*12 IWCC 87; 2012 Ill. Wrk. Comp. LEXIS 16, **

HERMILIO **ROMAN,** PETITIONER, v. **JETT** CUTTING, INC., STAFFING RESOURCES, INC. AND STATE TREASURER AS CUSTODIAN OF THE SECOND INJURY FUND, RESPONDENT.

NO: 03WC 53154, 03WC 54078

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF COOK

12 IWCC 87; 2012 Ill. Wrk. Comp. LEXIS 16

January 26, 2012

CORE TERMS: staffing, loaning, workers' compensation, borrowing, left hand, reimbursement, machine, loss of use, commencing, unemployment, workers compensation, upper extremity, conversation, permanent, eligible, heading, handle, bill rate, right arm, modification, underwent, coverage, credible, brochure, authored, tendon, joint and several, injured employee, loaned employee, waived

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

OPINION: [*1]

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent, Staffing Resources, Inc., and notice given to all parties, the Commission, after considering the issues of Section 1(a)(4) right to reimbursement and Petitioner's Motion to Bar Respondent's Right to Argue, 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 and denies Petitioner's Motion to Bar Respondent's Right to Argue.

Section 1(a)(4) of the Act provides that with respect to an injured employee, the liability of the loaning and borrowing employers is joint and several; as between employers, the borrowing employer is primarily liable and the loaning employer is secondarily liable, and if the loaning employer is required to pay the loss, it has the right to seek reimbursement from the borrowing employer absent an agreement to the contrary. Surestaff, Inc. v. Azteca Foods, Inc. 374 Ill.App.2d 625 (1st Dist 2007).

The Arbitrator found that the brochure provided by Staffing Resources to **Jett** Cutting stating that Staffing Resources "would assume the burdens and responsibilities **[*2]** of the employer,"

including "providing workers' compensation insurance coverage" constituted "an agreement to the contrary" for the purpose of Section 1(a)(4).

The Commission agrees with the Arbitrator's conclusion that Staffing Resources, Inc. agreed to pay workers' compensation benefits for its loaned employee. The Commission takes note of Surestaff, Inc. v. Open Kitchens, Inc., 384 Ill.App.3d 172, 892 N.E.2d 1137, which Staffing Resources cites in support of its claim that its right for reimbursement under Section 1(a)(4) was not waived. In that case, the Illinois Appellate Court held that "the loaning employer's right to reimbursement may be waived by an agreement between the respective employers." The decision in Surestaff does not require a specific waiver as claimed by Staffing Resources, it requires only an agreement that the loaning employer will assume responsibility for workers' compensation losses. The Arbitrator found in this case that Staffing Resources, Inc. agreed to "assume the burdens and responsibilities of the employer" including providing Workers' Compensation Insurance coverage. The Arbitrator was not in error **[*3]** in determining that the loaning employer agreed that it would retain responsibility to pay workers' compensation benefits.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator filed April 13, 2011 is hereby affirmed and adopted.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on the second July 15th after the entry of this award, the Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that Petitioner's Motion to Bar Respondent's Right to Argue is hereby denied.

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

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

Bond for removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $ 75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $ 35.00, payable to the Illinois Workers' Compensation Commission in the form **[*4]** of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

ATTACHMENT

ILLINOIS WORKERS' COMPENSATION COMMISSION ARBITRATION DECISION

Consolidated case: **03 WC 54078**

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 **Milton Black**, Arbitrator of the Commission, in the city of **Chicago**, on **January 28, 2011**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES
L. What is the nature and extent of the injury?
O. Other Section 1(a) (4) reimbursement claim

FINDINGS
On **October 23, 2003**, Respondents were operating under and subject to the provisions of the

Act.

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

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 Respondents.

Petitioner's current condition of ill-being **[*5]** ***is*** causally related to the accident.

In the year preceding the injury, Petitioner earned $ **3,600.00**; the average weekly wage was $ **300.00**.

On the date of accident, Petitioner was **24** years of age, ***married*** with **1** dependent child.

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

Respondent **Staffing Resources, Inc.** ***has*** paid all appropriate charges for all reasonable and necessary medical services.
Respondent **Staffing Resources, Inc.** shall be given a credit of $ **55,382.85** for TTD and $ **34,200.00** for **100**% loss of use of the left hand, for a total credit of $ **89,582.85**.

ORDER
Respondent **Staffing Resources, Inc.** shall pay Petitioner temporary total disability benefits of $ **200.00**/week for 276- 6/7ths weeks, commencing October 24, 2003 through February 8, 2009, as provided in Section 8(b) of the Act and pursuant to stipulation.

Respondent shall pay Petitioner permanent partial disability benefits of $ **180.00**/week for **190** weeks, because the injuries sustained caused the **100**% loss of the **left hand**, as provided in Section 8(c) of the Act.

Because Petitioner had previously **[*6]** sustained **100**% loss of the ***right arm*** and, as a result of this accident, has sustained **100**% loss of the ***left hand***, Petitioner is eligible for statutory permanent total disability benefits of $ **379.51**/week for life, commencing **February 9, 2009**, as provided in Section 8(e)18 of the Act.

Respondent **Staffing Resources, Inc.** shall pay Petitioner $ **180.00**/week for **190** weeks, commencing **October 23, 2003**, for the loss of the second body part and, during this time, the Second Injury Fund shall pay Petitioner $ **199.51**/week for **190** weeks, to equal the total PTD rate, as provided in Section 8(f) of the Act. Commencing **February 9, 2009**, the Second Injury Fund shall pay Petitioner $ **379.51**/week for life.

Commencing on the second July 15th after the entry of this award, Petitioner may become eligible for cost-of-living adjustments, paid by the ***Rate Adjustment Fund***, as provided in Section 8(g) of the Act.
RULES REGARDING APPEALS Unless a party files a *Petition for Review* within 30 days after receipt of this decision, and perfects a review in accordance with the Act and Rules, then this decision shall be entered as the **[*7]** 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

April 12, 2011

Date

STATEMENT OF FACTS

Petitioner filed an Amended Application for Adjustment of Claim naming **Jett** Cutting Service (hereinafter "**Jett**") and the Illinois State Treasurer as respondents. Petitioner's filed a separate Amended Application for Adjustment of Claim naming Staffing Resources, Inc. (hereinafter "Staffing") and the Illinois State Treasurer as respondents. The cases were consolidated for arbitration.

Petitioner testified that about one month before his accident, he went to **Jett,** because they were in need of people. When he went to the **Jett** factory, he was told to go to the office of Staffing. He then took about a thirty minute bus ride from **Jett** to Staffing. At Staffing, he provided a copy of his state ID, he provided a copy of his Social Security card, he underwent **[*8]** a drug test, and he was shown a safety video. Thereafter he went to **Jett** to begin working. Petitioner testified that his **Jett** supervisor was John Soto. Petitioner received his paychecks from Staffing.

Petitioner testified that on October 23, 2003, he was putting tubes in a machine. He had stopped the machine. He put his left hand in the machine to grab a piece of tubing. The machine then started, and his left hand got caught in three blades of the machine. Someone stopped the machine, and then he was able to take out his hand.

Petitioner was transported by the Bedford Park Fire Department to Christ Hospital. It was noted that he had sustained left hand and finger laceration with tendon involvement. He was released with instruction to follow up with Dr. Gary Kronen (PX8, p149). On October 24, 2003, Petitioner saw Dr. Kronen, who authored a report to Staffing. Dr. Kronen wrote that Petitioner had sustained multiple tendon injuries and that surgical exploration and repair was needed (PX9, p163). On October 31, 2003, Dr. Kronen authored a report to Staffing detailing a follow up evaluation after multiple extensor tendon repairs (PX9, p167). Petitioner continued to follow up with Dr. Kronen **[*9]** through April 9, 2004 (PX9, p183).

On April 20, 2004, Petitioner began treatment with Dr. Irwin Weisman (PX6, p66). On May 25, 2004, Dr. James Diesfeld performed a diagnostic nerve block after a referral by Dr. Weisman (PX6, pp38-39). On August 25, 2004, Dr. Weisman performed a surgical neurectomy with proximal transposition of the left dorsal radial sensory nerve and a tenolysis of the left extensor indices proprius (PX6, pp76-78). Thereafter, Petitioner underwent physical therapy and a December 28, 2004 functional capacity evaluation, which demonstrated that Petitioner could work at the sedentary work level (PX7, pp82-86). On November 7, 2008, Dr. Weisman authored a report that stated that Petitioner had sustained a complete loss of use of his left hand and that in combination with right upper extremity paresis, Petitioner had been rendered unemployable (PX1).

Petitioner was examined pursuant to Section 12 by Dr. John Fernandez on March 26, 2009. With respect to Petitioner's left hand, Dr. Fernandez concluded that he had reached maximum medical improvement and was only capable of very light work under five to ten pounds with restrictions of no repetitive work or the use of tools **[*10]** (PX3, p9). Petitioner was examined by Dr. Fernandez on May 14, 2009 with respect to the right upper extremity. Dr. Fernandez concluded that regarding Petitioner's right upper extremity, Petitioner had arm and hand partial paralysis related to childhood polio or possible stroke. Dr. Fernandez concluded that Petitioner's right upper extremity would be restricted to very minimal use, essentially as an "assist capacity" (PX4, p14).

Petitioner underwent a vocational rehabilitation evaluation on November 2, 2009. The report concluded that Petitioner cannot return to his past work as a machine operator and that a stable labor market does not exist for him (PX5, pp16-19).

The Arbitrator observed Petitioner's upper extremities and noted for the record the obvious conditions and limitations of both extremities.

William Walenda testified at an evidence deposition on behalf of **Jett.** He testified that he was hired as president and CEO in 1996 or 1997. At that time **Jett** had been using staffing agencies to supply temporary workers but was having a hard time getting competent people (RX1, p6). He inquired further and found out about Staffing (RX1, p7). Mr. Walenda testified to and identified a September **[*11]** 10, 1997 letter from Cherry Householder, owner and president of Staffing, in which Ms. Householder welcomed **Jett** as a new customer (RX1, pp7-8, dep ex1). Approximately a week before receiving the letter, Mr. Walenda had met with Tom Navarro, a Staffing representative (RX1, pp8-10). Mr. Walenda testified that during this meeting, Mr. Navarro and Mr. Walenda had a conversation and entered into an agreement whereby Staffing would provide **Jett** with workers (RX1, p10).

