ILLINOIS OFFICIAL REPORTS

Appellate Court

***Labuz v. Illinois Workers' Compensation Comm'n*, 2012 IL App (1st) 113007WC**

Appellate Court Caption	ANTONI LABUZ, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (JKC Trucking Company, Appellee).–JKC TRUCKING COMPANY, Appellant, v. ILLINOIS WORKERS' COMPENSATION COMMISSION *et al.* (Antoni Labuz, Appellee).
District & No.	First District, Workers' Compensation Comm'n Division Docket Nos. 1-11-3007WC, 1-11-3008WC cons.
Filed	November 5, 2012
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 finding that claimant was an employee and not an independent contractor at the time of his injury was not against the manifest weight of the evidence, and claimant's petition for fees and penalties due to his employer's refusal to pay claimant based on its argument that claimant was an independent contractor was properly denied, since that argument was not unreasonable, but the computation of claimant's average weekly wage was reversed and the cause was remanded for recalculation on the ground that claimant's lost time was not properly taken into account.
Decision Under Review	Appeal from the Circuit Court of Cook County, Nos. 10-L-50622, 10-L-50625; the Hon. Alexander P. White, Judge, presiding.
Judgment	No. 1-11-3007WC, Affirmed in part and reversed in part. Cause remanded with directions. No. 1-11-3008WC, Affirmed.

Counsel on Appeal	Hetherington, Karpel, Bobber & Miller, LLC, of Chicago (W. Joseph Hetherington, of counsel), for appellant. Lloyd M. Sonenthal, Ltd., of Chicago (Lloyd M. Sonenthal, of counsel), for appellees.
Panel	JUSTICE HOFFMAN delivered the judgment of the court, with opinion. Justices Hudson, Holdridge, Turner, and Stewart concurred in the judgment and opinion.

OPINION

¶ 1 Both the claimant, Antoni Labuz, and JKC Trucking Co., Inc. (JKC), have appealed from an order of the circuit court of Cook County that confirmed a decision of Illinois Workers' Compensation Commission (Commission), awarding the claimant certain benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2008)) for neck, back, and left-shoulder injuries sustained while in the employ of JKC. We consolidated the two appeals for review.

¶ 2 The following factual recitation is taken from the evidence presented at the arbitration hearing held on July 23 and 24, 2009, as well as the record on appeal.

¶ 3 Through a Polish interpreter, the claimant testified that he began working for JKC as a truck driver in May 2007. He said that JKC required him to submit documentation and to watch a training video before starting work. On cross-examination, the claimant agreed that JKC also required him to pass a drug test. The claimant recalled that, at the time he was hired, JKC "talked about whether [he] was going to get some percentage or whether [he] was going to be paid per trip," and he was "supposed to pick either one." On cross-examination, the claimant explained that JKC required him to submit written invoices for his trips in order to receive payment for his work. The claimant said that JKC did not offer him any benefits and in fact told him that he would not receive health insurance from the company.

¶ 4 The record also contains a "Master Independent Contractor's Agreement" signed by the claimant in June 2007. That document indicates that the claimant was retained as an independent contractor for JKC. The claimant testified that he did not understand the document, which was written in English, but signed it anyway because he understood that his doing so was a condition of his continued employment with JKC. The claimant further explained that he believed the independent contractor agreement was part of his employment agreement.

¶ 5 The claimant testified that he normally learned of a job JKC wanted him to complete by contacting JKC to request work or having JKC contact him. He said that, "many times," he called JKC to ask for work and was told no loads were available. When asked on cross-

examination whether he had the right to turn down jobs, the claimant recalled one instance in which he was sick and "asked that another driver take a load from Chicago to Ohio, but [he] had no say in this matter."

