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Carla Bender
4th District Appellate
Court, IL

2021 IL App (4th) 210003WC-U
No. 4-21-0003WC
Order filed September 21, 2021

IN THE

APPELLATE COURT OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

INDUSTRIAL CONTRACTORS SKANSKA,	)	Appeal from the Circuit Court
	)	of Vermilion County.
Plaintiff-Appellant,	)	
	)	
v.	)	No. 20-MR-165
	)	
THE ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*	)	Honorable
	)	Karen Wall,
(Leah Lutz, Defendant-Appellee).	)	Judge, Presiding.

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

ORDER

¶ 1 *Held*: Commission's decision that contract for hire arose between parties in this state was against the manifest weight of the evidence where last act necessary to form contract did not occur in Illinois.

¶ 2 I. INTRODUCTION

¶ 3 Respondent, Industrial Contractors Skanska, appeals from an order of the circuit court of Vermilion County confirming a decision of the Illinois Workers' Compensation Commission

(Commission) awarding damages pursuant to the provisions of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2014)). The sole issue raised in this appeal concerns the Commission's jurisdiction over this case. For the reasons that follow, we **reverse**.

¶ 4 II. BACKGROUND

¶ 5 Claimant, a resident of Illinois, is an electrician and a member of the International Brotherhood of Electrical Workers (IBEW), Local 538 in Danville, Illinois. Respondent is an electrical contractor based in Evansville, Indiana. Claimant was hired by respondent as an apprentice electrician in July 2014. It is undisputed that claimant sustained a compensable injury in the course of and arising out of her employment with respondent.

¶ 6 Claimant testified that she worked for respondent from July 2014 to March 2015 at the Duke Energy facility in Cayuga, Indiana. At that time, she was a member of IBEW Local 538. She testified that she was an apprentice. She explained that she got jobs by the training director contacting her and sending her to an available job. She added, "[W]e had no choice basically." This is how she came to be employed by respondent. She answered, "I believe so," when asked if she would be paid for going to a job site if the employer determined that it did not need her. When she was sent to respondent's job site, she had to fill out paperwork when she first arrived, including a W-4 form and other tax forms. She also had to sign a "safety booklet paper." Before she started working, claimant had to complete a safety class. She was paid for the time spent in the safety class. Claimant was aware that her local agreed to be bound by the terms of an agreement with the National Electrical Contractors Association (NECA).

¶ 7 On cross-examination, claimant testified that she was first contacted by Cathy Porter regarding the job with respondent. Porter is the union's training director. She did not recall the exact date she was contacted by Porter, but she stated it was "a couple days prior." Porter gave

claimant a referral to bring to the job site. To get the referral form, claimant had to go to the union hall, sign papers, and pick it up. A few days later, she brought the form to respondent in Cayuga, Indiana and presented it. She could not recall to whom she gave the form. She then filled out some tax forms and presented a card showing she had a clean drug screen. She also had to fill out an I-9 form and a "simple application" form. Claimant was given a copy of a safety booklet, which she had to sign, and a drug and alcohol policy. Further, on the day she arrived, she was required to undergo six to eight hours of safety training. During the safety training, she was given a hard hat, safety glasses, and gloves. After training, she was given an employee number and a card that allowed her access to the construction site. She also worked two to three hours on July 21, 2014. Completing the safety training was mandatory.

¶ 8 Claimant testified that under the IBEW's "inside labor agreement," she could be rejected by an employer after being sent to a job site. She was "an applicant" when she showed up to the job site on July 21, 2014. Respondent had a right to reject her "for any legitimate reason."

¶ 9 On redirect-examination, claimant testified that when given a referral by the union hall, an apprentice has no right to turn it down. On recross-examination, claimant testified, "When we get the referral, we are hired." Respondent could reject a referred individual if "they have a reason to." Respondent's counsel asked, "So you officially become an employee of [respondent] after you already are in Indiana?" The arbitrator sustained an objection to this question as calling for a legal conclusion. Under inquiry from the arbitrator, claimant explained: "When I get that referral [respondent] has hired me at that point. If I get to the job site and they decide they don't want me they will spin me at the gate."

