Illinois Official Reports

Appellate Court

***ABF Freight System v. Illinois Workers' Compensation Comm'n*,**
2015 IL App (1st) 141306WC

Appellate Court Caption	ABF FREIGHT SYSTEM, Respondent-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (John Rodriguez, Petitioner-Appellee).
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-14-1306WC
Filed	December 11, 2015
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 13-L-50911; the Hon. Robert Lopez-Cepero, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Matthew Ignoffo, of Keefe, Campbell, Biery & Associates, LLC, of Chicago, for appellant. Ivan M. Rittenberg, of Rittenberg, Buffen, Gulbrandsen, Robinson & Saks, Ltd., of Chicago, for appellee.
Panel	JUSTICE HUDSON delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 I. INTRODUCTION

¶ 2 Respondent, ABF Freight System, appeals an order of the circuit court of Cook County that confirmed a decision of the Illinois Workers' Compensation Commission (Commission) granting benefits to claimant, John Rodriguez, in accordance with the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)). Respondent raises a number of arguments as to why the Commission's decision should not stand. As we find none of these arguments well founded, we affirm.

¶ 3 II. BACKGROUND

¶ 4 It is undisputed that claimant suffered a compensable injury on August 22, 2011, when he backed a forklift into a raised steel structure on a loading dock while in respondent's employ. Claimant described the collision as "violent." He felt pain shoot down his left leg. His primary care physician, Dr. Leo Pepa, referred him to Dr. Tom D. Stanley, a board certified orthopedic surgeon. Stanley first examined claimant on August 24, 2011. He ordered a magnetic resonance imaging (MRI) scan, which revealed that a "large left para-central disc extrusion at the L5-S1 level with superior migration, [*sic*] is compressing the same sided S1 traversing nerve root and the thecal sac" and showed "[d]iffuse disc bulges at the L1-L2 and L2-L3" levels. Claimant also complained of pain in his right knee. On October 6, 2011, Stanley performed a hemilaminotomy discectomy. This surgery was paid for by respondent's workers' compensation carrier. During an October 21, 2011, follow-up visit, claimant reported that he was doing well and his pain had largely resolved. He was released to light-duty work.

¶ 5 One month later, during another follow-up visit, claimant reported that he had begun experiencing radicular symptoms in his left leg. Stanley diagnosed a recurrent disc herniation and possibly a meniscus tear in the right knee. In December 2011, Stanley ordered another MRI. A number of medical professionals disagreed on what this MRI showed. Stanley interpreted it as revealing a recurrent disc herniation at the L5-S1 level. A radiologist interpreted the MRI as representing "postsurgical changes." He noted, "There is intermediate T1 signal material extending posteriorly from the disc space in a left paracentral location approximately 7 mm." He continued, "This enhances on postcontrast axial images and is therefore compatible with epidural fibrosis rather than disc protrusion." The material "displaces the origin of the left S1 nerve root posteriorly."

¶ 6 On January 30, 2012, claimant was examined by Dr. Andrew Zelby on respondent's behalf. He believed the MRI simply showed postoperative changes. He opined that repeating the discectomy surgery was not warranted, as the MRI indicated no disc protrusion. Further, claimant was not a candidate for a fusion due to his degenerative disc disease, smoking, and obesity. Zelby believed a fusion would create more problems than it solved. Zelby noted certain inconsistencies during his examination of claimant. For example, the results of the lying straight-leg raise and the sitting straight-leg raise were different despite the fact that they are essentially the same test. Zelby recommended a work-hardening program.

¶ 7 Stanley reviewed and responded to Zelby's findings. In a letter, Stanley wrote, "I do not really understand [Zelby's] evaluation of the MRI because clearly on the MRI you can see

the current disc herniation." Stanley suggested that if there was any doubt as to the December 2011 MRI, a repeat MRI be performed with a "high-definition machine." A repeat MRI was performed on May 25, 2012. It showed a large disc herniation.

¶ 8 However, between the times of the two MRIs, claimant suffered an injury. On March 20, 2012, his newborn baby was crying. He went to change her and noted there were no diapers, so he went to the garage, where more diapers were stored. Claimant described the incident thusly: "And I went to step on a chair and noticed the chair was kind of flimsy; and when I came down–there was a jagged edge on the chair. When I came down, I cut my leg open." Claimant suffered a 12-inch laceration on his leg and sought medical care at the St. Alexius Medical Center. Claimant stated that if he had injured his back at this time, he would have reported the injury to his doctors. He further testified that he did not fall off the chair. Medical records from this visit corroborate claimant's testimony. His back pain did not change following this incident.

¶ 9 Subsequently, Zelby opined that this incident could have been an intervening cause. Specifically, he stated, "I would say that if he fell off a chair with such force to lacerate his leg, that could certainly be enough force to cause a recurrent herniation, particularly in someone who weighs 388 pounds." He based this opinion on his belief that the December 2011 MRI showed no recurrent disc herniation while the May 2012 MRI did.

¶ 10 Stanley again responded to Zelby's updated opinion. He wrote, "Again, I don't understand Dr. Zelby's interpretation because the recurrent disc herniation is clearly visible on the first MRIs." He further noted that to the extent Zelby based his opinion on claimant having fallen from a chair, the medical records at St. Alexius Hospital "show that he was not complaining of any other complaints other than the laceration."

¶ 11 The arbitrator found that claimant's condition of ill-being was causally related to his employment with respondent. She first noted that there was no dispute as to accident, causation as to the initial injury, and the appropriateness of claimant's initial surgery. At issue was whether claimant's continuing condition of ill-being (the recurrent disc herniation) was causally related to claimant's at-work accident and whether claimant should receive surgery for that condition. Also at issue was the causal relationship between the condition of claimant's knee and his employment. She expressly found Stanley's testimony to be entitled to greater weight than Zelby's. She characterized claimant's ongoing complaints as "credible." The arbitrator found Stanley's readings of the MRIs to be entitled to greater weight as well. Thus, to the extent Zelby's opinion is based on his belief that the December 2011 MRI did not show a herniation, it was ill founded. She also found that the condition of claimant's right knee was causally related to his employment, relying primarily on the fact that his knee problem developed concurrently with his work-related accident. Claimant's average weekly wage was determined to be $674.46, resulting in a temporary-total-disability (TTD) rate of $449.64 (a finding later modified by the Commission, as will be explained below). The arbitrator also overruled an objection by claimant to certain testimony from Zelby asserting that it was not based on medical records or contained in his report (the Commission overruled that arbitrator's ruling here).

¶ 12 The Commission affirmed and adopted most of the arbitrator's opinion; however, it modified two aspects of it. The Commission noted that claimant's testimony was unrebutted. Furthermore, medical records corroborate that he experienced only a short period of relief following the initial surgery. Prior to the December 2011 MRI, his symptoms gradually

worsened. It found that, regarding the March 2012 incident involving the leg laceration, the evidence and testimony contained "no indication of any type of fall or twisting to reinjure his back." It credited Stanley's testimony that radicular symptoms were already present in December 2011. It rejected Zelby's opinion for a number of reasons, including that it failed "to take into account the undisputed medical documentation of the return of [claimant's] radicular symptoms about three weeks post surgery."

¶ 13 Regarding average weekly wage, the Commission modified the arbitrator's decision, finding as follows. When claimant began working for respondent, he was employed as a "casual employee." He held this position from December 11, 2010, to March 19, 2011. As a casual employee, claimant was told the day before a shift whether respondent needed him to come to work. He was nonunion and worked about 19 hours per week. After obtaining his certification as a "spotter," claimant became a full-time, union employee and worked about 36.6 hours per week. Essentially, the Commission determined that time spent as a casual employee should not have been used to calculate claimant's average weekly wage. However, it also held that the arbitrator erroneously concluded that claimant had worked $21^{3}/_{7}$ weeks in his new position rather than 22 weeks. The Commission, using 22 weeks, recalculated claimant's average weekly wage as $661.29, which yielded a TTD rate of $440.86. It modified the arbitrator's decision accordingly.

¶ 14 The Commission also reversed the arbitrator's overruling of claimant's objection to the admission of the deposition of Zelby. The Commission determined that "Zelby's opinions contained within the deposition transcript were not based on medical records and not contained in his § 12, [Independent Medical Evaluation (IME) report]." It thus concluded that "[t]he Arbitrator erred in allowing the deposition transcript into evidence." It further held that this issue was moot, as the arbitrator found Stanley's testimony to be entitled to more weight.

¶ 15 Respondent appealed. The circuit court of Cook County confirmed the Commission without significant comment. This appeal followed.

¶ 16 ## III. ANALYSIS

¶ 17 On appeal, respondent raises three main issues. First, it asserts that the Commission's decision regarding causation is contrary to the manifest weight of the evidence (it also attacks a number of the Commission's rulings that are derivative of this argument). Second, it contends the Commission erred in calculating claimant's average weekly wage. Third, it contests one of the Commission's evidentiary rulings.

¶ 18 ### A. CAUSATION

¶ 19 Respondent first attacks the Commission's decision regarding causation. Causation presents a question of fact. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). Accordingly, we will disturb the decision of the Commission on this issue only if it is against the manifest weight of the evidence. *Id.* A decision is contrary to the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). A claimant bears the burden of establishing a causal connection between his or her condition of ill-being and employment. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989). As the trier of fact, the Commission is primarily responsible for resolving conflicts in the evidence, assessing the

credibility of witnesses, assigning weight to evidence, and drawing reasonable inferences from the record. *Hosteny v. Illinois Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 674 (2009). This is especially true regarding medical matters, where we owe great deference to the Commission due to its long-recognized expertise with such issues. See *Long v. Industrial Comm'n*, 76 Ill. 2d 561, 566 (1979). On appeal, it is respondent's burden, as the appellant, to convince us that the Commission erred. See *TSP-Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). It is not our role to reweigh evidence and substitute our judgment for that of the Commission. *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1055 (2004).

¶ 20 Unfortunately, respondent's argument concerning causation is really an invitation for us to do just that. Respondent begins its argument by attacking claimant's credibility. Respondent asserts that claimant only once presented to a doctor for back problems, yet records from Stanley indicate a long history of back problems. Thus, respondent asserts, claimant's testimony is inconsistent with Stanley's records. However, on their face, these propositions are not inconsistent. If claimant had a long, albeit minor, history of back problems that never warranted treatment, only seeking medical care once would not be surprising. Essentially, respondent asks that we speculate here as to the severity of claimant's prior condition, determine claimant's history was such that one visit is incredible, and draw an adverse inference about claimant's credibility. More fundamentally, credibility is primarily for the Commission. See *Hosteny*, 397 Ill. App. 3d at 674. Furthermore, we note that respondent's argument ignores significant evidence that bolsters claimant's credibility. For example, as the Commission observed, "The medical records in evidence support [claimant's] testimony" regarding the recurrence of radicular symptoms after his surgery. Moreover, the evidence concerning his treatment for the laceration of his leg indicated that–as he testified–he did not fall. Thus, even if the purported discrepancy identified by respondent existed, countervailing evidence would leave us unable to say that the Commission's decision is contrary to the manifest weight of the evidence.

¶ 21 Respondent next points to the disagreement between the doctors regarding the interpretation of the December 2011 MRI. Respondent first asserts that Stanley "is not a board certified neurologist." We find this statement somewhat disingenuous, in that respondent does not acknowledge that Stanley is, in fact, a board certified orthopedic surgeon until later in its brief. It points out that Zelby is a board certified neurologist. However, respondent never identifies anything that would allow us to conclude that a board certified neurologist is more qualified to interpret an MRI than a board certified orthopedic surgeon. As such, these assertions do nothing to establish that an opposite conclusion to the Commission's is clearly apparent.

¶ 22 Respondent also points out that the radiologist, like Zelby, also did not read the MRI as indicating a herniation. Thus, respondent contends, "This is not merely the situation of a treating doctor versus an IME doctor." However, it is well-established that the manifest weight of the evidence is not measured simply by counting noses. *Haas v. Woodard*, 61 Ill. App. 2d 378, 384-85 (1965) ("In determining the question of manifest weight, it is clear that the number of witnesses may be a factor, but it is not the controlling consideration ***."); see also *Augustine v. Stotts*, 40 Ill. App. 2d 428, 433 (1963) ("The number of witnesses testifying to a particular set of facts is not significant ***."). Thus, the mere fact that two doctors

interpreted the MRI as not showing a herniation while one did is not, in itself, enough for us to say that an opposite conclusion to the Commission's is clearly apparent.

¶ 23 Respondent next argues that Stanley's comments noting the lack of complaints about claimant's back during claimant's visit to the St. Alexius Medical Center for treatment for his laceration is not dispositive of the issue of whether claimant sustained a back injury on that date. We agree; however, we note that, while not dispositive, it, along with medical records from that visit and claimant's testimony, supports an inference that claimant did not injure his back at that time. Respondent continues, "[I]t stands to reason the only complaint which would be identified on this date would be related to the extensive laceration as this would be the emergency treatment being provided on this date." We do not disagree with respondent, but we point out that this is not the only inference possible. In essence, respondent would like us to draw the inference it suggests and substitute our judgment for the Commission, which drew the contrary inference that the absence of a complaint indicated that no back injury occurred during this incident. This we simply cannot do. See *Setzekorn*, 353 Ill. App. 3d at 1055.

¶ 24 Respondent points out that claimant had a long-standing history of back problems. However, it is well established that an employer takes an employee as he or she finds him. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 204-05 (2003). Thus, the existence of a pre-existing condition does not preclude recovery under the Act. Respondent's observation is, therefore, irrelevant. Moreover, respondent acknowledges that claimant's initial injury and treatment were related to his employment.

¶ 25 In short, we find none of respondent's attacks upon the Commission's decision on causation persuasive; therefore, we affirm it. As we uphold this finding by the Commission, respondent's attacks upon the Commission's awards of prospective medical treatment and TTD necessarily fail, as they are wholly derivative of respondent's first argument.

¶ 26 B. AVERAGE WEEKLY WAGE

¶ 27 Respondent next contends the Commission erred in calculating claimant's average weekly wage. Claimant worked as a "casual employee" for respondent from December 11, 2010, to March 19, 2011. He subsequently obtained a certification as a "spotter." After becoming a spotter, claimant was employed as a full-time employee for 22 weeks prior to his accident. Claimant earned more as a spotter than he did as a casual employee. The Commission only counted claimant's time as a spotter in calculating claimant's average weekly wage. Respondent contends it should have used both periods during which claimant worked for respondent, which would result in a lower average weekly wage. Section 10 of the Act provides, in pertinent part, as follows:

> "The compensation shall be computed on the basis of the 'Average weekly wage' which shall mean the actual earnings of the employee *in the employment in which he was working at the time of the injury* during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52 ***." (Emphasis added.) 820 ILCS 305/10 (West 2010).

At oral argument, a question arose as to the meaning of the phrase "in the employment in which he was working at the time of the injury." *Id.* On the one hand, it was posited that "employment" (which is not defined in the Act) referred to the occupation in which the

employee was working at the time of the injury, *i.e.*, as a spotter. On the other, it was suggested the "employment" meant the period during which the employee worked for the employer, which would encompass both the period claimant worked as a spotter and the period he was a casual employee.

¶ 28 Generally, where the language of a statute is clear, we must give effect to its plain language. *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 180 (2011). In *People v. Nash*, 409 Ill. App. 3d 342, 349 (2011), the court explained that when the legislature does not define a term in a statute, we may consult a dictionary to ascertain its meaning. Hence, we turn first to the dictionary to ascertain whether the language of section 10 is clear and unequivocal on this point. Webster's Third New International Dictionary contains several definitions for the term "employment." Pertinent here, it defines "employment" as "work (*as customary trade, craft, service, or vocation*) in which one's labor or services are paid for by an employer." (Emphasis added.) Webster's Third New International Dictionary 743 (2002). This definition, particularly the italicized portion, supports interpreting the term as referring to the particular job in which claimant was engaged at the time of the injury. However, the dictionary also defines "employment" as "the act of employing someone or something or the *state of being employed*." (Emphasis added.) *Id.* This definition suggest that the entire time that claimant was employed by respondent (as he was in "the state of being employed") should be considered under the statute. Thus, we are confronted with an ambiguity, so we turn to ordinary principles of statutory construction to resolve it. *Norris v. Industrial Comm'n*, 313 Ill. App. 3d 993, 996 (2000). Our primary goal remains to ascertain and give effect to the intent of the legislature. *Patton v. Industrial Comm'n*, 147 Ill. App. 3d 738, 741 (1986).

¶ 29 Of course, "if the meaning of an enactment is unclear from the statutory language itself, the court may look beyond the language employed and consider the purpose behind the law and the evils the law was designed to remedy." *Gruszeczka v. Illinois Workers' Compensation Comm'n*, 2013 IL 114212, ¶ 12. We may further consider "the consequences that would result from construing the law one way or the other." *County of Du Page v. Illinois Labor Relations Board*, 231 Ill. 2d 593, 604 (2008). It has repeatedly been held that "the Act is a remedial statute and should be liberally construed to effectuate its main purpose." *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 149 (2010); see also *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 563 (1976). The main purpose of the Act is to "provide financial protection for injured workers." *Interstate Scaffolding, Inc.*, 236 Ill. 2d at 149.

¶ 30 The present case illustrates why the legislature intended "employment" to mean the particular job a claimant was engaged in at the time of an injury rather than the continuous period of employment with a single employer. At the time of his accident, claimant was earning wages as a spotter–that is what he lost as a result of the accident. Having secured his union position, there is no indication that claimant would ever return to casual employment in the future. As such, the true measure of claimant's loss is the wages he was earning at the time he was injured, and that is what his award should be based on. This is consistent with the remedial purposes of the Act. *Hasler v. Industrial Comm'n*, 97 Ill. 2d 46, 52 (1983) (holding that the purpose of the Act is to make an injured employee whole).

¶ 31 Indeed, the contrary interpretation would run afoul of the absurd-results rule, which states that we must presume the legislature did not intend an absurd or unjust result when it enacted

a statute. *Hubble v. Bi-State Development Agency of the Illinois-Missouri Metropolitan District*, 238 Ill. 2d 262, 283 (2010). Quite simply, at issue is claimant's loss of future earnings. Our supreme court explained in *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 561 (2004), "The aim of the system of workers' compensation is to make an employee whole for the interference with his future earnings occasioned by an injury." Essentially, respondent's proposed method of calculating claimant's average weekly wage imputes an intent to the legislature to measure the degree of claimant's compensation by something he did not lose (*i.e.*, a casual employee's wages). Claimant is now a spotter; he is no longer a casual employee. There is no relationship between what claimant earned as a casual employee and what he lost when he could no longer work as a spotter. What he earned in a position he no longer holds provides no insight into his future earnings. Thus, the proper measure of claimant's damages is the pay he received as a spotter. If we were to presume that the legislature intended to measure claimant's loss by something to which it bears no relationship, we would be attributing to it an absurd and unjust intent. This is something we will never do. See *Hubble*, 238 Ill. 2d at 283.

¶ 32 Accordingly, we find respondent's position untenable for two reasons: it is contrary to the purpose of the Act, and it would require us to impute an absurd, unjust intent to the legislature. Therefore, we hold that "employment" as used in the context discussed above means the position in which a claimant was working at the time of his or her injury. In this case, at the time of his injury, claimant was working as a "spotter" and earning a salary based on that position. Thus, the Commission properly used claimant's employment at the time of his injury in calculating his average weekly wage.

¶ 33 C. EVIDENTIARY RULING

¶ 34 The Commission excluded the deposition of Zelby from evidence because, it explained, "Zelby's opinions contained within the deposition transcript were not based on medical records and not contained in his § 12, IME report." It continued, claimant "was apparently not provided with proper notice of that testimony." It also noted that the issue was moot since "the [a]rbitrator placed more reliance and credibility in the opinions of Dr. Stanley and found for [claimant] on the [relevant] issues above." Such evidentiary issues are matters within the discretion of the Commission. *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1010 (2005).

