by the employee in the relationship." *Id.* at 350. Implied consent to an employment relationship exists "where the employee knows that the borrowing employer generally controls or is in charge of the employee's performance." *Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 17. "Furthermore, the employee's acceptance of the borrowing employer's direction demonstrates the employee's acquiescence to the employment relationship." *Id.*

¶ 31 In *A.J. Johnson Paving Co.*, the court found that the employee's acquiescence could be established by the fact that he was aware that the paving job was being performed by the borrowing employer and by the fact that he accepted the borrowing employer's control over the work by complying with the foreman's instructions with regard to starting, stopping, and break times, as well as instructions as to where to start paving and other incidental directions as to the performance of the work. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 350.

¶ 32 In *Chaney*, a case very similar to the present case, the plaintiff worked for a temporary agency that supplied the defendant with workers during peak demand periods. *Chaney*, 315 Ill. App. 3d at 825. As is common with temporary agencies, the temporary agency handled its employees' payroll, tax withholding and reporting, and insurance; the agency also provided workers' compensation coverage for its employees. *Id.* However, when the plaintiff arrived at the defendant's facility, the defendant supervised and directed her work activities. *Id.* at 829. The defendant told her to perform particular tasks, and no one from the temporary agency was involved with or consulted regarding any task she performed while working at the defendant's

facility. *Id.* Although the defendant could not discharge her from her employment at the temporary agency, it could dismiss her from service at its own plant. *Id.* The appellate court affirmed summary judgment in favor of the defendant, finding that the defendant controlled the plaintiff while she was working at its facility. *Id.* at 829-30. The defendant's control was established by the fact that it supervised her work and directed her work activities. *Id.* at 829. The court held that the defendant's right to dismiss the plaintiff from service at its plant and to send her back to the temporary agency was sufficient to satisfy the discharge element of the control test. *Id.* The court noted that the mere fact that the plaintiff did not receive her wages from the borrowing employer would not defeat the finding of a borrowed-employee relationship. *Id.* The court noted that this method of compensation is so common with temporary agencies that it is of little import in the analysis of whether the defendant " 'controlled' " the plaintiff's work performance for purposes of the Act. *Id.* The court also found that the plaintiff impliedly agreed to the borrowed-employee relationship where there was no dispute that she knew she was working for the defendant but through the temporary agency. *Id.* at 829-30. Ultimately, the court held that the plaintiff was a loaned employee and the defendant a borrowing employer for purposes of the Act; that the material facts relating to its conclusion were capable of only one inference; and, that, because the defendant was a borrowing employer, the plaintiff's civil action against it was barred by the exclusive remedy provision of the Act. *Id.* at 830.

¶ 33 *Chavez v. Transload Services, L.L.C.*, 379 Ill. App. 3d 858 (2008), is also factually similar to the present case. In *Chavez*, the plaintiff, who was employed by a temporary agency, was working as a temporary laborer for the defendant, Transload Services, L.L.C., pursuant to an agreement between the two entities. *Id.* at 859-60. When the defendant needed additional labor, it would call the temporary agency, and the temporary agency would send temporary workers. *Id.* at 860. The defendant would sign off on the hours the temporary workers worked, and the temporary agency would pay them. *Id.* The temporary agency also paid for the employees' workers' compensation insurance. *Id.* The plaintiff, who was injured while performing his duties for the defendant, filed a complaint against the defendant alleging premises liability and negligence. *Id.* The defendant filed a motion to dismiss, arguing that the plaintiff's claims were barred by the exclusive remedy provision of the Act because the plaintiff was its borrowed employee. *Id.* at 860-61. The trial court granted the motion. *Id.* at 861. The plaintiff appealed, arguing that the trial court erred in granting the defendant's motion to dismiss because there was a question of fact as to whether he was the defendant's borrowed employee. *Id.* The appellate court affirmed, holding that the defendant was a borrowing employer entitled to the protections of the exclusive remedy provision of the Act. *Id.* at 864. The court noted that the plaintiff accepted the defendant's employee handbook and received individualized training from the defendant; that the defendant had the right to discharge the plaintiff for any reason, set his schedule, and control his work, all of which indicated that the defendant exercised a large degree of control over his employment; and that he was treated the same as the defendant's employees in that he worked the same hours, took breaks at times so designated by the defendant, and received instructions from the defendant as to how particular work was to be performed. *Id.* at 863. The court also noted that the plaintiff impliedly consented to the borrowed-employee relationship by accepting the employment assignment with the defendant, as well as its control and direction of his work activities. *Id.*

¶ 34 In the present case, construing the evidence strictly against Touchette and liberally in favor of the plaintiff, it is clear from the undisputed material facts that a borrowed-employee relationship existed between the plaintiff and Touchette at the time of her injury. Touchette clearly had the right to direct and control the manner in which she performed her work. Under the written agreement between ReadyLink and Touchette, Touchette was responsible for scheduling, supervising, and evaluating the plaintiff; it was also responsible for determining the proper patient treatment. In addition, Touchette had the right to immediately terminate the plaintiff's services if, in its sole discretion, she was found to be unsatisfactory for any reason.

¶ 35 At the time of her injury, the plaintiff had worked as a temporary nurse at Touchette for over two years. Touchette decided whether to allow her to work at its hospital, what shift she worked, what hours she worked, and what department she worked in. Touchette required her to work the same hours as its full-time employees. Touchette's doctors gave her orders and she followed those orders. She received assistance from Touchette's employees in the performance of her duties, she assisted Touchette's employees in the performance of their duties, and she was supervised by Touchette's employees. Touchette provided her with the same equipment and supplies it provided for its full-time employees. She was required to follow Touchette's policies and protocol while performing her duties, and she was written up by her supervisors at Touchette when she failed to do so.

¶ 36 In contrast, no ReadyLink supervisors were present when the plaintiff performed her work at Touchette, nor did ReadyLink exercise any control over how she performed her work. She had never even met anyone from ReadyLink in person. Her only contact with ReadyLink was by telephone.

¶ 37 Although ReadyLink paid the plaintiff; handled her unemployment insurance, social security, and tax deductions; and carried malpractice, general liability, and workers' compensation insurance for her, it is undisputed that Touchette supplied ReadyLink with the number of hours she worked each day and ReadyLink billed Touchette for those hours at an agreed-upon rate, which included reimbursement for those payroll expenses plus a profit. These facts suggest that ReadyLink was merely a conduit through which the plaintiff was paid, supporting the inference that she was a borrowed employee under Touchette's control. See *American Stevedores Co. v. Industrial Comm'n*, 408 Ill. 449, 455-56 (1951) (holding that the case came within the borrowed-employee doctrine as a matter of law where Frigidaire procured temporary workers through Stevedores, an agency, and Stevedores merely became the selecting agency to pick the workers and the conduit through which they were paid); see also *A.J. Johnson Paving Co.*, 82 Ill. 2d at 349 (the court did not "deem relevant" the fact that the plaintiff was paid by the loaning employer rather than the borrowing employer and stated that "[t]he mere fact that the employee does not receive his wages from the [borrowing] employer will not defeat the finding of a loaned-employee situation").

¶ 38 It is also clear from the undisputed material facts in the present case that, at a minimum, the plaintiff impliedly consented to the borrowed-employee relationship by accepting Touchette's temporary work assignments and accepting Touchette's control and direction as to her work activities. At the time of her injury, she had been accepting temporary work assignments at Touchette for over two years. In addition, she was given, and signed, Touchette's "Memo of Understanding," which was on Touchette's letterhead, acknowledging that she had been given other information and materials regarding her work at Touchette. She was also given, and signed, Touchette's job description for a registered nurse, which was also on its letterhead.

