2011 IL App (1st) 100813 & 102161-U
Nos. 1-10-0813 & 1-10-2161 (Consolidated)

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Third Division
July 20, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

WORKERS' COMPENSATION SELF-INSURANCE TRUST, Plaintiff-Appellant, v. SAFETY NATIONAL CASUALTY CORPORATION, Defendant-Appellee.	))))))))))	Appeal from the Circuit Court of Cook County. 03 L 007851 Honorable Donald J. Suriano, Judge Presiding.

JUSTICE NEVILLE delivered the judgment of the court.
Presiding Justice Quinn and Justice Steele concurred in the judgment.

ORDER

HELD: The manifest weight of the evidence in this case does not contradict the jury's finding that a self-insurance trust acted in good faith when it chose to litigate, and not to settle, a workers' compensation claim. The excess insurer owed the self-insurance trust reimbursement for part of its loss, even though the excess insurer had demanded that the trust settle the claim at an amount that did not implicate the excess insurance. The trial court did not abuse its discretion when it awarded the trust prejudgment interest, and the court did not abuse its discretion when it denied the trust's claim for penalties.

¶ 1 This case involves a dispute between Workers' Compensation Self-Insurance Trust (WCSIT),

an insurance trust, and Safety National Casualty Corporation (Safety National), an excess insurer. After a worker fell ill at work, he sought workers' compensation benefits. WCSIT, relying on the advice of its attorney and the findings of several doctors, decided to litigate the claim because it believed that the employee's job did not cause the illness. The employee's attorney suggested a settlement at an amount that did not implicate the excess insurance. Safety National implored WCSIT to settle the case, but Safety National never offered to contribute to the proposed settlement. After more than ten years of litigation, our supreme court held that the employee sufficiently proved that his employment proximately caused his injuries. *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187 (2002). WCSIT paid the total benefits then due and sought reimbursement from Safety National. Safety National refused to pay, claiming that WCSIT breached the excess insurance contract when it failed to settle the claim. WCSIT sued Safety National, seeking reimbursement for the payments it made, and penalties under section 155 of the Insurance Code. 215 ILCS 5/155 (West 2002). Safety National countersued for a judgment declaring that WCSIT breached the contract.

¶ 2 Eight more years of litigation followed. A jury found that WCSIT did not breach the contract, and therefore Safety National owed WCSIT reimbursement for the amount paid out in benefits, plus the contractually set proportion of the fees WCSIT paid its attorney for defending the claim. The trial court added prejudgment interest to the amount of the verdict, but it denied WCSIT's claim for section 155 penalties. Safety National appeals from the judgment in docket number 10-2161, and WCSIT appeals from the denial of section 155 penalties in docket number 10-0813.

¶ 3 We find that the evidence supports the jury's verdict, that the trial court committed no

reversible errors at trial, and that the trial court did not abuse its discretion when it awarded WCSIT prejudgment interest. We also find no abuse of discretion when the trial court denied the claim for section 155 penalties. Accordingly, we affirm the trial court's judgment.

¶ 4 BACKGROUND

¶ 5 On March 13,1990, Darwin Baggett had a heart attack in the high school where he taught industrial arts for the Marion school district. He suffered brain damage that left him permanently and totally disabled. He filed a claim under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 1998)).

¶ 6 The Marion school district participated in WCSIT. Marion and other Illinois school districts contributed money to WCSIT, which used the money to create a reserve fund for the payment of benefits as needed for the joint self-insurance programs. WCSIT agreed to pay in full all amounts its members owed for workers' compensation.

¶ 7 WCSIT purchased excess insurance from Safety National. The contract provided:

> "F. Reimbursement
>
> If the EMPLOYER [WCSIT] pays any Loss incurred in any Liability Period in excess of the Self-Insured Retention Per Occurrence *** the CORPORATION [Safety National] shall reimburse the EMPLOYER upon receipt of evidence acceptable to the CORPORATION of such payment. ***
>
> * * *
>
> L. Defense of Claims
>
> The EMPLOYER shall investigate and settle or defend all claims and shall

> conduct the defense and appeal of all actions, suits and proceedings commenced against it. The EMPLOYER shall forward promptly to the CORPORATION copies of any pleadings or reports as may be requested. ***
>
> M. Good Faith Settlement
>
> The EMPLOYER shall use diligence, prudence and good faith in the investigation, defense and settlement of all such claims and shall not unreasonably refuse to settle any claim which, in the exercise of sound judgment, should be settled ***."

¶ 8 Safety National assigned one of its employees, Paul Kurtz, to protect its interest in Baggett's claim, and WCSIT hired an attorney, William Lemp, to begin its defense against the claim. WCSIT sought opinions from a number of doctors about the connection between Baggett's work and his heart attack. After reviewing the doctors' opinions, Lemp estimated that WCSIT had a 75% chance of showing that Baggett's work did not cause his heart attack. But Lemp estimated that if the arbitrator found a causal connection, he could order payment of as much as $500,000 in benefits for Baggett's extensive injuries. Lemp suggested that WCSIT should try to settle the case for $125,000.

¶ 9 WCSIT decided to offer $50,000. Baggett rejected the offer and the case proceeded to arbitration. Harry Kinzie acted as WCSIT's attorney in the arbitration and in all subsequent proceedings.

¶ 10 Litigation of Baggett's Claim

¶ 11 At the arbitration hearing, doctors for WCSIT and Baggett agreed that bleeding from Baggett's upper gastrointestinal tract led to the heart attack, and the heart attack caused Baggett's

disability. Doctors for WCSIT found no connection between the gastrointestinal bleeding and stress of any sort, let alone job-related stress. Baggett's family doctor thought stress likely caused the bleeding, and a gastrointestinal specialist testified that stress could have caused the bleeding, but other factors also might have caused it. Baggett presented witnesses who said the job caused him considerable stress, while WCSIT's witnesses testified that other teachers faced much the same stresses Baggett faced, and Baggett's stresses did not significantly change prior to the heart attack. In a decision dated January 12, 1995, the arbitrator found that Baggett's injuries arose out of his employment, so the arbitrator awarded Baggett almost $500 per week for life, plus medical expenses, most of which the medical insurer had paid.

