2017 IL App (1st) 160002WC

Opinion filed: February 24, 2017

NO. 1-16-0002WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CARL CRITTENDEN, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.* (City of Chicago, Appellee).	)))))))))	Appeal from the Circuit Court of Cook County. No. 15-L-50296 Honorable Edmund Ponce De Leon, Judge, presiding.

JUSTICE MOORE delivered the judgment of the court, with opinion.
Presiding Justice Holdridge and Justices Hoffman, Hudson, and Harris concurred in the judgment and opinion.

OPINION

¶ 1 The claimant, Carl Crittenden, appeals the judgment of the circuit court of Cook County, which confirmed the decision of the Illinois Workers' Compensation Commission (Commission), in favor of the employer, the City of Chicago (City). An arbitrator awarded the claimant, *inter alia*, a wage differential pursuant to section 8(d)(1) of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)(1) (West 2012)), and the Commission reduced the amount of the wage differential. The circuit court entered a

judgment confirming the Commission's decision. The claimant now appeals the circuit court's judgment. For the following reasons, we reverse, vacate the Commission's decision, and remand this matter to the Commission with directions.

¶ 2 FACTS

¶ 3 The claimant filed an application for benefits under the Act. 820 ILCS 305/1 *et seq.* (West 2012)). An arbitration hearing was conducted on January 4, 2013, wherein the following evidence was presented. The claimant testified that he was employed by the City as a sanitation laborer for 27 years. He injured his lower back on April 11, 2008, while bending over, lifting a bag of compost, and throwing it into the back of a garbage truck.

¶ 4 After receiving medical treatment, the claimant saw Dr. Kern Singh on September 3, 2009. Dr. Singh recommended that the claimant undergo a functional capacity evaluation (FCE), which was conducted on October 17, 2009. The FCE indicated that the claimant reported current work limitations of 20 pounds of lifting—with additional limitations on bending and standing—and such restrictions could not be accommodated by his employer. The FCE concluded that the claimant could only meet light physical demands and could not satisfy the physical requirements of his previous job. The FCE further indicated that the claimant was at maximal functional improvement, and recommended that he never lift more than 20 pounds on an occasional basis; and up to approximately 13 pounds on a more frequent basis. Further restrictions included no pushing or pulling with greater than 40 pounds of force; no frequent or repetitive bending

or twisting; positional changes as needed to avoid constant standing, walking, or sitting over a full workday; and no walking for more than 10 minutes.

¶ 5 The claimant returned to Dr. Singh on March 18, 2010. After conducting an independent medical re-examination (IME), Dr. Singh concurred that the claimant is able to perform only light duty work—with a 20 pound lifting restriction—and advised that the restriction is permanent and the claimant has reached his maximum medical improvement (MMI). The claimant was subsequently examined by Dr. Samuel Chmell on March 27, 2010. Dr. Chmell agreed that the claimant had reached his MMI and can never return to his regular job due to the permanent physical restrictions.

¶ 6 The claimant testified that he met Steven Blumenthal, who conducted a vocational rehabilitation assessment on July 27, 2010. Blumenthal did not testify at the hearing, but his report was submitted by the claimant and admitted into evidence as Petitioner's Exhibit 7. The claimant testified that he told Blumenthal that he lost his driver's license following a DUI. Blumenthal's report states that the claimant informed him that he was arrested for DUI in 1995, that his driver's license was suspended after he received two speeding tickets, and that he expected to have his license reinstated in December 2010. The claimant told Blumenthal that he graduated from high school in 1980, but he testified at the hearing that he had neither graduated nor completed his GED.

¶ 7 Blumenthal's detailed report contains an array of information, including background and medical information based on his interview with the claimant as well as the results of numerous vocational evaluation tests. Regarding the claimant's work history, Blumenthal's report states that during the six months immediately preceding his

injury, he worked part-time cleaning a hospital, where he earned $12 per hour. He also worked part-time as a customer service supervisor for Target from 1997 to 2003, earning $11 per hour. The claimant informed Blumenthal that he is currently able to perform customer service work.

¶ 8 Blumenthal lists several occupations in his report that he opines may be suitable for the claimant in his current physical condition. These include cashier, retail salesperson, counter and rental clerk, hotel, motel, and resort desk clerk, school bus driver, and security guard. Blumenthal lists, based on data from the Illinois Department of Employment Security, the entry hourly wage and the median hourly wage for each occupation. However, Blumenthal notes as follows with regard to these positions:

> "***it is also very clear that [the claimant] will require specialized job placement assistance to identify job settings where his physical abilities can be accommodated by the employer. Certain job descriptions [*sic*] as an unarmed security guard in a gated community or industrial guard shack where [the claimant] could sit/stand as needed, or as a school bus driver where he could get in and out of the bus to change positions would be consistent with his documented physical abilities [*sic*] ([the claimant] stated he enjoyed driving workers around in the past). Customer service and cashiering, or even hotel clerk positions would require specific accommodations being made by the employer."

¶ 9 Blumenthal notes that the claimant would be a good candidate for vocational rehabilitation job placement services. The report concludes that the claimant will earn $8.25 to $13.78 per hour. Blumenthal notes earlier in his report that $8.25 was the

current minimum wage in Illinois at the time of the report. The highest median wage listed in Blumenthal's list of suggested occupations for the claimant is $13.78, the median wage for a school bus driver.

¶ 10 Julie Bose testified on behalf of the City that she is employed by MedVoc Rehabilitation as a rehabilitation counselor. She met the claimant on October 3, 2011, and conducted an initial vocational rehabilitation evaluation. At the meeting, the claimant informed Bose that he never graduated from high school nor obtained a GED. Accordingly, Bose recommended a GED program so the claimant could obtain a high school diploma and have more job opportunities. Bose additionally recommended computer classes and job placement services. She acknowledged that the claimant could not return to his previous job due to his physical limitations, and noted his desire to return to work in retail and customer service.

¶ 11 Bose testified that, as part of his program, the claimant was asked to contact a minimum of 10 prospective employers per week, with half of those in person. Bose explained that MedVoc sends weekly job leads. She recommended that the claimant follow up with all of the job leads, and send confirmations to MedVoc as he completed applications for employment. After the evaluation, Bose had only indirect contact with the claimant by reviewing his weekly job logs. She indicated that the claimant was not fully compliant with the program and that his level of compliance decreased over time. Bose specified that by April 2012, the claimant was not submitting attendance sheets from the GED classes, nor any documentation on the weekly job leads. Bose further noted the inconsistencies regarding his alleged contacts with potential employers. For

example, the claimant stated that he personally went to a certain company on March 23, 2012, but the company had relocated in 2008, making it impossible for the claimant to have contacted the company at the alleged location.

¶ 12 Bose testified that when she first met with the claimant, he informed her that he had two recent DUIs and no driver's license. Knowing that employers generally require reliable transportation, Bose asked the claimant about the possibility of having his driver's license reinstated. The claimant replied that he could not get his license back any time soon. To Bose's knowledge, the claimant never obtained his driver's license while participating in the program.

¶ 13 Bose admitted that none of the job searches submitted to her by the claimant revealed what the jobs paid and that none of her reports provide the wages of any of the suggested jobs because employers do not provide such information until after an interview and sometimes only concurrent with a job offer. The City offered no evidence of the claimant's post-injury earnings potential.

¶ 14 Following the hearing, the arbitrator found, *inter alia*, that the claimant sustained injuries on April 11, 2008, that arose out of and in the course of his employment with the City. The arbitrator further found that the claimant was partially incapacitated from pursuing his usual and customary line of employment as a result of the accident, and accordingly, is entitled to benefits under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)). The arbitrator found that the claimant's injuries resulted in a loss of earnings as provided in section 8(d)(1), and proceeded to calculate the amount of the claimant's wage differential. In so doing, the arbitrator noted that there is no dispute that

the claimant would be earning $32.79 per hour if he were able to perform his job with the employer. The arbitrator noted that the vocational experts agreed that cashier and customer service jobs should be targeted for the claimant and that the claimant had earned $11.00 per hour when he left his part-time job at Target. Additionally, the arbitrator noted that Blumenthal gave a range of projected earnings of $8.25 to $13.78 per hour. The arbitrator then stated that "[t]he arbitrator selects $11.00 per hour as a reasonable wage.[1]" The arbitrator then arrived at a wage differential rate of $581.06 per week "by multiplying $32.79 by 40 hours to arrive at $1,311.60, subtracting $440.00 ($11.00 per hour x 40) to arrive at $871.60, and dividing that by 2/3.[2]" Accordingly, the arbitrator ordered the City to pay the claimant wage differential benefits in the amount of $581.06 per week from April 9, 2012, through January 4, 2013, and continuing thereafter for the duration of the claimant's disability.

¶ 15 The City sought review of the arbitrator's decision before the Commission. On review, the Commission found, *inter alia*, as follows:

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[1] We note that the arbitrator could have selected $11.00 based on the evidence that the claimant earned this wage at his past job at Target or by averaging the range suggested by Blumenthal ($8.25 + $13.78 = $22.03/2 = $11.015).

[2] We note that rather than dividing $871.60 by 2/3, the arbitrator actually found 2/3 of $871.60 by dividing $871.60 by 3, which equals $290.53, and multiplying that by 2, which equals $581.06.

> "Taking the evidence as a whole, the Commission agrees that the [claimant] has clearly shown entitlement to a wage differential[;] however[,] his lack of effort in obtaining alternative suitable employment leads us to determine that he is capable of earning the highest amount that Mr. Blumenthal opined he was capable of earning, $13.78 per hour. We note that while the Respondent could have initially provided more assistance to the [claimant] than it did, but (*sic*) this does not absolve the [claimant's] responsibility to do his best and give his best effort in finding alternative employment. In this case, we do not believe he provided such effort, and as a result have determined the proper weekly wage differential should be $506.93 per week."[3]

¶ 16 The claimant appealed the Commission's decision to the circuit court of Cook County, which confirmed the Commission's decision on December 17, 2015. The claimant now appeals to this court.

¶ 17 ANALYSIS

¶ 18 The sole issue on appeal is whether the circuit court erred by confirming the Commission's decision regarding the amount of the wage differential award. Initially, we note the parties disagree regarding the standard of review. The claimant contends that the

[3] In order to arrive at $506.93 per week, the Commission multiplied $32.79 by 40 hours to arrive at $1,311.60, subtracting $551.20 (13.78 x 40) to arrive at $760.40, and finding 2/3 of that number by first dividing by 3 and then multiplying by 2 ($760.40/3 = 253.46 x 2 = $506.93.)

issue is one of statutory interpretation and is reviewed *de novo*. See *Cassens Transport Co. v. Industrial Comm'n*, 218 Ill. 2d 519, 524 (2006). On the other hand, the City argues that the Commission's calculation of an employee's wage differential award is a factual finding, which will not be set aside on review unless it is against the manifest weight of the evidence. See *Copperweld Tubing Products, Co. v. Illinois Workers' Compensation Com'n*, 402 Ill. App. 3d 630, 635 (2010). We find both of these statements to be correct, depending on the issue presented. First, as discussed in further detail below, we find that the issue raised in this case requires this court to interpret the language of the Act. To that extent, we employ a *de novo* standard of review. See *Cassens Transport Co.*, 218 Ill. 2d at 524. However, once we have set forth the proper interpretation of the Act, the issue of whether the Commission properly calculated the wage differential award under the statute as we have interpreted it is subject to a manifest weight of the evidence standard of review. See *Copperweld Tubing Products, Co.*, 402 Ill. App. 3d at 635.

