No. 4-10-0057WC

Workers' Compensation
Commission Division
Filed: January 13, 2011

IN THE APPELLATE COURT OF ILLINOIS
FOURTH JUDICIAL DISTRICT
WORKERS' COMPENSATION COMMISSION DIVISION

ISAACSON CONSTRUCTION COMPANY,	)	APPEAL FROM THE
	)	CIRCUIT COURT OF
Appellant,	)	McLEAN COUNTY
	)	
v.	)	No. 09 MR 121
	)	
ILLINOIS WORKERS' COMPENSATION	)	
COMMISSION, *et al.*,	)	
(ONIS BAIZE,	)	HONORABLE
	)	G. MICHAEL PRALL,
Appellee).	)	JUDGE PRESIDING.

JUSTICE HOFFMAN delivered the judgment of the court.
Presiding Justice McCullough and Justices Hudson, Holdridge, and Stewart concurred in the judgment.

O R D E R

HELD: The Workers' Compensation Commission's decision awarding the claimant, Onis Baize, benefits pursuant to the Workers' Compensation Act is not against the manifest weight of the evidence.

Isaacson Construction Company (Isaacson Construction)

appeals from an order of the circuit court confirming a decision of the Workers' Compensation Commission (Commission) which awarded the claimant, Onis Baize, benefits pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq.* (West 2004)) for injuries which he allegedly received on April 5, 2005. For the reasons which follow, we affirm the judgment of the circuit court.

The following factual recitation is taken from the evidence presented at the arbitration hearing, which was held pursuant to section 19(b) of the Act (820 ILCS 305/19(b) (West 2006)) on September 14, 2007, and September 24, 2007.

The claimant was employed by Isaacson Construction as a semi-truck driver. His duties included driving approximately 500 miles per day to deliver gravel to various businesses. According to the claimant, he was required to regularly work overtime to complete the job duties he was assigned. He stated that he would normally work from 5 a.m. until 5 or 6 p.m., five days a week and sometimes worked a half day on Saturdays.

The claimant testified that, on April 5, 2005, he was delivering a load of gravel, when he struck the tailgate of the truck with his right elbow. According to the claimant, his left ankle gave way, and he fell onto to his back. Immediately after the accident, the claimant experienced pain in his elbow and in his lower back. The claimant described the lower-back pain as occurring slightly above the buttocks and down to his left ankle.

The claimant finished his shift that day, arriving back at the plant at around 5:30 or 6 p.m. After work, the claimant soaked in a tub, used a heat pad, elevated his leg, and wrapped his elbow.

The following day, April 6, 2005, the claimant returned to his job at Isaacson Construction. The claimant testified that he informed his supervisor, Steve Clark, of the accident and asked for an accident report to complete. In the accident report, the claimant noted that he injured his right elbow after he was hit by the tailgate of a truck. According to the claimant, Clark was ill and asked him to return the form before he was able to complete it.

The claimant continued to work as a truck driver after April 6, 2005. The claimant testified that during this period he was in a lot of pain. To alleviate the pain while driving, he would place his left leg on the dashboard and use the cruise control.

The claimant testified that, on June 8, 2005, he had a disagreement with Isaacson Construction about the safety of the truck he was assigned to drive and stopped working for the company. The following day the claimant started working as a truck driver for Price Trucking Company.

On June 16, 2005, the claimant sought treatment from Dr. Lawrence Li, an orthopedic surgeon. In explaining his delay in seeking treatment, the claimant stated that he tried to work through the pain, but it kept getting worse, so he finally

decided "to do something about it." During the visit, the claimant gave a history of a tailgate striking his right elbow causing him to twist his left ankle and fall down. Dr. Li's report states that the claimant complained of pain in his right elbow and left ankle radiating to his buttock. An examination revealed that the claimant had some tenderness in his elbow and foot. The claimant's lumbar spine, however, was not tender, and a straight-leg raising test was negative for nerve root impingement. Dr. Li diagnosed the claimant with an ankle sprain and an elbow contusion and prescribed physical therapy.

