2019 IL App (1st) 181948WC-U

Workers' Compensation
Commission Division
Order Filed: June 28, 2019

No. 1-18-1948WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WAYNE BERGMANN,	)	Appeal from the
	)	Circuit Court of
Appellant,	)	Cook County
	)	
v.	)	Nos. 17 L 50993
	)	18 L 50019
	)	
	)	
THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.*,	)	
	)	
	)	Honorable
(Swift Transportation Co., Inc., Star Leasing, LLC, and Illinois Insurance Guaranty Fund, Appellees).	)	Michael F. Otto,
	)	Judge, presiding.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hudson, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held:* We affirmed the judgment of the circuit court, confirming a decision of the Illinois Workers' Compensation Commission awarding the claimant benefits pursuant to the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2014)), over the claimant's argument that the Commission's findings regarding which entity employed him are against the manifest weight of the evidence. We

> also reversed that portion of the circuit court's judgment that affirmed the Commission's finding that the claimant was entitled to temporary total disability benefits through a certain date and modified the Commission's decision to reflect the correct date that the claimant reached maximum medical improvement.

¶ 2 The claimant, Wayne Bergmann, appeals from a judgment of the circuit court of Cook County, confirming the decision of the Illinois Workers' Compensation Commission (Commission) which awarded him benefits pursuant to the Illinois Workers' Compensation Act (the Act) (820 ILCS 305/1 *et seq.* (West 2014)) for injuries he sustained while in the employ of Star Leasing. The claimant argues that: (1) the Commission's finding that he was employed by Star Leasing and not Swift Transportation Co., Inc. (Swift) when he sustained work-related injuries is against the manifest weight of the evidence; and (2) the Commission's finding that there was no borrowing/loaning relationship between Star Leasing and Swift is against the manifest weight of the evidence. For the reasons which follow, we affirm in part and modify in part.

¶ 3 The following recitation of the facts relevant to a disposition of this appeal is taken from the evidence adduced at the arbitration hearings held on November 20, 2015, and January 19, 2016.

¶ 4 The claimant testified that he was first employed by "Star Transport" as a truck driver from 1994 to 2007[1]. The claimant drove semi-trucks out of Star Transport's facility in Morton, Illinois. In January of 2011, the claimant resumed his employment with Star Transport. According to the claimant, in November 2013, Star Transport "partnered" with Swift,

[1] During the hearing, the parties often referred to "Star" without specifying which entity, Star Transport or Star Leasing, they were referencing. However, the claimant unequivocally testified that he was employed by Star Transport. According to the record, Star Transport is an Illinois corporation that has been incorporated since 1959. Star Leasing Services, LLC, on the other hand, was incorporated in Indiana on September 17, 2013.

precipitating several changes. He testified that, after Swift became involved, he was required to fill out an "application" for Swift, take a Department of Transportation (DOT) physical, and take a computer safety course entitled "Swift University." According to the claimant, approximately 150 Star Transport drivers were let go following the Swift partnership. He also testified that he was no longer allowed to go home on weekends, something that he was previously able to do before the Swift partnership began. Additionally, the tractor trucks that he drove now had a placard reading "leased to Swift Transportation" on it and his payment paperwork would be "transflowed" to Swift. The claimant testified that he was paid via direct deposit and thus never saw a pay stub. He admitted that he only ever received a W-2 from Star Transport and that all of the appropriate taxes were withheld.

¶ 5 With regard to his day to day duties, the claimant explained that he received his assignments through a small computer in the truck, referred to as a Qualcomm, which linked to the dispatchers via satellite. Although the claimant acknowledged that he did not know who was sending the communications, he stated that his understanding was that Swift was responsible for the messages he received through the Qualcomm directing "where [his] loads went, who [he] picked up from, [and] who [he] delivered to." The claimant explained that this understanding came from what he was told by a Star Transport dispatcher. The claimant admitted that he was free to determine which route to drive, so long as it was within a certain mileage, when to stop, and also when and where he refuelled. The claimant next testified to an incident where his truck fishtailed, which triggered a safety sensor in the Qualcomm system. He testified that, in order to be dispatched again, he was required to call the Swift safety department. According to the claimant, although his driving duties did not change as of November 2013, he believed, as of that date, that he was a driver for Swift and that they had the authority to terminate his employment.