¶ 19 The calculation of a wage differential award is governed by section 8(d)(1) of the Act, which provides:

> "If, after the accidental injury has been sustained, the employee as a result thereof becomes partially incapacitated from pursuing his usual and customary line of employment, he shall *** receive compensation for the duration of his disability, *** equal to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and *the average amount which he *** is able to earn in some suitable employment or business after the accident.*"

(Emphasis added.) 820 ILCS 305/8(d)(1) (West 2012).

¶ 20 "To qualify for a wage differential under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)), a claimant must prove (1) partial incapacity which prevents him from pursuing his 'usual and customary line of employment' and (2) an impairment of earnings." *Gallianetti v. Illinois Industrial Comm'n*, 315 Ill. App. 3d 721, 730 (2000). In order to prove an impairment of earnings, a claimant must prove his actual earnings for a substantial period before the accident and after he returns to work, or in the event that he has not returned to work, he must prove what he is able to earn in some suitable employment. *Id.* Once the claimant provides evidence of these amounts, it is the Commission's function to use the formula provided in section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)) to calculate the amount of the wage differential.

¶ 21 Whether the claimant is entitled to a wage differential is not an issue on appeal. However, the claimant takes issue with the Commission's method of determining "the average amount which [he] is able to earn in some suitable employment or business after the accident." Although Illinois courts have previously set forth the proper standard to be employed in determining "the average amount which [an employee] would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident" (see, *i.e.*, *Deichmiller v. Industrial Comm'n*, 147 Ill. App. 3d 66, 71-74 (1986); *Old Ben Coal, Co. v. Industrial Comm'n*, 198 Ill. App. 3d 485, 493 (1990)), no Illinois court has set forth an interpretation of the particular method the Commission is required to use to establish "the average amount which [the employee] is able to earn in some suitable employment or business after the accident," in the event that

the employee has not returned to work. Accordingly, we find this to be an issue of first impression and proceed to interpret the Act to resolve this legal issue.

¶ 22 With regard to the interpretation of the Act, the Illinois Supreme Court has provided as follows:

> "In interpreting the Act, our primary goal is to ascertain and give effect to the intent of the legislature. [Citation.] We determine this intent by reading the statute as a whole and considering all the relevant parts. [Citations.] We must construe the statute so that each word, clause, and sentence is given a reasonable meaning and not rendered superfluous, avoiding an interpretation that would render any portion of the statute meaningless and void. [Citation.] We interpret the Act liberally to effectuate its main purpose: providing financial protection for injured workers. [Citation.]" *Cassens Transport Co.*, 218 Ill. 2d at 524.

¶ 23 Here, the relevant statutory language is straightforward and succinct. In making the calculation of a wage differential under section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2012)), the Commission must determine "the average amount which [the claimant] is able to earn in some suitable employment or business after the accident." In calculating this average amount, if the claimant is working at the time of the calculation, the claimant must prove his actual earnings for a substantial period after he returns to work, and the Commission may apply his then current average weekly wage to the calculation. See *Gallianetti*, 315 Ill. App. 3d at 730; see also, *Levato v. Workers' Compensation Comm'n*, 2014 IL App (1st) 130297WC, ¶29-¶30. However, as in the case at bar, if the claimant is not working at the time of the calculation, the Commission must

rely on functional and vocational expert evidence.[4] See *Gallianetti*, 315 Ill. App. 3d at 730 (labor market survey); *Levato*, 2014 IL App (1st) at ¶12-¶13 (vocational rehabilitation specialist and labor market survey); *United Airlines, Inc.*, 2013 IL App (1st) 121136WC at ¶4-¶7 (vocational rehabilitation specialists).

¶ 24 In addition, where the claimant is not working at the time of the hearing, it is important to note that section 8(d)(1) requires that an average wage be derived from suitable employment for the claimant. Suitable employment is employment in which the claimant is both able and qualified to perform. See Merriam-Webster's Collegiate Dictionary, 1249 (11th ed. 2006) (definition of "suitable" in relation to a candidate for a job is "able and qualified"). For all of these reasons, we hold that in order to calculate a wage differential award, the Commission must identify, based on the evidence in the record, an occupation that the claimant is able and qualified to perform, and apply the average wage for that occupation to the wage differential calculation. As a corollary to this holding, the claimant is required to introduce evidence sufficient for the Commission to identify an occupation that the claimant is able and qualified to perform, and the

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[4] We note that in the case where the claimant is working at the time of the calculation, but functional and/or vocational evidence is submitted which is sufficient to determine another suitable occupation for the claimant, there is nothing in section 8(d)(1) of the Act (820 ILCS 8(d)(1) (West 2012)) that would prevent the Commission from utilizing such evidence to determine the average wage the claimant could make in some suitable employment as set forth in this opinion, and *vice versa*.

average wage for that occupation. In any case where the Commission identifies an occupation that the claimant is able and qualified to perform, as well as the average wage for that occupation, and applies that average wage to the appropriate part of the formula, the Commission's determination becomes a factual determination, and thus will not be disturbed unless it is against the manifest weight of the evidence. See *Copperweld Tubing Products, Co.*, 402 Ill. App. 3d at 635.

¶ 25 Having set forth the precise method that the Commission must utilize in determining "the average amount [the claimant] is able to earn in some suitable employment or business after the accident," we turn to the Commission's decision in order to determine whether it was against the manifest weight of the evidence. See *Copperweld Tubing Products, Co.*, 402 Ill. App. 3d at 635. In its decision, the Commission used $13.78 as the average amount the claimant is able to earn. However, the Commission did not identify a suitable occupation for the claimant and, accordingly, did not identify $13.78 as the average amount the claimant is able to earn in any suitable occupation. Rather, the Commission found that the claimant's lack of effort in obtaining alternative suitable employment led the Commission to find that the claimant is capable of earning the highest amount that Mr. Blumenthal opined he was capable of earning, which was $13.78 per hour. Nevertheless, if, based on the record, this court can identify said occupation and average wage of $13.78, we will affirm the Commission's determination. See *Comfort Masters v. Workers' Compensation Comm'n*, 382 Ill. App. 3d 1043, 1045-46 (2008) (quoting *Butler Manufacturing Co. v. Industrial Comm'n*, 140 Ill. App. 3d 729, 734 (1986)) (" '[w]e will affirm *** the Commission's decision if there

is any legal basis in the record which would sustain that decision, regardless of whether the particular reasons or findings contained in the decision are correct or sound.' ").

¶ 26 Turning to the record, $13.78 was identified in Blumenthal's report as the average wage of a school bus driver. However, the record is clear that, at the time of the hearing, the claimant did not possess a driver's license. As such, he was not qualified for the occupation of school bus driver. In addition, there is no other evidence in the record reflecting an occupation that the claimant is able and qualified to perform that has an average wage of $13.78 per hour. Accordingly, the Commission's calculation of the claimant's wage differential is against the manifest weight of the evidence. As such, the circuit court's judgment confirming the Commission's decision must be reversed, the Commission's wage differential award vacated, and this cause remanded to the Commission for further proceedings, including the identification by the Commission of an occupation the claimant is able and qualified to perform, and a calculation of the wage differential using the average wage of that occupation.

¶ 27 CONCLUSION

¶ 28 For the foregoing reasons, we reverse the judgment of the circuit court that confirmed the Commission's decision, vacate the Commission's decision, and remand this matter to the Commission with directions that the Commission recalculate the claimant's wage differential in accordance with this opinion.

¶ 29 Circuit court judgment reversed.

¶ 30 Commission decision vacated and cause remanded to the Commission with directions.

STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

CARL CRITTENDEN,

Petitioner,

vs. NO: 08 WC 19505

14IWCC0884

CITY OF CHICAGO,

Respondent.

DECISION AND OPINION ON REVIEW

Timely Petition for Review having been filed by the Respondent herein and notice given to all parties, the Commission, after considering the issue of the nature and extent of the Petitioner's injury, and being advised of the facts and law, modifies the Decision of the Arbitrator as stated below and otherwise affirms and adopts the Decision of the Arbitrator, which is attached hereto and made a part hereof.

The Commission agrees with the Arbitrator that the Petitioner has proven entitlement to a wage differential award under §8(d)(1) of the Illinois Workers' Compensation Act. However, the Commission finds that the Petitioner is entitled to a different amount than that awarded by the Arbitrator.

Pursuant to §8(d)(1), in a wage differential scenario, the claimant is entitled to 66-2/3% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident.

In this case, the Arbitrator calculated the weekly wage differential to be $581.06 per week, starting as of April 9, 2012, and continuing thereafter for the duration of the Petitioner's disability. She indicated that there was no real dispute that the Petitioner, but for being injured,

would have been earning $32.79 per hour in his pre-injury job with Respondent (see Petitioner's Exhibit 10). She then noted that the two vocational experts who evaluated Petitioner and opined on his earning potential, Julie Bose and Steve Blumenthal, essentially determined Petitioner was capable of earning $8.25 to $13.78 per hour in suitable employment per §8(d)(1). She found that $11.00 per hour would be reasonable, and then determined the weekly wage differential by multiplying each weekly wage by 40 hours ($1,311.60 for the former, $440.00 for the latter), subtracted the weekly wage Petitioner was capable of earning from what he would have been earning but for the injury, and took 66-2/3% of that figure, as required by §8(d)(1).

The Commission finds that it is more reasonable in this case to determine, based on a review of all of the evidence, that the Petitioner is capable of earning $13.78 per hour. This results in a weekly wage differential of $506.93. The Commission believes that the Petitioner did not provide the effort that he should have in performing his job search, and exaggerated the difficulties he encountered in dealing with the Respondent's initial method of vocational assistance. While the Arbitrator indicates she did not find that Petitioner's participation in GED classes was vital to his finding work, the Commission believes that his lack of full participation was evidence of a lack of effort on his part. This lack of effort was also supported by the testimony of Julie Bose, who indicated that over time Petitioner's compliance deteriorated, in that he was not submitting his GED attendance sheets, was not following up on provided job leads and was not submitting weekly documentation. She also noted inconsistencies in the contacts he did provide, including one contact at a location that had been out of business for some time prior to the alleged contact. In reviewing his job logs (Respondent's Exhibit 1), it is clear that he often would return to the exact same locations he previously contacted versus making new contacts. When Bose requested that Petitioner sign off on a release form to obtain his attendance records for his GED classes, Petitioner refused to do so. Petitioner's complaints of a weekly 3 hour round trip ride via public transportation to drop off his job search records to Chicago City Hall also support a lack of true effort on his part to locate employment and to work with the program. While such travel may not have been pleasant, the time consumption he reported is difficult to believe given his residential location and the City Hall location he had to provide his records to.

