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ILLINOIS LAW MANUAL

CHAPTER IV
STATUTORY CAUSES OF ACTION

C. STRUCTURAL WORK ACT

Effective February 14, 1995, the Illinois Structural Work Act was repealed. The repeal bars any action accruing on or after February 14, 1995. However, any action accruing before February 14, 1995, may be maintained in accordance with the provisions of the Structural Work Act as it existed before its repeal. Atkins v. Deere & Co., 177 Ill. 2d 222 (1997). Therefore, under the applicable four-year statute of limitations (Section 5/13-214), actions under Structural Work Act claims could have been filed until February 13, 1999. The following analysis still applies to an action under the Structural Work Act if the cause of action accrued before February 14, 1995. Any claim accruing on or after February 14, 1995 must be brought as a construction negligence claim.

Although the Act has been long repealed and most of these matters have worked their way out of the court system, there have been several efforts by the plaintiff's bar to resurrect the Act in a modified format. In addition, there is a "carry-over" of sorts in the analysis by many judges of construction negligence cases, including the factors involved in the old "in charge of the work" factor under the Act that has, at times, been analogized to the current Restatement (Second) 414

"control" of the work factor. See, Section H, "Construction Negligence," infra. As such, this section remains in the Illinois Law Manual as a historical reference with possible future implications.

1. Purpose and Statutory Language

The Structural Work Act provides for the protection and safety of persons in the construction industry. The Act provides a remedy where a worker suffers injury while preparing, altering, or removing buildings, bridges, viaducts, or other structures.

The Structural Work Act provides the following:

> All scaffolds, hoists, cranes, stays, ladders, supports or other mechanical contrivances erected or constructed by any person, firm, or corporation in the state for the use and the erection, repairing, alteration, removal, or painting of any house, building, bridge, viaduct, or other structure shall be erected and constructed, in a safe, suitable and proper manner, shall be so erected and constructed, placed and operated as to give proper and adequate protection to the life and limb of any person or persons employed or engaged thereon, or passing under or by the same, and in such a manner so as to prevent the falling of any material that may be used or deposited thereon.

740 ILCS 150/1.

The enforcement of the Structural Work Act is based on Section 150/9, which contains the following language:

> Any owner, contractor, subcontractor, foreman, or other person having charge of the erection, construction, repairing, alteration, removal, or painting of any building, bridge, viaduct or other structure within the provisions of this Act, shall comply with all the terms thereof . . .
>
> For any injury to person or property, occasioned by any willful violations of this Act, or willful failure to comply with any of its provisions, a right of action shall accrue to the party injured, for any direct damages sustained thereby; and in the case of loss of life by reason of such willful violation, or willful failure as aforesaid, a right of action shall accrue to the surviving spouse of the person so killed, the lineal heirs or adopted children of such person, or any other person or persons who were, before such loss of life, dependent for support on

> the person or persons so killed, for a like recovery of damages for the injuries sustained by reason of such loss of life or lives.

740 ILCS 150/9.

2. Elements of Proof

To establish liability under the Structural Work Act, the plaintiff must prove that:

(a) the plaintiff was in the protected class (engaged in a construction activity);

(b) the activity was being performed with reference to a structure;

(c) the defendants were in charge of the work being performed;

(d) a scaffold, support or mechanical device was in use;

(e) the defendants willfully violated the Act; and

(f) the plaintiff sustained damage as a proximate result of the willful violation.

3. Analysis of Burden of Proof

a. Protected Class: Engaged in Construction Activity

The legislature enacted the Structural Work Act to protect workers engaged in activities of a particularly hazardous nature. Meyer v. Caterpillar Tractor Co., 135 Ill. 2d 1, 7-8 (1990); Hernandez v. Paschen Contractors, Inc., 335 Ill. App. 3d 936 (2002). Courts will liberally construe the Structural Work Act to protect persons engaged in construction, repair, alteration, or removal of buildings, bridges, viaducts, and other structures. Vuletich v. U.S. Steel Corp., 117 Ill. 2d 417, 422 (1987).

The Structural Work Act was not intended to, nor have courts interpreted it to, apply to all construction activities. Id. Workers to whom Illinois courts have refused Structural Work Act protection include: a superintendent securing loose sheets of metal on a roof, Leschinski v. Forest City Steel Erectors, 243 Ill. App. 3d 124 (1993); a fireman required to perform rescue work at a

construction site, Grant v. Zale Constr. Co., 109 Ill. App. 3d 545 (1982); a next door neighbor who was injured when helping install a joist, see also, Herman v. Swisher, 115 Ill. App. 3d 179 (1983); and a mail clerk, a hospital, visitor and a production worker, Donohue v. George W. Stiles Constr. Co., 214 Ill. App. 82 (1919) (mailclerk); see also, Kelly v. Northwest Community Hosp., 66 Ill. App. 3d 679 (1978) (hospital visitor); Dasenbrock v. Serstel Co., 151 Ill. App. 3d 1092 (1987) (production worker).

