FIRST DIVISION
April 23, 2018

No. 1-17-0079

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

LIBERTY INSURANCE CORPORATION a/k/a LIBERTY MUTUAL INSURANCE COMPANY, Plaintiff-Appellant, v. SUPER TRUCKING CONSTRUCTION, INC.; THE ILLINOIS DEPARTMENT OF INSURANCE; ANDREW BORON; and LOUIS BUTLER, Defendants-Appellees.	)	Appeal from the Circuit Court of Cook County No. 14 CH 15183 The Honorable Thomas R. Allen, Judge Presiding.

PRESIDING JUSTICE PIERCE delivered the judgment of the court.
Justices Harris and Mikva concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court had subject matter jurisdiction over plaintiff's complaint for administrative review. The administrative agency's determination that truck drivers were independent contractors of the defendant trucking brokerage company was not clearly erroneous, and the Employee Classification Act did not apply.

¶ 2 Plaintiff Liberty Insurance Corp. (Liberty) appeals from the circuit court's judgment affirming an administrative order from defendant Illinois Department of Insurance (Department). Following a hearing, the Department adopted the hearing officer's conclusion that Liberty was

not entitled to collect additional workers' compensation insurance premiums from Super Trucking Construction, Inc. (Super Trucking) because Super Trucking's truck drivers were independent contractors and not employees. On administrative review, the circuit court affirmed the Department's order. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Super Trucking obtained a workers' compensation insurance policy through the Illinois Workers' Compensation Insurance Plan administered by the National Council on Compensation Insurance (NCCI), which provides a method for employers to obtain workers' compensation insurance coverage through the residual market when they cannot obtain it on their own. The NCCI binds coverage and then assigns the risk to a servicing carrier. Liberty is a servicing carrier for the Plan, and was assigned as Super Trucking's insurer. Liberty performed annual audits of Super Trucking's records in order to determine whether Super Trucking paid the correct amount of workers' compensation insurance premiums. In 2009, Liberty informed Super Trucking that, as part of an upcoming audit, Liberty was going to reaudit Super Trucking for the two previous policy periods. After the reaudit, Liberty determined that Super Trucking's independent contractors were actually employees, and therefore Super Trucking owed additional premiums. Super Trucking informed Liberty that it disputed the conclusions of the reaudit.

¶ 5 Super Trucking, through its insurance broker Rand-Tec Insurance Agency (Rand-Tec), requested NCCI's assistance in resolving the parties' premium dispute.[1] NCCI sent a letter to Rand-Tec on behalf of Super Trucking and to Liberty explaining that "the jurisdiction of the NCCI's Workers Compensation Appeals Board" is limited to "the application of the [NCCI's] [(1)] Experience Rating Plan, [(2)] Classification system, and [(3)] manual rules." The NCCI concluded that it lacked jurisdiction over the parties' dispute because "[c]overage or employment

[1]We have not located Rand-Tec's initial request for NCCI assistance in the record on appeal.

status disputes require an interpretation of state or federal law and cannot be resolved by an interpretation or application of NCCI rules." The NCCI letter stated, "You may now file an appeal with the Director of Insurance in accordance with [s]ection 462 of the Illinois Insurance Code [215 ILCS 5/462 (West 2010)] ***."

¶ 6 Rand-Tec sent a letter "appealing" to the Department for a ruling on whether Super Trucking was responsible for paying additional workers' compensation insurance premiums to Liberty. The Director of the Department (Director), "pursuant to sections 401, 402, and 403 of the Illinois Insurance Code [215 ILCS 5/401, 402, 403 (West 2010)]," designated defendant Louis Butler as the hearing officer to conduct a hearing. The parties engaged in discovery and a two-day hearing took place in January 2011.

¶ 7 The following facts were established at the Department's hearing.

¶ 8 In 2004, Super Trucking owned a maintenance shop, a fleet of trucks, and had a staff of about 20 "company drivers," which it considered employees. Super Trucking was sold to its current owners in 2004. In 2005, Super Trucking adopted a new business model as a "trucking brokerage," connecting its customers with truckers and trucking companies to meet the customers' needs. Super Trucking stopped employing company drivers and entered into written contracts with individual truck owner-operators and independent trucking companies to provide services as needed.

¶ 9 Super Trucking also offered its former company drivers the opportunity to start their own businesses and offered to finance the purchase of a truck for drivers who could not obtain their own financing. The driver would sign a "lease purchase agreement" and Super Trucking would deduct lease and interest payments from the driver's paycheck. Super Trucking also loaned some of the "lease purchase drivers" startup money for costs for items such as plates and licenses, as

well as premiums for liability and workers' compensation insurance. Super Trucking would then deduct from the lease purchase driver's paychecks loan repayments and would escrow an amount from the driver's paycheck to pay for the driver's maintenance and fuel costs.

