ILLINOIS OFFICIAL REPORTS

Appellate Court

***United Airlines, Inc. v. Illinois Workers' Compensation Comm'n*,**
2013 IL App (1st) 121136WC

Appellate Court Caption	UNITED AIRLINES, INC., Appellee, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Richard Young, Appellant).
District & No.	First District, Workers' Compensation Commission Division Docket No. 1-12-1136WC
Filed	June 3, 2013
Rehearing denied	July 11, 2013
Held (*Note: This syllabus constitutes no part of the opinion of the court but has been prepared by the Reporter of Decisions for the convenience of the reader.*)	The Workers' Compensation Commission's decision awarding claimant weekly wage differential payments for the duration of the disability he suffered in a work-related incident was reinstated on appeal from a trial court order reversing the decision, since the Commission properly determined that the award had to be calculated as of the date of the arbitration hearing, and the Commission's calculation, without considering claimant's alleged mandatory overtime hours, was not against the manifest weight of the evidence.
Decision Under Review	Appeal from the Circuit Court of Cook County, No. 11-L-50815; the Hon. Roberto Lopez Cepero, Judge, presiding.
Judgment	Reversed and Commission decision reinstated.

Counsel on Appeal	Katz, Friedman, Eagle, Eisenstein, Johnson & Bareck, P.C., of Chicago (Frank Bertuca, of counsel), for appellant. Wiedner & McAuliffe, Ltd., of Chicago (Timothy S. McNally, of counsel), for appellee.
Panel	JUSTICE HOFFMAN delivered the judgment of the court, with opinion. Presiding Justice Holdridge and Justices Hudson, Harris and Stewart concurred in the judgment and the opinion.

OPINION

¶ 1 The claimant, Richard Young, appeals from an order of the circuit court of Cook County which reversed a decision of the Illinois Workers' Compensation Commission (Commission) awarding him, amongst other relief, weekly wage differential payments of $277.06, beginning April 27, 2009, pursuant to section 8(d)(1) of the Workers' Compensation Act (Act) (820 ILCS 305/8(d)(1) (West 2006)) and continuing for the duration of the disability he suffered as a consequence of his employment with United Airlines, Inc. (UAL). In addition, the circuit court reinstated the decision of the arbitrator which, in part, had awarded the claimant weekly wage differential payments which decreased annually over the course of 10 years and terminated on April 13, 2018. For the reasons which follow, we reverse the judgment of the circuit court and reinstate the decision of the Commission.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing conducted on March 5, 2010.

¶ 3 The claimant testified that he started working as a ramp service worker for UAL on April 12, 1999. As a ramp service worker, the claimant loaded and unloaded luggage bags for UAL. On December 28, 2004, he sustained a right wrist injury arising out of and in the course of his employment. In December 2004, the claimant earned $20.66 per hour, which included shift differential pay ($0.50/hour) and line pay ($0.10/hour); he was also eligible for longevity and overtime pay. The claimant testified that in December 2004, he averaged 44 hours per week, which included overtime hours. On April 17, 2006, his physician released him to return to work on a trial basis; he returned to work on April 19, 2006. Two days later, on April 21, the claimant suffered a right shoulder injury while lifting a bag. On July 20, 2007, the claimant's physician, Dr. Terry Nicola, released him to return to work with permanent restrictions; the restrictions precluded him from returning to his ramp service position.

¶ 4 On August 29, 2007, at UAL's request, the claimant met with Joseph Belmonte for a vocational interview. The claimant began seeking alternative employment both inside and outside of UAL. In February 2008, the claimant accepted a station operations representative

(SOR) position at UAL. As an SOR, the claimant managed the weight loads of airplanes, requiring him to sit at a desk and monitor computer screens. The SOR position paid $20.63 per hour for 40 hours per week. The claimant testified that had he still been employed as a ramp service worker in April 2008, he would have been making $19.81 plus shift differential, line pay, and longevity pay, based on the union agreement that was in effect in March 2008. The claimant worked as an SOR at the $20.63 per hour rate for approximately six weeks, until April 27, 2008. At that time, UAL informed the claimant that there was an error and that his wage was being reduced to $9.92 per hour, because the union agreement required that he start at the lowest wage for the SOR position. As an SOR, he was also able to receive longevity pay and shift differential. The claimant testified that he worked 40 hours per week as an SOR, whereas he had the opportunity to work overtime hours as a ramp service worker. As a ramp service worker, overtime could be mandatory on some occasions, such as when the weather was bad, and it usually ranged from one hour to four hours.

