

Illinois Trial Lawyers Association Education Fund

Workers' Compensation Notebook

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**2002 WORKERS'
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TRIAL NOTEBOOK**

Chapter 2

**EMPLOYER / EMPLOYEE
RELATIONSHIP**

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EMPLOYEE / EMPLOYER RELATIONSHIP

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Specifically excluded from the definition of "employee" are: real estate brokers, broker-salespersons, and salespersons compensated solely by commission. 820 IICS 305/1 (b).

Prior to November 12, 1997, Section 22-307 of the Illinois Pension Code precluded an injured police officer or firefighter employed by a municipality from pursuing workers' compensation benefits if the municipality had enacted an ordinance providing for the medical care and hospital treatment of its injured police officers and firefighters. See Village of Winnetka v. Industrial Commission, 232 Ill.App.3d 351, 597 N.E.2d 630 (1st Dist. 1992). In 1997, the General Assembly amended Section 22-307 to allow police officers and firefighters in municipalities with populations under 500,000 to pursue workers' compensation benefits. See 40 ILCS 5/22-307; Nelson v. Industrial Commission, 305 Ill.App.3d 651, 713 N.E.2d 119 (1st Dist. 1999).

The courts have consistently refused to apply the amendment to Section 22-307 of the Illinois Pension Code retroactively. In Jones v. Industrial Commission, 00 I.I.C. 0463, No. 3-01-0154 WC (3rd Dist. 2002), the claimants were Rock Island police officers and firefighters who had filed Applications for Adjustment of Claim with the Industrial Commission. In 1993, Rock Island enacted a municipal ordinance pursuant to Section 22-306 of the Illinois Pension Code requiring the city to provide for the medical care of police officers and firefighters injured in the course of their employment. Pursuant to the enactment of this ordinance, Section 22-307 of the Code precluded the injured officers from collecting benefits under the Act. All of the claimants sustained injuries after the enactment of the ordinance in 1993, but prior to the General Assembly's amendment in 1997. In holding that the claimants were barred from pursuing compensation under the Act, the court observed that it found no express legislative intent that the amended statute was intended to apply to antecedent events. The court stated that retroactive application of the amendment would permit the claimants to recover both under the ordinance and the Act and reasoned that the legislature did not intend such a result.

Similarly, in Szubka v. Village of Bensenville, 99 IIC 401 (May 6, 1999), the Industrial Commission noted that no provision was made for the amendment to apply retroactively. Therefore, the claimant was barred from collecting workers' compensation benefits. Nelson, Szubka, and

Employers who are engaged in certain activities, which are defined as "extrahazardous," are automatically required to provide compensation to injured workers pursuant to the terms of the Act. 820 ILCS 305/3. Section 3 enumerates various activities that are considered "extrahazardous." By reviewing this Section, it quickly becomes apparent that there are very few-if any-businesses or enterprises that do not fall within the provisions of the automatic application of the Act. 820 ILCS 305/3.

An individual or entity that does not on its face appear to fall under the automatic application provisions of Section 3 and elects not to be subject to the Act may still be liable under the automatic application provisions of Section 3 if its activities are found to place it in one of the listed enterprises. In Fefferman v. Industrial Commission, 71 Ill.2d 325, 375 N.E.2d 1277 (1978), the owner of a building used for storage of goods elected not to be subject to the Act. An uninsured contractor's employee was injured in the process of demolishing the building. The building owner became liable under the Act because he was found to be engaged in the business of maintaining or demolishing a structure pursuant to Section 3 of the Act.

Under limited circumstances, the corporate officers of an enterprise covered under the automatic application provisions of Section 3 may elect to withdraw themselves as individuals from the operation of the Act. Section 3 provides that the corporate officers of any business or enterprise defined as a "small business" who are employed by the corporation may elect to withdraw themselves as individuals from application of the Act. 820 ILCS 305/3 (17)(b).

Recently, it has been held that this election to withdraw from coverage applies not only to the individual but also bars the claims of additional individuals who would otherwise be entitled to benefits under the Act. In D. Mayer Landscaping v. Industrial Commission, 328 Ill.App.3d 853, 767 N.E.2d 821, (1st Dist. 2002), the president of a landscaping business elected not to be covered by the Act pursuant to Section 3 (17)(b). The president died in the course of this employment in an accident involving a power mower. The decedent's spouse filed a claim for death benefits under the Act. The appellate court held that if an officer elects not to be covered by a workers' compensation insurance policy, the Workers' Compensation Act does not apply at all. Therefore, there is no claim by a widow or other survivor because, when an employee elects not to be covered under the Act, there is no statutory basis for a claim by a survivor. Id.

