2016 IL App (1st) 143387-U

FOURTH DIVISION
March 24, 2016

No. 1-14-3387

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

TELESFORO VILLASEÑOR, Plaintiff-Appellant, v. STERLING BRANDS, LLC, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County
STERLING BRANDS, LLC, Third-Party Plaintiff, v. RON'S TEMPORARY HELP SERVICES, INC., d/b/a RON'S STAFFING SERVICES, INC., Third-Party Defendant.	)	10-L-10366 Honorable Jeffrey Lawrence, Judge Presiding

PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Howse and Cobbs concurred in the judgment.

ORDER

¶ 1 *Held*: Summary judgment as to injured employee's tort suit affirmed where undisputed evidence led to but one conclusion that defendant manufacturing facility was a borrowing employer entitled to the protection of Illinois' workers' compensation system.

¶ 2 Telesforo Villaseñor, an employee of Ron's Staffing Services, Inc. (Ron's Staffing) assigned to work temporarily at the plastics manufacturing facility of Sterling Brands, LLC (Sterling) in Buffalo Grove, Illinois, filed this negligence action seeking damages from Sterling for injuries he sustained while operating Sterling's industrial mixer. Villaseñor alleged he was working as an independent contractor when he fell into the mixer and suffered severe, disabling, and permanent injuries to his legs and left arm. The trial court granted Sterling's motion for summary judgment on grounds that a borrowing employer is immune from common law liability and that Villaseñor's exclusive remedy was through the Workers' Compensation Act. 820 ILCS 305/5(a) (West 2008) (exclusivity provision); 820 ILCS 305/1(a)(4) (West 2008) (recognizing concept of loaning and borrowing employers) (Act). Villaseñor contends he ceased being a borrowed employee when Sterling exceeded the scope of its contract with Ron's Staffing by assigning him to a prohibited task. On appeal, he argues (1) there is, at minimum, a question of material fact as to whether Sterling so violated its contract with Ron's Staffing that it forfeited the protection of the Act and (2) that it is contrary to public policy to allow a borrowing employer that has exceeded the scope of a lending arrangement and placed nonemployees in harm's way to be shielded by the Act. Sterling responds that the record overwhelmingly demonstrates Sterling directed and controlled Villaseñor's work and, thus, had an employment relationship with him.

¶ 3 Unless otherwise specified, the following undisputed facts are found in the deposition testimony of Villaseñor and personnel from Ron's Staffing and Sterling.

¶ 4 Villaseñor, who was born on July 28, 1984, filled out an employment application at Ron's Staffing in 2007. After that, he arrived at their offices every weekday at noon to get a job, and, if he was chosen, he would be transported to and from the job site by a van and driver provided by

Ron's Staffing and then be paid by Ron's Staffing at the end of the work week. He was 25 years old when he was injured at Sterling's plant on December 9, 2009, while operating a Day ribbon blender. He had been working at the Sterling facility for a while and whenever he was there, a Sterling supervisor, Juan Delgado, gave him work assignments and told him when to take breaks. Temporary employees worked the same shifts and alongside Sterling's regular employees. Sterling had the authority to discharge any of them from employment at its facility.

¶ 5 The blender was a large machine at the beginning of Sterling's production line which mixed dry, dusty materials in preparation for heating and extrusion into specific plastic products. A Sterling employee, Isidro Sanchez, who had about two years experience working with the machine, was operating it by himself that day, but he could work faster if he had an assistant, and so shortly after the 3:00 p.m. shift began, Delgado told Villaseñor to move from the packaging area at the end of the production line to the blender. As the blender was finishing a batch, Sanchez gave Villaseñor safety instructions and demonstrated how to use the machine. Sanchez was not a safety expert and had never trained anyone to use the blender. Sanchez and/or Villaseñor were to climb onto the blender's platform, pour big bags of granular, chunky ingredients into the top of the blender, run the machine, and when the mixed product emerged from the bottom of the machine, they were to move it aside with a forklift. Each batch took about 20 minutes to process through the machine and additional time to load and unload. The machine needed to run until all the material had processed through it, then it would be powered off and another batch could be poured in. In order to keep down the dust, Sterling was covering the top of the blender with a large piece of cardboard.

¶ 6 The accident occurred when Sanchez went away for a few minutes with the forklift to pick up material for the next batch. Villaseñor was supposed to turn off the blender when it was

finished. Villaseñor tried to repeat what he had been shown, which was to walk along the edge of the platform to get to the button, but he accidentally stepped onto the soft cardboard and fell inside the running machine. Sterling's plant manager, Robolino Gutierrez, was called and came running from the plant office. Gutierrez confirmed that the machine was powered off, and then climbed on top of the machine, where he could see that Villaseñor was inside the mixer but wrapped up by the cardboard dustcover. The cardboard had jammed the machine and it was the only reason Villaseñor was still alive and had not been cut to pieces. Villaseñor was conscious and talking as Gutierrez and two other men pulled Villaseñor out by his pants. Nevertheless, his injuries were severe. The record indicates that as of February, 2011, he was still in treatment and that his medical bills exceeded $1.1 million. Gutierrez was a new employee of Sterling when the accident occurred and not yet familiar with all of its production practices. He deemed the blender to be unsafe and subsequently made extensive modifications to the platform, including adding a staircase which created an obvious place to enter and exit the platform, adding railings and chains to prevent someone from walking across the length of the platform, discontinuing the use of the cardboard, and covering the blender's opening with a metal grate.