¶ 12 Baggett died on April 30, 1995. The death limited WCSIT's liability to remaining medical payments and payments to Baggett's widow for 20 years, or until she remarried. Baggett's attorney calculated WCSIT's liability at somewhat more than $450,000, but he offered to settle the claim for $325,000. Safety National did not ask WCSIT to settle and it did not offer to participate in the payment if WCSIT settled.

¶ 13 With Safety National's approval, WCSIT appealed the arbitrator's decision to the Industrial Commission. The Commission reversed the arbitrator's decision, finding that Baggett failed to prove that the injuries arose out of his work, and he failed to prove that his work subjected him to any unusual stress. Baggett appealed to the circuit court. On December 13, 1998, the circuit court set aside the Commission's order and adopted the arbitrator's decision.

¶ 14 Again with Safety National's approval, WCSIT appealed, this time to the Industrial Commission Division of the Illinois Appellate Court. In a three to two decision filed June 12, 2000,

the court held that the manifest weight of the evidence did not contradict the Commission's findings. *Baggett v. Industrial Comm'n*, No. 5-99-0053WC (unpublished order under Supreme Court Rule 23). Therefore, the court reinstated the Commission's decision denying Baggett any recovery. But all five of the justices agreed that the case involved a substantial controversy warranting consideration by the Illinois Supreme Court.

¶ 15 Safety National Demands Settlement

¶ 16 On September 28, 2000, Kurtz wrote to Kinzie:

> "[I]t appears to me that the matter will be heard by the Supreme Court and our fates will rest in their hands.
>
> There can be no question that if we lose this case before the Supreme Court, it will open up any internal stress claim as being compensable for every employer in the state of Illinois. *** I view this as having a tremendous downside as opposed to having little upside, and I believe that the case continues to be one that we should settle."

¶ 17 Baggett's attorney offered to settle the case for half of the unpaid benefits. Because the attorney estimated those benefits at just under $268,000, he suggested the total settlement would approximate $134,000. Kinzie sent a letter, dated December 29, 2000, informing Kurtz and WCSIT of the offer. To the letter Kinzie added:

> "The Supreme Court has granted leave to appeal ***.
>
> ***
>
> Though we stand behind our position that the Appellate Court and the

Commission correctly decided this case, we do need input from your offices regarding any response to this demand."

¶ 18 Kurtz replied:

"[T]he Third Party Administrator, Hinz Claim Management, has never responded to any of my letters about getting this matter settled. *** I want you to convey a demand upon the employer to settle this case immediately for an amount up to the current demand of $133,819.02. ***

* * *

We have no problem with [WCSIT] attempting to negotiate a lower amount, but believe that the demand is reasonable in relation to the exposure that exists in this case and that they should undertake to resolve this on a full and final basis immediately. Failure to negotiate this to a successful conclusion will be regarded as an act of bad faith by Safety National ***."

¶ 19 WCSIT, through its third party administrator, Hinz, replied:

"We intend to continue to defend this matter and not make a settlement offer at this time. We feel we are acting in good faith and hope to maintain favorable potential case law in the State of Illinois regarding stress cases."

¶ 20 The Illinois Supreme Court heard oral arguments in the case on March 27, 2001. Prior to oral argument, Kurtz wrote:

"[W]hen this case is lost in front of the Illinois Supreme Court, the employer will be bearing the damages as a result of this adverse decision completely, as Safety

> National Casualty Corporation will not be reimbursing on this case should there be an adverse verdict."

WCSIT responded:

> "This case has been won twice at lower judicial hearings, and we expect to win it again before the Illinois Supreme Court. While it is possible that we will see an adverse result, that won't change the fact that Safety National wrote the excess coverage on this account, and that we fully expect that your company will honor that commitment and contract."

¶ 21 On April 20, 2001, WCSIT held a board meeting. Minutes of the meeting indicate that the board "approved the settlement of the Darwin Baggett claim from Marion *** for $200,000." No one from WCSIT directed Kinzie to negotiate a settlement with Baggett's attorney. Hinz specifically directed Kinzie not to offer a settlement.

¶ 22 WCSIT Demands Payment

¶ 23 The Illinois Supreme Court filed its decision in *Baggett v. Industrial Comm'n*, 201 Ill. 2d 187 (2002), on March 15, 2002. The court reversed the appellate court and affirmed the circuit court, thereby reinstating the arbitrator's decision. WCSIT petitioned for rehearing, but the supreme court, by a vote of four to three, decided not to rehear the case.

¶ 24 On December 19, 2002, WCSIT submitted to Safety National a request for reimbursement. According to the request, WCSIT had paid a total of $184,132.44 for Baggett's claim, and therefore Safety National owed it that amount minus WCSIT's self-insured retention of $175,000, for a net then due of $9,132.44. WCSIT also asked Safety National whether it wanted to take over

negotiations for the payments owed to Baggett's widow, which WCSIT estimated at $142,000.

¶ 25 Kurtz replied:

> "We are unable, at this time, to process this request because of certain unresolved coverage issues ***.
>
> * * *
>
> Safety National advised [WCSIT] of its good faith settlement duties under the Insurance Agreement and it declined to pursue settlement. The *** failure to settle may be a violation of the Insurance Agreement.
>
> In order to avoid the cost and risks associated with litigation, Safety National Casualty Corporation is willing to reimburse 50% of the Loss amounts in excess of the Self-Insured Retention, excluding interest expense resulting from appeals not approved by Safety National Casualty Corporation."

¶ 26 WCSIT reached an agreement with Baggett's attorney for a final payment of additional benefits of $125,000. WCSIT sent the final check on April 10, 2003. In a document entitled "Settlement Contract Lump Sum Petition and Order," the Industrial Commission approved the payment of the "Total amount of settlement." WCSIT notified Safety National of the payment and the total costs and attorney fees WCSIT paid for defending the case, and WCSIT demanded payment from Safety National of its portion of the expenditures. Safety National decided not to pay the claim.