When a claimant is receiving weekly benefits while performing a search for alternative employment, the search is his "job" during this time. Taking the evidence as a whole, the Commission agrees that the Petitioner has clearly shown entitlement to a wage differential, however his lack of effort in obtaining alternative suitable employment leads us to determine that he is capable of earning the highest amount that Mr. Blumenthal opined he was capable of earning, $13.78 per hour. We note that while the Respondent could have initially provided more assistance to the Petitioner in his job search than it did, but this does not absolve the Petitioner's responsibility to do his best and give his best effort in finding alternative employment. In this case, we do not believe he provided such effort, and as a result have determined the proper weekly wage differential should be $506.93 per week.

IT IS THEREFORE ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $758.84 per week for a period of 100 weeks, from April 12, 2008 through April 27, 2008 and from April 30, 2008 through March 15, 2010, that being the period of temporary total incapacity for work under §8(b) of the Act.

14IWCC0884

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent pay to Petitioner the sum of $758.84 per week for a period of 107-6/7 weeks, from March 16, 2010 through April 8, 2012, that being the period of temporary partial incapacity for work under §8(a) of the Act.

IT IS FURTHER ORDERED BY THE COMMISSION that commencing on April 9, 2012, Respondent pay to Petitioner the sum of $506.93 per week for the duration of Petitioner's disability, as provided in §8(d)(1) of the Act, for the reason that the injuries sustained permanently incapacitated Petitioner from pursuing the duties of his usual and customary line of employment.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury. This includes, but is not limited to, the $150,891.76 temporary total disability and temporary partial disability credits indicated in the Arbitrator's decision.

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

DATED: OCT 0 9 2014
TIT: pvc
o 08/11/14
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Thomas J. Tyrrell

Michael J. Brennan

Kevin W. Lamborn

ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

CRITTENDEN, CARL
Employee/Petitioner

Case# 08WC019505

CITY OF CHICAGO
Employer/Respondent

14IWCC0884

On 2/15/2013, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 0.12% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

0494 JOSEPH J SPINGOLA LTD
47 W POLK ST
SUITE 201
CHICAGO, IL 60605

0010 CITY OF CHICAGO LAW DEPT
MICHAEL GENTITHES
30 N LASALLE ST 6TH FL
CHICAGO, IL 60602

14IWCC0884

STATE OF ILLINOIS)
)SS.
COUNTY OF Cook)

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

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Carl Crittenden
Employee/Petitioner

v.

City of Chicago
Employer/Respondent

Case # 08 WC 19505

Consolidated cases: _____

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party. The matter was heard by the Honorable **Molly C. Mason**, Arbitrator of the Commission, in the city of **Chicago**, on **1/4/13**. After reviewing all of the evidence presented, the Arbitrator hereby makes findings on the disputed issues checked below, and attaches those findings to this document.

DISPUTED ISSUES

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

FINDINGS

On **4/11/08**, Respondent *was* operating under and subject to the provisions of the Act.

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

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

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

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

In the year preceding the injury, Petitioner earned **$59,189.52**; the average weekly wage was **$1,138.26**.

On the date of accident, Petitioner was **46** years of age, ***married*** with **3** dependent children.

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

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

Respondent shall be given a credit of **$71,005.42** for TTD, **$N/A** for TPD, **$79,886.34** for maintenance, and **$N/A** for other benefits, for a total credit of **$150,891.76**.

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

ORDER

Temporary Total Disability

Respondent shall pay Petitioner temporary total disability benefits of $758.84 /week for 100 weeks, commencing 4/12/08 through 4/27/08 and 4/30/08 through 3/15/10, as provided in Section 8(b) of the Act.

Maintenance

Respondent shall pay Petitioner maintenance benefits of $758.84/week for 107 6/7 weeks commencing 3/16/10 through 4/8/12, as provided in Section 8(a) of the Act. For the reasons set forth in the attached conclusions of law, the Arbitrator declines to award maintenance benefits after April 8, 2012, as requested by Petitioner.

Wage differential

For the reasons set forth in the attached conclusions of law, the Arbitrator finds that Petitioner is partially incapacitated from pursuing his usual and customary line of employment as a result of his undisputed work accident and that he is entitled to benefits under Section 8(d)1 of the Act. On this record, the Arbitrator finds it appropriate to begin the award of such benefits on April 9, 2012, there being no real disagreement between the parties as of that date as to the suitability of a cashier or customer service position. Respondent shall pay Petitioner wage differential benefits of $581.06/week from 4/9/12 through 1/4/13, a period of 38 5/7 weeks, and continuing thereafter for the duration of the disability, because the injuries sustained caused a loss of earnings, as provided in Section 8(d)1 of the Act.

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

14IWCC0884

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.

Molly E Mason
Signature of Arbitrator

2/15/13
Date

FEB 15 2013

Carl Crittenden v. City of Chicago
08 WC 19505

14IWCC0884

Arbitrator's Findings of Fact

Petitioner was fifty years old as of the hearing held on January 4, 2013. In 1985, he began working for Respondent as a sanitation laborer, or garbage collector. His job involved pulling garbage cans to trucks, picking up debris and disposing of large items such as couches and appliances. A job description in evidence reflects that sanitation laborers are required to "perform strenuous physical tasks," lift and carry up to 75 pounds continuously, lift up to 100 pounds continuously and carry up to 100 pounds frequently. PX 9. Respondent raised no objection to PX 9.

Petitioner testified he previously pursued workers' compensation claims against Respondent. None of these claims involved his back and all of them were settled. In the claim now under consideration, he is seeking a wage differential award stemming from a back injury.

The parties agree that Petitioner sustained a work injury on April 11, 2008. Arb Exh 1. At about 8:00 AM that day, Petitioner lifted a bag containing yard waste, tossed the bag into the back of the garbage truck and felt extreme pain in his lower back. On direct examination, he testified he was unable to continue working after this incident. At Respondent's direction, he sought treatment at MercyWorks on Cumberland in Norridge, Illinois, where he saw Dr. Marino.

Dr. Marino's note of April 11, 2008 sets forth a consistent history of the lifting incident. The doctor noted Petitioner had injured his back thirty years earlier. Petitioner complained of severe lower back pain radiating to his left leg, as well as tingling in his left foot.

On examination, Dr. Marino noted tenderness in the mid-lumbar area, minimal muscle spasm, positive straight leg raising at 60 degrees bilaterally and an inability to bend or twist due to severe pain. He diagnosed an acute low back strain. He prescribed Naproxen and Cyclobenzaprine. He directed Petitioner to refrain from working and return to the clinic on April 15, 2008. PX 1.

Petitioner returned to MercyWorks on April 15, 2008, as directed, and saw Dr. Bleier. Dr. Bleier indicated that Petitioner reported improvement. On examination, Dr. Bleier noted flexion to 60 degrees, limited extension and negative straight leg raising. He instructed Petitioner to stay off work, start a home exercise program and return in a week. PX 1.

On April 22, 2008, Petitioner saw Dr. Bleier again and indicated he felt ready to try working. The doctor described Petitioner's gait as normal. He noted pain in the L2-L4 region and painful lateral hip rotation. He instructed Petitioner to remain off work. PX 1.

Two days later, Dr. Bleier re-examined Petitioner and noted "no radicular complaints." He released Petitioner to full duty as of April 28, 2008 and instructed him to return to MercyWorks in two weeks if he remained symptomatic. PX 1.

Petitioner returned to MercyWorks on April 29, 2008 and again saw Dr. Bleier. The doctor noted that Petitioner "did return to work" but was now "complaining of increased low back pain" and "pain radial to left buttock." On examination, Dr. Bleier noted flexion to 90 degrees and very limited extension. He prescribed a lumbar spine MRI and took Petitioner off work. PX 1.

The MRI was performed without contrast on May 1, 2008. Dr. Simon, the interpreting radiologist, described the L3-L4 level as the "most significant level of abnormality," noting a moderate diffuse disc bulge along with an annular tear and a small, left-sided disc protrusion and bilateral neural foraminal narrowing. PX 2.

Petitioner returned to Dr. Bleier on May 5, 2008 and reported some improvement. Dr. Bleier reviewed the MRI results and recommended a course of physical therapy. He instructed Petitioner to remain off work. PX 1.

Petitioner underwent therapy at Bryn Mawr Physical Therapy between May 6 and May 16, 2008 and returned to Dr. Bleier on May 19, 2008. Petitioner reported no improvement. He complained of "persistent low back pain radiating to left thigh." The doctor's examination findings were unchanged. He kept Petitioner off work and prescribed additional therapy. PX 1.

After three more therapy sessions, Petitioner returned to Dr. Bleier on May 29, 2008 and complained of increased pain after "just bending over to pick up paper off floor." The doctor kept Petitioner off work and arranged for him to see Dr. Cupic.

Dr. Cupic administered two epidural steroid injections in June of 2008 and a lumbar facet injection in July of 2008. Petitioner testified that he "felt a little better for a little while" after undergoing these injections.

On July 24, 2008, Petitioner saw Dr. Spencer, a spine surgeon. Petitioner testified that MercyWorks referred him to Dr. Spencer.

Dr. Spencer's initial note of July 24, 2008 sets forth a history of a work-related back injury on April 11, 2008 followed by therapy and injections. Petitioner indicated he was gradually getting better.

Dr. Spencer described Petitioner's gait as normal. He noted no abnormalities on examination. He described Petitioner's complaints as "largely mechanical and non-consistent." He interpreted the MRI as showing some degenerative changes with no evidence of significant nerve root compression or disc herniation. He indicated Petitioner "appears to be recuperating

from an acute back sprain." He prescribed Naprosyn and instructed Petitioner to remain off work for an additional two weeks. PX 2.

Petitioner returned to Dr. Spencer on September 10, 2008 and indicated he was making no progress. The doctor re-evaluated him and concluded that surgery was in fact necessary, despite his previous findings. He recommended a discectomy and fusion at L3-4 and instructed Petitioner to remain off work. He saw Petitioner again on October 1, 2008 and wrote to Respondent's Committee on Finance, indicating he was awaiting approval of the proposed surgery. PX 2.

Dr. Spencer performed an L3-L4 laminectomy, discectomy and posterior lumbar interbody fusion at Advocate Lutheran General Hospital on October 20, 2008. PX 2.