¶ 10 In addition to the lease purchase drivers, Super Trucking entered into numerous independent contracts with owner-operators who were sole proprietors that owned their own trucks. Super Trucking also entered into broker-carrier agreements with numerous trucking companies that employed multiple drivers (carrier companies). The drivers employed by the carrier companies were covered by the carrier companies' workers' compensation insurance policies. Liberty acknowledges that these carrier company drivers were employees of carrier companies and were not employees of Super Trucking.

¶ 11 Liberty issued Super Trucking a workers' compensation insurance policy for the policy period of April 2006 through April 2007. The policy was renewed for the policy periods of 2007-08, 2008-09, and 2009-10. In 2007 and 2008, Liberty performed annual audits of Super Trucking's records for the policy periods of 2006-07 and 2007-08, respectively, and determined that Super Trucking did not owe additional premiums based on the fact that Super Trucking produced proof of insurance for the drivers with whom it contracted. However, in June 2009, Liberty informed Super Trucking that its audit for the policy period of 2008-09 would include a reaudit of the policy periods of 2006-07 and 2007-08. There was testimony at the hearing that the reaudit was due to two workers' compensation claims made by individuals that had driven for Super Trucking. One of those claims was by Arnulfo Pasillas, who reported an injury in March 2007. Liberty settled Pasillas's claim because it believed that Pasillas was an employee of Super Trucking.

¶ 12 During Liberty's reaudit, Super Trucking provided 1099 forms and certificates of insurance for its subcontractors, although it could not produce a certificate of insurance for Pasillas. After the reaudit, Liberty concluded that most or all of the truck drivers who drove for Super Trucking were Super Trucking's employees, and that Super Trucking owed Liberty over $800,000 in additional premiums.[2]

¶ 13 Relevant to the issues on appeal, Super Trucking called eight witnesses, including Kevin Herbig (one of Super Trucking's owners), Jennifer Bridgeman (the Super Trucking employee that kept track of certificates of insurance for Super Trucking's contractors), and five of Super Trucking's contractors. Liberty called three of Super Trucking's former lease purchase drivers as witnesses. The parties introduced numerous exhibits including Super Trucking's workers' compensation insurance policy, audit reports for the policy periods at issue, and copies of certain Super Trucking independent contractor agreements and lease purchase agreements. We summarize only the evidence relevant to the issues before us on appeal.

¶ 14 Herbig testified that he is one of Super Trucking's owners. He testified that all drivers entered into some form of written agreement with Super Trucking and that the drivers were required to provide documentation to show that they were able to work. All of the subcontractors were responsible for maintaining their own trucks and paid for their own fuel, repairs, tolls, and other necessary costs. Super Trucking's customers would request trucks and Super Trucking's dispatcher would select drivers from its list of contractors. Super Trucking did not set the drivers' hourly wage or set the drivers' hours. Super Trucking did not control when drivers took rest stops, which routes they took, where they refueled their trucks, where and when the drivers serviced their trucks, or where the drivers stored their trucks. Super Trucking did not withhold

[2]No party identifies on appeal the precise amount of premiums allegedly owed to Liberty by Super Trucking.

income or Social Security taxes from any drivers' paychecks and does not provide drivers with health insurance, life insurance, pension benefits, or any other benefits. Super Trucking was not involved in purchasing workers' compensation insurance for any of its subcontractors, and the drivers and companies could select their own insurance brokers and companies. Super Trucking did not provide performance evaluations. All of the drivers were free to decline any particular job and were not required to get Super Trucking's permission to accept other jobs. There was no dress code or uniform and Super Trucking did not have any driver appearance requirements. When Super Trucking employed union drivers, Super Trucking provided a manual or training for the trucking companies, but this practice stopped when Super Trucking began using nonunion drivers. Super Trucking did not lease material or equipment to drivers other than the trucks leased to the lease purchase drivers. Super Trucking retained a 12% brokerage fee for its services. Super Trucking withheld 30% of lease purchase drivers' wages in escrow for fuel and maintenance charges, and also withheld amounts for lease and interest payments towards the leased truck.

¶ 15 Bridgeman testified that she handled Super Trucking's general office duties, including subcontractor payroll and ensuring that subcontractors filled out the proper paperwork. Super Trucking collected information from drivers such as articles of incorporation or limited liability company documents, Illinois Commerce Commission (ICC) certificates stating the company's name and ICC numbers, and certificates of insurance for general, automobile, and workers' compensation insurance. Super Trucking had no involvement in purchasing workers' compensation insurance for its subcontractors and did not have any control over what insurance broker or company a subcontractor used.