¶ 7 Iveliz Figueroa, a six-year employee of Ron's Staffing, was responsible for the billing and payroll department; workers' compensation claims; insurance; and safety, including supervising the safety administrator, Trini Perez, and the field safety manager, Enrique Landeros. Figueroa testified that the company's relationship with Sterling was a long one that began in 2006 and predated her employment at Ron's Staffing. She had been unable to find the contract between Sterling and Ron's Staffing, but what typically occurred was to have a service confirmation agreement or at least an email stating there was an agreement to do business, what the employees would be doing, and the billing rate. In addition, Landeros would inspect the client's site for

safety and the report would be shared with the new client, along with a letter advising them that they must provide a safe working environment. Ron's Staffing sometimes declined to do business with a potential client because of safety concerns or would recommend changes, and existing clients would be spot checked by Landeros at least quarterly. Sterling requested only "picker-packers" which were "unskilled labor[ers]" in the "most basic position" on the job spectrum. Packagers did not operate or tend machines; they stood in a production line, picked products off the line, and put them into boxes or crates. Packagers were paid less and did not cost the client as much as machine tenders and operators. If Sterling had asked for machine workers, Ron's Staffing would have first inspected the company's machinery for safety and OSHA compliance. Or, if a job description changed at Sterling, then Sterling was supposed to call Ron's Staffing for permission to reassign an employee, and Ron's Staffing might respond that a particular person was not trained or was not capable of the new job and that someone else could be sent to do the job. Ron's Staffing required preapproval, even if the client wanted to pull an employee from one position to another just to help out for a few minutes. Figueroa agreed that once the employees were on Sterling's site, Sterling was in charge of instruction, supervision, setting times for meals and breaks, and could terminate an employee's assignment to Sterling but not their employment with Ron's Staffing. Even so, Ron's Staffing would have verbally told Villaseñor that he did not have to follow all the instructions he received from a client and that if a client told him to do something different from what he was sent to do, he should call Ron's Staffing. Figueroa had 20 years in the industry and knew, however, that the unskilled workers employed by Ron's Staffing needed income and likely did not get full-time work even from Ron's Staffing. "[O]ut of fear" of "retribution" an employee might just do whatever he was told. After considering Landeros' post-accident site report and photographs and the circumstances that led to the accident (inadequate

training, inadequate supervision, and the use of the cardboard), Figueroa recommended that Ron's Staffing cease doing business with Sterling, and although this did not happen immediately, the relationship did end. In the meantime, Figueroa informed Sterling that temporary workers were forbidden from ever working on the machines.

¶ 8 Michael C. Lewis, the president of Sterling, testified there was a written agreement between Ron's Staffing and his prior companies, Superior American Plastics or Multi FPG Lewis, which carried over to the date of Villaseñor's injury. Lewis used Ron's Staffing for many years but ended the relationship after Villaseñor's accident because the agency attempted to dramatically raise hourly pay.

¶ 9 Villaseñor used a preprinted Job Ticket provided by Ron's Staffing to record his work hours and Sterling would sign off on the ticket at the end of the week. Some of the appellate arguments concern language on the back of the ticket. We will set out those terms as relevant.

¶ 10 Sterling denied liability for Villaseñor's common law action and contended in an affirmative defense and motion for summary judgment that it was a borrowing employer. Sterling also filed a third party complaint against Ron's Staffing, alleging, in the alternative, that Ron's Staffing was a joint tortfeasor that failed in its duty to adequately train and instruct Villaseñor, inspect the premises, or warn him of dangerous conditions. Ron's Staffing denied the material allegations and contended that in any event its liability was limited by the workers' compensation statute. After discovery, written motion practice, and oral argument the trial court granted Sterling's motion for summary judgment. This appeal followed.

¶ 11 Summary judgment is a drastic but expeditious and efficient means of concluding litigation where there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. *Illinois Insurance Guaranty Fund v. Virginia Surety Co.*, 2012 IL

App (1st) 113758, ¶15, 979 N.E.2d 503 (mechanic injured by flying tire rim while on loan from temporary employment agency to intermodal trailer company). Summary judgment is appropriate only where "the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." 735 ILCS 5/2-1005(c) (West 2012). The trial court's entry of summary judgment is a decision we address *de novo*. *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶15, 979 N.E.2d 503.