Petitioner testified the surgery relieved his leg pain but he continued to have low back pain.

Petitioner continued to see Dr. Spencer postoperatively. On January 22, 2009, the doctor recommended five more weeks of therapy before a possible return to work. On March 5, 2009, the doctor released Petitioner to work but instructed him to return in three months for a re-check X-ray. PX 2.

Petitioner returned to Dr. Spencer on April 16, 2009 and complained of pain secondary to performing his regular duties. The doctor prescribed Flexeril for night time pain and spasm and released Petitioner to light duty with no lifting over 20 pounds and no bending. PX 2.

On June 11, 2009, Dr. Spencer took Petitioner off work and recommended additional therapy progressing to work hardening. PX 2. Petitioner began a course of therapy at Advanced Physical Medicine Centers on June 17, 2009. PX 2.

On August 11, 2009, Dr. Spencer released Petitioner to light duty and told Petitioner to discontinue therapy. PX 2. Petitioner testified that no light duty was available, that he advised Dr. Spencer of this and that the doctor then recommended work conditioning.

At Respondent's request, Petitioner saw Dr. Kern Singh of Midwest Orthopaedics for a Section 12 examination on September 3, 2009. Petitioner rated his low back pain at 4/10. He indicated that therapy had provided minimal relief.

On examination, Dr. Singh noted 5/5 positive Waddell findings. He characterized Petitioner's condition as degenerative. He recommended a functional capacity evaluation and indicated Petitioner should undergo two to four weeks of work conditioning if the evaluation proved to be valid. PX 4.

On September 17, 2009, Dr. Spencer recommended a functional capacity evaluation. PX 2. Petitioner underwent this evaluation at Athletico on October 17, 2009. Petitioner reported that he performed one day of full duty at April of 2009 but was limited by pain.

Petitioner also reported that he was currently subject to a 20-pound lifting restriction but that Respondent was unable to accommodate this restriction.

The evaluator concluded that Petitioner put forth "good, though not entirely full, effort" during the evaluation. He based this conclusion on the fact that Petitioner was "limited by reported low back pain before objective measures of physical effort . . . indicated that full effort was being exerted." He described Petitioner's subjective reports of pain to be "both reasonable and reliable." He found Petitioner capable of functioning at a light physical demand level and noted that Petitioner "did not meet the identified physical demand requirements of his target job of laborer/refuse collector." He recommended a variety of work restrictions, including no lifting or carrying over 20 pounds on an occasional basis, no frequent or repetitive bending or twisting and no prolonged walking. PX 3.

On October 29, 2009, Dr. Spencer noted that Petitioner had completed a functional capacity evaluation. He stated: "we are going to attempt to release [Petitioner] to work full duty." Two weeks later, Petitioner returned to Dr. Spencer and indicated he was back to work but experiencing pain. The doctor prescribed Motrin, to be taken three times daily. PX 2.

On January 20, 2010, Dr. Spencer recommended a repeat lumbar spine MRI due to Petitioner's ongoing complaints. The MRI, performed without contrast on February 2, 2010, showed post-operative changes at L3-L4 with no evidence of central or foraminal stenosis.

On February 11, 2010, Dr. Spencer reviewed the repeat MRI and recommended that Petitioner return to work within the restrictions recommended by the functional capacity evaluator. PX 2.

At Respondent's request, Dr. Singh re-examined Petitioner on March 18, 2010. Dr. Singh noted a pain rating of 4/10. On examination, he noted no positive Waddell findings. He found Petitioner's current symptoms to be causally related to the work injury. He found Petitioner to be at maximum medical improvement. With respect to work status, he recommended permanent restrictions based on the functional capacity evaluation. PX 5.

On March 27, 2010, Petitioner saw Dr. Chmell for an examination at the request of his attorney. The doctor's report of March 29, 2010 sets forth a consistent history of the April 11, 2008 work accident and subsequent treatment. The doctor noted that Petitioner had not worked since December 9, 2009 "because he has not been provided with a light duty job."

Petitioner complained of mild low back discomfort with minimal activities. Petitioner indicated he did reasonably well when inactive but would develop back pain radiating into his buttocks and thighs "even with a small amount of physical activity, such as household chores." He reported taking Ibuprofen frequently and a muscle relaxer occasionally.

Dr. Chmell described Petitioner's gait as normal. On examination of the lumbar spine, he noted a healed surgical scar between L1 and L5, tenderness of the paraspinal muscles on

both sides of this scar and a diminished range of motion. He was able to accomplish straight leg raising to 80 degrees bilaterally "with back, buttock and thigh pain."

Dr. Chmell reviewed Dr. Singh's reports along with the functional capacity evaluation and various treatment records. He found Petitioner to be at maximum medical improvement and characterized the treatment to date as reasonable and necessary. He agreed with the results of the functional capacity evaluation and indicated Petitioner could never resume working as a laborer. PX 6.

At the request of his attorney, Petitioner met with Steven Blumenthal, MS, CRC, a certified rehabilitation counselor [hereafter "Blumenthal"], on August 2, 2010 for purposes of a vocational rehabilitation assessment. Blumenthal issued a report the same day. He also prepared and signed a rehabilitation plan in accordance with Section 7110.10 of the Rules Governing Practice Before the Commission. PX 7.

In his report, Blumenthal described Petitioner as cooperative and communicative. He observed no pain behaviors. He stated that Petitioner "appeared motivated to return to work in another capacity."

Blumenthal described Petitioner's driving status as follows:

> "[Petitioner] reports that he holds a valid standard Illinois driver's license but that it is currently suspended due to receiving two speeding tickets and he expects to be able to have his license active again as of December 2010."

Petitioner denied any felony convictions but reported a DUI arrest in 1995.

Petitioner rated his current back pain level as 3/10. He had last seen Dr. Spencer in February 2010 and had no follow-up appointments. He reported taking Ibuprofen twice weekly and doing stretches at home on a daily basis. He denied having any health problem other than his back condition that would affect his ability to resume working. When asked about his current emotional status, he indicated it was difficult for him to not be able to get up in the morning and go to work. He reported "looking at other work such as customer service and sales."

Petitioner indicated he graduated from Wells High School in Chicago in 1980. He described himself as a "C" student. He had attended a computer class for two to three weeks in the 1980s. He reported having a home computer. He described himself as a "hunt and peck" typist.

Petitioner reported having worked as a bagger and cashier at a Jewel store in the early 1980s. He was unemployed between 1983 and 1985. In 1985, he began working as a laborer/garbage collector for Respondent. He was a member of the laborers union during the

period he worked for Respondent. As of his April 11, 2008 work accident, he earned $26.00 per hour. Between 1997 and 2003, he worked part-time for Target as a supervisor in customer service. When he left Target in 2003, he was earning $11.00 per hour. Between November 2007 and April of 2008, he did some maintenance-related work for Shriners Hospital, cleaning a kitchen and vacuuming floors. He earned $12.00 per hour for this work.

Petitioner informed Blumenthal he was receiving $495/month in disability pay from the pension board along with his workers' compensation benefits. He denied applying for Social Security disability benefits.

Petitioner indicated he felt he could still perform his customer service job at Target if his restrictions could be accommodated. He also expressed willingness to work as an unarmed security guard in a residential or industrial setting.

Blumenthal administered various tests to Petitioner. He indicated that the Gates-MacGinitie reading test showed Petitioner's reading skills to be "in the average range in comparison to entering community college students." Petitioner's WRAT [Wide Range Achievement Test] scores showed that his spelling, math paper and pencil computational skills were below average. Petitioner scored in the "low average to average range of non-verbal problem solving ability" on BETA III testing.

Blumenthal concluded that Petitioner's work experience was a better indicator of his aptitudes and abilities than his test scores, noting that Petitioner worked slowly and "was not a good test taker."

Blumenthal opined that Petitioner "would be a good candidate for vocational rehabilitation job placement services." He projected that job placement could take up to six months or longer and would cost about $15,000. He opined that Petitioner would benefit from job readiness and computer training.

Blumenthal projected that Petitioner "will earn $8.25 to $13.78 an hour based on State of Illinois Department of Economic Security Wage Data." PX 7.

Petitioner testified he received temporary total disability benefits from Respondent while he was undergoing treatment and some maintenance benefits after he concluded treatment. In 2010, he received a letter from Angie Matos, an administrator with the Department of Streets and Sanitation. Matos directed Petitioner to attend a meeting. Petitioner testified he attended this meeting in September of 2010. The meeting was held in a Streets and Sanitation building at 39th and Iron. When Petitioner walked into the room where the meeting was being held, he saw five individuals sitting at five separate tables. Matos was present. Petitioner gave the letter he had received to Matos and she directed him to start a job search. Over Respondent's objection, Petitioner testified that Matos gave him a form and told him to log ten job contacts weekly on this form and turn the form in at City Hall every Monday between 8 AM and 4 PM. Petitioner identified PX 8 as the form he received from Matos.

According to Petitioner, Matos did not ask him about his educational background or skills. Nor did she provide any other instructions as to how Petitioner was supposed to look for work.

Petitioner testified he does not have a high school degree. After he met with Matos, Respondent did not offer him an opportunity to acquire computer skills or attend GED classes.

Petitioner testified that, after he met with Matos, he started looking for work at various retail stores in his area. Those stores included Target and Wal-Mart. He listed his job contacts on a form similar to PX 8 and turned the form in at City Hall each week. Since he does not have a driver's license, he had to travel to City Hall via public transportation. It took him three hours, round trip, to accomplish this.

Petitioner testified he continued looking for work and turning in the requisite forms until he received a letter from Respondent advising him that his maintenance benefits had been suspended as of September 29, 2011. Petitioner identified PX 8 as a copy of this letter. The letter bears the signature of Kirstjen Lorenz, director of Respondent's workers' compensation division. Lorenz advised Petitioner his benefits were being suspended due to non-compliance with Respondent's "Injury on Duty Job Search Program." PX 8 reflects that Petitioner's counsel and Angie Matos received carbon copies of the letter.

Petitioner testified that Respondent suspended his benefits because he failed to present the requisite forms for several weeks. On September 30, 2011, he went to City Hall and supplied the missing forms. He had the forms time-stamped that day. [PX 8 contains these forms.] Despite the fact he supplied the forms, Respondent failed to pay him maintenance benefits for the period September 29, 2011 through October 16, 2011. Respondent did resume paying him benefits at a later point.

At Respondent's request, Petitioner met with Julie Bose, a certified vocational rehabilitation counselor, on October 3, 2011. Bose questioned him about his educational background, his skills and the status of his driver's license. At Bose's direction, Petitioner enrolled in a GED course at Triton Community College at the end of 2011. Petitioner testified that Triton is about 30 to 45 minutes away from his home via public transportation. The GED class was held from Monday through Thursday, 9 AM to 12 PM each day. Petitioner also enrolled in a computer literacy class at Elmwood Park Library. This class was held each Tuesday at 1:00 PM. Petitioner testified he continued attending the GED and computer classes until Respondent terminated vocational rehabilitation efforts. During this time, he continued to go to City Hall between 1:00 and 4:00 PM every Monday to drop off completed sheets.