That job description included a summary of the job, the essential functions and duties of the job, the qualifications for the job, the preferred skills and abilities for the job, the physical demands of the job, and the duties and responsibilities of the job. By signing the job description, she certified that she was "able to perform the essential duties and physical/mental functions" of the job and that she possessed "the required skills, knowledge, training, education and experience" required for the job. She also followed Touchette's doctors' orders and complied with Touchette's supervisors' instructions with regard to starting, stopping, and break times, as well as other incidental directions as to the performance of her work. Finally, she followed Touchette's policies and protocol in performing her duties and was written up by her supervisors at Touchette when she failed to do so.

¶ 39 Because the undisputed material facts demonstrate that Touchette directed and controlled the plaintiff's work and that she consented to the borrowed-employee relationship with Touchette, there is no genuine issue of material fact as to whether Touchette was a borrowing employer. The circuit court, therefore, properly determined, as a matter of law, that the plaintiff was Touchette's borrowed employee at the time of her injury and that her common law premises liability action against Touchette was, therefore, barred by the exclusive remedy provision of the Act. Accordingly, the circuit court properly granted summary judgment in favor of Touchette.

¶ 40 The plaintiff also argues that the agreement between Touchette and ReadyLink, whereby ReadyLink was responsible for workers' compensation claims and agreed to hold Touchette harmless from any such claims, relieved Touchette from liability under the Act and, in turn, the protection of the Act's exclusive remedy provision. We disagree.

¶ 41 The plaintiffs in *Chaney* made the same argument, and the appellate court rejected that argument, noting that to adopt the plaintiffs' argument would require it to ignore the Act's explicit provisions making borrowing and loaning employers jointly and severally liable to the employee. *Chaney*, 315 Ill. App. 3d at 830. The court noted that the Act establishes a system to help ensure that the employee will recover benefits in a borrowed-employee scenario. *Id.* If the borrowing employer fails to pay the employee's claim, the loaning employer must pay the employee but has the right to seek reimbursement from the borrowing employer. *Id.* Despite the indemnification agreement between the borrowing employer and the loaning employer waiving the loaning employer's right to indemnification, the borrowing employer was still primarily liable for the borrowed employee's injuries under the Act. *Id.*

¶ 42 Similarly, in the present case, despite the indemnification agreement between Touchette and ReadyLink waiving ReadyLink's right to indemnification, Touchette was still primarily liable for the plaintiff's injuries under the Act. We, therefore, reject the plaintiff's argument that Touchette should be subject to common law tort liability in this case because, pursuant to its agreement with ReadyLink, it was not liable under the Act.

¶ 43 Finally, the plaintiff argues that Touchette is collaterally estopped from claiming that it was her employer by the workers' compensation award finding that ReadyLink was her employer. Touchette argues that the plaintiff waived the collateral estoppel issue because she failed to raise it in the trial court. We agree. The plaintiff did not raise the collateral estoppel issue in the trial court and cannot raise it for the first time on appeal. See *Parks v. Kownacki*, 193 Ill. 2d 164, 180 (2000) (issues not raised in the trial court cannot be argued for the first time on appeal).

¶ 44 CONCLUSION

¶ 45 For the foregoing reasons, we affirm the order of the circuit court of St. Clair County granting summary judgment in favor of Touchette.

¶ 46 Affirmed.

FIRST DIVISION
AUGUST 10, 2015
NUNC PRO TUNC JUNE 15, 2015

No. 1-13-2252

RONALD BAYER, Plaintiff and Cross-Appellee, v. PANDUIT CORPORATION, Defendant and Third-Party Plaintiff-Appellant and AREA ERECTORS, INC., Defendant and Third-Party Defendant-Appellee and Cross-Appellant.	)	Appeal from the Circuit Court of Cook County. No. 07 L 09877 Honorable William J. Haddad, Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court, with opinion.
Justices Connors and Harris concurred in the judgment and opinion.

OPINION

¶ 1 This appeal arises from the October 5, 2012 order entered by the circuit court of Cook County, which granted a joint motion for a good-faith finding and approval of a settlement agreement between plaintiff Ronald Bayer (Bayer) and third-party defendant Area Erectors, Inc. (Area) in a negligence action, thereby dismissing with prejudice Area as a party in a contribution claim initiated by defendant and third-party plaintiff Panduit Corporation (Panduit). This appeal also arises from the circuit court's July 18, 2013 order granting Bayer's motion for attorney fees and costs against Area in a separate claim under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2012)). On appeal, Panduit appeals from the circuit court's October 5, 2012

ruling, and argues that the court erred in approving the settlement agreement between Bayer and Area and that Panduit's contribution claim against Area should not have been dismissed with prejudice. On appeal, Area appeals from the circuit court's July 18, 2013 order granting Bayer's motion for attorney fees and costs against Area in a separate workers' compensation claim. For the following reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County. We have jurisdiction pursuant to Illinois Supreme Court Rule 301 (eff. Feb. 1, 1994).

¶ 2 BACKGROUND

¶ 3 Panduit is an electrical components manufacturer and owner of a warehouse facility located in Dekalb, Illinois. In June 2007, Panduit, acting as its own general contractor, entered into an agreement with Garbe Iron Works, Inc. (Garbe) for the expansion of the warehouse facility. In the agreement, Panduit agreed to pay almost $3 million for Garbe to fabricate and erect structural steel for the expansion project. The agreement specified that Garbe was responsible for "initiating, maintaining and supervising all safety precautions and programs, including all those required by law in connection with the performance of the [a]greement," and that Garbe was required to comply with all Occupational Safety & Health Administration (OSHA) standards. Pursuant to the agreement, Garbe was required to include Panduit as an additional insured on Garbe's commercial general liability insurance policy. The agreement allowed Garbe to hire subcontractors, who must also be subjected to the same insurance requirements as Garbe.

¶ 4 Pursuant to a "purchase order," Garbe subcontracted Area to "[f]urnish all labor and equipment (including supervision) to upload and erect" structural steel, in exchange for

$520,485. The purchase order specified that Area would name Garbe and Panduit as additional insureds on a $2 million insurance policy.

¶ 5 On June 20, 2007, Bayer, an employee of Area, was working as an ironworker on the construction site when he allegedly fell and sustained injuries. As a result of those injuries, Bayer became a quadriplegic. Thereafter, Bayer filed a workers' compensation claim against Area.

¶ 6 On September 19, 2007, Bayer filed a lawsuit against Panduit for negligence. On March 24, 2008, Bayer filed a first amended complaint to include Garbe as a defendant.[1]

¶ 7 On April 30, 2009, Panduit filed a third-party complaint for contribution against Area, alleging that Area was also negligent in failing to ensure the safety of its employees, including Bayer. The third-party complaint for contribution requested that, in the event Panduit is held liable to Bayer, Panduit be awarded judgment against Area "in an amount commensurate with the relative degree of fault attributable to Area" in causing Bayer's injuries. On May 15, 2009, Area filed an answer and affirmative defenses to Panduit's third-party complaint for contribution.

¶ 8 On October 1, 2012, Area and Bayer filed a joint motion for a good-faith finding and approval of a settlement agreement between Bayer and Area (motion for a good-faith finding). The motion for a good-faith finding alleged that Bayer had filed a workers' compensation claim against his employer, Area; that Area has honored Bayer's workers' compensation claim and Bayer had been paid and continued to be paid temporary total disability and medical expenses; that the amount of workers' compensation lien to date totaled $5,275,585.57; that Bayer and Area, through Area's insurer Arch Insurance Company, have entered into a settlement agreement

[1] Tylk Gustafson Reckers Wilson Andrews, LLC (Tylk), as structural engineer, was also named as a defendant. However, Tylk was subsequently dismissed as a defendant at the summary judgment stage of the case on June 16, 2010.

through an arm's length bargaining process; and that the settlement agreement was supported by consideration. A copy of the settlement agreement was attached to the motion for a good-faith finding.