The claimant began physical therapy on July 11, 2005. In a letter to Dr. Li dated that same day, the physical therapist noted that the claimant's chief complaints were a left-ankle sprain and pain from the left foot which radiated upward to the buttock. The note also indicated that the claimant had a decreased lumbar range of motion that prevented full functional activity.

On July 12, 2005, Dr. Li took the claimant off of work due to his elbow condition. The claimant testified that he took the off-of-work slip to his attorney, who advised him to update his accident report. According to the claimant, he then completed a second accident report for Isaacson Construction, specifically adding that he had injured his ankle and back.

When the claimant returned to Dr. Li on August 4, 2005, he complained of numbness and tingling in the ring and small fingers

of his right hand. The claimant also complained of worsening back pain. As Dr. Li did not treat back problems, he referred the claimant to Dr. Won Heum Jhee, a physician board certified in physical medicine and rehabilitation.

The claimant first saw Dr. Jhee on August 8, 2005. Following an examination, Dr. Jhee observed moderate tenderness on the medial and lateral epicondylar region of the claimant's right elbow, a positive Tinel's sign for the median nerve, and a positive Phalen's test on his right hand. Dr. Jhee also performed an EMG and nerve conduction study, the results of which showed mild carpal tunnel syndrome.

On August 16, 2005, the claimant returned to Dr. Jhee for treatment of his back complaints. Dr. Jhee's examination revealed some moderate tenderness of the left sacroiliac joint, with consistently limited movement on the left side. The claimant's deep tendon reflexes of the lower extremity also showed brisk and symmetrical knee jerks and a brisk right ankle jerk. Dr. Jhee suggested that the claimant undergo an MRI of his lumbar spine to rule out disc disease. He also recommended that the claimant not return to work.

On August 17, 2005, a lumbar MRI was performed. The radiologist's report noted significant degenerative disc disease at L4-L5 and L5-S1, as well as a moderate paracentral disc herniation at L5-S1. An additional nerve conduction study conducted by Dr. Jhee revealed moderately advanced S1

radiculopathy. Dr. Jhee then recommended that the claimant see a neurosurgeon.

On December 13, 2005, the claimant began treating with Dr. Ann Stroink, a neurosurgeon. On that day, Dr. Stroink noted complaints of low-back pain radiating to the left lower extremity and down to the toes. According to Dr. Stroink's medical records, the claimant stated that these symptoms were present since he sustained an injury at work in April of 2005. An examination of the claimant confirmed the August 17, 2005, MRI findings of degenerative disc disease at L4-L5 and L5-S1 and a disc herniation at L5-S1. Dr. Stroink recommended that the claimant undergo surgery, specifically a microdiscectomy at L5-S1.

Dr. Stroink performed the surgery on March 1, 2006. At her deposition, Dr. Stroink explained that during the surgery she removed a "chronic" disc herniation and a "superimposed" subacute disc herniation. Dr. Stroink opined that the April 5, 2005, accident either aggravated the claimant's underlying condition of an old disc herniation with a superimposed new disc herniation or could have caused both the new and old disc herniations. She also believed that pain in the buttocks, radiating to the left leg, could be consistent with a herniated disc.

The claimant also presented into evidence the depositions of Drs. Li and Jhee. When deposed, Dr. Li testified that the claimant's elbow contusion and ankle strain could be related to

the April 5, 2005, work accident. Although Dr. Li did not render an opinion regarding the cause of the claimant's back condition, he did testify that the claimant should have developed symptoms in his back within three to five days after the accident. At his deposition, Dr. Jhee opined that the April 5, 2005, accident could have aggravated the claimant's preexisting degenerative disc disease. On cross-examination, however, Dr. Jhee admitted that the claimant's back condition could have nothing to do with his accident.

At the arbitration hearing, the claimant denied that, prior to the April 5, 2005, accident, he experienced back or leg pain or received any medical treatment for pain in his back or legs. The claimant also admitted that he attempted to return to work as a janitor on June 6, 2006. He testified that he only worked a few hours and was in a lot of pain.