¶ 35 Initially, we note that respondent has forfeited this issue. In contravention of Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013), respondent provides no legal authority to support its argument on this point. As such, it is forfeited. See *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23. Moreover, the Commission, like the arbitrator, rejected Zelby's opinion in favor of Stanley's, stating "Dr. Zelby's opinions appear less credible than Dr. Stanley who had been seeing [claimant] over a long period of time." Therefore, even if the Commission had not struck Zelby's deposition testimony, a different result would not have followed. In other words, in addition to being forfeited, this issue is moot. See *Hanna v. City of Chicago*, 382 Ill. App. 3d 672, 677 (2008) ("Mootness occurs once the plaintiff has secured what he basically sought and a resolution of the issues could not have any practical effect on the existing controversy."). Accordingly, this argument provides no basis for us to disturb the Commission's decision.

¶ 36 IV. CONCLUSION

¶ 37 In light of the foregoing, the decision of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 38 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

John Henry Rodriguez,

Petitioner,

13IWCC0801

vs.

NO: 11 WC 35966

ABF Freight Systems, Inc.,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review under §19(b)/8(a) having been filed by the Respondent/Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, causal connection, wage rate/benefit rates, temporary total disability, medical expenses, and prospective medical care and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof. The Commission further remands this case to the Arbitrator for further proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill.Dec. 794 (1980).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

- Petitioner is a 38 year old employee of Respondent, who described his job as a freight dock worker. Petitioner testified he began casual, part-time employment with Respondent December 11, 2010. Petitioner stated that he earned $14 per hour and did not have fixed hours. Petitioner stated that they would tell him the day before when to come to work or

call him; he was not guaranteed 40 hours per week. Petitioner testified that he was not a union member and did not have health and welfare/medical coverage or pension benefits. He stated that he had a promise of continued employment if he was hired full-time. Petitioner testified that when he was hired there was no requirement that he be hired full-time if he was there for six months; Petitioner testified that it was Respondent's choice whether or not to hire him full-time. Petitioner learned of the term 'casual employment' in the union book. He testified that 'casual employment' people are not covered by the union contract. It was noted that Respondent's wage exhibit indicated that on March 26, 2011 Petitioner worked 40 hours per week and his salary went from $14.00 to $16.52. Petitioner testified that starting March 26, 2011 he qualified as a spotter and Petitioner was hired full time. Petitioner testified as a casual worker you are only able to work on the dock; however, as a spotter you were able to move the equipment in the yard and got paid more; you were a full-time employee. Petitioner testified that as a union member he was guaranteed 40 hours of work per week. Petitioner testified at that time they gave him a certificate of qualification as a spotter and they signed Petitioner up full-time. Petitioner testified he signed the papers in the office of George Visty, the terminal manager. Petitioner stated that he then began paying union dues, getting pension credits, and health and welfare coverage. Petitioner testified that he then began moving trucks around the freight yard. Petitioner stated that most of the time he moved trucks. They would ask him to move an empty from the dock and he would pull that out and pull a full one in so the dock guys could unload it. Petitioner also continued to do dock work. Petitioner testified that dock work involved unloading trucks with a forklift. Petitioner testified that he would drive the forklift, get his assignment, and unload the truck. There was also manual labor involved with picking up boxes and bending and pulling up plates. Petitioner stated there are 143 places for trucks at the dock. He had no particular place to be on the dock. He would back the truck to the dock with the semi trailer himself. Petitioner testified that after he backed the trailer to the dock he unhooked the air-lines and dropped the trailer down with the hydraulic lift. He stated that he would then go grab another trailer.

- Petitioner stated that when he was unloading a trailer with a forklift he would have to pull up a dock plate before he could drive the forklift onto the trailer. The dock plate required from 50 pounds of pressure to pull up, if it was greased, to 75-80 pounds of pressure to pull up, if it was not greased. Petitioner had to pull up or put down the plates 5-8 times per day to unload the trailers. Petitioner also testified that boxes had to be lifted often. The boxes were on pallets and he had to pick them up if they fell off, were damaged or if he had to recuperate them. The boxes weighed from 30 to 100 pounds. Petitioner testified that prior to August 22, 2011 his general health was fine. Petitioner categorized the physical demands of his work as heavy with the constant lifting and jumping up and down from trucks and forklifts. Petitioner had no chiropractic treatment for his back prior to his accident. Petitioner had seen his family doctor regularly, but only once for his back in August 2011. Petitioner testified that the nature of his back problem at that point was muscle pulling. Petitioner stated that he had pain on the right side of his lower back at that point which did not radiate. Petitioner testified that he took Ibuprofen for that and

continued to work. Petitioner had no prior back surgery before that accident and never had pain in his back before that radiated down his leg. Petitioner also stated that he never had numbness in his leg before either.

- On the date of accident, August 22, 2011, Petitioner testified he went into a truck and pulled the plate; he was going to put some freight on the truck. When Petitioner came out the suspension on the truck went down so the plate was kind of on an angle and when he hit the plate with the forklift. the forklift pushed the plate up and Petitioner just slammed into the dock. Petitioner stated that he was backing the forklift out of the trailer to enter the dock. He estimated he was going about 5 miles per hour. He did not have a load on the forklift at the time as he had dropped the load in the trailer. He stated it was a Nissan forklift with the forks in the front and the propane tank behind and you sit in the middle on a seat with a cage around you. Petitioner testified that the forklift weighs about 3,500 pounds. Petitioner felt the forklift come in contact with the dock and he went from 5 miles per hour to an absolute stop, immediately, in less than a second. Petitioner testified that it was a violent hit and the stuff that was on the forklift (a PDA that locks in a docking station and his coffee) fell everywhere. Petitioner stated he almost flew off the jeep but he was able to hold on, but he stated it was a very violent hit. He stated he was violently slammed into the seat back. Petitioner testified that he got off the forklift and noticed pain shooting down his left leg. Petitioner testified he did not have that pain prior to this accident happening. Petitioner testified that he never had pain like that in his life. Petitioner stated that immediately after the accident he pulled the forklift up and had someone come over and pick up the dock plate because he was unable to. Petitioner stated he had an opportunity to look at the dock plate. Petitioner stated the plate was about three feet by four feet wide and about a quarter inch thick. He stated that damage was done to the plate; it had a big gouge in the middle of it and they ended up replacing it. Petitioner testified that after the plate was picked up he did try to continue working but the pain was unbearable. He stated he went back to the load and tried to grab a skid but could not do it.

- Petitioner testified that he reported the accident to his supervisor, Rick Arsenic. Petitioner came to work that day at midnight and the accident occurred about 1:30 to 2:00am. Petitioner filled out the paperwork when he reported the accident and then went home. Petitioner testified he sought treatment with his family doctor, Dr. Leo Pepa, in Elgin. Petitioner noted that the pain was really bad and he could not sleep; the pain was unbearable. Petitioner testified he had the pain in his back and he could not move his leg because every time he moved his left leg the pain would shoot up through his back. Petitioner recalled seeing the company doctor/clinic (sent by Mr. Arsenic) a couple days later; he did not recall that doctor's name as Petitioner only saw him the one time. Petitioner did recall mentioning his right knee problem to that doctor and they treated his back and leg. When Petitioner went to Dr. Pepa August 23, 2011, Petitioner was given pain and anti-inflammatory medications and the doctor recommended Petitioner see Dr. Stanley, who Petitioner first saw August 24, 2011. Petitioner believed Dr. Stanley gave

him a steroid pack and recommended an MRI. Petitioner stated that he was still treating with Dr. Stanley. Petitioner testified that when he saw the company doctor his knee was "swollen; it swelled up 3-4-5 days after the accident. Petitioner testified that Dr. Stanley was aware of his knee problems and was also treating his knee.

- Petitioner testified that Dr. Stanley performed surgery on Petitioner October 6, 2011 at St. Joseph's Hospital. Petitioner stated that he returned to light duty work after the surgery; prior to surgery he had not worked light duty. Petitioner had been paid while off and he returned to the light duty about October 23, 2011. Petitioner testified that his light duty work consisted of painting, paperwork, and phone calls; however it was mainly painting. Petitioner testified that after the surgery the pain started to slowly come back; the pain just progressed. Petitioner again came off of work November 5, 2011 because the pain was just getting too bad and Dr. Stanley suggested another MRI and advised Petitioner to stay home. Petitioner stated the pain was in his back and his left leg. He stated he also had problems with his right knee. Petitioner stated his right knee was swollen and he was unable to put his weight on it. Petitioner remained off work until April 2, 2012 when he returned to work painting. Petitioner stated that they had him painting everything safety yellow. He testified that they had him bending down painting poles, trim, and steps. Petitioner stated that he was constantly painting and he noticed more pain doing that. Petitioner testified that at that time he did sometimes do paperwork on light duty. Petitioner indicated that he would start painting on Monday and Tuesday and then by Wednesday, Thursday he was in so much pain that he could not do it anymore. Petitioner stated that he had to stay on the dock, but they did pay his salary. Petitioner testified that he did not have to lift anything or paint when he was in pain. Petitioner stated that with regard to the pain, he had good days and bad days but most of the days he was in pain. Petitioner stated that he continued on light duty, standing on the dock, until September 2 or 3, 2012. Petitioner testified that they told him, at that time, that he could not work anymore and that he was kicked off of the AWP program (alternate work program). Petitioner testified that he had the discussion about light duty with Gabe McBride, the terminal manager. Petitioner stated he left work on Friday and Mr. McBride called him and said they were not allowing him to return on Monday on AWP. Petitioner recognized Mr. McBride's voice on the phone. Petitioner stated Mr. McBride said he had a call from the Arkansas office telling him they were no longer going to pay Petitioner any longer on AWP. Petitioner testified if Respondent offered him the AWP, Petitioner would work. Petitioner testified that he was not totally disabled. He is capable of doing basic things around the house and he takes care of the baby all day and gets groceries and takes out the garbage. Petitioner stated he can occasionally lift 25-30 pounds but did not think that he could do that repetitively. He did not feel that he could paint all day, but if they gave him a job within his restrictions/limitations he would like to do that.

- Petitioner testified that while he was off work he had occasion to go to St. Alexius Medical Center (March 20, 2012). Petitioner stated that prior to his St. Alexius visit he was having back problems. Petitioner testified that from the time of his first surgery to

the date of his testimony, his back problems had never gone away. He testified he experiences pain and fatigue; the pain is in his back goes down his left leg and his right knee. He noted numbness in his left leg/foot. Petitioner testified that he reported all those things when he went to any doctor/medical provider. Petitioner agreed per the St. Alexius records, Petitioner reported injuring himself that day. Petitioner stated that day his newborn baby woke up crying and he wanted to feed her, give her a bottle and change her. Petitioner stated he realized there were no diapers so he had to go to the garage to get diapers that were on the top shelf. He stated he went up on a chair and noticed the chair was kind of flimsy and when he came down he cut his leg open on a jagged edge on the chair. Petitioner testified that if he would have injured his back then he would have told the doctors. Petitioner testified the only thing he hurt at that time was his right leg with a laceration injury. It was noted that the records indicated a 12-inch laceration, ¾'s of an inch in width in his leg from the sharp edge of a chair. Petitioner testified that he did not fall off the chair and he did not land on his back or anything like that; he indicated if that had happened he would have reported that to the doctors at the hospital. Petitioner further acknowledged that the history in the medical records noted no other complaints other than him cutting his leg. Petitioner stated that he still had the back pain and that the pain was no different than when he got off the chair and cut his leg. Petitioner testified that Dr. Stanley was treating his back pain and that he had discussed his situation with the doctor. Petitioner testified that Dr. Stanley was proposing another surgery for his back and Petitioner indicated that he was asking that surgery be awarded. Petitioner stated that, at the time of the hearing, he had not received any income for a couple of months. Petitioner testified that he had been able to generate some income by helping friends; he drives a friend around to work, maybe twice per month (earning about $100 each day) as the friend had several DUI's. Petitioner stated he also checked ID's at a pub in his neighborhood about 3 times per year. Petitioner was still taking Norco and Ibuprofen every 4-6 hours.

- Petitioner testified that if Respondent called and told him to report back to work on AWP, he would report. Petitioner testified that currently he still notices a lot of pain and suffering; he stated he is in horrifying pain all the time and it was getting worse and worse. Petitioner stated that the pain is still in his left side low back and shoots down his left leg to his foot (towards the outside) and also his right knee. He indicated he can feel it with each step he takes. He indicated his little toe is numb and gets a little jolt once in a while when he moves too much. Regarding the right knee he stated that it is swelling and he hears the cartilage cracking in there or something. Petitioner stated that when it swells he puts ice on it and it comes down a little but it was painful most of the time. Petitioner testified that he never had the problem with his right leg before the accident at work. Petitioner stated he had put on about 30 pounds since the accident because he is unable to do anything in particular.

The Commission finds Respondent indicated accident as an issue on their Petition for Review but did not argue the issue in their Statement of Exceptions, therefore it is deemed as waived. Regardless, the parties had stipulated to accident so it is not an issue here.

Petitioner testified that Dr. Stanley performed surgery on Petitioner October 6, 2011 at St. Joseph's Hospital. Petitioner stated that he returned to light duty work after the surgery; prior to surgery he had not worked light duty. Petitioner had been paid while off and he returned to the light duty about October 23, 2011. Petitioner testified that his light duty work consisted of painting, paperwork, and phone calls; however it was mainly painting. Petitioner testified that after the surgery the pain started to slowly come back; the pain just progressed. Petitioner again came off of work November 5, 2011 because the pain was just getting too bad and Dr. Stanley suggested another MRI and advised Petitioner to stay home. Petitioner stated the pain was in his back and his left leg. He stated he also had problems with his right knee. Petitioner stated his right knee was swollen and he was unable to put his weight on it. Petitioner remained off work until April 2, 2012 when he returned to work painting. Petitioner stated that they had him painting everything safety yellow. He testified that they had him bending down painting poles, trim, and steps. Petitioner stated that he was constantly painting and he noticed more pain doing that. Petitioner testified that at that time he did sometimes do paperwork on light duty. Petitioner indicated that he would start painting on Monday and Tuesday and then by Wednesday, Thursday he was in so much pain that he could not do it anymore. Petitioner stated that he had to stay on the dock, but they did pay his salary. Petitioner testified that he did not have to lift anything or paint when he was in pain. Petitioner stated that with regard to the pain, he had good days and bad days but most of the days he was in pain. Petitioner stated that he continued on light duty, standing on the dock, until September 2 or 3, 2012. Petitioner testified that they told him, at that time, that he could not work anymore and that he was kicked off of the AWP program (alternate work program). Petitioner testified that he had the discussion about light duty with Gabe McBride, the terminal manager. Petitioner stated he left work on Friday and Mr. McBride called him and said they were not allowing him to return on Monday on AWP. Petitioner recognized Mr. McBride's voice on the phone. Petitioner stated Mr. McBride said he had a call from the Arkansas office telling him they were no longer going to pay Petitioner any longer on AWP. Petitioner testified if Respondent offered him the AWP, Petitioner would work. Petitioner testified that he was not totally disabled. He is capable of doing basic things around the house and he takes care of the baby all day and gets groceries and takes out the garbage. Petitioner stated he can occasionally lift 25-30 pounds but did not think that he could do that repetitively. He did not feel that he could paint all day, but if they gave him a job within his restrictions/limitations he would like to do that.

Petitioner testified that while he was off work he had occasion to go to St. Alexius Medical Center (March 20, 2012). Petitioner stated that prior to his St. Alexius visit he was having back problems. Petitioner testified that from the time of his first surgery to the date of his testimony, his back problems had never gone away. He testified he experiences pain and fatigue; the pain is in his back goes down his left leg and his right knee. He noted numbness in his left leg/foot. Petitioner testified that he reported all those things when he went to any doctor/medical provider.

Petitioner agreed per the St. Alexius records, Petitioner reported injuring himself that day. Petitioner stated that day his newborn baby woke up crying and he wanted to feed her, give her a bottle and change her. Petitioner stated he realized there were no diapers so he had to go to the garage to get diapers that were on the top shelf. He stated he went up on a chair and noticed the chair was kind of flimsy and when he came down he cut his leg open on a jagged edge on the chair. Petitioner testified that if he would have injured his back then he would have told the doctors. Petitioner testified the only thing he hurt at that time was his right leg with a laceration injury. It was noted that the records indicated a 12-inch laceration, 3/4's of an inch in width in his leg from the sharp edge of a chair. Petitioner testified that he did not fall off the chair and he did not land on his back or anything like that; he indicated if that had happened he would have reported that to the doctors at the hospital. Petitioner further acknowledged that the history in the medical records noted no other complaints other than him cutting his leg. Petitioner stated that he still had the back pain and that the pain was no different than when he got off the chair and cut his leg. Petitioner testified that Dr. Stanley was treating his back pain and that he had discussed his situation with the doctor. Petitioner testified that Dr. Stanley was proposing another surgery for his back and Petitioner indicated that he was asking that surgery be awarded. Petitioner stated that, at the time of the hearing, he had not received any income for a couple of months.

Petitioner's testimony is unrebutted. The medical records in evidence support Petitioner's testimony regarding the short period of relief post surgery. Then about three weeks later Petitioner had recurrent symptoms, though not as bad as before surgery, but the symptoms were gradually worsening before the December 2011 MRI. There are questions raised regarding the December 2011 MRI and whether that open MRI showed the recurrent disc herniation or not; Dr. Stanley stated he saw the recurrent disc and the high-definition MRI showed it better; Dr. Zelby stated there was no recurrent disc in December 2011 but was shown on the later high-definition MRI. Dr. Stanley opined there was an ongoing causal relation with the recurrent disc herniation occurring shortly post surgery with the return of the radicular symptoms clearly evident. Petitioner had the leg laceration March 20, 2012. The testimony and evidence of that treatment indicated he came down from a wobbly chair and incurred a laceration due to a sharp edge on the chair with no indication of any type of fall or twisting to reinjure the back. Dr. Stanley noted the radicular symptoms were already there prior to even the December 2011 MRI and that he did not find the incident of March 20, 2012 to be an intervening event. Dr. Zelby opined this event was an intervening event as he did not see the recurrent disc on the December 2011 MRI and then, after this event saw it on the May 2012 MRI. Dr. Zelby's opinion, however, fails to take into account the undisputed medical documentation of the return of Petitioner's radicular symptoms about three weeks post surgery and ongoing and worsening since then. Dr. Zelby further seemed to be under the impression that Petitioner fell from the chair. Furthermore, Dr. Zelby did not know where he even learned of the chair incident. Dr. Zelby also seems to place great emphasis on Petitioner's weight as a cause of Petitioner's ill-being. Dr. Zelby did not observe Petitioner's antalgic gait with seeing Petitioner the one time. Dr. Zelby placed great emphasis in the deposition testimony of Petitioner's description of walking with all his weight on one leg, yet he acknowledged a person can favor a leg walking, which as a lay person, was what Petitioner described, instead of Dr. Zelby's strict literal interpretation. Dr. Zelby agreed reasonable doctors

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can disagree and here Dr. Zelby's opinions appear less credible than Dr. Stanley who had been seeing Petitioner over a long period of time. The evidence and testimony finds Petitioner developed the recurrence of radicular symptoms shortly after the surgery and that is clearly evidenced in the medical records with the worsening symptoms with time. Dr. Stanley opined the December 2011 MRI, while not as high a quality study, showed the recurrent disc herniation (and the May 2012 high-definition MRI showed it more clearly in the exact same place he said it was) and he opined an ongoing causal connection, which again is clearly evidenced in the records. The evidence and credible testimony finds Petitioner met the burden of proving an ongoing causal connection to his current condition of ill-being. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence and herein, affirms and adopts the Arbitrator's finding as to causal connection.