¶ 6 The claimant testified that he did not own his own truck when he worked with JKC. Instead, he drove JKC trucks bearing JKC logos, but he noted that he did not always drive the same JKC truck. JKC paid for his tolls and fuel, and it provided him with logbooks he was to complete to record his movements. On direct examination, the claimant testified that JKC told him what gas stations he could use during his trips, but, on cross-examination, he indicated that he could choose his gas stations from those that accepted JKC checks. The claimant further testified on direct examination that JKC dispatchers chose his routes for him. On cross-examination, he elaborated that there were two main routes to California, one involving Interstate 40 and one not, and he was usually told to avoid Interstate 40. He also said that, in the event that the truck he was driving had mechanical difficulties, he was required to call JKC to obtain authorization before pursuing repairs. In addition, according to the claimant, he was required to report his movements to JKC every morning by 11 a.m., or face a $100 fine. On cross-examination, the claimant added that JKC would call him, sometimes "more than ten times per day," to check his status.

¶ 7 The claimant testified that JKC paid him per route and that they paid him with checks. He would earn approximately $1,550 (minus deductions for loading and unloading and for insurance) for trips from Illinois to California, a trek that he estimated took "[s]even, eight, up to ten days." The claimant recalled that he also drove routes from Illinois to Idaho and Texas, and he said he was paid "[l]ess" for those routes. On cross-examination, the claimant agreed that income and social security taxes were not deducted from his JKC paychecks and that JKC reported his income to the IRS via a 1099 form.

¶ 8 The claimant said that he never told anyone at JKC that he wanted to work as an independent contractor. He testified that there was one "break" in his employment with JKC, from October 2008 through February 2009. The claimant said that the break began when he took a trip to Europe to see family. He said that he was not required to submit any forms to JKC to obtain leave time for his trip, but instead that he had an agreement that allowed him to take unpaid vacation at his discretion, so long as he provided two weeks' notice. When he returned from Europe in December, JKC told him that work was slow and it had no routes for him. However, JKC called him with work at the end of February 2009.

¶ 9 On March 28, 2009, the claimant slipped and fell while he was checking a load on his trailer for JKC. The fall caused him to lose consciousness, and it led to the back, neck, and left-shoulder problems that underlie his claim under the Act.

¶ 10 The second witness at the arbitration hearing, Ireneusz Panek, testified that he was an employee of ADP Total Source (ADP) , a company that leased workers to JKC. Panek stated that ADP leased a total of 240 employees to JKC and that JKC paid the premiums on their workers' compensation insurance. He further testified that JKC or ADP caused taxes to be deducted from the paychecks of the 240 leased employees. Panek recalled that, in March 2009, the time of the claimant's accident, JKC had "about 20" nonemployee drivers, whose hiring he oversaw. He said that the claimant was one of those independent contractor drivers.

¶ 11 According to Panek, at his initial meeting with the claimant, he offered the claimant two options: full employment with benefits, or an independent contractor relationship. Panek said that the claimant preferred to become an independent contractor so that he could avoid immediate tax deductions.

¶ 12 In his testimony, Panek described several differences between employees and contract drivers. First, regarding the requirement that drivers call in before 11 a.m. every day, Panek explained that the requirement applied only to employee drivers and that the $100 fine applied to a third violation of the policy. Panek said that the fines were never applied to independent contractors.

¶ 13 A second difference between employees and contract drivers, Panek explained, was that the company required employees, but not contractors, to submit written requests for time off. Panek also testified that JKC provided benefits to its employees but not contractors, and he said that the claimant received none of those benefits. However, Panek did describe a policy JKC used for helping its contractors obtain occupational accident insurance: JKC found a broker to provide discounted insurance, collected the premiums from its contractors, and submitted them to the broker. JKC paid none of the premiums for this insurance. Panek testified that the claimant used this procedure for obtaining insurance.

¶ 14 Another difference Panek described was that employee drivers were given assigned equipment, while contract drivers were not. Instead, contract drivers were given equipment, including trucks, on a "first come basis." Panek also said that employee drivers were required to use specific gas stations for refueling, while contractors were allowed to choose their gas stations. Likewise, Panek explained that JKC dictated the routes that its employee drivers could use but that contract drivers were allowed to choose their own routes. He also said that employee drivers were required to accept loads offered by JKC, while contractors could refuse and wait for another load, or even make a return trip with an empty truck. However, Panek explained that, if a contractor were to refuse a load, the company would likely "stop using his services."

