Digitally signed by Reporter of Decisions
Reason: I attest to the accuracy and integrity of this document
Date: 2024.08.29 15:05:01 -05'00'

Illinois Official Reports

Appellate Court

Carter v. Illinois Workers' Compensation Comm'n, 2023 IL App (1st) 221290WC

Appellate Court Caption	SHENEQUA CARTER, Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Chicago Transit Authority, Appellee).
District & No.	First District, Workers' Compensation Commission Division No. 1-22-1290WC
Filed Rehearing denied	August 11, 2023 September 20, 2023
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 19-L-50572; the Hon. John J. Curry Jr., Judge, presiding.
Judgment	Circuit court judgment reversed. Commission decision set aside and cause remanded to the Commission with directions.
Counsel on Appeal	Adam J. Scholl, of Donald W. Fohrman & Associates, Ltd., of Chicago, for appellant. Kent S. Ray, Stephen L. Wood, and Irina Y. Dmitrieva, of Chicago Transit Authority, of Chicago, for appellee.

Panel PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court, with opinion.
Justices Hoffman, Hutchinson, and Cavanagh concurred in the judgment and opinion.
Justice Barberis dissented, with opinion.

OPINION

¶ 1 The claimant, Shenequa Carter, was found to have sustained a compensable injury pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2014)) while working for the employer, Chicago Transit Authority. The Illinois Workers' Compensation Commission (Commission) awarded the claimant a wage differential, which the circuit court confirmed. The claimant appeals the Commission's calculation of the wage-differential award.

¶ 2 I. BACKGROUND

¶ 3 We provide a limited background in this case as the only dispute on appeal is the Commission's wage-differential award.

¶ 4 On June 5, 2014, the claimant filed an application for adjustment of claim pursuant to the Act, seeking benefits for injuries she allegedly sustained to her right arm, neck, and back while working as a bus operator for the employer on May 30, 2014. The matter proceeded to a hearing on December 1, 2014.

¶ 5 On February 12, 2015, the claimant was terminated by the employer for cause. The Office of the Executive Inspector General (OEIG) conducted an investigation and issued a decision on October 1, 2014, finding that the claimant falsified Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 *et seq.* (2012)) forms in 2012 and 2013. After receiving this decision, the employer conducted its own investigation and determined that the claimant violated its rules or policies.

¶ 6 On July 21, 2015, the arbitrator issued its decision and found that the claimant sustained compensable injuries to her "neck, right shoulder, right arm, and right wrist" while working for the employer on May 30, 2014. The arbitrator also found that the claimant's average weekly wage was $918.83. The arbitrator awarded the claimant temporary total disability (TTD) benefits and ordered the employer to pay all reasonable and necessary medical expenses incurred. Thereafter, the claimant continued to seek treatment for her condition. The employer disputed the medical expenses and nature and extent of the claimant's injuries.

¶ 7 On September 11, 2018, a second arbitration hearing was held. The evidence demonstrated that the claimant had since underwent surgery for her right shoulder, which was recommended as reasonable and necessary by the employer's independent medical examiner, and her right shoulder reached maximum medical improvement. A functional capacity evaluation provided that she could work at a physical demand level of light to medium, which fell below the occupational demand level of a bus operator established by the Department of Transportation. The claimant's physician opined that she could not return to commercial bus driving and recommended that she avoid lifting, pushing, or pulling objects greater than 20 pounds.

¶ 8 The claimant presented for a vocational rehabilitation assessment at the employer's recommendation. The assessment provided that she could earn approximately $10.20 to $12 per hour. The claimant subsequently obtained a full-time security guard position with U.S. Security Associates, but she did not always work a 40-hour work week. She earned $12 per hour as a security guard. The claimant submitted into evidence 16 payroll check stubs covering the bi-weekly periods from January 12, 2018, to August 23, 2018. She also submitted into evidence a document summarizing the information contained in her pay stubs. The document indicated that she worked 1071 hours over a 32-week period, earned $12,852 in gross pay, and her average weekly wage $401.63. The claimant remained in this employment at the time of the hearing.