The Commission finds, on the issue of average weekly wage/benefits rates, the applicable section of the Act, states in part:

> §10. The basis for computing the compensation provided for in Sections 7 and 8 of the Act shall be as follows:
>
> The compensation shall be computed on the basis of the "Average weekly wage" which shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury, illness or disablement excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee actually earned wages shall be followed. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the **casual nature** or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or

would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. In the case of volunteer firemen, police and civil defense members or trainees, the income benefits shall be based on the average weekly wage in their regular employment. When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation.

The Commission finds Petitioner clearly worked as a casual employee for Respondent from December 11, 2010 through March 19, 2011 where he was either called or told the day before whether or not Respondent needed him the next day. Petitioner was then a non-union worker making less per hour and per the wage statement was then averaging about 19 hours per week. Petitioner obtained his certification as spotter and thereafter, came on full-time as a union member with union protection and benefits and then averaged 36.6 hours per week. As a union member, Petitioner was guaranteed full-time employment including overtime that clearly, as a casual employee, he had little opportunity to work. A reading of §10 noted above seems to fit the facts here. Petitioner earned $14,548.30 for what is evidenced as 22 weeks, as an employee in the same grade (spotter) for those weeks, to find an average weekly wage (AWW) of $661.29; and a temporary total disability (TTD) rate of $440.86. The Commission finds the Arbitrator to have improperly calculated AWW, TTD, and PPD rates, as noted above, and herein, modifies the decision for the period of 22 weeks as a spotter rather than the Arbitrator's finding of 21-3/7 weeks, and to find an AWW of $661.29 and TTD rate of $440.86.

The Commission, with the finding above for Petitioner on causal connection, further finds the period of TTD benefits awarded should be affirmed. Respondent paid the accepted benefits at $353.58 per week for the accepted 30-2/7 weeks and per the AWW finding above, it should have been at a rate of $440.86 for a shortage of $87.28 per week on those accepted TTD benefits period for a total shortage of $2,643.34. Therefore, the decision is herein modified in that regard and also regarding the rate for the additional TTD benefits period as awarded by the Arbitrator. The evidence and testimony finds Petitioner met the burden of proving entitlement to the additional TTD period and the shortage for the prior accepted benefits at the corrected TTD rate. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, modifies as to the TTD rate and TD shortage but otherwise affirms and adopts the Arbitrator's finding as to the total temporary disability period awarded.

The Commission, with the finding above of ongoing causal connection finds evidence of Petitioner's ongoing condition of ill-being and his need for further surgical intervention as prescribed by Dr. Stanley. The evidence and testimony finds Petitioner met the burden of proving entitlement to the prospective medical care. The Commission finds the decision of the Arbitrator as not contrary to the weight of the evidence, and herein, affirms and adopts the Arbitrator's finding as to medical expenses/prospective medical care.

The Commission further finds that Dr. Zelby's opinions contained within the deposition transcript were not based on medical records and not contained in his §12, IME report. Petitioner was apparently not provided with proper notice of that testimony. Accordingly, the deposition transcript testimony should not have been allowed or considered. The Arbitrator erred in allowing the deposition transcript into evidence, but the issue is moot as the Arbitrator still placed more reliance and credibility in the opinions of Dr. Stanley and found for Petitioner on the issues above. The Commission finds the decision of the Arbitrator as contrary to the weight of the evidence and the applicable law. The Commission, herein, modifies the decision to reject the deposition testimony of Dr. Zelby.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent shall pay Petitioner the sum of $87.28 per week for the shortage of TTD benefits for the accepted prior period (30-2/7 weeks) of TTD benefits for a total payment of $2,643.34.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $440.86 per week for a period of 13-3/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to Petitioner reasonable and necessary medical expenses incurred pursuant to §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay provide for and pay the reasonable and necessary charges for the medical, surgical and hospital care prescribed by Dr. Stanley (removal of recurrent disc herniation at L5-S1 and fusion at L5-S1) and also provide reasonable and necessary post surgical care. Petitioner's request for prospective care regarding the right knee is denied as there was no currently prescribed right knee treatment by doctor.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired

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without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

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

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: SEP 16 2013
o-7/18/13
DLG/jsf

David L. Gore

Michael P. Latz

Mario Basurto

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

13IWCC0801

John H. Rodriquez
Employee/Petitioner

v.

ABF Freight System, Inc.
Employer/Respondent

Case # 11 WC 035966

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 Carolyn Doherty, Arbitrator of the Commission, in the city of Chicago, Illinois, on **December 5, 2012**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS:

On the date of accident, August 22, 2011, Respondent ***was*** operating under and subject to the provisions of the Act.
On this date, an employee-employer relationship ***did*** exist between Petitioner and Respondent.
On this date, Petitioner ***did*** sustain an accident that arose out of and in the course of employment.
Timely notice of this accident ***was*** given to Respondent.
Petitioner's current condition of ill-being ***is*** causally related to the accident.
In the year preceding the injury, Petitioner earned $14,548.30; the average weekly wage was $674.46. **See Decision .**
On the date of accident, Petitioner was **38** years of age, ***single*** with **0** dependent children.
Respondent ***has not*** paid all reasonable and necessary charges for all reasonable and necessary medical services
Respondent shall be given a credit of $**10,758.94** for TTD, $**2,475.17** for TPD, $**-0-** for maintenance, and $**-0-** for other benefits, for a total credit of $**13,234.11**.
Respondent is entitled to a credit of $**-0-** under Section 8(j) of the Act.

ORDER:

The respondent shall pay Petitioner the sum of $2,909.18 to pay for the deficiency in underpaid TTD for 30-2/7 weeks of the undisputed disability period pursuant to Section 8(b) and Section 10 of the Act. See Decision.

Respondent shall pay Petitioner temporary total disability benefits of $449.64 per week for a further period of TTD of 13-3/7 weeks, commencing 9/3/12 through 12/5/12, as provided in Section 8(b) of the Act.

Prospective medical care is ordered in that the Respondent shall provide for and pay the *reasonable and necessary* charges pursuant to Section 8(a)'s schedule for the medical, surgical and hospital care prescribed by Dr. Tom Stanley; to wit his prescription for the removal of the recurrent disc herniation at L5-S1 and a fusion at L5-S1 and also provide *reasonable and necessary* post surgical care. Petitioner's request for prospective care to the right knee is denied. See Decision.

Respondent shall pay Petitioner reasonable and necessary medical expenses incurred pursuant to Section 8(a) and Section 8.2 of the Act.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Carolyn Swerdy
Signature of Arbitrator

1/23/13
Date

ICArbDec19(b)

JAN 24 2013

FINDINGS OF FACT

Petitioner, a 38 year old freight dock worker, testified that he started casual employment with Respondent on 12/11/10. Petitioner did not work fixed hours. Petitioner was not guaranteed 40 hours per week and worked different hours every week on an on call basis. Petitioner earned $14.00 per hour. He was not a union member and did not have any union benefits such as health or pension benefits. Petitioner further testified that he worked as under these terms as a dock worker with the promise of continued employment if he was hired full time. Whether Petitioner was hired as a full time employee was completely Respondent's choice. Petitioner further testified that the union contract defines casual employment as jobs not covered under the union contract.

Petitioner testified that on 3/26/11 he qualified as a "spotter" and was hired full time by Respondent. As a dock worker, Petitioner could only manually work the dock but as a spotter Petitioner could now drive the equipment on the dock. As a full time union employee, Petitioner worked 40 hours per week and earned $16.52 per hour and then increased to $16.80 per week until his injury. Petitioner testified that he received a certification as a spotter to operate heavy equipment and signed papers pertaining to his new position in the dock manager's office. Petitioner began paying union dues and receiving union benefits.

Petitioner testified that he in his position as a spotter he drove a forklift and worked on the dock. Petitioner was required to lift heavy dock plates weighing up to 100 pounds. Prior to the accident of 8/22/11 Petitioner was able to perform the required heavy work without any problems. Petitioner testified that he did not suffer any prior back problems. Petitioner testified that he did see his family doctor on one occasion in August 2011 immediately before the 8/28/11 accident for a muscle pull on the right side of his lower back. The pain did not radiate and Petitioner did not experience any numbness in his leg at that time. Petitioner took ibuprofen and worked without interruption.

Accident and notice are not at issue. On 8/22/11 Petitioner was driving a forklift in reverse leaving a truck to enter the dock and traveling about 5mph. Petitioner testified that he hit the dock with the forklift and that the lift immediately stopped. Petitioner testified that the hit was "violent" and that he was jarred as his body was slammed into the back of the seat. Petitioner testified that he got off the lift and noticed pain immediately shooting down his left leg. Petitioner tried to continue working but testified that he could not continue due to pain. Petitioner reported the accident to his supervisor, completed accident paper work and went home.

Petitioner went to his family doctor, Dr. Pepa and reported unbearable shooting pain in his back when he moved his left leg. Petitioner was given pain medication and referred to Dr. Stanley on 8/24/11. On 8/24/11 Dr. Stanley prescribed a steroid pack and recommended an MRI. At Respondent's request Petitioner also saw the company doctor who treated Petitioner's back and his right knee which swelled up the week of the accident. Dr Stanley became aware of the right knee problem as well treated Petitioner for his back and his right knee complaints.

The lumbar MRI of 9/6/11 showed a large para-central disc extrusion with superior migration of the extruded disc compressing the ipsilateral traversing nerve root and thecal sac. PX 2. On 10/6/11 Dr. Stanley performed a diskectomy and hemilaminectomy at L5-S1 on Petitioner at St. Joe's Hospital. PX 3. Petitioner was taken off work 10/6/11. On 10/23/11 Petitioner returned to work after the surgery working

light duty such as painting, paper work and phone calls. Petitioner testified that after the surgery the pain slowly returned and progressed.

Dr. Stanley took Petitioner off work again as of 11/5/11. On 11/21/11 Dr. Stanley noted that Petitioner was 6 weeks out from his surgery and was doing well until he returned to work and experienced an acute recurrence of left leg radicular symptoms which prevented him from working even light duty. Petitioner's complaints of radicular pain resurgence suggested that he had a recurrent disc herniation to Dr. Stanley. PX 8, p. 15. Petitioner demonstrated positive straight leg raising during exam which reproduced pain in the S1 nerve distribution suggesting that Petitioner has an acute disc herniation pinching the S1 nerve root. PX 8, p. 16. Petitioner also reported an increase in right knee pain and an MRI was ordered of the right knee in that the injection Petitioner received to the right knee failed to alleviate the symptoms. Dr. Stanley suspected a meniscal tear. Petitioner was also given a Medrol Dosepak for back pain. Dr. Stanley determined that the likely recurrent disc herniation would likely resolve without further surgery. PX 1. Petitioner was prescribed Norco as the Dosepak provided no improvement of the left leg radicular symptoms.

Dr. Stanley ordered another lumbar MRI which was performed on 12/12/11. The radiologist interpreted the MRI to show L5-S1 left para-central epidural fibrotic tissue extending 7 mm posteriorly which displaces the origin of the left S1 nerve root. The radiologist further noted, "This enhances on post contrast axial images and is therefore compatible with epidural fibrosis rather than disc protrusion. This displaces the origin of the left S1 nerve root posteriorly. There is otherwise no significant central canal or foraminal stenosis." PX 4. Dr. Stanley interpreted this MRI to show a recurrent disc herniation at L5-S1 and testified that the herniation was in the same location as the original herniation. PX 8, p. 18. Dr. Stanley noted on 12/19/11 that a fusion was possible for the recurrent disc herniation but that he would rather remove the recurrent piece of disc for immediate pain relief. PX 1, PX 8, p. 19.

On 1/30/12, Petitioner was examined by Section 12 examining physician, Dr. Zelby. Dr. Zelby read the 12/12/11 MRI as negative for a recurrent disc herniation but rather showing postoperative changes. He did not agree that Petitioner would benefit from redo surgery. RX 4, p. 29. With regard to the right knee complaints, Dr. Zelby felt Petitioner's theory about his knee problems was "medically inaccurate" and that his spine problem "did nothing to affect the condition in his knees." PX 1, RX 1. Dr. Zelby attributed Petitioner's back and knee problems to Petitioner's near "super-morbid obesity." Further, he opined that Petitioner is not a good candidate for a fusion irrespective of cause due to his morbid status. PX 1, RX 4. p. 29. He recommended a work conditioning/hardening program. RX 1.

On 3/16/12, Dr. Stanley responded to the opinions of Dr. Zelby. Again, he opined that Petitioner suffered a disc herniation on 8/22/11 which did not spontaneously resolve in 4 to 6 weeks as expected. Due to the continued radicular pain and numbness as well as back pain Petitioner had the surgery and received immediate relief thereafter. However, Petitioner sustained a recurrent disc herniation three weeks after surgery which in his opinion is clearly represented on the 12/12/11 MRI. However, to clear any confusion regarding Petitioner's left leg radicular symptoms, Dr. Stanley suggested a repeat MRI in a high definition machine. He further reiterated that Petitioner had bilateral knee pain resulting from abnormal gait. PX 1.

On 3/20/12, Petitioner was treated at St. Alexis emergency room for a cut on his leg. Petitioner stood on a chair and when he stepped down he cut his leg open on the side of the chair. Petitioner did not injure his

back at that time. Petitioner testified that his back pain remained at the same level before and after the chair incident. No complaints of back problems were made at the ER on 3/20/12 as Petitioner was treated that day for a leg laceration. PX 5. On 4/27/12, Dr. Stanley noted that Petitioner's knee gave out on him causing him to fell from a chair on 3/20/12.

Dr. Zelby authored an amended report dated 4/27/12 in which he agreed to a new MRI for clarity and that if it showed a recurrent disc herniation a redo microdiscectomy would be appropriate. RX 2, RX 4, p. 33. On 5/25/12 another MRI done with and without contrast was read to show "large disc herniation to the left at L5-S1. Significant scar surrounding the disc and to the left of the thecal sac extending into the left neural foramina." PX 6. On 6/1/12, Dr. Stanley noted that the MRI of 5/25/12 was "as obvious at the first MRI. It shows a large extruded disc fragment on the left at L5-S1 consistent with his left radicular symptoms." PX 1.

On 8/6/12, Dr. Zelby conceded that the May 2012 MRI showed a small-moderate paracentral left disc protrusion. He further states that he did not see this on the December 2011 MRI and that it represents an interval change between these two studies. RX 4, p. 36. Dr. Zelby opines that the change can be explained by Petitioner's fall from the chair in March 2012. He further concedes that the redo microdiscectomy is reasonable but that it is not related to his work accident but rather the result of an intervening accident causing a new injury. PX 1, RX 3, RX 4, p. 37. Again, he confirms his opinion that the knee pain is not related to Petitioner's back complaints.

Finally, on 8/17/12, Dr. Stanley responds and states that there is no interval difference between the two MRI exams as the recurrent disc is clearly visible on the MRI of December 2011 and on the 5/25/12 MRI. PX 8, p. 22. Dr. Stanley testified that he disagreed with the radiologist reading of the 12/12/11 MRI in that he believes there was "...definitely epidural fibrosis there, but I believe there was also a recurrent disc herniation... because although parts of it did have high signal intensity which would be consistent with epidural fibrosis, you wouldn't get epidural fibrosis that displaces the nerve root in such a dramatic fashion as this does." PX 8, p. 48. In his opinion, the displacement of the S1 nerve root shown on the 12/12/11 MRI is consistent with a herniation such as an extrusion. PX 8, p. 49. Finally, the testified that the two MRI exams show the same disc extrusion. PX 8, p. 52. Further, he opines that the fall from the chair in March 2012 did not contribute to his symptoms in that the records from the ER show no back complaints or complaints other than to the cut on his leg that day. PX 1. PX 5, PX 8, p. 24. Dr. Stanley prescribed a fusion surgery to prevent recurrence and does not agree that Petitioner's size prevents the success of a fusion. PX 8, p. 27. With regard to Petitioner's right knee, Dr. Stanley believes the symptoms are the result of Petitioner's left sided radiculopathy. He testified that he believes the right knee will improve following the back surgery which will improve Petitioner's gait. Dr. Stanley is not prescribing any right knee treatment currently. PX 8, p. 29-31.

Petitioner testified that he returned to light duty work as of 4/2/12 painting on the dock. Petitioner testified that he continued to perform the light duty work despite continued pain. Dr. Stanley increased Petitioner's pain medication while Petitioner awaited surgical authorization. On 8/17/12, Dr. Stanley increased the meds and noted that Petitioner could not drive "until stable on the new dose." Petitioner was allowed to return to the alternative work program working light duty when he stabilized on the new dose. Petitioner testified that he continued to work light duty with continued pain for two more weeks until 9/2/12 when he went off work again. Petitioner testified that he stopped working light duty as he was told he was "kicked off" the light duty program. Specifically, Petitioner testified that Gabe McBride

told him he could no longer work the alternative work program. Petitioner testified that if the company offered Petitioner the alternative work program again he would and could accept the work. Petitioner is capable of doing basic things around the house including taking care of a baby and grocery shopping. He can lift 25 to 30 pounds occasionally. He is not capable of repetitive work

Petitioner testified that he currently takes Norco and ibuprofen for pain. He testified that he notices pain constantly in his back and left leg to the bottom of his left foot. He takes Norco every three to four hours for pain that starts in the left side of his back and down the left leg along the outside of the foot. The right knee swelling comes down with ice but Petitioner feels pain and cracking in the knee. Petitioner has gained 30 pounds since the accident. Dr. Stanley prescribed a right knee MRI and an L5-S1 fusion. Petitioner would like to undergo both procedures.

Petitioner has generated his own income by driving a friend to work and working the door at a pub in his neighborhood. Petitioner earns $100.00 from his friend once or twice a month works the door 3 times per year.

CONCLUSIONS OF LAW

The foregoing findings of fact are incorporated into the following conclusions of law.

F. Is Petitioner's current condition of ill-being causally related to the injury? O. Evidentiary objections in the deposition of Dr. Zelby, K. Is Petitioner entitled to any prospective medical care?

At trial, the parties stipulated that Petitioner sustained accidental injuries at work on 8/22/11. As a result of the accident, Petitioner suffered an L5-S1 disc herniation with resultant left leg radiculopathy for which he underwent a discectomy on 10/6/11. The parties, treating physician and Section 12 physician agree to causal connection between the accident and the injury and to the reasonable and necessary nature of the initial surgery. At issue is the causal relationship between Petitioner's current condition of recurrent disc herniation and the accident of 8/22/11 and whether Petitioner should receive the prescribed fusion surgery for the condition. Also at issue is causal connection for Petitioner's right knee symptoms and complaints.

With regard to Petitioner's current condition of ill-being in his back and his radicular left leg pain, the Arbitrator finds these conditions causally related to the accident of 8/22/11 and further finds that Petitioner is entitled to receive the medical treatment prescribed by Dr. Stanley in the form of a fusion surgery. Accordingly, Respondent is to authorize and pay for this procedure and the attendant post-surgical care pursuant to Section 8(a) of the Act.

In finding causal connection between Petitioner's current condition and the accident of 8/22/11, the Arbitrator places greater weight on the opinion provided by the treating physician Dr. Stanley than on the opinion of Dr. Zelby. The Arbitrator finds that Petitioner's credible complaints of consistent and continued radicular symptoms buttress Dr. Stanley's reading of the two MRI exams. Petitioner complained of recurring radicular symptoms at the time of the December 2011 MRI which clearly showed displacement of the S1 nerve due to a large extrusion. Petitioner continued to complain of these same symptoms at the time of the higher definition MRI in May 2012 which both doctors and the radiologist agree show an extrusion at L5-S1. The Arbitrator notes that Dr. Zelby agrees Petitioner has a recurrent disc extrusion at L5-S1 which needs surgical attention but denies that the condition is related to the

original accident. Dr. Zelby's opinion is based on his belief that the December 2011 MRI did not show the current disc extrusion currently exhibited on the May 2012 MRI, thereby preventing a finding of no causal connection with the original accident in August 2011.

