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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT  
WORKERS' COMPENSATION COMMISSION DIVISION

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KRISTINE DEATHERAGE, as Mother and Legal Guardian of ASHLEAH DEATHERAGE, a Dependent child of Decedent, ROBERT DEATHERAGE,	)	Appeal from the Circuit Court of Peoria County.
Appellant,	)	
v.	)	No. 15-MR-344
THE ILLINOIS WORKERS' COMPENSATION COMMISSION, <i>et al.</i> , (Robin Groom; Melissa Metternich and Henry "Hank" Tipton, Appellees).	)	Honorable James Mack, Judge, Presiding.

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

**ORDER**

¶ 1 *Held:* Claimant failed to show that the Commission's decision regarding the lack of an employment relationship between decedent and respondents was against the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Kristine Deatherage, as mother and legal guardian of Ashleah Deatherage, filed an action before the Illinois Workers' Compensation Commission seeking leave to pursue a civil claim against respondents, Robin Groom, Melissa Metternich, and Henry Tipton (Tipton), in the circuit court of Peoria County instead of maintaining an action before the Commission in accordance with section 4(d) of the Illinois Workers' Compensation Act (Act) (820 ILCS 305/4(d) (West 2010)). Section 4(d) allows such a course where an employer fails to maintain insurance coverage as specified in the Act. *Id.* The Commission denied claimant's request, and she now appeals. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Respondents Groom and Metternich (collectively, "the owners") owned various commercial properties that they rented out. From time to time, they hired Henry Tipton, also a named respondent, to perform maintenance on those properties. Claimant's decedent, Robert Deatherage, was electrocuted while on the roof of the garage of one of the owners' premises. At the time of his death, decedent was working with Tipton painting the exterior back wall of the garage.

¶ 6 Claimant initially filed a tort action, alleging negligence, against various defendants, including respondents here. Summary judgment was entered against claimant on August 13, 2014. About three months earlier, on May 15, 2014, claimant also filed an application for adjustment of claim, alleging decedent died "by electrocution on [the] jobsite." Groom, Metternich, and Tipton were named as respondents. The civil case was filed on behalf of Kristine Deatherage—decedent's wife; the workers' compensation claim was filed on behalf of Ashleah Deatherage—decedent's daughter. On June 6, 2014, in the workers' compensation proceeding, claimant filed a request for the Commission to hold a hearing pursuant to section

4(d) of the Act (820 ILCS 305/4(d) (West 2010)), find that respondents failed to maintain insurance as required by the Act, and grant claimant permission to pursue an action in the circuit court. A hearing was held on August 13, 2014, and November 14, 2014.

¶ 7 Under section 4(d) of the Act (820 ILCS 305/4(d) (West 2010)), a hearing is held directly before the Commission. Respondent Metternich first testified at the section 4(d) hearing. Metternich testified that she and Groom are sisters. They inherited buildings in Peoria and the surrounding area from their mother. When they inherited the buildings, they did not form a corporation or organize as a business. They have no employees. The buildings were insured, but that insurance did not include workers' compensation coverage. They maintained the same insurance that was in place when the sisters inherited the buildings. That coverage had been put in place by their father, an attorney and chief executive officer of an insurance company. Her current insurance agent never suggested she obtain workers' compensation coverage. Metternich testified that she has never employed anyone with regard to the buildings she inherited.

¶ 8 Typically, if work needed to be done on a building, her sister would call someone to perform it, and Metternich would issue payment. Sometimes, they would hire Tipton Roofing & Remodeling (Tipton Roofing). They would hire Tipton Roofing by the job. Her sister would call and tell them what needed to be done, and they would respond with a price. If the price was agreeable to respondents, "there would be an oral agreement to do it." She did not provide Tipton Roofing with any instrumentalities, and she did not control the work they performed. Prior to decedent's electrocution, Metternich was not aware he was working on her property. She never paid him directly. She had seen him before working on other jobs and knew him only as "Bobby."

¶ 9 Decedent was found on the roof of the garage on the site where Tipton Roofing was working. The work respondents hired Tipton Roofing to perform was to remove vines from a wall, power wash it, and paint the wall. No work was to be performed on the roof.

