2020 IL App (2d) 191105WC-U
No. 2-19-1105WC
Order filed December 14, 2020

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

Workers' Compensation Commission Division

MARIA ALVARADO, as Wife and Next Best Friend of Evaristo Alvarado, Deceased,	)	Appeal from the Circuit Court of Kendall County, Illinois
Appellee,	)	
v.	)	No. 19-MR-100
THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*,	)	Honorable Melissa Barnhart, Judge, Presiding.
(Menard, Inc. d/b/a/ Menards, Appellants).	)	

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Hoffman, Hudson, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's finding that the funds the employer paid the claimant's decedent pursuant to its profit sharing plan were a bonus, rather than wages that must be included in the calculation of the decedent's average weekly wage, was not against the manifest weight of the evidence.

¶ 2 Maria Alvarado, as wife and next best friend of Evaristo Alvarado, deceased (the claimant), sought a death benefit on behalf of the decedent under the Illinois Workers' Compensation (Act) (820 ILCS 305/1 *et seq.* (West 2012)). The decedent died during a forklift accident while working

for Menard, Inc. d/b/a/ Menards (the employer). The employer conceded that the claimant was entitled to a death benefit.

¶ 3 An arbitrator conducted a hearing on the sole issue of whether funds paid to the decedent by his employer pursuant to a profit sharing program were "wages" or a "bonus" under section 10 of the Act (820 ILCS 305/10 (West 2012) for purposes of calculating the decedent's average weekly wage. The arbitrator found that these payments were wages rather than a bonus and should be counted as such when determining the decedent's average weekly wage. The arbitrator therefore raised the amount of the deceased's average weekly wage from $821.24 per week to $971.32 per week. This increased the claimant's death benefit from $547.49 per week to $647.48 per week.

¶ 4 The employer appealed the arbitrator's decision to the Commission. The Commission reversed the decision of the arbitrator and found that the profit sharing payments at issue were a bonus rather that wages pursuant to section 10 of the Act.

¶ 5 The claimant sought judicial review of the Commission's decision in the circuit court of Kendall County. The circuit court reversed the decision of the Commission. The circuit court found that the funds at issue were wages rather than a bonus and therefore should be counted in determining the decedent's average weekly wage.

¶ 6 This appeal followed.

¶ 7 FACTS

¶ 8 The following factual recitation is taken from the evidence presented at the December 12, 2017, arbitration hearing. At the time of his death on March 27, 2012, the decedent was working as a fleet mechanic in the employer's distribution center in Plano, Illinois. He began working part time for the employer in June of 2004, quit in June of 2005, and returned full time in August of 2005. He continued to work for the employer thereafter until the date of his death.

¶ 9 The claimant testified that her husband would receive a check from the employer every February as part of the employer's "Instant Profit Sharing" (IPS) plan. The only thing that the claimant knew about it was that employees needed to work a required amount of hours in order to qualify for the IPS payment. The employer's records show that the decedent did not receive an IPS payment in 2005 given that he did not work enough hours to meet the eligibility requirements of the IPS program. However, he did receive IPS payments every year from 2006 through 2012, and his payment increased every year during that period. The claimant testified that these payments were included in her husband's yearly W-2 statements.

¶ 10 The last IPS payment the decedent received was on February 10, 2012, approximately a month-and-a-half before he died, in the amount of $7,717.76. This payment, like the previous IPS payments that the decedent received, was reflected on his W-2 statement under "wages, tips and other compensation." The claimant testified that the $7,717.76 that her husband received in February 2012 represented approximately 15 percent of his total earnings in 2011 and that it was an important part of his total yearly earnings from the employer. She stated that she and her husband counted on the yearly IPS payments and they expected to receive such payments if her husband and his work unit met the requirements set forth in the IPS program.