¶ 9 On October 1, 2012 and October 4, 2012, a hearing on the motion for a good-faith finding was held. On October 5, 2012, the circuit court granted the motion for a good-faith finding, approved the settlement agreement between Area and Bayer as one made in "good faith," and dismissed Area with prejudice as a third-party defendant in Panduit's contribution claim.[2]

¶ 10 On October 18, 2012, Bayer settled his claim against Garbe in the negligence action. Thus, Panduit proceeded to trial as the sole remaining defendant.

¶ 11 On October 23, 2012, a jury trial commenced on Bayer's negligence action. At trial, Bayer presented evidence that the cost of his life care plan ranged from about $17 million to over $25 million. On November 14, 2012, the jury entered a verdict in favor of Bayer and against Panduit in the sum of $80 million in damages, which included compensation for pain and suffering, but reduced the $80 million in damages by 20% for Bayer's own contributory negligence, for a total of $64 million ($80 million - 20% = $64 million). On that same day, the circuit court entered a judgment against Panduit in the sum of $64 million plus costs.[3]

¶ 12 From December 12, 2012 to January 23, 2013, the circuit court entered several orders granting Panduit an extension of time to file a posttrial motion. On February 20, 2013, Panduit filed a posttrial motion, arguing, *inter alia*, that the circuit court erred in dismissing Panduit's

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[2] Area was also dismissed with prejudice from a third-party contribution claim and a breach of contract claim filed by GARBE in January 2009.

[3] The record suggests that Panduit and Bayer later settled the lawsuit after the jury trial; hence, the jury's findings at trial are not issues before this court on appeal.

third-party contribution claim against Area upon its approval of the settlement agreement between Area and Bayer, where the settlement agreement was neither supported by good faith nor consideration.

¶ 13 On June 13, 2013, following a hearing on Panduit's posttrial motion, the circuit court denied the motion. In its ruling, the court incorporated by reference its prior findings at the October 2012 hearing on the motion for a good-faith finding. On June 13, 2013, the court entered an agreed order in which Bayer and Area, on behalf of its insurer Arch Insurance Company, agreed to extend workers' compensation benefits to Bayer until July 15, 2013.

¶ 14 Meanwhile, on March 5, 2013, while Panduit's posttrial motion was pending before the court, Bayer filed a motion for attorney fees and costs (motion for attorney fees) against his employer, Area, under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2012)). The motion for attorney fees, citing section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b) (West 2012)) and the holding in *Zuber v. Illinois Power Co.*, 135 Ill. 2d 407 (1990), requested the court to enter an order compelling Area to pay attorney fees in an amount representing 25% of future workers' compensation benefits for Bayer that had been suspended by statute as a result of the underlying settlements in the negligence action. On June 27, 2013, Area filed an amended response to Bayer's motion for attorney fees, requesting that the court deny Bayer's motion with respect to future medical or disability payments, or any future workers' compensation payments. On July 8, 2013, Bayer filed a reply in support of his motion for attorney fees.

¶ 15 On July 11, 2013, a hearing on Bayer's motion for attorney fees was held.

¶ 16 On July 12, 2013, Panduit filed a notice of appeal, appealing from the circuit court's October 5, 2012 order approving the settlement agreement between Bayer and Area, and

dismissing with prejudice Panduit's third-party contribution claim against Area. Panduit also appeals from the circuit court's June 13, 2013 order denying its posttrial motion.

¶ 17 On July 18, 2013, the circuit court granted Bayer's motion as to attorney fees relating to future workers' compensation payments and denied the motion as to costs relating to future workers' compensation payments. In its ruling, the court required Area to pay 25% attorney fees to Bayer's counsel, the law firm of Horwitz, Horwitz & Associates, Ltd., "for future medical bills, lost wages, long term care, and any other compensation and benefit compensable under the Illinois Worker's Compensation Act incurred on or after July 16, 2013." The court also ordered that "medical bills and/or loss wage statements or any other claims of compensation are to be submitted to [Area's] insurance company, Arch Insurance Company, for reimbursement of twenty-five percent (25%) of attorney's fees on said medical bills, wage loss, long term care, and compensation and benefits by [Bayer] in a reasonably timely manner and paid in a reasonably timely manner by [Area's] insurance carrier, Arch Insurance [Company]." The order further stated that there "shall be no double recovery of attorney's fees. Recovery shall go to assist [Bayer] in the one-third (1/3) payment of attorney's fees being paid pursuant to the [c]ontractual [a]greement between [Bayer] and his attorneys, Horwitz, Horwitz & Associates, Ltd. pursuant to In Re: Dierkes, 191 Ill. 2d 326 (2000)." The July 18, 2013 order also stated that the court "finds no just reason to delay enforcement or appeal of this order."

¶ 18 On July 24, 2013, Panduit filed a supplemental notice of appeal to postdate the court's final order entered on July 18, 2013.

¶ 19 On July 31, 2013, Area filed a cross-notice of appeal, appealing from the court's July 18, 2013 ruling. On February 19, 2014, this court granted Area's motion to amend the cross-appeal to label it as a "separate appeal," and granted Area leave to file an amended docketing statement.

¶ 20 ANALYSIS

¶ 21 We determine the following issues on appeal: (1) whether the circuit court erred in approving the settlement agreement between Bayer and Area and in dismissing with prejudice, Panduit's third-party contribution claim against Area in the negligence action; and (2) whether the circuit court erred in granting Bayer's motion for attorney fees against his employer, Area, in the workers' compensation claim.

¶ 22 We first determine whether the circuit court erred in approving the settlement agreement between Bayer and Area and, in dismissing with prejudice, Panduit's third-party contribution claim against Area in the negligence action. We review the circuit court's decision under an abuse of discretion standard. *Johnson v. United Airlines*, 203 Ill. 2d 121, 135 (2003); *Dubina v. Mesirow Realty Development, Inc.*, 197 Ill. 2d 185, 192 (2001). "An abuse of discretion occurs when the ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *Favia v. Ford Motor Co.*, 381 Ill. App. 3d 809, 815 (2008).

¶ 23 Panduit argues that the circuit court erred in approving the settlement agreement between Bayer and Area and in dismissing with prejudice Panduit's third-party contribution claim against Area. Specifically, Panduit argues that the settlement agreement entered into by Bayer and Area was not made in good faith, where Area had paid nothing to Bayer as consideration for its release from the pending legal action. Panduit contends that consideration was lacking by pointing out that Area had a statutory lien under the Workers' Compensation Act representing the amount of past and future workers' compensation payments to Bayer; that Area did not waive its statutory lien on a portion of the proceeds that Bayer is to receive from Panduit; and that, as a result of the jury verdict against Panduit, Area's entire statutory lien remained available for recoupment. Panduit further argues that, by not waiving any portion of its lien, Area "has been wrongly

allowed to shift its entire statutory liability" to Panduit and, thus, Area has not paid any "net" consideration to support a finding of good faith. Moreover, Panduit argues that Area's $2 million insurance policy, under which Panduit and Garbe were listed as insureds, did not constitute "consideration" for the settlement agreement because the policy limits were made available to satisfy Panduit's liability under the judgment, not Area's liability. Panduit further asserts that it was unfairly prejudiced by the dismissal of its contribution claim against Area, where Area specified the trip hazard in the construction plans, provided inadequate fall protection, and failed to supervise Bayer at the time of the accident.