¶ 10 On cross-examination, Metternich stated she owned six commercial buildings, with multiple units in each building. The building where decedent was electrocuted was a single-story strip mall. They had hired various contractors to perform work on this building in the past. When a building needs maintenance, they rely on contractors to perform the work. She acknowledged that the work she hired Tipton Roofing to perform included putting up new gutters. Metternich testified that she had nothing in writing that would indicate that Tipton Roofing was not supposed to remove any vines that had grown onto the roof. She agreed that she made a profit by leasing out buildings. She could not provide a certificate stating that Tipton Roofing had workers' compensation insurance. They have "asked to see [other companies certificates of insurance], if they have it." On redirect-examination, Metternich testified that there were no vines on the part of the roof where decedent was electrocuted.

¶ 11 Respondent Robin Groom next testified. Prior to the accident involving decedent, she had never been advised by anyone to procure workers' compensation insurance. She would coordinate with contractors to have work done on the buildings. Groom had set up the job on which decedent was electrocuted. The job involved removing vines "that had grown up on the back of the building," power washing the building, and painting it. Another contractor was engaged to repair gutters. Groom stated that the Tipton Roofing was simply supposed to work on the back of the building. She specifically told them "not to go up on the roof of the garage because that part wasn't in view and \*\*\* we didn't care about it being painted." Groom inquired whether Tipton Roofing had insurance, and Hank Tipton told her that they did.

¶ 12 On cross-examination, Groom acknowledged that she had testified during an earlier deposition that she did not ask whether Tipton Roofing had insurance. She was aware that electricity came into the building somewhere, but she did not know where. There was no written agreement concerning the job.

¶ 13 The Commission found that decedent was “working on a crew assembled by respondent Henry ‘Hank’ Tipton, a contractor doing business as Tipton Roofing & Remodeling.” They were working on a commercial building owned by respondents Metternich and Groom. Groom resided in Texas at the time; Metternich resided in Peoria.

¶ 14 The Commission noted that claimant had concurrently filed a negligence action in the circuit court and an application for adjustment of claim before the Commission. The circuit court granted summary judgment in the negligence action. Claimant now seeks authorization in accordance with section 4(d) to proceed in a civil action based on respondents’ failure to maintain workers’ compensation insurance. See *Keating v. 68th & Paxton, LLC*, 401 Ill. App. 3d 456 (2010). Part of the inquiry, noted the Commission, concerns whether an employment relationship existed between decedent and respondents. Groom and Metternich filed a motion to dismiss; Tipton did not appear. The Commission then recited much of the testimony of Groom and Metternich.

¶ 15 The Commission reviewed the transcript of the circuit court hearing. It noted that the circuit court found that “there was a meeting of the minds between Ms. Groom and Ms. Metternich and Mr. Tipton that no work was to be performed on the roof of the garage.” The court further found that “there was no duty for the owners to anticipate that a worker would essentially be ‘a trespasser on the roof of the garage.’ ” Moreover, while Groom and Metternich had the right to stop work or add work to the contract, they did not have control over the

performance of the work. There was no material fact as to the owners' lack of knowledge of the hazardous condition. It finally concluded that no duty was breached.

¶ 16 The Commission then found that, after considering all of the evidence, claimant failed to make out a *prima facie* case that an employment relationship existed between decedent and the owners. In turn, the owners were not required to maintain workers' compensation insurance for the benefit of decedent. It dismissed claimant's section 4(d) petition. The circuit court affirmed, and this appeal followed.

¶ 17

### III. ANALYSIS

¶ 18 Claimant raises two main arguments on appeal. First, she contends that Tipton was an employer of decedent and that he knowingly failed to provide workers' compensation coverage for decedent. Second, she argues that Groom and Metternich are statutory employers of decedent, as contemplated by the Act. See 820 ILCS 305/1 (2010). Whether an employment relationship exists is a question of fact subject to review using the manifest-weight standard. *Netzel v. Industrial Comm'n*, 286 Ill. App. 3d 550, 553 (1997). Hence, we will reverse the Commission's decision only if an opposite conclusion is clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992).

¶ 19 While it might seem as though the first issue is not properly before us, as the Commission's findings were limited to the lack of an employment relationship between decedent and the owners, decedent's status *vis-à-vis* Tipton bears upon the status of the owners as potential statutory employers. Thus, we will address this argument. However, we do so without prejudice to respondent Tipton, as he is not properly a party to this appeal. The Commission's order was limited to the owners' status; the trial court simply confirmed the Commission's decision; and claimant's notice of appeal identifies only this trial court order as the order

appealed from. Thus, there is no order for us to review with regard to Tipton, even if the underlying factual question has relevance here.