Cir. 1995); Kirk v. State of Illinois Dept. of Rehabilitation Services, 98 IIC 1216, (Dec. 21, 1998); Ware v. Industrial Commission, 318 Ill.App.3d 1117, 743 N.E.2d 579, (1st Dist. 2000).

The nature of the work performed by the employee in relation to the general business of the employer (factor 6 above) is also regarded as one of the most important factors. See Ware v. Industrial Commission, *supra*. The courts may find that an employee/employer relationship exists even in cases where a written contract specifically indicates that the parties did not intend for such a relationship to exist. Ware, *supra*; Yellow Cab v. Industrial Commission, 238 Ill.App.3d 650, 606 N.E. 2d 521 (1st Dist. 1993). In these cases, the courts have determined that they would not be controlled by the terms of a contract, but would instead look to the actual relationship of the parties at the time of the injury. With regard to the other factors listed above, if an employer has the right to discharge a worker, supplies the worker with the necessary tools, materials and equipment necessary to perform the work, pays the worker on an hourly basis and deducts withholding tax, an employee/employer relationship most likely will be established.

The courts examine the right to control the actions of the employee and the nature of the employee's work in relation to the general business of the employer to ascertain whether the relationship exists, even in cases where a lease agreement specifically refers to the alleged employee as an independent contractor. In Ware v. Industrial Commission, *supra*, the claimant was a truck driver who paid the operating costs, including fuel, taxes, maintenance costs, unemployment insurance, workers' compensation insurance, social security and payroll tax deductions. The claimant and the alleged employer had entered into an equipment lease agreement that referred to the claimant as an independent contractor. In determining whether an employment relationship existed at the time of the accident, the court stated that no rigid rule of law exists regarding whether a worker is an employee or an independent contractor. The court noted that there were a number of factors to consider in making the determination. The court analyzed an extensive list of circumstances wherein the alleged employer directed the claimant's behavior. The court noted that those circumstances, coupled with the claimant's compliance with the company's directives, provided strong evidence that the company had the right to control his activities.

The court next analyzed the nature of the work performed by the claimant in relation to the general business of the alleged employer. The alleged employer was engaged in the business of hauling freight for various customers. The claimant's work activities involved hauling freight for the alleged employer's various customers. Accordingly, the court concluded

exercise control over the claimant's work. The court noted that the claimant was required to sign in at the office everyday where he was given his job assignments and schedule. Furthermore, the claimant was required by the respondent to wear a uniform and a job badge identifying the respondent. Based upon these facts, the Commission found that the relationship of employer/employee existed between the claimant and respondent.

Even where the method of payment and other factors suggest that the employee/employer relationship does not exist, a finding that the alleged employer exercised control over the manner in which the work was performed is determinative. This was the case in Metzger v. Area Erectors, 99 IIC 487 (May 26, 1999). In that case, the claimant was a bricklayer. On the date of the accident, the claimant had been notified by an agent of the alleged employer that the job site he was working on was a "cash job." Nevertheless, the claimant testified that he had not made arrangements with anyone regarding payment for the work performed other than the alleged employer and that he expected to be paid by the alleged employer. Furthermore, the claimant had been directed by the alleged employer's agent as to which jobs to perform, and the claimant regularly worked under the supervision of the alleged employer's agent. These facts constituted sufficient evidence to find that the requisite employee/employer relationship existed and that the claimant was entitled to recover benefits under the Act.

A recent line of cases has shown a willingness on the part of the Industrial Commission to apply the same fact oriented inquiry in cases brought by claimant's who are engaged in providing services on behalf of someone other than the individual or entity that pays the claimant and with whom the claimant seeks to establish the employee/employer relationship.

In Kirk v. State of Illinois Dept. of Rehabilitation Services, 98 IIC 1216 (Dec. 21, 1998), the claimant was the personal assistant of a handicapped individual. The state instructed the claimant to provide the individual's cooking, cleaning, transportation, laundry and bathing needs. The state annually reviewed and reassessed this service plan and gave the reassessment to the claimant as a mandatory guideline. A limit on the number of hours that the claimant could provide services to the individual was established by the state, and the state mandated that this limit could not be exceeded. The state also required the handicapped individual and her family to complete a personal assessment of the claimant each year. The claimant's wages were paid by the state, who deducted federal and state withholding and social security taxes. Additionally, regularly deducted from the claimant's pay check were union dues for the claimant's union, with whom the state had a collective bargaining

More recently, the Commission has bolstered its decision in Marshall by reaching the same conclusion under similar facts in Turner v. State of Illinois, 02 IIC 215 (March 18, 2002). The claimant was injured while working as a personal home care assistant. The claimant obtained her placement after applying for a job at the Department of Rehabilitative Services. The Commission upheld the decision of the arbitrator that an employee/employer relationship existed between the claimant and the state agency. This relationship was evidenced by the fact that the agency provided the personal assistant/client agreement and service plan. The Commission concluded that the services to be provided and the delivery of the services were under the control of the state agency. See also Heaney v. State of Illinois, 00 IIC 500 (June 25, 2001). This recent line of cases indicates that the Commission will determine that the requisite employee/employer relationship exists to permit compensation pursuant to the Act even in cases where workers are engaged performing service on behalf of someone other than the entity with whom the worker seeks to establish the relationship.

