

NOTICE

Decision filed 12/28 /12. The text of this decision may be changed or corrected prior to the filing of a Petition for Rehearing or the disposition of the same.

NOTICE

This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (1st) 1120012WC-U

NO. 1-12-0012WC

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

| | | |
|-------------------------------------|---|----------------------|
| SALVADOR NEGRETE, |) | Appeal from the |
| |) | Circuit Court of |
| Appellant, |) | Cook County. |
| |) | |
| v. |) | No. 11-L-50569 |
| |) | |
| ILLINOIS WORKERS' COMPENSATION |) | |
| COMMISSION, (Slurry Systems, Inc.), |) | Honorable |
| |) | Margaret A. Brennan, |
| Appellee. |) | Judge, presiding. |

JUSTICE STEWART delivered the judgment of the court.
Presiding Justice Holdridge, and Justices Hoffman, Hudson, and Turner concurred in the judgment.

ORDER

¶ 1 The claimant, Salvador Nagrete, filed a claim for workers' compensation benefits due

to a work-related injury that occurred on February 13, 2009. At the time of his injury, the claimant was an employee of Slurry Systems, Inc. (the employer). The claimant filed a request for an expedited arbitration hearing pursuant to section 19(b) of the Illinois Workers' Compensation Act (the Act). 820 ILCS 305/19(b) (West 2010). On March 10, 2010, the arbitrator issued a decision finding that, in the year preceding the injury, the claimant earned \$10,171.97 and that his average weekly wage was \$847.66. The claimant appealed the arbitrator's decision to the Illinois Workers' Compensation Commission (the Commission). The Commission modified the arbitrator's decision by recalculating the claimant's wages for the year preceding his injury and assessing his average weekly wage at \$854.09. The claimant appealed the Commission's decision to the circuit court of Cook County, and the circuit court confirmed the Commission's decision. The claimant appeals from the decision of the circuit court.

¶ 2

BACKGROUND

¶ 3 At the arbitration hearing, the claimant testified that he began working for the employer in December 2008, at the BP plant in Whiting, Indiana. He was hired through the union hall as a third-year apprentice pile driver for an hourly wage of \$25.85. He testified that his work at that time included "[r]igging, pile driving work, welding, burning with the torch, just a lot of manual labor, hard work, heavy construction." His right hand was injured at work on February 13, 2009. After being treated for his injury, he came back to work on light duty and was terminated on March 6, 2009.

¶ 4 The claimant testified that, at this BP refinery, he "had to do mandatory overtime." He explained that he worked 10 hours per day, 6 days per week. He said that he arrived at work at 7 a.m. and left at 5 or 5:30 p.m., and was not able to leave until dismissed by his supervisor because he "needed transportation to get out of the compound." He testified that he and the others on his crew were transported by bus from the parking lot outside the compound to the job site, and then they went back to the parking lot by bus at the end of the work day.

¶ 5 The employer's president, Dana Weslock, testified that the claimant worked for the employer part-time from the week ending December 21, 2008, through March 8, 2009. Weslock explained that the claimant's "consecutive work time," during which he was employed at "the BP job, *** started December 21st, 2008¹." The employer did not always require its employees to work overtime, but overtime was required for certain jobs, because their work was "very project specific." On cross-examination, Weslock acknowledged that claimant's part-time status meant that he was hired on a "job-by-job basis." Weslock testified, "We're a union contractor, and [claimant was] employed with the UBC 578 [union] and he was an apprentice, yes, so he was hired specifically for that job." The first week the claimant worked at the BP job was the week ending December 21, 2008. Weslock testified that, from the time the claimant began the BP job until the date he was injured, February 13, 2009, he worked overtime every week except the week of the Christmas holiday. The

¹We note that December 21, 2008, is a Sunday and that both parties agree that the claimant was working for the employer in the week ending on December 21, 2008.

employer paid the claimant overtime for every day he worked more than eight hours, regardless of whether he worked 40 hours that week.

