2017 IL App (4th) 160305WC-U

NOS. 4-16-0305WC, 4-16-0369WC cons.

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Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

RPRD DYCKMAN, INC., Appellant, v. (4-16-0305WC) THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (Michael Shea, Appellee).	)	Appeal from Circuit Court of Coles County No. 15MR240
MICHAEL SHEA, Appellant, v. (4-16-0369WC) THE ILLINOIS WORKERS' COMPENSATION COMMISSION *et al*. (RPRD Dyckman, Inc., Appellee).	)	No. 15MR233 Honorable Brien J. O'Brien, Judge Presiding.

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

ORDER

¶ 1 *Held*: (1) Although the circuit court correctly set aside the Commission's original decision due to the Commission's application of an incorrect legal standard, the circuit court erred by making its own factual determinations rather than remanding the matter to the Commission so that it could make factual determinations in the first instance under the appropriate legal standard.

(2) The circuit court committed no error in applying the substitution of judge provisions of the Code of Civil Procedure during proceedings to review the Commission's original decision.

(3) Given the resolution of the employer's appeal, claimant's appeal is moot.

¶ 2 On May 27, 2011, claimant, Michael Shea, filed an application for adjustment of claim pursuant to the Workers' Compensation Act (Act) (820 ILCS 305/1 to 30 (West 2010)), seeking benefits from the employer, RPRD Dyckman, Inc., for psychological injuries he sustained as the result of a motor vehicle accident. Following a hearing, the arbitrator determined claimant failed to prove he sustained accidental injuries that arose out of and in the course of his employment. On review, the Illinois Workers' Compensation Commission (Commission) affirmed and adopted the arbitrator's decision. On judicial review, the circuit court of Coles County reversed and remanded to the Commission for an award of compensation.

¶ 3 On remand, the Commission awarded claimant 34-5/8 weeks' temporary total disability (TTD) benefits and 25 weeks' permanent partial disability (PPD) benefits for a 5% loss of the person as a whole. The circuit court confirmed the Commission's decision. The employer's appeals, arguing the circuit court erred in (1) reversing the Commission's original decision and remanding to the Commission for an award of benefits and (2) granting claimant's motion for substitution of judge during proceedings to review the Commission's original decision. Claimant also appeals, arguing the Commission erred on remand by failing to award him wage differential benefits. We vacate both the Commission's decision and opinion on remand and the circuit court's April 19, 2016, judgment, confirming that decision, as well as the circuit court's April 16, 2014, remand order. We also remand the matter to the Commission with directions.

¶ 4 I. BACKGROUND

¶ 5 On July 20, 2012, the arbitration hearing was conducted. Claimant testified he was 63 years old and worked for the employer as a semi-truck driver. He stated he had contemporaneous employment with FedEx and "worked for [FedEx] through" the employer, a

FedEx contractor. Claimant testified he initially worked as a semi-truck driver in 1995 for approximately 11 months. In 2002, he "returned to the transportation industry," working as a semi-truck driver until the time of his alleged work accident. Claimant stated he also had 21 years of active duty military service, which primarily consisted of aviation maintenance.

¶ 6 In the early morning hours of October 2, 2010, claimant was involved in a motor vehicle accident while performing his job duties. He testified he was travelling northbound in the right-hand lane of Interstate 57 when he observed another tractor-trailer pulling off onto the shoulder of the road. As a courtesy to that driver, claimant moved to the left lane of travel. He then noticed "a lot of smoke and dust" and that a vehicle was stopped ahead of him in the left lane. Claimant attempted to avoid the vehicle but made contact with its rear bumper. He stated his semi-truck ended up in the median and one of the two trailers he was pulling flipped over onto its side. Claimant exited his vehicle and heard a woman screaming and crying. He also saw the body of a man lying in the left lane of the roadway. Claimant observed that the man's clothing was torn and part of his skull was missing. At the time of the accident, another FedEx driver had been travelling behind claimant. Following the accident, claimant observed bloody human remains on the underside of the other FedEx driver's semi-truck. Claimant stated he was "in shock" and felt "sick" and "horrified" by what he witnessed.