¶ 16 Super Trucking also introduced testimony from four independent contractors who provided trucks and drivers to Super Trucking under owner-operator agreements and broker-carrier agreements, and testimony from one of Super Trucking's former lease purchase drivers. The four independent contractors were Raymond Rocke, Fernando Alas, Robert Taylor, and Duane Upchurch. Rocke testified that he owned a company called Vadar Trucking (Vadar), which was still doing business with Super Trucking at the time of the hearing. Between 2006 and 2009, Vadar employed eight truck drivers. Rocke estimated that 15-20% of Vadar's business was done through Super Trucking. Alas testified that he owned Inter United Trucking Corp. (Inter United), which was still doing business with Super Trucking at the time of the hearing. Between 2006 and 2009, Inter United employed or contracted with 40-50 people. Alas estimated that 20-25% of Inter United's business was done through Super Trucking. Taylor testified that he owns TNT Trucking Services, Inc. (TNT). Between 2006 and 2009, TNT had no employees and did not employ any drivers. Taylor estimated that 90% of his business was done through Super Trucking. Upchurch testified that he owned Dewey Upchurch and Son's Trucking, LLC (Dewey Upchurch). Between 2006 and 2009, Dewey Upchurch employed two full-time employees, a part-time employee, and two subcontractors. Upchurch estimated that less than 5% of his business was done through Super Trucking. Rocke, Alas, Taylor, and Upchurch each testified that they owned their own trucks.

¶ 17 Finally, Glen Maksinski testified that he owned GLM Enterprises, Inc. Maksinski was a lease purchase driver with Super Trucking between 2006 and 2009, but ended his business relationship with Super Trucking sometime in 2009. He purchased two trucks through Super Trucking. At times, he had other drivers working for him. He estimated that he performed jobs

for Super Trucking about two days a week, sometimes more, sometimes less. Maksinski leased two trucks through Super Trucking, which he subsequently purchased.

¶ 18 Rocke, Alas, Taylor, Upchurch, and Maksinski each testified that Super Trucking did not have any control over who they hired. Super Trucking did not establish the hours they or their drivers worked. Super Trucking withheld a brokerage fee, but did not withhold income or Social Security taxes from the wages it paid, and did not provide any life insurance, auto insurance, pension benefits, or any other benefits. Rocke, Alas, Taylor, Upchurch, and Maksinski each testified that they purchased their own plates and auto insurance, paid their own tolls, and had their own ICC numbers. They were not required to get Super Trucking's permission before accepting work from other trucking brokers or companies. Super Trucking did not have any control over maintenance schedules for their trucks or where the trucks were fueled, serviced, or stored. Super Trucking did not require any pretrip inspections of the trucks and did not require the drivers to maintain driving logs. Super Trucking did not exercise any control over how the drivers secured loads on their trucks or what routes the drivers took. Super Trucking did not provide them or their drivers with performance reviews. Super Trucking did not regulate the drivers' appearance or dress and did not provide them with—or require them to wear—a uniform. Super Trucking did not withhold workers' compensation insurance premiums, and Super Trucking had no involvement in procuring workers' compensation insurance for their companies.

¶ 19 Liberty presented the testimony of three former lease purchase drivers. Daniel O'Dell was a former company driver who leased a truck from Super Trucking in either 2004 or 2005 and worked for Super Trucking until 2013. Between 2006 and 2009, he did not consider himself an independent contractor. He continuously worked for Super Trucking and felt that he did not

have the option to decide whether to come to work. He testified that on one occasion, Gary Rabine, Sr., one of Super Trucking's owners, demanded that O'Dell come into work when O'Dell's father was in town visiting and O'Dell was sick with the flu. O'Dell owed Rabine money for repairs to O'Dell's truck. Rabine had personally lent O'Dell money to make a down payment for insurance and for plates. Rabine had also personally lent money to O'Dell to pay for child care and to pay off unrelated payday loans. O'Dell would sign over part of his paycheck to pay back Rabine. O'Dell testified that he has his own ICC number. Rabine personally paid the costs for O'Dell to incorporate. Super Trucking did not withhold income or Social Security taxes and did not provide him with health insurance, life insurance, pension benefits, or any other benefits. Super Trucking did not instruct him on how to secure loads and did not control the routes he took. O'Dell performed jobs based on instructions from the customer, not Super Trucking. He did not keep a driving log and Super Trucking did not have a safety program. Super Trucking paid for his workers' compensation insurance. He did not have a uniform and could choose how he dressed.