¶ 12 An employee injured on the job normally cannot sue his or her Illinois employer, provided the employee is entitled to receive workers' compensation benefits from the employer or the employer's insurer. *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶16, 979 N.E.2d 503; 820 ILCS 305/5(a) (West 2008) (exclusivity provision). The comprehensive Act specifies that an employee has no common law right to sue his or her employer in tort, but may automatically recover for injuries arising out of and in the course of his or her employment without regard to any fault on his or her part. *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶16, 979 N.E.2d 503. The employer is compelled to pay and has no right to various defenses that could be pled in a tort suit, but the employer's liability is capped under the Act's comprehensive schedule of recovery. *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶16, 979 N.E.2d 503. Thus, when an accident occurs, an employer assumes a new liability with regard to fault but avoids the prospect of a large damage award (*Meerbrey v. Marshall Field & Co., Inc.*, 139 Ill. 2d 455, 462, 564 N.E.2d 1222, 1225 (1990) (discussing purpose of and exceptions to the Act) and the employee receives prompt compensation for his or her injuries (*Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶16, 979 N.E.2d 503). There is no comparable statute for injured independent contractors.

¶ 13 Under the loaned employee doctrine, "an employee in the general employment of one person may be loaned to another for performance of special work and become the employee of the person to whom he is loaned." *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill. 2d 341, 347, 412 N.E.2d 477, 480 (1980). The concept of a loaned employee is a doctrine from the common law that has been incorporated into the Illinois workers' compensation statutes. See 820 ILCS 305/1(a)(4) (West 2008) (section of Act effective July 11, 1957 which recognizes concept of loaning and borrowing employers). Thus, if a loaned employee relationship is created, then both the lending employer (general employer) and the borrowing employer (special employer) are immunized from any tort action for work-related injuries or death. *Saldana v. Wirtz Cartage Co.*, 74 Ill. 2d 379, 388, 385 N.E.2d 664, 668 (1978).

¶ 14 By statute, in a loaned-employee arrangement: (1) the lending and borrowing employers are jointly liable for an employee's workers' compensation, (2) the lender is given a right of action against the borrower to recover any compensation it was required to pay to discharge this liability, and (3) the employers are authorized to reverse this payment priority. *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶19, 979 N.E.2d 503, 512. See 820 ILCS 305/1(a)(4) (West 2000)). " 'Both the employer who loans and employer to whom the employee is loaned and in whose service he was injured are made liable to the employee in order to make it reasonably sure that the employee will get compensation and to relieve him of the risk of selecting the proper employer against whom to proceed. But as between the two employers * * * [only one of them] is made to bear completely the ultimate loss. This is provided for by giving the lender a cause of action.' " *Illinois Insurance Guaranty Fund*, 2012 IL App (1st) 113758, ¶19, 979 N.E.2d 503 (quoting *American Surety Co. of New York v. Northern Trust Co.*, 240 Wis. 78, 2 N.W.2d 850, 851-52 (1942)). The two employers involved here, Ron's Staffing and Sterling,

agreed that Ron's Staffing would be liable for workers' compensation claims from employees that were lent to Sterling.

¶ 15 In analyzing whether an employer-employee relationship exists, there is no rule applicable in all situations. *Morgan Cab Co. v. Industrial Comm'n*, 60 Ill. 2d 92, 97, 324 N.E.2d 425, 427 (1975) (injured taxi driver). Instead, the analysis is based on all of the evidentiary facts in connection with the applicable principles of law. *Lawrence v. Industrial Comm'n*, 391 Ill. 80, 84, 62 N.E.2d 686, 688 (1945) (injured plasterer). The Act defines the term "employer" to include every firm "who has any person in service or under any contract for hire, express or implied, oral or written." 820 ILCS 305/1(a)(2) (West 2012). The statute does not define who is an "independent contractor" as opposed to an employee, however, the supreme court has defined an independent contractor as "one who renders service in accordance with the will of the person for whom the work is done only as to the results of the work, and who is free to exercise his own judgment and discretion as to the method or means by which it is accomplished, entirely exclusive of the control and direction of the party for whom the work is done." *Lawrence*, 391 Ill. at 85, 62 N.E.2d at 688.

¶ 16 The Act classifies Ron's Staffing as a "loaning employer" because "its business or enterprise *** consists of hiring, procuring or furnishing employees to or for other employers operating under and subject to the provisions of this Act for the performance of the work of such other employers and who pays such employees their salary or wages notwithstanding that they are doing the work of such other employers." 820 ILCS 305/1(a)(4) (West 2012).

¶ 17 However, that definition does not establish who shall be considered a "borrowing employer." In order to determine whether Sterling was a borrowing employer and thus immune from Villaseñor's common law suit, it is essential that we consider the two customary factors that

define a borrowing employer-employee relationship. *Crespo v. Weber Stephen Products Co.*, 275 Ill. App. 3d 638, 642, 656 N.E.2d 154, 157 (1995) (manual laborer injured in punch press accident while on loan from temporary employment agency to factory).

