2013 IL App (4th) 120810WC-U
No. 4-12-0810WC
Order filed August 12, 2013

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

CITY OF CHARLESTON, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al*., (John Philpott and State of Illinois Treasurer as custodian of the Rate Adjustment Fund, Appellees).	)))))))))))	Appeal from the Circuit Court of Coles County. No. 12-MR-80 Honorable Mitchell K. Shick, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Harris, and Stewart concurred in the judgment.

ORDER

¶ 1 *Held:* (1) Doctrine of judicial estoppel did not bar claimant from recovering benefits under the Workers' Compensation Act; (2) election of remedies doctrine did not bar award of workers' compensation benefits; and (3) Commission's decision that claimant's injuries arose out of and in the course of his employment with respondent is not against the manifest weight of the evidence.

¶ 2 Claimant, John Philpott, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2004)) alleging that he sustained a spinal cord injury resulting in paralysis while employed as a firefighter for respondent, the City of Charleston, Illinois. Noting that claimant filed for and was granted a not-in-duty disability pension and that claimant filed a civil suit against it, respondent disputed claimant's entitlement to benefits under the Act, citing the doctrines of estoppel and election of remedies. The arbitrator rejected these arguments and awarded claimant benefits. The Illinois Workers' Compensation Commission (Commission) corrected some clerical errors, but otherwise affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Coles County affirmed the decision of the Commission. On appeal before this court, respondent invokes the equitable doctrines of judicial estoppel and election of remedies in support of its position that claimant is precluded from pursuing his claim for benefits under the Act. Alternatively, respondent argues that claimant failed to carry his burden of proof before the Commission that his injuries arose out of and in the course of his employment with respondent. For the reasons set forth below, we affirm.

¶ 3 I. BACKGROUND

¶ 4 The facts leading to claimant's injury are undisputed. Claimant was hired by respondent as a firefighter/paramedic in April 1997. On April 5, 2004, claimant and Patrick Goodwin, a fellow firefighter, discussed going to a firefighter and police training facility respondent was building to assist with construction. On April 6, 2004, claimant went home after his shift ended at 7 a.m., and changed out of his uniform. Later that morning, claimant borrowed a flatbed trailer from a neighbor and drove in his pick-up truck with Goodwin to Coles Station, Illinois, to pick up some steel railroad

rails which had been donated to respondent for use at the training facility. After picking up the rails, claimant and Goodwin proceeded to the training facility to unload the rails using a backhoe. To that end, claimant and Goodwin placed a chain around the rails. Goodwin then used the backhoe to lift the rails off of the flatbed trailer. During the unloading process, the backhoe lowered suddenly and pinned claimant against the flatbed trailer. As a result of the accident, claimant suffered a severe spinal cord injury resulting in paralysis. Following the accident, and until August 2005, respondent voluntarily paid claimant temporary total disability (TTD) and medical benefits. See 820 ILCS 305/8(a), 8(b) (West 2004).

¶ 5 A. CIVIL CASE

¶ 6 In March 2005, claimant filed a three-count complaint against respondent in the circuit court of Coles County (case No. 05 L 16). Relevant here, counts II and III of the complaint alleged that claimant's injuries were the result of respondent's negligence. In July 2005, respondent filed a motion to dismiss counts II and III of the complaint pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2004)). Respondent argued in its motion that claimant's lawsuit was barred by the exclusive remedy provisions of the Act (820 ILCS 305/5(a) (West 2004) (providing that "No common law or statutory right to recover damages from the employer *** or agents or employees of [the employer] for injury or death sustained by any employee while engaged in the line of his duty as such employee, other than the compensation herein provided, is available to any employee who is covered by the provisions of this Act."); see also 820 ILCS 305/11 (West 2004)). On May 26, 2006, the trial court denied the motion to dismiss, finding that a genuine issue of material fact existed as to claimant's employment status at the time of the

accident.

¶ 7 In June 2007, claimant filed a motion to amend his complaint in case No. 05 L 16. In the motion, claimant stated that he was seeking to amend the complaint "to make clear that [he] is alleging that at the time of his injury he was not within the scope and course of his employment." Counts II and III of the amended complaint again alleged negligence on the part of respondent related to the injuries claimant sustained on April 6, 2004.[1] In addition, both counts stated that at the time of the accident, claimant "was off duty and was not within the scope or course of his employment."