¶ 6 At the arbitration hearing, the parties submitted the request for hearing form on which they listed the only disputed issue as the claimant's earnings for the year preceding his injury. In paragraph 5 of that form, the claimant asserted that his earnings for the year preceding his injury totaled \$8,646.93 and that his average weekly wage was \$1,080.87. The employer listed the claimant's average weekly wage as \$794.88, but the hand-written notation for his yearly wage is not legible. There is a hand-written notation on the form next to that paragraph, stating "for 8 weeks of work." The parties did not submit any testimony or make any arguments to explain that notation. The claimant submitted an exhibit (PX2) showing his weekly wages for the eight-week period for the weeks ending on December 21, 2008, through February 8, 2009. The employer submitted an exhibit (RX3), which the arbitrator admitted over the claimant's objection, showing the claimant's weekly wages for the period of the weeks ending on December 16, 2007, through March 8, 2009, which is more than one year. The employer's exhibit shows that, in addition to the BP job, the claimant was called out of the union hall to work for the employer during one week in December 2007, one week in March 2008, and four weeks in November 2008.

¶ 7 The arbitrator found that the claimant earned \$10,171.97 in the year preceding his injury and that his average weekly wage was \$847.66. Based upon that finding, the arbitrator determined that the claimant was entitled to receive \$564.54 per week in temporary total

disability (TTD) benefits for 46.429 weeks. The arbitrator explained how he calculated the claimant's average weekly wage:

"This figure includes overtime at the straight time rate. To arrive at the above figure, the arbitrator used Respondent's exhibit # 3 [RX3] (Earnings Register) and applied the statutory language of the Act stating, 'the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of the injury, ... divided by 52...'

Thus, the operative period of time is from 11-09-08 to 02-08-09. The arbitrator notes this is 13.174 weeks, but 12 pay periods. Nevertheless, it appears that during that time, the petitioner worked over 40 hours [on] only six occasions, yet received some form of overtime pay on eight of the 12 pay periods.

Please note, the arbitrator omits the first two pay periods of RX3 as they fall outside of the 52 week period used to compute [average weekly wage]. Likewise, the final four paychecks are omitted as they occurred post injury.

Based on the testimony at trial of all the witnesses, the petitioner's job each day appeared to be based upon achieving a specific goal. When the daily task(s) was met, the job was completed and the petitioner's day was finished. The petitioner could only leave the premises by bus, when arranged by his foreman. As a result, it would appear a somewhat uncommon [sic] instance in which overtime was required, even though

petitioner failed to clock over forty hours each and every week.

The petitioner earned \$25.85 per hour, and worked a total of 393.5 hours or units.

The two figures multiplied equal to \$10,171.97. That figure divided by 12 weeks (pay periods) comes to \$847.66.

Why not divide \$10,171.97 by 13.174 weeks? The Act states that, 'if the injured employee lost 5 or more calendar days during such a period, whether or not in the same week, then the earnings for the remainder of such ... weeks shall be divided by the remaining...' "

¶ 8 On appeal, the Commission modified the arbitrator's decision on the calculation of the claimant's average weekly wage. Like the arbitrator, the Commission used the employer's exhibit (RX3) listing the claimant's wages, rather than the claimant's exhibit, as the basis for its calculations. The Commission explained how it arrived at its figures:

"Regular wages (excluding overtime) *** 3/23/2008 - 11/30/2008 – \$2543.23

Wages (including mandatory overtime at straight time rate of \$25.85/hour)

during period 12/21/2008 - 2/15/2009 – \$9047.61

Total wages \$11,590.84

÷ Total weeks 13 4/7

Average Weekly Wage \$854.09"

Based on the modified average weekly wage, the Commission also modified the arbitrator's award of TTD benefits to \$569.39 per week for the period of March 8, 2009, through January

26, 2010, a period of 46 3/7 weeks. Otherwise, the Commission affirmed and adopted the arbitrator's decision. The circuit court confirmed the Commission's decision, and this appeal followed.

¶ 9

ANALYSIS

¶ 10 We first consider the claimant's argument that the parties and the Commission were bound by a stipulation set forth on the request for hearing form. The claimant argues that the parties' notation on the request for hearing form, "for 8 weeks of work," binds both the parties and the Commission. The claimant contends that the Commission was not free to use a time period other than the eight weeks listed on PX2, his list of wages for the eight-week period from the week ending on December 21, 2008, through February 8, 2008. The claimant argues that the Commission's calculation of his average weekly wage is incorrect because, despite the stipulation, it used his wages from the week ending on March 23, 2008, through February 15, 2009.