¶ 6 David Berry, Swift's Vice President, testified as to the nature of the relationship between Swift and Star Leasing. According to Berry, "Star" approached Swift in 2013 to inquire about becoming a "fleet owner"—an independent contractor who provides trucks and drivers—for Swift. On September 19, 2013, Berry, on behalf of Swift, signed a "Contractor Agreement" (Agreement) with Star Leasing to that effect. The Agreement described Star Leasing as a "contractor" that leased trucks and provided drivers to Swift.[2]

¶ 7 Under the terms of the Agreement, Star Leasing was to provide equipment to Swift for the transportation of freight owned by Swift's customers under Swift's federal Department of Transportation (DOT) number. The Agreement expressly provided that Star Leasing was not required to accept "every load tendered by" Swift. Berry testified that Star Leasing was also permitted to provide services to other carriers under the terms of the Agreement. Additionally, the Agreement permitted Star Leasing to employ third parties, such as drivers, to carry out its obligations. Berry testified that he believed the drivers were "Star" employees. Berry noted that provision 17 of the Agreement states that Star Leasing was "solely responsible" for the "direction and control" of its employees and the "method, means and manner of performing work and services under this Agreement." Berry further testified that Swift paid Star Leasing on a per-mile basis and had no control over the compensation that Star Leasing paid to its drivers.

¶ 8 With regard to the Qualcomm messages that claimant referenced, Berry explained that Swift planner's would electronically forward Swift's collection of loads/routes to Star Leasing personnel, who would then select which loads Star Leasing would accept. Then, according to Berry, Star Leasing personnel would forward an electronic message about assigned loads to Star

[2] The record does not contain any testimony or evidence regarding the relationship between Star Transport and Star Leasing.

Leasing's drivers, such as the claimant, via the Qualcomm computer. Berry admitted that Swift could specify that, for safety purposes, specific Star employees would no longer be allowed to drive loads for Swift but he maintained that Swift had no power to terminate a Star Leasing employee. Berry further testified that the application the claimant referenced in his testimony was a requirement of the DOT that Swift maintain a file with certain information with respect to all drivers, employees or independent contractors, operating under Swift's DOT number. He further explained that the drivers that Swift employed would have a DOT file and fill out a separate, more thorough, job application. He testified that the claimant was never required to fill out such a job application.

¶ 9 Berry conceded that the Agreement provided that while Star Leasing drivers were operating under Swift's DOT number, Swift had "exclusive possession, control, and use of the equipment." According to Berry, this provision was required by the DOT, the language was taken directly from the DOT regulations, and the provision applied to only the equipment and not the drivers. Berry testified that, at the time the Agreement was entered into, he believed that Star also had its own DOT number. Berry noted that the Agreement required Star Leasing to provide workers' compensation insurance for its employees and specified that "neither [Star Leasing] nor its employees are entitled to Workers' Compensation benefits from [Swift]."

¶ 10 The claimant also testified with regard to his injuries. According to the claimant, from November 2013 to February 2014 he noticed pain in his lower back that caused him difficulty when he walked, bent over, squatted down, or "crank[ed] the dollies." The claimant testified that his back injury was not the result of any specific incident; rather, it was the result of the "cumulative trauma" of several years of standard truck driving duties. He further explained that,

"after sitting in the truck with that constant vibration all day," it would be difficult for him to walk or stand up straight.

¶ 11 The claimant presented himself to Dr. Patrick O'Leary, a board certified orthopedic surgeon, on February 14, 2014, after being referred by his primary physician, Dr. Whitford. Dr. O'Leary conducted a physical exam and reviewed x-rays of the claimant's back. Dr. O'Leary's notes indicate that the claimant had past medical history of diabetes, hypertension, and kidney disease. According to the notes, the claimant was 6'3 inches tall and weighed 326 pounds. Dr. O'Leary's provisional diagnosis was lumbar spinal stenosis and right hip degenerative joint disease. Dr. O'Leary scheduled an MRI for the claimant's lumbar spine.

¶ 12 The claimant testified that, on February 17, 2014, he sustained an injury to his right shoulder when he slipped while exiting the cab of his truck.

¶ 13 On February 21, 2014, the claimant presented himself to Dr. Brett Johnson, an orthopedic physician who specializes in upper extremities, to examine his right shoulder injury. During the visit, the claimant complained of right shoulder pain, weakness, and stiffness following his February 17, 2014 injury. Dr. Johnson recommended that the claimant undergo an MRI of his right shoulder and indicated that he was unable to return to work due to injury until the appointment following the MRI.

¶ 14 On February 27, 2014, the claimant underwent an MRI on his right shoulder. Dr. Johnson reviewed the MRI results, which revealed significant tendinosis within the supraspinatus tendon, without high grade or full thickness tear; tendinosis of the biceps tendon; and moderate degenerative changes of the AC joint.