¶ 15 Panek said that JKC retained responsibility for the trucks and that it provided all drivers, including contract drivers, with basic tools and with required documentation such as logbooks and trip reports. However, Panek added that contract drivers were not required to use JKC logbooks and trip reports, and he said that many contractors used their own forms. According to Panek, if a contractor's truck were to break down, the driver was required to report the problem and submit a service quote if possible.

¶ 16 Panek testified that employee drivers were paid on Fridays, while contractors were paid irregularly, several days after their returns from trips. After reviewing records of the claimant's pay record, Panek agreed that the claimant had been paid only on Fridays.

¶ 17 After reviewing JKC's records, Panek said that, in the 52 weeks preceding the claimant's accident, JKC paid the claimant $28,654. Panek asserted that the claimant's average weekly wage, therefore, was that figure divided by 52, or $551.04. The claimant objected to that calculation, and he asserted instead that his average weekly wage was $1,404.30. The claimant's figure represents $28,086 (the claimant's tabulation of his past-year's wages), divided by 20, the number of trips he took for JKC.

¶ 18 Following the arbitration hearing which was held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2008)), the arbitrator found that the claimant's injury arose out of and in the course of his employment with JKC. In finding that the claimant was an employee of JKC and not an independent contractor, the arbitrator relied on JKC's level of control over the claimant's work and the facts that the claimant's type of work matched the type of work JKC itself did, that JKC (or ADP) controlled the claimant's pay, and that the claimant used JKC's equipment. The arbitrator noted the independent contractor agreement the claimant had signed, but he found the signature to be invalid because the claimant did not understand English and signed the forms only so that he "would not be fired."

¶ 19 The arbitrator calculated the claimant's average weekly wage at $551.04 and awarded him temporary total disability (TTD) benefits of $367.36 for 16 6/7 weeks, as well as medical expenses. In setting the claimant's average weekly wage, the arbitrator reasoned that the claimant did not "meet his burden of proof" on the issue of weekly wage, because "[d]etermining the exact [duration] of each trip would be guesswork." Based on JKC's argument that the claimant's average weekly wage was $551.04, the arbitrator found that the "parties agree[d] that [the claimant] earned at least $551.04 weekly." The arbitrator therefore "accept[ed] [JKC's] proposed average weekly wage of $551.04."

¶ 20 The arbitrator denied the claimant's claim for penalties and fees pursuant to sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2008)). The claimant had argued that JKC acted in bad faith in refusing to pay benefits based on the assertion that the claimant was an independent contractor, but the arbitrator found that JKC "placed a reasonable reliance on the disputed issue of the employee-employer relationship."

¶ 21 JKC and the claimant both sought review of the arbitrator's decision before the Commission. JKC challenged the arbitrator's finding that the claimant was an employee, and not an independent contractor, at the time of his injury. The claimant challenged the arbitrator's determination of his weekly wage, and he also asserted that the arbitrator should have granted his petition for penalties and fees on the ground that JKC's independent-contractor argument was a specious basis for delaying payment of benefits. In a unanimous decision, the Commission affirmed and adopted the arbitrator's decision, and it remanded the matter to the arbitrator for further proceedings pursuant to *Thomas v. Industrial Comm'n*, 78 Ill. 2d 327, 399 N.E.2d 1322 (1980).

¶ 22 JKC and the claimant both sought judicial review of the Commission's decision in the circuit court of Cook County. The parties renewed their arguments before the circuit court. JKC also asserted that the claimant's petition for review should be dismissed for lack of jurisdiction, because he had caused a summons to be mailed to the Commission but did not have a summons served personally on a particular Commission member, or the Secretary or Assistant Secretary thereof. The circuit court denied the motion to dismiss and confirmed the Commission's decision. The claimant filed a timely notice of appeal to this court (case number 1-11-3007WC), and, the next day, JKC did the same (case number 1-11-3008WC). We consolidated the two appeals for review.