¶ 10 Respondent then called Chris Lamberson. He is currently employed by respondent as "Assistant Vice President of Operations for the Midwest." On July 21, 2014, he was a project

manager for respondent. He had worked for respondent since 2004. He remains a card-carrying member of the IBEW but now is in management. Lamberson testified that respondent requested journeymen and apprentices in the same manner. However, he acknowledged that journeymen have "more power over their job assignments than the apprentice." Apprentices do not have the right to decline assignments. Lamberson opined that claimant was not an employee of respondent at the time she was referred by her training director. He noted that the inside labor agreement stated that "the union shall have the sole and exclusive source of referral of applicants for employment." It also provides, "[T]he employer shall have the right to reject any applicant for the employer." Lamberson stated that an applicant had to "go through a series of requirements in order to become an employee of our company." Claimant completed those steps. Lamberson testified that respondent still had a right to reject claimant after she completed safety training.

¶ 11 Lamberson was asked whether claimant would have been paid if she had not "pass[ed] her safety test." Typically, an employee such as claimant would work a few hours at the end of the training day. He answered: "If the employee does not go to work then we deny paying them for that work. There is a process for that called a grievance. More than likely that occurs." According to Lamberson, a referral from the training director constitutes a commitment "saying I am going to go to this location and I am going to work for this contractor."

¶ 12 On cross-examination, Lamberson testified that respondent had agreed to be bound by the terms of the inside agreement, subject to "the right to rebuttal and file a grievance." He agreed that respondent was bound by the terms of the agreement that the union be the sole source of referrals of employees (unless it did not have enough workers available). Under certain conditions, if the employee were unable to work due to conditions beyond his or her control (such as weather

or a gas leak), the employee would receive one hour pay for showing up with a referral. He reiterated that apprentices could not turn down an assignment.

¶ 13 Pertinent here, the arbitrator noted that the labor agreement between respondent and the IBEW states, "Apprentices shall be hired and transferred in accordance with the apprenticeship provisions of the Agreement between the parties." The agreement provides that when a person is directed to a job and does not start work due to weather conditions, lack of material, or other such occurrences, the person is entitled to one hour of pay. The only exception concerns the use of drugs or alcohol. It also states, "The Employer shall have the right to reject any applicant for employment." Further, regarding apprentices, it states that the Joint Apprenticeship & Training Committee (JATC) "shall have full authority for issuing all job training assignments and for transferring apprentices from one employer to another." The JATC is to make "every effort" to accommodate an employer's request for an apprentice. After recounting the testimony of claimant and Lamberson, the arbitrator noted that respondent's records indicate that claimant was paid for 10 hours on July 21, 2014.

¶ 14 The arbitrator found that respondent was operating under and subject to the Act. He noted that under Illinois law, the place the contract for hire arose is the "sole factor" in determining whether Illinois had jurisdiction over this case. He cited *Hunter Corp. v. Industrial Comm'n,* 268 Ill. App. 3d 1079 (1994), in support of his finding. Noting that claimant could not refuse the assignment, the arbitrator found that the contract arose at the time "the phone call was placed to [claimant's] union hall in Illinois and [claimant] was given a referral to the job site."

¶ 15 The Commission affirmed in all aspects material here, the circuit court of Vermilion County confirmed the Commission, and this appeal followed. **One commissioner dissented, relying on (1) the language of the labor agreement that stated that the claimant's union was**

the "exclusive referral agent," (2) the obligations claimant had to fulfill after arriving at respondent's jobsite, and (3) that respondent retained a right to reject a referred person.