¶ 8 Following extensive discovery, including the taking of numerous depositions, respondent filed a motion for summary judgment on two grounds. First, respondent reasserted that the Act's exclusivity provisions (820 ILCS 305/5(a), 11 (West 2004)) barred claimant's suit because claimant was acting within the scope of his employment at the time of the accident. Second, respondent argued that it is immune from liability under sections 2-109, 2-201 and 3-108 of the Local Governmental and Governmental Employees Tort Immunity Act (Tort Immunity Act) (745 ILCS 10/2-109, 2-201, 3-108 (West 2004)). On August 12, 2008, the trial court denied respondent's motion as to the Act's exclusive-remedy provision, again finding that issues of material fact existed as to whether claimant was acting within the scope of his employment at the time of his injuries. However, the court granted summary judgment in respondent's favor based on the Tort Immunity Act. The trial court's ruling was affirmed on appeal (see *Philpott v. City of Charleston*, No. 4-08-0609 (June 3, 2009) (unpublished order under Supreme Court Rule 23)) and the Illinois Supreme

[1]Count I of claimant's complaint was a Freedom-of-Information-Act request.

Court denied leave to appeal. (*Philpott v. City of Charleston*, 233 Ill. 2d 599 (2009)).

¶ 9 B. PENSION APPLICATIONS

¶ 10 Meanwhile, in February 2005, claimant, without the assistance of legal counsel, filed an application with the Board of Trustees of the Charleston Firefighters' Pension Fund (Board) for a line-of-duty disability pension (see 40 ILCS 5/4-110 (West 2004)) arising out of the events of April 6, 2004. On August 9, 2006, after retaining counsel, claimant moved to withdraw his application for a line-of-duty disability pension. The Board granted claimant's request on August 29, 2006.

¶ 11 In February 2008, claimant filed an application for a not-in-duty disability pension pursuant to section 4-111 of the Illinois Pension Code (Code) (see 40 ILCS 5/4-111 (West 2004)) also based on the event of April 6, 2004. The matter proceeded to a hearing before the Board on June 17, 2008. On September 3, 2008, the Board issued a decision and order granting claimant a not-in-duty disability pension with a commencement date of February 1, 2008. Claimant sought administrative review of the Board's decision in the circuit court of Coles County, challenging the commencement date of the pension benefits. Claimant argued that the benefits should be retroactive to the date he filed his application for a line-of-duty disability pension in 2005. On April 3, 2009, the circuit court entered an order affirming the decision of the Board. The appellate court affirmed the Board's determination as to the commencement date of claimant's pension benefits (*Philpott v. Board of Trustees of City of Charleston Firefighters' Pension Fund*, 397 Ill. App. 3d 397 (2010)) and the Illinois Supreme Court denied leave to appeal (*Philpott v. Board of Trustees of City of Charleston Firefighters' Pension Fund*, 236 Ill. 2d 573 (2010)).

¶ 12 On August 31, 2009, during the pendency of the foregoing appeals, claimant submitted an

application for a line-of-duty disability pension arising out of the accident of April 6, 2004. See 40 ILCS 5/4-110 (West 2004). On February 3, 2010, claimant filed a petition for mandamus in the circuit court of Coles County. According to that petition, the Board refused to rule on his application for a line-of-duty disability pension on the basis that it does not have "jurisdiction" to grant the relief requested. Claimant requested the issuance of an order directing the Board "to consider and vote upon the [claimant's] 'In Line of Duty' disability pension [a]pplication."

¶ 13 C. APPLICATION FOR ADJUSTMENT OF CLAIM

¶ 14 On January 19, 2007, claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for the injuries he sustained on April 6, 2004. An arbitration hearing on claimant's application was held on June 24, 2010. Prior to taking evidence, the arbitrator allowed each party to make an opening statement. In his opening statement, claimant's counsel advised that the evidence would show that claimant was in the course and scope of his employment at the time of the injury on April 6, 2004. Respondent's attorney asserted that the evidence would show that by the actions of claimant himself through his allegations in the civil case, his deposition in the civil case, and his application for and receipt of not-in-duty disability benefits, that claimant's request for benefits under the Act was barred by the equitable doctrines of collateral estoppel and election of remedies. Respondent further asserted that claimant could not establish by a preponderance of the credible evidence that he was in the course and scope of his employment on April 6, 2004, as claimant had made contrary assertions on these issues in sworn testimony and submissions to the circuit court of Coles County and to the Board.