¶ 23 Because they pertain to prefatory matters, we begin with JKC's arguments on appeal. JKC's first argument on appeal is that the circuit court should have dismissed the claimant's

petition for review for lack of subject matter jurisdiction, because the claimant failed to effect proper service of the summons related to his petition. "It is well settled that '[t]he method of bringing before the circuit court for consideration the record of the *** Commission is purely statutory, and the court can obtain jurisdiction of the proceeding only in the manner provided by statute.' " *Jones v. Industrial Comm'n*, 188 Ill. 2d 314, 319-20, 721 N.E.2d 563, 566 (1999) (quoting *Moweaqua Coal Mining & Manufacturing Co. v. Industrial Comm'n*, 322 Ill. 403, 405, 153 N.E. 678, 678 (1926)). Thus, in order for a circuit court to obtain subject matter jurisdiction, the party or parties seeking to trigger that jurisdiction must comply with the statutorily prescribed conditions for presenting a Commission decision for circuit court review. *Jones*, 188 Ill. 2d at 320, 721 N.E.2d at 566.

¶ 24 For its jurisdictional argument, JKC directs us to section 19(f) of the Act, the section that describes the jurisdictional prerequisites to circuit court jurisdiction over a Commission decision:

> "A proceeding for review shall be commenced within 20 days of the receipt of notice of the decision of the Commission. The summons shall be issued by the clerk of such court upon written request ***, and the written request shall contain the last known address of other parties in interest and their attorneys of record who are to be served by summons. *Service upon any member of the Commission or the Secretary or Assistant Secretary thereof shall be service upon the Commission*, and service upon other parties in interest and their attorneys of record shall be by summons, and such service shall be made upon the Commission and other parties in interest by mailing notices ***. The clerk of the court issuing the summons shall on the day of issue mail notice *** which shall be done by mailing a copy of the summons to the office of the Commission, and a copy of the summons to the other parties in interest or their attorney or attorneys of record ***." (Emphasis added.) 820 ILCS 305/19(f)(1) (West 2008).

¶ 25 According to JKC, the above language indicates that service on the Commission may be accomplished only by serving a particular Commission member, or the Secretary or Assistant Secretary thereof. Thus, JKC asserts, the service in this case, which was directed only to the Commission generally and not to a particular Commission representative, was insufficient to trigger circuit court jurisdiction. We disagree.

¶ 26 JKC asks us to interpret section 19(f) of the Act. The interpretation of a statute is a question of law to be reviewed *de novo*. *Branson v. Department of Revenue*, 168 Ill. 2d 247, 254, 659 N.E.2d 961, 965 (1995); *Cassens Transport Co. v. Illinois Industrial Comm'n*, 218 Ill. 2d 519, 524, 844 N.E.2d 414, 418 (2006). The fundamental rule of statutory interpretation is to ascertain and effectuate the legislature's intent. *Beelman Trucking v. Illinois Workers' Compensation Comm'n*, 233 Ill. 2d 364, 370, 909 N.E.2d 818, 822 (2009). The best indication of that intent is a statute's language, given its plain and ordinary meaning. *Beelman*, 233 Ill. 2d at 370-71, 909 N.E.2d at 822-23. If the language of a statute is clear and unambiguous, a court must interpret it according to its terms without resorting to aids of construction. *Branson*, 168 Ill. 2d at 254, 659 N.E.2d at 965.

¶ 27 Here, the language of section 19(f) is quite clear. JKC invites us to focus on the discrete portion of section 19(f) that states "Service upon any member of the Commission or the

