Docket No. 115728

IN THE ILLINOIS SUPREME COURT

THE VENTURE-NEWBERG PERINI STONE & WEBSTER, Plaintiff-Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION AND RONALD DAUGHERTY, Defendants-Appellees.	On Appeal from the Illinois Appellate Court, Fourth Judicial District, Illinois Workers' Compensation Division Pursuant to Certification Appellate Docket No. 4-11-0847 WC There Heard on Appeal from the Circuit Court of Sangamon County, Seventh Judicial Circuit Docket No. 10 MR 509 The Honorable Patrick Kelley, Judge Presiding

SUPPLEMENTAL BRIEF AND ARGUMENT OF THE VENTURE-NEWBERG PERINI STONE & WEBSTER

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ORAL ARGUMENT REQUESTED

TABLE OF POINTS AND AUTHORITIES

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NATURE OF THE CASE

The defendant-appellee, Ronald Daugherty (claimant), a pipefitter, filed an application for adjustment of claim under the Workers' Compensation Act (820 ILCS 305/1 *et seq.* (West 2006)) alleging that he sustained work-related injuries in a truck accident while working for the plaintiff-appellant, The Venture-Newberg, Perini Stone & Webster (Venture-Newberg). The arbitrator found that the accident did not arise out of and in the course of employment, but the Illinois Workers' Compensation Commission (Commission) reversed the arbitrator's decision. On review, the trial court reversed the Commission. The Illinois Appellate Court, Fourth Judicial District, Illinois Workers'

Compensation Division (2013 IL App (4th) 110847WC, 981 N.E2d 1091 (4th Dist. 2013)) reversed the trial court and reinstated the Commission's decision, from which Venture-Newberg appeals.

ISSUES PRESENTED FOR REVIEW

Whether the Commission properly determined that the claimant was a "traveling employee" when he was injured in a traffic accident while en route from a motel where he was staying to his temporary employment as a pipefitter at a power plant.

Whether the Commission properly determined that the claimant was entitled to benefits because the course or method of travel to the plant was determined by the demands or exigencies of his pipefitting job when the claimant had not been called into work for an emergency at the time of the traffic accident.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Supreme Court Rule 315(a). Ill. S. Ct. R. 315(a) (eff. Feb. 26, 2010). On December 6, 2012, the Illinois Appellate Court, Fourth Judicial District, Illinois Workers' Compensation Division, handed down an opinion in which it reversed the trial court and reinstated the Commission's decision. Venture-Newberg timely filed a petition for rehearing or in the alternative for certification to the Supreme Court within 21 days pursuant to Rules 367 and 315(a) on December 27, 2012. On January 29, 2013, the Illinois Appellate Court, Fourth Judicial District, Illinois Workers' Compensation Division, denied the petition for rehearing, but granted certification. Within 35 days, on March 5, 2013, Venture-Newberg filed a petition for leave to appeal. This Court granted the petition for leave to appeal on May 29, 2013.

STATEMENT OF FACTS

Venture-Newberg's Maintenance Agreement With Exelon

Venture-Newberg, based in Wilmington, Illinois, is in the business of performing maintenance and modification work on power plants (R.P6, R.P258, R.P271).[1] Along with certain trade unions, Venture-Newberg was a signatory to a project maintenance agreement for power plants with Exelon Generation Company, LLC (Exelon), including the Cordova Nuclear Power Plant (Cordova), prior to the claimant's traffic accident (R.P105-45, R.P255, R.P269-70). By the terms of the agreement, Venture-Newberg had:

> ...complete authority and right to:
>
> A. Plan, direct and control the operation of all Work.
>
> B. Decide the number of employees required...
>
> C. Hire and lay off employees, as [Venture-Newberg] feels appropriate to meet work requirements and/or skills....
>
> D. Transfer employees...
>
> E. Determine work methods and procedures
>
> * * *
>
> G. Require all employees to observe [Venture-Newberg's] and/or [Exelon's] rules and regulations not inconsistent with this Agreement.
>
> H. Require all employees to observe all safety regulations prescribed by [Venture-Newberg] and/or [Exelon] and to work safely.
>
> I. Discharge, suspend, or discipline employees for proper cause.

(R.P118-19). Under the agreement, Venture-Newberg did not pay employees

[1] To avoid confusion, all references to the nine-volume report of proceedings before the Illinois Workers' Compensation Commission will be (R.P) whereas reference to the one-volume common law record will be (R.C).

"subsistence, travel allowance, mileage, or...travel time" (R.P120).[2]

Hiring Is Done Through Local Union Referrals

Venture-Newberg did not have permanently employed tradespeople to perform the work (R.P261). Instead, Venture-Newberg relied on qualified tradespeople through a system of local union referrals (R.P261, R.P271).

Venture-Newberg did not control which tradespeople applied for work at the plant (R.P263). Initially, Venture-Newberg would post jobs with Local Union 25 in Rock Island; however, if hiring needs were not met, Local 25 would reach out to other locals (R.P263-64). Venture-Newberg could reject someone if there was a problem—some sort of disciplinary action, for cause, a fitness for duty event or something similar (R.P202-03, R.P64).

The business agent for Plumbers & Steamfitters Local 137, John A. Haynes, located in Springfield, was responsible for dispatching manpower throughout the local's jurisdiction in Illinois (R.P226). Because Local Union 25 in Rock Island did not have qualified manpower for the Cordova plant shut-down, with the knowledge of the plant's management, it looked to sister locals for help (R.P228-31, R.P235-36). When someone like the claimant was from a different local, the member was referred or assigned to Local 25 and worked at its wages and benefits without any seniority (R.P230, R.P244-46).

The claimant was not working for Venture-Newberg when Haynes referred him out to Local Union 25 in March 2006 (R.P245). The job was for a limited duration, 17 to 20 days (R.P245, R.P260). The claimant was not required to take the job and could not

[2] The only exception, not applicable in this case, was when an existing employee working under the agreement needed to be transferred inside or outside the local union territory to another job location due to the unavailability of workers with sufficient skills (R.P111).

take the job if there was work within Local Union 137's area, but pipefitters went where they need to go to make money (R.P87-88, R.P245-46, R.P249, R.P255-56).

Because Venture-Newberg was not a signatory to Local 137's master agreement with certain employers in central Illinois, it was not an employer or association member (R.P241). An employer within Local 137's fairly broad territory, stretching across parts of eleven counties, did not have to pay for a worker's travel expenses or lodging (R.P243-44). Venture-Newberg did not pay travel time or travel and lodging expenses of Local 137's members working at the Cordova plant, consistent with Local 25's agreement (R.P246-47). The start time for Local 137 members working at Cordova was when they clocked in at the plant (R.P252).

Claimant's Sporadic Employment With Venture-Newberg

The claimant had been a pipefitter for 30 years, and at the time of the accident, was 50 years old and a member of Local 137 in Springfield, Illinois (R.P176-77, R.P227). He applied for pipefitting work through his union (R.P198). It was not unusual for him to take a job on a project basis, and when the job ended, return to the union hall at his home local to find another job through his union business manager (R.P196-97). When he worked at various jobs throughout central Illinois, he was not paid travel expenses (R.P199). The job started when he punched in and ended when he punched out (R.P199).

The claimant was employed from time-to-time by Venture-Newberg at various Exelon power plants between the following dates:

Hire date	Term date	Site
3/23/06	4/6/06	Quad Cities, Cordova, IL
2/22/06	3/08/06	LaSalle Station, Marseilles, IL
1/11/06	2/15/06	Clinton Station, Clinton, IL

2/18/04	3/7/04	Quad Cities, Cordova, IL
1/04/04	2/16/04	Clinton Station, Clinton, IL

(R.P74). Venture-Newberg never reimbursed him for travel or lodging expenses, or paid travel time while he was employed on prior jobs (R.C199-201, R.P213-14). To his knowledge, Venture-Newberg did not violate any agreement by not paying his travel or lodging expenses (R.P214). He took a tax deduction for travel expenses on his income tax returns (R.P216).

When Haynes could not find work for him locally in 2006, Haynes asked him whether he would be interested in working at the Cordova plant (R.P202). He agreed as he had worked there previously in 2004 (R.P201-02). The claimant was not required to take the job (R.P217-18). Before he accepted the job, he weighed the costs of travel and lodging against the hours and money he would make at $45 an hour (R.P219). He knew that the job was short term and that he would make a lot of money working a 12-hour shift and overtime (R.P224). Overtime was anything over eight hours (R.P90).

Because the Cordova plant was 200 miles away from his home, he decided to stay at a hotel with a co-worker, Todd McGill, who was a friend and a member of the same local (R.P85-86, R.P204-05, R.P211). McGill roomed with him to share expenses and save money (R.P91, R.P211-12). The hotel was approximately 30 miles from the plant (R.P190).

Venture-Newberg did not tell him or McGill to stay at the hotel or what route to take to work, or pay for travel, lodging or food (R.P84-85, R.P90, R.P212-13). He and McGill had the same cost-sharing arrangement while previously working at the Cordova plant (R.P91-92). As he did not want to commute and get to work tired or work 12 hours and then start driving tired, temporary hotel lodging made sense (R.P224-25).

Claimant's Traffic Accident Takes Place On The Way To Work

The claimant and McGill worked at the Cordova plant for one day before the accident (R.P90, R.P180). The accident happened at about 6:05 a.m. on March 24, 2006 while McGill was driving his truck with the claimant riding as a passenger (R.P83). They were on the way from their hotel to the plant where they were to start work at their regularly scheduled time of 7:00 a.m. when the truck skidded on ice (R.P84, R.P98-99, R.P190-91, R.P204). They started getting paid when they clocked in at 7:00 a.m. (R.P85). Venture-Newberg did not ask them to come in earlier than 7:00 a.m. or direct McGill to take a particular route to the plant (R.P85, R.P90). They were not on-call or called in for an emergency (R.P98-99, R.P210).

The Arbitrator Finds That The Claimant Is Not Covered

The arbitrator found that the claimant had failed to prove that his injuries sustained in the traffic accident arose out of and in the course of employment (R.P17-24). After setting forth the relevant facts, the arbitrator relied on the rule that an employee who works at a fixed location with fixed hours is generally not considered in the course of employment while going to and from work (R.P23). The arbitrator recognized that there were exceptions to the general rule, but the exceptions were not applicable (R.P23-24). Specifically, the claimant was not a traveling employee because he was not a Venture-Newberg employee who was transferred to the plant; he was not paid or reimbursed for travel time, travel or lodging expenses; he was not required to accept the job under the union contract; Venture-Newberg did not direct or control his choice of lodging or the route that he took to work; and he was not entitled to "on call" pay (R.P23-24). In the arbitrator's view, it was the claimant's voluntary choice to take the job

outside his local union's territory after he considered the expenses that he would incur against the substantial money that he would earn (R.P24).

A Divided Industrial Commission Reverses The Arbitrator

The Industrial Commission, over a dissent, viewed the evidence and the law differently, reversed the arbitrator and found that the claimant's injury arose out of and in the scope of employment (R.P2208-19). The Commission cited the rule that accidents sustained while employees are on the way to or from work are not compensable, but concluded that two exceptions were applicable (R.P2213).

First, the Commission determined that the claimant was in the course of employment at the time of the accident because the course or method of travel was the result of the demands or exigencies of the job rather than his personal preferences (R.P2213). Although the Commission acknowledged that Venture-Newberg did not demand that he lodge within a certain distance from the plant, he had to stay, "as a practical matter," a reasonable commuting distance from the plant and it was not realistic to expect him to commute each day from Springfield, 200 miles away (R.P2213). Further, Venture-Newberg could not have met its obligations under the agreement were it not for the willingness of employees to work long hours and make themselves available in the event of an emergency (R.P2213-14).

Second, the Commission determined that the claimant was a traveling employee at the time of the accident (R.P2214). Although the Commission recognized that not every employee who accepts employment in a remote location is necessarily a traveling employee, it concluded that the claimant was a traveling employee because Venture-Newberg was required to recruit from local unions around the state to fulfill manpower

requirements and the claimant, "as a practical matter," had to stay within a reasonable distance from the plant to meet the job's demands (R.P2215-16). The Commission further concluded that Venture-Newberg must have anticipated that the claimant, McGill and others recruited outside the local would have been required to travel and arrange for convenient lodging to perform the duties of the job (R.P2215-16). Finally, according to the Commission, the claimant's conduct was reasonable and foreseeable to Venture-Newberg as the accident took place on the road from the hotel to the plant (R.P2216). The Commission awarded temporary total disability benefits and medical expenses, and remanded to the arbitrator for further proceedings (R.P2216-18).

The Trial Court Reverses The Commission On Administrative Review

On administrative review, the trial court reversed the Commission (R.C64-67). After reviewing the "undisputed facts" (R.C64-66), the trial court concluded that the Commission had misconstrued or misapplied Illinois law when it found that the demands of the job rather than personal factors supported the first exception (R.C66). Further, the Commission had misconstrued or misapplied Illinois law when it found that the second exception for traveling employees applied because the claimant's job did not require him to travel away from the employer's premises and Venture-Newberg had not directed him to travel to another location for work (R.C66-67). The trial court also noted that the result reached by the Commission was inequitable and unjust: it would allow an employee who voluntarily chose to live remotely from the place of employment to become a traveling employee and receive workers' compensation benefits, but deny benefits to a co-employee who permanently resided in the same geographical area of employment (R.C67).

A Divided Appellate Court Reverses The Trial Court

A divided appellate court, over two dissenting justices, reversed the trial court and reinstated the Commission's decision. 2013 IL App (4th) 110847WC, 981 N.E2d 1091 (4th Dist. 2013). Without addressing the first exception, the majority reasoned that the claimant was a traveling employee because (1) he was employed by Venture-Newberg; (2) he was assigned to work at the Cordova power plant more than 200 miles from his home; and (3) the premises at which he was assigned to work were not his employer's premises. ¶13. The court referred to the Commission's findings that Venture-Newberg must have anticipated that the claimant would have been required to travel and arrange for convenient lodging to perform the duties of the job and that it was reasonable and foreseeable that he would travel a direct route from the lodge to the plant, and concluded that the Commission's determination that the claimant's injury arose out of and in the scope of employment was not against the manifest weight of the evidence. ¶¶14-15.

The appellate court denied Venture-Newberg's petition for rehearing, but granted certification pursuant to Rule 315(a). Thereafter, this Court granted Venture-Newberg's petition for leave to appeal, and this appeal now follows.