Under cross-examination, Petitioner testified he was not asked about his prior medical history during his initial visit to MercyWorks. [Dr. Marino's note reflects Petitioner did in fact relate that he had injured his back many years earlier.] Petitioner testified he last underwent injury-related treatment at MercyWorks in May 2010. He has been back to MercyWorks since that time for general check-ups pursuant to his pension plan. He is eligible for a pension by virtue of his age but he is not currently receiving pension benefits. He is not currently taking

any medication for his low back. He has no upcoming appointments for low back care. He is 5 feet, 9 inches tall and weighs 197 pounds. He has not injured his low back since the work accident. He has a beer maybe twice a month. He lost his driver's license due to a DUI and had no license while he was undergoing vocational rehabilitation. Respondent required him to make ten job contacts per week. Between September 2010 and October 2011 there were occasions when he failed to turn in sheets reflecting ten weekly contacts. About 70% of the job contacts he made were in person. On some occasions he wrote "not hiring" on the sheets indicating he could not obtain an interview. He repeatedly contacted the same retail outfits, such as Lowe's, Jewel, Target and Wing Stop, while looking for work. The Lowe's, Target and Jewel stores he visited are in the Brickyard Mall. Wing Stop is on Harlem.

Petitioner testified he met with Blumenthal on one occasion. Blumenthal did not make job contacts for Petitioner. Petitioner testified he told Blumenthal he did not have a valid driver's license. He also told Blumenthal he lost his license due to DUI issues, not speeding tickets. He denied telling Blumenthal he expected to have his license again by December 2010. He did not recall telling Blumenthal he graduated from high school in 1980. After looking at Blumenthal's report, he recalled telling Blumenthal he graduated from high school in 1980 and was a "C" student. While he was undergoing vocational rehabilitation with Med Voc, he was required to make ten job contacts per week and pursue leads supplied by Med Voc. Med Voc sent him job contact information.

Petitioner acknowledged he did not provide Med Voc with attendance slips from his GED classes. [Petitioner did, however, offer into evidence records from Triton College concerning the reading and math classes he attended in early 2012. PX 11.] He has not yet obtained his GED. He again contacted various Brickyard Mall stores, including Jewel, Home Depot and Wing Stop, in April 2012.

Petitioner testified he took public transportation to the Commission. This took an hour. He arrived at the Commission at 8:00 AM. His low back pain was aggravated by sitting at the Commission.

On redirect, Petitioner testified that, when he contacted prospective employers, he asked about cashier and sales-related jobs. He did this because he worked as a cashier in the past. When he used the term "pending" on a sheet dated July 21, 2010, this meant he submitted an application and was told to check back every couple of weeks. When he wrote "no" with respect to his resume, this meant he had previously submitted a resume.

In addition to the exhibits previously summarized, Petitioner offered into evidence PX 10, a June 27, 2012 letter authored by Robert Chianelli, the assistant business manager of Local 1001. In this letter, Chianelli indicated that as of June 27, 2012, the hourly wage of a sanitation laborer is $32.79 "under the current collective bargaining agreement between [Respondent] and Laborers' Local 1001." Respondent did not object to PX 10.

Respondent called Julie Bose, a certified vocational rehabilitation counselor, to testify. Bose testified she has a master's degree in counseling from IIT. She has taken post-master's classes at IIT in order to maintain her certification. She owns Med Voc. Med Voc provides an array of services, including testing, retraining when appropriate, ergonomic studies and labor market surveys. She has operated Med Voc for thirteen years. She previously worked for Grzesik, another vocational rehabilitation outfit, for fifteen years.

Bose testified she first met Petitioner in October 2011. They met at a Burger King in Petitioner's neighborhood. After she met with Petitioner, she created a vocational plan and issued a report setting forth that plan. Thereafter, it was her employee, Laura Kronenberg, who interacted with Petitioner. Bose testified she never met with Petitioner again. She and Kronenberg met weekly to discuss Petitioner's progress. Bose supervised Kronenberg as necessary and wrote reports.

Bose testified she recommended a GED program to Petitioner because Petitioner told her he did not finish high school. The plan that Bose developed consisted of GED monitoring by Med Voc until Petitioner could begin GED classes at Triton, job search efforts and computer classes.

Bose acknowledged that Petitioner has no transferable skills from his laborer job. However, Petitioner has retail experience and expressed interest in working in retail.

Med Voc requires individuals to make a minimum of ten job contacts per week. Five of those contacts are to be made in person. Med Voc sends out job leads weekly. Med Voc requires individuals to send E-mail confirmation of job contacts made via the Internet.

Bose testified that Petitioner's compliance was less than full at the outset and "completely deteriorated" thereafter. By April of 2012, Petitioner was failing to follow up on job leads and failing to provide Med Voc with evidence that he was attending the GED classes at Triton. After Petitioner failed to supply signed attendance sheets, Bose contacted Triton. Triton would not release information unless Petitioner signed a release form. Bose sent this form to Petitioner (with a copy to Petitioner's counsel) but Petitioner refused to sign it. Bose was thus never able to confirm attendance. In March of 2012, Petitioner indicated he went to Menard's on West Diversey to find a job but there was no Menard's store at the address Petitioner provided.

Bose testified that, when she first met with Petitioner, he told her his driver's license had been suspended due to two recent DUIs. Since a driver's license can be very helpful to someone who is looking for work, Bose asked Petitioner what steps he was taking to regain his license. Petitioner said he did not anticipate getting his license back "anytime soon."

Bose testified that she reviewed Blumenthal's report and that Petitioner's reporting to Blumenthal was inconsistent with his reporting to her. Petitioner told Blumenthal he lost his license due to speeding tickets. Had this been true, Bose could have negotiated the tickets and

eased the vocational rehabilitation process. Petitioner also told Blumenthal he graduated from high school. If in fact Petitioner is a high school graduate, there would be no reason for him to attend GED classes. The inconsistencies impair Blumenthal's opinions concerning Petitioner's employability. Blumenthal was trying to find a security guard job for Petitioner. You need a PERC card to get such a job and you need a GED or high school degree in order to obtain a PERC card.

Under cross-examination, Bose acknowledged she met with Petitioner only once. Bose also acknowledged that Petitioner is physically unable to resume his old job. At the outset, she asked Respondent about light duty jobs it might have available. Respondent told her it had "internal staff" to address this and that she was not to be involved in looking for alternative work within Respondent.

Bose testified that the vocational plan she formulated in this case is set forth on pages four and five of her initial report. In this plan, she described Petitioner as a "good candidate" for vocational rehabilitation. She did not prepare a vocational assessment on the designated Commission form.

On redirect, Bose testified that employers typically do not broach the subject of salary without an application having been made. She did not use the Commission form to describe her plan because the form consists of only one page and it requires Petitioner's signature. In the thirty years she has been involved in vocational rehabilitation, no claimant has signed such a form. Petitioner agreed to the plan she set forth in her initial report. Her list of possible jobs for Petitioner is not exhaustive.

In addition to the exhibits previously discussed, Respondent offered into evidence a group of reports issued by MedVoc. RX 4. Petitioner's attorney raised a hearsay objection to all of the documents in RX 4 other than Bose's initial report (separately offered as RX 2), noting that Bose never met with Petitioner after October 22, 2011 and that he had no opportunity to cross-examine the MedVoc employees who met with and evaluated Petitioner's level of cooperation after that date. The Arbitrator sustained Petitioner's objection. The Arbitrator notes that the reports at issue were co-authored by two individuals, Laura Kronenberg, B.A. and Lauren Egle, B.A., both of whom are described as "job placement specialists." There is no indication that either of these individuals is a certified vocational rehabilitation counselor.

Respondent also offered into evidence a large group of pre-printed "City of Chicago Injury on Duty Job Search Logs" completed by Petitioner. These documents run from June 4, 2010 through April 6, 2012. Each document contains the following instructions:

> "This is to document your job search now that you have reached Medical Maximum Improvement (MMI). Please fill out this form out [sic] and deliver it in person each week to the address listed below. Failure to complete and deliver this form by the end of each week may result in the

suspension or termination of your disability payments."

Each form allows the person documenting his job search to list up to six prospective employers.

Arbitrator's Credibility Assessment

Petitioner was a calm and articulate witness. Respondent has employed Petitioner for 27 years, a factor which weighs in Petitioner's favor, credibility-wise.

There were discrepancies between Blumenthal's and Bose's accounts of Petitioner's education and driver's license suspension. At the hearing, Petitioner denied telling Blumenthal he finished high school and lost his driver's license due to speeding tickets. Petitioner stipulated he lost his license due to DUIs. Blumenthal's report reflects that Petitioner mentioned a DUI arrest.

The Arbitrator has considered the variances between the two reports in assessing Petitioner's credibility. On this record, the Arbitrator is unable to conclude that Petitioner deliberately misled Blumenthal. To the extent that Blumenthal relied on inaccurate information, that information could have prompted him to project higher rather than lower potential earnings.

While it is true that a DUI conviction has a negative connotation, as Bose testified, there is no evidence suggesting that Petitioner used his lack of a valid driver's license as an excuse for failing to look for work. Rather, the evidence suggests that Petitioner is comfortable with, and regularly takes, public transportation to get where he needs to go.

Arbitrator's Conclusions of Law

Is Petitioner entitled to maintenance benefits from September 29, 2011 through October 16, 2011 and from April 9, 2012 through the hearing of January 4, 2013? Is Petitioner entitled to wage differential benefits?

In his report of March 18, 2010 (PX 5), Respondent's Section 12 examiner, Dr. Singh, found Petitioner to be at maximum medical improvement and in need of permanent restrictions per the functional capacity evaluation (PX 3).

Petitioner claims maintenance from March 16, 2010 through the hearing of January 4, 2013. Respondent contends that Petitioner was entitled to maintenance during only two intervals: from March 16, 2010 through September 28, 2011 and from October 17, 2011 through April 8, 2012.