Similarly, in Eklund v. Local 705 International Brotherhood of Teamsters, 98 IIC 39 (Jan. 20, 1998), a union steward hit by a truck while walking a picket line was found to be an employee of the local where the evidence indicated that the claimant's supervisor at the local instructed him to work the picket line.

In Wyse v. Precise Concrete and General Casualty Insurance Co., 01 IIC 0736 (Oct. 18, 2001), the Commission indicated that false representations on the part of a claimant during the hiring process would not nullify the employee/employer relationship. In Wyse, the claimant applied for a position as a concrete laborer. In the course of applying for the position, the applicant failed to fully represent his health history and the extent of his experience as a concrete finisher. Nevertheless, the claimant was hired by the respondent and began employment for the respondent as a concrete finisher. When the claimant was subsequently injured in the course of his employment, approximately seven weeks later, the respondent argued that the contract for hire was voided by the claimant's material misrepresentations regarding his health history and experience. The respondent stated that the offer of employment would not have been extended to the claimant had his prior health history been known to the respondent. The claimant's prior health history included back surgery for a herniated disc, as well as permanent work restrictions that prohibited the claimant from lifting over twenty pounds and included a recommendation to stop performing construction work. The Commission awarded benefits pursuant to the Act, finding that the respondent's position lacked merit. The Commission noted that the respondent had the opportunity prior to hiring the claimant to conduct a physical examination which would

In Mejia v. Rockford Register Star, 01 IIC 819 (Nov. 15, 2001), the claimant was hired to deliver newspapers for the respondent. In determining that the claimant was an independent contractor rather than an employee, the Commission noted that the claimant was hired to perform a specific task for an agreed upon price. The Commission noted further that the claimant deducted vehicle and supply expenses on his federal tax forms. The Commission found that the claimant was subject to a degree of control by the respondent only to ensure the end result: the satisfactory delivery of the newspapers. The arbitrator found that the claimant retained the right to control the mode, manner, method and means of performing the job duties. Therefore, a sufficient number of the factors did not indicate that the employee/employer relationship existed. The most important factor regarding control over the manner in which the work was performed indicated to the Commission that the employee/employer relationship did not exist.

The Commission followed a similar analysis in Keefe v. William J. Creaney, Inc., 01 IIC 633 (Sept. 6, 2001). In Keefe, a carpenter who was injured performing tile work was found to be an independent contractor rather than an employee. The Commission found that the evidence indicated the respondent was only interested in the results to be achieved, not the manner in which the work was performed. Therefore, an employer/employee relationship was not established.

If performance of the job duties requires special skills which are acquired prior to or independent of the work performed on behalf of the alleged employer, the Commission will consider this factor as tending to indicate that the employer/employee relationship does not exist. This was the case in Romano v. Lightning Deterrent Corp., 98 IIC 882 (Sept. 23, 1997), where the Commission noted that work being performed by the claimant required a degree of skill which had to be learned through an apprentice system. This factor, combined with the fact that the claimant was being paid as an independent contractor, confirmed the Commission's determination that the employer/employee relationship did not exist.

A written document does not, as a matter of law, determine an individual's employment status. As discussed above, in Ware v. Industrial Commission, supra, the appellate court found that the employer/employee relationship existed despite a leasing agreement which specifically stated that the claimant was an independent contractor. Similarly, in Gray v. Internet Construction, 97 IIC 869 (Aug. 20, 1997), the Commission held that the claimant was an employee, not an independent contractor, even though the claimant had signed an independent contractor agreement. In Gray, the Commission noted that the employer had the right to control the manner in which the work was performed and the claimant was not free to

control over whom the claimant enlisted to help with unloading or even driving the truck in 1999. Additionally, the Commission noted that in 1999 the claimant was responsible for his own insurance and licensure requirements. Furthermore, the claimant was responsible for selecting his own route in the process of hauling the respondent's shipments. The agreement was found to reflect the true intent of both parties and was not a sham label. Therefore, the employee/employer relationship did not exist.