Secretary or Assistant Secretary thereof shall be service upon the Commission," without reference to its context within the remainder of section 19(f). However, we must determine legislative intent by reading a statute as a whole and considering all of its relevant parts, not by reading certain parts in isolation. *Cassens*, 218 Ill. 2d at 524, 844 N.E.2d at 419 (citing *Flynn v. Industrial Comm'n*, 211 Ill. 2d 546, 555, 813 N.E.2d 119, 124-25 (2004)). Further, we must construe a statute so that each word, clause, and sentence is given meaning and not rendered superfluous or void. *Cassens*, 218 Ill. 2d at 524, 844 N.E.2d at 419. The context surrounding the quoted passage gives it a much different meaning than JKC assigns it. Immediately after the statutory language JKC quotes, section 19(f) continues by explaining that service on the Commission is to be effected by mailing notice "to the office of the Commission." For this latter provision to have any meaning, we must interpret the whole of section 19(f) to allow service by mailing notice "to the office of the Commission." Under this interpretation, the language on which JKC relies is not a restriction on proper service but an expansion: it mandates that service on the named individuals be considered service on the Commission.

¶ 28 To the extent that JKC resists this interpretation on the ground that it allows a party to trigger circuit court jurisdiction by, in JKC's words, "serving no one at the Commission," again we disagree. The plain legislative purpose underlying the requirement that service be tendered to the Commission is that the Commission be adequately and timely notified of the challenge to its decision. This purpose is no less accomplished if the Commission receives notice as an entity rather than via an individual member. For these reasons, we reject JKC's argument that the circuit court erred in denying its motion to dismiss for lack of subject matter jurisdiction.

¶ 29 JKC's second argument on appeal is that the Commission erred in finding that the claimant was its employee, and not an independent contractor. The question of whether an employment relationship existed at the time of an accident is one of fact. *Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122, 743 N.E.2d 579, 583 (2000). Accordingly, we will disturb the Commission's resolution of that issue only if it is against the manifest weight of the evidence. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. A finding is contrary to the manifest weight of the evidence only if the opposite conclusion is clearly apparent. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. 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, 675 N.E.2d 175, 178 (1996).

¶ 30 No rigid rule exists regarding whether a worker is an employee or an independent contractor. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. Rather, courts have articulated a number of factors to consider in making this determination. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. The single most important factor is whether the purported employer has a right to control the actions of the employee. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. Also of great significance is the nature of the work performed by the alleged employee in relation to the general business of the employer. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. 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. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. Finally, a factor of lesser weight is the label the parties place upon their relationship. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. For purposes of the Act, the word "employee" should be given a broad meaning. *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583.

¶ 31 On the first, most important factor, JKC cites what it views as "compelling evidence" that the Commission was mistaken in its conclusion that JKC controlled the claimant's work. JKC asserts that the claimant "came to work whenever he pleased, and took off whenever he wanted to." JKC also discounts several of the modes of JKC's control over the claimant's work, because, it notes, many of those requirements were conceived not by JKC but by federal regulation. In particular, JKC cites the claimant's duty to conduct pretrip inspections of his truck and to maintain logs of his trips.

¶ 32 JKC also disputes the Commission's interpretation of, or treatment of, several pieces of evidence. For example, it argues that the fact that the claimant signed a document indicating that he was an independent contractor very strongly indicates that he was, in fact, an independent contractor. However, as noted, the label the parties place upon their relationship is a factor of minor significance in our appraisal of the parties' relationship. See *Ware*, 318 Ill. App. 3d at 1122, 743 N.E.2d at 583. Further, the Commission found that the claimant's signature on the document was not valid, because he was pressured to sign it and because he did not understand it. Although JKC disputes whether the claimant understood the document, it does not specifically contest the Commission's finding that his signature on the form was invalid. As a result, we have no basis for saying that the Commission was wrong to disregard the document.

¶ 33 JKC also disputes the notions that the claimant was required to call in to JKC every morning, use routes dictated by JKC, and use JKC's preferred gas stations. JKC argues that the claimant's testimony on these points was contradicted by Panek's. However, it is the function of the Commission to decide questions of fact, judge the credibility of witnesses, and resolve conflicting evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221, 223-24 (1980). If the claimant and Panek presented conflicting testimony, it was within the Commission's prerogative to credit the claimant's testimony over Panek's.

¶ 34 These points aside, there was additional evidence cited in the Commission's decision supporting its finding that JKC controlled the claimant's work. As the Commission noted, the claimant was required to start each of his trips at JKC's facilities and drive JKC trucks, and he was required to obtain JKC authorization for any truck repairs. Given all of this evidence, the Commission had ample basis for concluding that JKC exercised control over the claimant's work.