The Arbitrator finds that Petitioner was entitled to maintenance during the first disputed interval, September 29, 2011 through October 16, 2011. Before September 29, 2011,

Petitioner participated in Respondent's "job search program" by reporting to City Hall every Monday and turning in the requisite sheets. On September 29, 2011, Respondent sent Petitioner a letter indicating his benefits were being terminated due to "non-compliance" with this program. Petitioner acknowledged having failed to turn in several sheets prior to September 29, 2011. He immediately remedied the situation by going to City Hall on September 30, 2011 and handing in the missing sheets. He had the presence of mind to have copies of those sheets time-stamped. PX 8. He went back to City Hall on October 3 and 24, 2011 and submitted other sheets listing contacts he made between September 26 and October 21, 2011. [See the sheets time-stamped October 3 and 24, 2011 in RX 1.] Respondent resumed the payment of maintenance on October 17, 2011 and never provided an explanation of its failure to pay Petitioner from September 29, 2011 through October 16, 2011. Since "compliance" with Respondent's program consisted solely of producing the sheets each Monday, with Respondent providing no guidance as to how Petitioner should be going about his job search, and since Petitioner took steps to supply Respondent with the missing information, the Arbitrator finds that Respondent should be held liable for maintenance from September 29, 2011 through October 16, 2011.

With respect to the second disputed period, April 9, 2012 through January 4, 2013, the Arbitrator awards Petitioner wage differential benefits but not maintenance. Respondent contends Petitioner is entitled to no benefits after April 8, 2012 based on alleged non-compliance with vocational rehabilitation. Petitioner contends he is entitled to maintenance because Respondent did not provide true vocational rehabilitation and there is no evidence of non-compliance. The Arbitrator has carefully considered these arguments. The Arbitrator agrees with Petitioner that, before October of 2011, Respondent did not provide vocational rehabilitation as contemplated by the Act. The evidence, including Petitioner's credible testimony and the forms in RX 1, leads the Arbitrator to conclude that Respondent provided no actual job search assistance before October of 2011. [See W. B. Olson, Inc. v. IWCC, 2012 Ill.App. LEXIS 907, in which the Appellate Court held that "vocational rehabilitation may include, but is not limited to, counseling for job searches, supervising a job search program, and vocational retraining, including education," citing 820 ILCS 305/8(a) (West 2010) [emphasis added]. Even after Respondent decided to alter its approach and retain MedVoc, it prevented MedVoc from exploring the most obvious source of light duty work, i.e., its own job bank.

The Arbitrator turns to the issue of whether Petitioner cooperated with MedVoc's efforts. As noted previously, Petitioner's interaction with MedVoc consisted of one meeting with a certified vocational counselor and subsequent supervised evaluations by non-certified personnel. Even if one goes beyond Bose's initial report and testimony and considers all of the rejected MedVoc reports in RX 4, there is no evidence that Petitioner consistently refused to pursue job leads or show up for appointments. In her report of April 9, 2012, Egle acknowledged that Petitioner typically submitted job sheets, attended scheduled appointments and dressed appropriately. Egle noted that Petitioner did not always meet MedVoc's goal of ten contacts per week but conceded that Petitioner typically came close to meeting this goal. Egle expressed some concern about Petitioner's motivation but again sent Petitioner job leads on April 13, 2012, after Respondent stopped paying benefits. There is no evidence that Bose,

Kronenberg, Egle or anyone else at MedVoc ever recommended that rehabilitation efforts be discontinued. Bose faulted Petitioner for failing to allow her access to his Triton College records but, in the Arbitrator's view, there is no convincing evidence that Petitioner's participation in GED classes was vital to his finding work. The MedVoc reports do not reflect that any prospective employer declined to interview or hire Petitioner because he lacked a high school degree.

Having said this, there is also no evidence that Petitioner continued to seek work on his own between early April 2012 and the January 4, 2013 hearing. [See Roper Contracting v. Industrial Commission, 349 Ill.App.3d 500, 506 (5th Dist. 2004), in which the Appellate Court upheld an award of maintenance during a period when the claimant conducted a self-directed job search.] Petitioner did continue to attend classes at Triton after April 8, 2012 but only until early May. PX 11.

On this record, the Arbitrator finds it appropriate to award wage differential benefits rather than maintenance from April 9, 2012 forward. There was never any dispute as to Petitioner's inability to resume his former laborer job. Nor is there any dispute as to how much Petitioner would be earning, i.e., $32.79 per hour, if he could still perform that job. PX 10. While Blumenthal and Bose did not rely on identical histories, their opinions overlapped to the extent that they both targeted cashier and customer service jobs when they evaluated Petitioner in 2010 and 2011, noting Petitioner's past retail experience. Blumenthal noted that Petitioner was earning $11.00 per hour when he left his part-time job at Target. Blumenthal projected earnings of $8.25 to $13.78 per hour. Bose did not criticize this projection or make a projection of her own. The Arbitrator selects $11.00 per hour as a reasonable wage. The Arbitrator arrives at a wage differential rate of $581.06 by multiplying $32.79 by 40 hours to arrive at $1,311.60, subtracting $440.00 [$11.00/hour x 40] to arrive at $871.60 and dividing $871.60 by 2/3.

In summary, the Arbitrator awards maintenance benefits in the amount of $758.84 per week from March 16, 2010 through April 8, 2012, with Respondent receiving credit for the $79,886.34 it paid in maintenance benefits prior to the hearing (Arb Exh 1), and wage differential benefits in the amount of $581.06 per week from April 9, 2012 through January 23, 2013 and continuing thereafter for the duration of Petitioner's disability.

Illinois Official Reports

Appellate Court

***Morales v. Herrera*, 2016 IL App (1st) 153540**

Appellate Court Caption	MARIA MORALES and MARICELA SANCHEZ, Plaintiffs-Appellants, v. ALBERTO HERRERA and RADIO FLYER, INC., Defendants-Appellees.
District & No.	First District, Third Division Docket No. 1-15-3540
Filed	December 7, 2016
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 2012-L-002133; the Hon. Edmund Ponce de Leon, Judge, presiding.
Judgment	Affirmed.
Counsel on Appeal	Sheldon J. Aberman, of Cary L. Wintroub & Associates, of Chicago, for appellants. Julie A. Teuscher, Tomas P. Boylan, and Henry Oritz, of Cassiday Schade LLP, and Joel Stephen, of Beverly & Pause, both of Chicago, for appellees.
Panel	JUSTICE LAVIN delivered the judgment of the court, with opinion. Justices Pucinski and Cobbs concurred in the judgment and opinion.

OPINION

¶ 1 Plaintiffs Maria Morales and Maricela Sanchez were employees of Express Employment Professionals (Express), a temporary employment agency. On April 21, 2010, Express sent plaintiffs to work at Radio Flyer, Inc. (Radio), located at 6515 West Grand Avenue in Chicago. While Alberto Herrera, a supervisor at Radio, was driving plaintiffs from Radio's Chicago facility to its Elwood facility, a collision occurred. Plaintiffs received workers' compensation benefits through Express but nonetheless commenced this action against defendants Radio and Herrera. The trial court subsequently granted defendants summary judgment, finding that the exclusive remedy provision of the Workers' Compensation Act (Act) (820 ILCS 305/5 (West 2010)) barred plaintiffs' claims because plaintiffs were Radio's borrowed employees and the collision arose in the course of employment. We affirm the trial court's judgment.

¶ 2 I. BACKGROUND

¶ 3 Express was in the business of sending its employees to temporarily work for entities such as Radio, but Express itself was responsible for paying employees' wages and withholding taxes as well as social security contributions. In April 2010, Express sent plaintiffs to do assembly work for Radio. Sanchez testified that Herrera, her supervisor at Radio, told her what to do and how to do it. Additionally, he told Sanchez when to start and stop working, although she generally worked from 8:30 a.m. to 5 p.m. Morales similarly testified that Herrera was her supervisor at Radio, although she considered Express, rather than Radio, to be her employer. Furthermore, Sheila Ryan, Express's general manager, testified that she was not present at the job site and expected plaintiffs to follow the directions of Radio's supervisors within the scope of the job identified by Radio. Ryan also testified, however, that "if we send someone in to be an assembler and all of a sudden they're on a forklift, that's an issue." Moreover, Ryan testified that Express's staffing agreement, which reflected the terms of its contract with Radio, provided that Radio would supervise, direct, and control the work of Express employees.

¶ 4 Express employees received a document containing Radio's policies, and Ryan expected her employees to adhere to that document, which stated that "[a]ll warehouse contract employees must comply with the code of conduct, policies and practices during an assignment with Radio Flyer." Additionally, the document stated, "[w]e have a zero tolerance policy at Radio Flyer, and [violations] if discovered, will lead to immediate dismissal from the assignment without the opportunity to return." Finally, the document stated, "[a]ll contract employees must communicate directly with their employer regarding policies, procedures and terms for their employment *with the Agency*." (Emphasis added.) Ryan testified that while employees would bring questions about Express's policies and procedures to the attention of Express, questions regarding their employment with Radio would be directed to Herrera.

¶ 5 Ryan acknowledged that Radio could have an Express employee removed for violating one of Radio's policies. Ryan might try to persuade an employer to deal with an issue in other ways, however. Additionally, Ryan testified that Radio could prevent a particular individual from working for it, even though Radio could not discharge an employee from Express or otherwise discipline Express employees. Similarly, Herrera, as well as AnnMarie Bastuga, Radio's vice president of human resources, stated that Herrera was responsible for determining plaintiffs' duties, schedules, and responsibilities and could determine whether plaintiffs' work should be stopped or terminated.

¶ 6 According to Herrera, he had instructed plaintiffs and Donald Bailey, another Express employee, to meet Herrera at Radio's parking lot in Chicago at 7 a.m. on the day in question. Herrera was to drive them to a distant facility in Elwood.[1] Sanchez testified, "We had to be there at 7:00 o'clock in the morning." Upon inquiry, Sanchez further testified it would be correct to say that Herrera "offered" her a ride. Moreover, this was not the first time that Herrera had transported plaintiffs to Elwood.

¶ 7 Plaintiffs and Bailey met Herrera in Radio's parking lot and they left at about 7 a.m. Sanchez testified that they would be paid for their time starting at 8 a.m. At about 7:25 a.m., however, Herrera was distracted and hit the vehicle in front of him. Plaintiffs never arrived at the Elwood facility that day, notwithstanding that they were paid for working eight hours. Instead, an ambulance took plaintiffs to the hospital. Sanchez sustained injuries to her chest and back while Morales sustained injuries to her neck, head, and back.

¶ 8 Ryan testified that when Bailey called Express's office following the collision, she did not understand what Express employees were doing in Herrera's car. Ryan testified that Express's staffing agreement provided that Radio was to notify Express if duties or the workplace were to change. In addition, plaintiffs were supposed to have started working at 8:30 a.m. in Chicago, and no one consulted her regarding a change in time or location. According to Ryan, the collision occurred approximately an hour before plaintiffs were supposed to have started working. Ryan further testified that while plaintiffs were not performing any delineated tasks at the time of the collision; they were being transported for the purpose of performing work for Radio. Ryan testified that they were "on the clock" for the purposes of workers' compensation, albeit not for Express's purposes. Ryan was later informed that plaintiffs thought she knew Herrera would be transporting them to Elwood.