¶ 27 On June 30, 2003, WCSIT sued Safety National for breach of contract, and, in a separate count, WCSIT sought penalties under section 155 of the Insurance Code for unreasonable and vexatious refusal to pay an insurance claim. In the contract count, WCSIT sought payment of the

$9,132.44 it initially claimed, the $125,000 it paid Baggett's widow, and $36,151.65 as Safety National's portion of the attorney fees and costs. Safety National answered the complaint and filed a counterclaim for a judgment declaring that WCSIT breached its duty to respond in good faith to settlement offers. In the counterclaim Safety National alleged:

> "After paying Baggett's estate a total of $309,13[2].44, WCSIT formally requested reimbursement from Safety of: (1) $134,132.44, the loss amount paid by WCSIT in excess of the $175,000 self insured retention; and (2) $36,151.65, representing WCSIT's alleged pro-rata share of its claim expenses."

¶ 28 In paragraph 6 of the complaint, WCSIT alleged that "the subject policy was in full force and effect, WCSIT having paid all premiums then due and owing and all other conditions of coverage having been satisfied or waived." To this allegation, Safety National answered, "Safety states that Plaintiff was covered by the Agreement subject to its terms, conditions, limitations and exclusions. Safety denies any remaining averments of this paragraph." In an amended answer, filed in November 2009, Safety National "[d]enie[d] the allegations of paragraph 6, except *** that as of March 13, 1990 Plaintiff was covered by the Agreement subject to the Agreement's terms, conditions, limitations and exclusions." Safety National added a new allegation, that "WCSIT did not report significant developments regarding the claim, in violation of [clause] L of the Agreement." Safety National reiterated its initial claim that WCSIT's refusal to settle the claim violated clause M of the contract.

¶ 29 Trial

¶ 30 The trial court deferred its decision on the declaratory judgment and the claim for section 155

penalties, letting the jury decide the breach of contract claim first. Safety National moved *in limine* for an order "prohibiting WCSIT from offering any testimony or argument that WCSIT's funds constitute, or are derived from, 'taxpayers' funds,' 'public funds,' 'public money,' or any similar phrase." The court granted that motion, but denied Safety National's motion *in limine* to bar testimony or argument concerning the amount WCSIT paid in premiums for Safety National's insurance coverage for the period in which Baggett suffered his injury.

¶ 31 The trial focused on the effect of largely uncontested facts. Safety National admitted it paid WCSIT nothing, arguing that because WCSIT breached the contract, Safety National owed nothing.

¶ 32 In regard to clause F, concerning proof of loss, Safety National presented evidence that WCSIT filed a formal proof of loss only for its initial claim for $9,132.44. After Safety National refused to pay that claim in full, WCSIT did not fill out further forms when it notified Safety National of its payments to Baggett's widow and to WCSIT's attorney.

¶ 33 In regard to clause L, concerning the duty to forward to Safety National "copies of any pleadings or reports as may be requested," Safety National relied on Kurtz's correspondence in which he complained that he received no response to his questions regarding settlement. But Safety National presented no evidence that WCSIT, Hinz or WCSIT's attorney ever failed to send Safety National any pleadings or reports Safety National specifically requested. Safety National singled out the minutes of WCSIT's April 2001 board meeting as a document that WCSIT had a duty to forward to Safety National, because the minutes record that the board, at that meeting, "approved the settlement of the Darwin Baggett claim *** for $200,000."

¶ 34 WCSIT's witnesses explained that in the April 2001 meeting, the board did not authorize

WCSIT's attorney, Kinzie, to settle Baggett's claim prior to the Illinois Supreme Court's anticipated decision on Baggett's appeal. James Sandner of Hinz testified that at the April 2001 meeting, he asked WCSIT's board to set aside $200,000 to fund a reserve in case the supreme court overturned the decision of the appellate court in *Baggett v. Industrial Comm'n*.

¶ 35 Two board members who voted at the April 2001 meeting confirmed that the board intended the reserve only as a fund Hinz could use to finally dispose of the case if the supreme court entered an adverse decision prior to the next board meeting. They explained that to the board, the term "settlement" refers to ending a case by any means, including by a judicial decision adverse to the board in all respects. The board members also clarified that the board never authorized Kinzie to settle the case prior to the supreme court's decision. The board decided to wait for the decision of the supreme court. One of the board members, on cross-examination, admitted that nowhere did the minutes indicate that the board authorized use of the $200,000 only if the supreme court decided against WCSIT, but he further testified that the minutes would not reflect that kind of restriction on the authority to use the funds.

¶ 36 Kurtz testified that WCSIT never informed him about the board's formal authorization for a settlement of Baggett's claim for up to $200,000. Kurtz said that if WCSIT had informed him of the authorization, he would have used that fact to influence the outcome of the case. In his opinion, WCSIT breached its duties under the contract when it failed to inform him of the authorization for settlement. Kurtz admitted that he knew WCSIT had regular board meetings, and he never requested any minutes from those meetings.

¶ 37 Most of the testimony at trial centered on the issue of whether WCSIT acted in good faith,

in compliance with clause M, when it failed to offer to settle the case at any time after the Industrial Commission first issued its order granting judgment in WCSIT's favor. Kinzie explained that he always believed WCSIT had valid defenses and it should owe Baggett nothing more than it had already paid prior to the arbitrator's decision. Kinzie informed WCSIT of all of Baggett's settlement offers, and the relevant considerations, but he never recommended settlement.

¶ 38 James Austin, president of WCSIT's third-party administrator Hinz, admitted that WCSIT made no offer to settle Baggett's claim after 1994. Austin listed the charges from attorneys that WCSIT paid for defense of Baggett's claim. The charges totaled $83,318. Counsel for WCSIT asked Austin to identify a joint exhibit which showed the amount WCSIT paid to Safety National for premiums for the period in which Baggett suffered his injury. Counsel for Safety National objected that WCSIT had not previously warned Safety National that WCSIT would elicit this testimony from Austin. See Ill. Sup. Ct. R. 213 (eff. May 30, 2008). This exchange followed:

"[Counsel for Safety National]: It can be stipulated that the premium was paid.

