**Illinois Official Reports**

**Appellate Court**

***City of Joliet v. Illinois Workers' Compensation Comm'n*,**
**2023 IL App (3d) 220175WC**

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| Appellate Court Caption | THE CITY OF JOLIET, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Kimberly Smyth, Appellee). |
| District & No. | Third District, Workers' Compensation Commission Division<br>No. 3-22-0175WC |
| Filed | January 10, 2023 |
| Decision Under Review | Appeal from the Circuit Court of Will County, Nos. 21-MR-807, 21-MR-808; the Hon. John C. Anderson, Judge, presiding. |
| Judgment | Affirmed and remanded. |
| Counsel on Appeal | Nicole L. Wiza, of Knell O'Connor Danielewicz, of Chicago, for appellant.<br><br>Matthew J. Coleman, of Law Offices of Parente & Norem, P.C., of Chicago, for appellee. |

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

## OPINION

¶ 1 I. INTRODUCTION

¶ 2 Respondent-appellant, the City of Joliet, appeals a decision of the circuit court of Will County confirming a decision of the Illinois Workers' Compensation Commission (Commission) denying its multiple requests for credits against amounts awarded to claimant, Kimberly Smyth, in accordance with the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)). The only issues raised in this appeal concern these credits. For the reasons that follow, we affirm and remand in accordance with *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327 (1980).

¶ 3 II. BACKGROUND

¶ 4 Claimant filed two claims against respondent relating to two at-work injuries she suffered while in respondent's employ. The first occurred on September 29, 2014, when claimant was involved in a motor-vehicle accident. The second took place on January 31, 2017, when claimant lost her footing on uneven ground and felt a "crack and pop" in her neck. The compensability of these injuries and the treatments she received for them are no longer in dispute. Hence, we will limit our discussion of the facts to those pertinent to respondent's claims that it was entitled to various credits for certain payments it made to claimant.

¶ 5 Following claimant's first injury, claimant continued to work until January 28, 2015,[1] at which time she was taken off-work by her treating physician. Respondent began paying claimant temporary total disability (TTD) payments ($2327.54). Additionally, pursuant to a "make-whole" provision in the collective-bargaining agreement (CBA) under which the parties operated, respondent was obligated to pay claimant the difference between what she received for TTD and her actual salary ($1412.03). Respondent was required to make the "make-whole" payments for a period of six months. After that, an employee could opt to continue to receive the "make-whole" payments, which would reduce her accrued sick leave at a rate of one hour for every three hour period the employee is absent or her vacation or compensatory leave by one day for every three days she was absent. These payments continued until July 28, 2015.

¶ 6 Claimant remained off-work on July 29, 2015. Respondent continued to make TTD payments as well as make-whole payments. According to Armando DeAvila, who works in respondent's human resources department, no deductions were made from claimant's sick leave or compensatory leave during this period, which continued for 48 weeks. He also testified

[1]At issue in this appeal are credits respondent claims it is due for four distinct periods. At times, the parties, arbitrator, or Commission identify these periods with slightly different date ranges that vary by a day or two. No one suggests any legal significance to this or that the ultimate awards were incorrect relative to the duration of the periods in question. We will therefore ignore these minor discrepancies.

that there was no indication in claimant's personnel file that she made an election to continue to receive the make-whole payments beyond the initial six-month period.

¶ 7 On December 16, 2015, respondent sent claimant for an independent medical examination with Dr. Lawrence Lieber. Lieber opined that claimant was at maximum medical improvement (MMI) and was capable of full-duty work. Based on Lieber's opinion, respondent terminated claimant's TTD on January 12, 2016. Claimant, relying on her own doctor, remained off work. Respondent then began paying claimant her full salary of $3729.36. Claimant did not actually work again until August 2016, when she returned to light-duty employment. Claimant continued to receive her salary while working light duty. DeAvila stated that he thought claimant had returned to work in January 2016, but he had not yet been employed by respondent at that time.

¶ 8 On January 31, 2017, claimant suffered a second work-related injury when she slipped and felt a "crack and pop" in her neck. Respondent initially denied this claim; however, claimant was taken off work by her doctors on February 17, 2017. Claimant did not receive TTD during this period but was paid pursuant to her expenditure of sick, vacation, and compensatory leave. Claimant also applied for benefits from the Illinois Municipal Retirement Fund (IMRF).