ARGUMENT

Introduction And Standard Of Review

Before a reviewing court may overturn the Commission's decision, it must find that the award is contrary to the law or that the Commission's factual determinations were against the manifest weight of the evidence. *Fitts v. Industrial Comm'n*, 172 Ill. 2d 303, 307, 666 N.E.2d 4 (1996). Where the issue on appeal involves a question of law, a

court is not bound by the Commission's decision. *Butler Mfg. Co. v. Industrial Comm'n,* 85 Ill. 2d 213, 216, 422 N.E.2d 625 (1981). Furthermore, where, as here, the facts essential to the appeal are undisputed and not subject to different inferences, a question of law is presented and the Commission's decision is reviewed *de novo*. *Kertis v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120252WC, ¶13 (2d Dist. 2013); *Mlynarczyk v. Illinois Workers' Compensation Comm'n*, 2013 IL App (3d) 120411WC, ¶15 (3d Dist. 2013).

On the other hand, where the question is one of fact to be resolved by the Commission, its determination will not be disturbed on review unless it is against the manifest weight of the evidence (*Aaron v. Industrial Comm'n*, 59 Ill. 2d 260, 269, 319 N.E.2d 820 (1974)), and for a finding to be contrary to the manifest weight of the evidence, the test is whether there is sufficient factual evidence to support the Commission *(Beattie v. Industrial Comm'n*, 276 Ill. App. 3d 446, 449-50, 657 N.E.2d 1196 (1st Dist. 1995)) or whether the opposite conclusion is clearly apparently. *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 548 N.E.2d 1033 (1989).

An employee's injury is compensable under the Workers' Compensation Act only if it arises out of and in the course of employment. 820 ILCS 305/2 (West 2006). Both elements must be present at the time of the claimant's injury to justify compensation. *Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483, 546 N.E.2d 603 (1989). Arising out of employment refers to the origin or cause of the claimant's injury (*Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 544, 941 N.E.2d 961 (1st Dist. 2010)), whereas in the course of employment refers to the time, place and circumstances under which the claimant is injured. *Scheffler Greenhouses, Inc. v.*

Industrial Comm'n, 66 Ill. 2d 361, 366, 362 N.E.2d 325 (1977). The burden of establishing compensability rests upon the claimant, and proof that he would not have been at the place where the injury took place but for employment is not alone sufficient. *Howell Tractor & Equipment Co. v. Industrial Comm'n*, 78 Ill. 2d 567, 403 N.E.2d 215 (1980).

In this case, the Commission's decision was not based upon conflicting evidence, but rather on the application of the law to the undisputed facts. Accordingly, a question of law is presented as to whether the claimant was a traveling employee and appellate review is *de novo*. *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶15. But even if the undisputed facts could give rise to more than one reasonable inference and review is not *de novo*, this Court will not hesitate to reverse when the Commission's determination is against the manifest weight of the evidence. *Potenzo v. Industrial Comm'n*, 378 Ill. App. 3d 113, 119, 881 N.E.2d 523 (1st Dist. 2007). As demonstrated below, the appellate decision reinstating the Commission's decision was contrary to the law and the evidence, and cannot stand.

I. THE CLAIMANT WAS NOT A TRAVELING EMPLOYEE WHEN HE WAS INVOLVED IN A TRAFFIC ACCIDENT ON HIS WAY TO WORK AS A PIPEFITTER AT A POWER PLANT

A. The Appellate Court Should Have Decided The Case Based On The Rule That Accidental Injuries Sustained While Going To Or Coming From Work Are Not Compensable And The Court Erred In Applying The Traveling Employee Exception

Generally, an accident which occurs while an employee is traveling to or from work is not considered one that arises out of and in the course of employment. *Commonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534, 537, 428 N.E.2d 165 (1981); *Warren v. Industrial Comm'n*, 61 Ill. 2d 373, 377, 335 N.E.2d 488 (1975). This

is sometimes referred to as the "going and coming" rule. *Urban v. Industrial Comm'n*, 34 Ill. 2d 159, 163, 214 N.E.2d 737 (1966). The rationale behind this rule is that the employee's trip to and from work is a product of his or her decision as to where to live, a matter in which the employer ordinarily has no interest. *Sjostrom v. Sproule*, 33 Ill. 2d 40, 43, 210 N.E.2d 209 (1965); *Lopez v. Galeener*, 34 Ill. App. 3d 815, 819, 341 N.E.2d 59 (5th Dist. 1975).

One exception to this rule—the one on which the appellate court solely relied to reinstate the Commission's decision—is for a "traveling employee" who must travel away from his or her employer's premises to perform his or her job. *Wright v. Industrial Comm'n*, 62 Ill. 2d 65, 68-69, 338 N.E.2d 379 (1975); *Cox*, 406 Ill. App. 3d at 545. The underlying principle is that the journey is part of the service for which the employee is compensated. *Commonwealth Edison Co.*, 86 Ill. 2d at 538.

Illinois recognizes that some work requires an employee to travel as an essential part of the job. *Urban*, 34 Ill. 2d at 163. The clearest example is a traveling salesperson or company representative who must cover a general and often large geographical area. *Wright*, 62 Ill. 2d at 68. As such, traveling employees "are compelled to expose themselves to hazards of streets and the hazards of automobiles...much more than the general public." *Mlynarczyk*, 2013 IL App (3d) 120411WC, ¶19, quoting *Illinois Publishing & Printing Co. v. Industrial Comm'n*, 289 Ill. 189, 197, 132 N.E. 511 (1921). But it is not necessary for a person to be a salesperson or a company representative to be considered a traveling employee. *Kertis*, 2013 IL App (2d) 120252WC, ¶13. Other examples include a truck driver (*Potenzo*, 378 Ill. App. 3d 113), an airplane pilot (*Jensen* v. *Industrial Comm'n*, 305 Ill. App. 3d 274, 711 N.E.2d 1129 (1st Dist. 1999)), a bank

manager regularly traveling between bank branches (*Kertis*, 2013 IL App (2d) 120252WC), a cleaner who travels to various work sites (*Mlynarczyk*, 2013 IL App (3d) 120411WC), or a field supervisor who is routinely sent by an employer to a field installation and returns only when the work is completed (*Wright*, 62 Ill. 2d at 69).

Unlike the cases above, however, travel itself was not essential to the claimant's pipefitter job at Cordova and Venture-Newberg did not send or assign him to Cordova. The claimant made the personal and voluntary choice of seeking temporary employment through a union referral some distance from home and staying at a motel to shorten his daily commute. At the moment that he was injured, however, the claimant faced no greater travel risk than local residents using the same road to go from home to work.

In this case, the appellate court erred in reinstating the Commission's decision based on its determination that the claimant was a "traveling employee" (R.P2214). The totality of the circumstances shows that the claimant was not a traveling employee when:

- the claimant did not apply directly with employers, but secured employment through his union (R.P198);
- the claimant's employment at Cordova was temporary (R.P245);
- the claimant had no ongoing and exclusive employment relationship with Venture-Newberg (R.P74, R.P196-97);
- the claimant had accepted four temporary work assignments at other fixed locations with Venture-Newberg beginning two years before the accident, through union referrals that paid him as a "local hire," none lasing longer than six weeks, with substantial breaks in between (R.P74, R.P230, R.P244-46);

- the claimant could not accept employment with Venture-Newberg when work was available within his home local's territory and he did not have to accept an assignment outside his home local's territory (R.P87-88, R.P245-46, R.P249, R.P255-56);
- Venture-Newberg did not send or assign the claimant to Cordova as pipefitting jobs were filled through referrals from Local 25 which would reach out to locals outside its jurisdiction as needed to meet hiring demands (R.P263-64);
- Venture-Newberg did not pay travel time or travel or lodging expenses (R.P199-201, R.P213-14, R.P26-47);
- Venture-Newberg did not make travel accommodations for the claimant (R.P84, R.P212);
- it was the claimant's personal choice to leave his home local and seek employment at the Cordova plant after he weighed the costs of travel and lodging against the money that he would earn (R.P217-19);
- the claimant was not on call or instructed to report to work earlier than scheduled on the date of the accident (R.P90, R.P209-10); and
- the claimant was only paid from the time he clocked in at Cordova until he clocked out (R.P85, R.P210).

These facts are undisputed.

A key element in the definition of a "traveling employee" is that the employee must travel "away from his employer's premises" to perform the job. *Cox*, 406 Ill. App. 3d at 545. But in this case the claimant was not traveling *away from*, but, in effect, *to* his

one and only place of employment—Cordova—at the time of the accident, thus falling outside the definition. The claimant never worked at Venture-Newberg's place of business located in Wilmington, Illinois (R.P6). The claimant did not have to travel to any other premises before reporting to the power plant and his job did not take him away from the plant. Venture-Newberg did not hire the claimant as a pipefitter for one location and then require him to travel for work to a second location; rather, as a result of the union referral process, he knew when he accepted the pipefitting job that he would work as a "local hire" at Cordova and nowhere else.

In upholding the Commission, the appellate court relied on *Wright* and *Chicago Bridge & Iron, Inc. v. Industrial Comm'n*, 248 Ill. App. 3d 687, 618 N.E.2d 1143 (4th Dist. 1993), but these decisions are a mismatch for this case.

In *Wright*, the claimant supervised the installation of the company's machines in the factories of the purchasers, which "frequently required" him to travel to out-of-state installations. 62 Ill. 2d at 67. This process took 5 to 6 months, during which the claimant lived in a nearby motel, paid hourly on a 40-hour work week, and received a *per diem* allowance. 62 Ill. 2d at 67. He was off-duty when he was killed in a traffic accident while on assignment in Tennessee, some six miles from his motel room. 62 Ill. 2d at 67. It was unclear why he was driving on that particular road, but there was some indication that he may have been going for some welding equipment at the time. 62 Ill. 2d at 68. In finding that the claimant was a traveling employee, this Court adopted the rule that for such remote workers, any reasonable conduct which might normally be anticipated or reasonably foreseeable by his employer was compensable. 62 Ill. 2d at 69-71. As further relevant here, this Court refused to distinguish between a continuously traveling

employee and one traveling to a distant job location only to return when the work is completed. 62 Ill. 2d at 69.

More recently, in *Chicago Bridge & Iron*, a boilermaker-welder began his employment in 1968 and worked exclusively for his employer. 248 Ill. App. 3d at 688. He was "periodically required" to travel to work sites located in different states. 248 Ill. App. 3d at 688-89. When each job began, he was placed on the payroll; when the job ended, he was terminated from the payroll. The employer was not obligated to notify the claimant when work was available, nor was the claimant under any obligation to accept the job offered. 248 Ill. App. 3d at 689. The claimant's last job ended two months before the one that gave rise to the claim. 248 Ill. App. 3d at 689. The claimant was hired to travel to a job in Minnesota and compensated for mileage. 248 Ill. App. 3d at 689. He was involved in a traffic accident after leaving his temporary lodgings while driving to work on the first day on the job. 248 Ill. App. 3d at 689. At the time of the accident, he was carrying in his truck several items of equipment belonging to the employer, including a hard hat, safety glasses, welding hood, lanyard safety belt, slag hammer and hand wrench. 248 Ill. App. 3d at 689. The appellate court observed that the welder clearly would not have been a traveling employee if he had never worked for his employer before receiving the call for the Minnesota job and that he more clearly would have been a traveling employee if he was to return to his employer after the Minnesota job. 248 Ill. App. 3d at 694. In concluding that the claimant was a traveling employee, the court believed that the case was closer to the latter and emphasized the claimant's "long-standing (19 years) and exclusive" employment along with the Workers' Compensation Act's purpose of providing protection for injured workers. 248 Ill. App. 3d at 694.

The only common denominator that this case has to *Wright* and *Chicago Bridge & Iron* is that the claimant in each case was temporarily away from home on a job assignment when he sustained his injury in a traffic accident. The differences trump this superficial similarity.

Unlike this case, in *Wright*, the field supervisor was a permanent employee whose employment "frequently required" him to accept temporary assignments away from his usual place of employment and to which he would have returned but for the accident when the assignment was over. Also unlike this case, in *Chicago Bridge & Iron*, the boilermaker-welder had an ongoing and exclusive relationship with his employer for 19 years which "periodically required" him to travel to work sites in different states. Notably, in each case, the employer paid the claimant a per diem or mileage to compensate for travel expenses in sending the employee to a remote work site.

Here, by comparison, the claimant did not have regular, much less exclusive, employment with Venture-Newberg. Venture-Newberg did not employ him at one location and then send or assign him to Cordova; he was unemployed and not on Venture-Newberg's payroll before he accepted the union's referral of temporary employment at Cordova; he would not have been on Venture-Newberg's payroll after he completed his temporary assignment at Cordova; he was not compensated for lodging or travel expenses while employed at Cordova; and he was paid as a "local hire" rather than at his home local's prevailing scale. Neither *Wright* nor *Chicago Bridge & Iron* supports the result reached by the appellate court here.

Wright and *Chicago Bridge & Iron* illustrate the traveling employee whose employment "frequently" or "periodically" requires travel to a remote location for which

the employee receives a per diem or mileage allowance. By comparison, someone like the claimant, who is not on the employer's payroll but who voluntarily accepts a temporary job at a fixed location away from home, and who is not compensated for travel or lodging, is not, under any reasonable definition, a traveling employee. It was the claimant's choice to seek a position outside his home local's territory some 200 miles from home, after calculating his earnings and his expenses, and his decision where to stay and how close to the plant. The appellate court erred in upholding the Commission's determination that the claimant was a traveling employee.

B. The Appellate Court's Reinstatement Of the Commission's Decision Would Unduly Expand The Traveling Employee Exception And Employer Liability For Accidental Injuries While Going To Or Coming From Work

The appellate court ignored the undisputed facts surrounding the claimant's temporary employment by adopting the Commission's reasoning that Venture-Newberg must have expected that the claimant, once "recruited" to work at a remote location, would have to travel and arrange for lodging to perform his job. ¶15.

But it is irrelevant whether Venture-Newberg could foresee that he would temporarily stay closer to the plant. An employer always receives a benefit from a hire's relocation nearer to the workplace, but until the appellate decision in this case that benefit was not enough to make someone a traveling employee. Regardless of the claimant's temporary relocation closer to Cordova, travel and the journey itself were not part of the service that he was hired to perform at the plant. In recognition of that fact, Venture-Newberg did not pay his travel or lodging expenses. Instead, his temporary relocation was a personal decision that he made to pursue an opportunity of employment.

To uphold the appellate court and the Commission's determination that the claimant was as a traveling employee would unduly expand employer liability and lead to anomalous and unintended results. The effect, if not the intent of the appellate court's holding, allows an employee who voluntarily chooses to live remotely from the place of employment to receive benefits for injuries sustained in commuting to work from temporary lodgings, yet deny benefits to a co-employee who permanently resides in the same geographical area of employment. That result is illogical and cannot be good law

Moreover, if Cordova were not considered the "employer's premises" for purposes of the traveling employee doctrine, then anyone hired through local union referrals to perform maintenance work on a temporary basis, even local residents living in the shadow of the plant, could now argue that they were traveling employees.