¶ 7 Following the accident, claimant called 9-1-1. After first responders arrived at the scene, he also contacted his dispatcher to report the accident. Claimant testified he was required to remain at the scene and was interviewed by the police. Ultimately, he was taken to a hospital, examined by the hospital's on-duty physician, and given a blood test to determine whether any drugs or alcohol were in his system. Claimant stated the employer's owner, Robert Dyckman, met him a couple of hours after the accident and drove him to retrieve his personal vehicle at a

FedEx facility.

¶ 8 On October 7 and 8, 2010, shortly following the motor vehicle accident, claimant returned to work and "took a load out" for FedEx using the employer's truck. Initially at arbitration, claimant testified his route was from St. Louis to Kansas City; however, he later stated he had been confused and agreed his route was from St. Louis to Champaign, Illinois. His route also went through the same area where the October 2, 2010, motor vehicle accident occurred. According to claimant, he continued to feel effects from the accident during his return to work, stating "the shock and the horror still hadn't worn off." However, he returned to work because he felt he "had to stay with it." Claimant testified that, while driving, he was constantly worrying and "constantly second guessing every decision" he made. He stated he did not feel like he could drive safely and "struggled" during his entire route.

¶ 9 Claimant testified, following his brief return to work, Dyckman informed him that FedEx had "disqualified" him as a driver until further notice. Claimant testified he was disqualified even though he had not been accused of any wrongdoing with respect to the motor vehicle accident. Despite his disqualification, he wanted to return to work driving semis, stating "that was the work that [he] knew." Claimant testified he also wanted the income. However, despite his desire to return to work, he did not think he could continue driving semis because he was "bothered" by the "increase[d] level of responsibility."

¶ 10 Claimant denied having any psychological problems before the October 2010 accident. However, following his accident, he experienced an inability to sleep and had difficulty concentrating. He was also irritable and agitated, and had alienated friends and family members. Claimant testified he continued to think about the October 2010 motor vehicle accident and when he was idle at nighttime it could "reoccur" and prevented him from sleeping.

Claimant testified he would become very agitated and get in and out of bed several times at night.

¶ 11 Claimant's wife, Janis Shea, testified she had been married to claimant for 26 years. After the October 2010 accident, she noticed that claimant had sporadic sleeping patterns. Specifically, he would get up in the middle of the night and slept less than he did before the accident. Janis also noticed that claimant became very short tempered and "[h]is concentration [was] just not there." She testified claimant would get in "quiet moods" and "always seemed like [he was] thinking about something else."

¶ 12 Claimant estimated that, in April 2011, he saw his family physician, who recommended he see a psychologist. On May 19, 2011, he sought treatment with Dr. David Lipsitz, a psychologist. Claimant testified he saw Dr. Lipsitz three or four times but only felt worse. At arbitration, he submitted two pages of illegible, handwritten records from Dr. Lipsitz. Additionally, on cross-examination, claimant asserted he could not recall whether he spoke to his attorney prior to visiting his family physician to discuss the "difficulties" he was having.

¶ 13 On October 14, 2011, claimant saw Dr. Gregg Bassett, a psychiatrist, at the request of the employer's insurance company. Claimant submitted Dr. Bassett's deposition at arbitration and the record also contains Dr. Bassett's report, dated October 31, 2011. Dr. Bassett's report contains a history of the October 2010 motor vehicle accident and states as follows:

> "[Claimant] brought with him to the evaluation the official report of the [October 2, 2010] accident/incident. [Claimant] informed me that the opinion of the official report is that the driver of the car was killed when he was hit by the second FedEx tractor-trailer ([who claimant had] tried to warn).

* * *

> [Claimant] learned (either from the accident investigators or from the report of the accident) that a female driver who had been traveling southbound crossed the median, hit and disabled the vehicle whose driver was killed when he exited the car, and then returned to travel in the southbound lane. [Claimant] informed me that he did not see either brake lights or headlights on the vehicle whose driver was killed. The headlights had been disabled by the head-on collision that disabled the victim's vehicle.
>
> [Claimant] was interviewed 'several times that night' by various investigators. Although he did not view the victim's fatal injury, 'They seen [*sic*] that half his head was gone.' The victim's body was covered with a sheet. The coroner arrived on the scene approximately five hours later.
>
> [Claimant] was not charged with any wrongdoing as a consequence of the *** incident/injury. It was determined that the other FedEx truck hit the victim and removed part of that man's skull."