¶ 9 Even if Radio had consulted with her, she would not have allowed Express employees to work in Elwood because it did not fall within Express's insurance coverage. Additionally, it was unreasonable to expect a worker earning $8.50 per hour to travel that distance. Furthermore, Elwood did not fall within her franchise's territory. After the accident, Ryan wrote to Karyn DeFalco, Radio's human resource director in Chicago:

> "At no time, past or present, was Mr. Herrera given authorization by Express *** to assign our associates to work in a facility other than 6515 W. Grand Ave., Chicago, IL. We appreciate all opportunities to work with Radio Flyer but respectfully decline employment for Chicago Express associates at locations outside of the facility located at 6515 W. Grand Ave., Chicago, IL 60635 unless the work is at alternative locations within the Chicago metro area comprised of Chicago, Melrose Park, Franklin Park, Schiller Park, Niles, Park Ridge, Morton Grove, Evanston and Skokie. If work should arise in the above stated locations please let us know and we will dispatch our associates accordingly. Any work located outside those areas can be accomplished by other Express offices and we will be happy to provide contact information at your request."

Bastuga's understanding from conversations with Herrera, however, was that Herrera had a long-standing practice of transporting Express employees to other Radio locations and Express was aware of that.

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[1]Although testimony also indicated that Radio's other facility was in Joliet, we refer only to Elwood for consistency.

¶ 10 Plaintiffs then filed workers' compensation claims against Express. Express's insurance company paid the claims without contest. Additionally, plaintiffs filed this negligence action against defendants. Ultimately, Morales claimed about $1 million in damages while Sanchez claimed about $6000.

¶ 11 Radio moved for summary judgment, arguing that Radio was plaintiffs' borrowing employer, their injuries occurred in the scope of employment, and consequently, their claims against Radio were barred by the exclusive remedy provision of the Act. Similarly, Herrera moved for summary judgment, arguing that plaintiffs were Radio's borrowed employees as well as his coemployees. Thus, the exclusive remedy provision barred their claims against him as well. In response, plaintiffs maintained that genuine issues of material fact existed as to whether they were Radio's borrowed employees and whether they were injured in the course of employment. The trial court entered summary judgment in favor of defendants, finding plaintiffs were Radio's borrowed employees, and thus, the Act's exclusive remedy provision barred plaintiffs' claims against both defendants. Plaintiffs now appeal.[2]

¶ 12 II. ANALYSIS

¶ 13 Summary judgment is appropriate where affidavits, admissions, depositions, and pleadings reveal no genuine issue of material fact so that the movant is entitled to judgment as a matter of law. *Prodanic v. Grossinger City Autocorp, Inc.*, 2012 IL App (1st) 110993, ¶ 13. In determining whether the record presents a genuine issue of material fact, courts consider the aforementioned items strictly against the movant and liberally in favor of the nonmovant. *Id.* Additionally, the court may draw inferences from undisputed facts but should deny summary judgment where reasonable persons could draw different inferences from those undisputed facts. *Pyne v. Witmer*, 129 Ill. 2d 351, 358 (1989). Although summary judgment is a drastic measure, it is to be encouraged in the interest of prompt disposition of lawsuits where the movant's right to judgment is clear. *Id.* Furthermore, we review an order granting summary judgment *de novo*. *Prodanic*, 2012 IL App (1st) 110993, ¶ 13. Accordingly, we may affirm the trial court's judgment on any basis in the record. *Reed v. Getco, LLC*, 2016 IL App (1st) 151801, ¶ 16.[3]

¶ 14 The Act protects workers from accidental workplace injuries by imposing resulting liability on their employers, regardless of fault. *Prodanic*, 2012 IL App (1st) 110993, ¶ 14. In exchange, section 5(a) states as follows: "No common law or statutory right to recover damages from the employer *** for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act." 820 ILCS 305/5

[2]We note that plaintiffs' appellate briefs repeatedly fail to include pin cites in citations to case law, as required by Illinois Supreme Court Rule 341(h)(7) (eff. July 1, 2008). *Babcock v. Wallace*, 2012 IL App (1st) 111090, ¶ 7. Additionally, plaintiffs make factual assertions without citation to the record. We remind counsel that the failure to comply with Rule 341 may result in forfeiture. *Old Second National Bank v. Indiana Insurance Co.*, 2015 IL App (1st) 140265, ¶ 35.

[3]Plaintiffs moved below to strike an affidavit executed by Herrera. The court did not rule on that motion, finding the affidavit did not affect the judgment. Contrary to plaintiffs' suggestion, it was their burden as movants, not defendants' burden, to obtain a ruling on their motion to strike. Under our *de novo* review, we are entitled to rely on that affidavit. Because the affidavit does not change the result, however, we similarly disregard it.

(West 2008); see also 820 ILCS 305/11 (West 2010) ("Compensation as Full Measure of Employer's Responsibility"). Additionally, this statute provides immunity to loaning and borrowing employers alike. *Chavez v. Transload Services, L.L.C.*, 379 Ill. App. 3d 858, 862 (2008). Furthermore, section 5(a) renders coemployees immune from a common law negligence action. *Ramsey v. Morrison*, 175 Ill. 2d 218, 224 (1997). This is because the Act's purpose of placing the cost of accidents on the industry would be blunted if such costs were shifted from one employee to another. *Collier v. Wagner Castings Co.*, 81 Ill. 2d 229, 241 (1980).

¶ 15 A. Estoppel

¶ 16 As a threshold matter, defendants assert that plaintiffs are judicially estopped from denying that the injuries occurred within the scope of their employment because plaintiffs took a contrary position by seeking and accepting workers' compensation benefits on the premise that their injuries had occurred within the scope of employment. In response, plaintiffs assert that judicial estoppel does not apply here because defendants failed to demonstrate that plaintiffs intended to deceive or mislead the court. Plaintiffs further assert that judicial estoppel does not apply because it was consistent to assert that the injuries occurred within the scope of their employment with Express but not within the scope of any employment with Radio.

¶ 17 In order for judicial estoppel to apply, the trial court must first determine that the party to be estopped has taken two factually inconsistent positions in separate judicial or quasi-judicial administrative proceedings. *Seymour v. Collins*, 2015 IL 118432, ¶ 47. Additionally, the court must determine that the party intended for the trier of fact to accept the truth of the facts alleged and that the party received some benefit from the initial proceeding. *Id.* Even if the foregoing factors are established, however, the party's conduct may reflect inadvertence, rather than an intent to deceive. *Id.* Accordingly, the trial court must then exercise its discretion to determine whether judicial estoppel should bar the action. *Id.*

¶ 18 While defendants' pleadings below effectively noted the disingenuous nature of plaintiffs' contention that their injuries occurred outside the scope of employment, defendants did not specifically raise "judicial estoppel." *Vance v. Wentling*, 249 Ill. App. 3d 867, 872 (1993) (observing that issues not raised in the trial court cannot be argued for the first time on appeal). Additionally, the trial court did not use that term and, contrary to defendants' assertion, it is not clear that the court found the requisite factors were present. Similarly, the record does not clearly show that the court, in its discretion, decided that judicial estoppel was warranted.

¶ 19 Nonetheless, our supreme court has held that when an employee who was injured by a coemployee has collected compensation under the Act, he cannot then assert that his injuries fell outside of the Act. *Collier*, 81 Ill. 2d at 241. In so holding, the court recognized the need to prevent not only double recovery, but the proliferation of litigation as well. *Id.* at 241-42. Thus, where a plaintiff has collected workers' compensation pursuant to a settlement agreement, he is precluded from filing a civil action for damages. *Id.*; see also *Fregeau v. Gillespie*, 96 Ill. 2d 479, 481, 486 (1983) (where the plaintiff had already filed for and received workers' compensation, his civil action against his coemployee was barred); *Rhodes v. Industrial Comm'n*, 92 Ill. 2d 467, 471 (1982) (observing that "[t]he legislative intention underlying section 5 of the [Act] would obviously be frustrated if an injured employee could recover damages in a common law action and workmen's compensation benefits as well"). Furthermore, the appellate court has had numerous opportunities to apply this holding. *Locasto*

v. City of Chicago, 2016 IL App (1st) 151369, ¶ 16; *Marquez v. Martorina Family, LLC*, 2016 IL App (1st) 153233, ¶ 14; *Glasgow v. Associated Banc-Corp*, 2012 IL App (2d) 111303, ¶¶ 16, 22; *Hall v. DeFalco*, 178 Ill. App. 3d 408, 414 (1988). We note that neither *Collier*, *Fregau*, nor *Rhodes* expressly mentioned judicial estoppel, however, or any requirement that a party intend to deceive a judicial body.

¶ 20 Based on the aforementioned case law, it appears that section 5 of the Act, which defendants clearly raised below, created its own form of estoppel, albeit not *judicial* estoppel as defined in *Seymour*. See *Wren v. Reddick Community Fire Protection District*, 337 Ill. App. 3d 262, 267 (2003) (finding that the application and acceptance of benefits does not transform an individual into an employee but nonetheless "acts as a form of estoppel, denying a plaintiff who has availed herself of the benefits of the Act from thereafter asserting that she falls outside its reach"). Accordingly, the elements of judicial estoppel do not control our determination, notwithstanding prior case law characterizing this procedural hurdle as one of judicial estoppel. See, *e.g.*, *Mijatov v. Graves*, 188 Ill. App. 3d 792, 796 (1989).

¶ 21 Nonetheless, plaintiffs' argument suggests that no form of estoppel should apply here because they could claim to be employees of Express without acknowledging that Radio constituted a borrowing employer. Thus, plaintiffs suggest that the Act's exclusivity provision and corresponding estoppel does not bar their action against defendants. But see *Wren*, 337 Ill. App. 3d at 267 (finding that the application and acceptance of benefits does not transform a nonemployee into an employee but nonetheless "acts as a form of estoppel"). Contrary to plaintiffs' assertion, the record clearly shows they were Radio's borrowed employees, and thus, their acceptance of workers' compensation benefits precluded them from seeking further payment from Radio or Herrera, their coemployee.

¶ 22 B. Borrowed Employee

¶ 23 An employee who is generally employed by one person may be loaned to another person to perform special work and, while performing the special work, become the employee of the person to whom he has been loaned. *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341, 346-47 (1980). To determine whether an employee has been borrowed, courts must determine (1) whether the special employer had the right to direct and control the manner of the employee's work and (2) whether a contract of hire, express or implied, existed between the employee and the special employer. *Id.* at 348. Additionally, the loaned-employee concept was codified in the Act. *Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 826 (2000). Section 1(a)(4) of the Act states as follows:

> "Where an employer operating under and subject to the provisions of this Act loans an employee to another such employer and such loaned employee sustains a compensable accidental injury in the employment of such borrowing employer and where such borrowing employer does not provide or pay the benefits or payments due such injured employee, such loaning employer is liable to provide or pay all benefits or payments due such employee under this Act and as to such employee the liability of such loaning and borrowing employers is joint and several, provided that such loaning employer is in the absence of agreement to the contrary entitled to receive from such borrowing employer full reimbursement for all sums paid or incurred pursuant to this paragraph ***.
>
> ***

> An employer whose business or enterprise or a substantial part thereof consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers shall be deemed a loaning employer within the meaning and provisions of this Section." 820 ILCS 305/1(a)(4) (West 2010).