¶ 16 III. ANALYSIS

¶ 17 The sole issue raised in this appeal is whether the Commission had jurisdiction over this case. Under the Act, jurisdiction extends to "persons whose employment is outside of the State of Illinois where the contract of hire is made within the State of Illinois." 820 ILCS 305/1(b)(2) (West 2014). A contract for hire arises where the last act necessary for its formation occurs. *Hunter Corp.*, 268 Ill. App. 3d at 1083. The Commission, adopting the decision of the arbitrator, determined that his occurred when "the phone call was placed to [claimant's] union hall in Illinois and [claimant] was given a referral to the job site." Where a contract for hire arose is a question of fact. *Id.* at 1083. Accordingly, we will not disturb the Commission's decision on such a question unless it is contrary to the manifest weight of the evidence. *Id.* A finding is against the manifest weight of the evidence only if an opposite conclusion is clearly apparent. *Id*. **Though it is not our role to substitute our judgment for the Commission on factual matters, we nevertheless have a duty to set aside it's decision where an opposite conclusion is clearly apparent. *Bethlehem Steel Corp. v. Industrial Comm'n,* 41 Ill. 2d 40, 43 (1968).**

¶ 18 The parties dispute whether *Hunter Corp.*, 268 Ill. App. 3d 1079, or *Correct Construction Co. v. Industrial Comm'n*, 307 Ill. App. 3d 636 (1999) should control this case. As noted, the Commission determined that the former did. We will examine each case in detail.

¶ 19 First, we turn to *Hunter Corp*. In that case, the claimant was a union boilermaker working in Hammond, Indiana. The claimant's union was based in Illinois, but had jurisdiction over parts of Indiana. The respondent-employer was a signatory to an employment agreement with the union of which the claimant was a member. The respondent got workers from the union by making a

request of the union; the union would then refer employees to respondent. The respondent could reject employees "based upon physical incapacity or a lack of qualifications." If the union referred an employee to the respondent and the respondent had no work for the employee, the respondent was obligated to pay the employee two hours of wages plus travel expenses. When a referred employee arrived at a job site, he or she had to fill out various forms.

¶ 20 The claimant received a call from the union's referral agent referring him to the respondent's job site. The claimant arrived, filled out the required paperwork **(which included a "sign-up form" rather than an application)**, and started working. He was injured about three weeks later. Pertinent here, the arbitrator determined that the contract for hire between the claimant and the respondent arose in Illinois when the respondent contacted the union and requested employees. The Commission affirmed the arbitrator, finding significant the fact that the respondent was required to pay the claimant two hours of wages and travel expenses if it did not have work for him after he had been referred.

¶ 21 The respondent challenged the Commission's finding regarding jurisdiction on appeal. This court noted that where a contract for hire arose is a question of fact. *Hunter Corp.*, 268 Ill. App. 3d at 1083. We observed that the respondent called the union and requested an employee; the union contacted the claimant and directed him to report to the respondent's job site; and the claimant went to the job site and filled out the required forms. *Id.* at 1084. We found the fact that the respondent could reject the claimant insignificant because if it did so for anything other than the two permitted reasons (physical incapacity or lack of qualifications), a grievance would be filed. *Id.* We also placed significance on the claimant's entitlement to two hours of pay plus travel expenses if the respondent did not have work available for him. *Id.* Therefore, we held that the Commission's decision was not against the manifest weight of the evidence. *Id.*

¶ 22 Next, we examine *Correct Construction Co.*, 307 Ill. App. 3d 636. That case also involved an Illinois claimant—a union pipefitter—who worked and was injured in Indiana. *Id.* at 636-37. The arbitrator found Illinois had jurisdiction over the matter, and the Commission affirmed. *Id.* at 637. In this case, the union involved had business offices in Chicago, but maintained a satellite office in Hammond, Indiana. A member of the union was required to seek employment only through the union. The claimant was contacted by a union business agent from the Hammond office regarding a job available with the respondent. The job site was in Indiana. The claimant told the business agent that he would accept the position. He arrived at the job site at about 7 a.m. the next day, and he was given an employment application and tax forms to fill out. He gave the respondent a drug-screening card. He did not recall undergoing safety training or receiving any documents pertaining to safety information.