¶ 24 Area counters that the settlement agreement was entered into in good faith, arguing that multiple consideration existed to support the agreement. Area argues that the settlement agreement stated that the $2 million from its primary insurance policy was Panduit and Garbe's money, however, Area "controlled that amount due to the fact that Area had a $500,000 deductible." Area argued that because it had "some control" over the $2 million, this supported the circuit court's finding, after hearing extensive arguments by the parties, that consideration existed. Area further argues that the lack of waiver of its workers' compensation lien did not constitute bad faith, and that Illinois courts have consistently rejected challenges to settlement agreements based on the argument that they shifted a disproportionate share of liability to a nonsettling tortfeasor, like Panduit, which received an unfavorable verdict at trial. Area further argues that, even without a lien waiver, Bayer received very tangible benefits from the settlement—including the right to continue living in a house that had been outfitted to suit his physical needs, as agreed to in his workers' compensation case, as well as the continuation of workers' compensation benefits to Bayer until the negligence action was fully resolved despite Area's right under Illinois law to suspend workers' compensation payments to Bayer once he had

received any amount of money paid by another party in the lawsuit. Area further contends that it had an excess insurance policy of $25 million that was issued by insurer, "Chartis/AIG Insurance," under which Panduit and Garbe were also named as additional insureds. Area notes that Chartis/AIG Insurance was the same insurer as Panduit's own insurer. Area claims that the entire $25 million had been triggered and exhausted to pay for Garbe's settlement, as well as, Panduit's posttrial settlement with Bayer which, consequently, left Area with no additional insurance coverage "to satisfy any contribution counterclaim or judgment."

¶ 25 The Joint Tortfeasor Contribution Act (Contribution Act) (740 ILCS 100/1 et seq. (West 2010)) "creates a statutory right of contribution in actions 'where 2 or more persons are subject to liability in tort arising out of the same injury to person or property, or the same wrongful death' (740 ILCS 100/1, 2(a) (West 1996)), to the extent that a tortfeasor pays more than his *pro rata* share of the common liability." *Johnson*, 203 Ill. 2d at 128. Section 2 of the Contribution Act states, in relevant parts, as follows:

> "(c) When a release or covenant not to sue or not to enforce judgment is given in *good faith* to one or more persons liable in tort arising out of the same injury or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide but it reduces the recovery on any claim against the others to the extent of any amount stated in the release or the covenant, or in the amount of the consideration actually paid for it, whichever is greater.
>
> (d) The tortfeasor who settles with a claimant pursuant to paragraph (c) is discharged from all liability for any contribution to

any other tortfeasor." (Emphasis added.) 740 ILCS 100/2(c), (d) (West 2010).

Although the term "good faith" is not defined by the Contribution Act, a settlement "will not be found to be in good faith if it is shown that the settling parties engaged in wrongful conduct, collusion, or fraud," or "if it conflicts with the terms of the [Contribution] Act or is inconsistent with the policies underlying the [Contribution] Act." *Johnson*, 203 Ill. 2d at 134. The two public policies underlying the Contribution Act include "the encouragement of settlements and the equitable apportionment of damages among tortfeasors." *Id.* at 133.

¶ 26 Here, Panduit does not argue on appeal that any wrongful conduct, collusion, or fraud occurred to undermine the circuit court's finding of good faith. Nor does it argue that the public policy of the Contribution Act which is to encourage settlement was violated. Rather, Panduit argues that the settlement agreement entered into between Bayer and Area was inconsistent with the second purpose of the Contribution Act, which is promoting the equitable apportionment of damages among tortfeasors. Panduit argues that Area's relative culpability was high and its settlement with Bayer shifted its entire liability to Panduit at trial. Thus, our relevant inquiry is whether the circuit court abused its discretion in finding good faith in approving the settlement agreement.

¶ 27 In order to prove whether a settlement was negotiated in good faith within the meaning of the Contribution Act, the settling parties carry the initial burden of making a preliminary showing of good faith. *Id.* at 132. Once a preliminary showing of good faith is made by the settling parties, the burden of proof shifts to the nonsettling party, who challenges the good faith of the settlement. That party must prove "the absence of good faith by a preponderance of the evidence." *Id.* " 'Ultimately, however, whether a settlement satisfies the good faith requirements

as contemplated by the [Contribution Act] is a matter left to the discretion of the trial court based upon the court's consideration of the totality of the circumstances.' " *Cellini v. Village of Gurnee*, 403 Ill. App. 3d 26, 37 (2010) (quoting *Johnson*, 203 Ill. 2d at 135).

¶ 28 In the instant case, a copy of the settlement agreement was attached to Area and Bayer's October 1, 2012 joint motion for a good-faith finding, which detailed the release terms to which Bayer and Area agreed. Thus, we find that Area sufficiently made a preliminary showing of good faith, and the burden of proof shifted to Panduit to show an absence of good faith by a preponderance of the evidence. See *Johnson*, 203 Ill. 2d at 132 (a settling party must show the existence of a legally valid settlement agreement); *Cellini*, 403 Ill. App. 3d at 37 (settling tortfeasor made a preliminary showing of good faith where it submitted to the circuit court a copy of the "full and final release and satisfaction agreement"); see generally *Snoddy v. Teepak, Inc.*, 198 Ill. App. 3d 966, 969 (1990) (a preliminary showing of good faith was evidenced by the settling parties' "release" and the circuit court properly presumed that the settlement was valid). However, we note that not all legally valid settlements satisfy the good-faith requirements of the Contribution Act. See *Johnson*, 203 Ill. 2d at 132; *Bowers v. Murphy & Miller, Inc.*, 272 Ill. App. 3d 606, 610 (1995).

¶ 29 The terms of the settlement agreement between Bayer and Area provided as follows:

> "For the sole consideration of the payment to [Bayer] at this time of the sum of:
>
> 1. Arch/Area represents that the workers' compensation lien for medical and indemnity as of today's date is $5,275,985.57. If the civil case or any portion thereof settles before a verdict is rendered, Arch/Area *** agrees to waive its entire workers' compensation

lien pursuant to 5(b) of the Illinois Workers' Compensation [A]ct as it relates to said settlement. (For example, if [Bayer] settles with only one party before a verdict, then the lien is waived as to that settlement only, but the lien remains as to any verdict or recovery arising out of the verdict as stated below. Or, if [Bayer] settles with both Panduit and [Garbe] before a jury verdict, then the entire 5(b) lien is waived.)

2. If any portion of the case is tried to verdict and recovery is made by reason of the verdict and an amount is paid that would satisfy the workers' compensation lien or any part of the *** lien, [Bayer] agrees to pay back the workers' compensation lien subject to section 5(b) of the [W]orkers' [C]ompensation [A]ct.

3. During the pendency of this matter and before the matter is resolved with all parties by either settlement or trial, Arch/Area *** agrees to continue to leave open all benefits under the Workers' Compensation Act as they are today.

4. If the case is settled with all parties prior to verdict then Arch/Area *** would stop workers' compensation payments once the settlement funds are received by [Bayer]. In addition, under said circumstance, [Bayer] and his attorneys would waive their statutory attorneys' fees in regards to future workers' compensation payments.

5. Arch to pay [$2 million] which it represents to be its policy

limits on the primary commercial liability policy issued to [Area] as the named insured wherein [Panduit] and [Garbe] are additional insureds under said policy.

This [$2 million] is to be credited towards any settlement or verdict, until it is exhausted, against [Panduit] and [Garbe].

Subject to provision 6, this [$2 million] payment is not intended as and will not act as an advance on [w]orkers' [c]ompensation benefits, is not being paid pursuant to the Workers' Compensation Act, will not be utilized as to setoff for any future payments under the Workers' Compensation Act and Area/Arch waives its 5(b) lien. This settlement represents a good faith settlement between [Bayer] and Arch/Area in the civil action, and is not a settlement of the [w]orkers' [c]ompensation action with Area. This is not a settlement with [Garbe] and [Panduit].