Although the Commission recognized that not every employee who accepts employment in a remote location is necessarily a traveling employee (R.P2215), neither the Commission nor the appellate court provided any limits or guidance for how this determination could ever be made.

To take an example: if an Illinois resident with valuable skills is offered a temporary position four hours away by car in another state, but the employer does not pay travel or motel expenses, under the appellate court's reasoning, the resident would be a traveling employee if he accepted the position, temporarily stayed in a motel, and sustained an injury while driving from the motel to work—even though travel was not part of the job itself and the employer exercised no control over where the employee chose to live. The result reached by the appellate court would render the exception

meaningless whenever someone made the personal decision to relocate temporarily for a job.

The rationale for extending coverage to a traveling employee is that when travel is an essential part of the job, the hazards of travel become the hazards of employment even though the employee may not be actually working at the time of the injury. But when someone is hired for only a temporary job at a fixed location, remote or otherwise, that location becomes the employer's "premises" for purposes of the traveling employee. It is respectfully submitted that one should become a traveling employee because of the employer's requirements for travel, which is consistent with the doctrine's purpose, and not because the employee has made a personal choice of seeking employment away from home.

The traveling employee doctrine began as an exception to the "going and coming" rule, applicable in only a limited or unusual class of cases. The appellate court did not address the far-reaching implications of its decision for employers, but this Court cannot evade its responsibility to construe the Workers' Compensation Act in a way that avoids an unreasonable result. Unless all temporary relocating makes one a traveling employee, the appellate court should be reversed and the trial court's order reinstated.

II. THE CLAIMANT WAS NOT UNDER THE DIRECTION OR CONTROL OF VENTURE-NEWBERG ON THE DRIVE TO HIS PIPEFITTING JOB AT THE PLANT

The appellate court did not address the Commission's determination that the claimant was entitled to benefits because the course or method of travel to the plant was determined by the demands or exigencies of his pipefitting job (R.P2213). But even if

the appellate court had reached this issue, the Commission's decision cannot be affirmed on this alternative ground.

The Commission recognized that Venture-Newberg did not direct the claimant to reside within a particular geographical radius and that the claimant and his co-worker were not under Venture-Newberg's direction or control on their drive into work at the plant. Similarly, in both *Lopez v. Galeener*, 34 Ill. App. 3d at 819-20 and *Chicago Bridge & Iron*, 248 Ill. App. 3d at 693, the court determined that the injury did not arise out of and in the course of employment when the employer did not require an employee to travel a particular route to the job. On the other hand, in *Sjostrom v. Sproule*, 33 Ill. 2d at 43-44, the court held that the employer controlled the method of travel by requiring two employees to use a car to travel to a temporary work location to ensure that only one employee would need to be reimbursed for travel.

Venture-Newberg did not exercise any similar control over the method or course of travel to the plant. The claimant and his co-worker were using McGill's truck, they chose where to stay, Venture-Newberg neither made travel accommodation nor told them what route to take to work, and he and McGill were working regular hours on the day of the accident and not on call (R.P84-85, R.P209-13). The Commission did not find otherwise.

The Commission concluded that exception applied because as a "practical matter" the claimant and others pipefitters from his home local had to live closer to the plant to perform their jobs (R.P2213). While that conclusion might be realistic based on the travel distance involved, that is not the legal test. It would be unworkable, if it became the test, because there is no intelligible standard for determining what is "practical"

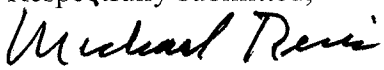
(R.P2213). If 200 miles is too far away from the job, it could be argued that a distance of 150 miles or 100 miles or even 75 miles from the job would allow someone to relocate temporarily and make any injury sustained in going to or coming from work compensable as one that arose out of and in the course of employment.

The Commission supported its determination on the basis that the claimant was required to come to work ready and fit to perform tasks that called for special skills, that he was expected to work 10-to-12 hours a day up to seven days-a-week, and that he was expected to be available to work more hours in case of an emergency (R.P2213). But all employers can reasonably expect employees to come to work ready and fit to perform their duties, as the dissent observed (¶34), and the claimant's availability in case of an emergency was irrelevant when he had not been called into work for an emergency on the day of the accident (citing 1 A. Larson, *Larson's Workers' Compensation Law* §14.05[6], at 14-14 (2009)). As Venture-Newberg did not direct or control where the claimant resided or how he commuted to Cordova, the appellate court cannot be affirmed on the basis that the demands or exigencies of his pipefitting job determined the course or method of travel.

CONCLUSION

For all of the foregoing reasons, the plaintiff-appellant, The Venture-Newberg, Perini Stone & Webster, respectfully requests that this court reverse the opinion and judgment of the Illinois Appellate Court, Fourth Judicial District, Illinois Workers' Compensation Division, and reinstate the order of the trial court entered on August 26, 2011, whereby the trial court reversed the Illinois Workers' Compensation Commission's decision which reversed the Commission arbitrator.

Respectfully submitted,



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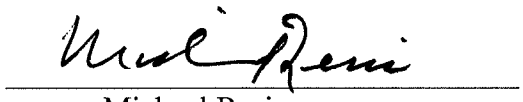
CERTIFICATION OF COMPLIANCE

I certify that this supplemental brief conforms to the requirements of Rules 341(a) and (b) of the Supreme Court Rules. The length of this supplemental brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) statement of points and authorities, Rule 341(c) certificate of compliance, and those matters to be appended to the brief under Rule 342(a), is 24 pages.



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APPENDIX

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ILLINOIS WORKERS' COMPENSATION COMMISSION
NOTICE OF ARBITRATOR DECISION

DAUGHERTY, RONALD
Employee/Petitioner

Case# 06WC018366

10IWCC0752

THE VENTURE- NEWBERG PERINI STONE & WEBSTER
Employer/Respondent

On 04/18/2008, an arbitration decision on this case was filed with the Illinois Workers' Compensation Commission in Chicago, a copy of which is enclosed.

If the Commission reviews this award, interest of 1.38% shall accrue from the date listed above to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

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

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STATE OF ILLINOIS)
)
COUNTY OF SANGAMON)

10IWCC0752

ILLINOIS WORKERS' COMPENSATION COMMISSION
ARBITRATION DECISION

Ronald Daugherty
Employee/Petitioner

Case # 06 WC 18366

v.

The Venture - Newberg Perini Stone & Webster
Employer/Respondent

An *Application for Adjustment of Claim* was filed in this matter, and a *Notice of Hearing* was mailed to each party.

The matter was heard pursuant to Section 19(b) by the Honorable Stephen J. Mathis, arbitrator of the Commission, in the city of Springfield, on March 7, 2007, August 7, 2007 and February 22, 2008.. After reviewing all of the evidence presented, the arbitrator hereby makes findings on the disputed issues circled below, and attaches those findings to this document.

Disputed Issues

A. Was the respondent operating under and subject to the Illinois Workers' Compensation or Occupational Diseases Act?

B. Was there an employee-employer relationship?

C. **Did an accident occur that arose out of and in the course of the petitioner's employment by the respondent?**

D. What was the date of the accident?

E. Was timely notice of the accident given to the respondent?

F. **Is the petitioner's present condition of ill-being causally related to the injury?**

G. **What were the petitioner's earnings?**

H. What was the petitioner's age at the time of the accident?

I. What was the petitioner's marital status at the time of the accident?

J. **Were the medical services that were provided to petitioner reasonable and necessary?**

K. What amount of compensation is due for temporary total disability?

L. What is the nature and extent of the injury?

M. Should penalties or fees be imposed upon the respondent?

N. Is the respondent due any credit?

O. Other

10IWCC0752

Findings

- On 03/24/06, the respondent. The Venture - Newberg Perini Stone & Webster (hereinafter "Newberg"), was operating under and subject to the provisions of the Act.
- On this date, an employee-employer relationship did exist between the petitioner and respondent.
- Timely notice of this alleged accident was given to the respondent.
- At the time of injury, the petitioner was 50 years of age, married, with 1 child under 18.
- Necessary medical services have not been provided by the respondent.
- To date, $0.00 has been paid by the respondent for TTD and/or maintenance benefits.

(SEE ATTACHED FINDINGS OF FACTS AND CONCLUSIONS REGARDING DISPUTED ISSUES.)

Order

- The respondent shall pay the petitioner temporary total disability benefits of $ - 0 - /week for weeks, from --- through ---, which is the period of temporary total disability for which compensation is payable as petitioner failed to prove that he sustained injuries arising out of and in the course of his employment on March 24, 2006.
- The respondent shall pay the further sum of $ - 0 - for necessary medical services, as provided in Section 8(a) of the Act as petitioner failed to prove he sustained a compensable accident.
- The respondent shall pay $ N/A in penalties, as provided in Section 19(k) of the Act.
- The respondent shall pay $ N/A in penalties, as provided in Section 19(l) of the Act.
- The respondent shall pay $ N/A in attorneys' fees, as provided in Section 16 of the Act.

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

Statement of Interest rate If the Commission reviews this award, interest of 1.38 % shall accrue from the date listed below to the day before the date of payment; however, if an employee's appeal results in either no change or a decrease in this award, interest shall not accrue.

S J Mathis 4-16-08

APR 18 2008

10IWCC0752

THE ARBITRATOR HEREBY MAKES THE FOLLOWING FINDING OF FACTS

Petitioner filed this claim for injuries he sustained in a motor vehicle accident on March 24, 2006 (Ax1, Rx1). The threshold issue is whether Petitioner's accident and injuries arose out of and in the course with his employment with Newberg.

At the time of the accident Petitioner was a 50 year old pipefitter, who resided in Springfield, Illinois. He had worked as a pipefitter for approximately 30 years and was a union member of the Plumbers & Pipefitters Local #137 located in Springfield (T.9,13,30; Rx3). During his 30 year work experience, Petitioner did pipefitting jobs, not just in Springfield, but throughout Central Illinois (T.30-31).

As a member of Local 137, Petitioner would go to his union hall and bid on a job. It was not unusual to take a job or work on a project for a certain period of time, or until completed, and then return to the local union to find another job or project (T.27-28). This employment process was confirmed by Petitioner's Business Agent at Local 137, John Haynes. The advantage to Petitioner being a union member was that it was his source for finding jobs (T.29). Petitioner would go to his union Business Agent and tell him he needed to work (T.29). Petitioner did not apply for a job directly with an employer. He went through the union (T.30).

The documentary evidence and testimony of Petitioner, Mr. Haynes and Todd McGill, Petitioner's co-union member at Local 137, established that local union members could take jobs outside the union territory provided no work was available within the local territory. Local 137 union members had to take local work first (Rx7, p.12; T.49). Petitioner and local members

were not required to take jobs outside the local territory (T.48-50). Mr. Haynes confirmed it was the union member's choice. It was the usual and customary practice for pipefitters to take jobs outside local union territory if no work was available locally (Rx7, p.12-13). Mr. McGill had personal knowledge of Petitioner working outside local union territory (Rx7, p.13). Union members would take jobs where available, even if it meant paying for travel and lodging.

Union members of Local 137 were not generally paid for travel time or expenses while working within local territory which covered portions of Central Illinois, including Sangamon, Logan, Menard, Pike, Scott, Morgan and Cass Counties and portions of Mason, Macon, Christian, Macoupin and Montgomery Counties (Rx5). Petitioner deducted his travel expense for his jobs on his tax returns (T.47). Local employers would pay travel and lodging expenses if they directed employees to work outside the local territory (Rx5).

Both John Haynes and Ron Cahill, representatives for Newberg, stated Newberg was not an employer, contractor or member of the Association under agreement with Local 137. (See also, Rx5). Newberg was not a signatory to the Local 137 agreement (Rx5). Newberg was a contractor for maintenance and repair of certain Exelon power plants in Illinois, which was controlled through a separate agreement with various union representatives outside the Local 137 territory (See, Rx6). Under the provisions of the Exelon agreement, contractors were not required to pay employees for travel allowances, mileage or travel time for work projects unless an existing employee was transferred inside or outside the union territory to a project (See, Rx6).

Prior to March 24, 2006, Petitioner had performed work for Newberg on several occasions (Rx3, 4). He had worked at the Cordova Nuclear Power Plant in 2004 (T.33). Petitioner had also worked for Newberg at the Clinton and LaSalle Plants prior to March 24,

2006 (T. 18,27; Rx4; Rx7, p.11). Petitioner paid for his travel and lodging expenses when he previously did jobs for Newberg (T.44-45). It is unrefuted, based on the testimony of Petitioner and Ron Cahill, that he was not a permanent employee of Newberg and not an ongoing employee of Newberg when he took the job at the Cordova Plant in March, 2006 (T.34-35; Rx4).

In 2006, Petitioner was advised by his Business Agent, John Haynes, that there was a job coming up at the Cordova Plant (T.33). Mr. Haynes said there was no work available locally and asked Petitioner if he was interested in traveling to and working at the Cordova Plant (T.33). Todd McGill, a pipefitter, also signed up for work at the Cordova Plant in March, 2006, through a posting of the job through Local 137 (T.36; Rx7, p.10-13). Pipefitting work had slowed down in 2005 (T.48; Rx7, p. 23). The local union referred Petitioner and Mr. McGill for work at the Cordova Plant through the local Quad Cities union (Rx7, p.11-12). It was Petitioner's choice to take the job; he was not forced (T.48-50).

The Cordova Plant is 200 – 250 miles from Springfield (T.12). Petitioner and Mr. McGill understood the job with Newberg at the Cordova Plant was going to last several weeks (T.26; Rx7, p.14). They also understood they would be working seven days a week, 12 hours a day (T.14; Rx7, p.14). Petitioner knew it was not a permanent job (T. 26-27).

Because the job at the Cordova Plant was not close to where they lived, Petitioner and Mr. McGill made arrangements for lodging close to the Plant (T.42; Rx7, p.13). Petitioner said when he accepted the Cordova job he weighed the expenses for travel and lodging versus the money he would earn (T.50). Petitioner and Mr. McGill made arrangements to share their lodging and travel expenses for the Newberg job (Rx7; p.16-17; T.42-43).