Mr. Walenda testified that Staffing would verify that the workers were eligible to work in this country, would handle all payroll matters, and would provide safety training using **Jett** videotapes. Staffing would handle all insurances, which would include unemployment and workers' compensation. Mr. Walenda testified that during this conversation, Mr. Navarro advised Mr. Walenda that Staffing would pay all of the workers' compensation insurance and handle the claims for Staffing (RX1, pp10-11, 13-14, 30). Employees were to be provided in one of two ways. Staffing could prescreen a worker and send the worker to **Jett** for an interview. Alternatively, **Jett** would find a worker and send the worker to Staffing where the potential **[*12]** employee would be prescreened (RX1, pp11-13). In either event, the worker would be employed by and paid by Staffing, and Staffing would provide the workers' compensation insurance and handle all claims (RX1, pp 13-14). Mr. Walenda testified that in 2003 Petitioner was hired by Staffing and was working at **Jett's** facility as a Staffing employee when he was injured (RX1, p22).

Mr. Walenda testified to and identified a Staffing proposal, which was prepared exclusively for **Jett** (RX1, pp14-15, dep ex2). He testified that his understanding was that the proposal was in accordance with his discussion with Mr. Navarro, including the pricing of services and who was to purchase workers' compensation coverage for Staffing employees (RX1, pp 17-18).

On a page with the heading "Employee Benefits", the proposal states:

> The benefits package we offer is among the leading in our industry and includes, **but is not limited to**: (emphasis added).

A list refers to such items as vacation pay and holiday pay. The list does not explicitly refer to workers compensation.

On a page with a section heading "Insurance", the proposal states:

> STAFFING ***Resources, Inc.,*** has workers compensation and **[*13]** general liability insurance. A copy of our Certificate of Insurance is available, upon request (emphasis in the original).

On a page with the heading "Payrolling", the proposal states:

> As the employer, STAFFING ***Resources, Inc.,*** provides Workers' Compensation Insurance coverage to all employees, withholds state, federal and social security

> taxes in addition to paying state and federal unemployment costs. This program has reduced expenses for many clients in the areas of state unemployment contributions and even assisted in significantly reducing both their unemployment and workers compensation modification factor (emphasis in the original).

On a page with the heading "Using Supplemental Staffing Help", the proposal recites the following question and answer:

What is included in STAFFING ***Resources, Inc's bill rate?***

> The bill rate is based on the amount we pay the employee which is determined by your job requirements and the person's experience. The rate also includes all mandated taxes such as FICA, state and federal unemployment charges and workers compensation plus our operating costs and profit. All these factors comprise our hourly bill rate which **[*14]** is invoiced weekly on one invoice (emphasis in the original).

Mr. Walenda testified that his understanding of his discussion with Mr. Navarro was that Staffing would pay any worker's compensation claims and the payment of workers' compensation benefits for their employees would go against Staffing's modification ratio and not **Jett's** (RX1, pp18-20). Mr. Walenda testified that the agreement entered into with Mr. Navarro as set forth in the Staffing proposal did not ever change from the period of 1997 to 2003 (RX1, p21). Mr. Walenda testified that he and Mr. Navarro did not sign a document and that they had a hand shake agreement (RX1, pp26-27, 29). Mr. Walenda testified that he had no conversation about rights to reimbursement (RX1, pp27-28).

NATURE AND EXTENT OF PETITIONER'S INJURIES

The Petitioner's credible testimony, as corroborated by the medical records and the Section 12 reports, establish that the Petitioner has suffered a 100% loss of use of the left hand.

Additionally, the Petitioner's credible testimony, as corroborated by the medical records and the Section 12 reports, establish that the Petitioner has suffered a pre-accident loss of 100% loss of use of the right arm. **[*15]**

The permanent and complete loss of use of the left hand and the permanent and complete loss of use of the right arm constitutes the total and permanent disability of the Petitioner.

LOANING EMPLOYER'S REIMBURSEMENT CLAIM

All benefits were paid by Staffing Resources, Inc., the loaning employer. Staffing now seeks full reimbursement from **Jett** Cutting Service, the borrowing employer. Staffing relies on that portion of the Act that states that the loaning employer is entitled to receive full reimbursement from the borrowing employer. **Jett** disputes the reimbursement claim and relies on that portion of the Act that states there can be an agreement to the contrary.

Section 1(a) (4) of the Act is applicable and states, in relevant part:

> Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all

> benefits or payments due such employee under this Act and as **[*16]** to such employee the liability of such loaning and borrowing employers is joint and several, ***provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement*** for all sums paid or incurred pursuant to this paragraph together with reasonable attorneys' fees and expenses in any hearings before the Illinois Workers' Compensation Commission or in any action to secure such reimbursement (emphasis added).

William Walenda testified that there was an oral agreement. He testified that Staffing had the responsibility for worker's compensation claims. He testified that payment of workers' compensation benefits for Staffing's employees would go against Staffing's modification ratio and not **Jett's.** He testified that he had no conversation about reimbursement. He testified that the handshake was followed by a brochure.

William Walenda testified credibly. His credible direct testimony was not eroded by cross examination. His testimony was consistent with the Staffing brochure. His testimony was not contradicted by any other testimony. His testimony was not contradicted by any document.

The credible evidence **[*17]** leads to the conclusion that Staffing had full responsibility for the liability of all workers' compensation matters, including the responsibility to pay all claims.

Based upon the foregoing, the Arbitrator finds that Staffing Resources, Inc., the loaning employer, is not entitled to reimbursement from **Jett** Cutting Service, the borrowing employer, because there was a an oral agreement to the contrary.

Legal Topics:

For related research and practice materials, see the following legal topics:
Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Coverage & Definitions

Labor & Employment Law > Disability & Unemployment Insurance > Unemployment Compensation > Eligibility > Payments

Workers' Compensation & SSDI > Coverage > General Overview

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Date/Time: Friday, May 11, 2012 - 9:30 AM EDT

*163 Ill. 2d 284, *; 644 N.E.2d 1163, **;*
*1994 Ill. LEXIS 158, ***; 206 Ill. Dec. 110*

EMPLOYERS MUTUAL COMPANIES, Appellant, v. GEORGE SKILLING, Appellee.

Docket No. 76951

SUPREME COURT OF ILLINOIS

163 Ill. 2d 284; 644 N.E.2d 1163; 1994 Ill. LEXIS 158; 206 Ill. Dec. 110

November 23, 1994, Filed

PRIOR HISTORY: [*1]** Appeal from the Circuit Court of McHenry County, the Hon. James C. Franz, Judge, presiding.

DISPOSITION: Judgments reversed; cause remanded.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant employee filed two **workers' compensation** claims against defendant employer for injuries that occurred in Illinois. Plaintiff insurer filed a declaratory judgment action, claiming that it had no obligation toward either the employee or the employer because its policy provided **coverage** only for injuries occurring in Wisconsin. The trial court dismissed the action and the Illinois Appellate Court affirmed. The insurer appealed.

OVERVIEW: The trial court determined that the industrial **commission,** not the trial court, was the proper forum to resolve the **coverage** dispute. The intermediate court agreed. The appellate court, however, disagreed, holding that **jurisdiction** was **concurrent** and that the **jurisdiction** of the trial court was **paramount.** The court reasoned that the courts of Illinois had original **jurisdiction** over all justiciable matters and that if a legislative enactment divested the courts of their original **jurisdiction** through a comprehensive statutory administrative scheme, it had to do so explicitly. The court found that 820 Ill. Comp. Stat. 305/18, a section of the **Workers' Compensation** Act, was insufficient to divest the courts of **jurisdiction.** The court further held that the trial court should not have declined resolution of the **insurance coverage** dispute in deference to the **commission** because it was the trial court's particular province to resolve questions of law such as the one presented in the declaratory judgment action. The court said that when the question of law was

presented to the trial court in the declaratory judgment suit, the **jurisdiction** of the trial court became **paramount.**

OUTCOME: The court reversed the judgments of the intermediate court and the trial court and remand the cause to the trial court for further proceedings.

CORE TERMS: concurrent, declaratory judgment, administrative agency, primary jurisdiction, questions of law, coverage dispute, declaratory judgment, concurrent jurisdiction, Compensation Act, doctrine of exhaustion, jurisdiction to hear, present case, coverage issue, paramount, administrative remedies, questions arising, parties interested, original jurisdiction, declaration, exhaustion, expertise, coverage, disputed, divest, workers' compensation, injuries occurring, resolving

LEXISNEXIS® HEADNOTES **Hide**

Administrative Law > Separation of Powers > Jurisdiction

Workers' Compensation & SSDI > Administrative Proceedings > Awards > Types

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction

HN1 **Jurisdiction** over a suit for declaratory judgment in a **workers' compensation** matter is **concurrent** between the circuit court and the administrative agency. The **jurisdiction** of the circuit court is **paramount.** More Like This Headnote | *Shepardize:* Restrict By Headnote

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN2 See 820 Ill. Comp. Stat. 305/18. *Shepardize:* Restrict By Headnote

Administrative Law > Separation of Powers > Jurisdiction

Civil Procedure > Jurisdiction > Jurisdictional Sources > Constitutional Sources

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN3 The courts of Illinois have original **jurisdiction** over all justiciable matters. Ill. Const. art. VI, § 9 (1970). The legislature may vest exclusive original **jurisdiction** in an administrative agency. However, if the legislative enactment does divest the circuit courts of their original **jurisdiction** through a comprehensive statutory administrative scheme, it must do so explicitly. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Concurrent Jurisdiction

Workers' Compensation & SSDI > Administrative Proceedings > Claims > General Overview

HN4 The **Workers' Compensation** Act's pronouncement that all questions arising under the Act shall be determined by the Industrial **Commission,** 820 Ill. Comp. Stat. 305/18, is insufficient to divest the circuit courts of

jurisdiction. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > Justiciability > Exhaustion of Remedies > General Overview

Labor & Employment Law > Collective Bargaining & Labor Relations > Exhaustion of Remedies

HN5 The doctrine of primary **jurisdiction** provides that where a court has **jurisdiction** over a matter, it should in some instances stay the judicial proceedings pending referral of a controversy, or some portion of it, to an administrative agency having expertise in the area. The doctrine of primary **jurisdiction** only applies when a court has either original or **concurrent jurisdiction** over the subject matter of the dispute. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Separation of Powers > Primary Jurisdiction

Civil Procedure > Justiciability > Exhaustion of Remedies > Administrative Remedies

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview

HN6 Under the doctrine of exhaustion of remedies, a party must first pursue all administrative remedies provided for by the statute before turning to a review in the courts. The doctrine of exhaustion of remedies is applied only where the administrative agency has exclusive **jurisdiction** to hear the action. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Administrative Law > Separation of Powers > Primary Jurisdiction

HN7 The doctrine of primary **jurisdiction** is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. Under this doctrine, a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards. More Like This Headnote | *Shepardize:* Restrict By Headnote

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Insurance Law > Claims & Contracts > Declaratory Relief > General Overview

HN8 It is the particular province of the courts to resolve questions of law. Administrative agencies are given wide latitude in resolving factual issues but not in resolving matters of law. More Like This Headnote | *Shepardize:* Restrict By Headnote

Civil Procedure > Declaratory Judgment Actions > General Overview

HN9 See 735 Ill. Comp. Stat. 5/2-701. *Shepardize:* Restrict By Headnote

COUNSEL: Stevenson, Rusin & Friedman, Ltd., of Chicago (D. William Porter, Theodore J. Powers and Douglas F. Stevenson, of counsel), for appellant.