¶ 18 Whether an individual is a borrowed employee is generally a question of fact. *A.J. Johnson Paving*, 82 Ill. 2d at 348, 412 N.E.2d at 481. If the undisputed facts permit but a single inference, then the question becomes a question of law. *A.J. Johnson Paving*, 82 Ill. 2d at 348, 412 N.E.2d at 481 (affirming industrial commission's decision in borrowed temporary employee case where it was impossible to draw more than one reasonable conclusion from the facts); *Reichling v. Touchette Regional Hospital, Inc.*, 2015 IL App (5th) 140412, ¶39, 37 N.E.3d 320 (affirming court's entry of summary judgment where undisputed material facts demonstrated but one conclusion); *American Stevedores Co. v. Industrial Comm'n*, 408 Ill. 449, 455-56, 97 N.E.2d 325, 327 (1951) (holding that case came within borrowed employee doctrine as a matter of law where facts were not in dispute and showed the borrowing employer procured temporary workers through an agency and the agency was merely a "straw boss" that transported workers, collected time sheets, and followed instructions to fire certain workers); *Chavez v. Transload Services, LLC*, 379 Ill. App. 3d 858, 884 N.E.2d 1258 (2008) (same). The trial court found this to be the latter type of case and, after review of the record and the relevant authority, we also conclude that it is possible to draw only one reasonable inference from the facts of this case as to whether Villaseñor was a borrowed employee of Sterling.

¶ 19 Of the two factors, the primary consideration in determining whether a borrowed employee relationship has been created is whether the borrowing employer had the right to control and direct the manner in which the claimant performed the work. *A.J. Johnson Paving*, 82 Ill. 2d at 348, 412 N.E.2d at 481; *Saldana*, 74 Ill. 2d at 389, 385 N.E.2d at 668 ("The main

criterion for determining when a worker becomes a loaned employee is whether the special employer has control of the employee's services."). Details such as freedom from control of the lending employer, the giving of directions and work supervision, the mode of payment, the manner of hiring, and the nature of the work may be indicative of a purported borrowing employer's right to control the manner in which an employee works. *Crespo*, 275 Ill. App. 3d at 641, 656 N.E.2d at 156. The right to discharge the employee from a job site may be a significant indicator of the right to control. *Evans v. Abbott Products, Inc.*, 150 Ill. App. 3d 845, 849, 502 N.E.2d 341, 344 (1986) (manual laborer injured in punch press accident while on loan from temporary employment agency to factory); *Emma v. Norris*, 130 Ill. App. 2d 653, 657, 264 N.E.2d 573, 577 (1970) (where hotel bartender injured in elevator while on loan from hotel to management company contended he must, as a matter of law, have a common law action against one or the other company, the court stated the power to discharge or its equivalent is a condition precedent to being an "employer"). The terms of any contract between the purported lending and borrowing employers, although not conclusive, may also indicate that the borrowing employer had the right to control the manner in which the employee's work was to be done. *O'Loughlin v. ServiceMaster Co. Ltd. Partnership*, 216 Ill. App. 3d 27, 34, 576 N.E.2d 196, 202 (1991) (where painter employed by school district to paint exterior of high school's buildings was injured in fall from scaffolding, there was a question as to whether he was loaned to management company). Cases are fact specific and no one fact can be solely dispositive. *O'Loughlin*, 216 Ill. App. 3d at 34, 576 N.E.2d at 202.

¶ 20 In *A.J. Johnson Paving*, for instance, the issue was whether a heavy equipment operator employed by an asphalt manufacturer had been borrowed by a paving company when he injured his arms. *A.J. Johnson Paving*, 82 Ill. 2d at 345, 412 N.E.2d at 479. When an asphalt purchase

exceeded a certain tonnage, the asphalt maker would also provide, at no additional charge, a paving machine and someone to operate the machine. *A.J. Johnson Paving*, 82 Ill. 2d at 345, 412 N.E.2d at 479. The asphalt maker delivered its material and equipment in 1974 to a job site at Harlem and Foster Avenues in Chicago and told its employee, Ray Wolfgram, to go to the site and report to the paving company's job foreman. *A.J. Johnson Paving*, 82 Ill. 2d at 345, 412 N.E.2d at 479. The asphalt maker sent only Wolfgram and did not send someone to supervise him. *A.J. Johnson Paving*, 82 Ill. 2d at 349, 412 N.E.2d at 481. Wolfgram was skillful in operating the machine and was capable of deciding technical details about a paving operation. *A.J. Johnson Paving*, 82 Ill. 2d at 349, 412 N.E.2d at 481. At the site, the paving company's job foreman told Wolfgram where to lay the material and how thickly to lay it in order to create a parking lot. *A.J. Johnson Paving*, 82 Ill. 2d at 345-46, 412 N.E.2d at 479. If the foreman was not satisfied with the results of Wolfgram's work, the foreman could have ordered Wolfgram to relay the asphalt. *A.J. Johnson Paving*, 82 Ill. 2d at 346, 412 N.E.2d at 480. The foreman told Wolfgram when to stop and start work for the day and could also tell him to stop or start the paving machine. *A.J. Johnson Paving*, 82 Ill. 2d at 346, 412 N.E.2d at 480. The foreman did not have control over when Wolfgram took a work break, but the foreman did control the break times of the paving company's own laborers and Wolfgram would customarily take his breaks with the laborers because he needed their assistance to operate the paving machine. *A.J. Johnson Paving*, 82 Ill. 2d at 346, 412 N.E.2d at 479-80. These facts were sufficient for the court to conclude that the asphalt maker relinquished and the paving company took control over the method of Wolfram's work at the time of his injury. *A.J. Johnson Paving*, 82 Ill. 2d at 349, 412 N.E.2d at 481.