¶ 11 On cross examination, the claimant testified that the IPS program was "an incentive for all the employees," including her husband. She noted that the decedent left the house at 3:00 a.m. to get to work before 5:00 a.m. so he could be there on time and put in the hours. He was very excited to work for the employer because of the IPS program.

¶ 12 The claimant agreed that the program was also based upon the earnings of the group in which the decedent worked, noting that the employer had this program "in the whole company" and that "each department, each team, ha[d] their own profit hours to make up." The claimant

testified that she knew that “everybody gets the profit sharing check every year according to the hours put in in the department with the team.” She understood that the basis for the payment would be based upon the profit earned by the team, and not the individual.

¶ 13 Kimberly Januszewski, the employer’s Human Resources Coordinator, testified on behalf of the employer. She stated that she was familiar with the compensation that is provided to the team members who work for the employer. She noted that there were approximately 20 people in the claimant’s department at the time he worked in the employer’s Plano distribution facility.

¶ 14 Januszewski testified that the decedent’s regular rate of pay was $16.10 per hour. Although the employer offers overtime at time-and-a-half after 40 hours worked, it is not mandatory. However, an employee may be asked to work overtime during seasonal periods. Januszewski further stated that the employer adds $2.50 per hour for work on the weekend, which would bring the claimant’s weekend hourly wage to $18.60.

¶ 15 Januszewski was shown an IPS booklet that referred to the program as “discretionary.” She testified that “discretionary meant that “[i]t can be removed at any time” and that the employer can determine not to make payments under the program at any time. Januszewski read into the record the following disclaimer included in the IPS program manual:

> “The [employer’s] I.P.S. program is a discretionary program. [The employer] reserves the right to amend or cancel the I.P.S. program in whole or in part at any time without notice. [The employer] also reserves the right to reduce, modify, or withhold awards based on such factors as regulatory events, changes in business conditions, individual performance or any other reason. [The employer] also reserves the right to decide all questions and issues arising under the I.P.S. program and its decisions are final. The I.P.S. program is a statement of [the employer’s] intentions and does not constitute a guarantee that any

particular amount of compensation will be paid. It does not create a contractual relationship or any contractually enforceable rights between [the employer] and the employee."

¶ 16 Januszewski testified that, in order for an employee to be eligible for a yearly payment under the IPS program, three things must occur: (1) the employee needs to be paid for hours worked on or after December 15th of the W-2 year; (2) the employee must achieve a thousand hours paid during the W-2 year; and (3) the employee's work unit must achieve the profit requirements set by the program. Januszewski denied that an employee's IPS benefit is based upon a measure of the volume or quality of the work performed by employee. Rather, the IPS benefit is based on the profit earned collectively by the unit to which the employee is assigned.

¶ 17 Januszewski explained that the IPS payments are paid as a percentage of profitability, "[s]o, for example, if a unit is only 80 percent profitable, then they receive 80 percent of that figure." She stated "[t]he unit has to maintain 100 percent profitability based on year-end figures in order to compensate at 100% percent profit sharing ability." According to Januszewski, if a unit is not profitable at all "they do not receive Instant Profit Sharing." She indicated that this had occurred during the period she had worked for the employer, but that it does not happen often. When asked who determines the division of profit for IPS purposes, Januszewski testified that "we have profit and loss statements that we receive at each unit that will give us an idea as to where we are in accordance to our profit levels but ultimately that's coming from our general office."

¶ 18 On cross examination, Januszewski agreed that the employer referred to the IPS program as "partners in profit." She noted that all employees are given a Team Member information booklet that lists the IPS program in the Table of Contents under "Benefits." She further agreed that the word "bonus" is not mentioned in the IPS program booklet. In addition, she acknowledged that the information booklet given to employees refers to IPS payments as "earnings."