Isaacson Construction introduced into evidence the deposition of Dr. Stephen Pineda, an orthopedic and spinal surgeon. On October 17, 2005, Dr. Pineda had examined the claimant at the request of Isaacson Construction's attorneys. Dr. Pineda's examination of the claimant's lower extremities showed a dramatic weakness in his feet, which should have precluded him from walking in a normal fashion. Dr. Pineda, however, observed that the claimant had no trouble walking. His examination of the claimant's back, elbow, and ankle were otherwise normal. Dr. Pineda agreed with Dr. Li that if the

April 5, 2005, accident resulted in a spinal injury, the symptoms would have begun immediately or a few days later. Because the claimant informed him that his back pain began two months after the accident, Dr. Pineda believed that the claimant's back condition was unrelated.

Testifying on behalf of Isaacson Construction, Clark denied that he took the first accident report away from the claimant prematurely. Clark testified that he gave the claimant an incident report to fill out and found it later that day on his desk, completed and signed by the claimant.

Isaacson Construction also presented the testimony of Todd Isaacson, the company's owner, and Dennis Backlund, a truck driver. Clark, Isaacson, and Backlund each testified that overtime was not mandatory and that Isaacson Construction did not force its drivers to work more than eight hours a day.

Following the conclusion of the hearing, held pursuant to section 19(b) of the Act, the arbitrator found that on April 5, 2005, the claimant sustained an injury to his right elbow arising out and in the course of his employment with Isaacson Construction and awarded the claimant $6,400 in medical expenses related to the treatment of his elbow. However, relying on the inconsistencies between the two accident reports, the fact that the claimant continued to work for months after the accident, and Dr. Li's initial finding that the claimant did not have a back condition, the arbitrator determined that the claimant's low-back

and ankle conditions were not causally related to the April 5, 2005, accident. As a consequence, the arbitrator denied the claimant's request for temporary total disability (TTD) benefits. Although the arbitrator did not award TTD benefits, he still calculated the claimant's average weekly wage and included the overtime worked by the claimant at Isaacson Construction. The arbitrator also denied Isaacson Construction's request to bar the testimony of Dr. Stroink pursuant to section 12 of the Act (820 ILCS 305/12 (West 2004)).

Both the claimant and Isaacson Construction filed petitions for review of the arbitrator's decision before the Commission. In a unanimous decision, the Commission reversed the arbitrator and found that the claimant met his burden of proving a causal connection between the April 5, 2005, accident and his low-back and ankle conditions. In reaching this conclusion, the Commission noted that the claimant's testimony regarding the mechanism of his injury was corroborated by Dr. Li's medical records and the physical therapy report dated July 11, 2005. In addition, the Commission relied on the fact that, at oral argument, Isaacson Construction had conceded liability for the claimant's ankle injury, and the fact that a letter from Isaacson Construction's workers' compensation insurance carrier denying benefits for treatment unrelated to the claimant's elbow mentioned that the claims adjuster took a recorded statement from the claimant on July 13, 2005. The Commission concluded that it

was not unreasonable to infer that Isaacson Construction would have introduced the statement into evidence had it been favorable to its position.

The Commission also affirmed the arbitrator's calculation of the claimant's average weekly wage and the denial of Isaacson Construction's request to bar the testimony of Dr. Stroink pursuant to section 12 of the Act (820 ILCS 305/12 (West 2004)). The Commission ordered Isaacson Construction to pay TTD benefits in the sum of $350.67 per week from December 13, 2005, through September 24, 2007, as well as necessary medical expenses totaling $35,920.32. The Commission also 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).

Thereafter, Isaacson Construction sought judicial review of the Commission's decision in the Circuit Court of McLean County. The circuit court confirmed the Commission's decision, and this appeal followed.