¶ 5 On cross-examination, the claimant admitted that as a ramp service worker, he was a member of the International Association of Machinists and Aerospace Workers Union (IAM). He testified that he was still a member of this union as an SOR. The claimant also admitted that, pursuant to the union agreement for ramp service workers, overtime became mandatory only in emergencies, such as weather-related conditions. He admitted his current hourly pay was "$10.60-something," and he was eligible for annual wage increases as an SOR. On March 15, 2010, his wage was set to increase to $11.07 per hour. The claimant denied that his wage would progress in the same manner as a ramp service worker. He explained that when he started as a ramp service worker there was a five-year progressive pay scale; he was earning the top wage as a ramp service worker at the time of his injury. Under the current union agreement, there was a 10-year progressive pay scale for both positions. The claimant admitted that he would be at the top wage for the SOR position in 2018.

¶ 6 The report of Joseph Belmonte was submitted into evidence. Belmonte opined that the claimant was employable in a variety of alternative occupations, including truck driving and transportation-related activities, material handling and warehouse activities. Belmonte opined that occupations such as industrial truck operator or forklift operator, which often paid $15 per hour, might also be suitable positions for the claimant. Belmonte recommended that the claimant seek alternative employment and undergo vocational testing and training.

¶ 7 Julianne Cooney, a labor relations analyst at UAL, testified that she ensured that union contract terms relating to wages and other rules were followed. She had been employed by UAL for 22 years, the last 8 years as a labor relations analyst. She testified that the same union, IAM, oversaw ramp service workers and SORs. She explained that IAM negotiated two separate agreements, the "Ramp Service Agreement" and the "Public Contact Employees Agreement," which applied to ramp service workers and SORs, respectively.

¶ 8 Cooney identified the Ramp Service Agreement, dated July 1, 2005, which was still in effect at the time of the hearing. She admitted that a new agreement was being negotiated, but she did not know when such agreement would be reached. Cooney also identified the Public Contact Employees Agreement, dated May 1, 2008. She testified that the claimant began working as an SOR on March 17, 2008, earning $20.63 per hour. That hourly rate was incorrect, because the Public Contact Employees Agreement provided that inactive

employees begin at the lowest wage. The $20.63 hourly wage was the top wage for an SOR; the starting wage was $9.67. Under the contract terms, the claimant was considered an "inactive" employee.

¶ 9 Cooney testified that on March 17, 2008, had the claimant still been employed as a ramp service worker, he would have been earning the maximum base pay ($19.81 per hour), line pay ($0.10 per hour), and longevity pay ($0.06 per hour), totaling $19.97 per hour. Using the current Ramp Service Agreement, Cooney projected the claimant's wages through April 12, 2020, incorporating contractual wage increases. As of April 26, 2009, Cooney projected that the claimant would have been earning $21 per hour as a ramp service worker. She explained that the contractual increases generally occurred annually, but admitted that such increases depended upon the terms of the agreement. In her experience, contractual increases historically have been the same for both the ramp service and SOR positions.

¶ 10 Cooney also projected the claimant's wages through April 12, 2020, using the SOR pay scale. She testified that the claimant's SOR wage as of March 17, 2008, was $9.61 per hour. On April 12, 2009, the claimant earned $10.36 per hour as an SOR. As of March 5, 2010, the hearing date, Cooney testified that the claimant earned $10.61 per hour. She testified that the claimant would progress to the top of the SOR wage scale on March 17, 2018, earning $21.77 per hour. At that point, Cooney testified that the claimant would be earning more money than he would have had he remained in the ramp service position, which she projected would pay $21.08 per hour in 2018. Cooney testified that employees could not receive discretionary raises, because they were bound by the union agreements. The claimant's counsel objected to Cooney's projections on the basis the projections were speculative. The arbitrator overruled the objection.

¶ 11 On cross-examination, Cooney admitted her projections were based on the current union agreements, which covered years 2005 through 2009. She admitted that, under the Ramp Service Agreement, the ramp service worker's top wage decreased from the prior agreement's top wage. Cooney explained that UAL was in bankruptcy before the 2005 agreement was reached. As part of the terms of the bankruptcy, UAL had to implement a court-imposed wage reduction. Cooney admitted that it was possible that wages may change over the next decade, based on UAL's performance and changes in union contracts. She admitted that her projections did not reflect these factors.