Pete Sullivan & Associates, of Rockford (James F. Black and Peter T. Sullivan III, of counsel), for appellee.

JUDGES: HEIPLE

OPINION BY: HEIPLE

OPINION

[*285] **[**1164]** JUSTICE HEIPLE delivered the opinion of the court:

Defendant, George Skilling, filed two **workers' compensation** claims against his employer, Kirkpatrick Trucking Company (Kirkpatrick), for two accidents which occurred in Illinois. Plaintiff, Employers Mutual Companies (Employers Mutual), Kirkpatrick's **workers' compensation** carrier, filed a motion with the Industrial **Commission** requesting leave to be added as a party-respondent to Skilling's claims. Employers Mutual therein contended that since its policy provided **coverage** only for injuries occurring in work places located in Wisconsin, it had no obligation to defend or indemnify **[*286]** Kirkpatrick or to pay **workers' compensation** benefits to Skilling for injuries occurring in Illinois.

Employers Mutual additionally filed a suit for declaratory judgment in the circuit court of McHenry County against Kirkpatrick and Skilling, which again asserted that Employers Mutual had no obligation toward either Skilling **[***2]** or his employer. Skilling moved to dismiss the declaratory judgment complaint, alleging that Employers Mutual had failed to exhaust its administrative remedies before the Industrial **Commission (Commission)**. Skilling asserted that the **Commission,** and not the circuit court, was the proper forum to resolve the **coverage** dispute. The trial court dismissed the suit for declaratory judgment. The appellate court affirmed. (256 Ill. App. 3d 567.) We **[**1165]** allowed Employers Mutual's petition for leave to appeal (145 Ill. 2d R. 315).

The issue before us is one of **jurisdiction.** Is **jurisdiction** exclusive with the administrative agency, or is it **concurrent** with the circuit court? And, if it is **concurrent**, which is **paramount**? We rule that the HN1 **jurisdiction** is **concurrent** and that the **jurisdiction** of the circuit court is **paramount**.

Section 18 of the **Workers' Compensation** Act states:

> HN2 "All questions arising under this Act, if not settled by agreement of the parties interested therein, shall, except as otherwise provided, be determined by the **Commission.**" (820 ILCS 305/18 (West 1992).)

Section 19 states that "any disputed questions of law or fact shall be determined" by the **[***3]** **Commission.** 820 ILCS 305/19 (West 1992).

Skilling urges us to hold that the **Commission** has exclusive **jurisdiction** to resolve the **insurance coverage** dispute that is in question. Specifically, Skilling argues that section 18, which states that the **Commission** has the power to determine "all questions arising under the Act," deprives the circuit court of **concurrent jurisdiction** to resolve this issue. We disagree.

[*287] HN3 The courts of Illinois have original **jurisdiction** over all justiciable matters. (Ill. Const. 1970, art. VI, § 9.) The legislature may vest exclusive original **jurisdiction** in an administrative agency. However, if the legislative enactment does divest the circuit courts of their original **jurisdiction** through a comprehensive statutory administrative scheme, it must do so explicitly. *People v. NL Industries* (1992), 152 Ill. 2d 82, 96-97, 178 Ill. Dec. 93, 604

N.E.2d 349.

HN4 The **Workers' Compensation** Act's pronouncement that "all questions arising under this Act * * * shall * * * be determined by the **Commission**" (820 ILCS 305/18 (West 1992)) is insufficient to divest the circuit courts of **jurisdiction.** In *NL Industries,* the State brought an action on behalf of the Illinois Environmental **[***4]** Protection Agency against the owners and operators of a manufacturing facility. This court determined that the circuit court and the Pollution Control Board had **concurrent jurisdiction** to decide the issues presented in that case, finding that no language in the Environmental Protection Act specifically excluded the circuit courts from deciding such cases. *(NL Industries,* 152 Ill. 2d at 97.) Since exclusionary language is similarly absent from the **Workers' Compensation** Act, we reach the same conclusion herein.

Our determination that the circuit court and the **Commission** have **concurrent jurisdiction** to hear the **insurance coverage** issue raised in the present case does not end our inquiry. Employers Mutual contends that the doctrine of primary **jurisdiction** dictates that the circuit court should hear the declaratory judgment action. Skilling, on the other hand, contends that even if the circuit court and **Commission** have **concurrent jurisdiction**, the exhaustion of remedies doctrine applies and the **coverage** issue must remain before the **Commission.**

The different doctrines of primary **jurisdiction** and **[*288]** exhaustion of remedies have previously been defined by this court. HN5 **[***5]** The doctrine of primary **jurisdiction** provides that where a court has **jurisdiction** over a matter, it should in some instances stay the judicial proceedings pending referral of a controversy, or some portion of it, to an administrative agency having expertise in the area. *(NL Industries,* 152 Ill. 2d at 95-96, quoting *Board of Education of Warren Township High School District 121 v. Warren Township High School Federation of Teachers, Local 504* (1989), 128 Ill. 2d 155, 162.) The doctrine of primary **jurisdiction** only applies when a court has either original or **concurrent jurisdiction** over the subject matter of the dispute. *NL Industries,* 152 Ill. 2d at 95.

HN6 Under the doctrine of exhaustion of remedies, however, a party must first pursue all administrative remedies provided for by the statute before turning to a review in the courts. *(NL Industries,* 152 Ill. 2d at 95; *Warren Township,* 128 Ill. 2d at 163.) **[**1166]** The doctrine of exhaustion of remedies is applied only where the administrative agency has exclusive **jurisdiction** to hear the action. **[***6]** *(NL Industries,* 152 Ill. 2d at 95-96; *Warren Township,* 128 Ill. 2d at 163.) Since we have determined that the **Commission** and the circuit courts have **concurrent jurisdiction,** the doctrine of exhaustion of remedies is inapplicable to the present case.

HN7 The doctrine of primary **jurisdiction** is "'concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties.'" *(Kellerman v. MCI Telecommunications Corp.* (1986), 112 Ill. 2d 428, 444, 98 Ill. Dec. 24, 493 N.E.2d 1045, quoting *United States v. Western Pacific R.R. Co.* (1956), 352 U.S. 59, 63, 1 L. Ed. 2d 126, 132, 77 S. Ct. 161, 165.) Under this doctrine, a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there **[*289]** is a need for uniform administrative standards. *Kellerman,* 112 Ill. 2d at 445.

Applying these foregoing principles to the present case, we conclude that the circuit court should not have declined resolution of this **[***7]** **insurance coverage** dispute in deference to the **Commission.** HN8 It is the particular province of the courts to resolve questions of law such as the one presented in the instant declaratory judgment case. Administrative agencies are given wide latitude in resolving factual issues but not in resolving matters of law.

The **insurance coverage** dispute presented before the circuit court is precisely the type of issue that declaratory judgment suits are intended to address. The declaratory judgment

statute provides, in part:

> HN9"The court may, in cases of actual controversy, make binding declarations of rights, having the force of final judgments, whether or not any consequential relief is or could be claimed, including the determination, at the instance of anyone interested in the controversy, of the construction of any * * * contract or other written instrument, and a declaration of the rights of the parties interested. * * * The court shall refuse to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." (735 ILCS 5/2-701 (West 1992).)

Here, Employers Mutual seeks to have **[***8]** the circuit court determine whether Illinois is included in the scope of **coverage** afforded by the specific provisions of its **insurance** contract with Kirkpatrick. This is a question of law and, thus, a question which the circuit court, and not the **Commission,** is in the best position to address. A ruling in favor of Employers Mutual on this issue could foreclose needless litigation, expense and delay and advance a goal underlying declaratory judgment actions. See *La Salle Casualty Co. v. Lobono* (1968), 93 Ill. App. 2d 114, 117, 236 N.E.2d 405.

[*290] Therefore, although we conclude that the **Commission** had **concurrent jurisdiction** to hear the disputed **insurance coverage** issue presented in this case, when the question of law was presented to the circuit court in the declaratory judgment suit, the **jurisdiction** of the circuit court became **paramount**.

Accordingly, we reverse the judgments of the appellate court and the circuit court and remand this cause to the circuit court for further proceedings.

Judgments reversed; cause remanded.

*2012 Ill. App. LEXIS 90, *; 2012 IL App (1st) 101751, ***

HASTINGS MUTUAL **INSURANCE** COMPANY, Plaintiff-Appellant, v. ULTIMATE BACKYARD, LLC, NATIONAL COUNCIL ON COMPENSATION **INSURANCE,** INC., and JAVIER VASQUEZ, Defendants-Appellees.

Nos. 1-10-1751, 1-10-3001 (cons.)

APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, FOURTH DIVISION

2012 Ill. App. LEXIS 90; 2012 IL App (1st) 101751

February 9, 2012, Decided

PRIOR HISTORY: [*1]
Appeal from the Circuit Court of Cook County. No. 09 CH 07232. The Honorable Richard J. Billik, Jr., Judge Presiding.
Hastings Mut. Ins. Co. v. Ultimate Backyard, LLC, 2011 Ill. App. Unpub. LEXIS 3071 (2011)

DISPOSITION: Reversed and remanded.

CASE SUMMARY

PROCEDURAL POSTURE: The Cook County Circuit Court (Illinois) entered a judgment that denied a motion to stay proceedings filed by appellant insurer and granted motions to dismiss filed by appellees, an employer and an employee, after the insurer filed a declaratory judgment action seeking a declaration that it was not responsible for an underlying **workers' compensation** claim between the employer and employee. The insurer appealed.