¶ 15 The only witness to testify at the arbitration hearing was claimant. At the time of the

arbitration hearing, claimant was partially paralyzed and confined to a wheelchair. Claimant initially testified regarding the events surrounding his injury. Claimant testified that the day before the accident, he and Goodwin, who claimant described as a captain/supervisor, discussed going to the training facility to help out with construction. Claimant stated that he was not wearing a uniform at the training facility at the time of the accident. Claimant further stated that the training facility is situated on respondent's property and that respondent furnished all the equipment he and Goodwin used the day of the accident except for the flatbed trailer and the pick-up truck. Claimant testified that Darrell Nees, the fire chief at the time, was in charge of the work that particular day and that he received direction on what to do from Nees and Goodwin. During his testimony, claimant identified a time card showing he worked two hours of overtime on the day of the accident. Claimant testified that Nees "signed off" on the overtime hours. In addition, claimant acknowledged that he was, in fact, paid for the time he spent at the training facility on April 6, 2004. Claimant opined that his work at the training facility benefitted respondent in that "it would further [his] education and sharpen [his] skills."

¶ 16 Claimant acknowledged that he applied for a line-of-duty disability pension, but later withdrew this request and applied for a not-in-duty disability pension. Claimant noted that the benefits for a not-in-duty pension are less generous than the benefits for a line-of-duty pension. Claimant explained that he requested the change because it was taking time to have the line-of-duty pension approved, his family had no income, and he thought that he could obtain a not-in-duty disability pension without any problem. Claimant noted that the not-in-duty pension was approved, but since then he has filed a motion for mandamus in the trial court for a line-of-duty disability

pension.

¶ 17 On cross-examination, claimant testified that as a firefighter, he was on duty for 24 hours followed by a 48-hour period of rest. Claimant stated that he worked a regular 24-hour shift beginning at 7 a.m. on April 5, 2004, and that he was therefore not scheduled to work on April 6, 2004, after 7 a.m. Claimant acknowledged that in his 2005 deposition for the civil case, it was his position that he was a volunteer at the time he was injured. Claimant added, however, that he and Goodwin never discussed in detail whether the work at the training facility was volunteer work. Claimant also acknowledged that in July 2005, he completed an affidavit in conjunction with a motion filed by his attorney in the civil case, in which he states that he was a volunteer at the training facility on the date of the accident. Claimant further averred in the affidavit that numerous firefighters volunteered their time and labor at the training facility and none of them were compensated for their efforts. Claimant also recognized that the amended complaint in his civil case against respondent states that he was off duty and not within the scope of his employment at the time of the accident.

¶ 18 D. ARBITRATOR'S DECISION

¶ 19 The arbitrator concluded that claimant sustained his burden of proving that the injuries he sustained on April 6, 2004, arose out of and in the course of his employment with respondent. The arbitrator cited the facts that claimant was paid for his work on the date of the accident, he was working with his supervisor, and the backhoe involved in the accident was provided by respondent. The arbitrator also determined that claimant's labor at the training facility benefitted respondent. The arbitrator further concluded that claimant's current condition of ill-being is causally related to

the accident at issue, and that the medical services provided to claimant were reasonable and necessary. The arbitrator awarded claimant TTD benefits of $622.94 per week for 133 weeks, commencing on "April 6, 2005." See 820 ILCS 305/8(b) (West 2004). The arbitrator also determined that claimant is permanently and totally disabled as a result of the injuries sustained in the accident, and awarded claimant permanent total disability benefits of $622.94 per week for life, beginning on October 25, 2007, following the period of TTD. See 820 ILCS 305/8(f) (West 2004).

¶ 20 The arbitrator rejected respondent's contention that claimant was precluded from seeking benefits under the Act pursuant to the doctrines of collateral estoppel and election of remedies. With respect to collateral estoppel, the arbitrator acknowledged that claimant had sought a line-of-duty disability pension, withdrew that request, and subsequently applied for a not-in-duty disability pension. Nevertheless, the arbitrator concluded that collateral estoppel did not apply because respondent was not a party to the hearings related to claimant's pension and the issue before the Board was not identical to any issue before her. The arbitrator explained:

> "Respondent is not a party to the pension proceedings. That application was made to the Board of Trustees of the Charleston Firefighters' Pension Fund. There are no findings of fact in the Board's Decision and Order beyond the bald statement, 'That Applicant's disability entitled him to a "not on duty" disability pension benefit pursuant to 40 ILCS 5/4-111.' The real dispute there was the effective date of the pension. [Claimant] lost his claim for pension benefits retroactive to *** 2005, so that his non-duty pension benefits were effective as of the date he filed the application, February 1, 2008."