¶ 19 Januszewski further testified that the IPS program has been in existence continuously since 1958. She acknowledged that the IPS program is a way to encourage employees to make contributions towards the profitability of their unit, and that the goal of the program was to provide employees like decedent with a personal stake in the growth and success of their work unit in the company. She agreed that IPS is an incentive-based program, and that the IPS earnings are paid at least in part in consideration for the work performed by each team member, including the decedent. However, she noted that "there are a multitude of factors that go into [determining] whether or not the Instant Profit Sharing is paid out and *** at what percentage."

¶ 20 Januszewski agreed that IPS earnings are not pension, retirement or 401(k) benefits and that they are included in the employee's yearly W-2 wage statement. She stated that an individual receives his or her IPS earnings based on a formula, and that IPS earnings increase with the employee's length of service up to a maximum of 15 percent after six years. She acknowledged that the yearly IPS earnings are conditioned at least in part upon the diligent work and cooperation of each employee. She further agreed that if an employee meets the eligibility requirement then the employee would expect to receive an IPS payment.

¶ 21 On re-direct examination, Januszewski indicated that an employee would not be excluded from the IPS program based upon a performance review. She also noted that the IPS benefit is not based upon the volume or quality of an individual employee's work.

¶ 22 The arbitrator found that the decedent's IPS payment of $7,717.76 that he received shortly before his death was part of the decedent's wages and must be included in calculating his average weekly wage. The arbitrator noted that section 10 of the Act provides, in pertinent part, that "compensation shall be computed on the basis of the 'Average weekly wage' which 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, illness or disablement *excluding* overtime, *and bonus* divided by 52" (Emphasis added).

¶ 23 In finding that IPS payments were wages rather than a bonus, the arbitrator relied upon our appellate court's decision in *Arcelor Mittal Steel v. Ill. Workers' Comp. Comm'n,* 2011 IL App. (1st) 102180WC (2011). In that case, we held that a production bonus paid to the claimant by his employer should be included in calculating the claimant's average weekly wage because the production bonus was provided "in consideration for work performed pursuant to his collective bargaining agreement and not as an extra benefit provided by employer gratuitously." *Arcelor Mittal Steel*, 2011 IL App. (1st) 102180WC, ¶¶ 19-20. Under these circumstances, we found that the claimant's production bonus was, in substance, part of the claimant's wages rather than a "bonus" as contemplated by section 10 of the Act. *Id.*, at ¶¶ 20-21. The arbitrator found there were similarities between the IPS payments at issue in this case and the production bonuses considered in *Arcelor Mittal Steel*. Specifically, the arbitrator noted that both were considered an important part of the compensation packages offered to the employees, both required that the employee meet certain eligibility requirements, and both were paid as consideration for work performed by the employee, either in whole or in part.

¶ 24 The arbitrator acknowledged that, in *Arcelor Mittal Steel*, the "employer had no discretion and was obligated to pay the production bonuses if earned by its employees,"[1] whereas, in this

[1] In *Arcelor Mittal Steel*, the employee's collective bargaining agreement (CBA) entitled the employees to receive production bonuses if they met the applicable eligibility requirements. Accordingly, the production bonuses were "strictly due." *Id.* ¶ 20.

case, there was some evidence suggesting that the IPS payments were discretionary. However, the arbitrator found that it would be "speculative" to conclude that the IPS program payments made to the decedent were discretionary bonuses as contemplated in Section 10 of the Act given that: (1) the employer never exercised any discretion in making the decedent's IPS payments for the work that he performed, which contributed to the employer's increasing profitability every year; (2) the decedent received ever-increasing IPS payments on a yearly basis because he met the eligibility requirements every year except his first year when he worked part-time; (3) the decedent historically received these structured incentive payments pursuant to the IPS Program based on his ever-increasing work production; (4) the decedent's ever-increasing yearly IPS payments from 2006 through 2012 confirmed the claimant's testimony that she and her late husband expected the IPS payment as a part of his earnings every year.

¶ 25 Based on these considerations, the arbitrator found that the employer's IPS payments to the decedent were mandatory when he met the eligibility requirements, and they were not bonuses as contemplated by section 10 of the Act.