OVERVIEW: The employee sustained a knee injury during the course of his employment with the employer. He then filed a claim with the **Commission** that named the employer and the insurer as respondents. The employer tendered its defense and indemnity to its insurer. The insurer filed a declaratory judgment action asserting that it did not owe **coverage** to the employer because the relevant **workers' compensation insurance** policy had been cancelled. An arbitration proceeded with the employee, but allegedly without the employer or insurer present. In the declaratory case, the insurer filed a motion to stay the proceedings, and the employer and employee filed a motion to dismiss. The trial court denied the motion to stay as moot since the arbitrator had already issued a decision, and granted the motion to dismiss upon finding that the **Commission** could decide the **coverage** issue. The appellate court found that the trial court erred in granting the motion to dismiss because it, being a

court of original **jurisdiction** under Ill. Const. art. VI, § 9, should have decided the **coverage** issue. It also find that resolving the **coverage** issue did not require any of the **Commission's** special expertise.

OUTCOME: The appellate court reversed the trial court's judgment and remanded the case to the trial court with directions for it to stay the underlying **workers' compensation** claim until a decision was made by the trial court regarding the issue of **insurance coverage.**

CORE TERMS: notice of cancellation, expertise, arbitrator, notice, insurance coverage, injunction, Compensation Act, questions of law, insurance policy, workers' compensation, compensation claim, stay order, primary jurisdiction, administrative agency, specialized, order granting, question of fact, concurrent jurisdiction, cancellation, appealable, cancelled, coverage, declaratory judgment, interlocutory, asking, declaratory action, original jurisdiction, undisputed, injunctive, indemnify

LEXISNEXIS® HEADNOTES Hide

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

HN1 Motions with respect to pleadings under 735 ILCS 5/2-615 (2010) and motions for involuntary dismissal under 735 ILCS 5/2-619 (2010) may be filed together as a single motion in any combination. 735 ILCS 5/2-619.1 (West 2010). A combined motion, however, shall be in parts. 735 ILCS 5/2-619.1 (2010). Each part shall be limited to and shall specify that it is made under 735 ILCS 5/2-615 (2010) or 735 ILCS 5/2-619 (2010). 735 ILCS 5/2-619.1 (2010). Each part shall also clearly show the points or grounds relied upon under the section on which it is based. 735 ILCS 5/2-619.1 (2010). To that extent, the state supreme court has regularly admonished parties that fail to distinguish whether their motions to dismiss were made pursuant to 735 ILCS 5/2-615 (2010) or 735 ILCS 5/2-619 (2010), that meticulous practice dictates that a lawyer specifically designate whether her motion to dismiss is pursuant to 735 ILCS 5/2-615 (2010) or 735 ILCS 5/2-619 (2010). The failure to do so may not always be fatal, but reversal is required if prejudice results to the nonmovant. More Like This Headnote

Civil Procedure > Pleading & Practice > Motion Practice > Content & Form

Civil Procedure > Pleading & Practice > Pleadings > General Overview

Civil Procedure > Dismissals > Involuntary Dismissals > Failures to State Claims

Civil Procedure > Dismissals > Involuntary Dismissals > Motions

HN2 A 735 ILCS 5/2-615 (2010) motion to dismiss challenges the legal sufficiency of a complaint by alleging defects on the face of the complaint. A 735 ILCS 5/2-615 (2010) motion provides that a pleading or portion thereof may be stricken because it is substantially insufficient in law. A court considering whether to grant or deny a 735 ILCS 5/2-615 (2010) motion to dismiss must determine whether the allegations of the complaint and all reasonable inferences therefrom, when considered in a light most favorable to a plaintiff, are sufficient to state a cause of action upon which relief can be granted. The court must consider all facts that are apparent on the face of the

pleadings, which includes any exhibits attached thereto. The court does not consider nor does the motion raise any affirmative factual defenses. A cause of action will not be dismissed on the pleadings unless it clearly appears that a plaintiff cannot prove any set of facts that will entitle it to relief. More Like This Headnote

Workers' Compensation & SSDI > Coverage > General Overview

HN3 See 820 ILCS 305/4(b) (2010).

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

HN4 An appeal from a 735 ILCS 5/2-619 (2010) dismissal is the same in nature as one following a grant of summary judgment. In both instances, the reviewing court must ascertain whether the existence of a genuine issue of material fact should have precluded the dismissal, or absent such an issue of fact, whether dismissal is proper as a matter of law. A 735 ILCS 5/2-619 (2010) motion admits the legal sufficiency of the pleadings and raises defects, defenses, or other affirmative matters that act to defeat the claim. In ruling on a 735 ILCS 5/2-619 (2010) motion, a lower court may take under consideration all pleadings, affidavits, and other proof presented by the parties. On appeal, a court must determine whether there is a genuine issue of material fact, which should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. More Like This Headnote

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Evidence > Procedural Considerations > Burdens of Proof > Allocation

Evidence > Procedural Considerations > Burdens of Proof > Clear & Convincing Proof

HN5 A 735 ILCS 5/2-619(a)(3) (2010) motion specifically applies in cases where there is another action pending between the same parties for the same cause. Under 735 ILCS 5/2-619(a)(3) (2010), it is a movant's burden to demonstrate by clear and convincing evidence that the two actions involve the same cause and the same parties. Even in a case where the movant has established both the same cause and parties, the lower court retains discretion to grant or deny the motion; 735 ILCS 5/2-619(a)(3) (2010) relief is not mandatory. Finally, the trial court must also consider the potential prejudice to the nonmovant if the motion is granted versus the policy of avoiding duplicative litigation. More Like This Headnote

Civil Procedure > Pleading & Practice > Motion Practice > General Overview

Civil Procedure > Dismissals > Involuntary Dismissals > General Overview

Civil Procedure > Appeals > Standards of Review > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN6 Motions to dismiss are generally reviewed de novo, due to the fact that they typically do not require the lower court to determine credibility or weigh the facts present in the case. That is not the case with 735 ILCS 5/2-619(a)(3) (2010), where the motion

in fact urges the trial court to weigh several factors in order to make the determination of whether it is appropriate for an action to proceed. Due to that weighing of evidence by the lower court, motions to dismiss under 735 ILCS 5/2-619 (a)(3) (2010) are reviewed under an abuse of discretion standard, the required alternative. More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Governments > Courts > Rule Application & Interpretation

HN7 Courts have treated the denial of a motion to stay as a denial of a request for a preliminary injunction. A stay is considered injunctive in nature and, thus, an order granting or denying a stay fits squarely within Ill. Sup. Ct. R. 307(a). The denial of a stay by a trial court is treated as a denial of a request for a preliminary injunction, which is appealable under Ill. Sup. Ct. R. 307(a)(1). More Like This Headnote

Civil Procedure > Judgments > Entry of Judgments > Stays of Proceedings > General Overview

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

HN8 The standard of review in an appeal of a motion to stay is abuse of discretion. In determining whether a trial court abused its discretion, a reviewing court should not decide whether it agrees with the trial court's decision, but rather, should determine whether the trial court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted. More Like This Headnote

Civil Procedure > Appeals > Records on Appeal

Civil Procedure > Appeals > Standards of Review > General Overview

HN9 Any doubts that may arise from incompleteness of a record will be resolved against an appellant. More Like This Headnote

Administrative Law > Agency Adjudication > General Overview

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > Exclusive Jurisdiction

Constitutional Law > State Constitutional Operation

HN10 It is undisputed that the courts of Illinois have original **jurisdiction** over all justiciable matters. Ill. Const. art. VI, § 9. While the legislature generally cannot deprive trial courts of that **jurisdiction,** an exception arises in administrative actions. The legislature may vest exclusive original **jurisdiction** in an administrative agency only when it has explicitly enacted a comprehensive statutory administrative scheme. More Like This Headnote

Administrative Law > Agency Adjudication > General Overview

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

HN11 The doctrine of primary **jurisdiction** provides that even when a trial court has **jurisdiction** over a matter, it should, in some instances, stay the judicial proceedings pending referral of the controversy to an administrative agency. Referral of the matter is proper so long as the administrative agency has a specialized or technical expertise that would help resolve the controversy, or where there is a need for uniform administrative standards. More Like This Headnote

Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > Appeals > Standards of Review > Fact & Law Issues

Governments > Legislation > Interpretation

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Jurisdiction

HN12 Interpretation of a statute is a question of law, which is best answered by a trial court and one that does not require the specialized expertise of the **Commission.** When there is a ruling on a question of law that could foreclose needless litigation, it is best addressed by the trial court. More Like This Headnote

COUNSEL: For Appellant: Rusin Maciorowski & Friedman, Ltd., Chicago, II.

For Appellee: Dykema Gossett PLLC, Brian J McManus & Associates, Ltd., Chicago, IL.

JUDGES: PRESIDING JUSTICE LAVIN delivered the judgment of the court, with opinion. Justices Fitzgerald Smith and Pucinski concurred in the judgment and opinion.

OPINION BY: LAVIN

OPINION

[P1]** This appeal stems from the denial of a motion to stay proceedings and the granting of motions to dismiss. Hastings Mutual **Insurance** Company (Hastings Mutual) filed a complaint for declaratory judgment seeking an order that it was not responsible for an underlying **workers' compensation** claim between Javier Vasquez (Vasquez) and his employer, The Ultimate Backyard, LLC (Ultimate Backyard). The case ultimately turns on the issue of whether a notice of cancellation that was sent from Hastings Mutual to the National Council on Compensation **Insurance** conformed with the statutory requirements. Hastings Mutual appeals the denial of its motion to stay as well as the order granting appellees Vasquez's and Ultimate Backyard's motions to dismiss. We reverse and **[*2]** remand with directions for the lower court to stay the underlying **workers' compensation** claim until a decision is made by the court regarding the issue of **insurance coverage**.

[P2]** BACKGROUND

[P3]** Appellee Vasquez sustained a knee injury during the course of his employment with Ultimate Backyard. Soon after the incident, Vasquez. filed a claim with the Illinois **Workers' Compensation Commission** (referred to hereinafter as "IWCC" or "**Commission**") naming Ultimate Backyard and Hastings Mutual, as insurer of Ultimate Backyard, as respondents. Ultimate Backyard tendered its defense and indemnity to Hastings Mutual based on an **insurance** policy which was effective from April 18, 2007, to April 18, 2008. Under a reservation of rights, Hastings Mutual began providing temporary total disability (TDD) and medical benefits to Vasquez. Five months later, Hastings Mutual informed Ultimate Backyard that it was withdrawing its tentative acceptance and would deny **coverage** of the Vasquez claim. Hastings

Mutual sought a declaratory judgment that it had no duty to defend or indemnify and also filed a motion to stay the underlying proceedings before the IWCC. Appellees Vasquez and Ultimate Backyard each filed a motion **[*3]** to dismiss Hastings Mutual's complaint along with a response to the motion to stay.