Petitioner first claimed it was his understanding he had to be within an hour of the Cordova Plant location to take the job (T.21-22). He later said he did not want to work 12 hours

and then drive home. He was going to make a substantial amount of money at the job and it made sense to stay at a motel (T.55-56). Mr. McGill said it was not required to stay close to the Plant. Newberg did not say they would like us to stay close (Rx7, p.20,22). Mr. McGill also said he had a chance to make a lot of money at the Newberg job in Cordova with the trade off being the travel expenses (Rx7, p.17,23). Nothing under the union contract or Newberg policy mandated that employees were required to be within a certain geographical distance to a Plant in order to work (Rx6).

Petitioner and Mr. McGill had worked for Newberg at the Cordova Plant for one day prior to his accident (T.12,25; Rx7, p.15). They made arrangements to stay at the Lynwood Lodge or Lynwood Resort (Rx7, p.8; T.37) which was about 30 minutes from the Plant. (T.38). Petitioner said he thinks he worked 10 hours on the first day of work (T.15).

On March 24, 2006, the date of accident, Petitioner was a passenger in a pick-up truck owned and operated by Mr. McGill (T.35-36; Rx7, p.8). It was not a company vehicle provided by Newberg (T.37). Petitioner and Mr. McGill were traveling from the motel to work at the Cordova Plant (T.35; Rx7, p.8). They were scheduled to start work at 7:00 A.M. (T.38; Rx7, p.9). The motor vehicle accident occurred at 6:09 A.M. on March 24th, when Mr. McGill's vehicle skidded on ice (T.35-36,38; Rx1).

It is unrefuted that Petitioner and Mr. McGill were neither "on call" nor directed by Newberg to come to work earlier on March 24, 2006 (T.42, 40-41; Rx7, p.15). It is also unrefuted that Newberg paid Petitioner from the time he punched in at the Plant until he punched out (T.41,31; Rx7, p.10). Petitioner was not paid for travel time or for travel and lodging expenses by Newberg (T.41,44; Rx7, p.9-10,15-16,18). Newberg also did not direct or make

accommodations for Petitioner or Mr. McGill to stay at the motel or direct them to take a specific route to the Plant (T.44; Rx7, p.9-10).

Under Illinois law, an employee who works at a fixed location with fixed hours is generally not considered in the course of his employment when going to and from work. *Commonwealth Edison Co.* v. *Industrial Commission*, 86 Ill.2d 534, 428 N.E.2d 165 (1981); *Martinez* v. *Industrial Commission*, 242 Ill.App.3d 981, 611 N.E2d. 545 (1993); *Warren* v. *Industrial Commission*, 61 Ill.2d373, 335 N.E.2d 488 (1975). While there are exceptions to this general rule of law, including close proximity to employment with attendant risks, special errands and missions, employer provided transportation and traveling employees, the issue is whether Petitioner meets any of these exceptions.

Based in the facts, Petitioner was scheduled to work fixed hours on the date of the motor vehicle accident. He had not been called in earlier to work by Newberg. He was not on an errand or mission directed by Newberg. Rather, Petitioner was on a public way in transit to his place of employment to start work at his scheduled time. Petitioner was also not using a company vehicle – he was a passenger in his co-employee's personal vehicle.

Further, Petitioner was not a traveling employee of Newberg. He was not an existing or permanent employee of Newberg, who was transferred to the Cordova Plant. He was also not paid or reimbursed for his travel time, travel or lodging expenses by Newberg. Petitioner was not entitled to on call pay. Newberg did not direct or control Petitioner's choice of lodging or the route he was to take to work. Moreover, Petitioner was not required to accept the Newberg job at the Cordova Plant under the union contract. Rather, it was his voluntary choice to take the job outside local union territory, which would require travel and temporary lodging. Petitioner's employment within his local union territory also did not generally include payment for traveling

and lodging expenses despite the considerable distance within the geographical boundaries. Evidence presented at arbitration also did not prove he was required by Newberg to be located within a certain geographical distance to the Plant.

The facts here only prove that Petitioner, who was a pipefitter for 30 years, voluntarily chose to work in a remote location over a short duration for the opportunity to earn substantial money in his trade. He asked his union Business Agent about employment, he was told of the employment opportunity and then took the job after considering the expenses to be incurred and how the expenses could be shared or reduced against the earnings to be made. It can be inferred further that this was the custom and practice of Petitioner's trade as a pipefitter due to fluctuations in job market conditions. Although Petitioner's accident and injuries while on his way to work for Newberg are certainly unfortunate and tragic, the accident did not arise out of or in the course of his employment under the facts or the law.

THE ARBITRATOR THEREFORE CONCLUDES:

Based on the Finding of Facts and Illinois law discussed herein, the Arbitrator concludes the Petitioner failed to prove his motor vehicle accident and injuries on March 24, 2006 arose out of or in the course of his employment.

Based on the findings on accident, the issues regarding causation, TTD, medical and wages are moot.

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STATE OF ILLINOIS)
) SS.
COUNTY OF SANGAMON)

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

BEFORE THE ILLINOIS WORKERS' COMPENSATION COMMISSION

Ronald Daugherty,

Petitioner,

vs.

NO. 06 WC 18366

10IWCC0752

The Venture-Newberg Perini Stone & Webster,

Respondent.

DECISION AND OPINION ON REVIEW

Petitioner appeals the Decision of Arbitrator Mathis under §19(b) finding that Petitioner failed to prove that he sustained an accident arising out of and in the course of his employment with Respondent on March 24, 2006. Petitioner's issues on review are accident, causal connection, temporary total disability, and medical expenses. After considering the entire record, and for the reasons stated below, the Commission reverses the Arbitrator's Decision and finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent, his current condition of ill-being is causally related to the accident, and he was temporary totally disabled from March 25, 2006 through August 7, 2007 (71 4/7 weeks). In light of the Commission's Decision, the Commission further remands this case to the Arbitrator to determine the issue of medical expenses and for proceedings for a determination of a further amount of temporary total compensation or of compensation for permanent disability, if any, pursuant to Thomas v. Industrial Commission, 78 Ill.2d 327, 399 N.E.2d 1322, 35 Ill. Dec. 794 (1980).

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

1. Petitioner, a resident of Springfield, Illinois, testified he had been a union pipefitter for thirty years, working out of Local 137 in Springfield. On March 24, 2006, he was employed by Respondent, a contractor doing maintenance work at the Exelon nuclear plant in Cordova, located about 200 miles from Springfield. For the job with Respondent, he was assigned out of his home union hall, Local 137, and did not report to the union hall near the plant, but went straight to Exelon to work. (T.9-13)

2. Petitioner testified that he and co-worker, Todd McGill, drove up to Cordova on March 23, 2006. McGill was also a union pipefitter out of Local 137 in Springfield, and had obtained a job at Cordova the same way Petitioner did. They left Springfield at about 3:00 a.m., started their work-day in Cordova at 6:00 or 7:00 a.m., and stopped working at approximately 4:00 or 5:00 p.m. Petitioner did not return to Springfield that night based upon his understanding that he was expected to work seven days a week, twelve hours a day, and also had to be available in the event he received a phone call to come in early or he was asked to stay late. Rather, he and McGill found a place to stay that was within thirty miles of the plant. According to Petitioner, workers had to be within certain parameters of the plant. Petitioner had worked for Respondent at another plant in Clinton and had to stay at that job fourteen to sixteen hours per day. Petitioner had previously worked for Respondent in plants at Clinton, LaSalle, and Cordova. In most cases, he was supposed to be within an hour of the plant. (T.14-22)

3. On the morning of March 24, 2006, Petitioner and McGill were involved in a serious auto accident, driving from the motel to work. As of the 19(b) hearing, Petitioner had not received any benefits and was still off work. (T.23, 24)

4. On cross-examination, Petitioner testified that the Cordova job was not permanent, but was to last several weeks. (T.25-27) It was not unusual for him to take such a job, and be laid off when the work was done. He would then go back to his local union hall and his business manager would let him know about another job. (T.28-30)

Petitioner testified he lives near Springfield, but not all the work he had performed in the past was in the Springfield area. He had performed jobs throughout central Illinois which required him to travel. (T.30, 31) In this instance, his business manager had looked for local work but when nothing was available, had asked Petitioner if he would be interested in the job at Cordova. Since he had worked for Respondent at other plants, his hiring was pretty much guaranteed. However, he was not considered an employee until he actually punched in and started the job. (T.34, 35)

5. On further cross-examination, Petitioner testified that just before the accident, McGill's pick-up truck was going over an overpass. That was the last thing he remembered. He was on his way to the plant to start work and believes the vehicle skidded over ice.

The accident occurred at about 6:09 a.m. and, more than likely, he was to start work at 7:00 a.m. (T.35-39) He was paid from the time he punched in to the time he punched out. (T.41,42)

Petitioner testified that he planned to stay at a motel since the plant was 200 miles from his home. He and McGill roomed together for both financial and safety reasons. Petitioner testified that Respondent did not tell them to stay at the Lynwood Resort and never told them what route to take to the plant. The hotel and plant were on the same road. (T.43, 44)

It was Petitioner's understanding, that Respondent wanted workers to be within an hour's traveling distance from the plant, so they would not spend a lot of time driving and could arrive

at the job site alert and ready to work. According to Petitioner, he was going to make a substantial amount of money, and it made sense to stay in a motel. (T.52-57)

6. John Haynes, business agent for Local 137 in Springfield, testified on behalf of Petitioner. Haynes dispatches manpower out of the Springfield Local. He explained that Petitioner was assigned the Cordova job out of Local 137 directly to the plant. The plant would shut down for maintenance and Respondent would determine how many men were needed. Since there were not enough workers out of Rock Island, where the Cordova Plant is located, the local union would call sister locals. It was a benefit to the employer to be able to turn to the union and obtain the workers needed. (T.67-70) At the nuclear level in particular, there are security background checks and specialized skill levels required. When Petitioner went to the Cordova Plant (located in the Rock Island area) he was an employee. (T.58-62)

Haynes also testified that when a worker is assigned to a distant location, it is not feasible to drive home every night. In Petitioner's case, he could not have been expected to drive six hours per day between Springfield and Cordova as that would have posed a safety hazard. Also, Petitioner was not being reimbursed for expenses. It was simpler and easier to stay near the plant. Petitioner was there to work ten to twelve hour shifts and, if he was needed in an emergency, the plant would call him in. (T.63-67)

7. On cross-examination, Haynes testified that he is familiar with Local 137's master agreement between certain employers in Central Illinois and the Pipefitter's union. If a local employer sends a union member outside of his territory, the union agreement applies and the member is entitled to travel expenses and lodging. But if a job is within the Springfield area (which covers a broad territory of eleven counties), a union member is not entitled to travel expenses. (T.76) Respondent was not an employer, contractor, or associating member under the agreement and the provisions of the local union contract did not apply to it. (T.73,74)

Haynes testified further that Petitioner was not working for Respondent when he was referred to the Cordova plant. Union members were required to take local jobs first, but since none were available Petitioner decided to take the job at Cordova. Probably six to ten workers were referred to the Cordova plant for work during the limited shut-down time. Respondent did not provide transportation or lodging. (T.76-78)

Lastly, Haynes testified that according to the union records, Petitioner did not work a lot in 2005. (RX3) When work slowed down, members took jobs outside their local territory. Pipefitters go where they can make money and they offset travel expenses against their earnings. Since they work ten to twelve hours per day, it makes economic sense to stay near the plant. Petitioner did not get paid until he clocked in. (T.79-84)

8. Anthony Cahill testified on behalf of Respondent. He has been employed by Respondent as Radiological and Industrial Safety Supervisor for eight years and is familiar with hiring practices and somewhat familiar with union agreements involving the Cordova plant. (T.89,90) On March 24, 2006, Respondent was a maintenance modification contractor for the Exelon Nuclear System. Respondent obtained tradesmen through the local union per their agreement. Respondent was not an employer or a signatory to the union contract, however.

The refuel outage work at the Cordova plant was scheduled to last between seventeen and twenty days. (T.91-93) When the employment contract was completed, the tradesmen were laid off and no longer considered employees of Respondent. (T.92,93)

In March of 2006, Cahill contacted the Rock Island union about the number of tradesmen Respondent needed. Respondent had no control over the tradesmen who applied for the work because Respondent was working through the union, pursuant to the agreement. It was not unusual for Respondent to hire tradesmen outside the local union as the local union would reach out to sister jurisdictions. There is a labor shortage that is to the critical point nationwide. Travel expenses were not paid under the union contract. (T.94-96,98,99)

Once he was hired, Petitioner was paid hourly commencing when he clocked in on his first day. The hours were anywhere from "six tens" to "seven twelve's". (T.97,98) Respondent did not tell the tradesmen where to lodge or what roads to take to get to the Cordova plant. Cahill testified that to his knowledge, Respondent did not call Petitioner on the date of accident to tell him to report to work early. (T.100,101)

9. On cross-examination, Cahill testified that Respondent must comply with the General President's Agreement for Maintenance Contracting with Exelon which places the onus on contractors, as well as the union, to provide a ready, willing and able workforce, even when insufficient skilled labor is available at a facility such as the Cordova power plant. Respondent is required to provide sufficient skilled labor even if that means transferring employees from facilities inside or outside the local union territory. A contractor is not restricted from hiring outside the local union if the union is unable to fulfill manpower requests within 48 hours, since the plant would otherwise have to shut down. If a contractor such as Respondent fails to provide a ready, willing and able workforce, it has failed to perform according to the standard of the President's Agreement. (T.109)

Cahill admitted that Respondent derives a benefit from workers who are ready, willing and able to work staying within the geographic area. Petitioner's election to place himself in the immediate vicinity of the Cordova power plant was of benefit to Respondent. (T.111) Emergency labor needs arise within the plant and if Petitioner had elected to drive 200 miles home each night, he would not have been of much use to Respondent. (T.111-112)

10. On August 21, 2007, Todd McGill, called as an adverse witness by Respondent, testified via deposition. McGill testified that he went to Cordova for four to six weeks with the intention of working longer. He was expected to work twelve hours per day, seven days per week, and received overtime for anything over eight hours. Since the Cordova job was quite a distance from where he lived, he made arrangements for lodging and shared expenses with Petitioner. The arrangement was a trade-off since he made good money but had to stay in a hotel. Respondent did not make their motel arrangements or pay their motel expenses. Respondent did not direct them where to stay, and did not tell them what route to take to the plant. On the morning of the accident, he and Petitioner left the Lynwood Lodge at 6:05 a.m. so they could start work at the Cordova Plant at 7:00 a.m. McGill testified that he was not called on March 24, 2006 to come in early. He started getting paid when he clocked in at 7:00 a.m. on March 23, 2006. (RX7, pp. 8-11,13-16)

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11. On cross-examination, McGill testified that when he went through orientation at Cordova, the benefit of being close to the plant so he could come to the plant on short notice was stressed. In the past, the benefit of being close to the plant was also stressed and he had been called to work in the middle of the night. He could have driven home each night, but that would not have been practical. McGill testified he wasn't required to be close, but it was desired. (RX7, pp.19-22)

12. Respondent submitted a document showing Petitioner's employment history with Respondent as follows (PX6):

Hire date, 3/23/06, term date, 4/6/06 in Quad Cities, Cordova.
Hire date 2/22/06, term date, 3/8/06, LaSalle Station, Marseilles
Hire date 1/11/06, term date, 2/15/06, Clinton Station, Clinton
Hire date 2/18/04, term date, 3/7/04, Quad Cities, Cordova
Hire date 1/4/04, term date, 2/16/04, Clinton Station, Clinton.