¶ 20 Marilyn Webster was a company driver for Super Trucking in 2003-04 and was a lease purchase driver from 2005 until she left in 2006. She continually worked for Super Trucking and stated that she was allowed to refuse jobs if she wanted to. She could have her truck serviced wherever she chose. Super Trucking's dispatcher would tell her who the customer was and where to go, but the customer would tell her what to do. She paid her own tolls. Super Trucking never gave her a performance review. Super Trucking never set her hours and did not provide her with a uniform. Her workers' compensation and auto insurance payments were withheld from her paycheck and she did not select her insurers.

¶ 21 Rush DePoutee testified that he had worked for Super Trucking under a lease purchase agreement. Super Trucking would tell him where to go. He purchased his fuel wherever he wanted to and he decided where to get repairs done. He chose his own routes.

¶ 22 Liberty also introduced copies of Super Trucking's lease purchase agreements. Under the lease purchase agreement, Super Trucking maintained the right to rent the leased truck from the lease purchase driver. The lease purchase driver could use the truck for other jobs if they gave 72 hours' notice to Super Trucking, provided that Super Trucking did not anticipate the need for the driver's services. The lease purchase driver was responsible for maintaining and insuring the truck while Super Trucking held title to the truck. The lease stated "Lessee also has read and will abide by the rules and requirements of the Super Trucking Construction Co. Policy Handbook." An event of default under the lease included a lease purchase driver's failure (1) to make lease payments, (2) perform his other obligations under the lease, (3) follow Super Trucking's rules and regulations, or (4) cure a negative escrow balance within 30 days. Furthermore, a lease purchase driver's insolvency was an event of default. If the driver defaulted on his obligations, Super Trucking could either terminate the lease, demand full payment, repossess the truck without a court order, sell the truck, or "take steps as necessary to recover" its costs as provided for by law.

¶ 23 Finally, Liberty introduced copies of Super Trucking's "Independent Contract for Owner Operators." Under these agreements, the contractor, which was defined as the driver, "in its sole discretion shall direct in all aspects," including (1) when a load was to be picked up and unloaded, (2) how the load was to be loaded and tied down, (3) when to take rest stops, (4) where to get oil and fuel, (5) where and how the truck was repaired, stored, and maintained "subject to compliance" with all state and federal regulatory bodies, (6) time of delivery, (7) how the service

was performed, and (8) working hours. If the contractor became ill, the contractor could employ a substitute, and the contractor was responsible for directing and controlling the substitute driver for all purposes, including wages and workers' compensation insurance. Super Trucking had no disciplinary authority over the contractor or its employees, no authority to fire any of the contractor's employees, no responsibility to provide holiday pay, vacation pay, or any benefits, and no authority to withhold any state, local, or federal taxes. The contractor agreed to comply with all federal, state, and local laws, rules, and regulations. When the contractor performed work for Super Trucking, the contractor was required to use signs bearing "Super Trucking Construction Co.," but was required to remove any signage when performing work for any other carrier. The contractor was responsible for all licensing fees, fuel taxes, costs, tolls, and other fees and fines. The contractor was responsible for its own liability and workers' compensation insurance. Under a section entitled "Miscellaneous Information," the agreement stated "Super Trucking *** has exclusive control, use, and responsibility for the operation of equipment for the duration of the lease." The agreement, however, does not define "equipment."

¶ 24 On August 1, 2014, the hearing officer issued his "Findings of Fact, Conclusions of Law, and Recommendations." He concluded that Super Trucking's drivers were independent contractors and not employees. On the question of whether the lease purchase drivers were employees, he found it was a "close call," but "based on the totality of the testimony it cannot be said that Super Trucking had control over the [lease purchase] drivers." On August 21, 2014, the Director adopted the hearing officer's findings of fact, conclusions of law, and recommendations, and concluded that Liberty was not entitled to any additional workers' compensation premiums from Super Trucking.

¶ 25 On September 19, 2014, Liberty filed a complaint for administrative review in the circuit court. The Department moved to dismiss Liberty's complaint for lack of jurisdiction for failing to exhaust administrative remedies. The circuit court denied the Department's motion. After briefing and hearing oral argument, the circuit affirmed the Department's decision. Liberty's motion to reconsider was denied, and Liberty filed a timely notice of appeal.