¶ 9 The claimant testified that she would earn $35.01 per hour if employed by the employer as a full-time bus operator at the time of the hearing. She submitted into evidence a document summarizing the collective bargaining agreement (CBA) between the employer and its union employees wherein full-time bus operators earned $35.01 per hour effective July 1, 2018 (2018 CBA). When discussing the admission of the document into evidence, the following colloquy occurred:

> "[THE CLAIMANT'S COUNSEL]: As Petitioner's Exhibit Number 6, your Honor, I'm presenting a document called the Summary of Tentative Agreement from January 1, 2016 through December 31, 2019 of the Collective Bargaining Agreement with the [employer]. It reflects that the current full-time operator hourly wage is $35.01.
>
> I don't have the full document. In fact, I believe the actual agreement has now been ratified, but I think counsel and I have discussed that $35.01 is the accurate amount, if he's willing to stipulate to that.
>
> [THE EMPLOYER'S COUNSEL]: I will stipulate that that is an accurate—that the document is accurate, and I won't object to it being admitted into evidence.
>
> [THE ARBITRATOR]: All right. And her testimony was whatever the current wages are already. So that's noted. Petitioner's 6 is admitted."

¶ 10 On December 26, 2018, the arbitrator issued its decision, finding that the claimant was no longer physically capable of working as a bus operator and obtained alternative employment as a full-time security guard earning a lower wage. Specifically, the arbitrator found that the claimant earned $12 per hour and was able to earn $480 per week ($12 per hour x 40 hours) as a security guard. The arbitrator also found that, if the claimant could fully perform the job duties of a bus operator for the employer, "she would currently earn the contractual rate of $35.01 per hour or $1,400.40 per week based on a 40-hour work week." The arbitrator noted in its decision that the employer's counsel stipulated that $35.01 was the current rate for full-time bus operators. Accordingly, the arbitrator awarded the claimant a wage-differential award of $613.60 per week (($1400.40 - $480) x $66^{2}/_{3}$%) from September 11, 2018, until she turned 67 years old. See 820 ILCS 305/8(d)(1) (West 2018).

¶ 11 The employer sought review of the arbitrator's decision with the Commission and disagreed with the arbitrator's usage of the $35.01 hourly rate in calculating the claimant's wage-differential award. The Commission issued a unanimous decision, reducing the arbitrator's wage differential award from $613.60 to $344.80 per week. First, the Commission reduced the claimant's current average weekly wage as a security guard by considering that she only worked 33.47 hours per week on average rather than 40 hours. This resulted in a current average weekly wage of $401.64 (33.47 hours x $12 per hour) instead of $480 (40

hours x $12 per hour). Second, the Commission found that the claimant "would not be able to earn" $35.01 per hour as a bus operator for the employer under the 2018 CBA. Its decision focused on the fact that the claimant was terminated in February 2015 for cause. Therefore, the Commission used the average weekly wage of $918.83, which was her average weekly wage at the time of the accident. These two modifications resulted in a wage differential of $344.80 (($918.83 - $401.64) x $66^{2/3}$%).

¶ 12 The claimant sought judicial review of the Commission's decision before the circuit court of Cook County. The court confirmed the Commission's decision. The claimant appeals.

¶ 13 II. ANALYSIS

¶ 14 Section 8(d) of the Act provides that a claimant who becomes partially incapacitated from pursuing his usual and customary line of employment may receive a wage-differential award. *Id.* § 8(d). To prove entitlement to such an award, a claimant must show that (1) she is partially incapacitated from pursuing her usual and customary line of employment and (2) there is a difference between the average amount which she would be able to earn in the full performance of her duties in the occupation in which she was engaged at the time of the accident and the average amount which she is earning or is able to earn in some suitable employment or business after the accident. *Id.* § 8(d)(1). The purpose of a wage-differential award is to compensate an injured claimant for her reduced earning capacity. *Lenhart v. Illinois Workers' Compensation Comm'n*, 2015 IL App (3d) 130743WC, ¶ 44.

¶ 15 Section 8(d)(1) provides that qualifying claimants receive compensation:

> "equal to 66-$^{2/3}$% of the difference between the average amount which he would be able to earn in the full performance of his duties in the occupation in which he was engaged at the time of the accident and the average amount which he is earning or is able to earn in some suitable employment or business after the accident." 820 ILCS 305/8(d)(1) (West 2018).

¶ 16 The Commission's calculation of a wage-differential award is a factual finding, which this court will not disturb on appeal unless it is contrary to the manifest weight of the evidence. *United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*, 2013 IL App (1st) 121136WC, ¶ 28. A finding of fact is against the manifest weight of the evidence where an opposite conclusion is clearly apparent. *Id.* We now turn to whether the Commission erred when it used the average weekly wage the claimant was earning at the time of the accident instead of the average weekly wage she would have earned under the 2018 CBA at the time of hearing.

¶ 17 This court has previously interpreted section 8(d)(1) of the Act and found that a wage-differential award "should be calculated based on the amount the claimant would have been able to earn *at the time of the arbitration hearing* if he were able to fully perform the duties of the occupation in which he was engaged at the time of his injury." (Emphasis added.) *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 1002, 1021 (2005). A claimant's termination has no bearing on this calculation and its consideration is contrary to our supreme court's precedent.