¶ 14 Dr. Bassett's report reflects claimant reported sleeping difficulties following the accident. He stated he constantly thought about the accident in the two to three months after it occurred and felt anxious and hyper-alert while driving. Claimant reported he also had dreams about the accident, increased irritability, and difficulty concentrating. Dr. Bassett opined the October 2010 accident caused claimant to develop "a constellation of depressive, anxiety, and dissociative symptoms," which met the criteria for a diagnosis of posttraumatic stress disorder (PTSD). He described claimant's PTSD symptoms as being of "moderate intensity" and opined his symptoms permanently precluded him "from being able to work as a professional driver of a

heavy truck ***, a bus, a limousine, or a taxi." However, Dr. Bassett found claimant could work without restrictions in a capacity that did not involve specially-licensed professional driving. Dr. Bassett reasoned that the closer a type of driving was to the type claimant was doing at the time of the accident, the more likely it was to provoke or aggravate claimant's PTSD symptoms, particularly his "re-experiencing symptoms." He opined claimant would pose a potential safety risk if he experienced PTSD symptoms while driving a heavy vehicle.

¶ 15 Dr. Bassett further testified that he placed claimant at maximum medical improvement (MMI) "in mid 2011" after claimant had several sessions with Dr. Lipsitz. He noted claimant reported "the emotional discomfort associated with engaging in the treatment was such that it was almost better for him to not engage in the treatment." Dr. Bassett opined claimant's symptoms were not so severe that he required ongoing treatment. He further testified that he did not "assign a lot of value to the fact that [claimant] waited" over seven months before seeking mental-health treatment. Dr. Bassett testified it was recognized in his field that there could be "delayed onset or delayed evolution of symptoms in PTSD."

¶ 16 Dr. Bassett further stated that it was "hard to say" whether additional treatment would allow claimant to return to work. He testified that certain medications have been approved to treat PTSD, but claimant reported that he was not interested in taking any medications. Additionally, some of the medications had side effects that could impair one's ability to operate a motor vehicle. At arbitration, claimant testified he did not want to take the medications mentioned by Dr. Bassett due to the possible side effects. On cross-examination, claimant testified he was unaware of the side effects of the medications until he read Dr. Bassett's deposition (taken April 20, 2012).

¶ 17 At his deposition, Dr. Bassett testified treatment was available to claimant if he

was willing to engage in it. He also agreed that "with certain treatment and certain gains" by claimant, claimant could return back to work as a commercial driver. However, Dr. Bassett noted that claimant had to be willing and able to engage in the treatment, a portion of which involved "reliving some of the discomfort of the trauma itself." Further, he testified there was no guarantee as to the outcome of any treatment.

¶ 18 At arbitration, claimant further testified that as soon as he was disqualified from working for FedEx he began looking for other employment. Toward the end of 2010, he had an interview with Home Depot but was not offered employment. Claimant stated he also had an interview with a janitorial service, resulting in a "short stint" of employment for less than one week. With the janitorial service, claimant was paid minimum wage, or between $7 and $8 per hour. On cross-examination, he testified he quit the janitorial service job because of a disagreement with a co-worker. Finally, claimant testified that, prior to Thanksgiving 2010, he worked for Wal-Mart as holiday help for a period of 10 days.

¶ 19 Claimant asserted he continued to search for employment in 2011 and 2012, estimating that he "looked for work" with 50 to 75 different potential employers, some of whom were in the "transportation trucking field." Claimant testified he was not necessarily looking for work as a driver, stating "you can still load [trucks], you can still do warehouse work, you can still do spotting trailers around, you know, the facility yards." Claimant testified he was not hired at any of the places to which he applied.

¶ 20 On cross-examination, claimant testified he applied for work with trucking companies "for any type of work that they had available at their facility." He acknowledged that some of the jobs he applied for could have been for driving.