The Commission was careful in Garcia to distinguish its decision from the court's holding in Ware, *supra*. The Commission's decision in Garcia noted that the lease agreement in Ware gave the respondent the right to control the manner in which the work was being performed. In Garcia, the independent contractor agreement was not supported or amplified by a lease agreement giving the respondent control over the performance of the work duties.

Both Ware and Garcia indicate that an employer/employee relationship may exist even where there is a written contract specifically indicating that the parties did not intend for such a relationship to exist but rather intended to establish an independent contractor arrangement. Ware and Garcia indicate that the courts and Commission will conduct a fact oriented analysis that focuses most sharply on the extent of control exercised by the alleged employer over the manner in which the work is performed.

Interestingly, insurance carriers have responded to the exposure which exists because their insureds may be found to be employers pursuant to the Act, even where employers assert that the workers are independent contractors. In Wausau General Ins. Co. v. Kim's Trucking, Inc., 289 Ill.App.3d 201, 682 N.E.2d 190 (1st Dist. 1997), an insurance company sought recovery of premiums it claimed were owed because workers engaged in hauling materials on behalf of the defendant trucking company could be employees pursuant to the Act. The trucking company asserted that the workers were not employees but rather independent contractors and that no coverage for the workers was sought by the trucking company nor required under Illinois law. The appellate court found that the outside truck haulers were engaged in work that could make the trucking company's insurer liable for their workers' compensation coverage, and

In Jaskoviac v. State of Illinois, Will County Jury Commission, 01 IIC 315 (April 26, 2001), the Commission denied benefits to a claimant who was injured while performing jury duty. Although the claimant was performing these duties pursuant to a court ordered summons, the Commission determined that the claimant had not been hired to be a juror, but instead was performing a civic duty. Therefore, no employer/employee relationship existed and the claimant was not entitled to benefits under the Act.

The appellate courts have been reluctant to disturb the findings of the Commission on the question of whether a worker is an independent contractor or an employee. This reluctance is due to the case-specific nature of the factual inquiry that the Commission conducts to determine a worker's status. As the court explained in Young America Realty v. Industrial Commission, 199 Ill.App.3d 185, 556 N.E.2d 796 (4th Dist. 1990), there is no inflexible rule for determining whether an individual is an employee or an independent contractor. Id. at 798. The court stated that where elements of both the relationship of employee and of an independent contractor are present and facts permit an inference either way, the Commission alone is empowered to draw the inferences, and its decision as to the weight of the evidence will not be disturbed on review. Id., citing Greenberg v. Industrial Commission, 23 Ill.2d 106, 178 N.E.2d 646 (1961).

II. ACTIONS AND CIRCUMSTANCES AFFECTING LIABILITY

A. Loaning/Borrowing Employers

The Act specifically addresses the question of borrowing and loaning employers in Section 1(a)(4):

Where an employer loans an employee to another employer and that employee sustains an injury in the course of employment with the borrowing employer, if the borrowing employer does not provide benefits, the loaning employer is liable to provide all benefits under the Act to which the employee would be entitled had he been injured exclusively in the course of his employment with the loaning employer. Section 1(a)(4).

Provisions addressing borrowing and loaning employers were added when the General Assembly, in its 1957 amendment of the Act, inserted subparagraph (a) (4) to Section 1. This amendment reflected the first legislative attempt to express the duties of loaning and borrowing employers and to recognize their existence in the Act as such, although the courts had recognized the doctrine in industrial cases much earlier. In

of any written contract between the two alleged employers, though the contract is not conclusive Emma, Id.; the length of service for the allegedly borrowing employer Nutt, Id. at 931; Freeman, Id. at 1248; the identity of the party for whom the employees services are being performed Freeman, Id.; Mosley v. Northwestern Steel & Wire Co., 76 Ill.App.3d 710, 719, 394 N.E.2d 1230, 1237 (1979); quoted in O'Laughlin, Id.

1. Applying the Criteria

Recent cases have applied differing combinations of the above factors to determine whether the lending/borrowing relationship exists. Among the most important criteria is whether the borrowing employer had the right and ability to control the manner in which the work was to be performed. Related to this inquiry is whether a contract of hire existed between the parties of interest. In REO Movers v. Industrial Commission, 226 Ill.App.3d 216, 589 N.E.2d 704, (1st Dist. 1992), the claimant filed an application for benefits under the Act naming REO Movers as the respondent. The claimant asserted that although he had been employed by a different trucking company, he had been loaned to the respondent. The court reasoned that the petitioner was performing work for the respondent and that the petitioner had received instructions from the respondent while engaged in hauling freight on the respondent's behalf. Furthermore, the court noted that while hauling freight for the respondent, the claimant used a truck with the respondent's name on it, and that the respondent had the right and ability to control the manner in which the petitioner performed the work. Therefore, an employee/employer relationship existed between claimant and the respondent and the respondent was a borrowing employer.