The Arbitrator overruled the evidentiary objections raised at Dr. Zelby's deposition pertaining to the basis of his causal connection opinion. The Arbitrator considered the opinion and testimony of Dr. Zelby on causal connection and assigned greater weight to the opinion and testimony of Dr. Stanley. Specifically, the Arbitrator finds Dr. Stanley's review and analysis of the MRI exams from December 2011 and May 2012 to be more persuasive and medically credible than the reading and conclusions provided by Dr. Zelby.

With regard to the Petitioner's right knee, the Arbitrator again finds Petitioner's condition of ill-being in the right knee causally related to the accident of 8/22/11. The Arbitrator finds that Petitioner had no complaints of right knee problems prior to this accident. Petitioner's complaints of right knee pain were noted during his initial treatment for back pain complaints after the accident. Dr. Stanley documented the right knee complaints and administered an injection which failed to alleviate the symptoms. Dr. Stanley further opined that Petitioner's gait was altered by his left leg radicular symptoms resulting in the right knee pain and that the right knee complaints are thus casually related to the accident of 8/22/11. Based on the opinion of Dr. Stanley and on the credible and continued complaints of Petitioner, the Arbitrator finds causal connection for Petitioner's right knee complaints.

With regard to prospective medical treatment for the right knee, the Arbitrator notes Petitioner's request for an MRI authorization as requested by Dr. Stanley in November 2011. However, at his deposition in November 2012, Dr. Stanley testified that he would like to wait on right knee treatment until the back surgery is performed. Dr. Stanley testified that back surgery will likely improve Petitioner's altered gait and thus alleviate his right knee pain. Accordingly, the Arbitrator finds that there is no current prescribed right knee treatment and thus no prospective medical treatment is awarded for the causally related right knee in this Decision.

J. Were the medical services that were provided to Petitioner reasonable and necessary? Has Respondent paid all appropriate charges for all reasonable and necessary medical services?

Based on the finding of causal connection for Petitioner's condition of ill-being in his back and right knee, the Arbitrator further finds that Respondent shall pay the reasonable and necessary medical expenses incurred by Petitioner in the care and treatment of these injuries pursuant to Section 8 and 8.2 of the Act. Respondent's objection was based on liability. ARB EX 1. The Arbitrator notes that Respondent has paid a vast majority of Petitioner's medical care. RX 9. Respondent shall receive credit for all amounts paid and shall hold Petitioner harmless for amounts paid.

G. What were Petitioner's earnings?

The Arbitrator finds that Petitioner worked as a spotter for Respondent starting on 3/26/11 through 8/22/11 a period of 21-4/7 weeks and earned gross wages during that period of $14,548.30. RX 8. The Arbitrator further finds that Petitioner's position and earnings as a spotter provide the appropriate basis on which to determine average weekly wage as that is the position Petitioner worked in prior to and at the

time of his injury. The spotter position was a union position with different duties and greater pay from Petitioner's previous position as a dock worker for Respondent.

Accordingly, Petitioner's average weekly wage was $674.46 and his TTD rate was $449.64.

K. What temporary benefits are in dispute? TTD

The parties stipulated to the undisputed TTD periods prior to 9/2/12 which total 30-2/7 weeks. ARB EX 1. TTD was paid for those periods at the TTD rate of $353.58. Based on the above finding of AWW of $674.46, Petitioner's correct TTD rate was $449.64 resulting in an underpayment of TTD for the undisputed 30-2/7 weeks in the amount of $96.06 per week and totaling $2,909.18. Respondent is to receive credit for all amounts paid and is to pay Petitioner $2,909.18 to remedy the underpayment of benefits.

The TTD period at issue at trial was a period of 13-3/7 weeks commencing 9/3/12 to 12/5/12. Petitioner testified that he was working light duty on the alternative work program as of 9/2/12. Petitioner further testified that he had been cleared to work after his adjusted medication levels were stabilized. However, Petitioner testified that he was told the alternative work program was no longer available to him as of 9/2/12 and he was not allowed to continue working light duty. Petitioner testified that he did not remove himself voluntarily from the program and that he would still work light duty if available to him. Petitioner's testimony is unrebutted. Respondent's denial of TTD benefits for this period is based on liability and on the opinion of Dr. Zelby. ARB EX 1. Based on the foregoing findings, the Arbitrator finds that Petitioner is entitled to TTD at the rate of $449.64 for the period of 13-3/7 weeks commencing 9/3/12 to 12/5/12 during which he was under light duty restrictions which were not accommodated.

2016 IL App (1st) 150706WC
No. 1-15-0706WC
Opinion filed: February 11, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

SALVADOR ESQUINCA, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (Romar Transportation Systems, Inc., Appellees).	)	Appeal from the Circuit Court of Cook County, Illinois Appeal No. 1-15-0706WC Circuit No. 14-L-50809 Honorable Robert L. Cepero-Lopez, Judge, Presiding.

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

OPINION

¶ 1 The claimant, Salvador Esquinca, filed an application for adjustment of claim under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2010)), seeking benefits for a low back injury which he allegedly sustained while working for the employer, Romar Transportation Systems, Inc. (employer). After conducting a hearing, an arbitrator found that the claimant was an independent contractor, and not an employee of the employer, at the time he was injured. Accordingly, the arbitrator denied benefits.

¶ 2 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). The Commission affirmed and adopted the arbitrator's decision with one Commissioner dissenting.

¶ 3 The claimant then sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling.

¶ 4 This appeal followed.

¶ 5 FACTS

¶ 6 The employer is a transportation company engaged in the business of warehousing, yard storage, truck brokering, and intermodal freight transport by rail and trucking. Some of the employer's drivers are employees of the company, and some are "owner-operators" that the employer hires as independent contractors.

¶ 7 The claimant, who owned his own truck, delivered loads for the employer. On April 29, 2010, the claimant was driving his truck and a trailer belonging to the employer northbound on I-55 when he was rear ended by three other vehicles. The claimant injured his low back in the collision. He sought workers compensation benefits from the employer, but the employer claimed that he was ineligible for such benefits because he was an independent contractor, not an employee of the employer.

¶ 8 The parties' relationship began approximately two and a half years before the accident. On September 28, 2007, the claimant and the employer signed a "Contractor Service Agreement" (the Agreement). The Agreement stated that "[i]t is the intention of the parties that [the claimant] shall be an independent contractor with respect to the [employer]. Neither [the

claimant] nor any driver, employee, or other worker engaged by [the claimant] shall be deemed an employee or agent of the [employer] for any purpose whatsoever," including but not limited to payroll taxes, income tax withholdings, and other tax payments. The Agreement noted that the claimant owned his own truck but provided that, "[a]s required by 49 C.F.R. § 1057.12(c) and comparable state regulations," the employer shall have exclusive possession, control, and use of the truck "to the extent required by such regulation during the term of this agreement, but only during the time the [truck] is in fact operated in the service of the [employer]." The Agreement provided that the claimant shall be responsible for the entire cost of operating the truck in connection with the claimant's performance under the Agreement, including fuel, fuel taxes, tolls, permits, licenses, maintenance costs, and plate registration. The Agreement stated that the claimant "shall direct the operation of the [truck] in all respects and shall determine the method , means and manner of performance of this Agreement including, but not limited to, such matters as choice of routes, points of servicing of [the truck] and rest stops." The Agreement also required the claimant to obtain insurance, including workers' compensation insurance in his own name for himself and his employees and "bobtail" insurance, and to pay the premiums for such insurance.

¶ 9 Affixed to the Agreement was a provision entitled Addendum "C" Insurance, which allowed that "Contractor/Claimant, Salvador Esquinca/Esquinca Trucking" either elect to be covered under the Illinois Workers' Compensation Act or waive coverage under the Act and elect coverage under an Occupational Accident Insurance Policy. The claimant did not check either box (*i.e.*, he did not elect either option).

¶ 10 The Agreement required the claimant and his employees to abide by various federal and state laws and regulations. However, it provided that the all drivers or other employees used by the claimant "shall be under the sole control and direction of [the claimant]" and that the employer "shall have no right to direct or control the hiring or discharging of such individuals, or the manner in which such individuals perform duties for [the claimant]."

¶ 11 The Agreement provided that it would remain in effect for a period of 24 months after the parties signed it on September 28, 2007. The Agreement contained a merger clause indicating that the Agreement "represents the entire agreement between the parties with respect to matters contained herein," and that "[n]o amendment or addition to this agreement will be effective unless in writing and signed by both parties." By its terms, the Agreement expired on or around September 28, 2009, approximately seven months prior to the accident. The parties never expressly renewed the Agreement, wither orally or in writing. Accordingly, no written agreement characterizing the employment relationship between the parties was in effect on the date of the accident.

¶ 12 The claimant testified that, since January 9, 2007, he has been incorporated under the name "Esquinca Trucking." The claimant was still incorporated at the time of the arbitration hearing. The claimant stated that, before he worked for the employer, he never sold his trucking services directly to the general public. However, he had previously worked as an independent contractor for other trucking companies.

¶ 13 On or about September 25, 2007, the claimant filled out a "Drivers Application For Employment" form with the employer. From that day forward, the claimant drove for the

employer five days per week. The claimant testified that he owned his own truck, which he used when driving for the employer. However, the claimant claimed that he was told he was one of the employer's employees. The claimant admitted that he was responsible for paying for the license plate fees, gas, repairs and maintenance for the truck. When he drove for the employer, the claimant was told where to pick-up the shipment and where to the deliver the shipment. However, the claimant acknowledged that he chose the route he would travel to make the delivery. Although the employer provided a required delivery time for each shipment, the claimant otherwise decided his own schedule for making the delivery, including when and where to make rest stops and get gas.

¶ 14 Once the clamant completed a delivery, he would submit paperwork to the employer. He would then be paid a settlement for the delivery. The claimant was paid per shipment and not paid by the hour. The employer did not deduct taxes out of the claimant's paychecks. Rather, the claimant was responsible for deducting taxes. At the end of the year, the employer would issue a 1099 to the claimant for tax purposes.

¶ 15 When driving for the employer, the claimant was required to display the employer's logo decal as well as the employer's Department of Transportation (DOT) number on his truck. The claimant stated that he never removed the employer's logo decal from his truck because it could not be reattached after it was removed. He was not required to make any other modifications to his truck in order to drive for the employer. The employer did not require the claimant to wear a uniform. However, the employer required each person who drove for it, including the claimant, to wear a safety vest the entire time he or she was on duty. According to the employer's written

policy (which the claimant signed), any driver caught without their safety vest on was subject to a $75 fine. The claimant was required to sign other written policies promulgated by the employer, including a policy restricting the claimant's use of a cell phone while driving and requiring him to report any ticket he received for illegal use of a cell phone or electronic device to the employer within 24 hours.

¶ 16 The claimant stated that, other than the manner in which he was paid, he was treated the same as all the other drivers for the employer, two of whom were classified as "employees."[1] Moreover, the claimant stated that he was treated the same by the employer as he was when he drove for other companies as an employee. For example, the claimant testified that the employer required him to: (1) undergo drug tests and federally mandated physicals with a doctor of the employer's choice; (2) take written road tests; (3) attend safety meetings; (4) keep a log book; (5) check the tire pressure on all trailers he picked up at the rail yards; (6) report accidents. He also stated that the employer told him what loads to pick up, required him to work full-time hours, five days per week, and restricted the number of consecutive hours he could drive.

¶ 17 The claimant testified that he believed that if he did not accept a load offered by the employer, he would be left off the work schedule for a day or would get a shorter trip assignment. However, the claimant admitted that he had refused loads offered by the employer

[1] The claimant testified that, while he worked for the employer, a total of 18 drivers drove for the employer. Sixteen of these drivers were classified by the employer as "independent contractors," and two were classified as "employees."

and had subsequently returned to drive for the employer.

¶ 18 The claimant testified that he drove five days per week for the employer. From the time he filled out an application to work for the employer in September 2007 until the April 29, 2010, accident, the claimant never drove for any other company. The claimant testified that, during the time he had a relationship with the employer, he was not allowed to haul freight for other customers. He stated that, in order to drive for another company, he would have had to terminate his contract with the employer.

¶ 19 The claimant paid for his own liability and bobtail insurance on the truck. The premium for the occupational accident policy was deducted from the claimant's pay. The claimant was also responsible for any speeding tickets or driving citations which he incurred while driving. However, he claimed that he was required to report all speeding tickets and other citations to the employer, which the employer tracked. Moreover, the claimant parked his truck in a lot which was owned by a private entity. He paid for the expenses associated for parking the truck and was not reimbursed by the employer for the parking expenses.

¶ 20 Michael Marden, the employer's President, testified on the employer's behalf. Marden's job duties included oversight of all the employer's divisions. Marden testified that the employer's workforce is composed of approximately 22 employees and between 30 and 32 owner-operators. Marden stated that the claimant began driving for employer in 2007. Marden believed that the claimant was an independent contractor and not an employee of the employer. He noted that the claimant signed a Contractor Service Agreement prior to driving for the employer. According to Marden, if the claimant had been hired as an employee, he would not

have been required to sign the Contractor Service Agreement.

¶ 21 Marden testified that the Agreement between the claimant and the employer began in 2007 and continued for 24 months thereafter unless it was terminated earlier. He admitted that the Agreement expired some seven months before the accident and was never renewed or extended. He further conceded that any amendments under the Agreement were required to be in writing and signed by both parties. However, he testified that, after the Agreement expired in 2009, the claimant continued to drive for the employer in the same capacity. During that time period (*i.e.,* from late September 2009, through April 29, 2010), the claimant was not added to the employee schedule, the expenses he was responsible for did not change, the way he was paid did not change, and the percentage of shipment he received did not change.

¶ 22 Regarding load assignments, Marden testified that the claimant would get notice that a load was available either by receiving a call or by calling the dispatcher. According to Marden, the only information given to the claimant regarding the load was the location of the load, the pick-up number, and where and when it was to be delivered; the claimant was not given any other information, nor was he given a schedule or route to follow. Rather, the claimant could choose the route he would travel to make the delivery and could determine his own schedule for making the delivery so long as he complied with the assigned delivery time. The claimant could also determine where to get gas and where and when to make rest stops en route. Marden stated that drivers hired as employees were given a specific schedule.

¶ 23 Moreover, Marden testified that, although all drivers received their assignments from the same dispatcher, employee drivers "have to do the work they are directed to do," whereas owner-

operators "have the free choice" of either taking the work or turning it down. In sum, unlike employees, owner-operators "may choose whether they want to work or not." Marden stated that the claimant did not have to accept every load that was offered to him and that the claimant's rejection of a load did not have any effect on his ability to drive for the employer.

¶ 24 Marden testified that the claimant owned his own truck, which he used to make deliveries for the employer. Marden stated that the claimant was responsible for all operating expenses of the truck, including tires, fuel, license plates, maintenance, windshields, bumpers, and repairs. Marden noted that, if the claimant had been hired as an employee, the employer would have been responsible for the operating expenses of the truck. Marden testified that, other than repairs which were required by the DOT, the employer did not tell the claimant any repairs or maintenance that needed to be done to the truck. In addition, the employer did not tell the claimant where to park his truck or pay for any of the associated parking expenses. While driving for the employer, the claimant was required to put the employer's decals on his truck along with the employer's DOT number. This requirement was mandated by DOT regulations, and it applied both to independent contractors and to drivers hired as employees. Marden explained that the claimant was required to have the company decal on the side of his truck only when operating in the service of employer. Because the claimant owned his own truck, he could use his truck for anything he wanted, not just for driving for the employer.

¶ 25 Marden further testified that the claimant was compensated differently than the employer's employee drivers. Marden stated that the claimant was paid a percentage of the revenue received for each shipment he delivered. Marden noted that some of the employee

drivers are paid on an hourly basis, while others receive a percentage per shipment. However, the percentage per shipment received by a driver hired as an employee was lower than the percentage received by an owner-operator. (Employee drivers received 30-35% of shipments, while owner-operators received 70-75% of shipments.) Moreover, Marden noted that the claimant was personally responsible for deducting taxes out of his earnings. He indicated that, if the claimant had been hired as an employee, taxes would have been deducted from his paycheck by the employer. Similarly, Marden noted that, if the claimant had been an employee, there would have been deductions for a 401(k). The claimant received 1099s for each year from 2007 through 2010. Marden stated that 1099s are used only for independent contractors.

¶ 26 Marden also testified regarding the differences in insurance offered to drivers hired as employees versus owner-operators. He explained that the claimant was responsible for maintaining his own bobtail, truck, and health insurance. According to Marden, if the claimant had been hired as an employee, he would have been offered health, medical, dental, short-term and long-term disability insurance through the employer, and the premiums for any such insurance would have been deducted from his paycheck by the employer.

¶ 27 Marden testified that the employer offered occupational accident insurance to its owner-operator drivers through U.S. Specialty. The employer offered this insurance policy to the claimant. However, Marden stated that the claimant was not required to purchase the specific policy offered by employer and could opt for a policy through another carrier. Marden testified that the employer contributed nothing towards the premium for the occupational accident policy and the claimant was responsible for the entire premium (which was deducted from his

paycheck). Marden claimed that the claimant never came to him to discuss any issues or questions he had regarding the occupational accident policy. Nor did the claimant ever question the deductions taken out of his paycheck for occupational accident insurance. Marden confirmed that the employer provides and pays for workers' compensation insurance for its employees.

¶ 28 After the April 29, 2010, accident, the claimant reported the accident to the employer, who referred him to Concentra, the employer's company clinic. The claimant first sought treatment at Concentra on May 7, 2010. A Concentra intake form indicates that the claimant identified his employer as "Esquinca Company." The claimant was initially diagnosed with a lumbosacral strain and limited to light duty work. A July 2010 MRI revealed a herniated lumbar disc. From May 27, 2010, through December 2012, the claimant sought treatment intermittently from several different doctors. He was taken off work entirely for four weeks (from late May 2010 through July 8, 2010), but he worked full time with certain permanent lifting restrictions thereafter. At the time of the arbitration hearing, the claimant was working full time as a truck driver.

¶ 29 Dr. Michael Gross, the claimant's section 12 independent medical examiner (IME), opined that the claimant suffered from residual low back and thoracic spine injury that was causally related to the April 29, 2010, accident. The employer's IME, Dr. Avi Bernstein, disagreed. Dr. Bernstein opined that the claimant's MRI demonstrated nothing more than age appropriate degenerative changes and that the objective medical findings did not support the claimant's subjective complaints, which suggested exaggeration and symptom magnification. Dr. Bernstein also opined that the medical care received by the claimant had been unindicated,

unnecessary, and excessive.

¶ 30 The arbitrator found that the claimant was not entitled to workers' compensation benefits under the Act because he "failed to prove that an employee-employer relationship existed at the time of the accident." After analyzing the relevant factors, the arbitrator concluded that "the evidence clearly demonstrate[d] [that the claimant's] employment status was that of an independent contractor and not an employee of the [employer] on the accident date." For example, the arbitrator found that the employer "had minimal control over the manner in which [the claimant] performed his job duties." In support of this finding, the arbitrator noted that: (1) the claimant testified he was not told by the employer what route to take when making deliveries and he decided his own schedule for transporting the delivery, including when and where to make rest stops and to refuel; (2) Marden testified that if the claimant were hired as an employee driver, he would have had a set schedule; (3) unlike employee drivers, who were required to do assigned work, the claimant "was able to pick and choose when he wanted to drive" and "did not have to accept every load that was offered to him."; (4) the claimant owned his own truck and was responsible for all operational expenses associated with the truck as well as any speeding tickets or driving citations he incurred; (5) Marden testified that, if the claimant had been hired as an employee, the employer would have been responsible for operating expenses of the truck; (6) the employer did not tell the claimant what maintenance or repairs to perform on the truck; (7) the claimant was responsible for maintaining liability and bobtail insurance on the truck; and (8) the employer did not tell the claimant where to park his truck or pay for parking.

¶ 31 The arbitrator also found that, although the Contractor Service Agreement expired

approximately seven months before the accident, both parties testified that they "there was no change in their actions or behaviors and they continued to conduct their business relationship as if the [Agreement] was still in effect." Accordingly, the arbitrator found that, pursuant to the Agreement, the claimant was solely responsible for the hiring, firing, payment, and job performance of any employees he hired, and for any insurance, payroll deductions, and any other labor costs associated with any such employees.