¶ 26 The employer appealed to the Commission, which reversed the arbitrator's decision. The Commission found that the $7717.76 IPS payment that the decedent received from the employer in February 2012 "was essentially a bonus and should not be included in the calculation of his average weekly wage pursuant to § 10 of the Act." In support of this finding, the Commission noted that documents describing the IPS program clearly showed that the program was discretionary, and that the employer reserved the right to amend or even cancel the program in whole or in part without notice and in its sole discretion. The Commission further found that these documents explicitly showed that the employer's intention to pay these benefits was not a guarantee, and that no contractually enforceable rights between the employer and its employees

were created in the process. The Commission also found that "the evidence shows that IPS payments were not tied to individual performance, but were instead dependent upon the profitability of the unit in which a Team Member worked, assuming an employee met the requisite number of hours worked."

¶ 27 The Commission found *Arcelor Mittal Steel* to be distinguishable. It explained that:

> "[i]t *** matters not that the IPS payment represented an important component of Decedent's earnings package, or that he and his spouse had come to expect and rely upon it as part of their annual income. Instead, the issue is whether the payment was truly incentive-based pay which an employee would receive for specific work performed as a matter of contractual right, and the evidence shows that the IPS program in question was not."

¶ 28 The Commission therefore found that the IPS payment received by the decedent was "essentially a bonus and therefore should not be included in the calculation of wages." The Commission then set the decedent's average weekly wage at $821.24, based upon the parties' stipulation.

¶ 29 The claimant sought judicial review in the circuit court of Kendall County, which reversed the Commission's decision. The circuit court found that the employer's IPS payments to the decedent were wages rather than a bonus and therefore should be counted in determining the decedent's average weekly wage. The circuit court reviewed the Commission's decision *de novo* because it found that all material facts were undisputed and that the only disputed issue was the interpretation of the term "bonus" in section 305/10 of the Act, which is a matter of statutory construction.

¶ 30 Applying this standard, the circuit court found that the IPS payments at issue were not a "bonus" because: (1) the payments were not provided gratuitously. Rather they were an important part of the decedent's compensation that were meant to remunerate him for meeting performance expectations and to allow him to share in the company's profits; (2) the payments were provided, in part, in consideration for the work performed by team members of a unit, and the work performance of individual members of a unit determines, in part, whether that individual receives an IPS payment; (3) the decedent paid taxes on the payments; (4) the payments were designed to incentivize the decedent to work more hours and to increase his productivity.

¶ 31 The circuit court acknowledged that the plan documents the employer gave to the decedent indicated that the IPS program was discretionary, could be altered or terminated at any time, and created no contractual rights. However, it found that the factors listed above outweighed those considerations. Accordingly, the circuit court held that the IPS payments were earnings that must be included within the decedent's wages when calculating his average weekly wage.

¶ 32 This appeal followed.

¶ 33 ANALYSIS

¶ 34 Before addressing the merits of the employer's appeal, we must decide two preliminary issues.

¶ 35 First, the claimant maintains that the employer's brief on appeal and appendix violate Supreme Court Rule 341 in several respects. Some of the flaws identified by the claimant are legitimate. The claimant urges us either to strike the employer's brief or to ignore any noncompliant material therein. Our supreme court's rules are mandatory rules of procedure, not mere suggestions. *Menard v. Illinois Workers' Compensation Comm'n*, 405 Ill. App. 3d 235, 238 (2010). Accordingly, we may strike entire briefs or portions of briefs that violate Rule 341. We

decline to do so in this case because the violations by the employer's attorney do not impede our review. However, we admonish the employer's attorney to ensure that their briefs are in full compliance with the requirements of the supreme court rules in future submissions.