¶ 9 Respondent argued that it was entitled to a credit for (1) the make-whole payments it made during the first six months of claimant's disability; (2) the "make-whole" payments it made after the first six-month period when it was no longer required to make them in accordance with the CBA; (3) the overpayment of wages during the period claimant did not work following respondent's decision to terminate TTD; and (4) the benefits claimant received following her second injury due to her expenditure of vacation, sick, and compensatory leave.

¶ 10 Pertinent here, the arbitrator noted:

> "Respondent claims that it paid $58,188.50 in temporary total disability benefits. Respondent also claims it paid $105,863.35 in medical bills through its group medical plan for which credit may be allowed under Section 8(j) of the Act. It further sought 8(j) credits for 'whole pay benefits' and 'short term disability benefits' the amount of which to be determined by proofs."

The arbitrator denied respondent's request for a credit due to the payment of medical bills and awarded respondent a credit for payment of TTD—neither of which is under dispute. Regarding the "make-whole" payments, the arbitrator found respondent was entitled to a credit of $14,120.30 for the period running from January 27, 2015, to June 27, 2015. He found that this benefit was "solely paid for work accidents."

¶ 11 Regarding the period between June 28, 2015, and January 7, 2016, the arbitrator found that respondent paid claimant "$20,371.35 by means of accrued collective bargaining benefits." The arbitrator found that respondent had not established that claimant requested that her "make-whole" benefits continue beyond the initial six-month period required under the CBA. Thus, the arbitrator found that respondent "is attempting to seek credit for accrued Sick and Vacation Leave benefits by renaming them as 'make whole' benefits." Since these benefits can be paid regardless of whether claimant suffered an at-work accident, they were not compensable under section 8(j) of the Act (820 ILCS 305/8(j) (West 2014) (stating that section 8(j) "does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act")).

¶ 12 The arbitrator next addressed respondent's claim for a credit based on payments made during the period running from January 8, 2016, to August 11, 2016, which amounted to $59,669.76. The arbitrator again found that claimant was entitled to these payments "irrespective of her work injury." The arbitrator noted that DeAvila testified that these payments represented "actual regular gross pay." Further, claimant testified that "Andrea from human resources [told her] that [respondent] had used Vacation and Sick leave, and Comp time benefits to compensate her for this period." (Respondent asserts that this testimony was hearsay, a contention we will address below.) The arbitrator concluded that since these payments were based on claimant's accrued benefits that could be used regardless of the occurrence of an at-work injury, respondent could not claim a credit under section 8(j).

¶ 13 The arbitrator's final findings relevant to this appeal concern the period from February 17, 2017, to December 7, 2017. During this period, respondent paid $54,403.28. Again, the arbitrator determined that these payments were made pursuant to claimant's expenditure of accrued sick leave, vacation, and compensatory time. As these could be used irrespective of claimant's work injury, respondent was not entitled to a credit under section 8(j).

¶ 14 The Commission issued separate decisions concerning claimant's two at-work accidents. In the first, it affirmed and adopted the arbitrator's decision with one exception. It vacated the arbitrator's award of a credit to respondent for the "make-whole" benefits it paid during the initial period of TTD (January 27, 2015, to June 27, 2015) in the amount of $14,120.30. The Commission found that respondent had failed to carry its burden of proving that it was entitled to this credit. It further found that respondent could not recover this sum in light of the provision of section 8(j)(2) that limits such credits to the amount "that would have been payable during the period covered by such payment." *Id.* § 8(j)(2). This amount was exhausted by the credit respondent received for payment of TTD.

¶ 15 The circuit court of Will County confirmed the decision of the Commission, and this appeal followed.

¶ 16 III. ANALYSIS

¶ 17 At issue in this appeal is respondent's claimed entitlement to a credit to sums paid to claimant as a result of her two work-related accidents under section 8(j) of the Act. That section provides, in pertinent part, as follows:

> "(j) 1. In the event the injured employee receives benefits, including medical, surgical or hospital benefits under any group plan covering non-occupational disabilities contributed to wholly or partially by the employer, which benefits should not have been payable if any rights of recovery existed under this Act, then such amounts so paid to the employee from any such group plan as shall be consistent with, and limited to, the provisions of paragraph 2 hereof, shall be credited to or against any compensation payment for temporary total incapacity for work or any medical, surgical or hospital benefits made or to be made under this Act. In such event, the period of time for giving notice of accidental injury and filing application for adjustment of claim does not commence to run until the termination of such payments. This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act. Any employer receiving such credit shall keep such employee safe and harmless from any and all claims or liabilities that

may be made against him by reason of having received such payments only to the extent of such credit.