¶ 32 The arbitrator listed several additional factors supporting its conclusion that the claimant was an independent contractor. For example: (1) Marden testified that the claimant was paid as an independent contractor rather than an employee; (2) the employer did not have an unqualified right to discharge the claimant for any reason or no reason. Instead, the parties had a mutual, limited right to terminate the contract for a breach by the other party; (3) although the claimant's trucking business was related to the employer's business, the employer was "only interested in the end result" (*i.e.*, the delivery of the shipment), and "[a]ll the details of accomplishing the shipment were left to [the claimant]"; (4) the claimant was not required to wear a uniform when he drove for the employer, and he was only required to display the employer's decal and DOT number when he was "operating in the service of [the employer]" (pursuant to DOT regulations); (5) although the claimant drove exclusively for the employer from 2007 through April 2010, Marden testified that the claimant could have driven for other companies during that time period if he had wanted; (6) the claimant testified that he was hired as an owner-operator, and the Agreement stated that it was the parties' intent that the claimant would be an independent contractor; (7) the claimant purchased occupational accident insurance on his own; (8) on the

application for that insurance, the claimant "checked the box indicating that he was an owner-operator"; and (9) the Concentra medical records "indicate[d] [that the claimant] reported his employer was Esquinca Company, not [the employer]."

¶ 33 Because the arbitrator found that the claimant was an independent contractor at the time of the accident, it denied benefits and found all remaining issues raised by the parties (including accident, causation, and the claimant's entitlement to TTD benefits, medical expenses, and penalties) moot.

¶ 34 The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (Commission). In a divided decision, the Commission affirmed and adopted the arbitrator's decision.

¶ 35 Commissioner Tyrrell dissented. Commissioner Tyrrell concluded that the claimant had proven that he was an employee of the employer at the time of the accident. He found that the claimant's case was factually analogous to *Earley v. Industrial Comm'n*, 197 Ill. App. 3d 309 (1990) and *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (2000), both of which found the claimant to be an employee rather than an independent contractor. In *Ware*, we reversed the Commission's finding that there was no employment relationship, finding it to be against the manifest weight of the evidence. Commissioner Tyrrell stated that "[w]here the Appellate Court reverses despite the onerous nature of the standard of manifest weight, the Commission should heed this guidance and consistently find that truck drivers working with these 'independent contractor agreements' are what they are: employees." Commissioner Tyrrell found it "clear *** that 'independent contractor agreements', such as those used in *Ware, Earley*, and this case,

seek to shift the burden of the cost of workers' compensation to truck drivers who happen to own their own trucks, despite that the actual employment tasks performed are virtually identical to employee truck drivers." Moreover, he concluded that "the testimony in this case shows how these agreements may not be at arm's length, and instead are based on 'take it or leave it' tactics."

¶ 36 Commissioner Tyrrell noted that the 24-month written Agreement between the parties had expired before the accident and, therefore, was arguably "moot" to the question of the claimant's employment status. Regardless, Commissioner Tyrrell found statements in the Agreement suggesting that the claimant was an employee rather than an independent contractor. For example, the Agreement provided that the claimant's truck was to be maintained in safe mechanical operating condition and repair, and it "stated that the delivery was to be by manner and means and over routes in accordance with schedules selected and agreed to by the contractor," thereby implying that "a route could be presented by [the employer] to [the claimant] for agreement."

¶ 37 Moreover, although the Agreement stated that the claimant was not obligated to accept every load offered by employer, Commissioner Tyrrell concluded that "[the claimant's] testimony made it clear that there were consequences to [him] for refusing a load." The claimant testified that he was not allowed to drive for another trucking company, despite the contract language, because the contract would have been terminated. Further, Commissioner Tyrrell found it "highly relevant" that the claimant "never checked the option in the [A]greement to waive workers compensation coverage." Commissioner Tyrrell concluded that "this clearly

supports [the claimant's] testimony that he was not properly informed about workers compensation coverage and which party is responsible" for such coverage," and it supports the inference "that [the employer] did not discuss this with [the claimant], and there was no meeting of the minds in this regard."

¶ 38 Commissioner Tyrrell listed several additional facts that he believed "point[ed] to [the employer's] exertion of control over the [claimant], thereby suggesting an employment relationship. For example: (1) the employer "arranged for all of [the claimant's] work, and [the claimant] testified he never was in direct contact with any customer"; (2) the claimant "was required to deliver goods in accordance with the terms and conditions that [the employer] agreed to with the customer"; (3) the employer gave the claimant forms to complete, tracked his hours and directed which loads he was to deliver; (4) the claimant testified that, when he initially sought treatment after the accident, "Concentra did not initially want to provide medical services until [the employer's] dispatcher *** called the facility." Moreover, Commissioner Tyrell noted that, pursuant to law, the employer maintained exclusive possession, control and use of the claimant's truck during the time it was operated to deliver a load on behalf of the employer, and the claimant was required to display the employer's signs and DOT number on his truck while delivering a load for the employer. The Commissioner observed that, in *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159 (2007), our supreme court "indicated that evidence of control, exerted or implied, based on a requirement of local or federal regulations is evidence that such control exists, and the motivation of the employer in exerting or implying such control is irrelevant."

¶ 39 Further, Commissioner Tyrrell noted that the relationship of the claimant's business to

the employer's business favored the finding of an employment relationship because "both [the claimant] and [the employer] were in the identical 'business': the delivery of goods to customers by truck."

¶ 40 Moreover, Commissioner Tyrell cited Roberson for the proposition that "there is a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business." The Commissioner agreed with this proposition and found it "very applicable in this case," particularly given the claimant's unrebutted testimony that "he has worked for no other company other than the [employer] since *** September 2007."

¶ 41 The claimant sought judicial review of the Commission's decision in the circuit court of Cook County, which confirmed the Commission's ruling.

¶ 42 This appeal followed.

¶ 43 ANALYSIS

¶ 44 1. The Commission's Finding that the Claimant was an Independent Contractor

¶ 45 On appeal, the claimant argues that Commission's finding that he was an independent contractor, rather than the employer's employee, at the time of the accident was against the manifest weight of the evidence.

¶ 46 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*, 197 Ill. App. 3d at 314; see also *Roberson*, 225 Ill. 2d at 174 (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*, 318 Ill. App. 3d at 1122. 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. *Id.* 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.

¶ 47 Our supreme court has identified a number of factors to assist in determining whether a person is an employee. 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. *Id.*; see also *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, whether the purported employer has a right to control the actions of the employee

is "[t]he single most important factor." *Ware*, 318 Ill. App. 3d at 1122; see also *Bauer v. Industrial Comm'n*, 51 Ill. 2d 169, 172 (1972). The nature of the claimant's work in relation to the employer's business is also an important consideration. *Kirkwood*, 84 Ill. 2d at 21; *Steel & Machinery Transportation, Inc. v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 133985WC, ¶ 31.

¶ 48 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 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. *Steel & Machinery Transportation*, 2015 IL App (1st) 133985WC, ¶ 32. 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. *Steel & Machinery Transportation*, 2015 IL App (1st) 133985WC, ¶ 32. A finding is not against the manifest weight of the evidence if there is sufficient factual evidence in the record to support the Commission's decision, even if this court, or any other tribunal, might reach an opposite conclusion. *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 944-45 (2006); *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002). Accordingly, when the evidence is "well balanced," (*i.e.*, when the facts of the case are susceptible to more than one reasonable interpretation) 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.

¶ 49 Applying these standards, we find that there is sufficient evidence in the record to support the Commission's finding that the claimant was an independent contractor at the time of the accident. Regarding the most important factor, the evidence shows that the employer did not have the right to control the claimant's work performance or work-related activities to any notable degree. The employer did not tell the claimant what route to take when making deliveries. Although the claimant had to deliver each shipment on time, he decided his own schedule for transporting the delivery, including when and where to make rest stops and to refuel. The only information the employer provided to the claimant was where to pick up a shipment and where and when to deliver it. Marden testified that, if the claimant had been hired as an employee driver, he would have had a predetermined schedule.

¶ 50 Moreover, unlike employee drivers, who were required to do any and all assigned work, the claimant was able to pick and choose when he wanted to drive and did not have to accept every load that was offered to him. Although the claimant testified that he believed there would have been negative consequences if he refused a load, he admitted that he rejected loads offered to him by the employer and continued to drive for the employer thereafter. Marden denied that there were any consequences for the claimant's refusing a load, and the Commission was entitled to credit Marden's testimony on this issue.

¶ 51 In addition, the claimant owned his own truck and was responsible for all operational expenses associated with the truck as well as any speeding tickets or driving citations he incurred. Marden testified that, if the claimant had been hired as an employee driver, the

employer would have been responsible for operating expenses of the truck. Further, the employer did not tell the claimant when, where, or how to perform maintenance or repairs to his truck. Nor did the employer pay for parking or tell the claimant where to park his truck. The claimant paid for liability and bobtail insurance on the truck.

¶ 52 Pursuant to DOT regulations, the claimant was required to display the employer's logo decal and DOT number on his truck when, and only when, he was driving in the employer's service. The claimant was not required to make any other modifications to his truck in order to drive for the employer. Although the claimant drove exclusively for the employer during the duration of their working relationship, Marden testified that the claimant could have driven for other companies if he had wanted. The claimant disputed this, but the Commission was entitled to credit Marden's testimony.

¶ 53 In addition, although it is a factor of lesser weight, the label the parties placed on their own relationship also weighs in favor of the Commission's finding. The Agreement stated that it was the parties' intent that the claimant would be an independent contractor. In his occupational insurance application, the claimant checked the box indicating that he was an owner-operator, rather than an employee. Moreover, Concentra's medical records indicate that, when the claimant sought treatment at Concentra shortly after the accident, he identified his employer as "Esquinca Company," not the employer. During the arbitration hearing, Marden testified that the claimant was an owner-operator and that Marden therefore believed he was an independent contractor.

¶ 54 Other factors further support the Commission's finding that the claimant was an

independent contractor rather than an employee. The claimant owned his own truck, which he used while driving for the employer. Thus, the employer did not furnish all the primary equipment used to perform the work. The method of payment also suggested that the claimant was an independent contractor. Marden testified that driver employees were paid either an hourly wage or 30-35% of each shipment delivered. However, owner-operators (like the claimant) received 70-75% of each shipment. Moreover, Marden testified that the claimant was personally responsible for deducting taxes out of his earnings whereas the employer deducts such taxes from its employee's paychecks. The claimant received 1099s for each year from 2007 through 2010, which Marden stated are used only for independent contractors. Marden also noted that, if the claimant had been an employee, there would have been deductions for a 401(k).

¶ 55 Further, the claimant paid for his own occupational accident insurance and health insurance. According to Marden, if the claimant had been hired as an employee, he would have been offered health, medical, dental, short-term and long-term disability insurance through the employer, and the premiums for any such insurance would have been deducted from his paycheck by the employer. The claimant's paychecks (which were admitted into evidence) showed no such deductions.

¶ 56 The claimant argues that the evidence in this case, particularly the evidence of the employer's control of the claimant's work and the nature of the claimant's work, "overwhelmingly" favors a finding of an employment relationship. As to the employer's control over his work, the claimant notes that the employer required him to: (1) undergo training; (2) undergo federally mandated physicals with a doctor of their choice; (3) submit to background

checks; (4) attend safety meetings; (4) wear a safety vest (and pay a $75.00 fine if he failed to do so); (5) abide by the employer's policies regarding the use of cell phones while driving; (6) "semi-permanently placard his tractor with [the employer's] adhesive signs which were not able to be removed and re-attached"; and (7) make his truck available to the employer for the employer's exclusive use (pursuant to applicable legal regulations). Moreover, the employer restricted the number of continuous hours the claimant could drive, and the claimant asserts that the employer required him to give the employer written notice if he intended to drive for another company. [2]

¶ 57 The claimant argues that other factors further confirm that he was an employee. For example, the claimant's business was the same as the employer's business (hauling freight). The

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[2] The claimant testified that he was not allowed to drive for other companies while he worked for the employer and that he would have had to terminate his contract with the employer before he did so. Marden disputed this and stated that the claimant could have driven for other companies if he so desired. Regardless, the claimant argues that, at a minimum, the employer set up substantial obstacles preventing the claimant from driving for others by mandating that the claimant affix a "semi-permanent" adhesive decal on his truck containing the employer's logo and DOT number and by requiring him to inform the employer if he drove for another company. The claimant provides no record citation for the employer's alleged notice requirement. Regarding the decal requirement, the employer counters that, if the clamant wanted to drive for another company, he could have simply covered up the employer's decal.

claimant had no customers of his own and worked exclusively for the employer five days per week for more than two and a half years. The employer provided equipment that was necessary for the performance of the work, such as trailers (which had the employer's logo on them) and the dispatching system. Moreover, the claimant filled out an "employment" application for the employer, and, in his occupational insurance application, the claimant did not check the box indicating that he waived his workers' compensation rights. The employer chose what trips to offer the claimant. Although the employer did not dictate the routes or require the claimant to wear a uniform, there was no evidence that the employer imposed these requirements on any of its employees. Moreover, although the claimant paid for his own bobtail and liability insurance, the employer selected and purchased the policies and then deducted the premiums from the claimant's pay. Further, the claimant argues that the fact that the employer did not dictate where the defendant could park his truck is irrelevant because the claimant drove his truck home and parked at home after his shift ended. He also argues that anything contained in the parties' former Agreement is irrelevant because it is undisputed that the Agreement had expired and was no longer in force at the time of the accident. Accordingly, the claimant maintains that the Commission erred in relying upon the Agreement in finding him to be an independent contractor.

¶ 58 In sum, the claimant argues that, other than how he was paid, he was treated no differently than an employee. He maintains that he was an "independent contractor" in name only. He agrees with dissenting Commissioner Tyrrell that the employer labeled several of its employees "independent contractors" in order to evade its obligations to its employees, including its legal obligation to provide workers' compensation benefits.

¶ 59 We acknowledge that there is evidence in the record that arguably suggests an employment relationship. However, as noted above, there is also ample evidence suggesting the opposite conclusion, *i.e.*, that the claimant was an independent contractor. That remains true even if all references to the parties' expired Agreement is disregarded. When the relevant evidence is capable of supporting either conclusion, as here, 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; *Steel & Machinery Transportation*, 2015 IL App (1st) 133985WC, ¶ 32 (noting that it is 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). There is sufficient evidence in the record to support the Commission's finding that the claimant was an independent contractor; on this record, we cannot say that the opposite conclusion was "clearly apparent." Accordingly, the Commission's finding was not against the manifest weight of the evidence.[3]

[3] The claimant argues that the employer's brief on appeal violates Illinois Supreme Court Rule 341(h)(6), (i) (eff. Jan. 1, 2016) by misrepresenting Marden's testimony on disputed issues as "facts" in its statement of facts. He also argues that the employer violated the supreme court's rules (presumably, Rule 341(h)(7), (i)) by failing to include any record citations in the argument section of its brief. The claimant asks us to strike the improper factual statements and argument or, in the alternative, to disregard such statement. We note that, contrary to the claimant's

¶ 60 The claimant also argues that the Commission's finding that he was an independent contractor was erroneous as a matter of law because the parties were not operating under a valid written lease Agreement at the time of the accident. The claimant notes that federal regulations require an employer to have a written carrier lease (containing certain required provisions) with an independent contractor. 49 U.S.C. § 14102 (2006); 49 C.F.R. § 373.12(c)(4) (2010). Similarly, Illinois law requires motor carrier equipment leases to be in writing. 92 Ill. Adm. Code 1360.30(b) (1987). The Commission found, correctly, that the parties' written Agreement expired prior to the accident and had not been renewed in writing (as required by the Agreement). The claimant argues that, because the parties were not operating under a valid written lease at the time of the accident, the claimant could not have been an independent contractor as a matter of law, and, "by default," he must have been an employee operating under an implied-in-fact employment agreement.

¶ 61 We do not find the claimant's argument persuasive. The question presented in this case is whether an employment relationship existed between the claimant and the employer. Our supreme court has directed the Commission to answer this factual question by considering all of

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assertion, the employer's brief does contain record citations to most (but not all) of the factual assertions made in the fact and argument sections of its brief. Moreover, while we acknowledge that rebutted testimony may not be presented as "fact," is appropriate for the employer to present *unrebutted* testimony as fact. We have disregarded any improper factual statements or arguments that find no support in the record.

the relevant facts and circumstances, including the degree of control the employer asserted over the claimant's work performance, the nature the claimant's business in relation to the employer's business, and several other factors our supreme court has deemed significant. *Roberson*, 225 Ill. 2d at 174-75. 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, and no single relevant factor is determinative. *Id.* at 175; *Kirkwood*, 84 Ill. 2d at 20. "[A]lthough a contractual agreement is a factor to consider, it does not, as a matter of law, determine an individual's employment status." *Early*, 197 Ill. App. 3d at 317-18; see also *Wenholdt v. Industrial Comm'n*, 95 Ill. 2d 76, 80 (1983).

¶ 62 In this case, the Commission properly considered all of the relevant facts and circumstances. Based on its consideration of all the relevant evidence (and the factors identified by our supreme court), the Commission determined that the claimant was not an employee of the employer. The fact that the parties did not properly renew their written Agreement might render that Agreement unenforceable in an action for breach of contract. However, that fact, standing alone, cannot resolve the issue of whether an employment relationship existed for purposes of the Act. The Commission found that the employer had very little right to control the claimant's work and that this fact (plus other relevant factors) weighed against finding an employment relationship. Moreover the Commission found that, after the expiration of the Agreement, nothing changed and the parties continued to act as if the terms of the independent contractor Agreement remained in effect. Reviewing the parties' actions and all the other relevant evidence in light of the governing case law, the Commission concluded that the claimant was not an

employee for purposes of the Act. It committed no error of law in reaching that conclusion.

¶ 63 The claimant also argues that the Commission erred as a matter of law in finding him to be an independent contractor because the employer violated section 23 of the Act (820 ILCS 305/23 (West 2006)) by attempting to solicit him to waive his rights under the Act, thereby rendering the Agreement illegal and unenforceable. The claimant has forfeited this argument by failing to raise it before the Commission or the circuit court. See, *e.g.*, *Carter v. Illinois Workers' Compensation Comm'n*, 2014 IL App (5th) 130151WC, ¶ 31; *May v. Industrial Comm'n*, 195 Ill. App. 3d 468, 472 (1990).

¶ 64 However, even if we were to address this argument, we would reject it. Assuming *arguendo* that that the alleged improper solicitation rendered the parties' Agreement invalid and unenforceable, that fact would not compel reversal of the Commission's decision. As noted above, the existence of a valid contract is only one factor among many to consider, and the absence of a valid contract does not require a finding of an employment relationship as a matter of law. In this case, there was sufficient evidence aside from the Agreement to support the Commission's finding of no employment relationship.[4]

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[4] The claimant argues in passing that, because of the employer's alleged violation of section 23, the employer should be "estopped by virtue of their conduct and latches from claiming that *** [the claimant] was not their employee." However, the claimant cites no authority in support of this argument, and has therefore forfeited the argument. *Ameritech Services, Inc. v. Illinois Workers' Compensation Comm'n*, 389 Ill. App. 3d 191, 208 (2009); Ill. S. Ct. R. 341(h)(7) (eff.

¶ 65 The claimant also contends that the Commission erred by finding that the claimant had executed a "valid waiver of his rights under the Act." We disagree. The Commission noted that, on his application for occupational liability insurance, the claimant checked a box indicating that he was an owner-operator. The Commission apparently considered this as one fact, among many, that suggested the claimant was an independent contractor, rather than an employee. However, the Commission never found that the claimant executed a "valid waiver" of his rights under the Act by checking any box in any insurance application or other document. The Commission did not base its decision on any such "waiver." Rather, as noted above, the Commission based its decision on a consideration of all the relevant evidence.