[P4]** Hastings Mutual's complaint asserted that it did not owe **coverage** to Ultimate Backyard, because the **workers' compensation insurance** policy had been cancelled and any duty to indemnify or defend was vitiated. Hastings Mutual argues that it complied with section 4 (b) of the **Workers' Compensation** Act (820 ILCS 305/4 (b) (West 2010)), the statute which controls the cancellation of **workers' compensation** policies, when it sent a notice of cancellation January 14, 2008, to Ultimate Backyard and the National Council on Compensation **Insurance** (NCCI). The notice informed the parties that the **workers' compensation insurance** policy would be cancelled effective 12:01 a.m. on April 18, 2008. Hastings Mutual maintains that the sole question before the court involves the statutory interpretation of whether it complied with section 4(b) of the **Workers' Compensation** Act when it sent the notice of cancellation to the NCCI. The NCCI is an organization which the IWCC contracted with to delegate some of its duties, including receiving and maintaining certificates of **insurance** and notices of termination of **insurance coverage** **[*4]** under section 4 of the **Workers' Compensation** Act. Hastings Mutual and the NCCI entered into an affiliation agreement in which the NCCI agreed to services that included transmitting Hastings Mutual **insurance** policy information to the IWCC.

[P5]** The next month, Vasquez and the Attorney General's office, on behalf of the Injured Workers' Benefit Fund, proceeded with the **workers' compensation** claim by initiating a hearing before an IWCC arbitrator. Hastings Mutual claims that despite the fact that it never received proper notice or service and that neither it nor Ultimate Backyard participated in the arbitration, the arbitrator still ruled against Hastings Mutual on the issue of **insurance coverage**.

[P6]** Shortly thereafter, the trial court ruled that Hastings Mutual's motion lacked convincing authority to enjoin the proceedings and that the motion to stay was moot in light of the decision already handed down by the IWCC arbitrator. In granting appellees' motions to dismiss without prejudice, the court held that the IWCC had valid authority to decide the **coverage** issue. Hastings Mutual then filed its second amended complaint that named the NCCI as a defendant for the first time. All three appellees, **[*5]** Vasquez, Ultimate Backyard and the NCCI, filed motions to dismiss. Appellees' motions to dismiss argued that the issue before the court involved factual determinations and that the IWCC had both the authority and expertise to best handle such determinations. Furthermore, the appellees maintained that the arbitrator's decision already adjudicated the issue of **insurance coverage**. Soon thereafter, Hastings Mutual filed a third amended complaint in order to add facts specific to its claims against the NCCI; this complaint was again followed by the NCCI filing a motion to dismiss.

[P7]** Before a ruling was made on Hastings Mutual's complaint and appellees' motions to. dismiss, the IWCC entered a decision vacating Vasquez's previous *ex parte* **workers' compensation** arbitration award. Following this dismissal, Vasquez again filed a claim with the IWCC, asking an arbitrator to adjudicate his **workers' compensation** claim as well as the **coverage** issue between Hastings Mutual and Ultimate Backyard. Hastings Mutual once more filed a motion in the circuit court to stay or sever the IWCC proceedings as they related to the **insurance coverage** issue. On June 30, 2010, the lower court denied Hastings Mutual's **[*6]** motion to stay. Hastings Mutual filed a timely interlocutory appeal on this issue.

[P8]** Undeterred and with the reversal of the initial IWCC arbitrator's decision in hand, Hastings Mutual filed a motion in the circuit court to strike appellees' motions to dismiss, arguing that their motions were supported by the IWCC arbitrator's decision. On August 18, 2008, the circuit court conducted a hearing on appellees' three motions to dismiss, Hastings Mutual's complaint for declaratory action and all of the replies. The court granted the motions of appellees Vasquez and Ultimate Backyard based on the doctrine of primary **jurisdiction**, holding that there are several factual questions that needed to be determined and that the matter was

already being properly resolved in another forum, the IWCC. Ultimately, the court held that the issue as to whether Hastings Mutual properly cancelled the **workers' compensation** liability policy, which could have an impact on Vasquez's ability to recover if he prevails on his **workers' compensation** claim, is a matter that is uniquely suited to the specialized and/or technical expertise of the IWCC. Last, the court dismissed Hastings Mutual's claims against the NCCI, **[*7]** finding the claims to be premature. The court held that Hastings Mutual may attempt to replead a legally sufficient claim that is ripe for adjudication against the NCCI within 30 days of an award by the arbitrator in the underlying **workers' compensation** action or the decision of the **Commission,** if an appeal is taken by any party. Hastings Mutual filed a timely appeal of the order granting Ultimate Backyard's and Vasquez's motions to dismiss.

[P9]** Finally, we note that appellee Ultimate Backyard did not file an appearance or a brief on any of the issues before this court.

[P10]** ANALYSIS

[P11]** This is a consolidated appeal which consists of: (1) an appeal of the June 23, 2010, denial of Hastings Mutual's motion to stay IWCC proceedings. (All three appellees, Ultimate Backyard, the NCCI and Vasquez, are a party to this motion); and (2) Hastings Mutual's appeal of the August 18, 2010, order granting Ultimate Backyard's and Vasquez's motions to dismiss with prejudice. There was no final dismissal order entered on August 18, 2010, with regard to the NCCI's motion to dismiss. It is worth noting that the arguments and issues raised throughout Hastings Mutual's complaint for declaratory judgment and its subsequent **[*8]** motions to stay as well as appellees' motions to dismiss are essentially the same: is the question being asked in the lower court one of fact or law? It is undisputed that the circuit court and the IWCC have **concurrent jurisdiction** over **workers' compensation** matters. Hastings Mutual argues that there are only two ways in which the IWCC can have primary **jurisdiction** over this matter. Either the legislature must have divested the circuit court of its **jurisdiction** or the IWCC must be able to provide a specialized or technical expertise that would help resolve the controversy. Hastings Mutual cites case law which states that the legislature did not divest the court of **jurisdiction** over the interpretation of an **insurance** contract nor does such an interpretation require the expertise of an administrative agency. Appellees maintain that the issue presented is factual and cite a line of authority that confers factual decisions to the **Commission.** Thus, our review of the motion to stay and motions to dismiss will involve the same question: is the issue presented a question of fact that should be decided by the **Commission** or one of law that should be decided by the trial court?

[P12]** **[*9]** Motions to Dismiss

[P13]** As a primary matter, we note that neither Ultimate Backyard nor Vasquez specifies which section of the Illinois Code of Civil Procedure that their motions to dismiss were filed under. It appears through a reading of the order that the lower court interpreted appellees' motions to dismiss as a combination of a section 2-615 (735 ILCS 5/2-615 (West 2010)) and section 2-619. 735 ILCS 5/2-619 (West 2010). The lower court also never specifically stated on which grounds that it granted appellees' motions. The Illinois Code of Civil Procedure specifically deals with this issue in section 2-619.1 (735 ILCS 5/2-619.1 (West 2010)), which states that ***HN1***[↑] motions with respect to pleadings under section 2-615 and motions for involuntary dismissal under section 2-619 may be filed together as a single motion in any combination. 735 ILCS 5/2-619.1 (West 2010). A combined motion, however, shall be in parts. 735 ILCS 5/2-619.1 (West 2010). Each part shall be limited to and shall specify that it is made under sections 2-615 or 2-619. 735 ILCS 5/2-619.1 (West 2010). Each part shall also clearly show the points or grounds relied upon under the section on which it is based. 735 ILCS 5/2-619.1 **[*10]** (West 2010). To that extent, we also note that the supreme court has regularly admonished parties that fail to distinguish whether their motions to dismiss were made pursuant to section 2-615 or 2-619, "[m]eticulous practice dictates that a lawyer specifically designate whether her motion to dismiss is pursuant to section 2-615 or section 2-619. [citations.] The failure to do so may not always be fatal, but reversal is required if prejudice results to the nonmovant." *Illinois Graphics Co. v. Nickum*, 159 Ill. 2d 469, 484, 639 N.E.2d 1282, 203 Ill. Dec. 463. (1994). We will

reluctantly review appellees' motions to dismiss through the lens used by the lower court, which recognized and conducted both a section 2-615 and section 2-619 analysis.

[P14]** HN2 A section 2-615 motion to dismiss challenges the legal sufficiency of a complaint by alleging defects on the face of the complaint. *Id.* at 493. A section 2-615 motion provides that a pleading or portion thereof may be stricken because it is substantially insufficient in law. *Keating v. 68th & Paxton, L.L.C.*, 401 Ill. App. 3d 456, 463, 936 N.E.2d 1050, 344 Ill. Dec. 293 (2010). A court considering whether to grant or deny a section 2-615 motion to dismiss must determine whether the allegations of the complaint and all **[*11]** reasonable inferences therefrom, when considered in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted. *Vitro v. Mihelcic*, 209 Ill. 2d 76, 81, 806 N.E.2d 632, 282 Ill. Dec. 335 (2004). The court must consider all facts that are apparent on the face of the pleadings, which includes any exhibits attached thereto. *Dloogatch v. Brincat*, 396 Ill. App. 3d 842, 846-47, 920 N.E.2d 1161, 336 Ill. Dec. 571 (2009). The court does not consider nor does the motion raise any affirmative factual defenses. *Maxon v. Ottawa Publishing Co.*, 402 Ill. App. 3d 704, 712, 929 N.E.2d 666, 341 Ill. Dec. 12 (2010). A cause of action will not be dismissed on the pleadings unless it clearly appears that the plaintiff cannot prove any set of facts that will entitle it to relief. *Board of Directors of Bloomfield Club Recreation Ass'n. v. Hoffman Group, Inc.*, 186 Ill. 2d 419, 424, 712 N.E.2d 330, 238 Ill. Dec. 608 (1999).

[P15]** Hastings Mutual frames its argument as asking the lower court to merely interpret a statute and **insurance** contract. This is the type of issue that the circuit court is well versed in and not the type of question that requires the expertise of the IWCC. Hastings Mutual contends that this case should merely involve comparing the cancellation notice which was sent to the **[*12]** NCCI with the statute which dictates the proper procedure that an **insurance** company takes when cancelling an **insurance** policy. Section 4(b) of the **Workers' Compensation** Act states in pertinent part:

> HN3 "The **insurance** so certified shall not be cancelled or in the event that such **insurance** is not renewed, extended or otherwise continued, such **insurance** shall not be terminated until at least 10 days after the receipt by the Illinois **Workers' Compensation Commission** of notice of cancellation or termination of said **insurance**" 820 ILCS 305/4 (b) (West 2010).