¶ 18 In *Interstate Scaffolding, Inc. v. Illinois Workers' Compensation Comm'n*, 236 Ill. 2d 132, 149 (2010), the supreme court held that an employer's obligation to pay TTD benefits to an injured employee did not cease because the employee had been discharged—regardless of whether the discharge was for "cause." The court explained, "[w]hether an employee has been

discharged for a valid cause, or whether the discharge violates some public policy, are matters foreign to workers' compensation cases." *Id.* We acknowledge that we are not presented with a situation where benefits were ceased on the basis of termination like in *Interstate Scaffolding*, but we find the same reasoning should apply here where an employer attempts to consider an employee's subsequent termination to calculate a wage differential. Thus, we find the claimant's termination is irrelevant in calculating a wage differential. Although the claimant did not object to the admission of evidence regarding her termination, it does not change its relevancy, or rather, lack thereof. A contrary conclusion would require a determination as to the validity of such terminations, among other things, which extends beyond the function of the Act.

¶ 19 Here, the arbitrator admitted into evidence the summary of the 2018 CBA detailing the $35.01 pay rate for the employer's bus operators with an effective date of July 1, 2018. The employer's counsels stipulated that the document was accurate. The arbitrator reasonably interpreted this stipulation to mean that the parties agreed the employer was currently paying its bus operators an hourly rate of $35.01. The claimant testified at the arbitration hearing (on September 11, 2018) that she would have been able to earn the hourly rate of $35.01 under the 2018 CBA if she were able to fully perform the duties of a full-time bus operator with the employer.

¶ 20 However, for the first time, the employer now attempts to correct the record and explain that it did not stipulate to the $35.01 pay rate, but rather, stipulated that there simply was a tentative agreement between the employer and the union to increase the bus operators' pay. Additionally, the employer now states that the 2018 CBA was not ratified until August 14, 2019. Therefore, the employer argues that the $35.01 rate is speculative and improper to use in calculating a wage differential. See *Taylor v. Industrial Comm'n*, 372 Ill. App. 3d 327, 330-31 (2007) (providing that a claimant's preaccident earnings can be used if other methods in calculating the claimant's potential earnings are too speculative).

¶ 21 We find the employer's issue with the stipulation to be ill-timed. The employer had opportunities to timely raise the issue with the arbitrator's interpretation of the stipulation and failed to do so. For instance, upon review before the Commission, the employer did not raise this purported error contained in the arbitrator's decision. The Commission's decision also provides that "the record contains the relevant portion of the CBA reflecting that a full-time bus operator would have been earning $35.01 per hour effective July 1, 2018." The employer again failed to acknowledge this purported error with the circuit court, even when the claimant's brief discussed this stipulation when presenting its argument as to why the Commission erred. Consequently, we find that the employer forfeited this argument. See *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 336 (1980); see also *Brink v. Industrial Comm'n*, 368 Ill. 607, 609-10 (1938) (a party may relieve a party from the effect of the stipulation upon application seasonably made and a showing that the matter is in fact untrue, violative of public policy, or the result of fraud). Moreover, the employer does not dispute that the effective hourly wage for its bus operators was $35.01 at the time of the arbitration hearing.

¶ 22 Accordingly, the 2018 CBA hourly wage of $35.01 with the effective date of July 1, 2018, is the proper rate to calculate the claimant's wage differential, and thus, the Commission's wage-differential award is against the manifest weight of the evidence.

¶ 23 III. CONCLUSION

¶ 24 For the foregoing reasons, we reverse the judgment of the circuit court, set aside the Commission's decision, and remand this matter to the Commission with directions that the Commission recalculate the claimant's wage differential in accordance with this opinion.

¶ 25 Circuit court judgment reversed.

¶ 26 Commission decision set aside and cause remanded to the Commission with directions.

¶ 27 JUSTICE BARBERIS, dissenting:

¶ 28 In my view, the Commission's wage-differential award was neither contrary to the law nor against the manifest weight of the evidence. Therefore, I respectfully dissent.

¶ 29 As the majority correctly notes, in *Interstate Scaffolding*, the supreme court held that an employer's obligation to pay TTD benefits to an injured employee did not cease because the employee had been discharged—regardless of whether the discharge was for "cause." 236 Ill. 2d at 149. Here, unlike *Interstate Scaffolding*, the Commission awarded claimant wage-differential benefits despite her termination. As such, it is my view that the reasoning of *Interstate Scaffolding* does not extend to the circumstances of the present case where claimant was not denied benefits as a result of the termination of her employment. Thus, I would hold that *Interstate Scaffolding* does not apply to the present case and does not preclude the Commission from considering evidence of claimant's termination in determining the average amount she could earn as a commercial bus driver.