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2. Nothing contained in this Act shall be construed to give the employer or the insurance carrier the right to credit for any benefits or payments received by the employee other than compensation payments provided by this Act, and where the employee receives payments other than compensation payments, whether as full or partial salary, group insurance benefits, bonuses, annuities or any other payments, the employer or insurance carrier shall receive credit for each such payment only to the extent of the compensation that would have been payable during the period covered by such payment." *Id.* § 8(j).

A payment may form the basis of a credit only if it is payable solely as the result of a work-related injury. *Village of Streamwood Police Department v. Industrial Comm'n*, 57 Ill. 2d 345, 351 (1974). It is the burden of the employer to establish its right to a credit under this section of the Act. *Elgin Board of Education School District U-46 v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 943, 953 (2011). The right of an employer to receive such a credit is an exception to liability created by the Act, so it is narrowly construed. *World Color Press v. Industrial Comm'n*, 125 Ill. App. 3d 469, 471 (1984).

¶ 18 To the extent resolving this appeal requires us to construe section 8(j), our review is *de novo*. *Con-Way Freight, Inc. v. Illinois Workers' Compensation Comm'n*, 2016 IL App (1st) 152576WC, ¶ 18. Factual decisions of the Commission are reviewed using the manifest-weight standard. *Shafer v. Illinois Workers' Compensation Comm'n*, 2011 IL App (4th) 100505WC, ¶ 35. Under the manifest-weight standard, we will disturb a decision of the Commission only if an opposite conclusion is clearly apparent. *Id.* We may affirm the Commission's decision on any basis appearing in the record, regardless of the actual reasoning relied on by the Commission. *American Coal Co. v. Illinois Workers' Compensation Comm'n*, 2020 IL App (5th) 190522WC, ¶ 72. With these standards in mind, we now turn to respondent's individual claims.

¶ 19 A. January 28, 2015, to July 28, 2015

¶ 20 During this period, respondent claims an entitlement to a credit of $14,210.30 for the initial six-month period for the payments it made pursuant to the "make-whole" provision in the CBA. Regarding the TTD paid during this period, respondent received an appropriate credit, which is not in dispute. The arbitrator awarded respondent a credit for the "make-whole" payments, and the Commission reversed this award.

¶ 21 The provision in the CBA that required these payments provided, in pertinent part, as follows:

"An Employee (or his authorized representative) who becomes ill, injured, or disabled shall report to his supervisor as soon as possible. In case of an on-the-job injury, illness or disability, the City will pay the difference between any payments received by the Employee from a public employee pension fund and/or provisions under Workers Compensation or Occupational Diseases Acts and the Employee's regular salary or wages for a maximum of six (6) months."

Thus, respondent voluntarily assumed an obligation to pay claimant the difference between whatever she received for TTD and her actual wage.

¶ 22 Respondent now argues that the Commission erred in denying it this credit. The Commission determined that respondent failed to carry its burden of proving that these payments "were limited to employment related disabilities," as required by section 8(j)(1) (820 ILCS 305/8(j) (West 2014)). The Commission also found that since respondent had received full credit for the TTD payments it made during this period, it was not entitled to any further credit for the period, explaining, "Respondent already received a credit for the TTD paid of $58,188.50—the extent of the compensation that would have been payable during the period covered by such payment."

¶ 23 Respondent does not address the latter finding in its opening brief, thereby forfeiting any challenge to this finding. See *Khan v. Fur Keeps Animal Rescue, Inc.*, 2021 IL App (1st) 182694, ¶ 42; Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) ("Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."). Accordingly, we reject respondent's challenge to this portion of the Commission's decision.

¶ 24 Respondent does address this issue belatedly in its reply brief. We find its argument unpersuasive. Citing *World Color Press*, 125 Ill. App. 3d 469, and *Salisbury v. Illinois Workers' Compensation Comm'n*, 2017 IL App (3d) 160138WC, respondent points out that, in these cases, this court sanctioned a credit for the overpayment of TTD, which would, presumably, be an amount beyond the amount of TTD ultimately awarded. That is, both of these cases involved a credit based on the *overpayment* of benefits at an earlier time. That renders them distinguishable from the instant case.