Hastings. Mutual argues that it complied perfectly with the statute when it sent the notice of cancellation to the IWCC. It further contends that there is no question of fact regarding receipt of the notice because the IWCC logged the notice in its system and put its unique coding on the cancellation form indicating the date the form was received. Hastings Mutual argues that this case should merely involve having the lower court determine an issue of *law*. It asks for the lower court to make a determination, based on a reading of the relevant statute, what constitutes receipt of notice. Hastings Mutual argues for the lower court make a determination **[*13]** if the NCCI is even allowed to reject a notice of cancellation.

[P16]** Hastings Mutual further contends that this case is analogous to *Employers Mut. Cos. v. Skilling*, 163 Ill. 2d 284, 644 N.E.2d 1163, 206 Ill. Dec. 110 (1994), where the supreme court was asked to determine the scope of the IWCC's and the circuit court's **jurisdiction** over the interpretation of a **workers' compensation** policy. *Skilling* involved an employee who filed **workers' compensation** claims. The employer's **insurance** company contended that its policy only provided **coverage** for injuries occurring in Wisconsin and because the employee's injuries occurred in Illinois, it had no obligation to defend or indemnify. *Id.* at 285-86. The **insurance** company also filed a suit for declaratory action in the circuit court seeking an order that it had no obligation to the employee or the employer. *Id.* at 286. The supreme court held that the courts of Illinois have original **jurisdiction** over all justiciable matters. *Id.* at 287. The court stated that the legislature may vest exclusive original **Jurisdiction** to an administrative agency, but it must do so explicitly through a comprehensive statutory administrative scheme, and that the **Workers' Compensation** Act is insufficient **[*14]** to divest the circuit courts of **jurisdiction.** *Id.* The court went on to hold that under the doctrine of primary **jurisdiction**, "a

matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards." *Id.* at 288-89: The court held that the circuit court should not have declined to resolve the **insurance coverage** dispute, ultimately finding that questions of law, such as the one presented, are questions that the circuit court was meant to handle. *Id.* at 289. Hastings Mutual urges this court to adopt the reasoning found in *Skilling* and find that the question before the lower court is an issue of law that does not require the expertise of the IWCC.

[P17]** Appellee Vasquez argues that the IWCC is expressly authorized to resolve **insurance coverage** questions. Vasquez concedes that the circuit court shares **concurrent jurisdiction** with the IWCC. While Vasquez also cites to *Employers*, he maintains that the circuit court only has **paramount jurisdiction** if the complaint raises issues of law. Vasquez further argues that the existence of **concurrent jurisdiction** does not **[*15]** deprive the circuit court of discretion to determine that the factual issues are best left before the IWCC. *Keating*, 401 Ill. App. 3d 456, 936 N.E.2d 1050, 344 Ill. Dec. 293; *Residential Carpentry, Inc. v. Kennedy*, 377 Ill. App. 3d 499, 502, 879 N.E.2d 439, 316 Ill. Dec. 372 (2007). Vasquez characterizes Hastings Mutual's argument as asking the circuit court to decide a *fact* question in a **workers' compensation** case regarding the Illinois **Workers' Compensation** Act and **Insurance** Code (215 ILCS 5/143.17 (West 2010)), notice requirement. Vasquez states that Hastings Mutual is not proposing a question of law but is in fact asking the court to make factual determinations regarding what date Hastings Mutual provided notice to NCCI of the cancellation of the **insurance** policy. He argues that notice of cancellation of an **insurance** policy is fundamentally a question of fact.. Vasquez also takes issue with Hastings Mutual's failure to state in its brief that the original notice of cancellation Hastings Mutual submitted had been rejected and returned by the NCCI and was not resubmitted until seven months later. He argues that these factual questions are at the heart of the case and are best handled by the IWCC. Vasquez further contends that *Skilling* is distinguishable **[*16]** from the present case, because *Skilling* only presented a question of law while here we are presented with questions of fact.

[P18]** Vasquez supports his position by arguing that this jurisdictional issue has already been decided in *Casualty **Insurance** Co. v. Kendall Enterprises, Inc.*, 295 Ill App. 3d 582, 692 N.E.2d 752, 229 Ill. Dec. 763 (1992). In *Kendall*, the **insurance** company filed a declaratory judgment seeking an order that it was not obligated to defend employer or pay benefits to employee in a pending **workers' compensation** dispute. *Id.* at 583. *Kendall* hinged on whether the **insurance** company had properly cancelled the **insurance** policy. At an IWCC hearing, an employee of the **insurance** company provided testimony that she did not see nor did she have personal knowledge that the notice of cancellation had been mailed to or received by the NCCI. *Id.* at 583-84. An employee of the NCCI testified that after an exhaustive search of its entire database, it did not find either an original filing of the policy or a notice of any filing of cancellation. *Id.* at 584. The arbitrator found in favor of employee and employer, concluding that the **insurance** company could not "provide conclusive proof of receipt of a notice of cancellation **[*17]** by the NCCI as required by the statute." *Id.* After the IWCC arbitrator rendered its decision, the **insurance** company filed a declaratory judgment action in the circuit court. *Id.* at 585. Employer and employee filed motions to dismiss, which the lower court granted. *Id.* at 585-86. On appeal this court affirmed the decision, holding that despite the **insurance** company's attempt to frame the issue as a question of law, the **insurance** company's declaratory action was merely contesting the administrative findings of fact by the IWCC. *Id.* at 586. *Kendall* went on to distinguish itself procedurally from *Skilling* in two ways. First, in *Skilling* the IWCC had not made any factual findings, and second, the **insurance** company in *Skilling* contested the authority or **jurisdiction** of the IWCC to hear the case. *Id.* at 587.

[P19]** This court is unpersuaded by Vasquez's argument and finds that the present case is easily distinguishable from the facts of *Kendall*, First, Hastings Mutual affirmatively states on the record that it sent notice of cancellation to the NCCI. Furthermore, Hastings Mutual asserts, and appellees do not rebut, that the notice of cancellation was not only received by the NCCI but was also logged **[*18]** into its system and stamped by the NCCI's unique date coding system. Second, the relevant facts in *Kendall* that distinguish its holding from *Skilling* are present in the

case *sub judice*, namely, Hastings Mutual's contesting the authority and/or the **jurisdiction** of the IWCC to Hear the underlying **workers' compensation** claim as well as the IWCC not yet making any factual findings.

[P20]** The lower court also conducted a section 2-619 analysis in its order granting Vasquez's and Ultimate Backyard's motions to dismiss. HN4 An appeal from a section 2-619 dismissal is the same in nature as one following a grant of summary judgment. *Carroll v. Paddock*, 199 Ill. 2d 16, 22, 764 N.E.2d 1118, 262 Ill. Dec. 1 (2002). In both instances, the reviewing court must ascertain whether the existence of a genuine issue of material fact should have precluded the dismissal, or absent such ah issue of fact, whether dismissal is proper as a matter of law. *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 178, 874 N.E.2d 1, 314 Ill. Dec. 91 (2007). A section 2-619 motion admits the legal sufficiency of the pleadings and raises defects, defenses, or other affirmative matters that act to defeat the claim. *Keating*, 401 Ill. App. 3d at 463. In ruling on a section 2-619 motion, **[*19]** the lower court may take under consideration all pleadings, affidavits and other proof presented by the parties. *People v. Philip Morris, Inc.*, 198 Ill. 2d 87, 90, 759 N.E.2d 906, 259 Ill. Dec. 845 (2001). On appeal, a court must determine whether there is a genuine issue of material fact, which should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law. *Carroll*, 199 Ill. 2d at 22.

[P21]** HN5 A section 2-619(a)(3) motion specifically applies in cases where there is another action pending between the same parties for the same cause. Under section 2-619(a)(3), it is the movant's burden to demonstrate by clear and convincing evidence that the two actions involve the same cause and the same parties; *Hapag-Lloyd (America), Inc. v. Home **Insurance** Co.*, 312 Ill. App. 3d 1087, 1090, 729 N.E.2d 36, 246 Ill. Dec. 36 (2000). Even in the case, where the movant has established both the same cause and parties, the lower court retains discretion to grant or deny the motion, section 2-619(a)(3) relief is not mandatory. *Id.; Kendall*, 295 Ill. App. 3d at 586. Finally, the trial court must also consider the potential prejudice to the nonmovant if the motion is granted versus the policy of avoiding duplicative litigation. *Kapoor v. Fujisawa Pharmaceutical Co.*, 298 Ill. App. 3d.780, 785-86, 699 N.E.2d 1095, 232 Ill. Dec. 910 (1998).

[P22]** **[*20]** HN6 Motions to dismiss are generally reviewed *de novo*, due to the fact that they typically do not require the lower court to determine credibility or weigh the facts present in the case. *Hapag-Lloyd (America), Inc.*, 312 Ill. App. 3d at 1090. This is not the case with section 2-619(a)(3), where the motion in fact urges the trial court to weigh several factors in order to make the determination of whether it is appropriate for an action to proceed. *Id.* Due to this weighing of evidence by the lower court, motions to dismiss under section 2-619(a)(3) are reviewed under an abuse of discretion standard, the required alternative. *Id.* at 1091.

[P23]** While a majority of the analysis on this motion has been fleshed out above, we find that *Kendall*, 295 Ill. App. 3d 582, 692 N.E.2d 752, 229 Ill. Dec. 763, is particularly instructive on this issue. There this court held that "[t]he circuit court and the **Commission** had **concurrent jurisdiction** over questions arising under the Act." *Id.* at 586. The court went on to state that based on the doctrine of primary **jurisdiction**, a circuit court should refer a matter to the appropriate administrative agency when that agency has a special expertise that would help resolve the controversy or where there **[*21]** is a need for a uniform standard. *Id.* The court also stated, however, that the circuit court should rule on questions of law when it could "'foreclose needless litigation.'" *Id.*

[P24]** Motion to Stay

[P25]** The last issue on appeal in this case is whether the lower court properly denied Hastings Mutual's motion to stay, which asked the lower court to halt proceedings before the IWCC until the circuit court made a decision regarding **insurance coverage**. As a threshold matter, appellees contend that this court does not have **jurisdiction** over Hastings Mutual's appeal regarding the denial of its motion to stay. Appellees argue that the stay order does not

qualify as an injunction and does not qualify as an appealable interlocutory order under Illinois Supreme Court Rule 307(a). Ill. S.Ct. R. 307(a) (eff. Feb. 26,2010). Appellees contend that there is no constitutional right to appeal from interlocutory orders and, therefore, this court lacks appellate **jurisdiction** over the stay order. They argue that a stay order does not qualify as an injunction under Rule 307(a), maintaining that the stay order merely related to the circuit court's inherent right to control its own docket, which are the type of orders **[*22]** that are not subject to interlocutory appeal. Furthermore, appellees contend that nowhere in Hastings Mutual's complaint did it plead the elements necessary to obtain an injunction such as hardship or irreparable harm.