¶ 66 2. The Commission's Denial of TTD Benefits, Medical Expenses, and Penalties

¶ 67 Based on its argument that the claimant was an employee at the time of the accident, the claimant contends that we should remand this matter to the Commission with instructions to enter an appropriate award of benefits, including TTD, medical expenses, "or other benefits." Because we affirm the Commission's finding that the claimant was not an employee of the employer at the time of the accident, we also affirm the Commission's denial of benefits, including TTD and medical expenses. *Roberson*, 225 Ill. 2d at 174 (noting that an employment relationship is a prerequisite for an award of benefits under the Act); *Earley*, 197 Ill. App. 3d at 314 (ruling that a claimant's employment status determines whether he is entitled to benefits

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Jan. 1, 2016).

under the Act).

¶ 68 Moreover, given the evidence presented in this case, we hold that the employer acted in good faith in denying the claimant benefits (and had just cause to delay paying such benefits) because there was a genuine controversy regarding whether the claimant was an employee of the employer at the time of the accident. Accordingly, the Commission properly refused to impose penalties on the employer under sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2010)).

¶ 69 CONCLUSION

¶ 70 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, which confirmed the Commission's decision.

¶ 71 Affirmed.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Salvador Esquinca,

Petitioner,

vs.

NO: 10 WC 46972

14IWCC0903

Romar Transportation,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Petitioner herein and notice given to all parties, the Commission, after considering the issues of accident, employee/employer relationship, causal connection, average weekly wage, medical expenses, temporary total disability, prospective medical expenses, penalties and fees, 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 December 30, 2013, 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.

14IWCC0903

The party commencing the proceedings for review in the Circuit Court shall file with the Commission a Notice of Intent to File for Review in Circuit Court.

DATED: OCT 20 2014
TJT:yl
o 8/19/14
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Kevin W. Lamborn

Michael J. Brennan

DISSENT

I write separately from my colleagues because I believe, under the law, that Petitioner has proven that he was an employee of Respondent on the date of accident, April 29. 2010.

In my view, the recent Illinois Supreme decision in and Appellate Court decisions in *Roberson v. Industrial Commission*, 225 Ill.2d 159, 866 N.E.2d 191, 310 Ill.Dec. 380 (2007), and the Appellate court decisions in *Labuz v. Illinois Workers' Compensation Commission*, 2012 IL 113007, 981 N.E.2d 14, 366 Ill.Dec. 949 (2012) and *Ware v. Industrial Commission*, 318 Ill.App.3d 1117, 743 N.E.2d 579, 252 Ill.Dec. 711 (2000), support a finding that Petitioner in this case was an employee of Respondent.

The claimant in *Roberson* signed an Independent Contractor agreement/contract that was very similar to the one executed by Petitioner in this case. In *Roberson*, our Supreme Court reiterated the factors that are of key importance in determining if a worker is an employee or an independent contractor: whether the employer may control the manner in which the person performs the work; whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment. Additionally, the court noted that the right to control the manner of the work is often called the primary factor to be considered among these factors. Further, the court indicated that evidence of control, exerted or implied, based on a requirement of local or federal regulations is evidence that such control exists, and the motivation of the employer in exerting or implying such control is irrelevant. *Id.*

The Court also noted a more recently recognized factor which holds significant importance in this determination: whether the employer's general business encompasses the person's work. *Roberson* at p. 175, 200. In terms of the nature of the business factor in this case, clearly both Petitioner and Respondent were in the identical "business": the delivery of goods to customers by truck.

The *Roberson* case cites to two prior Appellate decisions, *Earley v. Illinois Industrial Commission*, 197 Ill.App.3d 309, 553 N.E.2d 1112, 143 Ill.Dec. 126 (1990) and *Ware v. Illinois Industrial Commission*. The fact scenarios in both cases are also very similar to this case. In both

cases, as here, the Commission determined that the claimant truck driver was not an employee of the trucking company. In *Earley*, the Appellate court affirmed the Commission; in *Ware*, they reversed, indicating the determination that there was no employer/employee relationship was against the manifest weight of the evidence. It should be noted that this determination is a factual determination, which is why the Appellate court deals with the issue on a manifest weight basis. It is unclear to me why the Appellate court came to different conclusions in these cases despite almost identical facts, but it is instructive to note that in the only one of these cases (*Ware*) where the Commission's determination was found to be against the manifest weight of the evidence, the decision reversed the Commission's finding that there was no employment relationship. Where the Appellate Court reverses despite the onerous nature of the standard of manifest weight, the Commission should heed this guidance and consistently find that truck drivers working with these "independent contractor agreements" are what they are: employees.

It is clear to this Commissioner that "independent contractor agreements", such as those used in *Ware*, *Earley*, and this case, seek to shift the burden of the cost of workers' compensation to truck drivers who happen to own their own trucks, despite that the actual employment tasks performed are virtually identical to employee truck drivers. However, the testimony in this case shows how these agreements may not be at arm's length, and instead are based on "take it or leave it" tactics. It is important to note that, at the time of the accident at issue, the 24 month written agreement between the parties had expired. Therefore, it is at least arguable that the agreement itself is moot in the determination of this issue. Pursuant to the Contractor Service Agreement (Petitioner's Exhibit 13), Petitioner's truck was to be maintained in safe mechanical operating condition and repair. Also pursuant to law, Respondent maintained exclusive possession, control and use of Petitioner's truck during the time it was operated to deliver a load on behalf of Respondent. The agreement did not give Respondent control over Petitioner other than that he timely deliver loads. The Agreement stated that the delivery was to be by manner and means and over routes in accordance with schedules selected and *agreed to* by the contractor, which in this case is the Petitioner. The "agreed to" language implies that a route could be presented by Respondent to Petitioner for agreement.

While the Agreement stated that Petitioner was not obligated to accept every load offered by Respondent, Petitioner's testimony made it clear that there were consequences to Petitioner for refusing a load. Petitioner testified that if he refused a load, Respondent "would leave you off a day or give you a shorter move", i.e. he would be punished with less work. He testified that it was his understanding that he could not drive for any other company. He testified that because he worked full time for Respondent, he would not have had time to drive for other customers anyway. On rebuttal, Petitioner testified that he was not allowed to drive for another trucking company, despite the contract language, because the contract would have been terminated. If the Petitioner were to hire another driver to take a load, he was required by Respondent to be properly licensed and compliant with all laws. Petitioner was required to maintain insurance.

I find it highly relevant that in Addendum C (Respondent's Exhibit 3) to the agreement, titled "Insurance", there are check boxes indicating that Petitioner could choose or not choose to be covered by workers' compensation insurance. Neither box is checked. Importantly, Petitioner testified that he never checked the option in the agreement to waive workers compensation coverage, and that he understood the costs for same were being deducted from his wages. In my

view, this clearly supports Petitioner's testimony that he was not properly informed about workers compensation coverage and which party is responsible for same. This is a contract term that required a "yea" or "nay", and neither was given. The inference is that Respondent did not discuss this with Petitioner, and there was no meeting of the minds in this regard.

Similarly to *Ware*, Petitioner's agreement with Respondent provided that he would lease the truck to Respondent in return for a percentage of the gross revenue from the delivery of a load. Petitioner was required to operate his truck in compliance with all applicable laws and regulations. Pursuant to law, the truck was to be identified as that of Respondent while delivering a load. He was required by law to display the Respondent's signs and DOT number on his truck with an adhesive decal. Respondent arranged for all of his work, and Petitioner testified he never was in direct contact with any customer. Petitioner was required to deliver goods in accordance with the terms and conditions that Respondent agreed to with the customer. In this case, Petitioner used his own tractor but never used his own trailer. Respondent gave him forms to complete, tracked his hours and directed which loads he was to deliver.

Petitioner's testimony in this case makes it very clear that he did not truly understand the difference between being an employee versus being an independent contractor, testifying that he has worked as both, in one case taxes were taken out of his wages, and in the other he paid his own taxes and received a 1099. Petitioner testified that his ability to do what he wanted as a driver, between when he was told to pick up a load and where and when to drop it off, was no different than when he worked for other companies and used their trucks, not his own. He was never told when to go to the restroom or when to stop for gas as a truck driver for any company, and he noted that as a driver you always have to make decisions on which routes to take depending on weather and traffic.

Petitioner testified that when he initially sought treatment after this accident, Concentra did not initially want to provide medical services until Respondent's dispatcher John Prince called the facility. Again, this evidence points to Respondent's exertion of control over the Petitioner.

As the court noted in *Roberson*, citing *Larson*, "there is a growing tendency to classify owner-drivers of trucks as employees when they perform continuous service which is an integral part of the employer's business." (See 3 A. Larson & L. Larson, *Workers' Compensation Law*, Section 61.07(5) at 61—21 (2006)). I agree with Professor Larson, and believe this is very applicable in this case, as the Petitioner has testified unrebutted that he has worked for no other company other than the Respondent since the agreement of September 2007. It is my opinion that Petitioner was, in fact, an employee of Respondent on April 29, 2010, and that this matter should be remanded to the Arbitrator for further findings consistent with this determination.

Thomas J. Tyrrell

14IWCC0903

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION
19(b)

Salvador Esquinca
Employee/Petitioner

v.

Romar Transportation
Employer/Respondent

Case # 10 WC 46972

Consolidated cases: n/a

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 **Brian Cronin**, Arbitrator of the Commission, in the city of **Chicago, IL**, on **April 15, 2013 and May 17, 2013**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On the date of accident, April 29, 2010, Respondent *was* operating under and subject to the provisions of the Act.

On this date, an employee-employer relationship *did not* exist between Petitioner and Respondent.

On the date of accident, Petitioner was 40 years of age, *married* with 1 dependent children.

Respondent shall be given a credit of $-0- for TTD, $-0- for TPD, $-0- for maintenance, and $-0- for other benefits, for a total credit of $0.00.

Respondent is entitled to a credit of $0.00 under Section 8(j) of the Act.

ORDER

BENEFITS ARE DENIED AS PETITIONER FAILED TO PROVE THAT AN EMPLOYEE-EMPLOYER RELATIONSHIP EXISTED ON THE ACCIDENT DATE. ALL OTHER ISSUES ARE MOOT.

In no instance shall this award be a bar to subsequent hearing and determination of an additional amount of medical benefits or compensation for a temporary or permanent disability, if any.

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.

Signature of Arbitrator

December 27, 2013
Date

ICArbDec19(b)

DEC 30 2013

14IWCC0903

STATEMENT OF FACTS

On April 29, 2010, Petitioner was a truck driver who was using his own truck to deliver loads for Respondent, Romar Transportation. Petitioner drove for Respondent from 2007 through 2010.

On April 29, 2010, Petitioner was driving northbound on I-55 when he was involved in a multi-vehicle motor vehicle accident. As a result of the collision, Petitioner sustained a low back injury.

On September 28, 2007, Petitioner and Respondent signed a Contractor Service Agreement. Affixed to the Agreement was a provision entitled Addendum "C" Insurance, which allowed that Contractor/Petitioner, Salvador Esquinca/Esquinca Trucking either elect to be covered under the Illinois Workers' Compensation Act or waive coverage under the Act and elect coverage under an Occupational Accident Insurance Policy. Said agreement was in effect for a period of 24 months subsequent to signing of agreement by the parties on September 28, 2007. (Rx.3)

Section 14 of that Agreement indicates that the agreement "represents the entire agreement between the parties with respect to matters contained herein. No amendment or addition to this agreement will be effective unless in writing and signed by both parties." Since the agreement was never amended, it expired some 7 months or so before the vehicular accident. Accordingly, no written agreement characterizing the employment relationship between the parties was in effect on April 29, 2010.

Testimony of Petitioner Regarding Employment Relationship

Petitioner testified he owned his own truck, which he used when driving for Respondent and he was not required to make any modifications to his truck in order to drive for Respondent. When driving for Respondent, Petitioner was required to display Respondent's decal as well as the DOT number on his truck. Petitioner did not wear a uniform when driving for Respondent.

Petitioner admitted the title of the truck was in his own name and he was responsible for paying for the license plate fees, gas, repairs and maintenance for the truck. He was also responsible for any speeding tickets or driving citations which he incurred while driving his truck. Petitioner was responsible for maintaining his own liability and bobtail insurance on the

truck. Petitioner parked his truck in a lot which was owned by a private entity. He paid for the expenses associated for parking the truck and was not reimbursed by Respondent for the parking expenses.

When he drove for Respondent, Petitioner was told where to pick-up the shipment and where to the deliver the shipment. Petitioner chose the route he would travel to make the delivery. Other than the delivery time for the shipment, Petitioner decided his own schedule for transporting the delivery, including when and where to make rest stops and get gas.

Petitioner confirmed he was not required to accept every load that was offered to him by Respondent. He believed if he did not accept a load, he would be left off a day or would get a shorter move. However, Petitioner admitted he had refused loads offered by Respondent and then returned to drive for Respondent. Petitioner testified that he drove five days per week for Respondent. Petitioner further acknowledged that he never inquired as to whether he was precluded from driving for other companies.

Once Petitioner completed a delivery, he would submit paperwork to Respondent. He would then be paid a settlement for the delivery. Petitioner was paid per shipment and not paid by the hour. Respondent did not deduct taxes out of each of Petitioner's paychecks. Rather, Petitioner was responsible for deducting taxes. At the end of the year, Respondent would issue a 1099 to Petitioner for tax purposes. (RX #1).

The premium for the occupational accident policy was deducted from Petitioner's paychecks. (RX #2).

Petitioner testified he is incorporated and his corporation name is Esquinca Trucking. Esquinca Trucking became incorporated on January 9, 2007 and Petitioner is still incorporated. (RX. #8).

Respondent's Testimony Regarding Employment Relationship

Michael Marden testified on behalf of Respondent. Mr. Marden is the President of Respondent and his job duties include oversight of all divisions. He has worked for Respondent since 1982. Mr. Marden described Respondent as a transportation company which does warehousing, yard storage, truck brokering and intermodal movements by rail and trucking. He testified Respondent's workforce is composed of approximately 22 employees and between 30-32 owner-operators. On cross-examination, Mr. Marden stated Respondent has two categories of drivers, which are drivers and owner-operators.

Mr. Marden testified Petitioner began driving for Respondent in 2007. He described the process of how Petitioner would have become a driver for Respondent which included coming in, filling out an application, making a copy of his driver's license, a drug test, watching a video and training. Mr. Marden further testified Petitioner would have been given a lease to execute and paperwork. The lease was the Contractor Service Agreement. (RX #3).

Mr. Marden further explained Petitioner signed a Contractor Service Agreement prior to driving for Respondent. (RX #3). He testified the agreement is created by the safety department and the drivers are required to keep a copy of it in their trucks. Mr. Marden testified if Petitioner was hired as an employee, he would not have been required to sign the Contractor Service Agreement. He admitted the agreement began in 2007 and continued for 24 months thereafter unless terminated earlier. However, he further confirmed Petitioner continued to drive for Respondent after 2009 in the same capacity and that he was not added to the employee schedule, the expenses he was responsible for did not change, the way he was paid did not change and the percentage of shipment he received did not change.

Regarding load assignments, Mr. Marden testified Petitioner would get notice a load was available by either receiving a call or calling into dispatch. The only information given to Petitioner regarding the load was the location, pick-up number, and where and when it was to be delivered. Mr. Marden confirmed Petitioner was not given any other information nor was he given a schedule or route to follow. Further, Mr. Marden testified drivers hired as employees are given a specific schedule. He testified all drivers report to the same dispatch person. Mr. Marden further testified the drivers can pick and choose when they want to drive and the loads are given on a first come first served basis. He stated Petitioner did not have to accept every load that was offered to him and rejection of a load did not have any effect on Petitioner's ability to drive for Respondent. Mr. Marden further explained on cross-examination that drivers hired as employees are required to do the work assigned, while drivers hired as owner-operators can turn the work down.

Mr. Marden testified Petitioner owned his own truck, which he used to make deliveries for Respondent and Petitioner was responsible for all operating expenses of the truck, including tires, fuel, license plates, maintenance, windshields and bumpers and repairs. Mr. Marden confirmed that if Petitioner had been hired as an employee, Respondent would have been responsible for the operating expenses of the truck.

Other than repairs, which were required by the DOT, Respondent did not tell Petitioner any repairs or maintenance that needed to be done to the truck. Additionally, Respondent did not tell Petitioner where to park his truck or pay for any of the associated parking expenses.

Regarding the method of payment for Petitioner, Mr. Marden explained Petitioner was paid on a per shipment basis. Mr. Marden identified the pay stubs for Petitioner, which were kept by Respondent. (RX #5). He explained the Revenue section related to the percentage of shipment per move Petitioner received. Mr. Marden further explained some employees are paid on an hourly basis, while others receive a percentage per shipment. However, the percentage per shipment received by a driver hired as an employee versus a driver who is an owner-operator were different as owner-operators receive 70-75% of shipments, while employees receive only 30-35% of shipments. Mr. Marden explained the Taxes section of the pay stub would identify any taxes which are withheld from employee wages. He indicated if Petitioner was hired as an employee, taxes would have been deducted. Under the Insurance section of the pay stub, Mr. Marden explained the deduction corresponded to the deduction for the premium of the occupational policy. If Petitioner was hired as an employee, Mr. Marden testified there would have been deductions for health insurance and a 401(k). (RX #5).

Mr. Marden testified regarding the differences in insurance offered to drivers hired as employees versus owner-operators. He explained Petitioner was responsible for maintaining his own bobtail, truck, and health insurance. If he was hired as an employee, Petitioner would have been offered health, medical, dental, short-term and long-term disability insurance through Respondent. Mr. Marden further explained Respondent offered occupational accident insurance through U.S. Specialty to the drivers hired as owner-operators. However, Petitioner was not required to get the specific policy offered by Respondent and could opt for a policy through another carrier. Mr. Marden confirmed Respondent contributed nothing towards the premium for the occupational accident policy and Petitioner was responsible for the entire premium. He further testified he had an open door policy and Petitioner never came to him to discuss issues or questions he had regarding the occupational accident policy.

Mr. Marden explained it is typical that drivers for Respondent had the company name on the side of their truck because it is a DOT regulation. He explained Petitioner was required to have the company decal on the side of his truck only when operating in the service of Respondent. He further explained that not all drivers for Respondent own their own trucks and Petitioner could use his truck for anything he wanted, not just for driving for Respondent.

On cross-examination, Mr. Marden testified he believed Petitioner was an independent contractor and not an employee of Respondent. He confirmed Petitioner had deductions coming out of his check for occupational accident insurance which he never questioned. Mr. Marden also testified Petitioner was provided with information from the safety department regarding what the money was being deducted for. Furthermore, Mr. Marden testified that while Respondent was noted as the sponsoring organization for the occupational accident policy, Respondent never signed off on the policy. (Rx.2)

Mr. Marden testified the Respondent's work force is composed of individuals hired as either employees or owner-operators. Mr. Marden confirmed he provides and pays for workers' compensation insurance for employees of Respondent.

CONCLUSIONS OF LAW

In support of his decision with regard to issue (A) "Was Respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?," the Arbitrator makes the following findings of fact and conclusions of law:

The Respondent disputes that they were operating under and subject to the provisions of the Illinois Workers' Compensation Act on the date in question. The Respondent's activity, namely commercial trucking of goods by diesel powered tractor-trailer combination vehicles, is subject to automatic Application of the Act.

Section 3 of the Act (820 ILCS 305/3 *et seq.*) defines various activities that are subject to automatic application of the Act. The Respondent's business activity falls within, at a minimum, several provisions requiring automatic application of the Act: §3(3) since the activity involves carriage by land by motor vehicles, §3(4) since the operation involved use of warehouses and §3(15) since the activity involves use of power driven equipment.

Therefore, based upon the foregoing, the Arbitrator finds that the Respondent was operating under and subject to the provisions of the Illinois Workers' Compensation Act.