¶ 15 The claimant returned to Dr. O'Leary on February 28, 2014. According to his notes, Dr. O'Leary reviewed the MRI results of the claimant's lumbar spine and diagnosed high grade

spinal stenosis at L3-4, L4-5, and L5-S1; disc bulging at L3-4 and L4-5; and a disc protrusion at L5-S1 encroaching upon the S1 nerve root. Dr. O'Leary noted that the claimant was "a very reasonable candidate for a 3-level lumbar laminectomy." Dr. O'Leary wrote that the claimant did not "need surgery urgently" but felt that it would "help his quality of life."

¶ 16 On March 5, 2014, Dr. Johnson treated the claimant with a subacromial corticosteroid injection, recommended physical therapy, and provided him with a home exercise program to strengthen his rotator cuff. Dr. Johnson also gave the claimant several work restrictions, including a five pound lift restriction with his right arm, no overhead work, and no commercial driving. In his deposition, Dr. Johnson testified that the March 5, 2014 work restrictions were related to the claimant's February 17, 2014 work accident.

¶ 17 On March 26, 2014, the claimant began physical therapy at Midwest Orthopedic Center.

¶ 18 On March 27, 2014, the claimant again treated with Dr. O'Leary regarding his lower back pain. Dr. O'Leary noted that the claimant reported having "worsening symptoms." Dr. O'Leary discussed with the claimant the possibility of having a 3-level laminectomy—L3-4, L4-5, and L5-S1. The claimant expressed a desire to proceed with the procedure.

¶ 19 On April 3, 2014, the claimant had another visit with Dr. O'Leary for the expressed purpose of discussing the claimant's belief that his condition of ill-being was related to his work activities. The claimant stated that he had done research on the Internet and multiple sites suggested that exposure to vibration as a truck driver can predispose the back to premature degeneration or, at least, aggravation of an underlying condition. Dr. O'Leary noted that there was information to that effect, but it is somewhat controversial. The claimant reported that in addition to the vibratory forces, his duties required him to jump down four feet from the height of his cab to the ground and lift objects. Dr. O'Leary thought it was reasonable that, at least in

some part, the repetitive nature of Bergmann's job contributed to an aggravation of his condition that necessitated surgery. However, he also noted that a number of factors were involved, including the claimant's congenitally narrow spinal canal. In his deposition testimony, Dr. O'Leary testified that "there's some loose link at least in the medical literature" suggesting that repetitive vibratory motion is connected to back pain.

¶ 20 On April 21, 2014, the claimant underwent an L3-S1 lumbar laminectomy, under the care of Dr. O'Leary. In his deposition, Dr. O'Leary testified that the claimant was taken off of work completely on the day of the surgery.

¶ 21 The claimant continued to treat with Dr. O'Leary following the surgery. During a follow-up visit, Dr. O'Leary indicated that the claimant could return to work on June 23, 2014, but imposed the following restrictions: (1) no lifting more than 25 pounds; (2) light duty only; (3) no climbing; and (4) no prolonged standing over an hour. Dr. O'Leary indicated that the restrictions were "indefinite up to 6 months."

¶ 22 On July 28, 2014, the claimant presented himself to Benjamin Holeman, a physician's assistant who works with Dr. Johnson. According to notes from that visit, the claimant reported that his pain was at a 3 out of 10 and that he had 70 percent improvement. A physical examination revealed near normal strength in his shoulder, positive painful arc, positive resisted pain with forward elevation in his shoulder, and positive impingement sign.

¶ 23 On August 25, 2014, the claimant again treated with Dr. Johnson with regard to his shoulder injury, at which time he reported that his pain was a 3 out of 10 and intermittent. Dr. Johnson recommended surgery for the right shoulder, including arthroscopy, subacromial decompression, distal clavicle resection, and biceps tenotomy. Dr. Johnson indicated that the claimant could return to work but restricted him from lifting, pulling, or carrying more than 25

pounds with his right arm. In his deposition testimony, Dr. Johnson confirmed this was his last visit with the claimant. He also testified that he would need to re-examine the claimant to determine if he still required surgery.