¶ 26 ANALYSIS

¶ 27 On appeal, Liberty raises two main arguments. First, it contends that the Department misapplied Illinois common law in reaching its conclusions. Liberty argues that the single most important factor in determining the nature of an employment relationship is whether the employer has the right to control the actions of the worker. See *Ware v. Industrial Comm'n*, 318 Ill. App 3d 1117, 1122 (2000). Liberty argues that the Department failed to correctly apply this "direction and control" test because the Department focused on Super Trucking's actual exercise of control rather than its right to control. Liberty further contends that the Department failed to consider the nature of the work performed by Super Trucking's drivers in relation to the general business of Super Trucking. See *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66, 71 (1982). Liberty argues that a proper application of these common law tests show that Super Trucking's drivers are employees. Second, Liberty argues that the Department failed to apply the Employee Classification Act (820 ILCS 185/1 *et seq.* (West 2014)), in determining whether Super Trucking's truck drivers were independent contractors rather than employees. Liberty acknowledges that Vadar and Inter United are carrier companies, and that Vadar and Inter United's drivers "are not employees of Super Trucking but rather are the employees of" those carrier companies. Liberty's arguments on appeal, therefore, relate only to drivers who

performed services for Super Trucking under lease purchase agreements and owner-operator agreements.

¶ 28 As a threshold matter, we must address the Department's argument that the circuit court lacked jurisdiction over Liberty's complaint for administrative review because Liberty failed to exhaust its administrative remedies by failing to file a motion for rehearing before the Department. The Department contends that its administrative rules allow for a party to file a motion for rehearing, and that when the rules allow for such a motion, a party aggrieved by the agency's decision must seek rehearing in order to exhaust its administrative remedies. It is undisputed that Liberty did not seek rehearing before the Department. We conclude, however, that Liberty was not required to file a motion to reconsider before seeking administrative review in the circuit court.

¶ 29 Whether the circuit court had subject-matter jurisdiction is a question of law reviewed *de novo*. *J&J Ventures Gaming, LLC v. Wild*, Inc., 2016 IL 119870, ¶ 25. The Illinois Constitution provides that "Circuit Courts shall have such power to review administrative action as provided by law." Ill. Const. 1970, art. VI, § 9. A court exercises special statutory jurisdiction when reviewing an administrative decision, and thus "[a] party seeking to invoke a court's special statutory jurisdiction must strictly comply with the procedures prescribed by the statute." *Ultsch v. Illinois Municipal Retirement Fund*, 226 Ill. 2d 169, 178 (2007). The circuit court "has no jurisdiction to review an administrative decision if the mode of procedure for administrative review, as provided by law, is not strictly followed." *Catledge v. Dowling*, 2017 IL App (1st) 162033, ¶ 13 (citing *Nudell v. Forest Preserve District of Cook County*, 207 Ill. 2d 409, 422-23 (2003)).

¶ 30 Here, the Director's final order stated:

> "This Order is a Final Decision pursuant to the Illinois Administrative Procedure Act (5 ILCS 100/1 *et seq* [(West 2014)].). Parties to the proceeding may petition the Director of Insurance for a Rehearing or to Reopen the Hearing pursuant to Section 2402.280 of Title 50 of the Illinois Administrative Code (50 Ill. Adm. Code 2402.280 [(2014)]). Appeal of this Order is governed by the Illinois Administrative Review Law (735 ILCS 5/3-101 *et seq*. [(West 2014)])."

¶ 31 The exhaustion of administrative remedies doctrine "has long been a basic principle of administrative law—a party aggrieved by administrative action ordinarily cannot seek review in the courts without first pursuing all administrative remedies available to him." *Illinois Bell Telephone Co. v. Allphin*, 60 Ill. 2d 350, 357-58 (1975). The exhaustion doctrine allows the administrative agency to fully develop a record, apply its expertise to the facts before it, and allows a party to ultimately succeed before the agency without resorting to administrative review in the courts. *Illinois Health Maintenance Organization Guaranty Ass'n v. Shapo*, 357 Ill. App. 3d 122, 130 (2005) (citing *Castaneda v. Illinois Human Rights Comm'n*, 132 Ill. 2d 304, 308 (1989)). "The doctrine also helps protect agency processes from impairment by avoidable interruptions, allows the agency to correct its own errors, and conserves valuable judicial time by avoiding piecemeal appeals." *Castaneda*, 132 Ill. 2d at 308. "Where the administrative rules allow for applications for rehearing, a party must do so in order to exhaust his administrative remedies and preserve his right to seek judicial review." *Burns v. Department of Insurance*, 2013 IL App (1st) 122449, ¶ 12 (citing *Castaneda*, 132 Ill. 2d at 321-23).

¶ 32 Section 3-102 of the Administrative Review Law provides:

> "Unless review is sought of an administrative decision within the time and in the manner herein provided, the parties to the proceeding before the administrative agency shall be barred from obtaining judicial review of such administrative decision. *** If under the terms of the Act governing the procedure before an administrative agency an administrative decision has become final because of the failure to file any document in the nature of objections, protests, petition for hearing or application for administrative review within the time allowed by such Act, such decision shall not be subject to judicial review hereunder excepting only for the purpose of questioning the jurisdiction of the administrative agency over the person or subject matter." 735 ILCS 5/3-102 (West 2016).