¶ 21 Claimant testified he was familiar with regulations for a commercial driver's

license (CDL). He stated his CDL was current but his medical certificate was not. According to claimant, he could not receive a medical certificate if he had a psychological disorder that precluded him from safely operating a commercial motor vehicle. Claimant testified he needed medical clearance to drive a semi, which neither Dr. Bassett nor Dr. Lipsitz had given him. On cross-examination, claimant testified he never tried to get a medical certificate to continue driving commercially after the accident.

¶ 22 At arbitration, claimant submitted the deposition and report of John Stephen Dolan, a certified rehabilitation counselor. On February 1, 2012, Dolan performed a vocational and rehabilitation assessment on claimant. In his report, Dolan described claimant has having a high school education and approximately three years of college credits through the military. He noted claimant served in the military from 1971 to 1993, and his "highest rank was CW3, Warrant Officer." Claimant reported serving in a helicopter maintenance crew, as a helicopter pilot, and as an administrator of helicopter maintenance. After retiring from the army, claimant held various types of employment, including "as an aircraft maintenance instructor, a factory machine operator, a buyer for manufacturing concerns, a municipal street worker, a chauffeur[,] and a tractor-trailer-truck driver." Dolan relied on Dr. Bassett's opinions in finding claimant's PTSD diagnosis precluded him from driving professionally.

¶ 23 Dolan determined that claimant had computer, record keeping, and oral communication skills due to his previous experience as a buyer. He found that, due to claimant's age, his skills would transfer to only very similar types of jobs. Further, he opined as follows:

> "I believe [claimant] is correct that he would not be considered a viable candidate for a buyer position. It has been more than a decade since he did that type of work. According to the U.S.

> Department of Labor, *** employers now prefer to hire people with college degrees in business, economics or engineering for these jobs and prefer candidates with up to date product knowledge. [Claimant] got into that line of work originally because of his military experience administering helicopter maintenance work, which included ordering supplies and materials. His military and civilian material ordering experience is now too remote."

Dolan determined there were unskilled jobs that claimant could perform, "such as cashier, fast food worker, housekeeping cleaner, etc." He noted those jobs typically started at a minimum wage of $7.25 and went up to $8 or $9 an hour. Dolan noted that, while working part time as a truck driver, claimant was averaging $307.43 per week. Further, he found the average weekly earnings for a truck driver in the area claimant lived was $787.88.

¶ 24 Finally, at arbitration, Dyckman testified on behalf of the employer. He stated claimant notified him about the October 2010 accident shortly after it occurred. Dyckman drove to the accident scene and spoke with claimant while waiting for the police to finish their investigation. Once the on-scene investigation was completed, Dyckman drove the employer's semi-truck, which had been disconnected from its trailers, to a nearby Wal-Mart. Claimant followed in Dyckman's car. Dyckman stated he then drove claimant to FedEx's St. Louis facility and returned claimant to his personal vehicle. During the drive, Dyckman discussed the accident with claimant. He described claimant as "upset" and "concerned" but denied that claimant was hysterical, crying, or physically shaking. Claimant also did not appear to be in shock. Dyckman stated claimant commented and responded appropriately during their

conversation.

¶ 25 According to Dyckman, following the accident, FedEx's policies regarding drug tests became an issue with respect to claimant's ability to return to work. He testified FedEx policy required a drug test to be performed on claimant within two hours after the accident. Although claimant had been tested by the State, his test results were not immediately available to FedEx. Dyckman testified he argued with FedEx to get the situation resolved, which resulted in claimant being allowed to do a "run" for FedEx on October 7 and 8, 2010. He stated claimant's route went through the same area of Interstate 57 where the accident occurred. Claimant completed the "run" satisfactorily but reported to Dyckman that he experienced a "weird sensation" and that "going through the scene" caused him to replay the accident in his mind. Dyckman testified that, thereafter, FedEx stated claimant was "disqualified indefinitely" from returning to work until all litigation involving the motor vehicle accident was settled.

¶ 26 Dyckman denied that claimant ever reported to him that he did not want to work as a truck driver or that he was mentally or physically incapable of such work. He testified, on May 5, 2011, he and claimant had a telephone conversation. According to Dyckman, claimant reported that he intended to see a psychologist and possibly file a workers' compensation claim.

