

# **A Legal Analysis of the Potential Impacts of Reinstating the SWA**

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## **1. Is the ITLA claim that a plaintiff must prove fault to collect under this structural work act (SWA) re-enactment true?**

Yes. The proposed Construction Safety Act provides that “for any injury to person or property, occasioned by any willful (sic) violations of this Act, or willful (sic) failure to comply with any of its provisions, a right of action shall accrue to the party injured . . . and in case of loss of life . . . a right of action shall accrue to the [surviving spouse or lineal heirs or dependents].

Therefore, a plaintiff must prove a willful failure to comply with the Act. However, Section .05 of the proposed Act provides, “it is the intent of the General Assembly that [the] Act shall be interpreted consistent with prior precedent and court decisions interpreting the Structural Work Act.”

Under the SWA, the “willful violation” was construed to mean a knowing violation. Under the SWA, “willful” did not require willful misconduct or a reckless disregard of the provisions of the Act but imposed liability when a dangerous condition was known or reasonably should have been known.

Additionally, under the SWA, liability was based upon violation of a statutory duty and the Illinois Supreme Court has held that comparative negligence does not apply in actions brought under the Structural Work Act. *Simmons v. Union Electric Co.*, 104 Ill.2d 444, 473 N.E.2d 946 (1984). Therefore, a plaintiff’s actions in contributing to his/her own injuries are irrelevant.

## **2. Can you describe the effect of enacting this measure in relation to the existing system of recovery under existing workers’ compensation and tort? How exactly does the bill expand rights and remedies? What is the net effect?**

The Act appears to contain provisions that pertain to just about everyone who could possibly be involved in a construction project and gives injured workers or their surviving families the right to hold

those involved accountable (i.e., owners, contractors, architects, draftsmen, foremen, etc.). The Act will not be the exclusive remedy for the plaintiff, as an injured worker will also have a workers’ compensation claim (against the employer) and a common law negligence claim (against non-employers). From a strategy standpoint, in civil court, a plaintiff may wish only to pursue his/her claim under the Act so as to avoid any allegations of comparative fault that would be relevant to a common law claim. (As mentioned, under the SWA a plaintiff is not liable for his/her own negligence that contributed to his/her injury).

## **3. The ITLA witness claims there is a “7 point” test that must be satisfied in order to recover under the new SWA. Is that true? If so, how does that work?**

The elements to establish a SWA action are (1) Plaintiff was engaged in or passing under/by a structural activity; (2) the activity was being performed with reference to a structure; (3) a scaffold or other mechanical device was being used; (4) a defect existed in the construction or use of the device; (5) the defect proximately caused the plaintiff’s injuries; (6) the defendants had charge of the work being performed; and (7) the defendant willfully violated the Act’s safety standard.

## **4. The new measure is called the Construction Safety Act. The first Section expresses a legislative intent that the new Act be interpreted consistent with the court decisions construing the SWA. Just to be clear, is this effectively a re-enactment of SWA . . . or is it somehow different?**

This appears to be a re-enactment of the SWA. However, we did not do a word-for-word comparison of the two Acts.

**5. There were factual representations by ITLA that this new law will improve workplace safety. In light of the Work Comp system, existing tort remedies, OSHA, and insurance modification factors, we obviously believe that the new law has nothing to do with promoting enhanced workplace safety. Can you help us articulate this point in a legally correct manner?**

Obviously, both sides (pro or against the Act) can make arguments as to the status of the construction business in Illinois and work place safety since the repeal of the SWA. For example, proponents of the Act cite that construction injuries have increased but it is unclear whether there has been an overall increase in the number of construction projects and permits in correlation thereto.

In arguing against the need for the Act, it is our understanding that the IL Workers' Compensation Commission has published a study that indicates work injuries have decreased since the repeal of the SWA. Also, the Department of Labor, in cooperation with the Illinois Department of Public Health, has also indicated that the number of fatal occupational injuries in Illinois has decreased on average since the repeal of the SWA.

[http://www.idph.state.il.us/about/epi/pdf/2005\\_CFOI\\_Annual\\_Report.pdf](http://www.idph.state.il.us/about/epi/pdf/2005_CFOI_Annual_Report.pdf)

Additionally, the Act would remove any incentive or responsibility for the plaintiff to take heed of his/her own safety because comparative fault will likely not be assessed in a claim under the proposed Construction Safety Act of 2008.