[Counsel for WCSIT]: Stipulate to the amount?

[Counsel for Safety National]: Yes."

The exhibit showed that WCSIT paid a premium of $627,828 for the year.

¶ 39 James Cerone testified as an expert for WCSIT. He explained the considerations that affect the assessment of the value of a workers' compensation claim, emphasizing the importance of the advice of legal counsel. He said, "[G]enerally you've got to make sure what you are about to pay for, especially if it's public funds, is covered under the Illinois Workers' Compensation Act." Safety National's counsel immediately objected, but the court overruled the objection.

¶ 40 On cross-examination, Safety National sought to clarify the considerations that affect a third-party claims administrator, like Hinz, who helps a client like WCSIT decide whether to pay a claim. This colloquy followed:

> "The person or entity adjusting the claim may not be the person or entity paying the claim. Are you familiar with that?
>
> A. Well, my understanding is that the ultimate person paying the claim are the – taxpayer money, if that's what you mean."

The court struck the statement and instructed the jury to disregard it. Safety National asked the court to direct the jury "that that's not the case." The court refused, noting it had already told the jury to disregard the statement.

¶ 41 Safety National presented an expert who said that Cerone had not listed all the relevant considerations, and in particular Hinz and WCSIT should have weighed more seriously the potential loss if the commission and the courts had decided against WCSIT's defense of Baggett's claim. The expert admitted that he found no lack of communication, and Kinzie kept Kurtz apprised of all significant developments in the case.

¶ 42 Kurtz testified that he estimated the total potential loss to WCSIT and Safety National for Baggett's claim at $500,000. He repeatedly encouraged WCSIT to settle the claim. However, Safety National presented no evidence that it ever offered to pay any portion of the suggested settlement amounts. In Kurtz's opinion, WCSIT breached the contract each time it failed to settle Baggett's claim. Kurtz admitted that before the supreme court granted the petition for leave to appeal, he did not inform WCSIT that in his opinion WCSIT had breached the contract by failing to settle. Another

employee of Safety National admitted that Safety National never set aside any loss reserve for Baggett's claim.

¶ 43 Kurtz also challenged the sums for which WCSIT sought reimbursement. He testified that the total paid to Baggett's estate included some interest on the workers' compensation benefits. Kurtz said that Safety National had no duty to reimburse WCSIT for interest that accrued during the pendency of any appeal WCSIT initiated unless Safety National approved the appeal. However, Safety National did not contest evidence that it approved both of the appeals WCSIT initiated.

¶ 44 WCSIT's attorney began his closing argument with the remark that WCSIT had paid the premium for Safety National's promise to reimburse it when it had to pay claims that exceeded $175,000. The argument continued:

> "WCSIT paid a compensation claim tota[l]ing $309,132.44, but Safety National denied the claim and refused to pay. WCSIT paid $628,000 in premiums in 1989, and Safety National refused to pay $170,284.09 14 years later.
>
> Last Monday when you were selected as jurors, I asked you a number of questions. Each one of you told me the same thing about your purchases of insurance. You said that each of you has bought insurance in the past with the intent to transfer the risk of loss to the insurer. You said you paid the premium and in so doing transferred the risk of loss for such things as an auto accident or your home damage to the insurer. You said you bought the insurance because you wanted to protect your assets from loss. You paid a premium, and you expect your insurance to keep its end of the bargain and accept the risk of loss.

> What happened here is WCSIT paid the premium to transfer the risk of loss to Safety National, but Safety National tried to transfer the risk of loss back to WCSIT by demanding that WCSIT settle the claim that was pending before the Supreme Court."

Safety National did not object.

¶ 45 At the instructions conference, Safety National proffered instructions that expressly placed the burden on WCSIT to prove that it complied with clauses F, L and M of the contract. The judge rejected almost all of the instructions both parties drafted, and the judge told the parties how he wanted them to revise their instructions. The court instructed the jury:

> "Plaintiff claims the defendant Safety National Casualty Corporation breached the agreement between the two parties. The terms of the agreement are as follows: WCSIT had control over settlement negotiations and acceptance of any settlement offers. In the contract condition M placed upon WCSIT the following duty to Safety National: WCSIT shall use diligence, prudence, and good faith in defense and settlement of all such claims and shall not unreasonably refuse to settle any claim which in the exercise of sound judgment *** should be settled.
>
> Condition L placed upon WCSIT the following duty to Safety National: WCSIT shall investigate and settle or defend all claims and shall conduct the defense and appeal of all actions, suits, and proceedings commenced against it. WCSIT shall forward promptly to Safety National copies of any pleadings or reports as may be requested. Safety National shall not be obliged to assume charge of the defense,

appeal, or settlement of any claim, suit, or proceeding brought against WCSIT, but Safety National shall be given the opportunity to defend or participate with WCSIT in the defense of any claim if in the opinion of Safety National its liability under this agreement might be involved.

If the terms of the agreement were met, Safety National was to reimburse WCSIT on certain claims covered under the contract for which WCSIT incur[r]ed liability in excess of its self-insured retention of $175,000 per occurrence plus a prorated share of any claim expenses. WCSIT has the burden of proving Safety National breached the contract by unjustifiably refusing to reimburse WCSIT the sums paid in excess of $175,000 plus its prorated share of expenses relative to the Baggett claim.

Generally if a party fails to perform its obligations according to the terms of the contract, the party has breached the contract. You must decide whether the party failed to do what they were required to do under the contract. WCSIT must prove Safety National's breach of the contract. To recover on its claim, WCSIT has the burden of proving Safety National failed to do something the agreement required it to do. WCSIT claims and has the burden of proving that under the contract Safety National was required to reimburse WCSIT for the amount WCSIT paid in excess of its self-insured retention in the Baggett claim and a prorated share of the expenses. WCSIT must prove that in the exercise of sound judgment it did not unreasonably refuse to settle the Baggett claim.

Safety National claims it did not breach the contract because WCSIT failed to use diligence, prudence, and good faith in the defense and settlement of the Baggett claim. You will address these issues in question on your verdict.