13. The Illinois Traffic Crash Report for the accident indicates that Unit 1, Chevy pickup truck (the vehicle Petitioner was riding in) lost control on an icy overpass, rolled over several times as it went down the steep ditch embankment and came to rest on its side. The Report also indicates that Petitioner was not wearing a seat belt and was ejected from the pickup truck. (PX1) Petitioner was transported to Iowa University Hospital where hospital records indicate that Petitioner was an unrestrained passenger in a rollover motor vehicle accident and was reportedly ejected 30 feet. (PX3)

Petitioner was transferred to Memorial Medical Center. On April 27, 2006, Petitioner was discharged from the hospital and the discharge diagnoses were bilateral vertebral artery dissection, bilateral cerebellar infarct, left medullary infarct, Pontine infarct, right occipital infarct, sternal fractures, rib fractures, right hemothorax and pneumothorax, resolved, and liver laceration. Petitioner sustained a cervical-spine injury, brain injury, and multiple fractures. (PX4)

The Arbitrator found Petitioner failed to prove that he sustained an accident arising out of and in the course of his employment with Respondent. Petitioner did not meet any of the exceptions to the general rule that an employee who works at a fixed location with fixed hours is not considered to be in the course of his employment when going to and coming from work. On the date of the accident, Petitioner was scheduled to work a fixed number of hours, had not been called to come to work earlier than anticipated, and was not on an errand or mission for Respondent. The Arbitrator rejected the contention that Petitioner was a traveling employee. Rather, Petitioner was a passenger in a co-worker's private vehicle on his way to start work at his scheduled time. Petitioner was not paid or reimbursed for his travel time or travel-related expenses, and was not entitled to "on call" pay. Further, Respondent did not direct or control Petitioner's choice of lodging or the route he was to take to work. Respondent did not require that Petitioner stay within a certain distance of the plant. It was Petitioner's voluntary choice to take the job outside his local union territory and it was Petitioner who weighed the travel and motel expenses against the potential earnings. This was the custom and practice within

Petitioner's trade as a result of fluctuations in the job market. The Arbitrator concluded the facts only proved that Petitioner voluntarily chose to work in a remote location for a short duration in order to earn substantial money in his trade. As such, the accident did not arise out of and in the course of employment.

The Commission views the evidence and applicable law differently and finds that Petitioner sustained an accident arising out of and in the course of his employment with Respondent on March 24, 2006. Generally, an accident which occurs while an employee is traveling to or from work is not considered one that arises out of or in the course of employment. Chicago Bridge & Iron, Inc. v. Industrial Commission, 248 Ill. App. 3d 687, 693, 618 N.E.2d 1143, 118 Ill. Dec. 573 (1993) citing Hall v. DeFalco 178 Ill. App. 3d 408, 413, 533 N.E. 2d 448, 127 Ill. Dec. 576 (1988) However, there are several exceptions to the general rule. An employee will be considered in the course of employment while traveling to or from work if the course or method of travel is determined by the demands or exigencies of the job rather than by his own personal preference as to where he chooses to live. Chicago Bridge & Iron, 248 Ill. App. 3d at 693, 694 citing Lopez v Galeener, 34 Ill. App. 3d 815, 819 341 N.E. 2d 59 (1975). Another exception to the general rule is that of the traveling employee. Chicago Bridge, 248 Ill. App. 3d at 693, 694, citing Wexler & Co. v. Industrial Commission, 52 Il.2d 506, 510, 288 N.E.2d 420 (1972) and Wright v. Industrial Commission, 62 Ill. 2d. 65, 68-69, 338 N.E. 2d 379 (1975). It has been held that injuries are compensable where traveling employees were engaged in activities other than those they were specifically instructed to perform by their employers. A traveling employee is one who is required to travel away from the employer's premises in order to perform his job. "The key factors to this test are 'reasonableness' and 'foreseeability'" of the activity the employee was performing when he was injured. Wright, 62 Ill.2d at 69-70.

In the Commission's view, Petitioner was in the course of his employment while traveling to work on the date of the accident since the course or method of travel was determined by the demands or exigencies of the job, rather than by his own personal preference as to where he chose to live. The Commission first notes that multiple witnesses, including Petitioner, testified consistently regarding the exigencies of the job. Although Respondent did not demand that Petitioner lodge within a certain distance from the plant in order to perform the work that was required, Petitioner had to stay, as a practical matter, a reasonable commuting distance from the plant. Petitioner was required to come to work ready and fit to perform tasks that required special skills. Petitioner was expected to work ten to twelve hours a day, up to seven days per week for the duration of the time-sensitive plant maintenance project. Petitioner was expected to meet his work schedule and be available to work additional hours in the event of an emergency. Both Petitioner and McGill testified that being close to the plant was highly encouraged and their testimony was consistent with the testimony of Haynes (T.63-67). It was simply not realistic, given the demands of the job, to expect Petitioner to commute to Cordova each day from Springfield, approximately 200 miles one way. Both Petitioner and McGill previously worked for Respondent at the Cordova plant and stayed at the Lynwood Lodge, about thirty miles from the plant. Their experience told them that a thirty-mile commute made it feasible for them to meet Respondent's needs.

Moreover, Respondent could not meet its obligations under the General President's Agreement for Maintenance Contract with Exelon were it not for the willingness of employees

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like Petitioner to work long hours and make themselves available in the event of an emergency. (RX6) Cahill testified that the onus was on the contractor to provide a ready, willing and able workforce. Respondent was required to get sufficient skilled labor even if that meant transferring employees from facilities inside or outside the local union territory, and hiring outside the union's territory if the union was unable to fulfill manpower requests within 48 hours. The evidence showed that Union Local 25 in Rock Island serviced the area of the Cordova plant. It was common for the union to seek union workers from other locals to meet the labor requirements. Cahill further testified that Respondent found it beneficial to have workers in other locals to meet the labor requirements. Cahill acknowledged that Respondent found it beneficial to have workers ready, willing, and able to work staying in the geographic area. A tradesman, who travelled 200 miles twice a day, would not have been of much use to Respondent. (T.104-114)

The Commission concludes that the exigencies of the job required that Petitioner stay within commuting distance of the Cordova plant. The facts presented herein are consistent with the first exception to the "going and coming rule," i.e., that the course of travel was determined by the exigencies of the job rather than Petitioner's personal preference as to where to live.

The Commission also finds that Petitioner was a traveling employee at the time of the accident. The facts in the case at bar are similar to the facts in Chicago Bridge & Iron, 248 Ill.App.3d at 688, 689. In Chicago Bridge & Iron, the claimant, an itinerant boiler-maker/welder, was employed by the employer over the course of several years and was periodically asked to travel to jobs in other states. When each job began, the claimant was placed on the payroll and filled out appropriate tax forms. When the job was completed, the claimant's employment was terminated. The employer was under no obligation to notify the claimant when work was available, and the claimant was under no obligation to accept any job offered. The claimant's last job prior to the one where he was injured was completed in February of 1987. On April 24, 1987, the employer's field personnel manager contacted the claimant in Illinois about a job in Pine Bend, Minnesota. The claimant agreed to go to the job site. On April 26, 1987, the claimant drove to Pine Bend, arrived at the job site around 7 p.m., located the job site, and spent the night in a motel. He was scheduled to work at 7 a.m. the next morning. At around 5:30 a.m. that morning, the claimant started driving toward the job site. When he was 200 yards from the employer's parking lot and waiting to cross the last two lanes of a four-lane highway, the claimant's truck was hit by another vehicle, and he was injured. At the time of the accident, the claimant was carrying in his truck several items of equipment belonging to the employer such as a hard hat, safety glasses, welding hood, lanyard safety belt, slag hammer, and hand wrench. The Arbitrator denied the claimant compensation for the accident, having found that the claimant was not a traveling employee. On review, the Commission reversed. The Appellate Court agreed with the Commission that the claimant was a traveling employee. In doing so, the Court referenced the claimant's employment with the employer over the course of several years, the practice of hiring the claimant for individual jobs and terminating him upon completion of the jobs, and the purpose of the Act to provide financial protection for injured workers through prompt and equitable compensation. The finding of the Commission that the claimant was a traveling employee was not against the manifest weight of the evidence.

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Turning to the present case, the evidence showed that Respondent had to recruit workers from other union locals in order to provide the necessary labor to complete the maintenance work according to the Exelon Maintenance Agreement. (RX6). The Commission also notes Haynes' testimony that because of the nature of a nuclear plant, security background checks and a specialized skill level were required. Rock Island Local 25 did not have the manpower to meet the obligations of the job and it was required to recruit union members from other locals throughout the State. Respondent depended on Local 137 to reach out to sister jurisdictions to fulfill the manpower needs. Like the claimant in Chicago Bridge & Iron, Petitioner agreed to travel from Springfield to Quad Cities to work at the Cordova plant. Petitioner worked at the plant on June 23, 2006, stayed at a motel that evening and was returning to the plant on June 24, 2006 when he was involved in a grievous motor vehicle accident. Also, like the claimant in Chicago Bridge & Iron, Petitioner had worked for Respondent in 2004 and regularly in 2006. Petitioner's work for Respondent took him to Clinton Station in Clinton, LaSalle Station in Marseilles and Quad Cities in Cordova. (PX6) When Petitioner completed a job, he was laid off. Petitioner was considered an employee when he started a job and punched in and he was paid until he punched out.

The Commission notes the similarities between Petitioner and the claimant in Chicago Bridge & Iron, where the claimant was considered an employee and within the scope of his employment when the accident occurred. Guided by Chicago Bridge and Iron, the Commission finds that Petitioner was a traveling employee. The Commission disagrees with the Arbitrator's conclusion that Petitioner chose to relocate close to the Cordova plant. In the Commission's view, Respondent, by virtue of the requirements of the services it provided, per the Exelon Maintenance Agreement, recruited union tradesmen from other locals and required them to travel to the location where the work was to be performed.

The Commission also relies on Wright v. Industrial Commission, 62 Ill.2d 65, 338 N.E.2d 379, 381 (1975), wherein the Court explained there can be

> "...no rational basis to distinguish between the employee who is continuously traveling and one who travels to a distant job location only to return when the work is completed...It would be inconsistent to deprive an employee of benefits of workmen's compensation simply because he must travel to a special location for a period of time to fulfill the terms of his employment and yet grant the benefits to another employee because he continuously travels."

The Commission finds that the fact that Petitioner was not permanently assigned to Cordova and knew the job would end does not defeat his argument.

The Commission recognizes that not every employee who accepts employment in a remote location is necessarily a traveling employee; however, in this instance it is appropriate to so find. Respondent was required to recruit from locals around the state to fulfill the manpower requirements and Petitioner, as a practical matter, was required to stay within a reasonable distance from the plant, to meet the demands of the job. The Commission finds that Respondent must have anticipated that Petitioner, McGill and other workers recruited from remote locations

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were required to travel and arrange for convenient lodging in order to perform the duties of the job.

The Commission turns then to a determination of the reasonableness and forseeability of Petitioner's conduct. Following the reasoning in Chicago Bridge & Iron, 248 Ill.App.3d at 694, Petitioner, a traveling employee, was engaged in reasonable and foreseeable conduct at the time of the accident. The evidence showed that the Lynwood Lodge was situated on the road that led to the Cordova plant. The accident occurred on that road. It can be inferred from the evidence that the route Petitioner and McGill took was a direct route to the Cordova plant.

Lastly, the Commission finds that Petitioner was exposed to a risk greater than that to which the general public was exposed when the accident occurred. The accident occurred on a public highway when the vehicle in which Petitioner was riding skidded on ice. The accident occurred at 6:00 a.m. and Petitioner was on his way to begin working at 7:00 a.m. At the early hour of 6:00 a.m. in March, it can be inferred that the streets had likely not been cleared and the accident occurred sometime before most people commute to work. The Commission also notes that McGill, the driver of the pickup truck, and Petitioner were on a road away from where they were staying, and, although they had traveled the road in the past, it can be inferred that they were not entirely familiar with it. Petitioner was exposed to the risk of an icy road to a greater degree than that of the general public.

Based on the foregoing, the Commission reverses the Arbitrator's finding on accident and awards temporary total disability benefits and medical expenses.

Petitioner suffered significant injuries stemming from the accident. While Petitioner was hospitalized following the accident, he developed an airway obstruction, dysphasia, respiratory distress and suffered a brain stem stroke. He also suffered multiple infections and spent a significant time in the Intensive Care Unit. (PX3,11,17) Petitioner was transferred to Memorial Medical Center four weeks after the accident so that he could undergo extensive rehabilitation. (PX2,4,13) He developed problems swallowing and speaking. Petitioner underwent an upper endoscopy performed by Dr. Fowler in August of 2006 which relieved some of those symptoms, but the symptoms returned in approximately October of 2006 when Petitioner developed problems swallowing solid food. In August of 2006, Petitioner underwent vital stim therapy. The physicians at Springfield Clinic, including Dr. Fowler, recommended a procedure called esophageal dilatation to improve Petitioner's ability to swallow. On October 5, 2006, Petitioner underwent that procedure. Dr. Harrison recommended a feeding tube and continued speech therapy to further evaluate Petitioner's swallowing. (PX17) Petitioner underwent speech therapy to assist with swallowing and occupational and physical therapy at Memorial's Outpatient Center (PX6,7,8,) The physical therapy records indicate Petitioner received treatment from June of 2006 through December of 2006. The history indicates Petitioner sustained a head injury with bilateral vertebral artery dissection, bilateral cerebral infarctions, left meduliary infarction, bilateral small pontine infarctions, a right occipital infarction, liver contusion, mesenteric hematoma, hip fracture, open right wrist fracture with external fixation, evidence of C3-4 contusion with cervical myelopathy, developed cerebellar edema and required placement of stunt, suboccipital craniotomy for surgical evacuation of part of cerebellar stroke because of development of herniation and obstructive hydrocephalus. The records of Iowa University

Hospital confirm the various diagnoses. (PX3) Petitioner has a peg tube and tracheostomy with Passey Muire valve in place. The therapy records note Petitioner was wearing a cervical collar and had problems with ambulation, including difficulties with his balance. In December of 2006, Petitioner had undergone a surgical procedure to correct his vision. (PX6,7,8,) Petitioner was evaluated for his vision complaints at Springfield Eye Consultants. (PX11) On October 9, 2006, Petitioner underwent surgery to his left eye performed by Dr. Krah, at St. John's Hospital. (PX14) The records of Springfield Clinic indicate Petitioner suffered a cervical and right wrist fracture. (PX10) On May 1, 2006, Petitioner underwent a psychological evaluation at Memorial Medical Center. (PX12) Petitioner received a cardiovascular evaluation on September 8, 2006 by Dr. Sandercock of Koke Mill Medical Associates. Petitioner presented with an abnormal baseline ECG which suggested a myocardial infarction between March and September of 2006. Alternatively, Dr. Nessler felt that Petitioner might have suffered multiple chest traumas as a result of the accident. The doctor ordered additional testing in the form of a two dimensional echocardiogram. (PX13) The medical records reflect that Petitioner has "Activities of Daily Living" dependence.