¶ 24 On August 28, 2015, at Swift's request, the claimant underwent an independent medical evaluation (IME) by Dr. Jesse Butler with regard to his lower back pain. Dr. Butler diagnosed the claimant with congenital stenosis. Dr. Butler further testified that (1) there was no causal connection between the claimant's condition and his work activities; (2) the claimant's job did not involve repetitive activity and that any vibration he experienced while driving would have had no aggravating effect on his stenosis; and (3) he believed the claimant's ill-being was, rather, exacerbated by a number of factors unrelated to his employment, including morbid obesity, diabetes, smoking, high blood pressure, and a possible narcotic problem. Dr. Butler agreed with Dr. O'Leary that the claimant's lumbar spine surgery was reasonable and necessary but disputed that it was causally related to his work activities. He noted there was no specific documentation of any event that aggravated his condition and the claimant's presentation to Dr. O'Leary in February 2014 suggested that he had back and neck pain for a number of years. He explained that the claimant described "pretty classically, the fact that he was developing this progressive ambulatory intolerance or claudication, which is very consistent with a presentation of congenital spinal stenosis." Dr. Butler noted that the only thing that could be found in the medical literature regarding whole body vibration was a loose association between exposure to vibration and back pain. Dr. Butler testified unequivocally that the supposed vibratory forces of the machine that Bergmann was driving would not have aggravated his congenital stenosis and this was based on his own research which failed to show any clinical correlation between surgery for congenital stenosis and whole body vibration.

¶ 25 On September 9, 2015, at Swift's request, the claimant underwent an IME by Dr. John Cherf, an orthopedic surgeon, who set forth his opinions in a letter. According to Dr. Cherf, the claimant reported that, as he exited his truck, he slipped on a step and grabbed the steering wheel with his right hand to support himself. The claimant noticed a "pop" in his right shoulder. The claimant reported that his right shoulder pain was a 3 out of 10 and his right shoulder function was at 50%. The claimant also reported left shoulder pain at a 5 out of 10 and left shoulder function of 50%. Dr. Cherf diagnosed the claimant with a shoulder sprain or strain and concluded that the injury was causally related to the claimant's February 17, 2014 work accident. Dr. Cherf also found that the claimant had a "degenerative pathology of his right shoulder that should be considered a preexisting condition." Dr. Cherf did not believe, however, that surgery was warranted because "there were no objective findings of acute shoulder pathology from the MRI of the right shoulder on February 27, 2014" and his examination of the claimant "did not identify any significant abnormal objective findings." Dr. Cherf further opined that the claimant was not an ideal candidate for surgery due to his "age, diabetes, long history of tobacco use, and obesity." In his deposition testimony, Dr. Cherf stated that the claimant's right shoulder had recovered to the point where he had "good" strength and range of motion and he believed that the claimant was at maximum medical improvement (MMI) as of the date that he examined him.

¶ 26 The claimant filed two applications for adjustment of claim pursuant to the Act, seeking benefits for injuries to his back and shoulder while working as a semi-truck driver. Initially, the claimant named "Star Leasing" as the employer-respondent.

¶ 27 Subsequently, Star Leasing's insurance carrier, Freestone Insurance Company (Freestone) became insolvent. On April 5, 2015, the claimant's attorney informed the arbitrator that Star Leasing had advised him that it would not participate in the proceedings and, if a

judgment were entered in his favor, it would not pay because it was insolvent. The claimant then moved to join the Illinois Insurance Guaranty Fund (IIGF) as a co-respondent. Thereafter, the claimant filed amended applications for adjustment of claim and added Swift Transportation Co., Inc. (Swift) as an additional co-respondent.

¶ 28 IIGF filed a motion to dismiss on the grounds that the claims are not covered under section 534.3 of the Guaranty Fund Act (215 ILCS 5/534.3(b)(iv) (West 2014)) because Star Leasing failed to complete an affidavit attesting that its net worth was not greater than $25 million.

¶ 29 Following the arbitration hearings on November 20, 2015, and January 19, 2016, pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2014)), the arbitrator issued a written decision on March 24, 2016, finding that the claimant proved that he sustained an injury to his shoulder and back arising out of and in the course of his employment and that his current condition of ill-being is causally related to his employment. The arbitrator further found that the claimant was an employee of Swift under a "borrowing employer" theory. The arbitrator awarded the claimant 91 4/7 weeks of total temporary disability (TTD) benefits. The arbitrator also ordered Swift to pay $59,324.20 for medical services rendered to the claimant and ordered Swift to pay for prospective treatment recommended by the claimant's treating physicians. Additionally, the arbitrator imposed penalties of $53,928.97 and $10,000 pursuant to sections 19(k) and 19(l) of the Act (820 ILCS 305/19(k), 19(l) (West 2014)), respectively, and attorney fees and costs totalling $21,571.59 under section 16 of the Act (820 ILCS 305/16 (West 2014)). Lastly, the arbitrator granted IIGF's motion to dismiss, finding that Star Leasing had failed to complete an affidavit attesting that its net worth was not greater than $25 million and had also failed to exhaust other available remedies; therefore, the matter was not a covered claim.