If you find that Safety National breached the contract, you must then decide how much money, if any, would compensate WCSIT for Safety National's breach of contract. WCSIT alleges that its damages are, one, the $134,132.44 for the amount of loss incurred in excess of the self-insured retention; two, the $36,151.65 for the amount of Safety National's prorated share of the claim expenses paid by WCSIT for investigating and defending the Baggett claim. Whether any of these elements of damages has been proved by the evidence is for you to determine.

* * *

You have the page here that says verdict. It says, one, did WCSIT prove Safety National breached the contract by its failure to perform its obligations under the contract? *** If your answer to question one is no, then your deliberations are complete. ***

If your answer to question one is yes, you should then answer question two. Question two states did WCSIT perform all its obligations under condition L of the contract? *** If your answer to question two was no, then your deliberations are complete. ***

If your answer to question two is yes, you should then answer question 3. Question 3 states did WCSIT perform all of its obligations under condition M of the

contract?"

¶ 46 The jury found in favor of WCSIT on all special interrogatories and it returned a verdict finding Safety National liable for $134,132.44 and $36,151.65, for a total of $170,284.09. The trial court entered judgment on the verdict and added prejudgment interest from April 15, 2003, to the date of the judgment. The court held that prejudgment interest started accumulating on the date on which WCSIT notified Safety National that WCSIT had paid a total of $309,132.44 to Baggett's estate and the total of $83,318 for attorney fees and costs for defending Baggett's claim. (The court started the interest calculation at December 19, 2002 for the $9,132.44 claim because WCSIT notified Safety National of that part of the claim on that date.) The court calculated the total prejudgment interest as $57,087.71.

¶ 47 The court entered judgment for WCSIT on Safety National's counterclaim for a declaratory judgment. At the argument on Safety National's motion for judgment on its counterclaim, the court noted that it agreed with the jury's assessment that WCSIT had proved that it complied fully with its duties under the contract.

¶ 48 However, the court found that Safety National had a *bona fide* dispute with WCSIT, so the court denied WCSIT's claim for penalties under section 155 of the Insurance Code. See 215 ILCS 5/155 (West 2002). The court added:

> "Also, on a side note, I think Section 155 is to be used when the big, bad insurance company is horsing around some small individual. Here we have two insurance companies fighting it out. It appears to the Court that Section 155 is being used more as a sword than some type of remedy for a small person."

¶ 49 WCSIT appealed from the denial of its claim for penalties under section 155. The clerk assigned the appeal docket number 1-10-0813. Safety National later filed a posttrial motion, which the trial court denied. Safety National then filed its notice of appeal, given docket number 1-10-2161. We consolidated the appeals.

¶ 50 ANALYSIS

¶ 51 Safety National's Appeal

¶ 52 In docket number 1-10-2161, Safety National argues that (1) WCSIT breached three clauses of the excess insurance contract; (2) the court erred in denying its motion *in limine* to preclude evidence of the amount of the premium Safety National paid, and the closing argument related to that amount prejudiced Safety National; (3) the testimony of WCSIT's expert concerning taxpayer funds deprived Safety National of a fair trial; (4) the court erred by including in the jury instructions the amounts WCSIT claimed; and (5) the court should not have awarded prejudgment interest.

¶ 53 I. Breach of contract

¶ 54 Safety National claims that WCSIT violated clauses F, L and M of the contract, and due to those violations, the trial court should have granted it a judgment notwithstanding the verdict on the claim for breach of contract, and the court should have granted Safety National the declaratory judgment it sought. In the alternative, Safety National argues that the trial court should have granted it a new trial because the jury's verdict is against the manifest weight of the evidence, and because erroneous instructions concerning the clauses at issue deprived it of a fair trial.

¶ 55 We review *de novo* the trial court's ruling on a motion for a judgment notwithstanding the verdict. *McClure v. Owens Corning Fiberglas Corp.*, 188 Ill. 2d 102, 132 (1999). The trial court

should order a judgment notwithstanding the verdict only if "the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern R.R. Co.*, 37 Ill. 2d 494, 510 (1967). The trial court must assess the manifest weight of the evidence when considering a motion for a new trial, and we will not disturb the trial court's decision on the motion unless the trial court abused its discretion. *Maple v. Gustafson*, 151 Ill. 2d 445, 455 (1992). We also defer to the trial court's rulings on instructions, and we will not reverse due to an error in the instructions unless the trial court abused its discretion and the error seriously prejudiced a party's right to a fair trial. *Bulger v. Chicago Transit Authority*, 345 Ill. App. 3d 103, 121-22 (2003).

¶ 56 A. Clause F

¶ 57 Safety National claims that WCSIT breached the excess insurance contract's clause F, which provided that Safety National would reimburse WCSIT for its payments in excess of $175,000 when Safety National received "evidence acceptable to [Safety National] of such payment." Safety National did not raise any issue concerning clause F in its answer or its amended answer to WCSIT's complaint, or in the counterclaim for declaratory judgment. Safety National waived any claim that WCSIT failed to comply with the contractual conditions in clause F by failing to raise the issue in the pleadings. See *Kalalinick v. Knoll*, 97 Ill. App. 3d 660, 669 (1981). But Safety National went further: in its counterclaim for a declaratory judgment, Safety National alleged that, "[a]fter paying Baggett's estate a total of $309,13[2].44, WCSIT formally requested reimbursement from Safety of: (1) $134,132.44, the loss amount paid by WCSIT in excess of the $175,000 self insured retention; and (2) $36,151.65, representing WCSIT's alleged pro-rata share of its claim expenses." By

asserting in its pleading that WCSIT paid Baggett's estate and formally requested reimbursement from Safety National for the total claimed here, Safety National judicially admitted that WCSIT complied with clause F. See *Roti v. Roti*, 364 Ill. App. 3d 191, 200 (2006). The trial court did not abuse its discretion when it refused all instructions related to clause F, as Safety National's judicial admission of compliance removed the issue from the case. See *Roti*, 364 Ill. App. 3d at 200.