¶ 23 The union business agent testified that the respondent was required to hire through the union (with certain exceptions not pertinent here). He further stated that a union member would be paid for time spent filling out paperwork on the first day of employment. The agreement under which the respondent and the union were operating stated that the employer shall have "the sole and exclusive responsibility for hiring" and "the sole and exclusive right of accepting or rejecting applicants for work." It also stated that "[a] person that accepts an employment referral but who is not employed by the employer shall not receive show-up pay or any other compensation." The respondent's office manager testified that a referred employee would not be hired if they did not provide the necessary documentation or failed to complete safety training. Once the individual meets the requirements, he or she is "hired" and paid for time spent in-processing. One of the respondent's field managers testified that referred employees "could be refused for any nondiscriminatory reason, including lack of qualifications or poor work record."

¶ 24 The arbitrator found that the last act necessary to form a contract between the claimant and the respondent occurred when the claimant decided to accept of the job offer (the Commission affirmed). On appeal, this court disagreed. It relied on the language of the contract granting the respondent the exclusive responsibility for hiring and a right to reject a referred employee. *Id.* at 641. It noted that the only limitation on the respondent's right to reject a referred employee was that the rejection could not be for discriminatory reasons. *Id*. It further observed that if a contract for hire arises, an employer would have to notify the union. The court reasoned that this would be unnecessary if it arose when the prospective employee communicated his desire to accept the position to a business agent of the union. *Id.* Under the language of the governing labor agreement, the union was the exclusive *referring* agent, "as distinct from the exclusive *hiring* agent." *Id.* at 642 (emphasis in original). The court distinguished *Hunter Corp.*, 268 Ill. App. 3d 1079, citing three reasons: (1) the referred employee was entitled to two hours of show-up pay; (2) the referred employee had to fill out a "sign-up form" rather than an application; and (3) if the employer rejected the referred employee for any reason other than physical incapacity or lack of qualifications, a grievance would be filed. *Correct Construction Co.*, 307 Ill. App. 3d at 644. This court then reversed the Commission's decision.

¶ 25 **Here, claimant asserts that the Commission was correct to rely on *Hunter Corp.*; respondent argues *Correct Construction Co.* controls. We agree with respondent. Here, language in the labor agreement between respondent and the union clearly states that the union is the exclusive referral agent for respondent and that respondent retains a right to reject a referred individual. In *Correct Construction Co.*, we found similar contractual language decisive: "This language clearly contemplates that the last act necessary for contract formation is the employer's decision to hire the referred Union member." *Correct***

***Construction Co.*, 307 Ill. App. 3d at 641. The presence of this language in the labor agreement that is operative in this case clearly brings it within the ambit of *Correct Construction Co*. Moreover, as in this case, the claimant in *Correct Construction* had to fill out an application after reporting to the respondent's work site; conversely, in *Hunter Corp.* the claimant merely filled out a "sign-up form."**

¶ 26 **Finally, we note the testimony of claimant and Lamberson. Lamberson testified that an applicant had to "go through a series of requirements in order to become an employee of our company." He also stated that respondent still had a right to reject claimant after she completed safety training. Claimant testified that under the IBEW's "inside labor agreement," she could be rejected by an employer after being sent to a job site. She acknowledged that she was "an applicant" when she showed up to the job site on July 21, 2014. Further, she agreed that respondent had a right to reject her "for any legitimate reason." Such testimony compels us to hold that an opposite conclusion to the one drawn by the Commission is clearly apparent.**

¶ 27 **In sum, we hold that the last act necessary to form a contract for hire between the parties occurred in Indiana after claimant reported to respondent's jobsite. Thus, the Commission's decision is contrary to the manifest weight of the evidence.**

¶ 28 IV. CONCLUSION

¶ 29 **In light of the foregoing, the judgment of the circuit court of Vermilion County and the decision of the Commission are reversed.**

¶ 30 **Circuit court judgment reversed; Commission decision reversed.**