¶ 30 Swift filed a petition for review of the arbitrator's decision before the Commission. On October 30, 2017, the Commission affirmed in part and modified in part the arbitrator's decision. The Commission affirmed the arbitrator's findings that the claimant's shoulder injury was work-related but found he was entitled to benefits only through November 3, 2015, the date that Dr. Cherf testified that he reached MMI, rather than November 20, 2016. The Commission modified the arbitrator's findings in all other respects, holding that: (1) Swift was not a "borrowing employer" and the claimant was employed by Star Leasing; (2) the claimant failed to prove his back injury was work-related; and (3) the arbitrator erred in dismissing IIGF from the proceedings based on the "odd, hyper-technical" argument that Star Leasing, who did not invite the protection of the IIGF, ignored requests to cooperate. The Commission ordered Star Leasing to pay TTD from February 27, 2014 through November 3, 2015, and to pay reasonable and necessary medical expenses for treatment of the claimant's right shoulder incurred through that same date. The Commission remanded to the case to the Arbitrator for further proceedings for determination of a further amount of temporary total or permanent disability, if any, pursuant to *Thomas v. Industrial Commission*, 78 Ill. 2d 327 (1980).

¶ 31 IIGF sought a judicial review of the Commission's decision in the circuit court of Cook County (Case No. 17 L 50993). The claimant also filed an appeal in the circuit court of Peoria County (Case No. 17 MR 880), but he later moved to transfer venue to Cook County so that his appeal could be consolidated with IIGF's appeal (Case No. 18 L 50019). The circuit court of Peoria County granted the claimant's motion to transfer and the case was transferred to Cook County. IIGF then moved to consolidate, which the circuit court of Cook County granted.

¶ 32 On August 29, 2018, the circuit court entered a written order confirming the Commission's decision. In so holding, the court found that, although the Commission's

reasoning for concluding that Swift was not a borrowing employer was erroneous, the conclusion itself was nevertheless correct because the evidence supported a finding that Swift did not have the right to control or direct the claimant's work. The circuit court also found that the Commission's determinations regarding the claimant's injuries were not against the manifest weight of the evidence. Lastly, the circuit court affirmed the Commission's decision to reverse the arbitrator's dismissal of IIGF, holding that the arbitrator lacked authority to determine whether there was a covered claim because the issue was not one of the statutorily authorized disputes between co-respondents that may be decided pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2014)). The claimant now appeals.

¶ 33 For his first assignment of error, the claimant argues that the Commission's finding that he was an employee of Star Leasing, rather than Swift, when the accident occurred was against the manifest weight of the evidence. Specifically, the claimant points to a single line of testimony from Berry that he contends is an "admission" that supports the proposition that Swift controlled the claimant's work. The claimant also argues that Star Leasing was a shell corporation of Swift and, therefore, he should be considered a Swift employee.

¶ 34 Whether an employment relationship existed at the time of an accident is a question of fact. *Esquinca v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 150706WC, ¶ 48. "In resolving questions of fact, it is within the province of the Commission to assess the credibility of witnesses, resolve conflicts in the evidence, assign weight to be accorded the evidence, and draw reasonable inferences from the evidence." *Id.* We will disturb the Commission's determination of a factual issue only if it is against the manifest weight of the evidence. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64 (2006). For a factual finding to be against the manifest weight of the evidence, the "opposite conclusion" must be "clearly

apparent," such that "no rational trier of fact could have agreed" with the Commission. *Id.* Whether a reviewing court might reach the opposite conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence; rather, the appropriate test is "whether there is sufficient factual evidence in the record to support the Commission's decision." *Benson v. Industrial Comm'n,* 91 Ill. 2d 445, 450 (1982).

¶ 35 It is well-established that, "[f]or purposes of the Act, the term 'employee' should be broadly construed." *Esquinca*, 2016 IL App (1st) 150706WC, ¶ 46. Although "[n]o rigid rule exists regarding whether a worker is an employee or an independent contractor," several criteria are relevant to consider in making this determination. *Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC, ¶ 30. "The single most important factor is whether the purported employer has a right to control the actions of the employee." *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000) (citing *Bauer v. Industrial Comm'n*, 51 Ill. 2d 169, 172 (1972)). Other relevant criteria include "whether the employer dictates the person's schedule; whether the employer pays the person hourly; whether the employer withholds income and social security taxes from the person's compensation; whether the employer may discharge the person at will; and whether the employer supplies the person with materials and equipment." *Roberson v. Indus. Comm'n*, 225 Ill. 2d 159, 175 (2007). Another criterion "of great significance" is the nature of the alleged employee's work in relation to the employer's general business. *Id.* (citing *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71 (1982)).