¶ 21 Another example is *Evans*, in which a temporary agency employee injured his hand while operating a punch press machine at a factory and argued that he was not a borrowed employee of the factory because the temporary agency controlled his work assignments, paid his wages, and retained the right to terminate his employment. *Evans*, 150 Ill. App. 3d at 848-49, 502 N.E.2d at 344. The court found that he was a borrowed employee in part because the factory had the right to control his work activities, at least temporarily, and could terminate his work at the factory and direct him back to the temporary agency. *Evans*, 150 Ill. App. 3d 849, 502 N.E.2d at 344. The facts led to but one conclusion and warranted the dismissal of the worker's suit as a matter of law pursuant to section 2-619 of the Code of Civil Procedure. 735 ILCS 5/2-619 (West 2012).

¶ 22 In *Reichling*, a registered nurse employed by a temporary healthcare staffing agency was assigned to work at a hospital in southern Illinois where she slipped on a wet floor and broke her left knee cap. *Reichling*, 2105 IL (5th) 140412, ¶37 N.E.3d 320. Like Villaseñor, she obtained worker's compensation benefits through the temporary agency, but filed a tort suit against the hospital, alleging her injury was caused by the hospital's negligence. *Reichling*, 2105 IL (5th) 140412, ¶4, 37 N.E.3d 320. Like Villaseñor's case, the nurse's case ended in summary judgment for the defendant, because the hospital was a borrowing employer and thus immunized by the Act from common law liability to its injured employee *Reichling*, 2015 (5th) 140412, ¶45, 37 N.E.3d 320. Numerous facts indicated the hospital had the right to control the manner in which the temporary nurse performed her work in its facility. For instance, the hospital, not the temporary agency, was responsible for determining proper patient treatment. *Reichling*, 2105 IL (5th) 140412, ¶8, 37 N.E.3d 320. The hospital's doctors gave orders to the nurse, which she followed. *Reichling*, 2015 IL (5th) 104012, ¶13, 37 N.E.3d 320. The hospital also treated the nurse like any other employee. She was required to follow the hospital's policies and protocol

when performing her duties. *Reichling*, 2015 IL (5th) 104012, ¶10, 37 N.E.3d 320. And, under the written agreement between the two employers, the hospital handled scheduling, supervision, employee evaluations, and had the sole discretion to discharge any temporary employee it found to be incompetent, negligent, or otherwise unsatisfactory. *Reichling*, 2105 IL (5th) 140412, ¶8, 37 N.E.3d 320. The hospital scheduled temporary employees to work alongside full time employees during the same shift hours. *Reichling*, 2105 IL (5th) 140412, ¶8, 37 N.E.3d 320. The hospital provided medical supplies such as syringes, needles, IV bags, and IV for temporary and full time employees to work, but required all of them to supply their own scrubs, footwear and stethoscopes. *Reichling*, 2105 IL (5th) 140412, ¶15, 37 N.E.3d 320. The temporary agency was essentially only a conduit through which the nurse was paid. *Reichling*, 2015 IL App (5th) 140412, ¶37, 37 N.E.3d 320. These facts helped lead the court to conclude that the hospital, not the temporary agency, was a borrowing employer that directed and controlled the manner in which the nurse worked. *Reichling*, 2105 IL (5th) 140412, ¶39, 37 N.E.3d 320.

¶ 23 The second of the two factors to be considered in a borrowed employee analysis is whether there was a contract of hire between the borrower and the worker. *A.J. Johnson Paving*, 82 Ill. 2d at 350, 412 N.E.2d at 481-82. There must be an employment contract, express or implied, between the borrowing employer and the worker in order to conclude there is a borrowed employee situation. *A.J. Johnson Paving*, 82 Ill. 2d at 350, 412 N.E.2d at 481-82. Implied or actual consent to an employment relationship occurs where the employee "is aware that the borrowing employer 'is in charge' or generally controls the employee's performance." *Crespo*, 275 Ill. App. 3d at 641, 656 N.E.2d at 156. The employee's acceptance of the borrowing employer's direction shows that he has acquiesced to the employment situation. *A.J. Johnson Paving*, 82 Ill. 2d at 350, 412 N.E.2d at 482; *Evans*, 150 Ill. App. 3d at 849, 502 N.E.2d at 344.

¶ 24 In the parking lot case, the court found that the heavy equipment operator had at least impliedly acquiesced to an employer-employee relationship with the paving company:

> "This acquiescence can be established by the fact that the claimant here was aware that the paving job was being performed by [the paving company] and by the fact that he accepted [the paving company's] control over the work in that he complied with the foreman's instructions with regard to starting, stopping and break times, as well as instructions as to where to start paving and other incidental directions as to the performance of the work." *A.J. Johnson Paving*, 82 Ill. 2d at 350, 412 N.E.2d at 482.