¶ 12 Cooney testified that she did not know whether either position worked overtime hours. She admitted her projections did not incorporate any overtime wages. Cooney testified that, because of UAL's financial distress, it was greatly reducing overtime offered. She admitted that the Ramp Service Agreement required overtime in emergency conditions, but that the Public Contact Employees Agreement did not contain a similar provision for SORs.

¶ 13 Following the hearing, the arbitrator found that, although the claimant was entitled to wage differential benefits pursuant to section 8(d)(1) of the Act (820 ILCS 305/8(d)(1) (West 2006)), those benefits would decrease annually over the course of 10 years and terminate on April 13, 2018. In his written decision dated April 21, 2010, the arbitrator found that the parties agreed that the claimant earned an average weekly wage of $791.55 in the year preceding his injury and that his injury arose out of and in the course of his employment.

Temporary total disability (TTD) benefits pursuant to section 8(b) of the Act (820 ILCS 305/8(b) (West 2006)) were awarded in the amount of $527.70 for the time period between November 15, 2006, and August 15, 2007. Maintenance benefits pursuant to section 8(a) of the Act (820 ILCS 305/8(a) (West 2006)) were awarded in the same amount for the time period between August 16, 2007, and March 16, 2008. Annually decreasing weekly wage differential payments were awarded to the claimant according to UAL's projected figures, based on 40 hours per week, for a 10-year period.

¶ 14 The arbitrator ruled that the wage differential benefit payments should end effective April 13, 2018, finding that UAL had proven by the preponderance of the evidence that the claimant will then be earning more as an SOR than he would have had he remained a ramp service worker. The arbitrator determined that the factual circumstances of this case were unique: the previous and current employer were the same; the claimant was covered by the same union in both positions; and the parties had a history of operating under contract, periodically renegotiating new contracts. The arbitrator concluded that he could fairly determine the claimant's pay "at present and in the future without resorting to speculation, guess, or conjecture by simply referencing the provisions of the present and any future collective bargaining agreements between UAL and the [IAM] by which [the parties] herein are bound."

¶ 15 The claimant sought a review of the arbitrator's decision before the Commission. On July 7, 2011, the Commission issued a ruling affirming and adopting the arbitrator's decision except for his wage differential payment schedule, which it modified to provide that the claimant will receive $277.06 per week, beginning April 27, 2009, and continuing for the duration of the disability. The Commission found that the arbitrator erred in adopting UAL's position that the wage differential could be calculated based upon wages to be paid past the date of the arbitration hearing. The Commission found "that the wage differential can only be determined based on what [wages are] at the time of the hearing." The Commission based its wage differential award on the claimant's working 40 hours per week.

¶ 16 UAL sought judicial review of the Commission's decision in the circuit court of Cook County. On March 20, 2012, the circuit court set aside the Commission's decision and reinstated the arbitrator's decision. The claimant now appeals.

¶ 17 The parties do not dispute that the claimant is entitled to wage differential benefits; they dispute only the amount and duration of the award. In modifying the arbitrator's wage differential award, the Commission stated:

> "The main issue before the Commission is calculation of § 8(d)(1) wage differential. The difference in pay between the ramp service position and the SOR position is that [claimant] was topped out of the step increases in the ramp service position and was no longer getting step raises. The reason the wage differential shrinks is that in the SOR position [claimant] is getting step raises, having come into that position at the bottom of the steps. The Commission finds that the Arbitrator erred in adopting [UAL's] position that the wage differential can be calculated past the date of the arbitration hearing. The Commission finds that the wage differential can only be determined based on what it is at the time of the hearing."

¶ 18 The claimant argues that the Commission properly rejected the arbitrator's step-down schedule of wage differential payments, because Cooney's projections were speculative. He argues that the Commission's award was based on a correct interpretation of section 8(d)(1) and relevant evidence. UAL counters, contending that the Commission's modification of the arbitrator's wage differential award was based on its erroneous construction of section 8(d)(1) of the Act. It argues that the Commission misapplied the holding in *Cassens Transportation Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519 (2006), which provides that the arbitration hearing was the only opportunity for both parties to present evidence showing the likely duration of an injury and its effect on future earning capacity. We begin by addressing UAL's argument that the Commission misapplied the law.