[P26]** Appellees rely on *Short Brothers Construction, Inc. v. Korte & Luitjohan Contractors, Inc.*, 356 Ill. App. 3d 958, 828 N.E.2d 754, 293 Ill. Dec. 444 (2005), which dealt with whether an order by the trial court referring a case to mediation was subject to appeal under Rule 307 (a). *Short Brothers* held that the substance of the mediation order was to streamline the judicial process, which is clearly related to the circuit court's authority to control its own docket, and thus, was not appealable as an injunction under Rule 307(a). *Id.* at 960. *Short Brothers* further held that whether an order constitutes an appealable injunction is determined by the substance rather than the form of the order. *Id.* Appellees contend that this point further strengthens their contention that the stay order was administrative, not injunctive, regardless of how it was labeled.

[P27]** Hastings Mutual argues that the denial of the stay order was implicitly a denial of injunctive relief. Hastings Mutual also relies on *Short Brothers* for the **[*23]** proposition that the term "injunction" is to be construed broadly and actions of the circuit court which have the effect and force of injunctions are appealable, regardless of what the motion or order is called. *Id.*

[P28]** Despite the numerous cases cited by Hastings Mutual and appellees, this court finds numerous decisions that are dispositive on the issue. HN7 "Courts have treated the denial of a motion to stay as a denial of a request for a preliminary injunction." *Lundy v. Farmers Group, Inc.*, 322 Ill. App. 3d 214, 216, 750 N.E.2d 314, 255 Ill. Dec. 733 (2001). "A stay is considered injunctive in nature, and thus an order granting or denying a stay fits squarely within Rule 307 (a)." *Rogers v. Tyson Foods, Inc.*, 385 Ill. App. 3d 287, 288, 895 N.E.2d 97, 324 Ill. Dec. 97 (2008). "The denial of a stay by a trial court is treated as a denial of a request for a preliminary injunction, which is appealable under Rule 307(a)(1)." *Beard v. Mount Carroll Mutual Fire **Insurance** Co.*, 203 Ill. App. 3d 724, 727, 561 N.E.2d 116, 148 Ill. Dec. 810 (1990). Thus, this court has **jurisdiction** to hear the appeal of the lower court's order denying the motion to stay.

[P29]** HN8 The standard of review in an appeal of a motion to stay is abuse of discretion. *Zurich **Insurance** Co: v. Raymark Industries, Inc.*, 213 Ill. App. 3d 591, 594, 572 N.E.2d 1119, 157 Ill. Dec. 655 (1991). **[*24]** "In determining whether the circuit court abused its discretion, this court should not decide whether it agrees with the circuit court's decision, but rather, should determine whether the circuit court acted arbitrarily without the employment of conscientious judgment or exceeded the bounds of reason and ignored recognized principles of law so that substantial prejudice resulted." (Internal quotation marks omitted.) *Id.* at 594-95.

[P30]** We first note that while the order denying Hastings Mutual's motion to stay appears in the. record, the motion itself is not included in the appellate record and, therefore, cannot be considered. HN9 Any doubts that may arise from incompleteness of record will be resolved against appellant. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 76 Ill. Dec. 823 (1984). While the motion to stay is missing, the record does include a transcript of the in-depth hearing on the issue which will be ample for conducting a conclusive analysis. Hastings Mutual argues that the lower court should stop proceedings before the IWCC until the circuit court determines the issue of **insurance coverage**, which it believes is a question of law, and the circuit court, not the IWCC, is in the best position to address **[*25]** the issue. The appellees again contend that Hastings Mutual has presented a question of fact, which must be answered by the IWCC.

[P31]** HN10 It is undisputed that the courts of Illinois have original **jurisdiction** over all justiciable matters. Ill. Const. 1970, art. VI, 9. While the legislature generally cannot deprive circuit courts of this **jurisdiction,** an exception arises in administrative actions. The legislature may vest exclusive original **jurisdiction** in an administrative agency only when it has explicitly enacted a comprehensive statutory administrative scheme. *People v. NL Industries*, 152 Ill. 2d 82, 96-97, 604 N.E.2d 349, 178 Ill. Dec. 93 (1992). This court in *Skilling* held that the **Workers' Compensation** Act's pronouncement that "[a]ll questions arising under this Act *** shall *** be determined by the **Commission**" was insufficient to divest the circuit courts of **jurisdiction** and, therefore, the circuit court and the IWCC have **concurrent jurisdiction**." (Internal quotation marks omitted). *Skilling*, 163 Ill. 2d at 287. HN11 The doctrine of primary **jurisdiction** provides that even when the circuit court has **jurisdiction** over a matter, it should, in some instances, stay the judicial proceedings pending referral of the controversy **[*26]** to an administrative agency. Referral of the matter is proper so long as the administrative agency has a specialized or technical expertise that would help resolve the controversy, or where there is a need for uniform administrative standards. *Id.* at 288-89; *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 445, 493 N.E.2d 1045, 98 Ill. Dec. 24 (1986); *NL Industries*, 152 Ill. 2d at 95-96. We find that resolving the controversy at issue does not require the specialized expertise of the IWCC.

[P32]** This court finds the facts of *Skilling* to be most analogous to the case at hand and, therefore, finds its reasoning to be instructive. The question that is posed by Hastings Mutual asks the lower court to interpret section 4(b) of the **Workers' Compensation** Act. HN12 Interpretation of a statute is a question of law, which is best answered by the circuit court and one that does not require the specialized expertise of the IWCC. Therefore, the IWCC does not have primary **jurisdiction**, and as stated in *Kendall*, when there is a ruling on a question of law that could foreclose needless litigation, it is best addressed by the circuit court. *Kendall*, 295 Ill App. 3d at 586. We find that this is the exact situation present before us.

[P33]** **[*27]** For the above mentioned reasons, we find that the lower court abused its discretion in granting appellees' motions to dismiss and denying Hastings Mutual's motion to stay. We, therefore, reverse and remand. We direct the lower court to stay the proceedings before the IWCC on the underlying **workers' compensation** claim until it determines if the notice of cancellation that Hastings Mutual submitted to the NCCI met the statutory requirements of section 4(b) of the **Workers' Compensation** Act, relying on the undisputed fact that the NCCI logged and date stamped the notice of cancellation prior to its rejection.

[P34]** Reversed and remanded.

*2010 Ill. Wrk. Comp. LEXIS 416, **

JAVIER **VASQUEZ,** PETITIONER, v. THE **ULTIMATE BACKYARD** LLC, HASTINGS MUTUAL INSURANCE COMPANY AND ALEXI GIANNOULIAS, AS STATE TREASURERAND CUSTODIAN OF THE INJURED WORKERS' BENEFIT FUND, RESPONDENT.

No. 08WC 36073

ILLINOIS WORKERS' COMPENSATION COMMISSION

STATE OF ILLINOIS, COUNTY OF LAKE

2010 Ill. Wrk. Comp. LEXIS 416

April 21, 2010

CORE TERMS: notice, hearing date, ex parte hearing, advising, surgery, temporary total disability, proper notice, ex parte, Commission Rule, declaratory judgment action, certified mail, fee schedule, right leg, replacement, vacated, employment relationship, workers' compensation, average weekly wage, rules governing, timely notice, right knee, participating, accompanied, referencing, reflecting, defending, underwent, notified, complied, delivery

JUDGES: Molly C. Mason; Yolaine Dauphin; Nancy Lindsay

OPINION: [*1]

DECISION AND OPINION ON REVIEW

This matter comes before the Commission on Respondent Hastings Mutual Insurance Company's timely review of the Decision of Arbitrator Fratianni in this Section 19(b) matter finding that on May 7, 2008, Petitioner and Respondents, The **Ultimate Backyard** LLC and Hastings Mutual Insurance Company, were operating under and subject to the provisions of the Act; that on May 7, 2008, an employment relationship existed between Petitioner and Respondent, The **Ultimate Backyard** LLC; that on May 7, 2008, Petitioner sustained accidental injuries arising out of and in the course of his employment with Respondent, The **Ultimate Backyard** LLC; that Petitioner provided Respondent, The **Ultimate Backyard** LLC, with timely notice of said injuries, that Petitioner established a causal connection between the accident of May 7, 2008 and his right leg condition of ill-being; that Petitioner's average weekly wage was $ 810.00; that Petitioner was 42 years old and single with no children under age 18 as of the date of accident, that the medical care Petitioner underwent for his injuries was reasonable and

4. Arbitrator Fratianni originally scheduled a Section 19(b) hearing for April 27, 2009 but continued this hearing to May 19, 2009. No record was made on April 27, 2009.

5. On May 19, 2009, Petitioner filed a Second Amended Application naming The **Ultimate Backyard** LLC, The **Ultimate Backyard** Company, Hastings Mutual Insurance Company and the State Treasurer, as custodian of the Injured Workers' Benefit Fund, (hereinafter "Injured Workers' Benefit Fund") as Respondents.

6. On May 19, 2009, Arbitrator Fratianni continued the Section 19(b) hearing to June 15, 2009, at which time the matter was set for hearing on June 19, 2009. No record was made on May 19, 2009 or June 15, 2009. The case proceeded to an ex parte hearing before Arbitrator Fratianni on June **[*6]** 19, 2009, with only one of the named Respondents, the Injured Workers' Benefit Fund, participating.

7. At the Arbitrator's request, Petitioner's counsel made a statement on the record on June 19, 2009 concerning the issue of notice. Petitioner's counsel represented that he notified Respondent The **Ultimate Backyard** LLC of the May 19, 2009, June 15, 2009 and June 19, 2009 hearing dates by sending "multiple certified letters" directly to said Respondent, with the last such letter being sent on June 11, 2009, and by sending letters by regular and certified mail to an attorney who was representing said Respondent "in an ancillary matter." Petitioner's counsel further represented that he notified Respondent Hastings Mutual Insurance Company of the May 19, 2009 hearing date via regular and certified mail to Ms. Dawn Henion. T. 6.