¶ 11 This issue presents a question of fact for which the standard of review is whether the Commission's decision is against the manifest weight of the evidence. *Freeman United Coal Mining Co. v. Workers' Compensation Comm'n*, 386 Ill. App. 3d 779, 784, 901 N.E.2d 906, 912 (2008). The test for whether the Commission's decision is against the manifest weight of the evidence is "whether there is sufficient evidence in the record to support the Commission's finding." *Id.*

¶ 12 The evidence on this issue is not entirely clear. The notation, "for 8 weeks of work,"

is not initialed by either party, and there is nothing in the record to explain the meaning of the notation, who wrote it, or when it was added. By the way it is written, it appears to apply to the entire paragraph (#5) in which the claimant and the employer each list the "earnings during the year preceding the injury" and "the average weekly wage calculated pursuant to Section 10 of the Act." In the blanks provided for that information, the claimant listed \$8,646.93 for his wages and \$1,080.87 for his average weekly wage. The employer listed \$794.88 as the claimant's average weekly wage, but the figure for his yearly wages is not legible. Specifically, only the partial figure of ",359.10." is visible. Evidently, a portion of that number was cut off during the copying process. It is the claimant's duty, as the appellant, to provide this court with a sufficiently complete record in support of his claim. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391, 459 N.E.2d 958, 959 (1984). "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id.* at 392, 459 N.E.2d at 959.

¶ 13 If the evidence was clear, we could more easily accept the claimant's argument that the employer stipulated to a period of only 8 weeks for the calculation of his average weekly wage. In *Freesen, Inc. v. Industrial Comm'n*, 348 Ill. App. 3d 1035, 1043, 811 N.E.2d 322, 329-30 (2004), the appellate court found that the claimant had stipulated in the circuit court to 38 weeks of work for the calculation of his average weekly wage and that he was thereby bound by that stipulation. In *Walker v. Industrial Comm'n*, 345 Ill. App. 3d 1084, 1087-88, 804 N.E.2d 135, 138 (2004), the court held that the Commission did not have the power to

modify TTD benefits to a period of less than 84 weeks because the statement on the request for hearing form was, in effect, a stipulation by the employer. The court cited section 7030.40 of the Illinois Administrative Code in determining that the employer's statement was binding. Section 7030.40 states that the request for hearing form is a stipulation of the parties. *Id.*; 50 Ill. Adm. Code § 7030.40 (2002) ("The completed Request for Hearing form, signed by the parties (or their counsel), shall be filed with the Arbitrator as the stipulation of the parties and a settlement of the questions in dispute in the case").

¶ 14 The claimant's argument that the stipulation on the request for hearing form is binding on the Commission is not persuasive in this case, however, because it is not clear from this record exactly what the parties stipulated to. The information on the request for hearing form does not clearly indicate that the employer agreed to an 8-week period for the calculation of the claimant's average weekly wage. Not only is the request for hearing form partially illegible, the parties' actions during the arbitration hearing do not support an inference that the employer agreed that the relevant time-period for calculating the claimant's average weekly wage should be the eight weeks from the week ending on December 21, 2008, through February 8, 2009. The employer's exhibit, RX3, listed the claimant's wages for more than one year. The claimant's attorney objected to this exhibit on the basis that it listed additional weeks that should not be included in the calculation of his average weekly wage. He did not object on the basis that the exhibit was contrary to the request for hearing form or any stipulation of the parties. Accordingly, there is nothing in the record to indicate that

the claimant believed that the employer had agreed to stipulate to the eight-week period. The manifest weight of the evidence does not support a conclusion that the employer intended to stipulate that the eight-week period from the week ending on December 21, 2008, through February 8, 2009, was the only period from which the claimant's average weekly wage could be calculated. Therefore, the claimant's argument that the Commission was bound by this stipulation fails.