¶ 58 B. Clause L

¶ 59 The trial court instructed the jury that WCSIT had a duty to forward to Safety National copies of any pleadings and reports that Safety National requested, and that WCSIT had the burden of proving that Safety National breached the contract by unjustifiably refusing to reimburse WCSIT for the payments it made. The trial court refused to instruct the jury more specifically, at Safety National's request, that WCSIT had the burden of proving it performed the obligations imposed on it by clause L. Instead, the court used a special interrogatory, asking the jurors whether they specifically found that WCSIT complied with clause L. Safety National argues that the court committed reversible error when it refused the proffered instructions concerning clause L. Safety National also claims that the court should have placed the special interrogatory about clause L before the interrogatory as to whether WCSIT proved that Safety National breached the contract.

¶ 60 We find that the instructions as a whole fully and fairly informed the jury about the law applicable to clause L and WCSIT's burden of proof. The trial court did not abuse its discretion in its instructions concerning clause L. See *Bulger*, 345 Ill. App. 3d at 121-22. Safety National cited no authority for its claim that the court had an obligation to place the special interrogatory about clause L ahead of the interrogatory about whether WCSIT proved breach of contract, so we find the

argument waived. See Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008); *Glassman v. St. Joseph Hospital*, 259 Ill. App. 3d 730, 742 (1994).

¶ 61 Safety National also argues that the manifest weight of the evidence contradicts the jury's finding that WCSIT complied with clause L. The evidence at trial showed that WCSIT and Kinzie did not send to Kurtz the minutes of the April 2001 board meeting, and those minutes stated that the board "approved the settlement of the Darwin Baggett claim *** for $200,000." Two board members explained that the board authorized the sum to pay Baggett's estate in case the supreme court reversed the appellate court decision. The board did not authorize Kinzie to settle the claim prior to the supreme court's decision. Both board members explained that "settlement" of a claim referred to any final disposition of the claim, regardless of whether the parties fully litigated the claim and WCSIT only paid a final judgment.

¶ 62 Kinzie promptly forwarded to Kurtz all documents Kurtz requested. Although Kurtz knew about WCSIT's board meetings, he never requested the minutes of those meetings. The evidence supports the inference that the minutes of the April 2001 meeting had no great significance, as the board did not authorize a settlement of Baggett's claim prior to the resolution of that claim by the supreme court. Safety National's expert said that he "didn't find that there was any lack of information given to" Safety National. Thus, the evidence supports the finding that WCSIT sent Safety National all the documents Safety National requested, and WCSIT kept Safety National apprised of all significant developments in the case. The jury's finding that WCSIT proved it complied with clause L is not against the manifest weight of the evidence. Because the evidence in the record supports the jury's verdict concerning clause L, the record does not justify entry of a

judgment notwithstanding the verdict. See *Maple*, 151 Ill. 2d at 453-54.

¶ 63 C. Clause M

¶ 64 Most of the pretrial discovery and the evidence at trial centered on the issue of whether WCSIT complied with clause M, in which WCSIT agreed to "use diligence, prudence and good faith in the investigation, defense and settlement of all *** claims." WCSIT also agreed it would not "unreasonably refuse to settle any claim which, in the exercise of sound judgment, should be settled." The trial court instructed the jury that WCSIT had these obligations, and that WCSIT bore the burden of proving that Safety National unjustifiably refused to reimburse WCSIT. The court refused a separate instruction more specifically stating that WCSIT had the burden of proving it complied with clause M, but the court used a special interrogatory asking the jurors whether WCSIT performed its obligations under clause M. Again, Safety National argues that the trial court erred by refusing the proffered instruction, and again Safety National contends, without citation to authority, that the court had a duty to put the question about compliance with clause M ahead of the question as to whether WCSIT proved that Safety National breached the contract.

¶ 65 The instructions concerning clause M fully and fairly informed the jury of the law applicable to the issues the jury needed to decide, so the trial court did not abuse its discretion in its instructions concerning clause M. *Bulger*, 345 Ill. App. 3d at 122. Because Safety National presented no authority supporting its argument about placement of the special interrogatories on the verdict form, we find that Safety National waived the issue. See Ill. Sup. Ct. R. 341(h)(7) (eff. July 1, 2008); *Glassman*, 259 Ill. App. 3d at 742.

¶ 66 In its argument for judgment notwithstanding the verdict, or for a new trial, Safety National

emphasizes that, after 1994, WCSIT refused to offer any amount for settlement of the claim. Safety National's expert opined that WCSIT erred by failing to weigh the risk to WCSIT and Safety National from an adverse supreme court decision. But Kinzie consistently advised WCSIT that he believed WCSIT would prevail on appeal, because Baggett failed to prove that his job caused him excessive stress, and he failed to prove that stress, let alone job-related stress, had any causal connection to his heart attack and his subsequent injuries. The testimony shows that Kinzie kept WCSIT informed about the issues, the evidence and the risks, and the board decided to fight the claim, even after the supreme court granted Baggett's petition for leave to appeal. We cannot say that the manifest weight of the evidence requires a finding that the board's conduct showed bad faith, or that WCSIT violated clause M. Because the evidence concerning clause M does not warrant a new trial, the evidence cannot justify a judgment notwithstanding the verdict. See *Maple*, 151 Ill. 2d at 453-54.

¶ 67 II. Premiums

¶ 68 Safety National moved *in limine* to prevent WCSIT from presenting evidence of the premium it paid for the contract at issue in this case. The trial court denied the motion. When WCSIT asked a witness a question about the premiums, Safety National stipulated to the amount of the premiums and WCSIT's payment of that amount. By failing to renew its objection to the evidence at trial, Safety National forfeited the issue of the admissibility of the evidence of the premiums paid. See *Jones v. Chicago Osteopathic Hospital*, 316 Ill. App. 3d 1121, 1132 (2000) (because the trial court may reconsider at trial its ruling on a motion *in limine*, a party must repeat its objection to the evidence at trial).