8. At the June 19, 2009 hearing, Petitioner's counsel offered the aforementioned Notice of Motion and Petitions as well as the following evidence on the issue of notice:

a) a letter dated March 3, 2009 from Dawn Henion of Hastings Mutual Insurance Company (hereafter "Henion") to The **Ultimate Backyard** LLC referencing an earlier letter of October 23, 2008 (in which **[*7]** Hastings had "tentatively accepted" Petitioner's claim under a reservation of rights) and advising that a declaratory judgment had since been filed and that no voluntary payments would be made toward the claim;

b) a letter dated April 30, 2009 from Petitioner's counsel to Howard Miller of Fichera & Miller advising Miller of the May 19, 2009 hearing before Arbitrator Fratianni;

c) letters dated May 8, 2009 from Petitioner's counsel to Jason Landry of The **Ultimate Backyard** LLC (hereafter "Landry") and Henion, advising of the May 19, 2009 hearing (with the letter to Landry reflecting that the word "June" was substituted for the word "May" in reference to the hearing date);

d) undated certified mail receipts signed by Landry (on behalf of The **Ultimate Backyard)** and Christian Alh (illegible, on behalf of Hastings Mutual Insurance Company);

e) an E-mail sent on May 14, 2009 by Henion to Petitioner's counsel acknowledging receipt of the May 8, 2009 letter and attaching an earlier letter dated "March 3rd" indicating that Hastings Mutual Insurance Company had "filed a declaratory judgment action and [would] not be defending" Petitioner's claim;

f) an excerpt from a June 9, 2009 **[*8]** letter from Hastings Mutual Insurance Company's present counsel, Gregory Vacala, to Howard Miller of Fichera & Miller indicating, in relevant part, that "Hastings Mutual Insurance Company will not be defending The **Ultimate Backyard** LLC at the Workers' Compensation Commission, whether pursuant to the request for trial on June 15, 2009 or otherwise";

g) a letter dated June 11, 2009 from Petitioner's counsel to Landry advising of the

necessary; that Respondents, The **Ultimate Backyard** LLC, and Hastings Mutual **[*2]** Insurance Company, are jointly and severally liable for Petitioner's outstanding medical expenses totaling $ 5,596.49, subject to the fee schedule; that Respondents, The **Ultimate Backyard** LLC, and Hastings Mutual Insurance Company, are liable for the charges of $ 119,025.94 paid by Blue Cross/Blue Shield of Illinois, subject to the fee schedule; that Respondent, Hastings Mutual Insurance, is entitled to credit for the $ 2,065.00 it previously paid toward Petitioner's medical expenses; that Petitioner was temporarily totally disabled from May 8, 2008 through June 19, 2009, the date of the Section 19(b) hearing, with Respondent, Hastings Mutual Insurance Company, receiving credit for the benefits it paid prior to arbitration; that Respondents, The **Ultimate Backyard** LLC and Hastings Mutual Insurance Company, are liable for Section 19(k) penalties in the amount of $ 70,644.96, Section 19(l) penalties in the amount of $ 10,000.00 and Section 16 attorney fees in the amount of $ 28,257.98, that Respondents, The **Ultimate Backyard** LLC and Hastings Mutual Insurance Company, are not entitled to any credit under Section 8(j) that, by virtue of Respondent Hastings Mutual Insurance Company's failure **[*3]** to notify either the Commission or NCCI of the cancellation of Respondent The **Ultimate Backyard** LLC's workers' compensation insurance policy, said Respondent remains jointly liable with Respondent, The **Ultimate Backyard** LLC, for Petitioner's claim; that no finding of liability can be imposed upon Respondent, The Injured Workers' Benefit Fund; and that Respondents, The **Ultimate Backyard** LLC and Hastings Mutual Insurance Company, are ordered to authorize and pay for the right knee replacement surgery recommended by Petitioner's physicians, along with all subsequent medical expenses and periods of temporary total disability stemming from said surgery.

The issues on review are jurisdiction, whether the Arbitrator erred in denying Respondent Hastings Mutual Insurance Company's Motion to Vacate Arbitration Proceedings, whether the Arbitrator erred in proceeding with an ex parte hearing, whether said hearing deprived Respondent Hastings Mutual Insurance Company of due process, and whether the Arbitrator erred in awarding penalties and fees.

After considering the entire record, and for the reasons stated below, the Commission finds that Petitioner failed to comply with Commission Rules **[*4]** 7030.20(c) and 7020.70 and the Arbitrator thus erred in proceeding with an ex parte hearing. The Commission reverses the Arbitrator's findings as to all issues and remands the case to the Arbitrator for further proceedings consistent with this Decision pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322 (1980).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Commission finds:

1. On August 18, 2008, Petitioner filed an Application alleging that he sustained injuries to his right leg while working for Respondent The **Ultimate Backyard** LLC on May 7, 2008.

2. On November 7, 2008, Petitioner filed a First Amended Application naming The **Ultimate Backyard** LLC, The **Ultimate Backyard** Company and Hastings Mutual Insurance Company as Respondents.

3. On March 25, 2009, Petitioner filed a Notice of Motion (reflecting a hearing date of April 17, 2009), a Petition for Immediate Hearing Pursuant to Section 19(b) and a Petition for Penalties and Fees. Although the Notice of Motion is directed to Hastings Mutual Insurance, neither the Notice nor the Petitions list any Respondent other than The **Ultimate Backyard** LLC. In the Petition **[*5]** for Penalties and Fees, Petitioner alleged that he underwent several surgeries as a result of his right leg injuries, that he received temporary total disability benefits and medical benefits from October 23, 2008 through March 3, 2009, and that, while the workers' compensation carrier had originally authorized a total knee replacement, it had subsequently decided to deny the claim and instead pursue a declaratory judgment action.

June 19, 2009 hearing date;

h) an E-mail dated June 11, 2009 sent by Petitioner's counsel to Henion acknowledging receipt of Henion's E-mail of May 14, 2009 and advising of the June 19, 2009 hearing date.

PX 6. Petitioner's counsel also made the following statement: "It has been made abundantly clear to me that neither Respondent has any intention of participating in this proceeding. They have been made aware of it and have made it crystal clear that they do not intend to participate and therefore I ask to move forward ex parte." T. 8. After the attorney representing the Injured Workers' Benefit Fund indicated he had nothing to add on the issue of notice, the Arbitrator allowed Petitioner to proceed ex parte. T. 8.

9. On September 10, 2009, **[*9]** the Arbitrator issued a Decision finding, inter alia, that Petitioner complied with all of the applicable Commission rules governing ex parte hearings and that the June 19, 2009 ex parte hearing was thus proper. Specifically, the Arbitrator found that Petitioner served proper notice "on all Respondents" on March 3, 2009, for the April 17, 2009 Waukegan call date, and that Petitioner again served proper notice "on all Respondents" for the May 19, 2009 and June 19, 2009 trial dates. The Arbitrator also found that "in spite of receiving certified notice" of the hearings, Respondents The **Ultimate Backyard** LLC and Hastings Mutual Insurance Company failed to appear at those hearings. The Arbitrator found that Petitioner established an employment relationship with Respondent The **Ultimate Backyard** LLC. The Arbitrator also found that Petitioner established accident, timely notice, causation and an average weekly wage of $ 810.00. As against Respondents The **Ultimate Backyard** LLC and Hastings Mutual Insurance Company only, the Arbitrator awarded 58 2/7 weeks of temporary total disability benefits, $ 5,596.49 in medical expenses pursuant to the fee schedule, $ 10,000.00 in Section **[*10]** 19(l) penalties, $ 70,644.96 in Section 19(k) penalties, $ 28,257.98 in Section 16 attorney fees and prospective care in the form of right knee replacement surgery, along with "all medical expenses and temporary total disability expenses arising out of" said surgery. The Arbitrator specifically found the Injured Workers' Benefit Fund "not liable for any amounts awarded."

10. Respondent Hastings Mutual Insurance Company filed a timely Petition for Review on September 21, 2009.

11. The Commission disagrees with the Arbitrator's finding that Petitioner complied with all of the applicable rules governing Section 19(b) and ex parte hearings.

Commission Rule 7020.70(b) requires that any motion for immediate hearing pursuant to Section 19(b) "shall be served on the Arbitrator and on all other parties 15 days preceding the status call day set forth in the notice." Commission Rule 7020.70(c) provides that proof of service of notices by delivery or mail shall be affixed by affidavit of the person making the delivery or depositing the papers in the mail. The Commission finds that Petitioner failed to provide proper notice of the June 19, 2009 Section 19(b) hearing to Respondent Hastings Mutual **[*11]** Insurance Company. While Petitioner mailed a Notice of Motion of such a hearing to Respondent Hastings Mutual Insurance Company on March 25, 2009, and while the Notice of Motion is accompanied by a certificate of mailing, the Notice references a hearing date of April 17, 2009. The transcript contains no Notice of Motion referencing a June 2009 hearing date. The E-mail that Petitioner's counsel sent to Henion on June 11, 2009 did not comport with Rule 7020.70(b).

Commission Rule 7030.20 (c)(1) requires that, if the parties do not agree to set a case for trial, "any party may file a motion requesting a date certain for trial" but that said motion "must be accompanied by a form provided by the [Commission] called a Request for Hearing, which sets forth the moving party's claims on each issue" (emphasis added). At the oral arguments held

before the Commission, Petitioner's counsel acknowledged that he never served a completed Request for Hearing on The **Ultimate Backyard** LLC or Hastings Mutual Insurance Company. Based on the communications he had received from Vacala and Henion, he felt it would have been an exercise in futility to serve this form.

The Commission has heretofore vacated **[*12]** Decisions based on a party's failure to provide adequate notice and/or serve a completed Request for Hearing form. See, e.g, Fry v. Gateway Auto Auction, 8 IWCC 1252. Because Petitioner failed to establish that he provided proper notice of the June 19, 2009 hearing and that he served the requisite completed Request for Hearing form, the Commission finds that the June 19, 2009 ex parte hearing was improper. Accordingly, the Commission vacates the Decision of the Arbitrator and remands this case to the Arbitrator for further proceedings consistent with this Decision.

12. As a final matter, the Commission strikes certain statements (concerning the actions of Hastings' prior counsel, Hastings' decision to retain new counsel, the progress of the declaratory judgment action, and communications with the Director of Insurance) that appear on pages two, four, five and six of Petitioner's response brief as these statements refer to matters outside the record. The Commission is precluded from considering new evidence on review.

IT IS THEREFORE ORDERED BY THE COMMISSION that the Decision of the Arbitrator is reversed and vacated and that this case is remanded **[*13]** to the Arbitrator for additional proceedings consistent with this Decision.

This Decision is interlocutory and non-appealable.

Dated: APR 21 2010

Legal Topics:

For related research and practice materials, see the following legal topics:
Administrative Law > Agency Rulemaking > Notice Requirements

Workers' Compensation & SSDI > Administrative Proceedings > Claims > Time Limitations > Notice Periods

Workers' Compensation & SSDI > Compensability > Injuries > Accidental Injuries