¶ 25 In the factory worker case, the court emphasized that the worker knew he worked for a temporary agency and was being loaned to the other employer:

> "Plaintiff also argues that he must assent to the loaned-employee relationship before he can acquire the status of a loaned employee. *** Plaintiff worked for a business which loans its employees on a temporary basis to other employers. By agreeing to work for Personnel Pool [a temporary agency] and by accepting temporary employment assignments, plaintiff impliedly consented to the loaned-employee relationship. Furthermore, plaintiff worked on the punch-press machine as directed by Abbott [the factory]. Plaintiff's consent to the employer-employee relationship is shown from his acceptance of [the factory's] control and direction as to his work activities." *Evans,* 150 Ill. App. 3d 849, 502 N.E.2d at 344.

¶ 26 In the nurse case, the court found that the undisputed material facts demonstrated, at a minimum, that the nurse impliedly consented to the borrowed employee relationship by accepting the hospital's temporary work assignments and its control and direction of her work activities. *Reichling*, 2105 IL App (5th) 140412, ¶38, 37 N.E.3d 320. Among other things, she

had followed doctors' orders, supervisors' instructions with regard to starting, stopping, and break times, and hospital policies and protocol in performing her duties, and been disciplined when she failed to do so. *Reichling*, 2105 IL App (5th) 140412, ¶38, 37 N.E.3d 320. The undisputed facts led to but one conclusion—she was a borrowed employee of the hospital—and warranted the affirmance of the trial court's entry of summary judgment in favor of the hospital on her negligence suit. *Reichling*, 2105 IL App (5th) 140412, ¶38, 37 N.E.3d 320.

¶ 27 Applying the courts' analysis here leads us to conclude that Villaseñor was also a borrowed employee at the time of his accident. The deponents, including Villaseñor himself, consistently indicated Sterling had the right to control his work activities, at least temporarily. Ron's Staffing transported Villaseñor to and from the Sterling facility, but did not supervise his work. Instead, it was Sterling that assigned Villaseñor to specific duties within its production line, controlled his work hours and break times, and had the authority to discharge him from employment at its manufacturing facility.

¶ 28 In addition to the deposition statements, there are two documents which indicate Ron's Staff gave up and Sterling took the right to control the method in which Villaseñor performed his duties. First, the Job Ticket that Villaseñor used to record his hours and which Sterling signed off on each week indicates on the reverse side, "The CUSTOMER [Sterling] agrees to supervise all employees of RON'S STAFFING SERVICES, INC. at all times while these employees are being provided by RON'S STAFFING SERVICES, INC." Second, the Service Confirmation Agreement in the record on appeal includes the statement, "RON'S STAFFING SERVICES, INC. shall provide workers' compensation insurance coverage for the Service Employee but CLIENT [Sterling] retains the right to direct and control the work of the Service Employees." There is some uncertainty as to whether this Service Confirmation Agreement is the agreement

in effect at the time of Villaseñor's accident. The document is called into question because it does not include Sterling's name, and instead refers to Ron's Staffing and "CLIENT," and the document came to light after the most of the depositions had been taken, thus, no deponent was questioned about it. Nonetheless, this is the document that was produced and which Villaseñor relies upon for his primary argument on appeal. In our *de novo* review, we have considered not only the language he contends favors him, but also this language which disfavors him. In any event, even without the Service Confirmation Agreement, the deposition testimony and undisputed Job Ticket definitively indicate Villaseñor was a borrowed employee of Sterling when he fell into Sterling's industrial blender.

¶ 29 Villaseñor points to other facts in the record indicating that Ron's Staffing did not intend for Villaseñor to be a machine operator and expressly prohibited the use of its employees on dangerous equipment or at heights. Villaseñor's Job Ticket and Ron's Staffing invoices indicate Villaseñor was sent to work in the packaging section of the Sterling production line, not to operate the machine that injured him. The Job Ticket also includes the statement, "Said employees will not be permitted to operate unprotected or dangerous equipment, to perform work on ladders, scaffolding, or rooftops, to perform excavation without proper shoring, or to work under any unsafe or questionable conditions." The Service Confirmation Agreement states: "CLIENT [Sterling] agrees that it will not require the Service Employees to perform the following prohibited work: operate a drill or punch press or saw without RON'S STAFFING SERVICES, INC.'s prior written approval; operate any unsafe equipment; *** work off the ground 6 feet or higher *(i.e.*, ladders, rooftops, elevated platforms) or below ground 4 feet or deeper *(i.e*., excavations); on or near bodies of water; or work with or near hazardous chemicals, materials or flammable products." There was also deposition testimony that Villaseñor was

categorized and paid as a packager, not a machine operator. Further testimony indicated Ron's Staffing reserved the right to safety check a work site and had no reason to safety check Sterling's machines, because none of its workers were supposed to be assigned to machine tasks. Villaseñor contends his injury occurred because Sterling breached the terms of its agreement with Ron's Staffing. Villaseñor contends these facts, particularly the contract terms, indicate Ron's Staffing did not relinquish complete control of Villaseñor's work. We disagree.