**6. ITLA expressed in testimony that one need for the new law is a restrictive view on negligence, particularly on general contractors, that were depriving accident victims of a remedy. The ITLA witness specifically said that recent court decisions significantly narrowed and constrained injured workers rights and remedies. Can you describe the current state of negligence case law?**

Since the repeal of the SWA, workers have sought compensation for construction injuries by pleading under Section 414 of the Restatement (Second) of Torts, which was adopted as common law by Illinois Courts. Under Section 414, one who entrusts work to an independent contractor, but retains control of any part of the work, is subject to liability for physical harm to others for whose safety the employer owes a duty to exercise reasonable care, which is caused by his failure to exercise his control with reasonable care.

Therefore, whether a defendant has retained control to incur a duty is centered on "control" and authority to stop the work for safety reasons. The "control" aspect is similar to the "in charge of" requirement under the former SWA. If there is enough evidence to find a defendant "in charge" of the work, then that evidence establishes a duty under Section 414.

Courts look to certain factors in viewing the totality of circumstances in analyzing whether a defendant retained the right to control work, as follows:

- (a) authority to stop the work of an independent contractor for safety reasons;
- (b) authority to prevent unsafe work from being resumed;
- (c) authority to order unsafe equipment removed from the job site;
- (d) authority to approve and/or change the work;
- (e) presence and/or supervision of Defendant's safety inspector/ agent;
- (f) authority to require subcontractors to use proper safety equipment;

- (g) advising subcontractors about safety equipment;
- (h) instructing subcontractors when, where and how to use and/or erect safety devices or equipment and require work in accordance with safety programs;
- (i) and other factors enumerated in *Chance v. City of Collinsville*, 112 Ill.App.3d 6, 445N.E.2d 39 (5th Dist. 1983), which include (1) supervision and control of the work; (2) retention of the right to supervise and control the work; (3) constant participation in ongoing activities at the construction site; (4) supervision and coordination of subcontractors; (5) responsibility for taking safety precautions at the jobsite; (6) authority to issue change orders; (7) the right to stop the work; (8) ownership of the equipment used on the job site; (9) defendant's familiarity with construction customs and practices; and (10) whether defendant was in a position to assure worker safety or alleviate equipment deficiencies or improper work habits.

**7. There are many new legislators in Springfield, and not much institutional memory of what SWA was all about. In reading the language of the attached bill, it does sound innocuous and directed at workplace safety. Clearly the problem is with the expansive court interpretations over time. Can you develop a paragraph that captures the real significance of this measure?**

The Structural Work Act was enacted in 1907, prior to the workers' compensation laws. Prior to its repeal in 1995, the SWA allowed injured workers to sue for damages even if the accident was their fault, and even if they had been compensated under the Illinois' Workers' Compensation Act. In light of the Workers' Compensation Act and common law construction negligence claims, an injured worker has adequate remedies to pursue in construction accidents. The elements of the SWA were so broadly

interpreted that even the most nominal contractors on a job-site would be held liable because the willful standard set forth under the Act was interpreted as a "should have known" standard nearly impossible to overcome. The SWA nearly equated to strict liability, with the plaintiff's negligent conduct contributing to his/ her own injury not contemplated. Re-enacting this law will certainly boost the costs of doing business in Illinois and deter future business with no actual proof that the Act will improve workplace safety. In short, this law has been repealed once and there is no to repeat history.

**8. There is some confusion about whether "double recoveries" are possible if this becomes enacted, or if there is always an offset for workers compensation awards made on the same injury. Can you explain?**

When the employee brought suit under the SWA, the employer/ workers' compensation insurer was entitled to reimbursement (lien attached to the employee's SWA action).

However, a workers' compensation lien was limited by statutory language to circumstance in where the employee (or personal rep is the plaintiff) there was no WC lien on a suit brought by employee's widow/ administrator as mother and next of friend to minor children. In 1994, the Illinois Supreme Court held the WC lien did not attach to widow's loss of society recovery under the SWA. The Court also held that the widow must seek damages for loss of support in a Wrongful Death Action, and the WC lien would attach to recovery under the Wrongful Death Act.

Reference for relatively concise and easy to understand summary of the SWA: Illinois Pattern Jury Instructions 180.00 pertaining to the SWA is a good source for an overall understanding of Structural Work Act. (See IPI 180.00 prior to the repeal of the SWA in 1995).

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