¶ 69 Safety National asks us to address the issue as plain error. We may reverse a judgment due to unpreserved error where the trial court committed an error of such magnitude that a party "cannot otherwise receive a fair trial or a deterioration of the judicial process occurs." *Dowell v. Bitner*, 273 Ill. App.3d 681, 693 (1995). WCSIT needed to prove its compliance with all contract conditions, including payment of premiums. To WCSIT's allegation that it paid the premiums, Safety National said in its answer that it denied the allegation, except that it admitted that "Plaintiff was covered by the Agreement subject to the Agreement's terms ***." In light of the equivocal denial, WCSIT prudently chose to prove full compliance with the contract's terms. The court committed no error, let alone plain error, when it denied the motion *in limine*, which would have excluded relevant evidence showing that WCSIT complied with the contract by paying the premiums. See *Arch of Illinois, Inc. v. S.K. George Painting Contractors, Inc.*, 288 Ill. App. 3d 1080, 1082-84 (1997).

¶ 70 Safety National contends that the evidence concerning premiums led to the prejudicial closing argument, which WCSIT's attorney began with a comparison of the amount WCSIT paid in premiums to the amount it sought to recover in this case. WCSIT's attorney also compared its payment of premiums to the jurors' payment of premiums for home and car insurance. The attorney said, "You paid a premium, and you expect your insurance to keep its end of the bargain and accept the risk of loss." Safety National now claims that in this argument WCSIT impermissibly invited the jurors to step into WCSIT's shoes. Because Safety National did not object to the comments in closing argument, we find the issue waived. See *Taluzek v. Illinois Central Gulf R.R. Co.*, 255 Ill. App. 3d 72, 82 (1993).

¶ 71 III. Taxpayer funds

¶ 72 On direct examination, Cerone, WCSIT's expert, testified generally about the factors a self-insured party should consider when deciding whether to offer to settle a claim. He said, "[G]enerally you've got to make sure what you are about to pay for, especially if it's public funds, is covered under the Illinois Workers' Compensation Act." Safety National immediately objected that the testimony violated the pretrial ruling which barred WCSIT from presenting evidence that WCSIT's funds come from taxpayers' funds or public funds. The trial court overruled the objection. On cross-examination, Cerone started an answer with a reference to taxpayer funds. The trial court sustained an immediate objection and instructed the jury to disregard the testimony. Safety National contends that the violations of the motion *in limine* deprived it of a fair trial. We review the court's ruling for abuse of discretion. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 95 (1995); *Reidelberger v. Highland Body Shop, Inc.*, 83 Ill. 2d 545, 550 (1981).

¶ 73 The first general comment about relevant considerations did not violate the motion *in limine*, because the expert did not testify that WCSIT used public funds. He said only that if public funds are at stake, the person evaluating the workers' compensation claim must act more cautiously. The trial court did not abuse its discretion by overruling the objection. See *Reidelberger*, 83 Ill. 2d at 550; *Lundell v. Citrano*, 129 Ill. App. 3d 390, 395 (1984) (if order granting motion *in limine* does not clearly forbid proposed evidence, the trial court should not bar the evidence).

¶ 74 The trial judge sustained a prompt objection to the second remark, and he instructed the jury to disregard the remark. We must presume the jury follows the court's instructions. *Kamp v. Preis*, 332 Ill. App. 3d 1115, 1127 (2002). A sustained objection usually cures any prejudice from

improper testimony. *Clayton v. County of Cook*, 346 Ill. App. 3d 367, 383 (2004). Safety National has not shown any prejudice from Cerone's remark, so we find the testimony provides no grounds for reversal. See *Simmons v. Garces*, 198 Ill. 2d 541, 567-68 (2002).

¶ 75 IV. Amount claimed

¶ 76 Safety National argues that the trial court committed prejudicial error when it included in the instructions statements of the exact amounts WCSIT claimed that Safety National owed it, because Safety National contested the propriety of those amounts. Kurtz testified that Safety National should not reimburse WCSIT for interest accrued during unapproved appeals, but WCSIT proved that Safety National approved both appeals WCSIT initiated. Safety National argues that it should not owe interest for the time the supreme court took to consider WCSIT's petition for rehearing, but no contract clause gives Safety National a right to withhold payment for interest accrued during that time, as long as WCSIT acted in good faith in petitioning for rehearing. While Safety National now suggests that it should not pay a pro rata share of all the attorney fees, it presented no evidence that Kinzie overcharged for his work or that any contract clause excused Safety National from paying its share of any part of his fees. We find that the instructions concerning the amount claimed fairly and fully informed the jury of the issues the jury needed to decide. See *Bulger*, 345 Ill. App. 3d at 122.

¶ 77 Because we find no trial error, and we find that the manifest weight of the evidence accords with the jury's verdict, we affirm the judgment entered on the jury's verdict in favor or WCSIT for breach of contract. We also affirm the judgment entered in favor of WCSIT on Safety National's counterclaim for a declaratory judgment.

¶ 78 V. Prejudgment interest

¶ 79 In a posttrial ruling the trial court granted WCSIT's motion for prejudgment interest on the amount of the verdict. The Interest Act (the Act) provides:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing." 815 ILCS 205/2 (West 2002).

The Act permits the award only if a fixed amount, or an easily computed amount, came due at an ascertainable time. *Cushman & Wakefield of Illinois, Inc. v. Northbrook 500 Ltd. Partnership*, 112 Ill. App. 3d 951, 963 (1983); *Adams v. American International Group, Inc.*, 339 Ill. App. 3d 669, 674 (2003).

¶ 80 Safety National objects that the court should not have awarded interest because (1) the contract should not count as an instrument of writing, within the meaning of the Act; (2) the court could not easily calculate the amount due under the contract; and (3) WCSIT never filled out a proper form for its claim for most of the reimbursement it seeks. We will not reverse the trial court's decision on a motion for prejudgment interest unless the court abused its discretion. *American States Insurance Co. v. CFM Construction Co.*, 398 Ill. App. 3d 994, 1004 (2010).