¶ 25 In *World Color Press*, 125 Ill. App. 3d at 471-72, construing section 8(j), we held, "The statute cannot reasonably be read to exclude credit for overpayment, or to give to the employee a greater amount of compensation than is awarded under the Act." In *Salisbury*, 2017 IL App (3d) 160138WC, ¶ 11, we found a credit warranted, explaining, "Quite simply, what is happening here is that the Commission is merely recognizing that an employer has already made a partial payment that goes to satisfying its obligation." In this case, the sum respondent seeks to recoup was paid to claimant pursuant to the "make-whole" provision in the CBA under which the parties operated. Thus, there was no overpayment of TTD, nor was there an early payment made toward satisfying a future obligation. Allowing respondent a credit against future awards for sums it was required by the CBA to pay during the first six months of claimant's injury would be a windfall to respondent. Indeed, it is hard to see how these payments would make claimant whole if respondent was allowed to take them back later in lieu of paying other benefits under the Act. Thus, even if respondent had not forfeit this issue, we would find its argument ill taken.

¶ 26 In sum, we will not disturb the Commission's decision to deny respondent's request for a credit here.

¶ 27 B. July 29, 2015, to January 12, 2016

¶ 28 Respondent next claims a credit for "make-whole" payments made during this period (respondent acknowledges that it received an appropriate credit for TTD paid during this period). Respondent asserts that it "erroneously continued after the initial 6 month period provided by the CBA" to make these payments. The CBA allowed claimant to elect to continue to receive "make-whole" payments after the initial six-month period in the following manner:

"(a) In cases where such disability exceeds six (6) months, and the Employee desires to continue receiving such pay differential, it shall be deducted from accrued but unused Sick Leave, at the rate of one (1) hour for each three (3) working hours the employee is absent due to such status.

(b) Employees who exhaust Sick Leave but remain disabled and wish to continue receiving pay differential, shall be able to do so by deducting such pay from accrued but unused Vacation Leave and/or Compensatory Leave at a rate of one (1) day for each three (3) working days the Employee is absent due to such status."

The Commission, adopting the decision of the arbitrator, found that the continuation of these payments was based on the expenditure of claimant's sick and vacation leave, to which she was entitled regardless of whether her injury was work related.

¶ 29 Respondent begins by asserting that the Commission drew a "sweeping inference that [respondent] deducted payments from [claimant's] sick and vacation leave." Respondent asserts that there was nothing in claimant's earning statements from this period to indicate that such leave time was expended. However, the Commission, adopting the arbitrator's decision, expressly found "the information on the payment vouchers to be unreliable." In support, it noted several inaccuracies in claimant's pay vouchers. For example, DeAvila testified that claimant's pay vouchers showed actual time worked during this period despite the fact that she had not yet returned to light duty. Thus, the Commission elected to place more weight on respondent's general procedures and the CBA, which required that a continuation of "make-whole" benefits beyond the initial six months be based on an expenditure of accrued leave. As such, the Commission's decision that respondent deducted payments from claimant's leave finds a basis in the record.

¶ 30 We note that at various points during this argument, respondent seems to forget that it bore the burden of proving an entitlement to a credit. See *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 953. For example, respondent complains that claimant "provided no proof these benefits came out of any of her accrued benefits." It was respondent's burden to prove that they did not. Similarly, respondent asserts that "an award under the Act cannot be based on mere speculation." See *A.O. Smith Corp. v. Industrial Comm'n*, 51 Ill. 2d 533, 536 (1972). However, because the burden here is upon respondent, the absence of evidence would mandate resolving the case against it.

¶ 31 To conclude, we cannot say that the Commission's decision on this point is contrary to the manifest weight of the evidence.

¶ 32 C. January 13, 2016, to August 11, 2016

¶ 33 Respondent next complains of the Commission's decision to deny it a credit for payments it made to claimant after it terminated her TTD. Based on the opinion of its independent medical examiner that claimant had reached MMI and was capable of full-duty employment, respondent terminated claimant's TTD on January 12, 2016. Claimant, relying on her own doctor, remained off work. Though claimant was not working and her TTD had been terminated, respondent paid claimant her full salary of $3729.36. Claimant did not return to work until August 2016, when she was offered light duty. DeAvila testified that he thought claimant had returned to work in January 2016.