¶ 21 The arbitrator also rejected respondent's election-of-remedies argument. The arbitrator noted

that claimant filed a civil suit against respondent in the circuit court of Coles County. During the course of the civil litigation, claimant filed affidavits and gave deposition testimony in support of his position that the accident did not arise out of and in the course of his employment with respondent, while respondent took the position that the accident arose out of and in the course of claimant's employment. Although the trial court determined that there was a genuine issue of material fact as to whether claimant's injuries arose out of and in the course of his employment, the court granted respondent summary judgment based on the Tort Immunity Act. Thus, the trial court never resolved whether claimant's injuries arose out of and in the course of his employment. Based on the foregoing, the arbitrator found that it is "inconsistent" for respondent to insist that claimant's exclusive remedy is under the Act "right up to the absolute final moment of the circuit court litigation and then assert here that [claimant] is barred from claiming workers' compensation."

¶ 22 E. COMMISSION AND TRIAL COURT

¶ 23 The Commission, noting that the arbitrator misstated the date of accident throughout her decision, corrected the period of TTD to commence on April 6, 2004 (resulting in a TTD award of 184-3/7 weeks), but otherwise affirmed and adopted the decision of the arbitrator. On judicial review, the circuit court of Coles County confirmed the decision of the Commission. This appeal by respondent followed.

¶ 24 II. ANALYSIS

¶ 25 A. JUDICIAL ESTOPPEL

¶ 26 Respondent first argues that due to the substantial amount of evidence proffered by claimant in his civil case and by virtue of claimant's application for and receipt of not-in-duty pension

benefits, claimant should have been judicially estopped from claiming before the Commission that he was in fact "on duty" at the time of his injury. According to claimant, the Commission "correctly did not invoke the doctrine of judicial estoppel to bar [his] workers' compensation claim."

¶ 27 It is unclear from the record presented to us whether a claim of judicial estoppel was presented to the arbitrator. In its opening statement to the arbitrator, respondent argued for the application of collateral estoppel. Further, in her decision, the arbitrator does not discuss the application of judicial estoppel, and instead notes that respondent "raise[d] the defense of collateral estoppel." Moreover, in its statement of exceptions before the Commission, respondent asserted that claimant "is collaterally estopped from claiming that he was in the course and scope of his employment at the time of the occurrence," although it later proceeded to set forth and argue in its statement of exceptions before the Commission the application of judicial estoppel.

¶ 28 Collateral estoppel and judicial estoppel, although related, are separate and distinct doctrines, (see *Ceres Terminals, Inc. v. Chicago Bank & Trust Co.*, 259 Ill. App. 3d 836, 850 n.2 (1994)), each with different elements (compare *Boelkes v. Harlem Consolidated School District No. 122*, 363 Ill. App. 3d 551, 557 (2006) (setting forth the five elements generally necessary to successfully assert judicial estoppel) with *Edmonds v. Illinois Workers' Compensation Comm'n*, 2012 IL App (5th) 110118WC, ¶ 21 (setting forth the three threshold requirements for collateral estoppel)). The doctrine of collateral estoppel applies "when a party participates in two separate and consecutive cases arising out of different causes of action and some controlling factor or question material to both cases has been fully and completely resolved by a court of competent jurisdiction against a party in the former suit." *Edmonds*, 2012 IL App (5th) 110118WC, ¶ 20. Stated differently, the doctrine of

collateral estoppel prohibits relitigation in the later proceeding of an issue actually decided in the earlier proceeding. *McCulla v. Industrial Comm'n*, 232 Ill. App. 3d 517, 520 (1992). In contrast, the doctrine of judicial estoppel provides that a party who assumes a particular position in a legal proceeding is estopped from assuming a contrary position in a subsequent legal proceeding. *J.R. Carrozza Plumbing, Co. v. Industrial Comm'n*, 307 Ill. App. 3d 220, 225 (1999) (Rarick, J., specially concurring) (noting that judicial estoppel turns on a litigant taking inconsistent positions); *Bidani v. Lewis*, 285 Ill. App. 3d 545, 550 (1996). As such, the doctrine of judicial estoppel is designed to promote the truth and protect the integrity of the courts by preventing litigants from deliberately shifting positions to suit the exigencies of the moment. *Bidani*, 285 Ill. App. 3d at 550; *Ceres Terminals, Inc.*, 259 Ill. App. 3d at 850.

