2016 IL App (1st) 152905WC-U
No. 1-15-2905WC
Order filed: December 23, 2016

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

JAMES KWIATKOWSKI, Petitioner-Appellant, v. SWIFT NEWS AGENCY, ILLINOIS STATE TREASURER as CUSTODIAN of the INJURED WORKERS' BENEFIT FUND, and ILLINOIS WORKERS' COMPENSATION COMMISSION, JOANN FRATIANNI, CHAIRMAN, THOMAS TYRELL, MICHAEL BRENNAN, KEVIN LAMBORN, CHARES DEVRIENDT, JOSHUA LUSKIN, RUTH WHITE, DAVID GORE, STEPHEN MATHIS, and MARIO BASURTO, MEMBERS of the COMMISSION, Respondents-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 15-L-50101 Honorable Carl Anthony Walker, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.
Presiding Justice Holdridge and Justices Hoffman, Harris, and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Claimant failed to show that Commission's decision regarding his employment status was against the manifest weight of the evidence.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, James Kwiatkowski, appeals an order of the circuit court of Cook County confirming a decision of the Illinois Workers' Compensation Commission (Commission) denying him benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2008)). The Commission determined that no employer-employee relationship existed between claimant and respondent, Swift News Agency. Swift is not a party to this appeal, as claimant prosecuted this case against the Injured Workers' Benefit Fund. See 820 ILCS 305/4(d) (West 2008). The Illinois State Treasurer, as custodian of the Fund, is defending this action. For the reasons that follow, we affirm.

II. BACKGROUND

¶ 4 Claimant was allegedly injured when he slipped and fell on May 2, 2008, while delivering newspapers for Swift. His job for Swift was to set up deliveries of newspapers to 15 different towns. He also typically drove two delivery routes each week. Claimant testified that he worked five days per week and had to punch a time clock at various locations. When asked whether anyone from Swift directed him on a daily basis, claimant replied, "After you knew your job, you just did your job." Someone might alert him if something unusual was going on that day, such as a "different truck coming in." Claimant would use electric floor lifts to load and unload trucks. He did not report to a direct supervisor. He was paid by how many deliveries he set up. Claimant stated he had W-2 forms to document his wages with Swift; however, they were not entered into evidence. Claimant used his own vehicle in his job. In 2008, claimant also worked for Arctic Snow and Ice Control, Inc. Claimant submitted pay stubs to document his employment with Arctic. When claimant had to work for Arctic, he would call Swift, and someone at Swift would fill in for him. Swift did not provide medical insurance to claimant.

¶ 5 The arbitrator found that claimant had failed to prove that he ever worked for Swift. She further found that even if claimant had proved that he worked for Swift, he failed to establish that he was an employee rather than an independent contractor. Initially, the arbitrator noted that while claimant testified that he worked for Swift and that Swift withheld taxes from his wages, he provided no corroborating evidence of either claim. She noted that the only reference in his medical records to an employer did not name Swift and instead named M. Lizen Manufacturing.

¶ 6 Regarding the nature of the relationship, the arbitrator, citing *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117 (2000), first noted that claimant drove his own vehicle while delivering newspapers. There was no evidence that Swift set claimant's hours. He was paid based on the jobs he actually completed rather than receiving an hourly wage or being on a salary. Claimant could not corroborate his claim that Swift withheld money from his pay for taxes. He testified that he was not closely supervised on a daily basis, and there was "no evidence that Swift controlled the exact manner in which [claimant] completed his duties." The arbitrator further noted that claimant's alleged employment with Swift was not exclusive, as he was concurrently employed by Arctic. Accordingly, the arbitrator found that no employer-employee relationship existed between claimant and Swift. This mooted all other issues. The Commission affirmed and adopted the arbitrator's decision, and the circuit court confirmed the Commission. This appeal followed.