¶ 19 The Commission's conclusion, that section 8(d)(1) requires the wage differential award to be calculated as of the date of the hearing, is a matter of statutory construction, which is a question of law. Issues of law are considered *de novo* on review without deference to the Commission's determination. *Elliott v. Industrial Comm'n*, 303 Ill. App. 3d 185, 187 (1999). Therefore, we will review *de novo* whether section 8(d)(1) allows an award of wage differential payments pursuant to a step down schedule which terminates on a date certain.

¶ 20 Section 8(d)(1) provides, in relevant part, that a partially incapacitated employee shall:

> "receive compensation for the duration of his disability *** 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 2006).

¶ 21 In interpreting the Act, our primary goal is to ascertain and give effect to the intent of the legislature. *Cassens*, 218 Ill. 2d at 524. The best indication of this intent is the plain and ordinary language of the statute itself. *Dodaro v. Illinois Worker's Compensation Comm'n*, 403 Ill. App. 3d 538, 545 (2010). We determine this intent by reading the statute as a whole and considering all the relevant parts. *Cassens*, 218 Ill. 2d at 524. "We interpret the Act liberally to effectuate its main purpose: providing financial protection for injured workers." *Id.*

¶ 22 In this case, section 8(d)(1) states that the wage differential award will be 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" 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 2006). The statute does not provide for a varying amount to be paid out at various future dates. Rather, as the statute states, the award must be based upon the *average* amount of the claimant's wages at the time of the accident and the *average* amount which the claimant is earning or able earn in some suitable employment after the accident. The statute, under its plain and ordinary language, does not contemplate multiple figures to be computed and awarded at future dates. Therefore, we agree with the Commission's interpretation of section 8(d)(1), that it requires the wage differential to be determined as of the date of the arbitration hearing.

¶ 23 In so holding, we reject UAL's argument that the Commission's interpretation of section

8(d)(1) disregards the supreme court's decision in *Cassens*. In *Cassens*, the Commission awarded a weekly wage differential to the employee in 1993. *Cassens*, 218 Ill. 2d at 521. Ten years later, the employer sought to terminate that award, because the employee's wage in 2002 matched the wage he had been earning at the time of the injury in 1988. *Id.* The employer raised the issue in a petition filed pursuant to section 19(h) of the Act (820 ILCS 305/19(h) (West 2002)). *Cassens*, 218 Ill. 2d at 523. The supreme court considered whether the Commission had jurisdiction to reopen or modify the 10-year-old wage differential award under either section 19(h) or section 8(d)(1) itself. *Id.* at 524-25.

¶ 24 The *Cassens* court concluded that section 8(d)(1) did not authorize the parties to petition for review of an award and the time had passed for the parties to raise the issue in a section 19(h) petition. *Id.* The *Cassens* court further rejected the employer's argument that the duration clause of section 8(d)(1) was meaningless if future modifications were not allowed, stating that it was meaningful to the Commission's initial determination of the propriety of a wage differential award. *Id.* at 529. At the initial hearing, the Commission was allowed to determine whether the claimant's disability was likely to end, abate, or increase after a certain duration, and award compensation accordingly. *Id.* The *Cassens* court stated that the "Act establishes that employees and employers alike must use the opportunity of their initial hearing to present evidence showing the likely duration of an injury and its effect on the claimant's earning capacity." *Id.* at 530.

¶ 25 Further, "[t]o receive an award under section 8(d)(1), an injured worker must prove (1) that he or she is partially incapacitated from pursuing his or her usual and customary line of employment and (2) that he or she has suffered an impairment in the wages he or she earns or is able to earn." *Id.* at 530-31. The court stated that the second prong of the inquiry properly focuses on earning capacity, rather than the dollar amount of an employee's take-home pay; taking into account factors such as wage increases, overtime, and increased hours of work. *Id.* at 531. The *Cassens* court stated:

> "Although wages are indicative of earning capacity, they are not necessarily dispositive. The initial hearing on an employee's claim gives both employers and employees the opportunity to present evidence beyond wages to establish long-term earning capacity. While this may result in an imperfect award, the legislature has not currently authorized infinite opportunities for correction." *Id.*

¶ 26 *Cassens* did not hold that multiple awards may be awarded at various future dates. Rather, *Cassens* provided that the parties may present evidence beyond wages to establish long-term earning capacity during the arbitration hearing. *Cassens*, 218 Ill. 2d at 530. The Commission's interpretation of section 8(d)(1) neither bars the parties from presenting evidence beyond wages to establish long-term earning capacity nor prevents the arbitrator or Commission from considering such evidence in determining the award. It only requires the fact finder to determine the value of the award at the time of the arbitration hearing that best addresses the evidence presented at the hearing.