¶ 29 Normally, the failure to raise an issue before the arbitrator results in its forfeiture on appeal. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1020 (2005) ("The failure to raise an issue before the arbitrator and the Commission results in its waiver."); *Kropp Forge Co. v. Industrial Comm'n*, 225 Ill. App. 3d 244, 252 (1992) ("An arbitrator's decision should not be reversed based on contentions not presented to him."); see also *Village of Arlington Heights v. National Bank of Austin*, 53 Ill. App. 3d 917, 919-20 (1977) ("An appellant who fails to raise a certain defense at trial may not raise that defense for the first time on review."). Even absent forfeiture, however, we do not find persuasive the argument that that the doctrine of judicial estoppel bars claimant from asserting before the Commission that he was acting in the course and scope of his employment at the time of his accident or from receiving workers' compensation benefits.

¶ 30 Although judicial estoppel is flexible and not reducible to a pat formula, the following five

elements are generally necessary to successfully assert the doctrine: (1) a party must have taken two positions; (2) the positions must have been taken in separate judicial or quasijudicial administrative proceedings; (3) the party must have intended the trier of fact to accept the truth of the facts alleged in support of the positions; (4) the party must have succeeded in asserting the first position and received some benefit from it; and (5) the two positions must be inconsistent. *Boelkes*, 363 Ill. App. 3d at 557; but see *Townsend v. Fassbinder*, 372 Ill. App. 3d 890, 901 (2007) (discussing whether judicial estoppel imposes an additional requirement that the positions must be taken under oath).

¶ 31 Initially, we find that claimant is not judicially estopped from asserting a work-related injury before the Commission based on the position he took in the civil case because not all of the elements necessary for the doctrine's application are present. In this regard, respondent moved for summary judgment in the civil action on the basis that (1) claimant's lawsuit was precluded by the Act's exclusivity provisions (820 ILCS 305/5(a), 11 (West 2004)) and (2) it is immune from liability under various provisions of the Tort Immunity Act (745 ILCS 10/2-109, 2-201, 3-108 (West 2004)). The trial court denied respondent's motion as to the Act's exclusivity provisions, finding that issues of material fact existed as to whether claimant was acting within the scope of his employment at the time of his accident. However, the court granted summary judgment in respondent's favor based on the Tort Immunity Act. Thus, claimant did not prevail in the civil case and there is no showing that he received any benefit in the proceeding. To the contrary, his case was dismissed. Accordingly, with respect to the civil case, we find that the doctrine of judicial estoppel does not apply.

¶ 32 We reach the same conclusion with respect to the proceedings before the Board. Respondent asserts that claimant took one position before the Board—that he was injured while *not* on duty—and

one position before the Commission—that he was injured while on duty. From this, respondent reasons that claimant has taken "entirely inconsistent" positions and therefore he should have been judicially estopped from litigating before the Commission that he sustained an injury compensable under the Act. We disagree.

¶ 33 Before the Board, claimant filed an application for a not-in-duty disability pension under section 4-111 of the Code (40 ILCS 5/4-111 (West 2004)). To be entitled to a disability pension under that provision, a firefighter must show that he or she was injured "as a result of any cause other than an act of duty." 40 ILCS 5/4-111 (West 2004). Article four of the Code, which applies to firefighters in municipalities, such as Charleston, which have fewer than 500,000 inhabitants does not define what constitutes an "act of duty." Accordingly, we look to the definition of that term in article six of the Code, which applies to firefighters in municipalities with more than 500,000 inhabitants. *Jensen v. East Dundee Fire Protection District Firefighters' Pension Fund Board of Trustees*, 362 Ill. App. 3d 197, 203-04 (2005). Section 6-110 of the Code defines "act of duty" as "[a]ny act imposed on an active fireman by the ordinances of a city, or by the rules or regulations of its fire department, or any act performed by an active fireman while on duty, having for its direct purpose the saving of the life or property of another person." 40 ILCS 5/6-110 (West 2004). Thus, by filing an application for a not-in-duty disability pension, claimant represented that the act he was performing at the time of his injuries was not imposed by an ordinance of the City of Charleston or by the rules and regulations of the Charleston fire department and that it was not an act performed while on duty having as its *direct* purpose the saving of the life or property of another person.

¶ 34 To prevail on his claim for benefits under the Act, claimant did not have to establish that his

injuries arose from "an act of duty," as respondent seems to suggest. Rather, he was required to show that his injuries "arose out of" and "in the course of" his employment. 820 ILCS 305/2 (West 2008); *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co. v. Industrial Comm'n*, 129 Ill. 2d 52, 57 (1989). An accident is said to "arise out of" one's employment if it has its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Orsini*, 117 Ill. 2d at 45. The "arising out of" and "in the course of" employment test, therefore, encompasses a broader range of conduct than an "act of duty" as that term applies to firefighters in the Code. Thus, contrary to respondent's stance, claimant did not take "entirely inconsistent" positions before the Board and the Commission.