Initially, we address Isaacson Construction's argument that the Commission erred in denying its request to bar the testimony of Dr. Stroink pursuant to section 12 of the Act (820 ILCS 305/12 (West 2004)). According to Isaacson Construction, Dr. Stroink's evidence deposition was inadmissible because the claimant failed to disclose the doctor's opinions prior to the commencement of the depositions of Drs. Li, Jhee, and Pineda. The decision whether to admit testimony into evidence is a matter within the

sound discretion of the Commission, which will not be disturbed on review absent an abuse of that discretion. *Homebrite Ace Hardware v. Industrial Comm'n*, 351 Ill. App. 3d 333, 337, 814 N.E.2d 2d 126 (2004).

Section 12 of the Act provides, in relevant part, that:

> "In all cases where the examination is made by a surgeon engaged by the injured employee, and the employer has no surgeon present at such examination, it shall be the duty of the surgeon making the examination at the instance of the employee, to deliver to the employer, or his representative, a statement in writing of the condition and extent of the injury to the same extent that said surgeon reports to the employee and the same shall be an exact copy of that furnished to the employee, said copy to be furnished the employer, or his representative, as soon as practicable but not later than 48 hours before the time the case is set for *hearing*. *** If such surgeon refuses to furnish the employer with such statement to the same extent as that furnished the employee, said surgeon shall not be permitted to testify at the *hearing* next following said examination."

(Emphasis added.) 820 ILCS 305/12 (West 2004).

In the prior decision of *Marks v. ACME Industries*, 02 IIC 0892 (November 22, 2002), the Commission found that the "hearing" referred to in section 12 of the Act was the deposition of a treating physician. This court, however, subsequently held that the Commission's reading of section 12 was contrary to our prior determination that the purpose of this section is to prevent surprise medical testimony at the arbitration hearing. *City of Chicago v. Workers' Compensation Comm'n*, 387 Ill. App. 3d 276, 280, 899 N.E.2d 1247 (2008), citing *Ghere v. Industrial Comm'n*, 278 Ill. App. 3d 840, 845, 663 N.E.2d 1046 (1996).

Isaacson Construction has not alleged that it was surprised by Dr. Stroink's testimony. In the absence of surprise, section 12 does not require that an examining physician's testimony be excluded from the evidence. See *City of Chicago*, 387 Ill. App. 3d at 280; *Certified Testing v. Industrial Comm'n*, 367 Ill. App. 3d 938, 947-48, 856 N.E.2d 602 (2006). As a result, we cannot say that the Commission abused its discretion in denying Isaacson Construction's request to bar the testimony of Dr. Stroink.

Next, Isaacson Construction contends that the Commission's finding that the claimant's lower-back condition is causally related to his April 5, 2005, work accident is against the manifest weight of the evidence. Isaacson Construction asserts that the facts of this case do not support the Commission's

decision to set aside the arbitrator's credibility determinations.

Before addressing the merits of Isaacson Construction's claim, we must first determine our standard of review. Whether a causal relationship exits between a claimant's employment and his current condition of ill-being is a question of fact to be decided by the Commission. *Certi-Serve, Inc. v. Industrial Comm'n*, 101 Ill. 2d 236, 244, 461 N.E.2d 954 (1984). The Commission's determination on a question of fact 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, 509 N.E.2d 1005 (1987). For a finding of fact to be contrary to the manifest weight of the evidence, an opposite conclusion must be clearly apparent. *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 64, 862 N.E.2d 918 (2006).

Citing to *Cook v. Industrial Comm'n*, 176 Ill. App. 3d 545, 531 N.E.2d 379 (1988), Isaacson Construction suggests that, as the Commission overturned the credibility findings of the arbitrator, we should apply "an extra degree of scrutiny" in determining whether there is sufficient support for the Commission's decision. In *Cook*, this court held that "in cases where the Commission has rejected the arbitrator's factual findings without receiving any new evidence, [the reviewing court applies] an extra degree of scrutiny to the record." *Cook*, 176 Ill. App. 3d at 552. However, numerous other appellate decisions