¶ 36 In addition, we must determine the proper standard of review to apply in this case. We review the decision of the Commission, not the circuit court. *Travelers Insurance v. Precision Cabinets, Inc.*, 2012 IL App (2d) 110258WC, ¶ 33. As noted, the circuit court reviewed the Commission's decision *de novo* because it found that all material facts were undisputed and the only disputed issue was the interpretation of the term "bonus" in section 305/10, which is a matter of statutory construction. The claimant agrees that a *de novo* standard applies in this case because: (1) the parties executed a stipulation providing that "the *legal* question presented" in the case was whether the IPS payment at issue was included is included in the calculation of the decedent's average weekly wage under section 305/10 of the Act (emphasis added); (2) that is the sole question presented in this case, and it involves a legal issue rather than a factual issue; (3) that issue involves a question of statutory construction; and (4) all of the material facts are undisputed and are susceptible to only one reasonable inference.

¶ 37 The employer, by contrast, argues that we should review the case under the manifest weight of the evidence standard because: (1) the Commission's determination of an employee's average weekly wage is a question of fact for the Commission; (2) whether the IPS payments at issue are wages or a bonus is also a factual issue; (3) in order to resolve this issue, we need not interpret the meaning of section 305/10, which has already been established in *Arcelor Mittal Steel*. Rather, we must interpret the terms and conditions of the IPS program and determine whether it constitutes a bonus, as the IPS did; and (4) this determination depends upon an analysis of the documentary

evidence and of the testimony presented before the arbitrator, which are capable of supporting different inferences.

¶ 38 We agree with the employer. Ordinarily, the Commission's determination of an average weekly wage is a question of fact which we will reverse only if it is contrary to the manifest weight of the evidence. *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 231-32 (2001); *Chlada v. Illinois Workers' Comm'n*, 2016 IL App (1st) 150122WC, ¶ 46. However, when the facts are undisputed and susceptible of only a single inference, the question is one of law and subject to a *de novo* review. *Farris v. Industrial Comm'n*, 357 Ill. App. 3d 525, 527 (2005). Here, the material facts, while undisputed, are capable of more than one reasonable inference. Specifically, the testimonial and documentary evidence are capable of supporting the inference that the IPS payments to the decedents were discretionary, and were therefore a bonus; but the evidence is also capable of supporting the inference that the IPS payments were required consideration for the decedent's work performance, and therefore earned wages. The Commission chose between these two inferences based upon its interpretation and weighing of the factual evidence. We therefore review the Commission's decision under the manifest weight of the evidence standard. *Mansfield v. Illinois Workers' Compensation Comm'n*, 2013 IL App (2d) 120909WC, ¶ 28; see also *Baumgardner v. Illinois Workers' Compensation Comm'n*, 409 Ill. App. 3d 274, 279, 349 (2011) ("Even in cases where the facts are undisputed, this court must apply the manifest-weight standard if more than one reasonable inference might be drawn from the facts.").[2]

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[2] We further note that, contrary to the claimant's suggestion, the parties' stipulation regarding the "legal issue" involved in this appeal does not determine the standard of review that we should apply in this case.

¶ 39 For a finding of fact to be against the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *City of Springfield v. Illinois Workers' Compensation Comm'n*, 388 Ill. App. 3d 297, 315 (2009); see also *Swartz v. Industrial Comm'n*, 359 Ill. App. 3d 1083, 1086 (2005). The test is whether the evidence is sufficient to support the Commission's finding, not whether this court or any other tribunal might reach an opposite conclusion. *Pietrzak v. Industrial Comm'n*, 329 Ill. App. 3d 828, 833 (2002).