¶ 35 We recognize that in *McCulla*, 232 Ill. App. 3d 517, a different panel of this court held that a firefighter seeking benefits under the Act was barred under the doctrine of collateral estoppel from relitigating whether his injuries were causally connected to his employment where the firefighter was previously awarded a not-in-duty disability pension under the same provision of the Code at issue here. *McCulla*, however, is not dispositive for several reasons. First, *McCulla* involved an application of the doctrine of collateral estoppel, a theory not presented in this appeal. Second, *McCulla* does not discuss the definition of an "act of duty." Third, the holding in *McCulla* is arguably *dicta* since the Commission denied benefits on two separate grounds and the *McCulla* claimant challenged only one of those grounds on appeal. *McCulla*, 232 Ill. App. 3d at 520.

¶ 36 For all the foregoing reasons, we find that the doctrine of judicial estoppel does not serve as

a bar to claimant pursuing benefits under the Act.[2]

¶ 37 B. ELECTION OF REMEDIES

¶ 38 Respondent also argues that claimant "elected his remedy" in the circuit court and in the pension proceedings before the Board to the exclusion of the Act. Respondent asserts that in rejecting this argument below, the arbitrator, whose decision was affirmed and adopted by the Commission, improperly focused on its actions in the civil lawsuit as opposed to claimant's actions in the collateral proceedings. Respondent further asserts that when claimant's actions are considered, he should be barred from seeking benefits under the Act because he applied for and received a not-in-duty disability pension and he elected to pursue a civil remedy in the trial court.

¶ 39 The doctrine of election of remedies precludes a subsequent proceeding if the remedies

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[2]In response to questions during oral argument regarding whether the claim of judicial estoppel was raised before the arbitrator, respondent filed a motion to supplement the record on appeal with a copy of the memorandum of law it filed with the arbitrator in support of its position that claimant should not be awarded compensation under the Act. In the memorandum, respondent asserted that claimant was judicially estopped from taking the position before the Commission that his injuries arose out of and in the course of his employment. Claimant filed an objection to respondent's motion, asserting that respondent did not reference judicial estoppel as in issue that would be submitted for decision in either the request for hearing submitted to the arbitrator or the oral stipulation presented to the arbitrator. Given our finding that respondent's claim of judicial estoppel has no merit, we deny the motion to supplement the record as moot.

sought are so inconsistent and irreconcilable that a party could not logically follow one without renouncing the other. *Kalabogias v. Georgou*, 254 Ill. App. 3d 740, 750-51 (1993). The doctrine applies when double compensation is threatened, the opposing party changes position in reliance on the other party's conduct, or *res judicata* applies. *Preston v. Industrial Comm'n*, 332 Ill. App. 3d 708, 715 (2002). Whether an election of remedies has occurred is a question of law. *Preston*, 332 Ill. App. 3d at 715.

¶ 40 Initially, we agree with respondent that, in addressing this argument, the Commission improperly focused on respondent's actions rather than the remedies sought by claimant in the various proceedings. It is axiomatic, however, that we review the result at which the Commission arrived, rather than its reasoning. See *Department of Mental Health & Developmental Disabilities v. Illinois Civil Service Comm'n*, 103 Ill. App. 3d 954, 957 (1982). Ultimately, we find that the Commission correctly determined that the doctrine of election of remedies does not apply under the facts of this case.

¶ 41 With respect to claimant's not-in-duty disability pension, respondent suggests that double compensation is threatened in this case and that it was "misled" with regard to its handling of his injury by claimant's actions before the Board. We conclude, however, that the election-of-remedies doctrine does not apply to bar claimant's application for benefits under the Act. First, double recovery is not threatened in this case. In this regard, we find instructive *Markham v. Board of Trustees of the Kankakee Fireman's Pension Fund*, 198 Ill. App. 3d 602 (1990). In *Markham*, a firefighter's request for a line-of-duty disability pension was denied. Thereafter, the firefighter applied for, and was granted, a not-in-duty disability pension. The firefighter also sought judicial

review of the decision denying his application for a line-of-duty disability pension. The trial court determined that the firefighter had waived his right to seek administrative review of the denial of the line-of-duty disability pension by his subsequent application for a not-in-duty disability pension. In so ruling, the trial court suggested that if the firefighter was ultimately successful in obtaining a line-of-duty disability pension, he would receive a double recovery. On appeal, however, the court of review rejected the position that claimant had made an election of remedies. *Markham*, 198 Ill. App. 3d at 604. In particular, the court noted that double recovery is not threatened because the statutory provisions at issue vested the pension board with authority to terminate the firefighter's not-in-duty disability pension if he were awarded a line-of-duty disability pension. *Markham*, 198 Ill. App. 3d at 604. We reach a similar conclusion here.