In support of his decision with regard to issue (B) "Was there an employee-employer relationship?," the Arbitrator makes the following findings of fact and conclusions of law:

In determining whether an employment relationship exists, or whether the relationship is, in fact, one involving an independent contract, the Illinois Supreme Court in Bauer v. Indus. Comm'n, 51 Ill.2d 169, 282 N.E.2d 448 (1972), defined the criteria for making such a determination as follows:

No single facet of the relationship between the parties is determinative, but many factors, such as the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and the furnishing of tools, materials or equipment have evidentiary value and must be considered . . . Of these factors, the right to control the work is perhaps the most important single factor in determining the relation ... inasmuch as an employee is at all times subject to the control and supervision of

his employer, whereas an independent contractor represents the will of the owner only as to the result and not as to the means by which it is accomplished.

Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities, and whether income tax has been withheld. Wendholdt v. Industrial Commission, 95 Ill.2d 76 (1983).

Right to Control

With respect to the right to control, it is clear Respondent had minimal control over the manner in which Petitioner performed his job duties. Petitioner testified he was not told by Respondent what route to take when making deliveries. Rather, the only information given to Petitioner was where to pick up the shipment and when and where to deliver it. Petitioner testified he otherwise decided his own schedule for transporting the delivery, including when and where to make rest stops and to refuel. Mr. Marden further testified that if Petitioner were hired as an employee driver, he would have had a schedule. Petitioner did not have a schedule.

Petitioner was able to pick and choose when he wanted to drive. Mr. Marden testified Petitioner did not have to accept every load that was offered to him and rejection of a load did not have any effect on his ability to drive for Respondent. In contrast, Mr. Marden testified employee drivers are required to do assigned work, while independent contractors are able to turn down work. Petitioner's testimony differed slightly from that of Mr. Marden in that he stated if he refused a load, it was his impression that he might not be allowed to drive for Respondent on the following day or would be assigned a shorter move. However, Petitioner did not dispute that he could refuse a load and yet continue to drive for Respondent. Mr. Marden also confirmed he has had drivers who have driven for other companies in the past and Petitioner could have driven for another company if he wanted. Petitioner testified that he never asked if he could drive for other companies.

Petitioner owned his own truck, which he used when driving for Respondent. He testified that he did not have to make any modifications to his truck in order to drive for Respondent. Petitioner was responsible for all operating expenses of the truck, including license plate fees, gas, windshields, bumpers, tires, repairs and maintenance as well as any speeding tickets or driving citations he incurred. Additionally, Petitioner was responsible for maintaining liability and bobtail insurance on the truck. Mr. Marden testified if Petitioner had been hired as an employee driver, Respondent would have been responsible for the operating expenses. Respondent also did not tell Petitioner when or what maintenance or repairs needed to be done to the truck.

Petitioner was not told where to park his truck. Rather, Petitioner testified he parked his truck in a private lot and paid the parking expenses associated with parking the truck. Respondent did not reimburse Petitioner for the parking expenses.

It is undisputed that the Contractor Service Agreement had expired approximately 7 months before the vehicular accident of April 29, 2010. However, regardless of the expiration of the agreement, both the testimony of Petitioner and Mr. Marden indicate that there was no change in their actions or behaviors and they continued to conduct their business relationship as if the Contractor Service Agreement was still in effect.

With that in mind, pursuant to Clause 7, Petitioner was responsible for all labor expenses associated with operation and loading/unloading of equipment, including paying any drivers or helpers. Clause 8 provided that all drivers, other employees and helpers used by Petitioner were to be under his sole direction and control. Respondent had no right to direct or control the hiring, firing or manner in which these individuals performed their duties. Furthermore, Petitioner was responsible for paying these individuals, making all tax and payroll deductions and for maintaining applicable insurance on these individuals. Clause 6 provided Petitioner would direct the operation of all equipment in all respects and determines the method, means and manner of performance, including choice of routes, points of servicing equipment and rest stops.

The Arbitrator finds the evidence demonstrates that despite the expiration of the Contractor Service Agreement, the parties continued to operate in a manner consistent with the provisions of the agreement.

Method of Payment

There is no dispute regarding Petitioner's method of payment. Petitioner was paid per shipment. Mr. Marden explained some employee drivers are also paid per shipment. However, the percentage received by employee drivers is less as employees receive only 30-35%, while owner-operators such as Petitioner receive 70-75% of shipments.

At the end of the year, Petitioner would receive a 1099 for tax purposes. No income tax was withheld.

Mr. Marden testified if Petitioner were hired as an employee, taxes would have been deducted from his checks. Additionally, there would have also been deductions for health and dental insurance as well as for a 401(k).

Instrumentalities/Equipment

There is also no dispute Petitioner owned his own truck which he used when making deliveries. The title of the truck was in Petitioner's name and he was responsible for the

maintenance, repairs, liability and bobtail insurance on the truck. When not driving for Respondent, Mr. Marden confirmed Petitioner could use his truck for anything he wanted.

Right to Discharge

Another factor to consider in determining the nature of the employment relationship between the parties is whether Respondent had the right to discharge Petitioner for any reason at any time. Clause 12 of the Agreement provides that the Agreement could be terminated by either party for breach of any duty or responsibility of either party, with termination being at the option of the non-breaching party. Any termination for other than a breach would result in a payment of $250.00 as the sole and exclusive remedy for the termination.

In Earley v. Industrial Commission, 197 Ill. App.3d 309, 316 (4th Dist.1990), the Court found the lease agreement did not appear to give Respondent an absolute right to discharge but instead seemed to be a mutual provision which either party to the agreement could invoke if dissatisfied. This is similar to Clause 12 as it allows the agreement to be terminated by either party for breach of any duty or responsibility by either party and is therefore mutual which either party can invoke. Additionally, the Court in Earley found it significant that there was nothing in the lease which provided for termination for a violation of Respondent's policies and procedures. The Court noted such language would have created a stronger inference that Petitioner was an employee. Similarly, the lease agreement also does not provide for termination if Petitioner violates Respondent's policies and procedures. Therefore, the mutual right to discharge points in favor of independent contractor status.

Nature of the business

Respondent is in the business of warehousing, yard storage, truck brokering and intermodal movements by rail and trucking. Petitioner is a semi-truck driver. This is similar to Earley (supra). In Earley, Respondent was in the business of transporting shipments for profit and Petitioner was a truck driver. The Court found the relationship between Petitioner's work and Respondent's business implied an independent contractor status. The Court relied on two factors in reaching its finding. First, the Court noted Respondent was in the same business Petitioner was employed and Petitioner could operate his business as an independent contractor, which he continued to do after termination of the lease agreement as Petitioner became incorporated and operated under the name of Earley Transportation. The Court also found it significant that Respondent told Petitioner only when and where to pick up and deliver shipments and therefore concluded Respondent was only interested in the end result.

Similar to Earley, Respondent is in the trucking business and Petitioner is a semi-truck driver. However, Petitioner became incorporated as Esquinca Trucking on January 9, 2007, which is long before he began driving for Respondent in September of 2007. Furthermore, Petitioner is still incorporated and works as a truck driver for D.B. Cartage. Additionally, the

evidence also demonstrates that similar to Earley, Respondent was also only concerned with the end result as Petitioner was only told where to pick up and when and where to deliver the shipment. All the details of accomplishing the shipment were left to Petitioner. This factor therefore supports an independent contractor status.

Uniform/Decals

Petitioner testified he was not required to wear a uniform when driving for Respondent.

Petitioner also testified he was required to display Respondent's decal and the DOT number when driving for Respondent. Although one of the more minor factors, the display of the decal does not support an employment relationship in this case. As Mr. Marden explained, the display of the decal is a DOT regulation. Additionally, Petitioner was only required to display the decal when operating in the service of Respondent.

Exclusivity of Relationship

Another factor is the length, exclusivity and continuity of the relationship between the parties. Petitioner testified he drove for Respondent from 2007-2010 and that during this time, he only drove for Respondent, which could support an employee status. However, Petitioner also testified he had no time to drive for other customers. Furthermore, Respondent testified Petitioner could have driven for other companies if he wanted. Nothing barred Petitioner from driving for other companies, Petitioner testified that he never specifically asked if he could drive for other companies and Respondent did not impose a mandatory schedule on Petitioner.

Labeling of Relationship

A factor of lesser weight is the label parties place upon their relationship. Earley v. Industrial Commission, 197 Ill. App.3d 309, 316 (4th Dist.1990)

Petitioner testified he was hired as an owner-operator for Respondent. He did not testify he was hired as an employee. Mr. Marden testified Petitioner was hired as an owner-operator and he therefore believed Petitioner was an independent contractor. Furthermore, Clause 6 of the Contractor Service Agreement stated that it was the intention of the parties that Petitioner would be an independent contractor with respect to Respondent.

The intention of the parties that Petitioner be considered an independent contractor is further supported by the Occupational Insurance Coverage Application that Petitioner completed on September 28, 2007. On the application, Petitioner checked the box indicating he was an owner-operator.

Finally, the Concentra medical records indicate Petitioner reported his employer was Esquinca Company, not Respondent.

Occupational Accident Insurance

A final factor to be considered is that Petitioner purchased occupational accident insurance on his own. Petitioner admitted he applied for occupational accident insurance through U.S. Specialty. Clearly, said policy was still in effect on the accident date as Petitioner testified that he received lost time benefits and some of his medical bills were paid through the occupational accident policy. Although a minor factor, the purchase of the occupational accident insurance also indicates an independent contractor status.

Based on the foregoing analysis, the evidence clearly demonstrates Petitioner's employment status was that of an independent contractor and not an employee of the Respondent on the accident date.

As Petitioner failed to prove that an employee-employer relationship existed, the Arbitrator finds that he is therefore not entitled to workers' compensation benefits under the Act.

All other issues are moot.

2016 IL App (1st) 130681

Nos. 1-13-0681 & 1-13-2138 (Cons.)

Fourth Division
February 18, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

MARK REED, Plaintiff-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, TH RYAN CARTAGE COMPANY and L & D DRIVERS SERVICES, INC., Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 12L51546 Honorable Robert Lopez-Cepero, Judge Presiding.
MARK REED, Plaintiff-Appellee, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, TH RYAN CARTAGE COMPANY and L & D DRIVERS SERVICES, INC., Defendants-Appellants.	)	Appeal from the Circuit Court of Cook County. No. 12L51546 Honorable Eileen O'Neil Burke, Judge Presiding.

JUSTICE COBBS delivered the judgment of the court, with opinion.
Presiding Justice McBride and Justice Howse concurred in the judgment and opinion.

OPINION

¶ 1 Pursuant to section 19(g) of the Workers' Compensation Act (Act) (820 ILCS 305/19(g) (West 2012)), plaintiff, Mark Reed, applied for a judgment on a portion of a workers' compensation award. Defendants, TH Ryan Cartage Company and L & D Drivers Services, Inc., moved to dismiss the section 19(g) application. The circuit court of Cook County concluded that the Act did not permit enforcement because a portion of the award was on judicial review before the circuit court. Consequently, the court dismissed the section 19(g) application as premature. Defendants thereafter filed a motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Feb. 1, 1994), which the circuit court denied.

¶ 2 Plaintiff appeals from the dismissal of his section 19(g) application. Defendants appeal from the denial of their motion for sanctions.

¶ 3 We affirm both orders of the circuit court.

¶ 4 BACKGROUND

¶ 5 On August 12, 2004, plaintiff suffered injuries in a motor vehicle accident while working as a truck driver for defendants. As a result, he pursued a workers' compensation claim against defendants. On January 18, 2012, an arbitrator with the Illinois Workers' Compensation Commission (Commission) issued a decision in favor of plaintiff. The arbitrator's decision included an award of medical expenses, and an award of temporary total disability (TTD) benefits based on his calculation of plaintiff's wages. Defendants filed a petition for review before the Commission (see 820 ILCS 305/19(b) (West 2012)), which affirmed and adopted the arbitrator's decision on October 15, 2012.

¶ 6 Defendants thereafter informed plaintiff that they planned to petition the circuit court for judicial review of the Commission's determination of plaintiff's wages, but did not plan to contest its determination of plaintiff's medical expenses. On November 15, 2012, defendants filed their petition for judicial review in the circuit court. See 820 ILCS 305/19(f) (West 2012).

¶ 7 On December 10, 2012, plaintiff filed a section 19(g) complaint in the circuit court, in which he applied for judgment on the medical expense portion of the workers' compensation award. See 820 ILCS 305/19(g) (West 2012). On January 23, 2013, defendants filed a motion to dismiss under both section 2-615 and section 2-619 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615, 2-619 (West 2012)). In the motion, defendants argued, *inter alia*, that section 19(g) of the Act did not allow enforcement proceedings because judicial review was pending and, alternatively, that the complaint violated a circuit court local rule.[1]

¶ 8 On March 6, 2013, following a hearing, the circuit court granted defendants' section 2-619 motion to dismiss, without prejudice. The court concluded that section 19(g) of the Act does not provide for enforcement while any proceedings for review are pending. The court subsequently denied plaintiff's motion for reconsideration of the dismissal order. On March 7, 2013, plaintiff filed his notice of appeal. On April 5, 2013, defendants filed a motion for sanctions under Illinois Supreme Court Rule 137 (eff. Jan. 4, 2013), which the court denied. On June 25, 2013, plaintiff filed an amended notice of appeal. On July 1, 2013, defendants filed notice of their separate appeal.[2] Additional pertinent background will be discussed in the context of our analysis.

¶ 9 ANALYSIS

¶ 10 Before this court, plaintiff assigns error to the circuit court's dismissal of his section 19(g) application. Also, defendants assign error to the circuit court's denial of their motion for sanctions under Rule 137.

¶ 11 Enforcement Under Section 19(g) of the Act

[1] Defendants additionally argued that they had already satisfied their obligations by tendering the amount due for medical expenses directly to plaintiff's health care insurer and medical provider.

[2] These consolidated cases were originally filed in the Workers' Compensation Commission Division (Division) of the Appellate Court. On May 25, 2015, on the Division's own motion, the cases were transferred to the First District Appellate Court for disposition. See *Aurora East School District v. Dover*, 363 Ill. App. 3d 1048, 1055 n.4 (2006).

¶ 12 The circuit court dismissed plaintiff's section 19(g) application because the Act, according to the court, does not provide for enforcement of a workers' compensation award while proceedings for review are pending. Section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)) provides for the involuntary dismissal of a cause of action based on certain defects or defenses. One of the enumerated grounds for a section 2-619 dismissal is that the claim is barred by affirmative matter which avoids the legal effect of or defeats the claim. 735 ILCS 5/2-619(a)(9) (West 2012). A section 2-619 dismissal is similar to the grant of a motion for summary judgment. Thus, the reviewing court considers whether the existence of a genuine issue of material fact should have precluded the dismissal, or absent such a factual issue, whether dismissal is proper as a matter of law. *Chandler v. Illinois Central R.R. Co.*, 207 Ill. 2d 331, 340-41 (2003). The terms of section 19(g) of the Act are properly considered "affirmative matter" that could negate completely the asserted claim. *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 487 (1994).

¶ 13 We review *de novo* a circuit court's dismissal of a complaint under section 2-619. *Skaperdas v. Country Casualty Insurance Co.*, 2015 IL 117021, ¶ 14; *Borowiec v. Gateway 2000, Inc.*, 209 Ill. 2d 376, 383 (2004). Specifically, the material facts being undisputed, the circuit court dismissed plaintiff's section 19(g) application based on the court's construction of the Act. The construction of a statute presents a question of law that is also reviewed *de novo*. *Skaperdas*, 2015 IL 117021, ¶ 15; *Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 524 (2006).

¶ 14 Our guiding principles are familiar. The primary goal in construing a statute, to which all other rules are subordinate, is to ascertain and effectuate the intent of the legislature. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 232 (2001). We look to the statutory language, which given its plain and ordinary meaning, is the best indication of legislative intent. *Beelman Trucking v.*

Illinois Workers' Compensation Comm'n, 233 Ill. 2d 364, 370 (2009). We read the statute as a whole and consider all relevant parts. We must construe the statute so that each word, clause, and sentence is given a reasonable meaning, and avoiding an interpretation which would render any portion of the statute superfluous, meaningless, or void. *Cassens Transport*, 218 Ill. 2d at 524. In addition to the statutory language, we also consider the reason for the law, the problems to be remedied, and the objects and purposes sought. *Beelman Trucking*, 233 Ill. 2d at 371. Also, we presume that the legislature did not intend absurdity, inconvenience, or injustice. *Sylvester*, 197 Ill. 2d at 232.

¶ 15 Likewise familiar is the purpose of the Act, which:

> "substitutes an entirely new system of rights, remedies, and procedure for all previously existing common law rights and liabilities between employers and employees subject to the Act for accidental injuries or death of employees arising out of and in the course of the employment. [Citation.] Pursuant to the statutory scheme implemented by the Act, the employee gave up his common law rights to sue his employer in tort, but recovery for injuries arising out of and in the course of his employment became automatic without regard to any fault on his part. The employer, who gave up the right to plead the numerous common law defenses, was compelled to pay, but his liability became fixed under a strict and comprehensive statutory scheme ***. [Citation.] This trade-off between employer and employee promoted the fundamental purpose of the Act, which was to afford protection to employees by providing them with prompt and equitable compensation for their injuries." *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 180-81 (1978).

Courts liberally construe the Act to effectuate its remedial purpose. *Beelman Trucking*, 233 Ill. 2d at 371; *Cassens Transport*, 218 Ill. 2d at 524.

¶ 16 Section 19(g) provides, in relevant part:

> "Except in the case of a claim against the State of Illinois, either party may present a certified copy of the award of the Arbitrator, or a certified copy of the decision of the Commission when the same has become final, *when no proceedings for review are pending*, providing for the payment of compensation according to this Act, to the Circuit Court of the county in which such accident occurred or either of the parties are residents, whereupon the court shall enter a judgment in accordance therewith." (Emphasis added.) 820 ILCS 305/19(g) (West 2012).

"The judgment entered by the court is in the nature of an execution of the award, to the end that adequate means may be provided for its enforcement ***." *Friedman Manufacturing Co. v. Industrial Comm'n*, 284 Ill. 554, 558 (1918). "The purpose of section 19(g) is to permit speedy judgment in cases where there has been a refusal to pay the award and a need to reduce the award to judgment to compel its payment. The statute delineates the powers of the court in such a situation." *Franklin v. Wellco Co.*, 5 Ill. App. 3d 731, 734 (1972).

¶ 17 Before this court, plaintiff contends that section 19(g) of the Act permitted the circuit court to enter judgment on only the medical expense portion of the workers' compensation award, even where the TTD benefits portion of the award was under judicial review in the circuit court. We cannot accept this contention. "[W]hile the Act is to be liberally construed to effectuate its purpose, it will not be given a strained construction not fairly within its provisions." *General American Life Insurance Co. v. Industrial Comm'n*, 97 Ill. 2d 359, 370 (1983). The exclusive means to contest the accuracy or validity of a workers' compensation award is through

a proceeding under section 19(f) of the Act. *Nichols v. Mississippi Valley Airlines*, 204 Ill. App. 3d 4, 6 (1990); *Konczak v. Johnson Outboards*, 108 Ill. App. 3d 513, 517 (1982). In contrast, "the circuit court's inquiry under section 19(g) is limited to a determination of whether the requirements of the section have been met." *Ahlers v. Sears, Roebuck Co.*, 73 Ill. 2d 259, 268 (1978). In other words, section 19(f) provides the exclusive method of review for the correction of errors in workers' compensation awards, and section 19(g) provides that *if such method is not selected or is concluded*, the circuit court may render judgment on the award. See *St. Louis Pressed Steel Co. v. Schorr*, 303 Ill. 476, 478 (1922). The Act reflects the legislative balancing of rights, remedies, and procedures that govern the disposition of employees' work-related injuries. This balance should not be lightly disturbed through judicial innovation. *Zimmerman v. Buchheit of Sparta, Inc.*, 164 Ill. 2d 29, 44-45. (1994).