¶ 15 The claimant's next argument is that, regardless of any stipulation, the Commission erred in calculating his average weekly wage because it included weeks he briefly worked for the employer at jobs other than the BP refinery job in Whiting, Indiana. This issue requires us to construe section 10 of the Act, which provides the basis for computing a claimant's average weekly wage and states, in pertinent part, as follows:

" 'Average weekly wage' *** shall mean the actual earnings of the employee in the employment in which he was working at the time of the injury during the period of 52 weeks ending with the last day of the employee's last full pay period immediately preceding the date of injury *** excluding overtime, and bonus divided by 52; but if the injured employee lost 5 or more calendar days during such period, whether or not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks and parts thereof remaining after the time so lost has been deducted. Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the

number of weeks and parts thereof during which the employee actually earned wages shall be followed. Where by reason of the shortness of the time during which the employee has been in the employment of his employer or of the casual nature or terms of the employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury *** was being or would have been earned by a person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer. " 820 ILCS 305/10 (West 2010).

¶ 16 "[S]ection 10 provides four different methods for calculating average weekly wage. (1) By default, average weekly wage is 'actual earnings' during the 52 week period preceeding the date of injury, illness or disablement, divided by 52. (2) If the employee lost five or more calendar days during the 52 week period, 'whether or not in the same week,' then the employee's earnings are divided not by 52, but by 'the number of weeks and parts thereof remaining after the time so lost has been deducted.' (3) If the employee's employment began during the 52 week period, the earnings during employment are divided by 'the number of weeks and parts thereof during which the employee actually earned wages.' (4) Finally, if the employment has been of such short duration or the terms of the employment of such casual nature that it is 'impractical' to use one of the three above methods to calculate average weekly wage, 'regard shall be had to the average weekly amount which during the 52 weeks previous to the injury, illness or disablement was being or would have been earned by a

person in the same grade employed at the same work for each of such 52 weeks for the same number of hours per week by the same employer.' " *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 230-31, 756 N.E.2d 822, 826 (2001).

¶ 17 Typically, a determination of an employee's average weekly wage is a question of fact subject to the manifest weight of the evidence standard. *Id.* at 231-32, 756 N.E.2d at 827. However, where, as here, the facts are undisputed and the issue is solely one of statutory construction, our review is *de novo*. *Id.* at 232, 756 N.E.2d at 827.

"Our primary goal, to which all other rules are subordinate, is to ascertain and give effect to the intention of the legislature. [Citation.] We determine this intent by reading the statute as a whole and considering all relevant parts. [Citations] We must construe the statute so that each word, clause, and sentence, if possible, is given a reasonable meaning and not rendered superfluous [citation], avoiding an interpretation which would render any portion of the statute meaningless or void [citation]. We also presume that the General Assembly did not intend absurdity, inconvenience, or injustice. [Citation.] The *** Act is to be interpreted liberally [citation], to effectuate its main purpose—providing financial protection for interruption or termination of a worker's earning power." *Id.*

¶ 18 Applying these rules to the facts of this case, we find that the Commission did not correctly calculate the claimant's average weekly wage. The Commission used the second method, which applies to workers employed for a full 52 weeks less 5 or more calendar days.

The Commission should have used the third method, which applies to workers employed for less than 52 weeks. See *Greaney v. Industrial Comm'n*, 358 Ill. App. 3d 10021016, 832 N.E.2d 331, 345 (2005) (where the claimant had worked for the employer for less than 52 weeks prior to his injury, the third method of calculating his average weekly wage applied). The first and second methods do not apply in this case because the claimant did not work 52 weeks at this job. The fourth method does not apply because the claimant's work was not so brief or casual that it was impractical to calculate his wages by dividing his earnings by the number of weeks or parts thereof he actually worked at this job.

¶ 19 The evidence in the instant case was undisputed that the claimant began working for the employer at the BP refinery in Whiting, Indiana, during the week ending December 21, 2008. The claimant was hired out of the union hall on a job-by-job basis. The employer's president testified that the claimant "was hired specifically for that job." The claimant testified that he had worked for the employer on a job at South Shore High School. However, neither party presented any other evidence concerning the nature or location of the claimant's work for any dates other than the week ending December 21, 2008, through March 6, 2009, when he was terminated from the BP job, a period of less than 52 weeks.