¶ 36 Applying these standards, we find that there is sufficient evidence in the record to support the Commission's finding that the claimant was not an employee of Swift at the time of his injuries. Turning first to the most important factor—control over the performance of the work—the Commission credited Berry's testimony in which he described the many ways Star Leasing

retained control over itself as an independent contractor under the Agreement. After reviewing the record, we conclude that there is ample evidence to suggest that Swift had little to no control over the claimant's work performance.

¶ 37 To begin, Berry testified that it was Star Leasing who determined which Swift loads to accept and which driver to assign the load. Berry also testified that Star Leasing and its drivers were free to carry loads for other carriers. The Agreement between Star Leasing and Swift supports Berry's testimony that Swift did not control Star Leasing's drivers. Provision 17 of the Agreement states that Star Leasing was "solely responsible" for the "direction and control" of its employees and the "method, means and manner of performing work and services under this Agreement." The only control Berry acknowledged that Swift had was its ability to remove drivers from carrying Swift loads if there was a safety issue with a driver. Berry explained that, while Swift could prohibit a Star Leasing driver from carrying loads for Swift customers, it had no ability to terminate a Star Leasing driver.

¶ 38 The claimant testified only to his subjective belief that Swift exercised control over his work, providing few firsthand examples. The claimant believed that it was Swift who controlled his work via messages sent to him on the Qualcomm system, but he admitted that his belief came from what another Star employee had told him. The claimant also admitted that he, not Swift, had control over which route he took to deliver the loads and he was free to choose when and where to make rest stops and to refuel. The one specific example that the claimant provided, when he fishtailed in the snow and triggered a safety feature in the Qualcomm device requiring him to contact Swift, hardly rises to the level of control required to show that the Commission's determination regarding the existence of an employment relationship was against the manifest weight of the evidence.

¶ 39 The claimant nevertheless argues that a single line from Berry's testimony shows that the Commission's determination was against the manifest weight of the evidence. Specifically, he points to the following colloquy:

> "Q: So under this agreement, if Swift decided that they didn't want to control the drivers, they wouldn't have that option with that clause, right?
>
> A: That's correct."

The claimant's argument is unpersuasive as the questions immediately preceding this one, and Berry's testimony as a whole, make clear that this was not the case. As mentioned above, the clause being discussed, provision 17, states that Star Leasing was "solely responsible" for the "direction and control" of its employees and the "method, means and manner of performing work and services under this Agreement." Berry also testified, in the moments prior to that colloquy, that Star Leasing retained control over their employees "entirely." Given the entire record, we cannot say that this one statement would lead us to conclude that no rational trier of fact could have agreed with the Commission's decision.

¶ 40 Several of the remaining factors also support the Commission's finding that the claimant was not an employee of Swift. Specifically, with regard to compensation, there is no evidence that Swift ever compensated the claimant. Rather, the claimant testified that he was paid via direct deposit and he admitted that he never saw a physical pay stub, nor could he say which company paid him. He further admitted that he received a W-2 from Star even after the agreement with Swift took effect. The claimant nevertheless testified that he believed "in a roundabout way" he was getting paid by Swift through "transflow or whatever." Berry, however, testified that the claimant was not compensated by Swift and that, under the terms of the Agreement, Swift paid Star Leasing on a per-mile basis.

¶ 41 That said, there was also evidence to suggest the existence of an employee relationship. Specifically, with regard to the ability to control the claimant's schedule, the claimant testified that he was no longer allowed to take weekends off, which he was able to do prior to Swift's involvement with Star. The claimant also testified to the fact the he had to take a drug test, fill out an application, and take an online safety course, all at the behest of Swift. The claimant testified that over 150 drivers were let go after Swift became involved with Star and the claimant believed that Swift was responsible for the downsizing. Berry, however, disputed that Swift had the power to terminate a Star Leasing employee and denied responsibility for the downsizing of Star Leasing's drivers.

¶ 42 After reviewing the record, it is clear that there was evidence presented to support the positions of both Swift and the claimant. When, as here, there is evidence capable of supporting two reasonable interpretations, it is the Commission's province to weigh the evidence and decide among competing inferences, and its decision will be upheld. *Roberson*, 225 Ill. 2d at 187. As such, we conclude that the Commission's finding that the claimant was not an employee of Swift was not against the manifest weight of the evidence.