¶ 30 These facts indicate that Ron's Staffing attempted to control the scope of its employees' work, to receive fair compensation for itself and its workers, and to manage its liability. However, these are not the tests for determining whether a lending-borrowing relationship has been formed between two employers. The right-to-control test refers to the right to control "the manner in which the employee's work was to be done." *O'Loughlin*, 216 Ill. App. 3d at 35, 576 N.E.2d at 202. See *Kawaguchi v. Gainer*, 361 Ill. App. 3d 229, 835 N.E.2d 435 (2005) ("the State Police had the power to direct, control, and supervise the manner in which Trooper Gainer performed her duties"). As we stated above, Ron's Staffing transported Villaseñor to the job site but no one from Ron's Staffing came inside the Sterling facility to supervise Villaseñor's work, to direct the specific manner in which he performed his tasks, or tell him when to start work, stop work, or take breaks. Regardless of what Ron's Staffing printed on its Job Ticket and Service Confirmation Agreement, Ron's Staffing did not have the right to control how Villaseñor performed his work duties at Sterling's plant. Ron's Staffing was not involved in any task that Villaseñor performed at Sterling. The record, despite Villaseñor's arguments, leads to but one conclusion: Sterling had control over the manner in which Villaseñor's work was done. The right-to-control factor indicates Sterling was a borrowing *employer*. *Chavez v. Transload Services, L.L.C.*, 379 Ill. App. 3d 858, 863, 884 N.E.2d 1258, 1262 (2008) (in a section 2-619

proceeding, concluding as a matter of law that borrowing employer had right to control, despite time ticket that restricted employee from operating "dangerous" or unprotected equipment or being entrusted with unattended premises or valuables, where borrowing employer had the right to discharge for any reason, set work schedule, gave instructions, and controlled start, stop, and break times).

¶ 31 Furthermore, Villaseñor, like the nurse in *Reichling*, acquiesced to loaned employee status, in part by agreeing to work for Ron's Staffing and by accepting temporary employment assignments including the one at the Sterling facility. Villaseñor reported every weekday to Ron's Staffing to get work assignments, was transported to jobs by a Ron's Staffing van and driver, and was paid weekly by Ron's Staffing. He had been to various job sites during his two year association with Ron's Staffing. He was well aware of the nature of his employment. He also acquiesced to an employer-employee relationship with Sterling by complying with instructions from Sterling's supervisors and employees about his work duties as well as when to start, stop take breaks from work. The deposition testimony clearly indicates that when Villaseñor arrived for a work shift at Sterling, he reported to a Sterling supervisor and would be assigned as needed within the manufacturing facility. *Reichling*, 2105 IL App (5th) 140412, ¶38, 37 N.E.3d 320. See also *Evans*, 150 Ill. App. 3d at 849, 502 N.E.2d at 344 (finding worker assented to a loaned employee relationship by working for a temporary employment agency, by accepting temporary employment assignments, and by accepting the borrowing employer's direction and control of his work activities); *A.J. Johnson Paving*, 82 Ill. 2d at 350, 412 N.E.2d at 482 (finding heavy equipment operator acquiesced to borrowed employment relationship by being aware job was being performed by borrowing employer, by accepting borrowing employer's control over the performance of his work).

¶ 32 Villaseñor now contends he consented to work as a "packager" and nothing more. But, in fact, he did consent to work on the machine. The record indicates that shortly after his work shift began, he followed the direction from Sterling's floor supervisor to move from the packaging area in the front of the facility to the manufacturing area in the back of the facility to assist Sanchez's work on the blender. Villaseñor then listened to Sanchez's instructions and watched him demonstrate how to move about and operate the machine. Villaseñor was injured while he was operating the machine, not while he was packaging. He fails to cite authority or explain why his job title should be considered controlling of his relationship. The undisputed facts demonstrate that Villaseñor acquiesced to employment with Sterling, a borrowing *employer*.

¶ 33 Thus, Villaseñor's relationship with Ron's Staffing and Sterling resemble those that occurred in *A.J. Johnson Paving*, *Evans*, and *Reichling*.

¶ 34 The circumstances in *A.J. Johnson Paving, Evans*, *Reichling*, and Villaseñor's case contrast with those in *Bauer*, in which a Chicago man delivering pizzas for Father & Son Pizzeria suffered serious injuries as he returned to the restaurant when his car was struck by a hit-and-run driver. *Bauer v. Industrial Comm'n*, 51 Ill. 2d 169, 170-71, 282 N.E.2d 448, 450 (1972). One question in that case was whether the pizzeria and the man had an employer-employee relationship or whether the man was an independent contractor, which is what Villaseñor alleged in his complaint against Sterling. The court indicated that the facts of each case must be considered and that there are no hard and fast rules for determining whether a person is an employee or independent contractor. *Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 450. The right to control is the primary factor but there is no fixed rule applicable in all situations to determine whether one is an employee or has some other status. *Morgan Cab Co.*, 60 Ill. 2d at 97, 324 N.E.2d at 427.