6. If [Bayer] recovers [$4 million] (or less) as a result of the verdict in the civil action then Arch/Area *** will waive its Section 5(b) lien as it relates to said [$2 million] referenced in paragraph 5 and waives any right to take said [$2 million] referenced in paragraph 5 as a set-off as to future workers' compensation payments.

However, if [Bayer] recovers more than [$4 million] as a result of the verdict in the civil action then Arch does not waive any 5(b) lien (including any rights to set-off under the [W]orkers' [C]ompensation [A]ct) with regard to said [$2 million] referenced

> in paragraph 5.
>
> 7. The 'occupancy agreement' between [Bayer] and Arch Insurance, as agreed to in the workers' compensation case, shall not be interfered with by any settlement or jury verdict in the civil case. The rights as contained in that agreement survive the third party case and [Bayer] shall maintain the right to live in the premises as delineated in the 'occupancy agreement.'
>
> 8. The above stated offer of compromise and settlement is strictly contingent on the dismissal of [Area] as a party to this litigation. A joint motion on behalf of [Bayer] and [Area] for a good faith finding pursuant to the Illinois Contribution Act will be made. The settlement is contingent upon the granting of that motion and the dismissal of [Area] as a party defendant in [the civil case]."

¶ 30 As noted, on October 1, 2012 and October 4, 2012, a hearing on the motion for a good-faith finding was held. During the hearing, counsel for Area presented the terms of the settlement agreement and the circuit court heard arguments from the parties. In finding good faith, the circuit court posed questions to the parties regarding the settlement terms, posed different hypothetical scenarios to the parties in examining the effects of various contingencies listed in the settlement agreement, and heard the parties' arguments about whether valid consideration supported the settlement agreement.

¶ 31 Under the facts and the record before us, we find that Panduit failed to demonstrate, by a preponderance of the evidence, any showing of bad faith by the settling parties. The bulk of Panduit's argument before the circuit court centered around the perceived unfairness Panduit

would face if the settlement agreement were approved, noting that a disproportionate amount of liability would be shifted to Panduit at trial and that the settlement agreement was supported by "illusory" consideration that did not satisfy the good-faith requirements of the Contribution Act. However, the record supports the circuit court's finding that the settlement agreement was supported by valid consideration. Section 5(b) of the Workers' Compensation Act gives an employer the right to recover the amount of past or future compensation payments from any money judgment or settlement received by the injured employee in an action brought by the injured employee against another party who is legally liable for the injury. See 820 ILCS 305/5(b) (West 2010). Under the settlement agreement, Bayer and Area agreed to multiple contingency lien waivers by Area which could be triggered under different scenarios. Area and its insurer, Arch Insurance Company, agreed to waive the entirety of its workers' compensation lien against Bayer as to any portion of the negligence action that was settled before a verdict was rendered. Area further agreed that if Bayer recovered $4 million or less as a result of the trial verdict, then the workers' compensation lien would be waived as to the $2 million primary insurance proceeds that would be paid towards Panduit's and Garbe's liability in the negligence action. However, Bayer agreed that if he recovered more than $4 million as a result of the trial verdict, Area's workers' compensation lien would not be waived as to the $2 million primary insurance proceeds that would be paid towards Panduit's and Garbe's liability in the action. At the hearing on the motion for a good-faith finding, counsel for Area clarified that Area had also paid a $500,000 deductible on the policy in order to ensure that the $2 million policy proceeds would be triggered and paid towards Panduit's and Garbe's liability as the policy insureds. Although it is now known to us that Panduit eventually proceeded to trial as the sole defendant and that on November 14, 2012, the jury rendered a verdict of $64 million against Panduit—

which consequently triggered the provision in the settlement agreement allowing Area to recoup the entirety of its workers' compensation lien against the verdict amount—hindsight is not the appropriate criteria for determining what was valid consideration *at the time* circuit court made its finding of good-faith and approved the settlement agreement on October 5, 2012. Indeed, at the June 13, 2013 hearing on Panduit's posttrial motion, the circuit court denied the motion by correctly noting that "[t]he question of consideration is one that has been discussed in many contexts, and in this case, the issue of public policy and the need looking *at the time* that this agreement was made there was consideration that would support what occurred." We further found that, aside from Area's contingency lien waivers, paragraph 3 of the settlement agreement alone was sufficient as valid consideration between Bayer and Area. Under Illinois law, an employer has a right to suspend workers' compensation payments to an injured employee once any amount of money is received by the injured employee from a third-party tortfeasor for the same injury. See *Freer v. Hysan Corp.*, 108 Ill. 2d 421, 426-27 (1985); 820 ILCS 305/5(b) (West 2010). Under paragraph 3, Area agreed not to suspend workers' compensation payments to Bayer at any time prior to the final resolution of the litigation against all parties. The effect of this specific provision allowed Bayer to continue receiving workers' compensation payments, even though Bayer had settled the lawsuit with Garbe for a specified sum only 14 days after the hearing on the motion for a good-faith finding. Had the trial issues not been fully resolved by Panduit's posttrial settlement with Bayer, pursuant to paragraph 3 of the settlement agreement, Bayer would have continued to receive workers' compensation payments during the appeals process—payments which would have been crucial to Bayer as a quadriplegic needing around the clock nursing care.

¶ 32 In *Cleveringa v. J.I. Case Co.*, a reviewing court upheld the circuit court's finding that a settlement agreement between an injured worker, his employer, and a manufacturer was entered into in good faith, and upheld the court's dismissal of all pending claims, including the contribution claims, against these settling parties. *Cleveringa*, 192 Ill. App. 3d 1081, 1083-84, 1087 (1989). Pursuant to the settlement agreement, the injured worker agreed to release both a manufacturer and his employer from all further liability, in exchange for a total of $1.1 million. *Id.* at 1084. At time of the settlement, the employer's workers' compensation insurance carrier, Home Insurance Company (Home), had paid the injured worker approximately $275,000 in compensation benefits and held a lien in that amount against any settlement or judgment obtained by the injured worker. *Id.* The settlement agreement included a term which provided that Home agreed to waive enforcement of its workers' compensation lien against the settling parties, but expressly reserved the right to enforce its lien against funds received by the injured worker against a non-settling party, J.I. Case Company (Case). *Id.* Case argued that the settlement was not in good faith and should be set aside because Case may be subject to a judgment which was greater than that which Case believed was appropriate for settlement. *Id.* at 1085. In rejecting this argument, the *Cleveringa* court stated that "[s]uch a possibility always exists when parties to litigation contemplate settlement. A party who refuses to settle a case on agreed terms always risks that he will be exposed to enhanced liability by that refusal. This is the essence of settlement negotiations. A party either compromises in return for the certainty of a fixed result, or gambles that he will obtain a more favorable result by submitting the case to a jury." *Id.* at 1085-86. The *Cleveringa* court further noted that accepting Case's argument would in effect "defeat the public policy favoring settlements and would allow one party to veto any settlement unless all parties had agreed on their respective liabilities." *Id.* at 1086. In upholding

the circuit court's finding of good faith, the *Cleveringa* court found that the record contained no evidence of collusion, fraud, or tortious conduct; that the trial court was aware of and considered all of the circumstances surrounding the settlement agreement; that the trial court conducted a full hearing at which each party was represented by counsel and the court determined that the parties to the agreement acted in good faith; and that "the good faith of a settlement is not judged by the obstacles it creates for the nonsettling tortfeasor." *Id.*