¶ 20 Therefore, although the claimant was called out of the union hall to work for this employer at other times, there is no evidence to support calculating his average weekly wage by including any weeks of employment except those worked at the BP job. The only evidence on which the Commission could base its decision here was the undisputed

testimony that the claimant began working for the employer at the BP refinery in Whiting, Indiana, in the week ending on December 21, 2008, that his work for the employer was on a job-by-job basis, and that he was hired specifically for that job.

¶ 21 The Commission included the claimant's work for the employer during March 2008 and November 2008. Without any evidence of the nature or location of the claimant's work for one week ending on March 23, 2008, and four weeks ending on November 30, 2008, the Commission could not include those weeks as the "employment in which he was working at the time of his injury." 820 ILCS 305/10 (West 2010). The Commission's inclusion of the earlier weeks that the claimant worked briefly for this employer is not proper under the plain language of the statute. The Commission should have calculated the claimant's average weekly wage by dividing the wages he earned during the BP job by the number of weeks and parts thereof during which he actually earned wages.

¶ 22 Although the employer argues that the claimant's average weekly wage should not include any overtime hours, it did not appeal the Commission's decision. Therefore, the employer has forfeited this argument. *Ming Auto Body/Ming of Decatur, Inc. v. Industrial Comm'n*, 387 Ill. App. 3d 244, 256, 899 N.E.2d 365, 377 (2008). Regardless, we believe the inclusion of overtime hours to be correct. For the weeks that are properly included in the calculation, the week ending on December 21, 2008, through the date of the claimant's injury, February 13, 2009, the Commission included the claimant's "mandatory overtime at straight time rate of \$25.85/hour," which is supported by the record. The testimony was undisputed

that the claimant rode a bus from the parking lot into the compound where he worked at this BP refinery, that he could not leave at the end of the day until the foreman allowed him to do so and until the bus arrived to take him and his co-workers back to the parking lot. The wage statements for the weeks ending on December 21, 2008, through February 8, 2009, show that he was paid overtime wages for all but one of those weeks. The employer's president, Weslock, testified that the employer did not require its employees to work overtime, but when asked if overtime was consistent for these employees, answered, "No, it's very project specific." Weslock did not refute the claimant's testimony about his overtime for the job at this specific BP refinery and acknowledged that the employees for that refinery required bus transportation to and from the parking lot outside the gates of the refinery. Weslock acknowledged that the claimant was paid overtime wages for every week except the week that included the Christmas holiday.

¶ 23 In *Edward Hines Lumber Co. v. Industrial Comm'n*, 215 Ill. App. 3d 659, 666, 575 N.E.2d 1234, 1238 (1991), the court found that the term "overtime," as used in section 10 of the Act, means "(1) compensation for any hours beyond those the claimant regularly works each week, and (2) extra hourly pay above the claimant's normal hourly wage." The court concluded that the evidence showed that the employee had averaged 67 hours of work per week in the year preceding his injury and that his average weekly wage should be based on his regular hourly wage for 67 hours per week. *Id.* at 666-67, 575 N.E.2d at 1238-39.

¶ 24 Thus, in the case at bar, the Commission properly based the claimant's average weekly

wage on all of the hours he worked because the evidence showed that he was required to work the extra hours as a condition of his employment. The Commission was also correct in using his regular hourly wage instead of the additional overtime wage he was paid. 820 ILCS 305/10 (West 2010) (average weekly wage excludes overtime and bonus pay).

¶ 25

CONCLUSION

¶ 26 For all of the reasons stated, we reverse the circuit court's order confirming the Commission's award of TTD benefits, vacate the Commission's decision, and remand this case to the Commission for a redetermination of benefits consistent with this order. Specifically, on remand, the Commission is directed to calculate the claimant's average weekly wage by including only the wages he earned at the BP job during the weeks ending on December 21, 2008, through the date of the injury, February 13, 2009.

¶ 27 Reversed in part, vacated in part, and remanded with directions.