have rejected the extra-degree-of-scrutiny standard as an inaccurate statement of the law. See *e.g.*, *Hosteny v. Workers' Compensation Comm'n*, 397 Ill. App. 3d 665, 675-76, 928 N.E.2d 474 (2009); *Boatman v. Industrial Comm'n*, 256 Ill. App. 3d 1070, 1071, 628 N.E.2d 829 (1993); *J & J Transmissions v. Industrial Comm'n*, 243 Ill. App. 3d 692, 700, 612 N.E.2d 877 (1993). Moreover, the Illinois Supreme Court has consistently held that when the Commission reviews an arbitrator's decision it exercises original, not appellate jurisdiction and is not bound by the arbitrator's findings of fact. See *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279, 811 N.E.2d 684 (2004); *Paganelis v. Industrial Comm'n*, 132 Ill. 2d 468, 483, 548 N.E.2d 1033 (1989); *Berry v. Industrial Comm'n*, 99 Ill. 2d 401, 405, 459 N.E.2d 963 (1984).

In light of the overwhelming weight of authority to the contrary, we decline to apply "an extra degree of scrutiny" even when the Commission rejects the credibility findings of the arbitrator. Nevertheless, when the Commission draws its own conclusions regarding the credibility of the witnesses, we deem it the better practice for the Commission to expressly state its reasons for doing so. Without a statement regarding its reasons for a contrary credibility determination, the Commission's decision may lack the findings which make meaningful judicial review possible, requiring that the matter be remanded back to the Commission with directions to make the necessary findings.

R&D Thiel v. Workers' Compensation Comm'n, 398 Ill. App. 3d 858, 866, 923 N.E.2d 870 (2010).

Here, the Commission expressly stated its reasons for setting aside the credibility findings of the arbitrator. In finding a causal connection between the injuries the claimant sustained on April 5, 2005, and his lower-back condition, the Commission noted that the claimant's testimony regarding the mechanism of his injury was corroborated by Dr. Li's medical records and the physical therapy report dated July 11, 2005. In addition, the Commission found that, by conceding liability at oral argument for the ankle injury the claimant sustained, this, in turn, connected the back injury to the accident. The Commission also noted that a letter from Isaacson Construction's workers' compensation insurance carrier denying benefits for treatment unrelated to the claimant's elbow mentioned that the claims adjuster took a recorded statement from the claimant on July 13, 2005. The Commission concluded that it was not unreasonable to infer that Isaacson Construction would have introduced the statement into evidence had it been favorable to its position.

In seeking to set aside the Commission's decision, Isaacson Construction contends that the Commission failed to acknowledge certain evidence. Specifically, the Commission did not address: (1) the absence of documented complaints or treatment for a back condition during the months initially following the accident; (2)

Dr. Li's opinion that symptoms should arise within three to five days of the injury; (3) the fact that the claimant was able to work at full-duty capacity for months after the accident; (4) the absence of any physical therapy for a lower-back condition; and (5) Dr. Li's finding, on June 16, 2005, that the claimant's back was normal. Contrary to Isaacson Construction's argument, the Commission's decision need not set forth a detailed description of all the evidence presented. *Setzekorn v. Industrial Comm'n*, 353 Ill. App. 3d 1049, 1054, 820 N.E.2d 586 (2004). Rather, the Commission is presumed to have considered all competent and proper evidence in reaching its decision. *Swift & Co. v. Industrial Comm'n*, 150 Ill. App. 3d 216, 221, 501 N.E.2d 752 (1986).

Isaacson Construction also takes issue with the Commission's findings that it made a concession at oral argument which connected the back injury to the accident and that adverse inferences could be drawn from its failure to introduce into evidence the statement made to the claims adjuster. However, even assuming that the Commission's findings in this regard were erroneous, it is well established that this court may affirm the decision of the Commission based on any ground appearing in the record. *Dodson v. Industrial Comm'n*, 308 Ill. App. 3d 572, 575, 720 N.E.2d 275 (1999); *Freeman United Coal Mining Co. v. Industrial Comm'n*, 283 Ill. App. 3d 785, 793, 670 N.E.2d 1122 (1996).