The medical records reflect that Petitioner had low back surgery and was off work for about ten months prior to working for Respondent. Petitioner had few other medical problems prior to the accident.

As of the 19(b) hearing, Petitioner was still undergoing medical care. Respondent offered no evidence to show that Petitioner no longer needed care or could work in any capacity. The Commission finds that Petitioner was temporarily totally disabled from March 25, 2006 through the August 7, 2007 hearing. Although the last hearing was held on February 22, 2008, no evidence was taken that day. The Arbitrator merely closed proofs. (T.116)

With regard to the average weekly wage, the Commission notes that at the initial hearing on March 7, 2007, Petitioner claimed an average weekly wage of $1,473.44 and Respondent did not dispute his claim. (Arb.Exh.1) Pursuant to Walker v. Industrial Commission, 345 Ill.App. 3d 1084, 804, N.E. 2d 135, 281 Ill. Dec. 509, 281 Ill.Dec. 509 (2004), the parties are bound by their stipulations. As such, the Commission finds that Petitioner's average weekly wage is $1,473.44 which yields a temporary total disability rate of $982.29.

As noted above, Petitioner has required extensive treatment. There appears to be no real dispute that this treatment was reasonable, necessary, and related to the accident. (PX15) The medical bills, however, are difficult to sort out. Petitioner's Exhibit 15 includes a cover sheet indicating a total claim of $650,382.81. The Commission reviewed the bills submitted at arbitration and notes that many of the invoices were obtained sometime in 2006, well before the hearing which took place on three dates in 2007 and 2008 (March 7, August 7 and February 22). Further, many of the bills were paid by a health insurance carrier, Blue Cross, although the payments are not reflected on the medical bill cover sheet. (PX15) Respondent did not claim a Section 8(j) credit, but it is not entirely clear how Petitioner obtained Blue Cross coverage. In light of these factors and the numerous bills incurred, the Commission remands the issue of medical expenses to the Arbitrator for a further determination of the correct amount of medical bills to be awarded, subject to the Fee Schedule.

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IT IS THEREFORE ORDERED BY THE COMMISSION that the Arbitrator's Decision filed on April 18, 2008 is hereby reversed. The Commission finds that on March 24, 2006, Petitioner sustained an accident arising out of and in the course of his employment with Respondent.

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall pay to the Petitioner the sum of $982.29 per week for a period of 71 4/7 weeks, that being the period of temporary total incapacity for work under §8(b), and that as provided in §19(b) of the Act, this award in no instance shall be a bar to a further hearing and determination of a further amount of temporary total compensation or of compensation for permanent disability, if any.

IT IS FURTHER ORDERED BY THE COMMISSION that the case be remanded to the Arbitrator for a determination of the exact amount of the medical award. The Commission finds that Petitioner's treatment was reasonable, necessary and related to the accident, but is unable to arrive at a specific medical award based on PX14.

IT IS FURTHER ORDERED BY THE COMMISSION that this case be remanded to the Arbitrator for further proceedings consistent with this Decision, but only after the latter of expiration of the time for filing a written request for Summons to the Circuit Court has expired without the filing of such a written request, or after the time of completion of any judicial proceedings, if such a written request has been filed.

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

IT IS FURTHER ORDERED BY THE COMMISSION that Respondent shall have credit for all amounts paid, if any, to or on behalf of Petitioner on account of said accidental injury.

Bond for the removal of this cause to the Circuit Court by Respondent is hereby fixed at the sum of $75,000.00. The probable cost of the record to be filed as return to Summons is the sum of $35.00, payable to the Illinois Workers' Compensation Commission in the form of cash, check or money order therefor and deposited with the Office of the Secretary of the Commission.

DATED: AUG 5 2010
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Molly Mason

Yolaine Dauphin
Yolaine Dauphin

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Dissent

I respectfully disagree with the Majority's Decision reversing the Arbitrator's Decision and finding that Petitioner sustained an accident which arose out of and in the course of his employment with Respondent. The Majority's Decision finding that Petitioner was a traveling employee at the time of his accident and that he was in the course of his employment while traveling to work on the date of the accident since the course or method of travel was determined by the demands or exigencies of the job, is erroneous as a matter of law. There is no evidence in the record indicating that Petitioner was directed to stay where he did or that he had to travel any particular route to the plant. Petitioner was not required to stay anywhere. Petitioner could have commuted from home. Petitioner, of his own volition, chose to stay at a motel. He could have stayed anywhere. Respondent did not pay for his travel. Respondent did not pay for his lodging. It was Petitioner's sole choice whether or not he took the job at Cordova.

The Majority's reliance on Chicago Bridge & Iron to find that Petitioner is a traveling employee is totally misplaced. Petitioner's situation herein was not at all like that of the claimant in Chicago Bridge & Iron. Unlike Petitioner, the claimant in Chicago Bridge & Iron worked exclusively for the employer-respondent and periodic travel to work sites throughout the United States was the heart of their employment arrangement. The claimant in Chicago Bridge & Iron was requested to travel to a particular location and was paid for his mileage to that location. Petitioner herein was not. Petitioner herein had only sporadically worked for Respondent before. The claimant in Chicago Bridge &Iron had worked for Respondent nineteen years. Petitioner traveled to the Cordova plant to take a short-term job. His choice to stay at a motel rather than somewhere else was a personal, individual choice. By definition, a traveling employee is one who is required to travel away from the employer's premises in order to perform his job. Petitioner simply does not meet that definition. I would have affirmed and adopted the well-reasoned Decision of the Arbitrator. For these reasons, I dissent.

Nancy Lindsay

IN THE CIRCUIT COURT FOR THE SEVENTH JUDICIAL CIRCUIT

SANGAMON COUNTY, ILLINOIS

THE VENTURE-NEWBERG-PERINI, STONE & WEBSTER,

Plaintiff,

-vs-

ILLINOIS WORKERS' COMPENSATION COMMISSION and RONALD DAUGHERTY)

Defendant.

CASE NO. 2010-MR-509

ORDER

This cause coming on to be heard for judicial review brought by The Venture-Newberg-Perini, Stone & Webster, (Hereinafter "The Venture") against Illinois Workers' Compensation Commission and Ronald Daugherty (hereinafter "Daugherty"), under Section 19(f) of the Illinois Workers' Compensation Act, the parties having filed their respective briefs setting forth the relevant facts, issues, and law to support their positions, as well as having presented oral arguments before this court on July 18, 2011; the court having examined the Transcript of Proceedings of the Illinois Workers' Compensation Commission (hereinafter "Commission"), relevant Illinois law and case authority, the Arbitrator and Commission decisions, and after considering the briefs and arguments of the parties and being fully advised in the premises, does hereby find as follows:

1. The following facts are undisputed:

A. Daugherty, a union pipe fitter who resided in Springfield, Illinois, chose to accept the job with The Venture at a nuclear power facility in Cordova, Illinois in early 2006.

B. The job at the Cordova facility would be temporary and last several weeks.

C. Daugherty was not an ongoing or exclusive employee of The Venture at the time he accepted the job at the Cordova facility.

D. The job at the Cordova facility was approximately 200 miles from Daugherty's residence

in Springfield, Illinois.

E. Daugherty could not accept the Cordova facility job if union jobs were available within his local union's territory.

F. Daugherty obtained jobs, including the Cordova facility job, through his local union.

G. Daugherty was not required under the union rules to accept the Cordova facility job since it was outside the local union territory.

H. Daugherty and co-union member, Todd McGill, voluntarily chose to accept the job at the Cordova facility.

I. Daugherty decided to live temporarily at a motel close to the Cordova facility rather than commute back and forth each day between Springfield, Illinois and the Cordova facility during the limited tenure employment.

J. The Venture did not make accommodations for Daugherty's lodging for the Cordova facility job. Daugherty chose the location for his lodging, and The Venture did not pay for Daugherty's lodging.

K. The Venture did not pay Daugherty for his travel time or travel expenses either from his Springfield residence to the Cordova facility or from his temporary residence at the motel to the Cordova facility.

L. The Venture did not provide Daugherty with a company vehicle for use to and from the Cordova facility job.

M. Neither The Venture nor local union rules had an employment requirement that employees for the Cordova facility job had to be within a certain geographical distance to the facility.

N. The Venture would pay Daugherty for work performed at the Cordova facility job from the time he clocked in until the time he clocked out.

O. The Venture did not exercise control or otherwise direct Daugherty as to the route he would take to work at the Cordova facility.

P. On March 24, 2006, Daugherty was scheduled to report to work at the Cordova facility at his regularly scheduled time. Daugherty was not on call and was not called into work early on March 24, 2006.

Q. On the morning of March 24, 2006, Daugherty, who was a passenger in a vehicle owned and operated by Todd McGill, sustained injuries due to an accident on a public road while on his way to regularly scheduled work at the Cordova facility.

2. In consideration of these undisputed facts and application with Illinois law, this Court finds that the Commission misapplied the law to the facts in ruling Daugherty sustained accidental injuries arising out of his employment on March 24, 2006.

3. Specifically, Illinois law provides that generally an accident which occurs while an employee is traveling to or from work is not considered one that arises out of or in the course of the employment. *Chicago Bridge & Iron, Inc. v. Industrial Commission,* 248 Ill. App. 3d 587, 618 N.E.2d 1143 (1993). The rationale behind this rule is that an employee's trip to and from work is a product of his own decision as to where he wishes to live, a matter in which his employer ordinarily has no interest. *Lopez v. Galeener*, 34 Ill. App. 3d 815, 341 N.E.2d 59 (1975).

4. The Commission misconstrued or misapplied Illinois law in finding that the demands of Daugherty's job, rather than his personal preference as to where he chooses to live, served as an exception to this general rule. *See, Lopez v. Galeener*, 34 Ill. App. 3d 815, 341 N.E. 2d 59, *See also, Sjostrom v. Sproule*, 33 Ill. 2d 40, 210 N.E. 2d 209 (1965), where the Illinois Supreme Court ruled that an employee's accident arose out of an in the course of the employment due to a motor vehicle accident where the employee was on temporary assignment to supervise construction work at a different location. The Supreme Court found the trip was determined by the demands of the job rather than personal factors.

5. The Commission further misconstrued or misapplied Illinois law in finding that Daugherty was a traveling employee. Under Illinois law, a traveling employee is one who is required to travel away from the employer's premises in order to perform his job. *Wright v. Industrial Commission*, 62 Ill. 2d 65, 338 N.E. 2d 379 (1975). Under the undisputed facts here, Daugherty's job did not require that he travel

away from the premises of The Venture. It is further undisputed that The Venture had not directed Daugherty to travel to another location for work. Therefore, the Commission's determination that Daugherty was a traveling employee is contrary to the law.

6. The Commission further erroneously relied on the law in *Chicago Bridge & Iron* in determining that Daugherty was a traveling employee even though the material facts regarding the nature of the employment relationship are not similar.

7. This court further finds that the Commission's determination results in a misapplication of law and an inequitable and unjust result. It would allow an employee who voluntarily chooses to live remotely from the place of employment to become a traveling employee and receive workers' compensation benefits for injuries while traveling to and from work from a temporary residence, but deny benefits to a co-employee who permanently resides in the same geographical area of the employment.

THEREFORE, IT IS HEREBY ORDERED that the decision of the Workers' Compensation Commission is improper as a matter of law. The Commission decision is reversed, in total, and the decision of the Arbitrator denying this claim is reinstated.

IT IS FURTHER ORDERED that there is no just reason to delay enforcement or appeal of this Judgment.

ENTER: August 26, 2014

Circuit Judge

APPEAL TO THE ILLINOIS APPELLATE COURT, FOURTH DISTRICT
FROM THE CIRCUIT COURT OF THE
SEVENTH JUDICIAL CIRCUIT OF ILLINOIS
SANGAMON COUNTY

THE VENTURE-NEWBERG PERINI STONE & WEBSTER Plaintiff-Appellee, vs. ILLINOIS WORKERS' COMPENSATION COMMISSION AND RONALD DAUGHERTY, Defendants-Appellants.	)	No. 2010 MR 509

NOTICE OF APPEAL
(Workers' Compensation)

Notice is hereby given pursuant to Supreme Court Rule 301 that Defendant RONALD DAUGHERTY appeals to the Appellate Court of Illinois, Fourth District, from the Order entered by the Circuit Court of the Seventh Judicial Circuit, Sangamon County, on August 26, 2011, which Order reversed the decision of the Workers' Compensation Commission, in total, and reinstated the decision of the Arbitrator denying Ronald Daugherty's workers' compensation claim, the said Order thereby entirely disposing of the litigation. A true and correct copy of that Order is attached hereto and incorporated herein as Exhibit A. Defendant, RONALD DAUGHERTY, seeks reversal of the Circuit Court's Order in total, reinstatement of the Workers' Compensation Commission's Decision and Opinion on Review, and remand to the Arbitrator for further proceedings consistent with the Workers' Compensation Commission's Decision and Opinion on Review.