¶ 33 Section 2402.280 of the Administrative Code allows the Director to "order a rehearing in a contested case on petition of an interested party." 50 Ill. Admin. Code § 2402.280(a) (2014). "A motion for a rehearing or a motion for the reopening of a hearing shall be filed within 10 days of the date of mailing of the Director's [o]rder." *Id.* § 2402.280(c).

¶ 34 Therefore, because the Department's administrative rules allow an aggrieved party to seek rehearing, Liberty was obligated to seek rehearing before the Department in order to exhaust its administrative remedies prior to seeking administrative review in the circuit court. *Catledge*, 2017 IL App (1st) 162033, ¶ 15.

¶ 35 Our supreme court, however, has identified several exceptions that permit a party to seek administrative review without complying with the exhaustion doctrine. See *Casteneda*, 132 Ill. 2d at 308-309. One such exception is where the administrative agency's expertise is not involved. *Id.* at 309. Here, the Department does not offer a compelling argument that it has any particular agency expertise on the question of whether an employment relationship exists.

Instead, the Department applied well-settled common law principles used by courts when determining the nature of an employment relationship, which are not unique to or within the exclusive province or expertise of any particular adjudicatory body. The parties' dispute turns solely on the question of whether an employment relationship exists, and the Department was not called upon to apply its expertise in insurance matters to resolve the parties' dispute. We therefore conclude that Liberty's failure to seek rehearing before the Department did not deprive the circuit court of subject-matter jurisdiction over Liberty's complaint for administrative review.

¶ 36 We now turn to the merits of Liberty's appeal. In administrative review cases, we review the decision of the administrative agency, not the circuit court. *Orsa v. Police Board of the City of Chicago*, 2016 IL App (1st) 121709, ¶ 47. "The applicable standard of review, which determines the degree of deference given to the agency's decision, depends upon whether the question presented is one of fact, one of law, or a mixed question of law and fact." *AFM Messenger Service, Inc. v. Department of Employment Security*, 198 Ill. 2d 380, 390 (2001). An administrative agency's factual findings are *prima facie* correct and are reviewed under the manifest weight of the evidence standard. *Orsa*, 2016 IL App (1st) 121709, ¶ 47. A mixed question of law and fact involves "an examination of the legal effect a given set of facts," which we review under the clearly erroneous standard. *City of Belvidere v. Illinois State Labor Relations Board*, 181 Ill. 2d 191, 205 (1998). An agency decision "will be deemed 'clearly erroneous' only where the reviewing court, on the entire record, is 'left with the definite and firm conviction that a mistake has been committed.' " *AFM Messenger*, 198 Ill. 2d at 395 (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). Finally, an administrative agency's findings on a question of law are reviewed *de novo*. *AFM Messenger*, 198 Ill. 2d at 395.

¶ 37 Here, the Department's determination of the employment relationship between Super Trucking and its truck drivers involves a mixed question of law and fact because it required the Department to make factual determinations and then apply the law to those facts. We therefore review the Director's decision under the clearly erroneous standard. *City of Belvidere*, 181 Ill. 2d at 205. Liberty's argument that the Employee Classification Act applies involves a pure question of law that we review *de novo*.

¶ 38 First, we reject Liberty's argument that the Employee Classification Act applies to this case. The Employee Classification Act is directed at the classification of employees in the construction industry and is administered by the Illinois Department of Labor. *Bartlow v. Costigan*, 2014 IL 112152, ¶ 3. The purpose of the Employee Classification Act is "to address the practice of misclassifying employees as independent contractors." 820 ILCS 185/3 (West 2016). The Employee Classification Act states, "For the purposes of this Act, an individual performing services for a contractor is deemed to be an employee of the employer except as provided in subsections (b) and (c) of this Section." *Id.* § 10(a). The Employee Classification Act provides, "Any interested party may file a complaint with the Department [of Labor] against an entity or employer covered under this Act if there is a reasonable belief that the entity or employer is in violation of this Act. It shall be the duty of the Department to enforce the provisions of this Act." *Id.* § 25. There is, however, nothing in the Employee Classification Act that suggests a legislative intent to modify or displace the factors used by courts to determine the nature of an employment relationship for the purposes of workers' compensation insurance coverage. Liberty does not identify any case law in which we or our supreme court have applied the Employee Classification Act to an insurance premium dispute over a person's employment

status. We therefore conclude that the Employee Classification Act does not control our analysis of the employment relationship between Super Trucking and its truck drivers.