¶ 40 We now turn to the merits of the employer's appeal. For purposes of section 305/10 of the Act, a "bonus" is "something in addition to what is expected or strictly due." *Arcelor Mittal Steel*, 2011 IL App. (1st) 102180WC, ¶ 40. An employee receives a bonus "for no consideration or in consideration of overall performance at the sole discretion of the employer." *Id.*

¶ 41 In this case, the Commission's finding that the IPS payments to the decedent constituted a bonus rather than wages was not against the manifest weight of the evidence. The IPS plan manual that the employer gave to the defendant stated, in relevant part, that: (1) "[the] I.P.S. program *is a discretionary program*; (2) the employer "reserves the right to amend or cancel the I.P.S. program in whole or in part at any time without notice"; (3) the employer "also reserves the right to reduce, modify, or withhold awards based on such factors as regulatory events, changes in business conditions, individual performance *or any other reason*."; (4) "[t]he I.P.S. program is a statement of [the employer's] intentions and *does not constitute a guarantee that any particular amount of compensation will be paid*; and (5) the program "does not create a contractual relationship or any contractually enforceable rights between [the employer] and the employee." (Emphases added.) This language makes clear that IPS payments would be made to the employees entirely at the discretion of the employer and that employees were not entitled to any such payments, contractually or otherwise, based upon the hours they worked or their work performance. Put

another way, the employees had no enforceable right to the IPS payments, regardless of their work performance and regardless of whether they met the eligibility requirements for such payments. Accordingly, although the IPS program may have been intended to incentivize employees to work harder and more productively, payments under the program were not *earnings* or *wages* that the employer was obligated to pay to the employee based upon his work. The IPS payments were not given as consideration for the employee's work, as are wages.

¶ 42 These facts distinguish this case from *Arcelor Mittal Steel* in material respects. In that case, the claimant received a "production bonus" which was calculated based on the hours he worked and by the volume and quality of the steel he produced. *Arcelor Mittal Steel*, 2011 IL App. (1st) 102180WC, ¶ 41. The claimant received his production bonuses "in consideration for work performed pursuant to his collective bargaining agreement and not as an extra benefit provided by [the] employer gratuitously." *Id.* The production bonuses were "strictly due" to the employees. *Id.* The employer "had no discretion and was obligated to pay the production bonuses if earned by its employees." *Id.* Under these circumstances, we held that the production bonuses at issue were not, in fact, "bonuses" under section 305/10 of the Act, and that the Commission did not err in counting such bonuses when calculating the claimant's average weekly wage. *Id.*

¶ 43 In this case, by contrast, the IPS payments were purely discretionary and were not "strictly due" to the employees as consideration for work they performed. There was no collective bargaining agreement or any other agreement that gave the decedent a contractual right to the IPS payments based upon his work hours or performance. In fact, the program manual explicitly provided otherwise.

¶ 44 It is the discretionary nature of the IPS payments in this case that make the payments a bonus rather than a wage. It does not matter that the IPS payments were a substantial portion of

the claimant's compensation or that the decedent and the claimant relied on such payments and expected the decedent to receive them if he met the IPS program's eligibility requirements. Nor does it matter that, *when the IPS payments were made*, they were paid partly in consideration for the employee's cooperation and work performance, or that the employer has always made the payments according to the program's eligibility requirements and escalating payment schedule.[3] What matters is that the employer had the discretion to do otherwise. The fact that the employer has exercised its discretion in a certain manner in the past does not transform the IPS payments into mandatory earnings. They remain a gratuity paid at the employer's sole, unfettered discretion.

¶ 45 Accordingly, the Commission's finding that the $7717.76 IPS payment made to the decedent on February 10, 2012, was a bonus that should not be included in the calculation of the decedent's average weekly wage was not against the manifest weight of the evidence.

¶ 46 CONCLUSION

¶ 47 For the foregoing reasons, we reverse the judgment of the circuit court of Kendall County, which reversed the Commission's decision, and reinstate the Commission's decision.

¶ 48 Circuit court reversed; Commission's decision reinstated.

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[3] It should be noted that the decedent was paid wages for all of the hours he worked, including time and a half for overtime, and that the IPS payments were not tied directly to the number of hours he worked. Thus, the decedent was fully compensated for the hours he worked regardless of any IPS payments.