¶ 20

A. TIPTON AS EMPLOYER

¶ 21 Claimant first argues that decedent was an employee of respondent Tipton. In support, she cites section 1(a)(2) of the Act. That section defines “employer” as “Every person, firm, public or private corporation \*\*\* who has any person in service or under any contract for hire, express or implied, oral or written, and who is engaged in any of the enterprises or businesses enumerated in Section 3 of this Act.” Claimant then argues that “there is no dispute that [decedent] was the direct and immediate employee of Tipton.” She points to Tipton’s discovery deposition, where, she claims, “Tipton acknowledge[d] hiring [decedent] to work by the hour.” While it is true that Tipton does state that he hired decedent for to work for \$10 per hour, he also states that decedent provided his own tools and insurance. Tipton further states that decedent was not his employee. Thus, what claimant characterizes as a straight-forward acknowledgement is anything but. Such considerations to which Tipton testified are indications of status as an independent contractor. See *Ware v. Industrial Comm’n*, 318 Ill. App. 3d 1117, 1122 (2000). Whether an employment relationship exists is a threshold question in a workers’ compensation claim (*Keating*, 401 Ill. App. 3d at 467), and absent such a relationship, there can be no liability under the Act (*Roberson v. Industrial Comm’n*, 225 Ill. 2d 159, 174 (2007)).

¶ 22 As the appellant here, the burden is on claimant to affirmatively establish error before this court. See *TSP—Hope, Inc. v. Home Innovators of Illinois, LLC*, 382 Ill. App. 3d 1171, 1173 (2008). Here, claimant offers nothing but the conclusory assertions that decedent was an employee of Tipton on this threshold issue. The failure to argue a point results in its forfeiture. *Wolfe v. Menard, Inc.*, 364 Ill. App. 3d 338, 348 (2006). Conclusory assertions, without

supporting analysis, are insufficient. *Id.* Claimant’s brief argument, alleging there is “no dispute” that decedent was an employee of Tipton, is not enough for claimant to carry her burden and results in the forfeiture of this argument. Quite simply, claimant has made no credible attempt to establish an employment relationship between decedent and Tipton, and we will not perform the independent-contractor analysis for claimant. Indeed, it would not be proper for us to act as an advocate for a party. *U.S. Bank v. Lindsey*, 397 Ill. App. 3d 437, 459 (2009).

¶ 23 In sum, claimant has forfeited her argument concerning the existence of an employment relationship between decedent and respondent Tipton. Claimant’s remaining arguments concerning the consequences of Tipton’s purported failure to maintain workers’ compensation insurance for decedent’s benefit are thus moot.

¶ 24 B. GROOM AND METTERNICH AS STATUTORY EMPLOYERS

¶ 25 Claimant next argues that Groom and Metternich were statutory employers of decedent pursuant to section 1(a)(3) of the Act. This section provides as follows:

“The term “employer” as used in this Act means:

\*\*\*

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 provisions of this Act, *and in addition thereto if he directly or indirectly engages any contractor whether principal or sub-contractor to do any such work, he is liable to pay compensation to the employees of any such contractor or sub-contractor unless such contractor or sub-contractor has insured, in any company or association authorized under the laws of this*



*State to insure the liability to pay compensation under this Act, or guaranteed his liability to pay such compensation.”* 820 ILCS 305/1(a)(3) (West 2010).

Claimant initially contends that the italicized language above would make Groom and Metternich liable for the employees of a contractor they employ where the contractor failed to provide workers' compensation coverage for its employees. Claimant argues that Groom and Metternich are employers in accordance with this section by virtue of their engaging in an ultrahazardous activity, specifically, maintaining a structure (see 820 ILCS 305/3(1) (West 2010)). Claimant also contends that the owners were engaged in an ultrahazardous activity as defined in section 9 of the Act (820 ILCS 305/3(9) (West 2010)), which declares enterprises subject to certain municipal regulations ultrahazardous.

¶ 26 However, section 1(a)(3) does not apply. As noted in the previous section of this order, claimant has not established that decedent was an employee—and not an independent contractor—with respect to Tipton. This section states that a person hiring a contractor, where the contractor fails to have his or her own insurance, “is liable to pay compensation *to the employees* of any such contractor.” (Emphasis added.) 820 ILCS 305/1(a)(3) (West 2010). As noted, claimant has forfeited any argument that decedent was an employee of Tipton, and, in any event, we note, evidence in the record on the issue is conflicting. Thus, the owners are not statutory employers because claimant has not established that decedent was an employee of Tipton. Claimant therefore cannot prevail here.

¶ 27 IV. CONCLUSION

¶ 28 In light of the foregoing, the decision of the circuit court of Peoria County confirming the decision of the Commission is affirmed.

¶ 29 Affirmed.