¶ 35 On the remaining factors, JKC notes that the claimant's method of payment required him to submit invoices to JKC, that the claimant was never disciplined by JKC, that the claimant's work required a skill (truck driving) personal to him, and that JKC did not withhold taxes from the claimant's pay. However, additional factors militate in the opposite direction. As the Commission noted, JKC provided the claimant with the truck he was to drive, and the claimant's work was the precise type of work JKC was in business to provide. Based on the totality of these circumstances, while we acknowledge that there is evidence

to support JKC's position that the claimant was an independent contractor, we conclude that there was also sufficient evidence to allow a rational trier of fact to conclude that the claimant was an employee. For that reason, we reject JKC's argument that the Commission's finding, that the claimant was a JKC employee at the time of his injury, is against the manifest weight of the evidence.

¶ 36 With that, we consider the claimant's contentions on appeal. The claimant's first argument on appeal is that the Commission erred in denying his petition for penalties and fees against JKC. The claimant sought penalties and fees pursuant to sections 19(k) and 19(*l*) of the Act (820 ILCS 305/19(k), (*l*) (West 2008)). Section 19(k) of the Act allows the Commission to impose penalties in cases where "there has been any unreasonable or vexatious delay of payment." 820 ILCS 305/19(k) (West 2008). Section 19(*l*) of the Act allows the Commission to impose penalties "[i]n case the employer or his *** insurance carrier shall without good and just cause fail *** or unreasonably delay the payment of" TTD benefits. 820 ILCS 305/19(*l*) (West 2008). "These sections are intended to prevent bad faith and unreasonable withholding of compensation benefits from injured workers." *Board of Education of the City of Chicago v. Industrial Comm'n*, 93 Ill. 2d 1, 9, 442 N.E.2d 861, 865 (1982). However, "Illinois courts have refused to assess penalties under these sections where the evidence indicates that the employer reasonably could have believed that the employee was not entitled to the withheld compensation." *Board of Education of the City of Chicago*, 93 Ill. 2d at 9, 442 N.E.2d at 865. The question of whether an employer's refusal to pay was reasonable is a factual question for the Commission, and the Commission's determination will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Continental Distributing Co. v. Industrial Comm'n*, 98 Ill. 2d 407, 416, 456 N.E.2d 847, 851 (1983).

¶ 37 Here, the claimant argues that JKC's basis for withholding his payments–its argument that he was an independent contractor and not an employee–was unreasonable and vexatious. According to the claimant, the question of his employment status "is not a close or difficult question." However, while it is true that the claimant has prevailed on the issue of employment status at every stage of this action, there are reasonable arguments for JKC's position that he was a contractor. For example, as we have discussed above, there was evidence that the claimant exercised control over his routes and over which gas stations he used. There was also evidence, in the form of Panek's testimony, that the claimant requested that he be considered an independent contractor. Further, JKC marshaled evidence to attempt to show that the claimant understood the independent contractor agreement he signed, and it was undisputed that JKC did not withhold taxes from the claimant's paychecks. Although the Commission ultimately either disbelieved this evidence or determined that it was outweighed by the claimant's evidence of an employment relationship, the fact remains that JKC presented the evidence in support of its position. In light of that evidence, we agree with the Commission's determination that JKC's refusal to pay, based on its assertion that the claimant was a contractor, was not unreasonable. Because we agree with the Commission's determination, we reject the claimant's argument that it was against the manifest weight of the evidence.