In this case, Dr. Stroink opined that the April 5, 2005, work accident either aggravated the claimant's underlying condition of an old disc herniation with a superimposed new disc herniation or could have caused both the new and old disc herniations. Furthermore, the claimant testified that prior to April 5, 2005, he did not experience back or leg pain, nor receive any medical treatment for pain in his back and legs. The claimant testified that, following the April 5, 2005, accident, he began experiencing pain in his lower back from his above buttocks and down to his left ankle. When an employee establishes both his state of health prior to a work-related accident and a change immediately following and continuing thereafter, this chain of events may be sufficient circumstantial evidence to prove that the impaired condition is due to the accident. See *Spector Freight System, Inc. v. Industrial Comm'n*, 93 Ill. 2d 507, 513, 445 N.E.2d 280 (1983); *Navistar International Transportation Corp. v. Industrial Comm'n*, 315 Ill. App. 3d 1197, 1205, 734 N.E.2d 900 (2000).

Based upon the opinion of Dr. Stroink and the claimant's own testimony, there is sufficient evidence in record to support the Commission's finding that the claimant's lower-back condition was causally connected to the April 5, 2005, work accident. As a consequence, it cannot be said that the Commission's decision in this regard is against the manifest weight of the evidence. See *P.I.&I. Motor Express, Inc. / FOR U, LLC v. Industrial Comm'n*,

368 Ill. App. 3d 230, 240-41, 857 N.E.2d 784 (2006) (where the Commission's decision is supported by competent evidence, its findings of fact are not against the manifest weight of the evidence).

Isaacson Construction also contends that the Commission's decision to award TTD benefits for the period of December 13, 2005, through September 24, 2007, is against the manifest weight of the evidence. Isaacson Construction argues that the award of TTD benefits is "dramatically inconsistent with the facts contained in the record."

We note that Isaacson Construction has failed to cite a single case in support of its contention that the Commission erred in awarded TTD benefits. Supreme Court Rule 341(h)(7) requires that the argument section of an appellant's brief contain its contentions "and the reasons therefor, with citation to the authorities *** relied on." 210 Ill. 2d R. 341(h)(7). This court has consistently held that any argument which is not supported by citation to legal authority is deemed forfeited. See *e.g.*, *Roper Contracting v. Industrial Comm'n*, 349 Ill. App. 3d 500, 504-05, 812 N.E.2d 65 (2004). In addition to the fact that Isaacson Construction has forfeited its arguments regarding the award of TTD benefits, we also find them lacking in merit.

An employee is temporarily and totally disabled from the time that an injury incapacitates him from work until such time as he is as far recovered or restored as the permanent character

of his injury will permit. *Archer Daniels Midland Co. v. Industrial Comm'n*, 138 Ill. 2d 107, 118, 561 N.E.2d 623 (1990). The time during which a claimant is temporarily and totally disabled is a question of fact to be resolved by the Commission, and the Commission's decision will not be disturbed on appeal unless it is against the manifest weight of the evidence. *Choi v. Industrial Comm'n*, 182 Ill. 2d 387, 398, 695 N.E.2d 862 (1998).

In its decision, the Commission found that the claimant was not entitled to TTD benefits in connection with his elbow or ankle condition. The Commission, however, did award the claimant TTD benefits in connection with his back condition from December 13, 2005, through September 24, 2007, the final date of the arbitration hearing. Despite Isaacson Construction's assertions to the contrary, we find nothing inherently inconsistent with the Commission's finding that the claimant's back condition entitled him to TTD benefits from December 13, 2005, and the claimant's testimony that the April 5, 2005, work injury caused him to suffer an injury to his lower back. During many of the months following the April 5, 2005, work accident, the claimant was either working or no physician had provided the claimant with a work restriction related to his back condition. To establish a temporary and total disability, the claimant must not only show that he did not work, but also that he was unable to work. *Archer Daniels Midland Co.*, 138 Ill. 2d at 119; *Gallentine v.*

Industrial Comm'n, 201 Ill. App. 3d 880, 887, 559 N.E.2d 526 (1990). Based on the evidence in the record, we believe that it was reasonable for the Commission to conclude that the claimant's lower-back condition did not render him temporarily and totally disabled until December 13, 2005, the date on which Dr. Stroink recommended that the claimant undergo a microdiscectomy. We, therefore, cannot say that the Commission's decision to award the claimant TTD benefits from December 13, 2005, through September 24, 2007, is against the manifest weight of the evidence.