¶ 42 Notably, the claimant here was awarded a not-in-duty disability pension pursuant to section 4-111 of the Code (40 ILCS 5/4-111 (West 2004)). Section 4-114.2(a) of the Code (40 ILCS 5/4-114.2 (West 2004)) provides for the reduction of pension benefits when a party also receives a workers' compensation award under the Act "for the same injury." Here, claimant was awarded a not-in-duty disability pension as a result of the April 6, 2004, injury. The Commission awarded claimant benefits under the Act for the same injury. Thus, pursuant to section 4-114.2(a) of the Code, claimant's pension award would be offset by his workers' compensation benefits. See *Sellards v. Board of Trustees of the Rolling Meadows Firemen's Pension Fund*, 133 Ill. App. 3d 415 (1985) (holding that pension board properly reduced disability pension benefits by amount of workers' compensation benefits); but see *Eckman v. Board of Trustees for the Police Pension Fund for the City of Elgin*, 143 Ill. App. 3d 757, 762 (1986) (holding, under similar provision in the police

pension fund, that not-in-duty disability pension awarded for an injury that was not work related may not be offset by award of workers' compensation benefits). In addition, although respondent insists that it was "misled" by claimant's actions before the Board, the record does not establish that respondent changed its position in reliance on claimant's conduct in the pension proceedings. Indeed, those proceedings were between claimant and the Board, not respondent. See *Demski v. Mundelein Police Pension Board*, 358 Ill. App. 3d 499, 503 (2005) (noting that the fact that both a municipality and a pension board are public entities is insufficient to establish that they are the same parties or that they are in privity). Thus, we conclude that the election of remedy doctrine is not applicable with respect to the proceedings before the Board.

¶ 43 With respect to the civil case against respondent, we note that the supreme court has determined that a workers' compensation claimant is not barred from filing simultaneous claims in different forums asserting different theories of recovery. See *Rhodes v. Industrial Comm'n*, 92 Ill. 2d 467, 471 (1982) ("[T]here is nothing to prevent a cautious employee who has a pending workmen's compensation claim from also filing a common law action, if he is uncertain of his ground for recovery, so as to toll the statute of limitations."); see also *Wren v. Reddick Community Fire Protection District*, 337 Ill. App. 3d 262, 268 (2003) ("[W]e believe that nothing should prohibit a cautious plaintiff with a pending lawsuit from also filing a workers' compensation claim."). As such, we decline to find that by merely pursuing a civil remedy against respondent claimant "elected a remedy" to the exclusion of benefits under the Act.

¶ 44 C. ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT

¶ 45 Respondent's final contention is that claimant failed to carry his burden of proof before the

Commission. The purpose of the Act is to protect an employee from risks and hazards which are peculiar to the nature of the work he is employed to do. *Orsini*, 117 Ill. 2d at 44. As noted previously, an employee's injury is compensable under the Act only if it "arises out of" and "in the course of" one's employment. 820 ILCS 305/2 (West 2008); *Orsini*, 117 Ill. 2d at 44. It is the burden of the employee to establish by a preponderance of the evidence that both elements were present at the time of the accident's occurrence. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989); *Rodin v. Industrial Comm'n*, 316 Ill. App. 3d 1224, 1226 (2000). The phrase "in the course of" refers to the time, place, and circumstances under which the accident occurred. *Caterpillar Tractor Co.*, 129 Ill. 2d at 57. The phrase "arising out of" refers to the origin or cause of an employee's injury. *Sisbro, Inc. v. Industrial Comm'n*, 207 Ill. 2d 193, 203 (2003). An accident is said to "arise out of" one's employment if it has its origin in some risk connected with, or incidental to, the employment so as to create a causal connection between the employment and the injury. *Orsini*, 117 Ill. 2d at 45. As a general rule, an injury arises out of one's employment if, at the time of the occurrence, the employee was performing acts he was instructed to perform by his employer, acts which he had a common law or statutory duty to perform, or acts which the employee might reasonably be expected to perform incident to his assigned duties. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. The Commission's determination that an injury arose out of one's employment involves a question of fact, and its decision on the matter will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Rodin*, 316 Ill. App. 3d at 1227. A decision is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Will County Forest Preserve District v. Illinois Workers' Compensation Comm'n*, 2012

IL App (3d) 110077WC, ¶ 15.