In Barraza v. Tootsie Roll Industries, Inc., 294 Ill.App.3d 539, 690 N.E.2d 612 (1st Dist. 1998), the claimant was hired at the Sweets Mix Factory. The Sweets Mix Factory was a wholly owned subsidiary of Tootsie Roll Industries. Claimant's wages were paid through Bee Groth, a temporary employment service that had entered into a contract with Sweets Mix and Tootsie Roll Industries to provide laborers for the plant. The trial judge ruled that the claimant was loaned by Bee Groth to the Sweets Mix Company. Upon review, the appellate court remanded for further consideration, finding that a question of fact existed that was more appropriately addressed by the factfinder. The court instructed the factfinder to consider whether the borrowing employer had the right to direct and control the manner in which the claimant performed the work, and to consider whether there existed a contract of hire,

employer was a subcontractor. The general contractor, however, directed and controlled the claimant's work and supplied the claimant's materials. The general contractor also paid the claimant union wages and provided him with a W-2 statement that he submitted to the IRS. Prior to the accident, the claimant was not told that his employment with the subcontractor had ended or that he was an employee of the general contractor. Furthermore, the claimant did not complete a W-4 form for the general contractor. Nevertheless, the Commission found that the claimant had temporarily ceased his employment with the employer/subcontractor and begun working for the general contractor prior to his injury. Therefore, a loaning/borrowing situation existed between the subcontractor and the general contractor and the general contractor was liable as a borrowing employer under the Act.

In Doreen Caprice Weiher, widow of Jerome W. Weiher, deceased v. A & M Express and Bright Electric., 00 IIC 566 (Aug. 21, 2000), the Commission found that A & M Express, a trucking company, loaned its driver to Bright Electric, a distribution company. In Weiher, the decedent drove a delivery truck two days per week for A & M, who owned two trucks that were used to make deliveries exclusively for Bright Electric. The trucks were licensed through A & M and contained the name "Bright Electric" on the sides of the truck. The decedent was killed while making a delivery to a customer of Bright Electric. The arbitrator found that Bright Electric had direction and control over the decedent. Its shipping department directed the drivers to use a two-way radio to stay in constant communication and provided a route sheet to the drivers each day informing the drivers of the deliveries they were to make and in what order to make them. Furthermore, the trucks were loaded by Bright Electric employees and the Bright Electric logo was located on the sides of the trucks. Based on the foregoing factors, the Commission determined that A & M Express was a loaning employer and Bright Electric was a borrowing employer under the Act.

As discussed above, some form of consent on the part of the employee to the loaning/borrowing arrangement is a factor that the courts will consider in determining whether the loaning/borrowing relationship exists. It has been held that the consent of an employee to the loaning/borrowing employer relationship may be implied in the context of a business like a temporary employment agency. Barraza v. Tootsie Roll Industries, Inc., 294 Ill.App.3d 539, 546, 690 N.E.2d 612, 616 (1997).

Until this year, it had been the rule that once a determination was made that the lending employer met the statutory definition, the other employer was per se the borrowing employer and a factual determination was unnecessary. Wasiolewski v. Havi Corp., 188 Ill.App.3d 340, 544 N.E.2d 116 (2nd Dist. 1989). However, recent cases challenged this assumption. In Crespo v. Weber Stephen Products Co., *supra*, the court indicated that determining an employer's status as a loaning employer was only half the test; a factual determination must still be undertaken to determine if an employment relationship existed between the borrowing employer and the employee at the time of the injury. Crespo, 275 Ill.App.3d 642, 656 N.E.2d 157.

In Chaney v. Yetter Manufacturing Company, 315 Ill.App.3d 823, 734 N.E.2d 1028, (4th Dist. 2000), a temporary worker was injured while working on the premises of a company that was a client of the temporary agency. The court held that a temporary agency's status as a loaning employer did not automatically establish that the temporary worker was a loaned employee and that the client company was a borrowing employer. The court held that a factual inquiry was necessary to determine whether the loaned employee and borrowing employer relationship existed. The court stated that this determination would depend upon the established factors such as the character of the supervision of the work performed, the manner of direction of the employee, the right to discharge, the right to hire, and the mode of payment.