A sole proprietor is one entitled to protection under the Structural Work Act. Cutuk v. Hayes-Gallardo, Inc., 151 Ill. 2d 314 (1992). Although a sole proprietor may recover under the Act, if the sole proprietor is in fact personally in charge of the work and the active tortfeasor, the sole proprietor would not be entitled to recover. Cutuk,
151 Ill. 2d 314 (1992) (citing, with approval, Flora v. Home Federal Savings & Loan Assoc., 685 F. 2d 209, 211 (1982)). Other categories of plaintiffs engaging in ultrahazardous activities and therefore protected by the Act include: a firewatch on the ground, a building inspector, a window washer, a farm hand, and an unpaid worker. See Martinez v. Mobil Oil Corp., 296 Ill. App. 3d 607 (1998) (firewatch); Quinn v. LBC, Inc., 94 Ill. App. 3d 660 (1981) (building inspector); Halberstadt v. Harris Trust & Savings Bank, 55 Ill. 2d 121 (1973) (window washer); Warren v. Meeker, 55 Ill. 2d 108 (1973) (farm hand); Price v. Victory Baptist Church, 205 Ill. App. 3d 604 (1990) (unpaid worker).

b. Activity With Reference to a Structure

A plaintiff must have been engaged in one of the activities specified or contemplated by the Act when the injury occurred to state a cause of action. Long v. City of New Boston, 91 Ill. 2d 456, 468 (1982). The relevant inquiry and analysis is not whether the plaintiff is a construction worker, but whether the plaintiff's actions were connected with, and significantly furthered, one

of the activities enumerated in the Act. For example, in Vuletich, the court held that the plaintiff was not engaged in a hazardous activity or work that one can describe as particularly hazardous in nature. The plaintiff in Vuletich was simply returning a broom and shovel to a construction trailer when he was injured as a result of falling while ascending a stairway leading into the trailer. The plaintiff was not using the stairs as a means of support in conducting his work. There was also no requirement that the defendant provide a support for the plaintiff to safely complete his work. The plaintiff was merely using the stairs as a means to transport himself from point to point on the construction site. See Vuletich, 117 Ill. 2d 417. Under those facts, the court did not find that the plaintiff was performing an activity covered by the Structural Work Act.

In Long, the court held that a worker stringing decorative lights to a utility pole was not engaged in an activity covered under the Act. Stringing the decorative lights while on a ladder did not amount to the erection of a structure and was not a protected activity under the Act. Long, 91 Ill. 2d at 467.

c. "In Charge of" the Work

The courts analyze the issue of whether one is "in charge of" the work by using ten factors. Those factors, however, do not necessarily exhaust the entire set of facts that could potentially demonstrate that a defendant is "in charge of" the work. Simmons v. Union Elec. Co., 104 Ill. 2d 444 (1984); Stewart v. Jones, 318 Ill. App. 3d 552 (2001); Hernandez v. Paschen Contractors, Inc., 335 Ill. App. 3d 936 (2002). The factors usually considered are:

(1) supervision and control of the work;
(2) retention of the right to supervise and control the work;
(3) extent of participation in ongoing activities on the construction site;
(4) supervision and coordination of the subcontractors;
(5) responsibility for taking safety precautions at the job site;

(6) authority to issue change orders;

(7) the right to stop the work;

(8) ownership of the equipment used on the job site;

(9) the defendant's familiarity with construction customs and practices; and

(10) whether the defendant is in a position to ensure worker safety, and alleviate equipment deficiencies and improper work habits. Id.

A defendant need not be in direct charge of the particular operation from which the injury arose if it was in charge of the overall work for the project. Block v. Lohan Assoc., Inc., 269 Ill. App. 3d 745 (1993). A court should not merely total up the ten factors and see which party had more factors in its favor. Rather, courts must engage in a "totality of the circumstances" approach in each case. Nobel v. U.S., 231 F.3d 352 (2000). The right to stop the work, if work is being performed in any unsafe manner, is the single most important factor in determining whether an owner or another party is in charge of the work. Hernandez v. Paschen Contractors, Inc., 335 Ill. App. 3d 936 (2002).

The court will not instruct the jury, however, as to the definition of "in charge of" the work. The term is of common usage and understanding, and any further attempt to define the term is thought to lead to confusion. Larson v. Commonwealth Edison Co., 33 Ill. 2d 316, 323 (1965); Stewart v. Jones, 318 Ill. App. 3d 552 (2001). However, an expert can now give the opinion as to whether a particular entity is "in charge of" the work, but cannot define the term. Chicago Title & Trust Co. v. Brescia, 285 Ill. App. 3d 671 (1996).

d. Support or Device

The critical issue in determining whether a particular device is a support is not whether a device elevates a worker but whether the device was serving as a support for the worker while performing work. Vuletich v. U.S. Steel Corp., 117 Ill. 2d 417 (1987).