¶ 43 The claimant alternatively argues that Star Leasing was a shell corporation of Swift and, therefore, he should be considered a Swift employee. The claimant contends that "the record is replete" with evidence indicating that Star Leasing was a shell corporation and both the Commission and the circuit court erred by failing to address the issue. As far as this court can tell, the claimant has failed to raise this issue either before the Commission or the circuit court. Rather, the record shows that the only party to raise this issue below was IIGF. The claimant cannot raise this issue for the first time on appeal and, therefore, he has forfeited the issue. See, e.g., *R.D. Masonry, Inc. v. Industrial Comm'n*, 215 Ill. 2d 397, 414 (2005) ("Arguments not

raised before the Commission are waived on appeal."); see also *U.S. Steel Corporation–South Works v. Industrial Comm'n*, 147 Ill. App. 3d 402, 406 (1986) (ruling that an issue raised for the first time in the circuit court "may be considered waived because the circuit court *** has no authority to consider evidence or arguments not presented before the Commission").

¶ 44 For his second assignment of error, the claimant contends that the Commission's finding that he was not a borrowed employee is against the manifest weight of the evidence.

¶ 45 The issue of whether an employee has been borrowed by a second employer is a question of fact to be determined by the Commission. *County of Tazewell v. Industrial Comm'n*, 193 Ill. App. 3d 309, 313 (1989). The test for determining the loaned employee's status consists of two elements, namely, (1) whether Swift had the right to direct and control the manner in which the claimant performed the work; and (2) whether there existed a contract for hire between the claimant and Swift. *Id.* A court of review will not disturb the Commission's finding on this question unless contrary to the manifest weight of the evidence. *Id.*

¶ 46 In this case, the Commission found that the claimant was not a borrowed employee because of the Agreement between Swift and Star Leasing. As the circuit court noted, this is incorrect as a matter of law. See *Morales v. Herrera*, 2016 IL App (1st) 153540, ¶ 33. The relevant agreement for determining if Swift was a borrowed employer is the contract, either explicit or implicit, between the claimant and Swift. An implicit contract "is established where the employee knows that the borrowing employer is generally in charge of, and controls, her performance." *Morales*, 2016 IL App (1st) 153540, ¶ 31. Here, the claimant has arguably satisfied that prong when he testified that he believed that Swift was ultimately his employer in November 2013 and he continued on with his employment. Regardless, the claimant must also show that Swift had that right to direct and control the manner in which he performed the work.

As we have already established, there was considerable evidence presented indicating that Swift had limited, if any, ability to control or direct the manner in which the claimant performed his work. Although the Commission's reasoning was incorrect, "[a] judgment may be sustained upon any ground warranted by the record regardless of whether the particular reasons given therefore in the written opinion are correct." *Grischow v. Indus. Comm'n*, 228 Ill. App. 3d 551, 561 (1992). We therefore conclude that the Commissions finding that the claimant was not a borrowed employee is not against the manifest weight of the evidence.

¶ 47 For his next assignment of error, the claimant contends that the Commission's decision to vacate the penalties and attorneys' fees awarded by the arbitrator was an abuse of discretion. Because we conclude, as did the Commission, that the claimant is not an employee of Swift, the Commission's decision to vacate the penalties and fees assessed against Swift was clearly not an abuse of discretion.

¶ 48 For his fourth assignment of error, the claimant contends that the Commission's determination that his work-related shoulder injury had resolved by November 3, 2015, and he was only entitled to TTD benefits as of that date, is against the manifest weight of the evidence. Specifically, he argues that the Commission erred by crediting Dr. Cherf's opinion that the claimant had reached MMI.

¶ 49 A claimant is temporarily totally disabled from the time an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118 (1990). The dispositive test is whether the claimant's condition has stabilized, i.e., whether he has reached MMI. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 759 (2003). In determining whether a claimant has reached MMI, a court may consider factors such as a release

to return to work, and medical testimony or evidence concerning the claimant's injury, the extent thereof, and, most importantly, whether the injury has stabilized. *Mechanical Devices*, 344 Ill. App. 3d at 760. Once an injured claimant has reached MMI, the disabling condition has become permanent and he is no longer eligible for TTD benefits. *Archer Daniels Midland Co.*, 138 Ill. 2d at 118. The time during which a claimant is temporarily totally disabled presents a question of fact to be determined by the Commission, and the Commission's decision will not be upset on review unless it is against the manifest weight of the evidence. *Archer Daniels Midland Co.*, 138 Ill. 2d at 119-20.

¶ 50 In this case, the Commission found that the claimant was entitled to TTD benefits from February 17, 2014, through November 3, 2015, because it credited Dr. Cherf's opinion that the claimant's February 17, 2015 work accident caused a temporary exacerbation of a preexisting degenerative condition in his shoulder that had resolved by the date of the IME. The Commission found that the claimant's current "subjective" complaints about his shoulder were likely due to his poor overall physical condition, noting that he also reported to Dr. Cherf that he had a higher pain level in his left shoulder, which was unrelated to any work injury.