" 'No single facet of the relationship between the parties is determinative, but many factors, such as the right to control the manner in which the work is done, the method of payment, the right to discharge, the skill required in the work to be done, and the furnishing of tools, materials or equipment have evidentiary value and must be considered. Of these factors, the right to control the work is perhaps the most important single factor in determining the relation [citation], inasmuch as an employee is at all times subject to the control and supervision of his employer, whereas an independent contractor represents the will of the owner only as to the result and not as to the means by which it was accomplished." *Bauer*, 51 Ill. 2d at 171-72, 282 N.E.2d at 450 (quoting *Coontz v. Industrial Comm'n*, 19 Ill. 2d 574, 577-78, 169 N.E.2d 94, 96 (1960).

¶ 35 The pizza delivery driver was not controlled by the pizzeria (*Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 451) and had signed a contract specifying that he was "free from control or direction over the performance of his delivery service *** and shall be deemed *** an independent contractor." *Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 450. The pizzeria required only that a delivery be made a quickly as possible but the driver was free to choose any route he desired to meet this goal. *Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 451. The driver provided his own car and paid his own expenses, including insurance with extended business coverage for his delivery work. *Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 451. According to the court, this was clear evidence of independent contractor status, rather than employment. *Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 451.

¶ 36 Nothing in the record here suggests Villaseñor conducted himself as an independent contractor like the pizza delivery driver. The depositions indicate he was employed by Ron's Staffing and lent to Sterling. Then Sterling had the right to control the manner in which

Villaseñor's work was done, Sterling provided the tools, material, or equipment that Villaseñor worked with, and Sterling had the right to discharge Villaseñor from working at its plastics manufacturing facility. *Crespo*, 275 Ill. App. 3d at 643, 656 N.E.2d at 157; *Bauer*, 51 Ill. 2d at 172, 282 N.E.2d at 450; *Morgan Cab Co.*, 60 Ill. 2d at 97, 324 N.E.2d at 428. The record substantiates that Villaseñor's relationship with Sterling was an employment relationship and it does not leave open the possibility that he functioned as an independent contractor. It would be impossible to conclude from the record that Sterling's input was limited to "the results of the work" and that Villaseñor was "free to exercise his own judgment and discretion as to the method or means [his work was] accomplished, entirely exclusive of the control and direction of [Sterling,] the party for whom the work [was] done." *Lawrence*, 391 Ill. at 85, 62 N.E.2d at 688 (defining an "independent contractor"). We strongly reject Villaseñor's contention that there is a question of fact as his relationship with Sterling. All of facts indicate he was a borrowed employee of Sterling. There is no basis for doubt.

¶ 37 Finally, Villaseñor argues that for public policy reasons we should reverse the summary judgment in Sterling's favor. He contends it was inexcusable for Sterling to use an unskilled packaging laborer on and around a dangerous machine and then pass the costs of its unsafe practices onto Ron's Staffing, which has paid all of Villaseñor's worker's compensation benefits. Villaseñor argues that to allow Sterling to use the workers' compensation system as a shield from liability is dangerous precedent that allows abusive borrowing employers to place unskilled, loaned laborers in harm's way instead of endangering their own employees. Villaseñor concludes, "That is exactly what happened in this case. Our legislature and courts could not have envisioned such injustices to occur."

¶ 38 This argument, however, is a generalization that does not accurately state the facts of this case. The record plainly indicates Sterling treated Villaseñor just as it treated its own employees, by providing him with safety instructions about the machine and by having him assist a Sterling employee who had previously worked on the machine alone but could work faster with an assistant. Moreover, a similar argument was considered and rejected in *Chaney*, which involved a temporary agency employee assigned to work at a factory who severed her right hand when her glove was caught in machinery. *Chaney ex rel. Chaney v. Yetter Manufacturing Co.*, 315 Ill. App. 3d 823, 734 N.E.2d 1028 (2000). In affirming the summary judgment ruling against the plaintiffs, the court rejected the contention that an indemnification agreement between the two employers relieving the borrowing employer of liability under the Act meant, in turn, that the borrowing employer was not shielded from tort liability by the statute's exclusive remedy provision. *Chaney*, 315 Ill. App. 3d 830, 734 N.E.2d at 1033. The court noted that to accept this argument, it would have to ignore the Act's express provision making lending and borrowing employers jointly liable to employees. *Chaney*, 315 Ill. App. 3d at 830, 734 N.E.2d at 1033. Thus, under the statute, Sterling is entitled to immunity from tort liability. The fact that Ron's Staffing and Sterling contractually agreed—as permitted by statute—that Ron's Staffing would assume the full burden of workers' compensation premiums and benefits does not change the statutory language which ensured that Villaseñor would be able to recover benefits from at least one of his two employers. The Illinois legislature authorized what has occurred. For these reasons, we find that Villaseñor's public policy argument is unavailing.

¶ 39 In light of the precedent, the material facts disclosed by the record are capable of only one inference. Under the facts presented, we find that, for purposes of the Act, Villaseñor was a loaned employee and Sterling was a borrowing employer. Since Sterling was a borrowing

employer, Villaseñor's exclusive remedy for his injuries is through the workers' compensation system and he is precluded from pursuing a civil judgment against Sterling. Accordingly, we affirm the entry of summary judgment for Sterling.

¶ 40 Affirmed.