¶ 7 III. ANALYSIS

¶ 8 Claimant now appeals, raising three issues. First, he contends that the Commission erred in failing to take judicial notice of an earlier workers' compensation case involving him and a former employer (M. Lizen Manufacturing). This issue is relevant only to claimant's second issue, and we will discuss it there. Second, claimant contends that that the Commission erred in

concluding he failed to prove *any* relationship existed between him and Swift. Third, claimant argues that the relationship between him and Swift was that of employer-employee and that the arbitrator's decision to the contrary was error. Claimant intimates that the facts are undisputed and the *de novo* standard of review applies. See *Johnson v. Illinois Workers' Compensation Comm'n*, 2011 IL App (2d) 100418WC, ¶ 17. However, our review of the record indicates that factual matters are in dispute (the Commission clearly relied on claimant's credibility and his failure to corroborate his testimony), so the manifest-weight standard applies. *University of Illinois v. Industrial Comm'n*, 365 Ill. App. 3d 906, 910 (2006). Moreover, whether an employment relationship exists presents a question of fact to which the manifest-weight standard applies. *Netzel v. Industrial Comm'n*, 286 Ill. App. 3d 550, 553 (1997). Under this standard, we will disturb a decision of the Commission only if an opposite conclusion is clearly apparent. *Id.*

¶ 9 For claimant to prevail here, he would have to controvert both of the Commission's findings regarding the existence of an employment relationship—*i.e.*, establish that there was a relationship and that the relationship was employment. We first consider the Commission's finding that claimant failed to prove that he had *any* relationship with Swift. The Commission found that nothing corroborated claimant's testimony that he worked for Swift. It noted that the sole reference in medical records to claimant's employment indicated he worked for M. Lizen Manufacturing. Moreover, despite the fact that claimant submitted paystubs to document his employment with Arctic (and two other employers the Commission ultimately found not relevant to the case), claimant produced no similar documents for Swift.

¶ 10 Claimant complains that the Commission failed to take judicial notice of an earlier workers' compensation case from 2003 that, he states, would have established that M. Lizen Manufacturing was a former employer. Granting claimant this point, we fail to see how it

renders an opposite conclusion to the Commission's clearly apparent. Quite simply, that claimant was employed by someone else in 2003 does not show he was employed by Swift in 2008. Even discounting this point, claimant's lack of corroboration for his testimony remains, which was the main basis for the Commission's decision. In other words, any purported error was harmless. See *Presson v. Industrial Comm'n*, 200 Ill. App. 3d 876, 880 (1990) ("[E]rror does not require reversal when there has been no prejudice or the evidence does not materially affect the outcome.").

¶ 11 Moreover, even if claimant had successfully established that there was some sort of relationship between him and Swift, he failed to prove he was an employee rather than an independent contractor. In distinguishing between the two, the seminal case of *Ware*, 318 Ill. App. 3d 1117, is instructive. In that case, we held as follows:

> "No rigid rule of law exists regarding whether a worker is an employee or an independent contractor. Rather, courts have articulated a number of factors to consider in making this determination. The single most important factor is whether the purported employer has a right to control the actions of the employee. Also of great significance is the nature of the work performed by the alleged employee in relation to the general business of the employer. Additional factors to consider are the method of payment, the right to discharge, the skill the work requires, which party provides the needed instrumentalities, and whether income tax has been withheld. Finally, a factor of lesser weight is the label the parties place upon their relationship." (Internal citations omitted.) *Id*. at 1122.

As set forth above, the Commission expressly relied on a number of these factors in reaching its decision. Our analysis of the record does not lead us to the conclusion that an opposite conclusion to the Commission's is clearly apparent.

¶ 12 Notably, claimant testified that for the most part, he was unsupervised. Swift exercised almost no control over him. While he testified he had set hours, he did not testify that Swift set them. Moreover, he was able to call in and miss his shift when Arctic had work for him. Claimant was paid by the job, like an independent contractor, and the Commission clearly questioned claimant's testimony that taxes were withheld from his pay. These factors point toward claimant being an independent contractor. While Swift provided some equipment, respondent used his own car. Thus, this factor does not point in either direction. Favoring claimant to a degree is the fact that the work he performed (delivering newspapers) was the sort of business in which Swift was engaged. No evidence exists regarding the remaining factors set forth in *Ware*. Hence, two factors point toward an independent-contractor relationship, one points toward employment, and the rest are not probative here. Under such circumstances, we clearly cannot say that an opposite conclusion to the Commission's is clearly apparent.

¶ 13 IV. CONCLUSION

¶ 14 In light of the foregoing, the judgment of the circuit court of Cook County confirming the decision of the Commission is affirmed.

¶ 15 Affirmed.