In reaching this conclusion, we reject Isaacson Construction's contention that the claimant should not have been awarded TTD benefits for June 6, 2006, as the claimant admitted that he worked a few hours that day as a janitor. The mere fact that an employee has been able to earn occasional wages or perform certain useful services does not preclude an award of TTD benefits. *Mechanical Devices v. Industrial Comm'n*, 344 Ill. App. 3d 752, 760, 800 N.E.2d 819 (2003); *Dolce v. Industrial Comm'n*, 286 Ill. App. 3d 117, 121, 675 N.E.2d 175 (1996).

Isaacson Construction next argues that the Commission erred in including the claimant's overtime earnings when calculating his average weekly wage. It maintains that the claimant failed to prove that the overtime he worked was mandatory rather than voluntary.

Yet again, Isaacson Construction has failed to cite to any legal authority in support of its contention that the Commission

erred in calculating the claimant's average weekly wage, and, therefore, any challenge before this court has been forfeited. See *Roper*, 349 Ill. App. 3d at 504-05. Forfeiture aside, we find no merit to Isaacson Construction's arguments in this regard.

As is the case with any element in a workers' compensation claim, the claimant has the burden of establishing his average weekly wage. *Cook v. Industrial Comm'n*, 231 Ill. App. 3d 729, 731, 596 N.E.2d 746 (1992). The calculation of an employee's average weekly wage is a question of fact for the Commission, which will not be reversed on appeal unless it is contrary to the manifest weight of the evidence. *Ogle v. Industrial Comm'n*, 284 Ill. App. 3d 1093, 1096, 673 N.E.2d 706 (1996).

In calculating an employee's average weekly wage, section 10 of the Act expressly excludes overtime. 820 ILCS 305/10 (West 2004). The Act, however, does not define "overtime." Nevertheless, this court has consistently interpreted the overtime exclusion to include those hours "in excess of an employee's regular weekly hours of employment that he or she is not required to work as a condition of his or her employment or which are not part of a set number of hours consistently worked each week." *Airborne Express, Inc. v. Workers' Compensation Comm'n*, 372 Ill. App. 3d 549, 554, 865 N.E.2d 979 (2007).

At the arbitration hearing, the claimant testified that he was required to work overtime to complete the job duties he was assigned and that this usually took between 11 to 12 hours a day.

Although Backlund, Clark, and Isaacson each testified that there are no negative consequences if an employee refuses to work overtime, it was the responsibility of the Commission to resolve the conflicts in the evidence. *O'Dette v. Industrial Comm'n*, 79 Ill. 2d 249, 253, 403 N.E.2d 221 (1980). After considering the evidence presented, the arbitrator found the claimant's testimony on the issue of overtime more credible and included the claimant's overtime earnings in computing his average weekly wage. The Commission subsequently adopted the arbitrator's findings in this regard.

Based on the claimant's testimony, we are unable to conclude that the Commission's determination that the overtime hours the claimant worked were mandatory is against the manifest weight of the evidence. As the hours that an employee is required to work as a condition of his employment are not considered "overtime" within the meaning of section 10 of the Act (*Airborne Express, Inc.*, 372 Ill. App. 3d at 554), we find that the Commission did not err in including the claimant's overtime earnings in the calculation of his average weekly wage.

Finally, Isaacson Construction argues that, based on the absence of a causal connection between the claimant's lower-back condition and his April 5, 2005, accident, the Commission's award of TTD benefits and certain medical expenses is against the manifest weight of the evidence. In light of the fact that we have previously rejected the premise upon which Isaacson

Construction's arguments are based, these arguments must also be rejected.

For these reasons, we affirm the judgment of the circuit court which confirmed the Commission's decision.

Affirmed.