¶ 27 In our view, under *Cassens* and section 8(d)(1), the parties have the ability to present relevant evidence regarding the duration of the claimant's physical or mental disability and the claimant's earning capacity, including factors such as wage increases, overtime, and

increased hours of work. However, the award must be calculated as of the date of the arbitration hearing. As *Cassens* noted, when considering the average wages of the past and present positions and factors beyond wages, awards may be imperfect. *Cassens*, 218 Ill. 2d at 531. Therefore, we reject UAL's contention that the Commission's interpretation of section 8(d)(1), that it requires the wage differential to be determined as of the date of the arbitration hearing, disregards the supreme court's decision in *Cassens* or is otherwise legally incorrect.

¶ 28 Next, we determine whether the Commission's award of $277.06 per week is erroneous based on this legal standard and the evidence presented. Whether the Commission's calculation of the amount of the weekly wage differential based upon the evidence presented was correct involves a question of fact and will not be disturbed on review unless it is against the manifest weight of the evidence. *Orsini v. Industrial Comm'n*, 117 Ill. 2d 38, 44 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Caterpillar, Inc. v. Industrial Comm'n*, 228 Ill. App. 3d 288, 291 (1992). 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. *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 120 (1996).

¶ 29 In this case, UAL presented evidence of the claimant's future earning capacity, including evidence of the 2005-09 SOR wage schedule, which included step increases over a 10-year period. It was the duty of the Commission to factor this evidence, along with evidence pertaining to the duration of the claimant's disability, into its determination of the award as of the date of the hearing. The Commission determined that as of the date of the arbitration hearing, the claimant should receive $277.06 per week, finding that he had been earning $21 per hour as a ramp service worker and $10.61 per hour as an SOR. Given that Cooney's projections did not factor in potential changes in the union agreement and changes in UAL's performance, we cannot hold that the Commission's finding is against the manifest weight of the evidence. Cooney's projections were speculative, because she could not predict changes in future union contracts and UAL's future performance, and the Commission could have discounted such speculative evidence when determining the amount of the claimant's award. See *United Airlines v. Illinois Workers' Compensation Comm'n*, 407 Ill. App. 3d 467, 473 (2011) (finding the Commission committed no error by excluding economist's opinion that the claimant would likely retire around age 62, because such evidence was speculative and irrelevant to a determination of the duration of the claimant's disability or impairment in the wages the claimant earned or was able to earn); *Deichmiller v. Industrial Comm'n*, 147 Ill. App. 3d 66, 74 (1986) (finding the Commission did not err in refusing to calculate the claimant's wage differential award on speculative evidence of what he would have earned as a union plumber instead of as an apprentice plumber where the claimant had not taken the test to be admitted to the union and had never earned union plumber wages). Accordingly, we find that the Commission's decision to award the claimant $277.06 per week, based on evidence of the wages he had earned as a ramp service worker before the injury and the wages he was earning as an SOR after the injury, is not against the manifest weight of the evidence.

¶ 30 Finally, we consider the claimant's argument that the Commission was required to

consider mandatory overtime hours in determining the wage differential amount. We agree that evidence of mandatory overtime may be presented during the arbitration hearing. *Cassens*, 218 Ill. 2d at 531. However, the calculation of an employee's wage differential award is a factual finding, which will not be set aside on review unless it is contrary to the manifest weight of the evidence. *Copperweld Tubing Products Co. v. Illinois Workers' Compensation Comm'n*, 402 Ill. App. 3d 630, 635 (2010).

¶ 31 In this case, the claimant testified that he averaged 44 hours per week as a ramp service worker in 2004 and that overtime hours became mandatory only during emergency conditions, such as poor weather. The claimant's pay history as a ramp service worker did not demonstrate that he worked mandatory overtime hours on a regular basis. Further, Cooney testified that, because of UAL's financial distress, it had been avoiding having employees work any overtime hours. Therefore, the Commission's decision to exclude the claimant's alleged mandatory overtime hours in his wage differential award was not against the manifest weight of the evidence.

¶ 32 Based upon the foregoing analysis, we reverse the judgment of the circuit court, and we reinstate the Commission's decision.

¶ 33 Reversed and Commission decision reinstated.