¶ 34 The Commission found that these payments were made by virtue of the expenditure of claimant's accrued leave benefits. Respondent contends that this finding is contrary to the manifest weight of the evidence. Respondent points out that claimant acknowledged that she did not know if these payments represented regular payroll. Respondent again misplaces the burden of proof (see *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 953), arguing that claimant "tried to claim her personal time, made up of vacation hours, sick time and comp time, were being used to pay her, [but] she had nothing to prove this." Respondent acknowledges that claimant testified that she spoke with "Andrea" from human resources (HR). She testified that Andrea told her that continued payments would be based on her expenditure of accrued leave. The arbitrator sustained a hearsay objection to this testimony; nevertheless the Commission chose to rely on it.

¶ 35 While the Commission did not articulate its reason for crediting this testimony, it appears to us that it is not hearsay at all. Generally, an admission by a party opponent is outside the scope of the hearsay rule. Illinois Rule of Evidence 801(d)(2)(D) (eff. Oct. 15, 2015) provides:

> "A Statement is not hearsay if
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> * * *
>
> *** [t]he statement is offered against a party and is * * * a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship ***."

At issue here is a statement made by Andrea (who works in respondent's HR department) regarding claimant's benefits (which is a matter within the scope of an HR employee's duties) made when claimant called HR, indicating Andrea was an employee at the time she made the statement. This statement, accordingly, was not hearsay. See *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1066 (2001) ("Because the statements at issue were made by the defendant's employee during the employment relationship about a matter within the scope of employment, the statements fall within the party admission exception to the hearsay rule."). Hence, the Commission did not err in relying on this testimony.

¶ 36 Respondent points out that DeAvila testified that no accrued benefits were deducted from claimant during this period. The Commission found his testimony to be entitled to little weight, as he was not employed by respondent during this period and he admitted that he could not reconcile the fact that claimant was receiving a paycheck with the fact that she had not yet returned to work. At best for respondent, the evidence here is conflicting. We cannot say it so favors respondent as to render the Commission's decision contrary to the manifest weight of the evidence.

¶ 37 Respondent points to *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 954, where an employer was given a credit for payment of wages in lieu of TTD. However, that case did not disturb, and in fact reiterated, the rule that an employer is not entitled to such a credit where the payments in question could have been paid irrespective of the occurrence of an at-work accident. Here, the Commission determined that this was the case, and as we have explained, its determination is not against the manifest weight of the evidence.

¶ 38 Given the state of the record, we cannot say that respondent has established on appeal that it is clearly apparent that it carried its burden before the Commission of showing that it was entitled to this credit.

¶ 39 D. February 17, 2017, to December 7, 2017

¶ 40 Finally, during this period, claimant was paid her salary through the expenditure of her accrued sick leave, vacation, and compensatory leave. She also applied for benefits through the IMRF. The Commission found that claimant received these payments by expending accrued leave time. It noted that such leave may be used irrespective of the occurrence of a work-related injury.

¶ 41 Respondent does not dispute this conclusion and instead argues that this limitation does not apply, again relying on *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 954. Respondent agrees that in *Tee-Pak, Inc. v. Industrial Comm'n*, 141 Ill. App. 3d 520, 529 (1986), this court held, "Under the Act, the employer receives no credit for benefits which would have been paid irrespective of the occurrence of a workers' compensation accident." Respondent points out that in *Elgin Board of Education School District U-46*, 409 Ill. App. 3d at 954, we allowed a credit under circumstances similar to those present here because, unlike *Tee-Pak*, there was no evidence in *Elgin Board of Education School District U-46* that the employer intended that its employees could collect TTD benefits and wages at the same time. Respondent asserts that this case is similarly distinguishable from *Tee-Pak*.

¶ 42 We note, however, that the limitation referenced in *Tee-Pak* was not announced by the *Tee-Pak* court; rather, it appears in the plain language of section 8(j)(1) itself: "This paragraph does not apply to payments made under any group plan which would have been payable irrespective of an accidental injury under this Act." 820 ILCS 305/8(j)(1) (West 2014). Regardless of whether *Tee-Pak* is distinguishable, this language is controlling here.

¶ 43 Therefore, since there is no dispute that claimant was paid through the expenditure of her accrued leave time and since there is no indication that she could not have used this leave time absent an occupational injury, the Commission's decision is not contrary to law or against the manifest weight of the evidence.

¶ 44 IV. CONCLUSION

¶ 45 In light of the foregoing, the judgment of the circuit court of Will County confirming the decision of the Commission is affirmed. This case is remanded for further proceedings, if any, in accordance with *Thomas*, 78 Ill. 2d 327.

¶ 46 Affirmed and remanded.