¶ 39 Next, we find that the Department's determination that the truck drivers at issue were independent contractors was not clearly erroneous. When determining whether a person is an employee or an independent contractor, we consider a number of factors, including:

> "(1) whether the employer may control the manner in which the person performs the work; (2) whether the employer dictates the person's schedule; (3) whether the employer pays the person hourly; (4) whether the employer withholds income and social security taxes from the person's compensation; (5) whether the employer may discharge the person at will; and (6) whether the employer supplies the person with materials and equipment." *Roberson v. Industrial Comm'n*, 225 Ill. 2d 159, 175 (2007).

¶ 40 We also consider whether a worker's "services form a regular part of the cost of a product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow ***. *Ragler*, 93 Ill. 2d at 71. While the right to control the manner of work is often called the most important consideration, no single factor is determinative of the employment relationship, and a determination ultimately rests on the totality of the circumstances. *Roberson*, 225 Ill. 2d at 175. Here, Liberty confines its arguments to Super Trucking's alleged right to control the drivers' work, and to what Liberty calls the "relativity" test, which examines the worked performed by drivers in relation to Super Trucking's business.

¶ 41 There was competing evidence regarding Super Trucking's right to control the manner of the drivers' work. Liberty argues that Super Trucking "told drivers where to go and what to do." Liberty further points to the lease purchase agreements as evidence of the right to control, which

allowed lease purchase drivers to use the leased truck for other job opportunities if the driver provided 72 hours' notice to Super Trucking provided that Super Trucking did not anticipate the need for the driver's services, and required the drivers to follow Super Trucking's rules. But Liberty does not explain how an obligation to give notice of unavailability amounts to "right to control" the drivers' work. Furthermore, not a single witness testified that they received the "Super Trucking Construction Co. Policy Handbook" referenced in the lease purchase agreements, and there was no testimony that there were any policies that were ever enforced against any drivers. Instead, there was testimony that a dispatcher from Super Trucking would call the drivers and tell them where to go to perform work for a customer. The customer would then tell the driver what to do. Super Trucking did not have any control over: (1) which routes the drivers took; (2) how the drivers loaded or unloaded their trucks; (3) how the drivers secured their loads; (4) where or when the drivers took breaks; (5) where or when the drivers bought fuel; (6) where or when the drivers had maintenance or repairs performed; or (7) where the drivers stored their trucks. Although there may have been some indicia of Super Trucking's right to control the drivers, there were sufficient facts before the Department from which it could conclude that Super Trucking did not have a right to control the drivers sufficient to find an employee relationship.

¶ 42 Liberty argues that the "drivers did not have the option to decide whether or not to come to work." But that was not conclusively established. O'Dell testified that he "did not feel" like he had the option to decide whether to work, and recounted a single incident in which Rabine demanded that O'Dell come in when he was sick. O'Dell's subjective beliefs are not enough to conclusively demonstrate that lease purchase drivers did not have the option to decide whether to work on any given day. Furthermore, Rabine's demand could have been based on the fact that

O'Dell was indebted to Rabine for personal expenses unrelated to Super Trucking's business. Additionally, Webster testified that she could refuse jobs if she wanted to. There was no additional evidence presented that any drivers were told they could not choose whether to work on any given day, nor was there any evidence that any drivers were retaliated against for refusing a job. Although Liberty argues that Super Trucking required its drivers to comply with all federal, state, and local laws, rules, and regulations, the drivers were required to comply with those laws, rules, and regulations regardless of whether they drove for Super Trucking. And while Super Trucking reserved the right to ensure compliance with those law, rules, and regulations, there was no testimony that Super Trucking ever did so.

¶ 43 Liberty also relies on *People ex rel. Department of Labor v. MCC Home Health Care, Inc.*, 399 Ill. App. 3d 10, 28 (2003), to argue that independent contractors must possess some skills and use those skills in an independent way without the aid of the alleged employers. But *MCC Home Health Care* was a case arising under the Minimum Wage Law and involved the Department of Labor's application of specific factors codified in its own administrative rules for the purpose of determining whether individuals were employees and therefore entitled to overtime pay. *Id.* at 13. *MCC Home Health Care* held that because the nurses were dependent on the defendant for their job assignments, the nurses did not use their nursing skills in a way independent of the defendant—the nurses would only work if their names were on the defendant's referral list and if the defendant chose to refer them. *Id.* at 29.

¶ 44 *MCC Home Health Care* is distinguishable. First, this case does not involve application of the Department of Labor's administrative rules and is therefore of little value in determining whether the drivers were independent contractors. Second, there was some testimony here that drivers turned down work or obtained work through means other than Super Trucking, indicating

that not all of the drivers were solely dependent on Super Trucking for work. Some of the lease purchase drivers testified that they only drove for Super Trucking, but that is not dispositive of an employment relationship and was one of many factors that the Department could consider in making its determination.