¶ 38 The claimant's second argument on appeal is that the Commission erred in setting his

average weekly wage at $551.04. According to the claimant, because he did not work continuously in the year preceding his injury, the Commission should not have set his weekly wage by dividing his yearly wage by 52. Instead, the claimant argues, the Commission should have divided his wage by 31, the number of weeks he actually worked in the year preceding his accident. "Normally, a wage determination by the Commission is a factual finding, and thus will be upheld on appeal unless against the manifest weight of the evidence." *Sylvester v. Industrial Comm'n*, 197 Ill. 2d 225, 231-32, 756 N.E.2d 822, 827 (2001). However, where the issue is whether the Commission has complied with the Act's requirements for setting compensation, our review is *de novo*. See *Sylvester*, 197 Ill. 2d at 232, 756 N.E.2d at 827; see also *McCartney v. Industrial Comm'n*, 174 Ill. App. 3d 213, 215, 529 N.E.2d 250, 251 (1988) ("Assuming compliance with [the Act], the *** Commission's determination of a claimant's average weekly wage is an issue of fact ***.").

¶ 39 At the outset, JKC argues that the claimant has forfeited this argument, because he did not present it to the arbitrator. Instead, JKC observes, the claimant relied entirely on the idea that the number of weeks he worked should be determined by the number of loads he carried, because each load took approximately one week to transport. However, JKC does not dispute, nor can it, that the claimant presented his current computational theory to the Commission. By so doing, the claimant has avoided forfeiting his argument for our review. *Cf. Christman v. Industrial Comm'n*, 180 Ill. App. 3d 876, 882 N.E.2d 773 (1989) (a party waives or forfeits an argument if it fails to raise it before the Commission).

¶ 40 Aside from its forfeiture argument, JKC presents nothing of substance to refute the claimant's position that we must set aside the Commission's computation of his average weekly wage. The claimant, on the other hand, cites case law for the proposition that the Commission must take lost time into account when determining a claimant's average weekly wage. Our decision in *McCartney* is instructive. In *McCartney*, the Commission set the claimant's average weekly wage by dividing his yearly income by 52. *McCartney*, 174 Ill. App. 3d at 214, 529 N.E.2d at 251. The Commission took this course despite evidence that the claimant worked irregular hours due to frequent layoffs, because " 'no evidence was presented as to the weeks or parts thereof that [claimant] actually worked.' " *McCartney*, 174 Ill. App. 3d at 214, 529 N.E.2d at 251. We noted that, pursuant to section 10 of the Act (now 820 ILCS 305/10 (West 2008)), "an employee's average weekly wage is determined on the basis of the employee's actual regular earnings divided by the number of weeks actually worked if the employee lost five or more calendar days of employment" during the year preceding his injury. *McCartney*, 174 Ill. App. 3d at 215, 529 N.E.2d at 251. Even without evidence of the precise amount of the claimant's total lost time, we concluded that it was clearly established that the claimant had not worked a full 52 weeks in the year preceding his injury. *McCartney*, 174 Ill. App. 3d at 215, 529 N.E.2d at 251-52. On that basis, we set aside the Commission's determination of the claimant's weekly wage and remand the matter to the Commission for further proceedings. *McCartney*, 174 Ill. App. 3d at 215-16, 259 N.E.2d at 252. See also *Sylvester*, 197 Ill. 2d at 230, 756 N.E.2d at 826 (stating that an employee's average weekly wage must be calculated based on weeks actually worked). Because JKC offers us no reason to ignore or distinguish this case law, we must follow it here. We therefore reverse that portion of the circuit court's judgment confirming the Commission's

determination of the claimant's average weekly wage, set aside the Commission's decision on the issue of average weekly wage, and remand to the Commission for recalculation of the claimant's average weekly wage and the benefits to which he is entitled which are dependent thereon, and for further proceedings.

¶ 41 In case number 1-11-3007WC, we reverse that portion of the circuit court's judgment confirming the Commission's calculation of the claimant's average weekly wage, vacate the Commission's calculation of the claimant's average weekly wage, and remand the cause to the Commission for determination of the claimant's average weekly wage and the weekly benefits to which he is entitled; and we affirm the circuit court's judgment in all other respects. In case number 1-11-3008WC, we affirm the judgment of the circuit court.

¶ 42 No. 1-11-3007WC, Affirmed in part and reversed in part. Cause remanded with directions.

¶ 43 No. 1-11-3008WC, Affirmed.