Although the question of whether an employee was borrowed generally constitutes a question of fact, the question is one of law where facts are undisputed and subject to only one reasonable inference. *Chaney*, 315 Ill. App. 3d at 827.

¶ 24 Several factors indicate that a borrowing employer had the right to direct and control the manner of the employee's work: (1) the employee worked the same hours as the borrowing employer; (2) she received instructions from the borrowing employer's employees; (3) the loaning employer's supervisors were not at the work site; (4) the borrowing employer told the employee when to start and stop working; and (5) the loaning employer relinquished its equipment to the borrower. *Prodanic*, 2012 IL App (1st) 110993, ¶ 16. Courts have also considered whether the purported borrowing employer could dismiss the employee from service at its worksite, notwithstanding that the borrowing employer could not discharge the employee from her employment with the loaning employer. *Id.* The fact that an employee does not receive wages from the special employer does not alone defeat a finding that he was a loaned-employee. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 349.

¶ 25 Here, even when viewed in the light most favorable to plaintiffs, the record supports only the determination that Radio had the right to direct and control the manner of plaintiffs' work. First, we observe that plaintiffs conflate the issue of whether Radio was their borrowing employer with the scope of employment issue. These distinct legal issues must be separately addressed. Indeed, plaintiffs themselves demonstrate the significance of this legal distinction by stating that "[h]ad the injuries occurred at the Chicago warehouse, between the hours of 8:30 a.m.—4:00 p.m., while the Plaintiffs were assembling wagons or performing other warehouse tasks, the Defendants arguments would be correct." Radio either was, or was not, plaintiffs' borrowing employer. Radio's status as such did not evaporate and rematerialize everyday between the hours of 4 p.m. and 8:30 a.m.

¶ 26 Morales testified that Herrera was her supervisor at Radio. Sanchez similarly testified that Herrera told her what to do and how to do it. Although work was generally from 8:30 a.m. to 5 p.m., Sanchez testified that Herrera told her when to start and stop working. According to Herrera and Bastuga, Herrera determined plaintiffs' duties, schedules, and responsibilities and could determine whether plaintiffs' work should be stopped or terminated. Furthermore, Ryan testified that Herrera supervised plaintiffs and that Radio had the right to control and direct the manner in which they performed their work for Radio. While Ryan also testified that she was plaintiffs' supervisor, Ryan's role did not foreclose Herrera from being their supervisor while working for Radio. Indeed, Express's staffing agreement provided that Radio would supervise, direct, and control the work of Express employees. In contrast, Express had no supervisors at the work site.

¶ 27 Moreover, Ryan testified that she expected plaintiffs to comply with Radio's policies while at its work site. Although plaintiffs observe that those polices required temporary employees to bring issues regarding their employment with Express to the attention of Express, Radio did not prevent such employees from raising issues regarding their work at Radio with its own

supervisors. Additionally, Ryan testified that Radio could remove an Express employee for violating one of Radio's policies, notwithstanding that Ryan might try to persuade Radio not to do so, and that Radio could not otherwise discipline Express employees. Radio had the right to discharge plaintiffs from its facility. It did not need to demonstrate the right to discharge plaintiffs from their positions with Express.

¶ 28 Contrary to plaintiffs' suggestion, Morales's testimony that Express, rather than Radio, was her employer, does not change the result. Her personal definition of an "employer" has no bearing on whether Radio was her employer as defined under Illinois law. As stated, Express's payment of plaintiffs' wages does not prevent Radio from being a borrowing employer either. See *A.J. Johnson Paving Co.*, 82 Ill. 2d at 349. To the extent plaintiffs argue that the collision occurred outside the confines of Express's contract with Radio, this does not negate the undisputed evidence that Radio generally had the right to control and direct the manner of work plaintiffs performed for Radio. See *Prodanic*, 2012 IL App (1st) 110993, ¶ 18 (finding the record only reasonably permitted the inference that the worker was a borrowed employee where deposition testimony showed employer had the right to control the manner of his work). At best, this reflects a potential contractual dispute between Express and Radio, not plaintiffs' employment status for purposes of the Act.

¶ 29 We are unpersuaded by plaintiffs' reliance on *Trenholm v. Edwin Cooper, Inc.*, 152 Ill. App. 3d 6, 9 (1986), where the reviewing court found issues of fact existed regarding the defendant's right to control the plaintiff's work. There, the plaintiff was sent to the defendant's premise by his general employer. While there, the defendant's employees would tell the plaintiff *what* tasks needed to be done, but the plaintiff was responsible for telling his employer's other employees on the defendant's premises *how* to perform each task. *Id.* at 8-9. Additionally, evidence was conflicting regarding whether the defendant had the right to hire, fire, or supervise the plaintiff and his fellow employees. *Id.* at 9-10.

¶ 30 In contrast, here, Radio told plaintiffs how to perform their tasks. Additionally, Radio ultimately had the right to prevent plaintiffs from working on its premises, the equivalent of discharge. Thus, the record before us presents no such factual dispute.

¶ 31 The record also clearly shows that plaintiffs had an implied contract for hire with Radio. In order to demonstrate that a contract existed, the employee must have at least implicitly acquiesced in that relationship. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 350. Additionally, implied consent is established where the employee knows that the borrowing employer is generally in charge of, and controls, her performance. *Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 641 (1995). Similarly, the employee's acceptance of direction shows her acquiescence to her relationship with the employer. *Prodanic*, 2012 IL App (1st) 110993, ¶ 17.

¶ 32 Plaintiffs willingly went to Radio, even prior to the day of the collision, and accepted directions from Herrera. When Herrera told plaintiffs to be in Radio's Chicago parking lot in order to be transported to Elwood, plaintiffs did so. Regardless of whether Herrera instructed plaintiffs to ride with him or merely offered them a ride, the record clearly shows that he directed plaintiffs to go to Elwood and, in response, they set out to go there. See *A.J. Johnson Paving Co.*, 82 Ill. 2d at 350 (finding acquiescence to an employment relationship where (1) the claimant was aware that the job was being performed by the special employer, and (2) the claimant accepted the special employer's control over his work by complying with the foreman's instructions); *Chavez*, 379 Ill. App. 3d at 863 (finding that the plaintiff implicitly consented to the borrowed employment relationship where he accepted his assignment with

that entity and its control and direction of his work); see *Crespo*, 275 Ill. App. 3d at 641-42 (finding the plaintiff's consent was demonstrated when he appeared at the defendant's facility and responded to instructions of the defendant's supervising employee). While plaintiffs argue that Ryan testified no contract was executed between plaintiffs and Radio, her testimony shows only that plaintiffs did not form a written contract with Radio.

¶ 33 Moreover, the agreement between Radio and Express has no bearing on plaintiffs' implied contract for hire with Radio. As our supreme court stated in *A.J. Johnson Paving Co.*, the loaned employee concept depends on a contract of hire "between the employee and the special employer," not the details of the contract between the two employers. *A.J. Johnson Paving Co.*, 82 Ill. 2d at 348. Thus, the employee's consent is the focus of the second prong of the borrowed employee test. The record does not demonstrate, however, that plaintiffs were aware of staffing agreement's terms. Thus, that agreement could not have limited the terms of plaintiffs' consent to an employment relationship with Radio. While Express may or may not have a claim for reimbursement against Radio based on the Act or their contract, that matter is entirely separate from whether plaintiffs and Radio had an implied contract for hire. See *Chaney*, 315 Ill. App. 3d at 826-27 (observing that between employers, the borrowing employer has primary liability, while the loaning employer has secondary liability).

¶ 34 Having determined that Radio was plaintiffs' borrowing employer and that plaintiffs have already received workers' compensation payments through Express, plaintiffs are clearly estopped from denying that their injuries fell outside the Act. Estoppel aside, we nonetheless observe that a trier of fact could find only that their injuries fell within the scope of employment.

¶ 35 C. Scope

¶ 36 An employee traveling to or from work is generally not within the scope of employment. *Pyne*, 129 Ill. 2d at 356; *Hall*, 178 Ill. App. 3d at 413. This is because the employee's travel results from his own decision where to live, a matter which is ordinarily of no interest to her employer. *Hindle v. Dillbeck*, 68 Ill. 2d 309, 318 (1977). An exception exists, however, where an employer causes its employee to travel away from a regular workplace or where the employee's travel is partly for her employer's purposes, rather than for the purpose of conveying the employee to or from the regular workplace. *Pyne*, 129 Ill. 2d at 356.

¶ 37 Here, the accident occurred while plaintiffs were en route to a distant location not of their choosing for the benefit of Radio. Additionally, plaintiffs willingly appeared early at work by 7 a.m. Regardless of Express's expectations with respect to the work site and work hours, plaintiffs were in Herrera's car for the benefit of Radio, their borrowing employer, when the collision occurred. Compare *Hindle*, 68 Ill. 2d at 319-20 (finding that the car accident occurred within the course of employment where the employer provided transportation for its crew as a business necessity, the foreman was authorized to pay the crew for time spent in travel, no public transportation was available, the worksites and hours varied, and the employees depended on the employer to provide transportation), *Sjostrom v. Sproule*, 33 Ill. 2d 40, 44 (1965) (where the coemployees' car accident occurred while en route to a different location to which they were assigned on a temporary basis, and thus, it was not contemplated that they should change their place of residence, the employees were traveling to accommodate their employer), and *Hall*, 178 Ill. App. 3d at 413 (finding "the fact that plaintiff had punched out of work" and that the defendant did not show the plaintiff was required to ride with his

coemployee did not permit an inference that the collision occurred outside the scope of employment), with *Moran v. Tomita*, 54 Ill. App. 3d 168, 170-71 (1977) (finding that the undisputed facts presented at trial permitted conflicting inferences as to whether injuries arose out of the parties' employment where the employer did not require its employees to travel to another location, did not pay for transportation, and gave no instructions regarding the trip).

¶ 38 III. CONCLUSION

¶ 39 Plaintiffs were the employees of both Express and Radio. The record supports no other determination. Having already sought and received workers' compensation benefits through Express, plaintiffs are not entitled to further damages from Radio or Herrera, their coemployee. Furthermore, the record supports only the inference that the injuries occurred within the scope of their employment. Accordingly, the trial court properly entered summary judgment in favor of defendants.

¶ 40 For the foregoing reasons, we affirm the trial court's judgment.

¶ 41 Affirmed.