Courts use the following analysis to determine whether a device is a support:

(1) whether the device is employed as a necessary support in performing the plaintiff's task;

(2) whether the plaintiff's injury was connected to the hazardous nature of the device; and

(3) whether the hazard that caused the injury involved the type of danger the legislature intended to alleviate when it adopted the Act.

Carnevale v. Inland Ryerson Bldg. Systems, 169 Ill. App. 3d 740 (1988).

In addition, the Act applies to devices used to support materials as well as those used to support workers. Meyer v. Caterpillar Tractor, 135 Ill. 2d 1 (1990). The failure to provide a scaffold is a basis for a cause of action. Delgatto v. Brandon Assoc., Ltd., 131 Ill. 2d 183 (1989).

e. Willful Violation

A violation of the Structural Work Act must be willful. 740 ILCS 150/9. The Act's definition of "willful," however, is not equivalent to a standard of recklessness. Instead, a "willful" violation exists when the actor knew of the "dangerous work practice" or, in the exercise of ordinary care, could have known or discovered the unsafe work practice before the accident occurred. Simmons v. Union Electric Co., 104 Ill. 2d 444, 453 (1984); Cockrum v. Kajima Int'l., Inc., 163 Ill. 2d 485 (1994).

4. Damages

a. Wrongful Death

The Structural Work Act grants a right of action to the surviving spouse and heirs of a decedent. 740 ILCS 150/9. A jury determines damages by analyzing the same elements of compensation as in a wrongful death action brought under the Wrongful Death Act. (For a further discussion of damages generally available for wrongful death, see Chapter IV, Section A, Paragraph 4.)

Also, it has been determined that, where a spouse of a deceased worker brings a claim under the Structural Work Act for her own loss of consortium, the employer's potential liability for contribution may not be limited to the extent of the workers' compensation liability. Schrock v. Shoemaker, 159 Ill. 2d 533 (1994). This situation deviates from the general rule of Kotecki v. Cyclops Welding Corp., 146 Ill. 2d 155

(1991), that an employer's liability for contribution cannot exceed its liability under the Workers' Compensation Act.

Like a wrongful death action, a death action under the Structural Work Act is for the benefit and pecuniary loss of the surviving spouse and the next of kin. The jury will assess damages for a death action under the Structural Work Act in the same way it would assess damages in a wrongful death action.

b. Loss of Consortium

The Supreme Court, in Harvel v. City of Johnson City, 146 Ill. 2d 277, 293 (1992), approved damages for loss of consortium under the Structural Work Act for a deceased worker's spouse. The court in Harvel expanded the interpretation of the direct damages provision of the

Structural Work Act and granted a spouse a right for damages for the loss of consortium when a worker suffers non-fatal injuries because of the defendant's willful violation of the Act.

5. Defenses

a. Conduct of the Plaintiff

A plaintiff's contributory negligence is not a defense to an action under the Structural Work Act. Hollis v. R. Latoria Constr., Inc., 108 Ill. 2d 401 (1985); Konieczny v. Kamin Builders, Inc., 304 Ill. App. 3d 131 (1999); Hernandez v. Paschen Contractors, Inc., 335 Ill. App. 3d 936 (2002). The purpose of the Structural Work Act is to prevent injuries to persons employed in dangerous and extra hazardous occupations so that negligence on the part of the worker and the manner of doing the work may not prove fatal to the plaintiff's action. The fact that a plaintiff or the plaintiff's employer violates the Structural Work Act does not bar the plaintiff's recovery. Kennerly v. Shell Oil Co., 13 Ill. 2d 431 (1958). The injured worker, however, cannot file an action against his employer under the Structural Work Act. Gannon v. Chicago, Milwaukee, St. P & P Rail Co., 22 Ill. 2d 305 (1961).

b. Sole Proximate Cause

It is an affirmative defense to a Structural Work Act suit that the plaintiff's actions were the sole proximate cause of the injuries. LiPetri v. Turner Constr. Co., 36 Ill. 2d 597 (1967); Konieczny v. Kamin Builders, Inc., 304 Ill. App. 3d 131 (1999); Hernandez v. Paschen Contractors, Inc., 335 Ill. App. 3d 936 (2002). However, it is not a defense that the plaintiff was partially to blame for his injuries. If a trier of fact attributes any part of the cause of the plaintiff's injuries to a defendant's violation of the Structural Work Act, the jury must find that defendant liable irrespective of the degree of the plaintiff's fault.

c. Limitation of Actions

Section 5/13-214 of the Illinois Code of Civil Procedure controls the statute of limitations with regard to the Structural Work Act. Section 5/13-214 states that a tort action resulting from the construction of an improvement to real property shall be commenced within four years from the time the person bringing an action knew or should reasonably have known of the act or omission. 735 ILCS 5/13-214.