¶ 45 In sum, the Department was tasked with weighing the evidence before it and we find that there was sufficient evidence from which it could conclude that Super Trucking did not control drivers' work to such an extent that the drivers should be considered employees.

¶ 46 Next, Liberty argues that the drivers' services formed a regular part of Super Trucking's business. Liberty argues that under this "relativity" test, if the drivers' services formed a regular part of Super Trucking's business, the drivers are "presumptively" employees, and the burden shifted to Super Trucking to prove otherwise. Liberty argues that the Department failed to apply the "relativity" test at all.

¶ 47 In *Ragler*, our supreme court recognized:

> "[B]ecause the theory of [workers'] compensation legislation is that the cost of industrial accidents should be borne by the consumer as part of the cost of the product, this court has held that a worker whose services form a regular part of the cost of the product, and whose work does not constitute a separate business which allows a distinct channel through which the cost of an accident may flow, is presumptively within the area of intended protection of the compensation act." *Ragler*, 93 Ill. 2d at 71.

Liberty relies on this statement to assert that a presumption of employment arises upon a showing that the worker's services form a regular part of the alleged employer's business. But Liberty cites no authority for its additional assertion that, upon such a showing, Super Trucking

would have the burden to show that the drivers were independent contractors. Instead, our courts have treated the "relativity" test as one of the factors to be considered when determining the nature of an employment relationship. See *Roberson*, 225 Ill. 2d at 175 (setting forth the various factors to be considered, reciting the quote from *Ragler*, and concluding, "No single factor is determinative, and the significance of these factors will change depending on the work involved. [Citation.] The determination rests on the totality of the circumstances.").

¶ 48 The Department heard testimony from Herbig about the nature of Super Trucking's business. He testified that Super Trucking was a "trucking brokerage" that connected customers in need of trucking services with trucks and truck drivers. The Department further heard testimony that Super Trucking's sole method of providing its customers with those services was utilizing the trucking companies and truck drivers with which it contracted. These facts weighed in favor of a finding that the truck drivers were employees. See *Ware*, 318 Ill. App. 3d at 1124-25 (2000) (concluding that a truck driver was "intimately related" to the business of the company with which he contracted where the driver had no customers of his own, exclusively hauled freight for the company's customers, and received a percentage of what the company received from those customers).

¶ 49 Here, there was evidence before the Department from which it could conclude that Super Trucking did not have sufficient control over the drivers even though the drivers who performed the work formed a regular part of Super Trucking's business. Even if these two factors weighed against one another equally, the Department heard evidence on the other factors identified in *Roberson* that are also generally considered when determining the nature of an employment relationship. On the issue of whether Super Trucking controlled the drivers' schedules, there was evidence that Super Trucking had no control beyond telling the drivers where to go on any given

day. On the issue of how the drivers were paid, it was undisputed that Super Trucking did not set the drivers' hourly wage, which instead was set by the customer for any particular job. For lease purchase drivers, Super Trucking withheld from the drivers' pay checks a contractually set amount to pay for expenses related to the lease of the truck. But it was further undisputed that Super Trucking did not withhold any federal or state income taxes or social security payments from the drivers' checks. Next, Super Trucking entered into contractual agreements with all of its drivers and many of those agreements could be terminated without cause by either party on written notice, including some of the lease purchase agreements that appear in the record. Finally, there was evidence that, aside from the trucks leased under the lease purchase agreements, Super Trucking did not provide the drivers with any equipment or materials used in the performance of the drivers' jobs.

¶ 50 The hearing officer, as well as the circuit court, observed that this case involved a "close call," particularly with respect to the lease purchase drivers. It was the province of the Department to consider the totality of the circumstances and to weigh all of the evidence in reaching its conclusions. On review, we do not make our own credibility determinations, reweigh the evidence, or substitute our judgment for that of the administrative agency. See *Chisem v. McCarthy*, 2014 IL App (1st) 132389, ¶ 21; see also *Edwards v. Addison Fire Protection District Firefighters' Pension Fund*, 2013 IL App (2d) 121262, ¶ 34. Based on our review of the parties' arguments and the record that was before the Department, we are not left a definite or firm conviction that the Department made a mistake in determining that the drivers were not employees of Super Trucking. We therefore affirm the decision of the Department.

¶ 51 CONCLUSION

¶ 52 For the foregoing reasons, the judgment of the circuit court affirming the decision of the Department is affirmed.

¶ 53 Affirmed.