¶ 27 On August 8, 2012, the arbitrator issued his decision, finding claimant failed to establish his entitlement to compensation. He first cited the supreme court's decision in *Pathfinder Co. v. Industrial Comm'n*, 62 Ill. 2d 556, 563, 343 N.E.2d 913, 917 (1976), for the proposition that an employee who "suffers a sudden, severe emotional shock traceable to a definite time, place and cause which causes psychological injury or harm has suffered an accident within the meaning of the Act." Relying on *General Motors Parts Division v. Industrial Comm'n*, 168 Ill. App. 3d 678, 687, 522 N.E.2d 1260, 1266 (1988), which interpreted

Pathfinder as being "limited to the narrow group of cases in which an employee suffers a sudden, severe emotional shock which results in immediately apparent psychic injury," the arbitrator determined there were "two necessary prongs" for having a compensable psychological injury: (1) " 'a sudden, severe [e]motional shock' " and (2) an " 'immediately apparent psychic injury.[']" In denying claimant benefits, the arbitrator noted claimant did not seek medical treatment until seven months after the accident, performed his same job duties several days after the accident, and continued to make himself available for truck driving positions. He concluded that if claimant "truly was mentally and emotionally unable to drive a truck because of what transpired previously, one would expect [claimant] not to look for another truck driving positions [*sic*.]"

¶ 28 Claimant sought review of the arbitrator's decision with the Commission. He also filed a motion to cite authority and asked the Commission to take judicial notice of this court's decision in *Chicago Transit Authority v. Workers' Compensation Comm'n*, 2013 IL App (1st) 120253WC, 989 N.E.2d 608, which was decided after the arbitrator's decision and while review was pending before the Commission. In that case, we held as follows:

> "Under *Pathfinder*, the *emotional shock* needs to be 'sudden,' not the ensuing psychological injury. Thus, if the claimant shows that she suffered a sudden, severe emotional shock which caused a psychological injury, her claim may be compensable even if the resulting psychological injury did not manifest itself until some time after the shock. To the extent that *General Motors* holds otherwise, we reject that aspect of the court's holding and decline to follow it." (Emphasis in original.) *Id*. ¶ 20.

On September 18, 2013, the Commission affirmed and adopted the arbitrator's decision without further comment.

¶ 29 Claimant next sought judicial review of the Commission's decision in the circuit court of Coles County. On December 12, 2013, he filed a motion for substitution of judge as of right pursuant to section 2-1001(a)(2) of the Code of Civil Procedure (735 ILCS 5/2-1001(a)(2) (West 2012)). On December 19, 2013, the court granted claimant's motion over the employer's objection.

¶ 30 On April 16, 2014, a hearing was conducted in the circuit court before Judge James R. Glenn. Judge Glenn noted the Commission affirmed and adopted the arbitrator's decision, giving "no indication whatsoever" that it considered this court's decision in *Chicago Transit Authority*. He concluded the Commission used an improper legal standard and, as a result, its decision was subject to *de novo* review by the circuit court. Judge Glenn then determined, based upon a *de novo* review of the evidence, that claimant proved he sustained an accidental injury that arose out of and in the course of his employment on October 2, 2010. He set aside the Commission's decision and "remand[ed] the case to the Commission for entry of an award of compensation to include [TTD] benefits and a permanency award." Additionally, Judge Glenn rejected the employer's request to also have the matter remanded so that the Commission could "confirm whether or not [it] actually considered *Chicago Transit Authority* as part of [its] decision."

¶ 31 The employer immediately sought review of the circuit court's decision with this court. However, we dismissed the employer's appeal and remanded to the Commission, finding the circuit court's order was an interlocutory, non-final order, resulting in a lack of appellate jurisdiction. *Shea v. Workers' Compensation* Commission, 2015 IL App (4th) 140429WC-U.

¶ 32 On August 24, 2015, the Commission issued its decision and opinion on remand. It awarded claimant 34-5/8 weeks' TTD benefits and 25 weeks' PPD benefits for a 5% loss of the person as a whole. In awarding PPD benefits, the Commission noted claimant sought a wage differential award of $241.71 based on Dolan's testimony that he "could earn only a little more than minimum wage." However, it determined a wage differential award was not appropriate on the basis that claimant "did not adequately prove the extent of any diminution of his earning potential." The Commission held claimant did not provide evidence of a *bona fide* and vigorous job search and that Dolan's testimony was "flawed because he did not ascribe any value to [claimant's] extensive experience in the military, his extensive experience as a mechanic, and his three years of higher education."