In Lanphier v. Gilster-Mary Lee Corp., 327, Ill.App.3d 801, 765 N.E.2d 493 (3rd Dist. 2002), the sole issue on appeal was whether the trial court properly determined that Lanphier was a loaned employee as a matter of law under the Act. The appellate court stated it found the reasoning in Crespo and Chaney persuasive and held that a temporary worker's status as a loaned employee is a question of fact to be determined by the factfinder. Id. at 495-96. The court further noted that Section 1(a)(4) of the Act does not define loaned employee. Id. The decision in Lanphier indicates that the Courts will no longer make a per se determination that a borrowing employer relationship exists merely because a lending employer relationship has been statutorily created pursuant to the last paragraph of Section 1(a)(4) of the Act. The factual analysis must be followed to determine whether a loaned employee/borrowing employer relationship has been established under the Act.

his work activities. The court reasoned that by accepting Illinois Power's conditions of employment when he went to work at the Clinton Power Station, Plaintiff consented to being a loaned employee. Therefore, the federal court concluded that the worker's claims against Illinois Power must be limited to recoveries allowed under the Worker's Compensation Act.

On a related matter, in Costiloe v. Allis-Chalmers, Corp., 245 Ill.App.3d 896, 615 N.E.2d 798 (3rd Dist. 1993), the court held that both the borrowing and loaning employer are entitled to the limitation of contribution liability conferred upon employers pursuant to Kotecki v. Cyclops Welding Corp., 146 Ill.2d 155, 585 N.E.2d 1023 (1991).

4. Joint, Several, and Primary Liability

The Act provides that loaning and borrowing employers are jointly and severally liable under the Act. Section 1 (a)(4). Between loaning and borrowing employers, primary liability rests with the borrowing employer. Evans v. Abbott Products, Inc., 150 Ill.App.3d 845, 502 N.E.2d 341, (1st Dist. 1986); Silica Sand Transport, Inc. v. Industrial Commission, 197 Ill.App.3d 640, 545 N.E.2d 734 (3rd Dist. 1990). The Act provides that benefits paid by the lending employer on behalf of the injured employee may be recovered from the borrowing employer. Section 1(a)(4). However, in the same sentence, the Act provides that the right of the lending employer to recover from the borrowing employer exists in the absence of an agreement to the contrary, indicating that the Act condones agreements among employers that may shift the burden of providing the employee's compensation.

Nevertheless, the courts have been hesitant to disturb the primacy of the borrowing employer's liability. For example, in Costiloe v. Allis-Chalmers Corp., *supra*, the borrowing employer was still found to be primarily liable despite an agreement to the contrary. The Court stated that the agreement reached between the employers in Costiloe was clearly the type of "agreements to the contrary" contemplated by Section 1(a)(4). However, the Court reasoned that the agreement did not change the fact that the borrowing employer was primarily liable for the payment of the borrowed employee's benefits. The Court reasoned that the agreement only affected the lending employer's right of reimbursement for funds paid as a result of its joint and several liability. Id. at 800.

individual or the public, carries the financial burden of industrial injuries. On the other hand, the doctrine has often been invoked to deny injured workers the opportunity to recover in a negligence action by triggering the exclusive remedy provisions of Section 5 of the Act.

B. Joint Employers

Joint employers are also jointly and severally liable for benefits under the Workers' Compensation Act. Freeman v. Augustine's, Inc., *supra*. Joint employers are those employers who: (1) Participate in hiring and paying the employee; (2) have the power to control the work, and; (3) benefit from the work of the employee. *Id.* If a joint employment relationship exists, each party is afforded the protection of Section 5(a) of the Act against a common law claim for damages.

It has been held that both employers must have paid the employee's wages for joint employment to be found. See Nutt v. Pierce, *supra*. However, in Dildine v. Hunt Transportation, Inc., 196 Ill.App.3d 392, 553 N.E.2d 801 (3rd Dist. 1990), the appellate court found a joint employment relationship even though the worker was only paid wages by one employer. In reaching its determination, the appellate court examined the relationship between the two employers and the degree of control exerted by each over the employee. The court noted that one employer conducted its business out of a garage owned by the second employer and that both companies were subsidiaries of another corporation. Furthermore, testimony indicated that supervisors of one employer had some control over the employees of the other. Therefore, despite the fact that the employee was paid exclusively by one of the employers, the court held that both employers were joint employers of the claimant. The court stated that sharing in the payment of wages was only one of a number of factors to be considered in determining whether a joint employment situation exists. The court stated that the totality of the circumstances should govern the decision.