¶ 51 The Commission also credited Dr. Cherf's opinion that surgery was not reasonable or necessary. Dr. Cherf testified that, by the time of the IME, the claimant had recovered to the point where he had "good" strength and range of motion. As the Commission noted, the medical records of Dr. Johnson, the claimant's treating physician, belie the need for surgery as they show that the claimant was reporting a much-improved condition and rated his pain at a 3 out of 10. Dr. Johnson also testified that, although he felt the claimant was a surgical candidate as of the date of his last visit, which was August 25, 2014, he admitted that he would need to reevaluate the claimant again to determine whether he would still recommend surgery. Based on this

evidence, we find that the Commission could reasonably have found that claimant had reached MMI on the date of Dr. Cherf's IME and the Commission's finding was not against the manifest weight of the evidence.

¶ 52 We note, however, that the Commission erred when it found that Dr. Cherf's IME took place on November 3, 2015, and, therefore, that was the date that the claimant reached MMI. According to Dr. Cherf's IME letter, he performed the claimant's IME on September 9, 2015, and not on November 3, 2015. Accordingly, we modify that part of the Commission's finding and hold that the claimant's shoulder injury resolved as of September 9, 2015, and he is entitled to TTD benefits as of that date.

¶ 53 Lastly, the claimant argues that the Commission's finding that he failed to show that his current condition of ill-being with regard to his lower back was causally related to his employment was against the manifest weight of the evidence. Specifically, the claimant contends that Dr. Butler's conclusions regarding causation were flawed, and the Commission erred in relying on them, because he discounted the possibility that cumulative trauma could aggravate a pre-existing injury.

¶ 54 There is no evidence that the claimant's condition was the result of any incident or discrete event prompting the development of his symptoms. Rather, the claimant predicated his claim on a theory of repetitive trauma sustained as a result of his duties as a truck driver.

¶ 55 In a repetitive trauma case, the claimant must prove by a preponderance of the evidence all elements necessary to justify an award under the Act. *Quality Wood Products Corp. v. Industrial Comm'n,* 97 Ill. 2d 417, 423 (1983). The claimant has the burden of establishing "some causal relation between the employment and the injury." *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 63 (1989). A work-related injury need not be the sole or

principal causative factor, as long as it was a causative factor in the resulting condition of ill-being. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 205 (2003).

¶ 56 Whether a causal relationship exists between a claimant's employment and his condition of ill-being is a question of fact to be resolved by the Commission, and its resolution of the issue will not be disturbed on review unless it is against the manifest weight of the evidence. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244 (1984). Whether a reviewing court might reach the same conclusion is not the test of whether the Commission's determination of a question of fact is supported by the manifest weight of the evidence; rather, the appropriate test is "whether there is sufficient evidence in the record to support the Commission's decision." *Benson v. Industrial Comm'n*, 91 Ill. 2d 445, 450 (1982).

¶ 57 In this case, the Commission credited Dr. Butler's "highly persuasive" testimony that the claimant's current condition of ill-being was caused by the natural progression of his congenital stenosis, factoring in his overall poor health, and not the result of his work activities or repetitive vibration. The Commission also noted Dr. Butler's testimony that the medical literature suggested only a "loose association" between exposure to vibration and back pain, a fact which Dr. O'Leary confirmed in his deposition testimony. In contrast, the Commission concluded that Dr. O'Leary's testimony that the claimant's back injury was related to his work activities was "vague, conclusory, and not persuasive." Essentially, the critical evidence of causation amounts to a "battle of the experts," and, in such situations, it is for the Commission, as the trier of fact, to resolve that battle. See, e.g., *Sottile v. Carney*, 230 Ill. App. 3d 1023, 1031 (1992). Here, the Commission resolved the issue in Swift's favor and, so long as that determination is not arbitrary and unreasonable, it must be accorded deference. See *Enbridge Energy (Illinois), LLC v. Kuerth*,

2018 IL App (4th) 150519-B, ¶ 62. Given the evidence, we cannot say that it was arbitrary and unreasonable for the Commission to believe Dr. Butler over Dr. O'Leary.

¶ 58 For the reasons stated, we reverse that portion of the circuit court's judgment that affirmed the Commission's finding that the claimant was entitled to TTD benefits for his shoulder injury through November 3, 2015, because the claimant's shoulder injury resolved as of September 9, 2015, and he is therefore entitled to TTD benefits only through that date; we affirm the circuit court's judgment in all other respects; and we modify the Commission's decision to reflect that the claimant is entitled to TTD benefits for the period of February 27, 2014 through September 9, 2015. This matter is remanded to the Commission for further proceedings pursuant to *Thomas*, 78 Ill. 2d 327.

¶ 59 Affirmed as modified and remanded.