¶ 30 Moreover, claimant testified that CTA terminated her employment, and claimant failed to object to the questioning and evidence regarding her termination. By failing to do so, claimant waived any objection to the Commission's consideration of evidence regarding her termination. See *Docksteiner v. Industrial Comm'n*, 346 Ill. App. 3d 851, 855 (2004) ("Having failed to object during Dr. Tuteur's evidence deposition or during the arbitration hearing, the claimant has waived any objection to the Commission's consideration of Dr. Tuteur's testimony regarding his interpretation of the CT scan or his reliance thereon in formulating his opinion that the claimant does not suffer from [coal workers' pneumoconiosis]."); see also *Caradco Window & Door v. Industrial Comm'n*, 86 Ill. 2d 92, 97 (1981) ("since claimant did not object before the arbitrator or the Commission to the introduction of evidence going to this issue, she cannot do so now"). Thus, in my view, the Commission did not determine whether claimant's termination was "for just cause," it merely considered the undisputed fact of her termination in determining the average amount she could earn as a commercial bus driver.

¶ 31 Having determined that the Commission was not precluded from considering evidence of claimant's termination in calculating claimant's wage-differential award, I would also conclude that the Commission's calculation of claimant's wage-differential award was not against the manifest weight of the evidence. "For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent." *United Airlines, Inc.*, 2013 IL App (1st) 121136WC, ¶ 28. "Put another way, the Commission's determination on a question of fact is against the manifest weight of the evidence when no rational trier of fact could have agreed." *Id.*

¶ 32 "A wage differential award is calculated on the presumption that but for the injury, the claimant would be in the full performance of his duties." *Taylor*, 372 Ill. App. 3d at 330 (citing

Old Ben Coal Co. v. Industrial Comm'n, 198 Ill. App. 3d 485, 493 (1990)). It is well settled that "the calculation of a claimant's wage differential award should be based on the amount the claimant would have been able to earn at the time of the arbitration hearing, not the amount he was actually earning at the time of his injury." *Greaney*, 358 Ill. App. 3d at 1022. However, "a claimant's preaccident earnings can be used if other methods are too speculative." *Taylor*, 372 Ill. App. 3d at 330-31 (citing *Albrecht v. Industrial Comm'n*, 271 Ill. App. 3d 756, 762 (1995)).

¶ 33 Here, the Commission could have reasonably concluded that the evidence demonstrated claimant would not have been in the full performance of her duties as a full-time bus driver for CTA but for her work injuries. I acknowledge that claimant testified she would earn $35.01 if she worked for CTA as a full-time bus driver at the time of the hearing. I also acknowledge that claimant presented a document summarizing the "tentative" CBA, which indicated that the current wage rate for full-time CTA bus drivers was $35.01 per hour, effective July 1, 2018. However, CTA presented evidence showing that claimant was terminated by CTA on February 12, 2015—prior to the effective date of the CBA. CTA also presented evidence showing that claimant's termination resulted from an investigation conducted by the OEIG concerning claimant's act of falsifying FMLA paperwork in 2012 and 2013—prior to her work-related accident. Claimant did not object to the testimony and evidence presented regarding her termination. In fact, claimant's own testimony confirmed that she was terminated for conduct that occurred prior to the work accident. As a result, the Commission could have reasonably concluded that the evidence of claimant's entitlement to the 2018 CBA wage rate of $35.01 was speculative. Because claimant presented no other evidence to establish the amount she could have earned as a commercial bus driver at the time of the hearing, the Commission did not err by using claimant's preaccident earnings to calculate her wage-differential award. See *id.*

¶ 34 It is the function of the Commission to resolve conflicts of evidence, and a reviewing court will not set aside a finding of the Commission unless it was against the manifest weight of the evidence, "even though the court might have drawn different inferences and reached a conclusion different from the Commission's." *Caterpillar Tractor Co. v. Industrial Comm'n*, 81 Ill. 2d 416, 421 (1980). In my view, it was reasonable for the Commission to disregard evidence of the wage rate set forth in the 2018 CBA where the undisputed evidence demonstrated that claimant would not have been working as a CTA bus driver at the time of the arbitration hearing.

¶ 35 For these reasons, I would conclude that the Commission's decision was neither contrary to the law nor against the manifest weight of the evidence. Therefore, I would affirm the Commission's decision awarding claimant wage-differential benefits based on claimant's preaccident earnings.