¶ 18 Plaintiff essentially seeks to impose on the circuit court the obligation to enter potentially multiple judgments on a single workers' compensation award. However, "[a] series of judgments upon an award is not contemplated by the [A]ct. [Citation.] The practice and procedure in workmen's compensation cases is, as we have so often held, strictly statutory, and paragraph (g) of section 19 of the [A]ct refers only to one judgment ***." *Fico v. Industrial Comm'n*, 353 Ill. 74, 78 (1933). This is why scholars and practitioners have consistently understood section 19(g) as requiring a complete and final Commission decision, from which no review proceedings are pending. See, *e.g.*, 3 Thomas C. Angerstein, Illinois Workmen's Compensation § 2195, at 61 (rev. ed. 1952) ("It is to be particularly noted that a judgment on an award under subsection (g) may be secured only when the award has become final and when no proceedings for review are pending."); Brad A. Elward, *Procedure, Appeals, and Special Remedies*, in Illinois Workers' Compensation Practice § 5.78, at 5-67 (Ill. Inst. for Cont. Legal Educ. 2015) ("Entry of judgment under §19(g) is premature if any review proceedings are pending.").

¶ 19 Plaintiff relies on *Jacobo v. Illinois Workers' Compensation Comm'n*, 2011 IL App (3d) 100807WC, in support of his contention that he may enforce a portion of a workers' compensation award immediately, even where a remaining portion of the award is under review in the circuit court. However, that decision is readily distinguishable. In *Jacobo*, the claimant filed a workers' compensation claim against her employer for injuries arising out of a forklift accident. An arbitrator found the claimant entitled to disability benefits, reasonable and necessary medical expenses, and penalties. The employer appealed to the Commission, which affirmed the arbitrator's award of disability benefits and medical expenses, but reversed the award of penalties against the employer. The employer informed the claimant that it was not going to seek judicial review of this decision, but the claimant sought judicial review of the Commission's decision to reverse the imposition of penalties on the employer. Throughout the appeal to the circuit court, and the later appeal to the appellate court, the employer refused to pay the disability or medical expense awards, despite the fact they were not contested. *Id.* ¶¶ 3-11. On July 3, 2008, claimant proceeded to file a second petition for penalties and fees with the Commission under sections 19(l) and 19(k) of the Act (820 ILCS 305/19(l), 19(k) (West 2006)), for improperly delaying payment of the undisputed portions of the award. On April 27, 2009, the appellate court found that the employer did not have to pay penalties due to conflicting medical opinions, and the employer paid the undisputed portion of the award a couple of months later. The Commission denied the petition for penalties and fees because parts of the original claim were still being contested in the circuit and appellate courts. After the appellate court resolved the employer's original dispute in favor of the employer, the claimant appealed the Commission's denial of her second petition for fees and penalties to the circuit court, which affirmed the Commission's decision. *Jacobo*, 2011 IL App (3d) 100807WC, ¶¶ 11-14. However, the appellate court reversed, finding that the employer was obligated to pay the portions of the award that it

did not dispute, despite the existence of proceedings for review on other portions of the award. Accordingly, the claimant was entitled to penalties and fees. *Id.* ¶ 54.

¶ 20 However, the *Jacobo* court never interpreted section 19(g) of the Act and it was never at issue in that case. In *Jacobo*, the court had already resolved the portions of the award that were being contested before the claimant brought her claim to the circuit court for enforcement. *Id.* ¶¶ 12-13. The issue in *Jacobo* was whether an employer can be penalized under sections 19(k) and 19(l) for failing to pay undisputed portions of an award from the Commission pending the outcome of a petition for review on a separate portion of the award. Neither section 19(k) nor section 19(l) have language requiring that a decision be final before a defendant is liable for penalties or fees for delaying payment of an award. In contrast, at issue in the case at bar is not whether defendants are obligated to pay undisputed portions of the Commission's award, but rather whether section 19(g) allows a party to *enforce* such an award in the circuit court.

¶ 21 Notably, plaintiff overlooks the record when he contends that his medical expenses were undisputed. Defendants represented to plaintiff that they did not plan to contest the Commission's determination of plaintiff's medical expenses. However, in their joint brief before the circuit court on judicial review, defendants not only contested the Commission's calculation of plaintiff's wages, but they also asked the court "to remand this case to the Commission to explain its order" regarding plaintiff's medical expenses. Indeed, defendants invited the circuit court to take judicial notice of the instant section 19(g) proceeding which involved "the interpretation of the medical award." We observe that the pending judicial review proceeding resulted in an order confirming the Commission decision. Defendants appealed to the appellate court, which upheld the circuit court's confirmation of the Commission's decision, but remanded the case to the Commission for the submission of evidence and fact finding on the issue of

plaintiff's medical expenses. *TH Ryan Cartage Co. v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 143209WC-U, ¶¶ 25-27.[3]

¶ 22 We observe that in *Ahlers v. Sears, Roebuck Co.*, 73 Ill. 2d 259 (1978), our supreme court held that a section 19(g) application for judgment was not barred by review proceedings pending on "unrelated matters." *Id.* at 267. However, even if the statutory scheme permitted "claim-splitting," the fact that plaintiff seeks section 19(g) enforcement on *the same matter* that was the subject of review proceedings distinguishes the instant case from *Ahlers* and bars his section 19(g) application for judgment.

¶ 23 Plaintiff complains that he "had to wait years" from the dates of services for the medical benefits to the date he had obtained his workers' compensation award for those expenses. He submits that "[n]o justification exists for [defendants] refusing to pay the underlying award of the Commission as soon as it was rendered and not appealed and the [plaintiff] has every right to proceed under section 19(g) to enforce payment as to these amounts." We are not unsympathetic to plaintiff's natural desire for closure, even if only for a portion of this matter. However, by seeking judicial review of the workers' compensation award, defendants are exercising their statutory right to have their liability "fixed under a strict and comprehensive statutory scheme." *Kelsay*, 74 Ill. 2d at 180.

¶ 24 We hold that plaintiff may not apply for a judgment on the medical expenses portion of his workers' compensation award pursuant to section 19(g) of the Act because, at the time of his

[3] Based on this decision, plaintiff filed a "Motion to Suggest Mootness of Appeal in Light of Change in Factual Circumstances." Oddly, plaintiff maintains that the pending review proceedings did not bar his section 19(g) application for judgment, but now suggests that "arguably" those proceedings render the circuit court's dismissal order, and hence this appeal, moot. Nonetheless, plaintiff prays that this appeal proceed "irrespective of a claim of mootness." We took the motion with the case and now deny the same as moot. This appeal is not moot, and other than plaintiff's suggestion, no claim of mootness has been presented. The viability of the section 19(g) application is determined at the time of its filing. *Ahlers*, 73 Ill. 2d at 266-67. Therefore, subsequent proceedings for review have not affected the circuit court's dismissal order and our review thereof.

application, proceedings for review were pending. Accordingly, we uphold the circuit court's section 2-619 dismissal of plaintiff's section 19(g) application.

¶ 25 We also observe that defendants argued before the circuit court that plaintiff's section 19(g) application should be dismissed also pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)) for failure to state a cause of action. Defendants argued that the section 19(g) complaint failed to adhere to Cook County Circuit Court Rule 10.2 (July 1, 1976), which is the circuit court's local rule implementing the pleading requirements for section 19(g) of the Act. Before this court, defendants repeat this argument in support of the circuit court's dismissal. Since we have upheld the dismissal based on section 2-619, we need not and do not address this alternative argument. See *Standard Mutual Insurance Co. v. Lay*, 2013 IL 114617, ¶ 35.

¶ 26 Supreme Court Rule 137 Sanctions

¶ 27 Defendants assign error to the circuit court's denial of their motion for sanctions pursuant to Illinois Supreme Court Rule 137 (eff. Jan. 4, 2013)). They argue that plaintiff's section 19(g) application was not well-grounded in the law because section 19(g) of the Act clearly does not allow enforcement of a workers' compensation award while there are proceedings for review pending.

¶ 28 "Rule 137 authorizes sanctions against an attorney for pursuing false or frivolous lawsuits." *Morris B. Chapman & Associates, Ltd. v. Kitzman*, 193 Ill. 2d 560, 578 (2000). Because Rule 137 is penal in nature, it is strictly construed. The decision whether to impose sanctions under Rule 137 is committed to the sound discretion of the circuit court, and that decision will not be overturned absent an abuse of discretion. *Dowd & Dowd, Ltd. v. Gleason*, 181 Ill. 2d 460, 487 (1998). "A court has abused its discretion when no reasonable person would agree with its decision." *Lake Environmental, Inc. v. Arnold*, 2015 IL 118110, ¶ 16.

¶ 29 In the case at bar, the circuit court concluded on the record that sanctions were not appropriate. After carefully reviewing the record, we cannot say that the circuit court abused its discretion in denying defendants' request for sanctions.

¶ 30 CONCLUSION

¶ 31 For the foregoing reasons, the order of the circuit court of Cook County dismissing plaintiff's complaint, and the order of the circuit court denying defendants' motion for sanctions, are both affirmed.

¶ 32 Affirmed.

2016 IL App (1st) 151369
No. 1-15-1369
Opinion filed March 8, 2016

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

JOSEPH LOCASTO, Platiniff-Appellant, v. THE CITY OF CHICAGO, a Municipal Corporation, JOHN S. McKILLOP, Director of Training/EMS, ARF ABDELLATIF, MONICA PORTER, and ANTHONY LONGINI, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 14 L 8230 The Honorable Themis N. Karnezis, Judge, presiding.

JUSTICE HYMAN delivered the judgment of the court, with opinion.
Presiding Justice Pierce and Justice Neville concurred in the judgment and opinion.

OPINION

¶ 1 At issue is whether a Chicago fire department paramedic trainee who was injured while participating in a training program may sue the city and fire academy training staff for damages after having obtained workers' compensation benefits for his injuries. Joseph Locasto sued defendants alleging they intentionally injured him during firefighter paramedic training by forcing him to engage in rigorous physical exercise with minimal water breaks that resulted in dehydration and acute kidney failure. While his lawsuit was pending, Locasto also filed a claim

for workers' compensation benefits, which was successful, and he eventually received medical expenses and disability benefits.

¶ 2 We previously resolved an appeal in this case involving an order of default judgment entered against defendants for their having repeatedly failed to timely respond to Locasto's discovery requests. *Locasto v. City of Chicago*, 2014 IL App (1st) 113576. After remand, defendants filed a motion for summary judgment, arguing that an award of medical expenses and disability benefits in his workers' compensation claim precluded the tort case, citing the exclusive remedy provisions of the Workers' Compensation Act (Act) (820 ILCS 305/5(a), 305/11 (West 2012)). The trial court agreed, and granted the motion for summary judgment. We find that the exclusive remedy provisions apply to Locasto's claim, and affirm.

¶ 3 BACKGROUND

¶ 4 While his tort claim was pending, Locasto filed a claim for workers' compensation with the Illinois Workers' Compensation Commission. An arbitrator found Locasto's injuries had been "sustained [in] an accident arising out of and in the course of his employment" with the city and that his "present condition of ill-being is causally related to those work accidents." The arbitrator awarded Locasto $152,788.74 in reasonable and related medical expenses and concluded that he was entitled to temporary total disability (TTD) benefits from May 8, 2008 through October 5, 2009 (the day before Locasto began part-time employment as an IV technician with Children's Memorial Hospital) but was not entitled to temporary partial disability benefits (TPD) after October 6, 2009. On review of that decision, the Commission reduced the medical expenses award to $138,202 and modified the award of disability benefits by awarding Locasto TPD benefits from October 6, 2009 through May 5, 2010. On administrative review, the circuit court confirmed the Commission's ruling. The appellate court, however, reversed the Commission's ruling awarding disability benefits after the date on which the retirement board found Locasto had made a full recovery and affirmed in all other respects,

including the commission's award of medical expenses and TTD benefits for time periods before Locasto's full recovery. *City of Chicago v. Illinois Workers' Compensation Comm'n*, 2014 IL App (1st) 121507WC. At the time of this appeal, the city had paid Locasto almost $150,000.

¶ 5 After remand of *Locasto v. City of Chicago*, 2014 IL App (1st) 113576, which involved the reversal of sanctions for defendants' discovery abuses, defendants moved for summary judgment arguing that Locasto's award of workers' compensation benefits barred his claim and there was no evidence of defendants' specific intent to injure him. Locasto responded that his injuries were intentional acts and that Illinois courts have consistently held that intentional torts allow an employee to bring a claim directly against the responsible employer or coworker as an exception to the Act's exclusive remedy provision. Locasto also argued that the exclusive remedy provision of the Act does not apply when the injuries are committed by the employer, as opposed to a coworker. Locasto contended the fire department instructors were acting at the direction of the fire department, and thus as the alter ego of their employer. Locasto also contended that the doctrines of election of remedies and estoppel do not bar his lawsuit because he claimed that his injuries were intentionally inflicted in both his complaint and before the Commission and because his injuries did not have to be accidental to be compensable under the Act. After a hearing, the circuit court granted the defendants' summary judgment motion. Locasto filed a motion to reconsider, which the circuit court denied.

¶ 6 ANALYSIS

¶ 7 Locasto contends this lawsuit falls into an exception to the exclusive remedy provision of the Act because defendants acted intentionally in injuring him. Defendants respond that, under the exclusive remedy provisions, by pursuing and accepting workers' compensation benefits for his injuries, Locasto elected his remedy and forfeited his right to receive additional compensation for his injuries through a tort action.

¶ 8 We agree with defendants. Once an employee has collected compensation on the basis that his or her injuries were compensable under the Act, the employee cannot then allege that those injuries fall outside the Act's provisions. See *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 241 (1980). Accordingly, we conclude that having applied for and accepted workers' compensation benefits, Locasto was barred from pursuing an intentional tort action against defendants.

¶ 9 Summary judgment is proper where the pleadings, depositions, admissions, and affidavits on file demonstrate that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2012). Appellate courts review summary judgment decisions *de novo*. *Jones v. Country Mutual Insurance Co.*, 371 Ill. App. 3d 1096, 1098 (2007).

¶ 10 The Act "was designed to provide speedy recovery without proof of fault for accidental injuries" that occur in the work place during the course of work. *Fregeau v. Gillespie*, 96 Ill. 2d 479, 486 (1983). Compensation under the Act provides the exclusive remedy for types of injuries set out in sections 5(a) and 11 (820 ILCS 305/5(a), 11 (West 2012)). Section 5(a) prohibits "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." 820 ILCS 305/5(a) (West 2012). Similarly, section 11 states that compensation "shall be the measure of the responsibility of any employer" as defined in the Act. 820 ILCS 305/11 (West 2012). Thus, under these exclusivity provisions, an injured employee is not permitted to seek workers' compensation benefits, claiming that the injuries are compensable under the Act, while additionally pursuing a common law action for, as here, intentional tort. *Collier*, 81 Ill. 2d at 241. To avoid the exclusivity bar of sections 5(a) and 11, a plaintiff must

prove " 'either that the injury (1) was not accidental (2) did not arise from his or her employment, (3) was not received during the course of employment or (4) was noncompensable under the Act.' " *Fregeau*, 96 Ill. 2d at 483 (quoting *Collier*, 81 Ill. 2d at 237).

¶ 11 Locasto argues that his case falls under the first exception—not accidental. Beginning with *Collier*, our supreme court has held that collecting workers' compensation benefits for an injury is inconsistent with a common law suit alleging the injury was the result of an employer's or coemployee's intentional conduct. In *Collier*, an employee brought a complaint against his employer, alleging that the employee suffered a heart attack while at work. Before filing the complaint, the employee accepted a lump sum workers' compensation payment under the Act. The circuit court dismissed the employee's complaint, the appellate court affirmed, and our supreme court agreed, holding that collecting workers' compensation benefits on the basis that an employee's injury was "accidental" and thus compensable under the Act is legally inconsistent with an allegation in a common law suit that the employee's injury was "intentional" and thus falls outside the Act's provisions. See *Collier,* 81 Ill. 2d at 241.

¶ 12 After *Collier*, the supreme court has consistently held that if an employee has been compensated for an injury through a common law action, he or she cannot then recover under the Act for the injury. For instance, in *Fregeau* an employee brought an action against his co-employee for civil damages arising from an assault and battery committed against him during the course of his employment. As an affirmative defense to the complaint, the coemployee alleged that the plaintiff had also filed an application for adjustment of claim with the Industrial Commission. The trial court granted defendant's motion for summary judgment on his affirmative defense, based on plaintiff's deposition testimony that he had filed for and received workers' compensation benefits from their employer. The appellate court reversed, holding that

the decision to accept workers' compensation benefits did not preclude plaintiff from bringing an action against the coemployee for an intentional tort. The Illinois Supreme Court held, however, that the appellate court's ruling directly conflicted with its holding in *Collier* and must be reversed. *Fregeau,* 96 Ill. 2d at 480-81.

¶ 13 The court noted that following *Collier* it had held that if an employee has been compensated for an injury through a common law action, the employee cannot then recover under the Act for the injury. See *Rhodes v. Industrial Comm'n*, 92 Ill. 2d 467, 471 (1982). The court stated in *Rhodes* that there is nothing to prevent a cautious employee who has a pending workers' compensation claim from also filing a common law action, if he or she is uncertain of the ground for recovery. This tolls the statute of limitations, although the employee cannot recover payments from the employer under both actions because the Act was designed "to serve as a substitute for an employee's common law right of action and not as a supplement to it." *Id.* The court concluded in *Fregeau* that because the employee chose to obtain compensation under the Act, which was designed to provide speedy recovery without proof of fault for accidental injuries, the holding of *Collier* barred him from bringing an action against his coemployee for civil damages. *Fregeau,* 96 Ill. 2d at 486.

¶ 14 Locasto contends that the holdings in *Collier* and *Fregeau* only apply to claims against coworkers and do not bar claims like his that contend that the employer intentionally "directed, encouraged, or committed" the tortuous conduct. This same argument was rejected in *James v. Caterpillar Inc.*, 242 Ill. App. 3d 538, 553 (1993). In *James*, the special administrator of estate of deceased employee, who was driving a forklift at work when he was killed in an explosion, brought suit against his employer and the forklift manufacturer, alleging the employer was guilty of several intentional and deliberate acts that resulted in the decedent's death. The employer filed

a motion to dismiss asserting that it had paid benefits to plaintiff under the Act and that the plaintiff had failed to allege that his complaint was not barred by the exclusive remedy provisions. The trial court granted the motion to dismiss, and the appellate court affirmed the dismissal.

¶ 15 Like Locasto, the plaintiff in *James* sought to distinguish *Collier* and its progeny by asserting that those cases involved causes of action against the employer or coemployee or both based on an intentional tort committed against the plaintiff. The court rejected this distinction finding that "whether a plaintiff seeks to bring a common law action against his employer for an intentional tort based upon the actions of his coemployee or the employer *** plaintiff's claim will be barred by the exclusivity provisions of the Act if plaintiff has filed for and received workers' compensation benefits." *Id.* at 551. While an employee may bring suit against his or her employer alleging intentional tort while also pursuing a workers' compensation claim, once the employee *actually receives* compensation under the Act, this acceptance precludes recovering in the tort case. *Id.* at 547-48 (citing *Rhodes*, 92 Ill. 2d at 471). Collecting workers' compensation benefits on the basis that an employee's injury was "accidental," and thus compensable under the Act (as the supreme court first concluded in *Collier*), is legally inconsistent with an allegation in a common law suit that the employee's injury was "intentional," and hence falls outside the Act's provisions. See *Collier*, 81 Ill. 2d at 241.

¶ 16 As in *Collier, James* and similar cases, because Locasto chose to obtain compensation under the Act, which was designed to provide speedy recovery without proof of fault for accidental injuries, he is barred from bringing this action against defendants for civil damages. Thus, the circuit court order granting defendants' motion for summary judgment is affirmed.

¶ 17 Affirmed.