¶ 33 In the instant case, the facts presented before us are remarkably similar to those in *Cleveringa*. Here, Bayer and Area entered into a settlement agreement by which Bayer agreed to release Area from further liability and Area would be dismissed as a third-party to the litigation, in exchange for various contingency lien waivers that benefitted Bayer. At the time of the settlement, Arch Insurance Company, on behalf of Area as the employer, had paid over $5 million in workers' compensation and held a statutory lien in that amount against any settlement or judgment obtained by Bayer. However, as part of consideration, like *Cleveringa*, the settlement agreement included provisions stating that "Arch/Area" agreed to waive enforcement of its workers' compensation lien against any settling parties, but expressly reserved the right to enforce its lien against funds received by Bayer against any nonsettling parties. In addition, "Arch/Area" agreed not to exercise its lawful right to suspend workers' compensation payments to Bayer at any time prior to the final resolution of the litigation against all parties, even if, in the interim, Bayer receives money of any kind from a third-party tortfeasor for the same injury. See generally *Ross v. May Co.*, 377 Ill. App. 3d 387, 391 (2007) ("the essential element of consideration is a bargained-for exchange of promises or performances that may consist of a promise, an act, a *forbearance*, or the creation, modification, or destruction of a legal relation" (emphasis added). Like *Cleveringa*, there was no evidence of collusion, fraud, or tortious

conduct by the parties in reaching settlement. Like Case, as the nonsettling party in *Cleveringa*, Panduit, as the nonsettling party in the case at bar, argues that the settlement was not entered into in good faith because Area had retained the right to enforce its entire workers' compensation lien against Panduit's judgment amount, and thus, Area "has been wrongly allowed to shift its entire statutory liability" to Panduit and has not paid any "net" consideration to support a finding of good faith. However, applying the principles in *Cleveringa*, we reject this contention. First, as discussed, paragraph 3 of the settlement agreement by which Area agreed to forbear its right to suspend workers' compensation payments to Bayer at any time prior to the final resolution of the litigation against all parties, was alone sufficient and valid consideration. The settlement agreement also set forth provisions which waived the entirety of Area's workers' compensation lien as to any funds received by Bayer as settlement with other parties in the negligence action. Second, the record shows that the circuit court was aware of and considered all of the circumstances surrounding the settlement agreement, conducted a full hearing at which each party was represented by counsel, and the court was well informed when it determined that the parties to the agreement acted in good faith. As the *Cleveringa* court noted, "the good faith of a settlement is not judged by the obstacles it creates for the nonsettling tortfeasor." *Cleveringa*, 192 Ill. App. 3d at 1086. Thus, we reject Panduit's argument that the settlement was not made in good faith. See also *Banks v. R.D. Werner Co.*, 201 Ill. App. 3d 762, 771 (1990) (failure of an employer to waive a workers' compensation lien does not *ipso facto* render a settlement invalid as having been made in bad faith); *Romack v. R. Gingerich Co.*, 314 Ill. App. 3d 1065, 1069 (2000) (settlement agreement entered into in good faith where employer only partially waived workers' compensation lien against injured employee and expressly reserved its right to enforce the lien against any funds received from the nonsettling party). Accordingly, we hold that, under

the totality of the circumstances, the circuit court did not abuse its discretion in finding good faith and in approving the settlement agreement.

¶ 34 Panduit cites cases in support of its argument that Bayer's and Area's settlement was not entered into in good faith. However, we find these cases to be factually distinguishable from the facts of the case at bar. Further, none of those cases nullify the analysis which we have explained above. See also *Higginbottom v. Pillsbury Co.*, 232 Ill. App. 3d 240 (1992) (no finding of good faith where employer retained its entire workers' compensation lien but offered no other consideration to injured worker), *abrogated on other grounds*, *Johnson*, 203 Ill. 2d 121.

¶ 35 Moreover, we reject Panduit's argument of bad faith premised upon the extent of the amount of damages awarded by the jury when measured against what it claims is Area's high relative culpability compared to Panduit's low relative fault. Courts have consistently rejected challenges to settlements brought on this basis. See *Johnson*, 203 Ill. 2d at 136-37 ("the disparity between the settlement amount and the *ad damnum* in the complaint is not an accurate measure of the good faith of a settlement"); *Palacios v. Mlot*, 2013 IL App (1st) 121416, ¶ 31 ("the fact that the settlement agreement would be 'advantageous to a party is not necessarily an indication of bad faith' ") (quoting *Johnson*, 203 Ill. 2d at 138-39); *Smith v. Texaco, Inc.*, 232 Ill. App. 3d 463, 469 (1992) ("[i]t has been recognized that settlements may be substantially different from the results of litigation because damages are often speculative and the probability of liability uncertain"); *Cleveringa*, 192 Ill. App. 3d at 1085-86 (allowing a settlement agreement to be set aside on the basis that a nonsettling party would be subject to a judgment greater than that which he believed was appropriate would in effect "defeat the public policy favoring settlements and would allow one party to veto any settlement unless all parties had agreed on their respective liabilities"). Panduit's dissatisfaction with the settlement agreement between Bayer and Area is

simply insufficient to establish bad faith. Accordingly, the circuit court did not err in dismissing with prejudice, pursuant to section 2(d) of the Contribution Act, Panduit's third-party contribution claim against Area in the negligence action. See 740 ILCS 100/2(d) (West 2010) ("[t]he tortfeasor who settles with a claimant *** is discharged from all liability for any contribution to any other tortfeasor").

¶ 36 We next determine whether the circuit court erred in granting Bayer's motion for attorney fees in his workers' compensation claim against his employer, Area.

¶ 37 On March 5, 2013, Bayer filed a motion for attorney fees in his workers' compensation claim against his employer, Area. The motion for attorney fees, citing section 5(b) of the Workers' Compensation Act (820 ILCS 305/5(b) (West 2012)) and the holding in *Zuber*, 135 Ill. 2d 407, requested the circuit court to enter an order compelling Area to pay attorney fees in an amount representing 25% of future workers' compensation benefits for Bayer that had been suspended by statute as a result of the underlying settlements[4] in the negligence action. On June 13, 2013, the court entered an agreed order in which Bayer and Area, on behalf of its insurer Arch Insurance Company, agreed to extend workers' compensation benefits to Bayer until July 15, 2013.[5] On June 27, 2013, Area filed an amended response to Bayer's motion for attorney fees. On July 8, 2013, Bayer filed a reply in support of his motion for attorney fees. On July 11, 2013, a hearing on Bayer's motion for attorney fees was held. On July 18, 2013, the circuit court granted Bayer's motion as to attorney fees relating to future workers' compensation payments and

[4] As discussed, GARBE settled with Bayer prior to trial, and Panduit settled with Bayer at some point after the jury trial.

[5] As a result, workers' compensation benefits were officially suspended as of July 16, 2013. See *Freer*, 108 Ill. 2d at 426-27 (an employer has a right to suspend workers' compensation payments to an injured employee once any amount of money is received by the injured employee from a third-party tortfeasor for the same injury).

denied the motion as to costs relating to future workers' compensation payments. In its ruling, the court required Area to pay 25% attorney fees to Bayer's counsel, the law firm of Horwitz, Horwitz & Associates, Ltd., "for future medical bills, lost wages, long term care, and any other compensation and benefit compensable under the Illinois Workers' Compensation Act incurred on or after July 16, 2013." The court also ordered that "medical bills and/or loss wage statements or any other claims of compensation are to be submitted to [Area's] insurance company, Arch Insurance Company, for reimbursement of twenty-five percent (25%) of attorney's fees on said medical bills, wage loss, long term care, and compensation and benefits by [Bayer] in a reasonably timely manner and paid in a reasonably timely manner by [Area's] insurance carrier, Arch Insurance [Company]." The order further stated that there "shall be no double recovery of attorney's fees. Recovery shall go to assist [Bayer] in the one-third (1/3) payment of attorney's fees being paid pursuant to the [c]ontractual [a]greement between [Bayer] and his attorneys, Horwitz, Horwitz & Associates, Ltd. pursuant to In Re: Dierkes, 191 Ill. 2d 326 (2000)."