Dated: September 22, 2011

RONALD DAUGHERTY,
Defendant-Appellant

BY: Jonathan Nessler
Jonathan T. Nessler

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CERTIFICATE OF SERVICE

The undersigned, an attorney, certifies under penalties of perjury that on this 22nd day of September, 2011, before 5:00 p.m., copies of Defendant-Appellant Ronald Daugherty's Notice of Appeal were sent to the following:

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct, except as to matters therein stated to be on information and belief, and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Original and a Copy to:
Sangamon County Circuit Clerk
200 South Ninth Street
P.O. Box 1299
Springfield, IL 62705-1299

***Via*: Hand Delivery**

Copy to:
Theodore J. Powers
Rusin, Maciorowski & Freidman, Ltd.
10 South Riverside Plaza, Suite 1530
Chicago, Illinois 60606

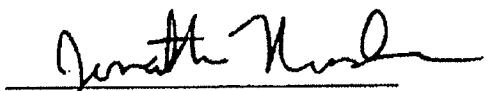
***Via*: US Mail (proper postage affixed) and Facsimile (312/454-6166 – 7 pages)**

Illinois Workers' Compensation Commission
100 West Randolph Street, Suite 8-200
Chicago, Illinois 60606

***Via*: US Mail (proper postage affixed)**

Clerk of the Fourth District Appellate Court
201 West Monroe Street
P.O. Box 19206
Springfield, Illinois 62794

***Via*: Hand Delivery**



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ILLINOIS OFFICIAL REPORTS

Appellate Court

***Venture-Newberg Perini Stone & Webster v. Illinois Workers' Compensation Comm'n*, 2012 IL App (4th) 110847WC**

Appellate Court Caption	THE VENTURE-NEWBERG PERINI STONE AND WEBSTER, Appellee, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Ronald Daugherty, Appellant).
District & No.	Fourth District Docket No. 4-11-0847WC
Filed	December 6, 2012
Rehearing denied	January 29, 2013
Held *(Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.)*	Claimant pipefitter was a "traveling employee" while he was working pursuant to an assignment to a nuclear power plant more than 200 miles from his home and the plant was not the premises of his employer, and the injuries he suffered in a motor vehicle accident while riding to work from the motel at which he was staying arose out of and in the course of his employment, since it was reasonable and foreseeable that his employer would anticipate that claimant would arrange for lodging to perform his duties and would travel a direct route from the motel to the plant where he was working.
Decision Under Review	Appeal from the Circuit Court of Sangamon County, No. 10-MR-509; the Hon. Patrick W. Kelley, Judge, presiding.
Judgment	Circuit court judgment reversed; Commission decision reinstated.

Counsel on Appeal

Jonathan T. Nessler (argued), of Law Offices of Frederick W. Nessler & Associates, Ltd., of Springfield, for appellant.

Theodore J. Powers (argued) and Jeffrey N. Powell (argued), both of Rusin, Maciorowski & Friedman, Ltd., of Chicago, for appellee.

Panel

JUSTICE HOFFMAN delivered the judgment of the court, with opinion.
Justices Holdridge and Stewart concurred in the judgment and opinion.
Justice Hudson dissented with opinion, joined by Justice Turner.

OPINION

¶ 1 The claimant, Ronald Daugherty, appeals the decision of the circuit court of Sangamon County finding that he is not entitled to benefits under the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2006)) for injuries he sustained while in the employ of the respondent, The Venture-Newberg Perini Stone & Webster (Venture-Newberg). On appeal, the claimant argues that the circuit court erred in setting aside the Commission's determination that his accident, which occurred while he was traveling from his motel to a jobsite, arose out of and in the course of his employment with Venture-Newberg. For the reasons that follow, we agree, and we therefore reverse the judgment of the circuit court and reinstate the Commission's decision.

¶ 2 We begin with a recitation of the relevant facts, drawn from the record of proceedings before the arbitrator. At the time of the accident, the claimant was a 50-year-old pipefitter who resided in Springfield, Illinois. He had worked as a pipefitter for approximately 30 years and was a member of the Plumbers & Pipefitters Union Local 137 (Local 137) based in Springfield. Members of Local 137 bid for jobs at their union hall. Typically, when a member completes a job he or she is terminated and must seek another position. Although members are permitted to take jobs outside of Local 137's home territory provided no work is available locally, they are not required to do so.

¶ 3 Venture-Newberg is a contractor that was hired to perform maintenance and repair work at a nuclear power plant in Cordova, Illinois, operated by Exelon Corporation (Exelon). Cordova is located between 200 and 250 miles from Springfield and is within the home territory of Plumbers & Pipefitters Union Local 25 (Local 25) based in Rock Island, Illinois. Venture-Newberg discussed its manpower needs for the Cordova project with Local 25, and Local 25 posted the positions to its membership. The positions at the Cordova plant were temporary and expected to last only a few weeks. Tradesmen hired for the Cordova job were expected to work between 6, 10-hour days and 7, 12-hour days and could be called in on an emergency basis.

¶ 4 Due to insufficient manpower within its home territory, Local 25 sought members from other locals, including Local 137, to work for Venture-Newberg at the Cordova plant. John Haynes, a business agent with Local 137, advised the claimant of the openings at the Cordova plant. At the time the Cordova jobs were posted, the claimant was unemployed and no work was available locally, so he bid on a job. The claimant and Todd McGill, another member of Local 137, accepted positions at the Cordova plant. Prior to the Cordova job, the claimant had worked for Venture-Newberg on four separate occasions between 2004 and 2006. The length of these four jobs varied and lasted for as few as two weeks to as many as six weeks. The claimant was laid off at the end of each job and had to be rehired for each subsequent job.

¶ 5 The claimant and McGill first reported to work at the Cordova plant on March 23, 2006. After completing their shifts that day, the two men spent the night at the Lynwood Lodge, which is located 30 miles from the jobsite. The men were scheduled to start work the following day at 7 a.m. On the morning of March 24, 2006, the men left the motel for the Cordova plant in McGill's pickup truck. Shortly after 6 a.m., the vehicle, which was being driven by McGill, skidded on a patch of ice while traveling on an overpass. The claimant sustained serious injuries as a result of the motor vehicle accident.

¶ 6 At the hearing on his application for adjustment of claim, the claimant testified that it was his "understanding" that in "most cases," Venture-Newberg requested workers to be within an hour of the jobsite so that they are alert and ready for work. He explained that workers "had to be available just at a phone call, and they would call you and maybe you would come in early or you would stay late, so you had to stay within a certain parameter of the plant." The claimant later testified that he did not want to have to work 12 hours and then drive home and that he planned on staying at the Lynwood Lodge because the jobsite was 200 miles from his residence. The claimant stated that it made sense for him, once he finished his shift, to rest at a hotel and prepare for the next day. The claimant acknowledged that Venture-Newberg did not instruct him to stay at the Lynwood Lodge and that Venture-Newberg did not direct which route to take from the motel to the Cordova plant. Further, Venture-Newberg did not reimburse the claimant or McGill for their travel or lodging expenses or pay the men for the time they spent traveling to the jobsite. Additionally, the claimant stated that he was not instructed to arrive early for work on March 24, 2006, was not called into work for an emergency on the day of the accident, and was not on "on-call status" at the time of the accident.

¶ 7 McGill acknowledged that Venture-Newberg never expressly requested employees to reside near the jobsite. However, he opined that driving a distance of more than 200 miles to the jobsite would make it difficult to work a 12-hour shift and to be available in the event of an emergency. McGill testified that the men were not called to the plant for an emergency on the date of the accident and Venture-Newberg did not ask the men to come in early that day. McGill further testified that Venture-Newberg did not direct him and the claimant to take a particular route to the Cordova plant. In addition, Venture-Newberg did not direct him and the claimant to stay at the Lynwood Lodge, make the arrangements for him and the claimant to stay at that location, pay for the motel accommodations or the men's travel expenses, or compensate them for time spent traveling from the motel to the jobsite.

¶ 8 Haynes testified that Local 137 covers a "fairly broad" geographical area. As a result, members generally have to travel to get to a particular job or project. Haynes testified that the union agreement does not provide for reimbursement of travel or lodging expenses unless "the contractor has sent [the member] away."

¶ 9 Ronald Cahill testified that, in March 2006, he was employed by Venture-Newberg as a radiological and safety supervisor. Cahill testified that although the claimant worked for Venture-Newberg on several other projects, he was not a permanent employee of the company in March 2006. Cahill explained that Venture-Newberg hired workers through the union and would lay off the workers when a project was completed. Tradesmen began receiving pay when they clocked in at the jobsite. Cahill testified that Venture-Newberg did not pay travel or lodging expenses for tradesmen working on the Cordova project in March 2006 and that tradesmen were not compensated for the time spent commuting to and from the jobsite. He stated that Venture-Newberg was required to pay travel expenses only if an existing employee was transferred to a different facility. Cahill stated that the claimant was not transferred to the Cordova plant from another facility in March 2006. Cahill acknowledged that the contract between Exelon, its contractors (including Venture-Newberg), and the unions places the onus upon the unions and the contractors to provide a ready, willing, and able workforce to fulfill the requirements of the contract. He also acknowledged that, by staying at a motel, the claimant benefitted Venture-Newberg and helped it comply with the Exelon contract. He noted that the claimant might not be able to assist in the case of an emergency if he had to travel 200 miles to reach the jobsite.

¶ 10 Based on the foregoing evidence, the arbitrator concluded that the claimant failed to sustain his burden of establishing that the motor vehicle accident arose out of and in the course of the claimant's employment with Venture-Newberg. In a divided decision, the Commission reversed the decision of the arbitrator and concluded that the claimant sustained an accident arising out of and in the course of his employment with Venture-Newberg. The Commission acknowledged that, ordinarily, an accident that occurs while an employee is traveling to or from work is not considered one that arises out of or in the course of employment. However, the Commission found two applicable exceptions. First, the Commission concluded that the claimant was in the course of employment while traveling to work because the course or method of travel was determined by the demands or exigencies of the job rather than by the claimant's personal preference as to where he chose to live. *Chicago Bridge & Iron, Inc. v. Industrial Comm'n*, 248 Ill. App. 3d 687, 693-94 (1993). Second, relying upon *Chicago Bridge & Iron, Inc.*, the Commission found that the claimant was a "traveling employee" at the time of the accident. On review, the circuit court of Sangamon County set aside the decision of the Commission. This appeal followed.

¶ 11 On appeal, the claimant argues that the trial court erred in setting aside the Commission's finding that his injury arose out of and in the course of his employment. An employee's injury is compensable under the Act only if it arises out of and in the course of his employment. 820 ILCS 305/2 (West 2008). Both elements must be present at the time of the claimant's injury in order to justify compensation. *Illinois Bell Telephone Co. v. Industrial Comm'n*, 131 Ill. 2d 478, 483 (1989).

¶ 12 The determination of whether an injury to a traveling employee arose out of and in the

course of employment is governed by different rules than are applicable to other employees. *Hoffman v. Industrial Comm'n*, 109 Ill. 2d 194, 199 (1985). Our first question, then, is whether the claimant qualified as a traveling employee.

¶ 13 A " 'traveling employee' " is defined as "one who is required to travel away from his employer's premises in order to perform his job." *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 545 (2010). It is undisputed that (1) the claimant in this case was employed by Venture-Newberg; (2) he was assigned to work at a nuclear power plant in Cordova, Illinois, operated by Exelon in excess of 200 miles from his home; and (3) the premises at which the claimant was assigned to work were not the premises of his employer. These facts establish the claimant's status as a traveling employee.

¶ 14 This is not to say that the claimant's status as a traveling employee necessarily satisfied his burden of establishing that his injury arose out of and in the course of his employment. A finding that a claimant is a traveling employee does not relieve him from the burden of proving that his injury arose out of and in the course of his employment. *Hoffman*, 109 Ill. 2d at 199. The test of whether a traveling employee's injury arose out of and in the course of his employment is the reasonableness of the conduct in which he was engaged at the time of his injury and whether that conduct might have been anticipated or foreseen by Venture-Newberg. *Howell Tractor & Equipment Co. v. Industrial Comm'n*, 78 Ill. 2d 567, 573-74 (1980). The question is one of fact to be resolved by the Commission, and its determination should not be disturbed on review unless it is against the manifest weight of the evidence. *Aaron v. Industrial Comm'n*, 59 Ill. 2d 267, 269 (1974); *Cox*, 406 Ill. App. 3d at 546. For a finding of fact to be contrary to the manifest weight of the evidence an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 15 In this case, the Commission found that Venture-Newberg must have anticipated that the claimant, recruited to work at Exelon's facility over 200 miles from the claimant's home, would be required to travel and arrange for convenient lodging in order to perform the duties of his job, and that it was reasonable and foreseeable that he would travel a direct route from the lodge at which he was staying to Exelon's facility. Therefore, the Commission concluded that the claimant's injury, sustained when the vehicle in which he was riding to work from the lodge at which he was staying skidded on a public highway, arose out of and in the course of his employment. This determination is clearly not against the manifest weight of the evidence.

¶ 16 Rather than focusing its attention on the issue of whether the claimant was required to travel away from Venture-Newberg's premises in order to perform his job, the dissent fixes the issue as whether the claimant was required to travel away from the only location where he was assigned to work. Then, without citation to authority, the dissent seemingly concludes that, where an employee is hired on a temporary basis only and is assigned by the employer to work at one specific jobsite other than the employer's premises, the assigned location becomes the employer's premises for purposes of applying the traveling-employee rule. We believe that the reasoning of the dissent in this regard was soundly rejected by our supreme court in *Wright v. Industrial Comm'n*, 62 Ill. 2d 65, 69 (1975). As the *Wright* court held, "It would be inconsistent to deprive an employee benefits of workmen's compensation simply

because he must travel to a specific location for a period of time to fulfill the terms of his employment and yet grant the benefits to another employee because he continuously travels." *Wright*, 62 Ill. 2d at 69.

¶ 17 For these reasons, we reverse the judgment of the circuit court and reinstate the Commission's decision.

¶ 18 Circuit court judgment reversed; Commission decision reinstated.

¶ 19 JUSTICE HUDSON, dissenting.

¶ 20 An accident that occurs while an employee is commuting to or from work does not arise out of and in the course of employment and is therefore not compensable under the Act. *Commonwealth Edison Co. v. Industrial Comm'n*, 86 Ill. 2d 534, 537-38 (1981); *Warren v. Industrial Comm'n*, 61 Ill. 2d 373, 377 (1975). The rationale for this rule is that the employee's trip to and from work is the result of the employee's decision where to live, which is a matter of no concern to the employer. *Martinez v. Industrial Comm'n*, 242 Ill. App. 3d 981, 985 (1993). Nevertheless, there are several exceptions to this rule. In this case, a divided Commission concluded that two of these exceptions entitled claimant to compensation under the Act. First, the Commission concluded that claimant was in the course of employment while traveling to work because the course or method of travel was determined by the demands or exigencies of the job rather than by claimant's personal preference as to where he chose to live. *Chicago Bridge & Iron, Inc. v. Industrial Comm'n*, 248 Ill. App. 3d 687, 693-94 (1993). Second, relying upon *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 693-94, the Commission found that claimant was a "traveling employee" at the time of the accident. On appeal, a majority of this court concluded that the Commission properly determined that claimant's injuries were compensable pursuant to the traveling-employee exception. I disagree. I also conclude that the second exception cited by the Commission is inapplicable. Accordingly, I respectfully dissent.