¶ 46 As noted above, the Commission in this case determined that claimant proved that his injuries arose out of and in the course of his employment because: (1) claimant was paid for his work; (2) claimant was working for his supervisor; (3) the backhoe involved was provided by respondent; and (4) the benefit of claimant's labors inured to respondent. According to respondent, however, the evidentiary admissions claimant made in his civil case and before the Board, do not support these findings. Claimant responds that the Commission was presented with conflicting evidence regarding whether his injuries arose out of and the course of his employment, and given the deferential standard of review applicable to the Commission's factual findings, its decision should be affirmed.

¶ 47 Initially, we note that at times, the parties appear to be arguing whether an employee-employer relationship existed at the time of claimant's injuries. However, that issue was not disputed before the Commission. As such, we confine our analysis to whether the Commission's evidentiary findings support a determination that claimant's injuries arising out of and in the course of his employment with respondent.

¶ 48 We begin with the Commission's finding that claimant was paid for his work at the training facility on April 6, 2004. Respondent disputes this finding, arguing that there is insufficient credible evidence in the record to support the arbitrator's holding. According to respondent, claimant himself provided evidence or testimony that contradicts this finding. Respondent cites to claimant's deposition and the affidavits he filed in the civil case. Respondent asserts that these documents establish: (1) claimant denied that he was to be paid for his time at the training facility; (2) claimant

suggested that Nees' "doctored" his time card to reflect that he was there on an overtime basis and he questioned Nees' authority to do so; (3) claimant stated that he was a volunteer at the training facility and it was not work for which he was to be compensated as a firefighter; and (4) no other firefighters were compensated for their time at the training facility. None of these statements, however, refute the finding that claimant was paid for his work at the training facility on the date of his injury. In any event, as the trier of fact, it is within the province of the Commission to judge the credibility of witnesses, determine the weight to assign the testimony, and to resolve conflicts in the evidence. *McRae v. Industrial Comm'n*, 285 Ill. App. 3d 448, 451 (1996). The Commission apparently found claimant credible despite the alleged inconsistencies cited by respondent and we decline to disturb its finding.

¶ 49 Likewise, we do not find persuasive respondent's suggestion that the Commission's finding that claimant was "working with his supervisor" is unfounded. According to respondent, there was no evidence that claimant was required to be at the training facility and the work being done there did not fall under the duties of a firefighter. The connection between respondent's statements and the Commission's finding that claimant was working with his supervisor is unclear. However, it is undisputed that claimant was at the training facility with Captain Goodwin and Chief Nees. Thus, there is evidence to support a finding that claimant was working with a supervisor. Regarding respondent's claim that claimant was not required to be at the training facility and the work being done there did not fall under the duties of a firefighter, we note that a claimant may show that an accident arose out of his employment where he might reasonably be expected to perform certain acts incident to his assigned duties. *Caterpillar Tractor Co.*, 129 Ill. 2d at 58. Here, there was evidence

that many firefighters did work at the training facility. As such, there was evidence from which the Commission could find that claimant might reasonably expected to work at the training facility.

¶ 50 The Commission also cited the fact that the backhoe involved in the accident was provided by respondent. Respondent acknowledges the presence of its equipment at the training facility, including the backhoe, but suggests that this evidence is offset by the facts that claimant provided a pick-up truck and a flatbed trailer and he was not reimbursed for mileage. Again, this merely presents a balancing of evidence, which the Commission decided in claimant's favor, and does not warrant reversal.

¶ 51 Finally, respondent disputes the Commission's finding that claimant's activities benefitted it. Respondent claims that claimant was acting as a "volunteer" and, citing Black's Law Dictionary, asserts that the very definition of that term "demands that the efforts being expended by the claimant benefit the employer." See *Black's Law Dictionary* 1570 (7th ed. 1999) (defining "volunteer"). Respondent argues that to use the fact that claimant's efforts benefitted respondent as a basis to find that claimant's injuries arose out of and in the course of his employment is "tautological reasoning" and would lead to every volunteer being in the course and scope of employment. We reject this argument as this was but one factor the Commission considered in reaching its decision. Having rejected each of respondent's individual arguments, we conclude that the Commission's finding that claimant's injuries arose out of and in the course of his employment with respondent is not against the manifest weight of the evidence.

¶ 52 III. CONCLUSION

¶ 53 For the reasons set forth above, we affirm the decision of the circuit court of Coles County,

which confirmed the decision of the Commission.

¶ 54 Affirmed.