In Schmidt v. Milburn Brothers, Inc., 296 Ill.App.3d 260, 694 N.E.2d 624 (1st Dist. 1998), the court considered whether a truck driver was jointly employed by two separate companies which combined with three others to form a single enterprise. The truck driver was injured when he was struck by a vehicle operated by an employee of one of the individual companies. As a joint employee, the truck driver would be precluded from recovering damages in a tort claim against the driver of the other vehicle. The court noted that although there was obviously some connection between the two individual companies, nothing indicated that a formal affiliation existed. The two companies were separately incorporated, had

C. Dual Capacity

An employer's liability may be increased to include obligations beyond those provided for under the Workers' Compensation Act. An employer may be found to be operating with a "dual capacity" and thus owe its employees additional duties and compensation for injuries sustained. There has been a great deal of uncertainty regarding the application of this doctrine since it was first applied in Marcus v. Green, 13 Ill.App.3d 699, 300 N.E.2d 512 (5th Dist. 1973).

Through case law, a two-part test has evolved to determine whether an employer has a "dual capacity". The employee must first prove that the employer has a second capacity from which stem obligations that are unrelated to those flowing from their obligations as an employer. Smith v. Metropolitan Sanitary District, 77 Ill.2d 313, 396 N.E.2d 524 (1979). The second part of the test requires the plaintiff to show that the duties stemming from this second capacity do not form the basis for the employee/employer relationship, but rather stem from this second capacity as a separate and distinct legal persona. Sharp v. Gallagher, 95 Ill.2d 322, 447 N.E.2d 786 (1983). A separate theory of liability against the same legal persona, the employer, is not a sufficient basis by itself to succeed under the dual capacity doctrine. Ocasek v. Krass, 153 Ill.App.3d 215, 505 N.E.2d 1258 (1st Dist. 1983). It should be noted that the dual capacity doctrine is an exception to the protection and immunity afforded by Section 5(a) of the Act.

A "second capacity" is one that creates legal obligations on the part of the employer to the general public and not just its employees. See Rosales v. Verson Allsteel Press Co., 41 Ill.App.3d 787, 354 N.E.2d 553 (1st Dist. 1976).

As noted above, the dual capacity provides an exception to the exclusive remedy provision of the Act. Therefore, if the dual capacity doctrine applies, a claimant can pursue recovery under various theories of liability distinct from any compensation to which the employee may be entitled under the Act. In Goins v. Mercy Center for Health Care Services, 281 Ill.App.3d 480, 667 N.E.2d 652 (2nd Dist. 1996), a hospital worker was exposed to infectious blood in the course of his employment. The worker alleged that during his subsequent stay in the hospital as a patient, the hospital violated the Confidentiality Act, giving rise to a cause of action on his part. The court considered whether the exclusive remedy provisions of the Act barred the worker's Confidentiality Act claim against the hospital. The court reasoned that at the time of the alleged violations, the hospital's role had changed from that of an employer providing statutorily required medical treatment to that of a medical provider which owed the

created a distinct persona separate and apart from his role as an agent of the company. Therefore, pursuant to the dual capacity doctrine, the worker's claim in tort was not barred by the exclusive remedy provisions of Section 5(a) of the Act.

Sobczak reflects the evolution of the dual capacity doctrine into a doctrine sometimes referred to as the "dual entity doctrine." As the appellate court explained in Robinson v. Kentucky Fried Chicken National, 171 Ill.App.3d 867, 870, 525 N.E.2d 1028, 1030 (1st Dist. 1988), "an employer may become a third person, vulnerable to tort suit by an employee, if and only if he possesses a second persona though completely independent from and unrelated to his status as employer that by established standards the law recognizes as a separate legal person."

Under the two part test discussed above, even if a separate and distinct legal persona exists, the dual capacity doctrine will not apply unless the second capacity generates obligations unrelated to those flowing from the first. For example, in Stewart v. Jones, 318 Ill.App.3d 552, 742 N.E.2d 896 (2nd Dist. 2001), *rehearing denied*, 754 N.E.2d 1293 (2001), the court held that the dual capacity doctrine did not apply to an individual who was the injured worker's supervisor as well as the owner of the premises where the worker sustained injury. Citing Reynolds v. Clarkson, 263 Ill.App.3d 27, 652 N.E.2d 410 (1995), the court found that the property owner's duties as a landowner were related to his duties as a co-employee of the injured worker. The court reasoned that the individual's duty as the worker's supervisor was to furnish the worker with a safe place to work. As a landowner, the individual had a similar duty to assure that his premises were safe. Therefore, the dual capacity doctrine did not apply and the worker was limited exclusively to compensation as provided pursuant to the Act.