¶ 81 A. Instrument of writing

¶ 82 The Act covers written insurance policies. *Marcheschi v. Illinois Farmers Insurance Co.*, 298 Ill. App. 3d 306, 314 (1998). Safety National titled its contract with WCSIT "Specific Excess and Aggregate Excess Workers' Compensation Insurance Agreement." In the contract, Safety National promised to reimburse WCSIT for certain losses due to workers' compensation claims in

excess of $175,000. The trial court correctly treated the agreement as an insurance policy that qualified as an instrument of writing covered by the Act. See *Marcheschi*, 298 Ill. App. 3d at 314.

¶ 83 B. Calculation

¶ 84 Safety National judicially admitted that WCSIT paid to Baggett's estate, for his workers' compensation claim, a total of $309,132.44. Safety National did not contest any of WCSIT's legal expenses in connection with defense of the claim, and those expenses totaled $83,318. Because of WCSIT's self-insured retention, Safety National owed it $309,132.44 - $175,000 = $134,132.44 for the payment to Baggett, plus ($134,132.44 ÷ $309,132.44) x $83,318 = $36,151.65 for its share of the legal expenses.

¶ 85 Safety National argues that we should not treat these amounts as readily ascertainable because Safety National disputed the claim. However, Safety National has never challenged the propriety of the payment to Baggett's estate in light of the supreme court's decision. WCSIT's attorney calculated the amount due under that decision in accord with the provisions of the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 1998)). Safety National also failed to challenge WCSIT's payment of attorney fees. The trial court correctly found it could easily calculate the amount Safety National owed WCSIT under the contract. See *Montgomery Ward & Co. v. Wetzel*, 98 Ill. App. 3d 243, 250 (1981).

¶ 86 C. Notice to Safety National

¶ 87 The trial court held that Safety National owed WCSIT reimbursement as of April 15, 2003, the date on which WCSIT notified Safety National that WCSIT had paid Baggett's estate and Baggett's widow $309,132.44 for the workers' compensation claim. Safety National argues that it

owed no payment as of that date, or at any time prior to the entry of the verdict in this case, because WCSIT did not fill out Safety National's claim form, and therefore it never complied with clause F.

¶ 88 Clause F does not require any certain form for notification of the payment. It requires proof of payment "acceptable to" Safety National. Safety National did not contest evidence that WCSIT sent Safety National notice of the payment to Baggett's estate on April 15, 2003. The judicial admission that WCSIT paid the estate $309,132.44 serves to show further that Safety National accepted WCSIT's proof of payment. See *Roti*, 364 Ill. App. 3d at 200. The trial court correctly found that Safety National owed reimbursement to WCSIT under the terms of the contract as of April 15, 2003. Accordingly, we find that the trial court did not abuse its discretion when it awarded WCSIT prejudgment interest on the amount Safety National owed. Therefore, in docket number 1-10-2161, we affirm the judgment of the trial court.

¶ 89 WCSIT's Appeal

¶ 90 In docket number 1-10-0813, WCSIT appeals from the trial court's decision denying WCSIT's claim for penalties under section 155 of the Insurance Code (215 ILCS 5/155 (West 2002)). Supreme Court Rule 303(a) gives this court jurisdiction to consider the appeal. Ill. Sup. Ct. R. 303(a)(2) (eff. June 4, 2008) (notice of appeal filed after the judgment but before disposition of posttrial motions takes effect when court decides posttrial motions). We will not reverse the trial court's decision on a request for section 155 penalties unless the trial court abused its discretion. *Baxter International, Inc. v. Guarantee & Liability Insurance Co.*, 369 Ill. App. 3d 700, 703 (2006).

¶ 91 The legislature enacted section 155 to prevent insurers from using their superior resources to pressure injured, needy persons into accepting insurance payments of amounts less than the

amounts the insurers owe under their policies. *Estate of Price v. Universal Casualty Co.*, 322 Ill. App. 3d 514, 517-18 (2001). Section 155 helps punish dishonest insurance companies by making lawsuits against them economically feasible. *Cramer v. Insurance Exchange Agency*, 174 Ill. 2d 513, 521 (1996). If the insurer has *bona fide* grounds for disputing coverage, the trial court should not award the insured section 155 penalties. *Estate of Price*, 322 Ill. App. 3d at 518.

¶ 92 Here, the trial court found that the parties had a *bona fide* dispute over coverage, because WCSIT refused to discuss settlement with Baggett's attorney at any time after the Industrial Commission entered a decision in favor of WCSIT. We agree with the trial court. WCSIT's refusal to discuss settlement provided Safety National with a *bona fide* basis for disputing its coverage for WCSIT's loss.

¶ 93 WCSIT contends that the trial court's comments show that it misunderstood the law applicable to section 155 claims. In denying WCSIT's claim, the court said, "I think Section 155 is to be used when the big, bad insurance company is horsing around some small individual. Here we have two insurance companies fighting it out."

¶ 94 Finally, the trial court's comments appropriately emphasize the purpose of the statute, as the court correctly observed that Safety National did not use superior resources to coerce WCSIT into an inadequate settlement. See *Estate of Price*, 322 Ill. App. 3d at 517-18. Therefore, we find that the trial court did not abuse its discretion when it denied WCSIT's claim for section 155 penalties.

¶ 95 CONCLUSION

¶ 96 The manifest weight of the evidence supports the jury's findings that WCSIT fulfilled its duties under the excess insurance contract with Safety National. Safety National waived objection

to evidence of the amount WCSIT paid as a premium for the policy. It also waived any objection to the references in closing argument to the premium WCSIT paid and to the results the jurors expected when they bought insurance. The trial court appropriately struck the comment by WCSIT's expert that WCSIT used taxpayer funds to buy insurance. The court's instructions fully and fairly informed the jurors of the issues they needed to decide and the applicable law. The court did not abuse its discretion when it awarded prejudgment interest on the amount Safety National should have paid when WCSIT proved that it made the workers' compensation payment to Baggett's estate and his widow. The court also did not abuse its discretion when it denied WCSIT's claim for penalties under section 155 of the Insurance Code. Therefore, we affirm the trial court's judgment in all respects.

¶ 97 1-10-0813: Affirmed.

¶ 98 1-10-2616: Affirmed.