¶ 38 On appeal, Area does not dispute the payment of attorney fees for Bayer's permanent total disability benefits, but does dispute the payment of attorney fees "for suspended medical bills, long-term care, or other compensable benefits." Area contends that neither the Workers' Compensation Act nor *Zuber* supports the notion that an injured employee is entitled to recovery of attorney fees for suspended future medical payments. Area further argues that because the $64 million jury verdict was partly comprised of an amount ($25 million - 20% contributory negligence = $20 million) for future medical expenses, of which Bayer's counsel was entitled to one-third in fees pursuant to his attorney-client contract with Bayer, allowing Bayer's counsel now to receive a fee on suspended future medical payments would amount to a double recovery

of attorney fees. Area argues that Illinois court have not directly addressed this issue and urges this court to turn to Indiana courts for guidance, which have rejected the same exact argument for the recovery of attorney fees for suspended future medical payments.

¶ 39 Bayer argues that, under the Workers' Compensation Act and the holding in *Zuber*, he is entitled to a recovery of attorney fees for suspended future medical expenses. Bayer argues that Area's references to section 16 of the Workers' Compensation Act, which deals only with attorney fees sought by the workers' compensation attorneys against their own clients in pursuing the initial or original workers' compensation claim, did not apply to the situation at hand. Rather, Bayer contends that an employer's obligation to pay attorney fees and costs out of the reimbursements recovered from third-party actions are specifically provided for in section 5(b) of the Workers' Compensation Act. Bayer further argues that Area is liable to pay attorney fees for suspended future medical expenses regardless of whether the Industrial Commission enters a final order requiring the payment of such attorney fees. Bayer argues that, pursuant to *In re Estate of Dierkes*, 191 Ill. 2d 326 (2000), the statutory 25% attorney fees required of Area is a contribution toward Bayer's attorney fees that is owed to his legal counsel; that there is no risk of "double recovery" by Bayer's counsel because it merely reduces the total amount of fees that Bayer owes his own attorney; and that such contribution is necessary because Area directly benefitted from the work performed by Bayer's counsel in securing settlement funds in the negligence action. Bayer further argues that Indiana court decisions do not assist this court in resolving this issue.

¶ 40 This issue before us requires the interpretation of provisions under the Workers' Compensation Act, which is a question of law requiring *de novo* review. See *Taylor v. Pekin Insurance Co.*, 231 Ill. 2d 390, 395 (2008). The primary object in interpreting a statute is to give

effect to the intent of the legislature. *Id.* The most reliable indicator of the legislature's intent is the language of the statute, which must be given its plain and ordinary meaning. *Id.* Statutory language that is unambiguous must be applied as written, without resorting to other aids of construction. *Id.* We may not depart from the plain language of an unambiguous statute by reading into it exceptions, limitations, or conditions not expressed by the legislature. *Id.*

¶ 41 Section 5(b) of the Workers' Compensation Act (the Act) provides in pertinent part as follows:

> "(b) Where the injury *** for which compensation is payable under this Act was caused under circumstances creating a legal liability for damages on the part of some person other than his employer to pay damages, then legal proceedings may be taken against such other person to recover damages notwithstanding such employer's payment of or liability to pay compensation under this Act. In such case, however, if the action against such other person is brought by the injured employee *** and judgment is obtained and paid, or settlement is made with such other person, either with or without suit, *then from the amount received by such employee *** there shall be paid to the employer the amount of compensation paid or to be paid by him to such employee *** including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.*" (Emphasis added.) 820 ILCS 305/5(b) (West 2010).

The above italicized portion of the Act concerns the employer's right of reimbursement under the Act, thus allowing the enforcement of the workers' compensation lien by the employer against funds recovered by an injured worker in any third-party negligence action for the same injury. Section 5(b) then continues to include the following:

> "*Out of any reimbursement received by the employer* pursuant to this Section *the employer shall pay his pro rata share of all costs and reasonably necessary expenses in connection with such third-party claim, action or suit* and where the services of an attorney at law of the employee *** have resulted in or substantially contributed to the procurement by suit, settlement or otherwise of the *proceeds out of which the employer is reimbursed*, then, in the absence of other agreement, *the employer shall pay such attorney 25% of the gross amount of such reimbursement.*" (Emphases added.) *Id.*

¶ 42 Area does not dispute that it owed Bayer 25% attorney fees for the suspended permanent total disability benefits to which Area had a right of reimbursement under the Act. Rather, Area argues only that it is not required under section 5(b) to pay 25% attorney fees on suspended future "medical bills, long-term care, or other compensable benefits."

¶ 43 Based on the plain language of section 5(b), we find that the Act does not require an employer to pay attorney fees for suspended future medical payments. Under section 5(b), the pool of money from which an employer has a right to reimbursement is "*the amount of compensation paid or to be paid by him to such employee *** including amounts paid or to be paid pursuant to paragraph (a) of Section 8 of this Act.*" (Emphasis added.) 820 ILCS 305/5(b)

(West 2010). In support of his argument that Area was required to pay attorney fees on the suspended future medical expenses, Bayer directs this court's attention to the term "compensation" as detailed in section 8 of the Act, and argues that "compensation" includes both wages and medical expenses. However, section 8(a) requires the payment of medical services to be made "*to the provider on behalf of the employee*," rather than directly to the employee. (Emphasis added.) 820 ILCS 305/8(a) (West 2010). Thus, because section 5(b) provides that an employer shall pay 25% attorney fees to the employee's attorney "[o]ut of any reimbursement received by the employer pursuant to this Section" and "the proceeds out of which the employer is reimbursed" (820 ILCS 305/5(b) (West 2010)) we find that, construing both sections 5(b) and 8(a) together, the plain language of the Act does not require the employer to pay attorney fees on suspended future medical expenses. Had the legislature intended for fees under section 5(b) to include future medical expenses, the legislature could easily have drafted section 5(b) to say that the employer's right to reimbursement included the amount of compensation paid or to be paid by the employer *to or on behalf of the employee*, which would have encompassed the medical expenses paid "to the provider on behalf of the employee" under section 8(a) of the Act. (820 ILCS 305/8(a) (West 2010)). We cannot depart from the plain language of the statute by reading into it exceptions, limitations, or conditions not expressed by the legislature. See *Taylor*, 231 Ill. 2d at 395.

¶ 44 As additional support for its argument that the statutory 25% attorney fees do not apply to suspended future medical expenses, Area points to section 16a of the Act, which states that "[n]o attorney fees shall be charged with respect to compensation for undisputed medical expenses." 820 ILCS 305/16a(D) (West 2010). However, we find section 16a to be inapposite to the case at bar, where the section pertains to attorney fees sought by an attorney from his own client in

pursuing any "initial or original claim" under the Act. As the circuit court correctly found in the July 11, 2013 hearing on Bayer's motion for attorney fees, citation to section 16a as authority was not proper because it "deals with the establishment or approval of attorney fees in relation to claims brought strictly under the [Act]." Thus, we find Area's references to section 16a, as well as case law relating to section 16a, to be irrelevant to the facts in the case at bar. See *Augustine v. Industrial Comm'n*, 239 Ill. App. 3d 561 (1992) (appealing from judgment pertaining to an award of attorney fees to the claimant's counsel in workers' compensation claim); *Spinak, Levinson & Associates v. Industrial Comm'n*, 209 Ill. App. 3d 120 (1990) (appealing from Industrial Commission's award of $100 nominal attorney fees to law firm for its representation of claimant in underlying workers' compensation proceeding).