D. Statutory Employer

Consequences can arise which obligate the employer to pay benefits under the Act not only to its own employees, but to those employees of an uninsured contractor or sub-contractor engaged by the employer to perform work. The employer who becomes obligated to pay the benefits to this employee is a "statutory employer". 820 ILCS 305/1(a)3. This Section of the Act provides:

Any one engaging in any business or enterprise referred to in subsections 1 and 2 of Section 3 of this Act who undertakes to do any work enumerated therein, is liable to pay compensation to his own immediate employees in accordance with the provision of this Act, and in addition thereto if he directly or indirectly engages any contractor whether principal

the Act. It should also be noted that an employer's status as a "statutory employer" does NOT create an employment relationship. Therefore, the statutory employer is not afforded the protection and immunity of Section 5(a) of the Act, and thus remains potentially liable to the injured employee at common law. Laffoon v. Bell & Zoller Coal Co., 65 Ill.2d 437, 359 N.E.2d 125 (1977); See also Statewide Insurance Co. v. Brendan Construction Co., 218 Ill.App.3d 1055, 578 N.E.2d 1264 (1st Dist. 1991).

One should not lose sight of the location limitation in this section. The worker must be injured "on, in or about the immediate premises" on which the contracted work was to be performed. 820 ILCS 305/1 (a) 3. If the worker is injured elsewhere, this Section does not apply.

The enterprises enumerated at subsections 1 and 2 need not be the exclusive or even principal business engaged in by the employer in the course of its business in order for the statutory employer provisions to take affect. For example, in CropMate v. Industrial Commission, Ill.App.3d 290, 728 N.E.2d 841 (4th Dist. 2000), the claimant was employed by his uncle. The uncle had contracted with CropMate to erect a building on CropMate's property. The claimant sustained injuries in the course of erecting the building. CropMate was engaged in the business of the sale, manufacture, and delivery of pesticides. The intended use of the building was to store these materials. CropMate argued that it was not in the business of erecting buildings or any of the other activities listed in subsection 1 and 2 of Section 3 of the Act. CropMate asserted that, therefore, it was not a statutory employer of the claimant. The Commission rejected CropMate's argument, reasoning that the building being erected for CropMate was to be used for the storage of materials that CropMate required in its business. Therefore, CropMate would indirectly derive revenue from the building. The court held that the erection or maintenance of a structure need not be the employer's "principal business" in order to invoke the statutory employer provision. The court held that therefore, the claimant was a statutory employee of CropMate pursuant to Section 3 of the Act.

E. Exclusivity Clause

The Act provides an "exclusivity clause" that affords protection to employers from civil liability for injuries sustained by an employee that arise out of and in the course of the injured worker's employment. There are exceptions to this clause as discussed, *supra*, (dual capacity and statutory employer). The exclusivity clause is found in Section 5(a) of the Act which provides in relevant part:

The acceptance of voluntarily paid worker's compensation benefits does not constitute an election of remedy on the part of the injured worker. Zurowska v. Berline Industries, Inc. et.al., 282 Ill.App.3d 540, 667 N.E.2d 588 (1st Dist. 1996). A worker can accept voluntary workers' compensation benefits and still maintain a claim against his employer for an intentional tort at the same time. Id. However, the courts will view filing of the claim and the acceptance of workers' compensation benefits under the Act as an election by the worker as to the choice of remedy. James v. Caterpillar, Inc., 242 Ill.App.3d 538, 611 N.E.2d 95 (5th Dist. 1993).

The exclusivity provision of Section 5(a) will not extinguish an employee's cause of action against an employer for conduct arising out of the scope of the Act. In Toothman, et. al. v. Hardee's Food Systems, 304 Ill.App.3d 521, N.E.2d 80 (5th Dist. 1999), Hardee's employees' filed complaints against their employer alleging false imprisonment and assault and battery. The employees were strip searched by the store's manager and assistant manager based upon their mistaken belief that \$50.00 was missing from the store. Hardee's filed a motion for summary judgment alleging that the Workers' Compensation Act provided the employees' exclusive remedy. The court noted that compensability under the Act could not be proven since the employees' incurred no medical or hospital bills and did not take anytime off work as a result of the incident. Id. at 884. Furthermore, the court noted that the plaintiffs' injuries were not accidental under the Act. Id. The court concluded that because the employees' injuries were not compensable under the Act, they were permitted to sue Hardee's at common law. Id. at 889. The court stated, "Our decision on this issue is strengthened by the central purposes of the Act: to provide workers with financial protection when injured at work, to circumvent employees' problems with proving negligence or willful and wanton conduct by employers, and to relieve workers from the pitfall of questions of contributory negligence." Id. at 888, citing Pathfinder Co. v. Industrial Commission, 62 Ill.2d 556, 563, 343 N.E.2d 913, 916-17 (1976); Moore v. Industrial Commission, 188 Ill.App.3d 31, 35, 543 N.E.2d 1062, 1064-65 (1989).