¶ 21 A "traveling employee" is defined as "one who is required to travel away from his employer's premises in order to perform his job." *Cox v. Illinois Workers' Compensation Comm'n*, 406 Ill. App. 3d 541, 545 (2010). The majority notes that claimant was employed by respondent and he was assigned to work at a facility operated by another entity. Based on these findings, the majority concludes that claimant qualifies as a traveling employee since "the premises at which the claimant was assigned to work were not the premises of his employer." *Supra* ¶ 13. In my opinion, the majority expands the definition of a traveling employee beyond its intended scope.

¶ 22 Significantly, claimant presented no evidence that he was required to travel away from his assigned work location in order to perform his job. Indeed, claimant's position required no travel from the work site at all. Further, claimant was not required to go to any other location prior to reporting to the Cordova plant. To the contrary, claimant's employment was fixed at a single location. Moreover, when claimant accepted the position with respondent he was aware that the job was located 200 miles from his residence. He voluntarily chose to work for respondent because no work was available within Local 137's home territory. I

believe that the majority's position will lead to anomalous and unintended results. It would allow an employee who voluntarily chooses to live remotely from the place of employment to become a traveling employee and receive workers' compensation benefits for injuries while traveling to and from work from a temporary residence. Perhaps more significantly, under the approach taken by the majority, everyone hired at the Cordova plant on a temporary basis, even individuals residing in close proximity to the plant, would arguably became a traveling employee.

¶23 In finding that the claimant was a traveling employee, the Commission relied on *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d 687. Claimant also cites to *Chicago Bridge & Iron, Inc.* in this appeal. However, that case is distinguishable. In *Chicago Bridge & Iron, Inc.*, the employee was an itinerant boilermaker-welder. He was hired by the employer in 1968. Thereafter, the employee worked regularly and exclusively for the employer and was periodically required to travel to work sites located in other states. When each job began, the employee was placed on the payroll and he filled out the required tax forms. When the job was completed, the employee was terminated from the payroll. The employer was under no obligation to notify the employee when work was available, and the employee was not under any obligation to accept the job offered. On April 24, 1987, the employer's field personnel manager contacted the employee in Illinois about a job in Minnesota. The employee agreed to go to the jobsite. On April 26, 1987, the employee drove to Minnesota, located the jobsite, and spent the night at a motel. The following morning, claimant was injured in a car accident as he was traveling from the motel to the jobsite. *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 688-89.

¶24 The arbitrator denied compensation, finding, *inter alia*, that the employee was not a traveling employee. The arbitrator reasoned that the employee would have had to arrive at the jobsite and commence employment to be considered a traveling employee. The Commission reversed, concluding that the employment began in Illinois when the employee was hired and that he was a traveling employee engaged in reasonable and foreseeable conduct traveling in a direct route from the motel to the jobsite at the time of the accident. On appeal, we affirmed the decision of the Commission, explaining:

> "At oral argument both parties seemed to agree that had the [employee] never worked for the employer prior to receiving the call from [the field personnel manager], he would not be a traveling employee. We agree. Conversely, if the [employee] had not been terminated from the payroll after each job, we would have little difficulty characterizing him as a traveling employee.
>
> While the facts *sub judice* are different than either of the above, we judge them closer to the latter. *Given [the employee's] long-standing (19 years) and exclusive employment with the employer*, and considering that the purpose of the Act is to provide financial protection for injured workers through prompt and equitable compensation [citations], we do not believe that the finding of the Commission that the [employee] was a traveling employee was against the manifest weight of the evidence." (Emphasis added.) *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 694.

Critical to our decision in *Chicago Bridge & Iron, Inc.* was the fact that the employee worked

regularly and exclusively for the employer for an extended period of time. In this case, claimant was not employed *exclusively* for respondent. Moreover, given that claimant only worked four short stints for respondent in the two years preceding the accident, I cannot conclude that he worked *regularly* for respondent or that he was a *long-standing* employee. Further, I note that the employee in *Chicago Bridge & Iron, Inc.* was "periodically *required*" to travel. (Emphasis added.) *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 688-89. In contrast, claimant knew he would be assigned to work at the Cordova jobsite when he accepted the job and he was not "required" to travel away from that location. For these reasons, the Commission's reliance on *Chicago Bridge & Iron, Inc.* for the proposition that claimant is a traveling employee is misplaced.

¶ 25 The Commission also cited to *Wright v. Industrial Comm'n*, 62 Ill. 2d 65 (1975). The Commission's reliance on *Wright* is misplaced as well. In *Wright*, it was undisputed that the employee's duties required him to travel away from the employer's premises. *Wright*, 62 Ill. 2d at 67 ("These duties frequently required that [the employee] travel to out-of-state locations and remain there during the installation of the machinery for 5 to 6 month periods."). As noted above, in this case claimant was not required to travel away from the site to which he was assigned to perform his job.

¶ 26 In sum, I would hold that in cases such as this, where an employee is hired on a temporary basis only and is assigned by the employer to work at one specific jobsite for the duration of the employment, that assigned location becomes the employer's "premises" for purposes of the application of the traveling-employee rule. Of course, if the employee is directed or required to work away from the assigned location during the period of temporary employment, the employee would then become a traveling employee under the law. This interpretation would lead to results more grounded in the true considerations of a given case and be more consistent with the purpose of the traveling-employee rule. That is, it is the requirements or directions of the employer, not a voluntary decision by the employee, that determines whether an individual is classified as a traveling employee.

¶ 27 The Commission also found that claimant is entitled to benefits because the course or method of travel to the Cordova plant was determined by the demands or exigencies of claimant's job with respondent rather than by his own personal preference as to where to live. I refer to this exception as the "exigency exception."

¶ 28 The exigency exception appears to have its origin in *Sjostrom v. Sproule*, 33 Ill. 2d 40 (1965). In that case, the plaintiff and the defendant were engineers for Armour & Co. (Armour). Both men resided in Chicago. Chicago was also the location of Armour's main office. In 1952, the men were assigned to supervise the construction of a plant in Bradley, Illinois. Armour would reimburse the men for the expenses they incurred while commuting to and from Bradley. The type of reimbursement depended on whether the employee used his own car, in which case reimbursement was on a per-mile basis, or whether the employee used a company car, in which case reimbursement was for the cost of gasoline and oil. To eliminate the duplicate expense involved in reimbursing both the plaintiff and the defendant, a supervisor at the Bradley plant asked the men to carpool. On December 4, 1952, the defendant left his house in his own car to pick up the plaintiff. While driving to Bradley, the men were involved in an automobile accident. The plaintiff sued the defendant for his

injuries.

¶ 29 The issue before the supreme court in *Sjostrom* was whether section 5 of the Act barred the plaintiff's lawsuit because the men were in the "line of duty" at the time of the accident. See Ill. Rev. Stat. 1963, ch. 48, ¶ 138.5 (now codified, as amended, at 820 ILCS 305/5 (West 2006) (barring an action by an employee against the employer or his employees "for injury or death sustained by any employee while engaged in the line of his duty as such employee")). The supreme court equated the "line of duty" inquiry to the general test of compensability under the Act, *i.e.*, whether the employee's injuries arose out of and in the course of his employment. *Sjostrom*, 33 Ill. 2d at 43. Applying the test, the court determined that the Act barred the plaintiff's action. *Sjostrom*, 33 Ill. 2d at 44. The court recognized that, as a general rule, accidents that occur while an employee is going to or from his place of employment do not arise out of and in the course of employment. *Sjostrom*, 33 Ill. 2d at 43. Nevertheless, the court concluded that "the nature of an employee's job is sometimes such that his trip to work is determined by the demands of his employment rather than personal factors." *Sjostrom*, 33 Ill. 2d at 43-44. The court found that the men traveled to Bradley to accommodate Armour rather then themselves. *Sjostrom*, 33 Ill. 2d at 44. In this regard, the court noted that Bradley was not the regular place of work of the plaintiff or the defendant, that the men were assigned to that location on a temporary basis, and that Armour exercised "control" over the method of travel to insure that only one of the parties would be reimbursed. *Sjostrom*, 33 Ill. 2d at 43-44.

¶ 30 The exigency exception was later discussed in *Lopez v. Galeener*, 34 Ill. App. 3d 815 (1975). In *Lopez*, Gibson Galeener operated a feed store in town and a poultry farm about 1½ miles outside of town. Galeener hired two young men, Richard Schuette and Douglas Lopez, to work on the poultry farm. Galeener provided a shower room at the feed store where those who worked at the poultry farm could change clothes. One afternoon, Schuette and Lopez went to the feed store after school. They changed their clothes, and left with another young man, Lawrence Hess, for the poultry farm in Galeener's station wagon. En route, they stopped at a café for about 20 minutes, drinking soda and talking to friends. When completing their journey to the poultry farm, the station wagon, then operated by Hess, was struck by an automobile, resulting in injury to Schuette and death to Lopez. Schuette and the administrator of Lopez's estate filed an action against Galeener and Hess. At trial, there was conflicting testimony regarding whether Schuette and Lopez were required to report to the feed store in town before beginning their work at the poultry farm. A special interrogatory was submitted to the jury which required the jury to state whether Schuette and Lopez were in the line of their duty as employees of Galeener. The jury answered the special interrogatory in the negative and returned a verdict in favor of the plaintiffs. *Lopez*, 34 Ill. App. 3d at 816-18.

¶ 31 Like *Sjostrom*, the issue presented on appeal in *Lopez* was whether the plaintiffs were engaged in the line of their duty as employees of Galeener when they were involved in an automobile accident and therefore precluded from recovering from the defendants under section 5 of the Act. In rejecting the defendants' request for judgment notwithstanding the verdict, the appellate court explained:

"The defendants *** have argued that the travel of Schuette and Lopez from the feed

store to the poultry farm was occasioned by the demands or exigencies of their employment with [defendant] Galeener. The evidence, when viewed most favorably to plaintiffs shows they were not required by their employment to go to the feed store, and that they were not required by their employment to travel from the feed store to the poultry farm. The most that can be said about the relationship of Schuette and Lopez to the feed store is that Schuette and Lopez could go to the feed store to change their clothes if they desired to do so. This certainly does not overwhelmingly prove that the presence of Schuette and Lopez at the feed store or that the traveling by Schuette and Lopez from the feed store to the poultry farm was brought by the demands or exigencies of the employment. The verdict of the jury that Schuette and Lopez were not engaged in the line of their duty at the time of the accident was therefore supported by the evidence." *Lopez*, 34 Ill. App. 3d at 819-20.

¶ 32 The applicability of the exigency exception was addressed in *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 693. There, the employee was injured while driving to a jobsite. This court found that the exigency exception did not apply. *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 693. We explained that while the employer gave the employee directions to the jobsite, he was free to use any route he chose to reach his destination. *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 693.

¶ 33 The foregoing cases establish that the applicability of the exigency exception entails an examination of the control the employer exercised over the course or method of the employee's travel to the jobsite. In *Sjostrom*, the exigency exception was found to apply because the employer assigned the employees to a location away from their regular jobsite and asserted control over the employees' method of travel to insure that only one of the parties would be reimbursed. *Sjostrom*, 33 Ill. 2d at 43-44. In *Lopez*, the exigency exception was found not to apply because the employer did not require the employees to stop at the feed store prior to traveling to the poultry farm. *Lopez*, 34 Ill. App. 3d at 819-20. Similarly, in *Chicago Bridge & Iron, Inc.*, the exigency exception was found not to apply because the employer did not direct the employee to use a particular route to reach his destination. *Chicago Bridge & Iron, Inc.*, 248 Ill. App. 3d at 693.

¶ 34 Here, the Commission determined that respondent "did not demand that [claimant] lodge within a certain distance from the plant in order to perform the work that was required." I agree that the record supports such a finding. Despite this determination, the Commission went on to find that, "as a practical matter," claimant had to stay within a reasonable commuting distance from the plant. The Commission explained that claimant was required to come to work ready and fit to perform tasks that required special skills, that he was expected to work 10 to 12 hours a day up to 7 days a week, and that he was expected to be available to work additional hours in the event of an emergency. On appeal, claimant cites these same factors in support of his argument for application of the exigency exception. However, neither claimant nor the Commission explains how these factors establish that respondent controlled the course or method of claimant's travel to the Cordova plant. Additionally, I do not find these factors relevant to application of the exigency exception in this case. Notably, I would expect all employers to want their workers to come to work ready and fit to perform their duties. Moreover, claimant was aware of his work hours when he

accepted the job and there was no evidence that he was called in early on the day of the accident. Finally, the fact that respondent expected its employees to be available in the case of an emergency is not relevant since claimant acknowledged that he was not called into work for an emergency on the day of the accident. See 1 Arthur Larson, Larson's Workers' Compensation Law § 14.05[6], at 14-14 (2009) ("The circumstance that the employee is 'subject to call' should not be given any independent importance in the narrow field of going to and from work; the important questions are whether the employee was in fact on an errand pursuant to call, and what kind of errand it was.").

¶ 35 For the reasons set forth above, I would conclude that claimant is not entitled to benefits under the Act because he was injured while commuting to work and he failed to establish the existence of any exception to the general rule that injuries sustained while going to and coming from work are not compensable. As such, I would affirm the judgment of the circuit court of Sangamon County, which set aside the decision of the Commission. Accordingly, I dissent.

¶ 36 Justice Turner joins in this dissent.

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APPELLATE COURT
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01/29/13

RE: General No. 4-11-0847WC
Circuit Court No. 10MR509
County of Sangamon
The Venture-Newberg Perini, et al. v. W.C.C. (Daugherty)

CORRECTED TITLE

The Court has this day entered in the above entitled cause the following order:

This cause having come on for hearing on the petition of the appellee, THE VENTURE-NEWBERG PERINI STONE and WEBSTER, for rehearing or, in the alternative, for a finding that the case involves a substantial question which warrants consideration by the supreme court; and the court being advised in the premises:

IT IS HEREBY ORDERED THAT:

1. The petition for rehearing is DENIED with 5 Justices having voted to deny rehearing; and
2. The petition for certification is GRANTED, Justices Hudson and Turner having filed statements that the case involves a substantial question which warrants consideration by the supreme court.

Thomas E. Hoffman, J.

William E. Holdridge, P.J.

Donald C. Hudson, J.

John W. Turner, J.

Bruce D. Stewart, J.

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