¶ 45 On the other hand, in support of his argument that Area was required to pay attorney fees for suspended future medical expenses pursuant to section 5(b), Bayer relies primarily on the holding in *Zuber*, 135 Ill. 2d 407. However, we do not find *Zuber* to be helpful in advancing Bayer's position. In *Zuber*, the Industrial Commission awarded a widow workers' compensation benefits in the amount of $224.41 per week for a period 20 years, for the decedent's death in the course of employment. *Id.* at 409. The widow filed a wrongful death action against a third-party tortfeasor, which resulted in a settlement providing her with a lump sum payment of $302,466.54 and an annuity in the amount of $900 per month for life (the cost of the annuity was $86,529). *Id.* at 410. Following settlement of the wrongful death action, the widow and the employer were unable to agree on the amount of attorney fees and costs owed by the employer pursuant to section 5(b) of the Act. *Id.* at 411. The circuit court interpreted section 5(b) of the Act as allowing an assessment of fees and costs only on an employer's *past* payments of workers' compensation benefits and, thus, the court did not assess fees and costs on the amount of *future*

compensation payments that the employer was relieved from making by virtue of the widow's recovery in the wrongful death action. *Id.* at 409, 411. The appellate court held that the employer owed fees and costs on both past and future compensation benefits, and ordered payment of the attorney fees to be made directly to the widow rather than her attorney. *Id.* at 412. On appeal, our supreme court affirmed the appellate court's ruling, finding that section 5(b) allows for the assessment of fees and costs for both *past* and *future* compensation payments. *Id.* at 415-16. The *Zuber* court specifically noted that because the source of funds from which an employer has a right to reimbursement under section 5(b) is "the amount of compensation paid or to be paid" by the employer to the beneficiary who succeeds in the third-party action, and that the employer benefits from the third-party action recovery both when it is repaid and when it is relieved of its obligation to make future compensation payments, it was appropriate to impose fees and costs in relation to both benefits. *Id.* The *Zuber* court, however, ordered that the attorney fees be paid directly to the widow's counsel, rather than to the widow herself, noting that there was no risk of "double recovery" where the widow had not fully compensated her attorneys under their attorney-client fee agreement. *Id.* at 421.

¶ 46 We find nothing in *Zuber* to help resolve the narrow issue before us—that is, whether the statutory 25% attorney fees imposed under section 5(b) of the Act applies to suspended future medical expenses. *Zuber* concerned a wrongful death action and the Industrial Commission's award of $224.41 per week in workers' compensation benefits for a period of 20 years, which did not include medical payments (because the injured employee had died). The *Zuber* court merely expressed the holding that section 5(b) allows for the assessment of fees and costs for both *past* and *future* compensation payments, but makes no mention of whether those "future compensation payments" included suspended future medical expenses. As discussed, in this case

Area does *not* dispute that it was required to pay 25% attorney fees on suspended *future* permanent total disability benefits pursuant to *Zuber*, but only disputes that it was also required to pay suspended future medical expenses.

¶ 47 We do not find Bayer's other cases, most of which were relied upon by *Zuber*, to be helpful as they do not directly address the issue before us. See *Lewis v. Riverside Hospital*, 116 Ill. App. 3d 845 (1983) (where a credit to the employer was ordered against an employee's third-party recovery, the appeal raised only a question as to the amount of the credit); *Denius v. Robertson*, 98 Ill. App. 3d 83 (1981) (issue on appeal concerned only the amount of credit to the employer against a recovery by an employee from a third party); *Vandygriff v. Commonwealth Edison Co.*, 68 Ill. App. 3d 396 (1979) (relevant issue on appeal concerned only the amount of recovery subject to a credit to an employer for future compensation payments against the amount of a third-party recovery); *Sands v. J.I. Case Co.*, 239 Ill. App. 3d 19 (1992) (holding that employer is subject to contribution under the Contribution Act to the extent of its reasonably projected liability for future workers' compensation medical benefits, but makes no mention of whether employer owes statutory legal fees on suspended future medical expenses).

¶ 48 Bayer further cites *In re Estate of Dierkes*, 191 Ill. 2d 326, in arguing that the statutory 25% statutory attorney fees required of Area on the suspended future medical expenses would not be duplicative of the legal fees which Bayer's counsel was entitled to receive from Bayer pursuant to their attorney-client fee agreement. Bayer argues that the statutory attorney fees imposed upon Area merely reduces the total amount of fees that Bayer owes his own attorney, and that such contribution by Area is necessary because Area directly benefitted from the work performed by Bayer's counsel in securing settlement funds in the negligence action. However, we find nothing in *In re Estate of Dierkes* to suggest that an employer is required under section

5(b) of the Act to pay attorney fees for any suspended future medical expenses. *In re Estate of Dierkes* involved a workers' compensation claim for a wrongful death situation which, like *Zuber*, involved no future medical payments. The *In re Dierkes* court neither ruled, nor was it asked to rule, on the issue of attorney fees for suspended future medical expenses. Thus, we find Bayer's reliance on *In re Dierkes* to be unavailing in its attempt to analogize its analysis to the facts of this case.

¶ 49 As we have already determined, because the plain language of the Act does not require an employer to pay attorney fees on suspended future medical expenses, we find that Area owed no obligation to pay 25% attorney fees on Bayer's suspended future medical expenses under the Act. Though Illinois courts have not specifically addressed the issue at bar, we note that our sister state, Indiana, when faced with the same issue, held that an employer in a workers' compensation claim was not required to pay attorney fees to an injured worker's attorneys on future medical expenses that the employer would have paid but for the third-party tort action. See *Spangler, Jennings & Dougherty P.C. v. Indiana Insurance Co.*, 729 N.E.2d 117 (Ind. 2000) (finding that future medical expenses were part of the verdict that attorneys had won for claimant and upon which attorneys negotiated post-verdict settlements, and attorneys were not entitled to double recovery of attorney fees for the same damages).

¶ 50 While we do not necessarily adopt *Spangler*'s precise reasoning in reaching this conclusion, we find it instructive. Similar to the injured worker in *Spangler*, Bayer is a quadriplegic whose medical expenses will be ongoing. Although the jury in this case awarded Bayer about $20 million ($25 million – 20% contributory negligence = $20 million) for the present cash value of Bayer's future medical expenses, which was reduced in an overall posttrial settlement, this alone cannot be a basis upon which to impose attorney fees against the employer

for suspended future medical expenses under the Act. See generally *Cherney v. Soldinger*, 299 Ill. App. 3d 1066, 1072 (1998) ("[s]tatutes that are in derogation of the common law will be strictly construed and nothing will be read into such statutes by intendment or implication"); *Kolacki v. Verink*, 384 Ill. App. 3d 674 (2008) (Illinois Workers' Compensation Act establishes system of liability without fault, in derogation of the common law, where traditional common law defenses available to employer are abrogated in exchanged for prohibition of common law suits against employer). Thus, we hold that the circuit court erred, in its July 18, 2013 order, in ruling that Area was required to pay 25% attorney fees to Bayer's counsel for suspended future medical expenses. Accordingly, in light of our holding, we reject Bayer's argument for the imposition of sanctions against Area under Illinois Supreme Court Rule 375(b) (eff. Feb. 1, 1994) (sanctions for frivolous appeals or other action not taken in good faith or for an improper purpose).

¶ 51 For the foregoing reasons, we affirm in part and reverse in part the judgment of the circuit court of Cook County.

¶ 52 Affirmed in part; reversed in part.