¶ 33 Both parties sought judicial review of the Commission's decision with the circuit court. On April 19, 2016, a hearing was conducted in the circuit court before Judge Brien J. O'Brien, who confirmed the Commission's decision and opinion on remand.

¶ 34 These appeals followed.

¶ 35 II. ANALYSIS

¶ 36 A. The Employer's Appeal (4-16-0305WC)

¶ 37 1. *The Commission's original decision*

¶ 38 On appeal, the employer first contends the circuit court erred in reversing the Commission's original decision, denying claimant benefits under the Act. The employer does not dispute the applicability of *Chicago Transit Authority* to the underlying facts. However, it maintains the record is clear that the appropriate case law was before the Commission for consideration. In particular, the employer notes our decision in *Chicago Transit Authority* was brought to the Commission's attention through both a motion by claimant to cite authority and

the parties' oral arguments before Commission. As a result, the employer argues we must presume that the Commission was aware of the *Chicago Transit Authority* decision and followed the applicable law when affirming the arbitrator's denial of benefits. It asks us to order the Commission's decision reinstated or, alternatively, remand to the Commission "to confirm whether or not [it] actually considered *Chicago Transit Authority* as part of rendering its decision."

¶ 39 In *Chicago Transit Authority*, 2013 IL App (1st) 120253WC, ¶ 20, 989 N.E.2d 608, this court rejected an employer's assertion that a claimant could only recover for a traumatically induced, mental-mental injury when his resulting psychological injury was "immediately apparent." In that case, the claimant, who worked for the employer as a bus driver, was informed by one of her passengers that someone chasing the bus had been hit. *Id*. ¶ 6. The claimant stopped the bus and saw a man lying near the curb. *Id*. She observed that the man was lying in a fetal position and his mouth was moving. *Id*. ¶ 7. The accident victim was removed from the scene by an ambulance and the claimant was later informed that the man had died. *Id*. ¶¶ 7-8. Following the incident, the claimant reported feeling "shaken" and "depressed." *Id*. ¶ 8. She also experienced flashbacks. *Id*. ¶ 10. Approximately two months after the incident, the claimant sought treatment with a clinical psychologist and was diagnosed with suffering from an adjustment disorder with mixed anxiety and depressed mood. *Id*. ¶ 11.

¶ 40 In reaching our decision, this court distinguished *General Motors*, 168 Ill. App. 3d 678, 522 N.E.2d 1260, on the basis that it "involved a claim of psychological injuries that appeared to have arisen gradually 'from a variety of factors' " rather than a single, traumatic, work-related accident. *Id*. ¶ 19. Additionally, we stated as follows:

> "Under *Pathfinder*, the *emotional shock* needs to be "sudden," not the ensuing psychological injury. Thus, if the claimant shows that she suffered a sudden, severe emotional shock which caused a psychological injury, her claim may be compensable even if the resulting psychological injury did not manifest itself until some time after the shock. To the extent that *General Motors* holds otherwise, we reject that aspect of the court's holding and decline to follow it." (Emphasis in original.) *Id*. ¶ 20.

Finally, we further clarified "that, although not dispositive as a matter of law, evidence that a claimant delayed seeking treatment for alleged psychological injuries for an extended period of time following a work-related accident may still be relevant in a given case." *Id*. ¶ 21. "Depending on the facts of the case, such evidence might undermine the inference that the claimant suffered a severe emotional shock that caused a psychological injury." *Id*.

¶ 41 In the case at bar, the record reflects the arbitrator applied an incorrect legal standard when denying claimant benefits. Specifically, he determined that, pursuant to *General Motors*, claimant had to prove an " 'immediate[ly] apparent psychic injury[']" to establish his entitlement to benefits under the Act. However, as clarified by *Chicago Transit Authority*, it is the emotional shock that must be sudden and not any resulting psychological injury. The arbitrator's decision was, therefore, contrary to law. Further, when the Commission affirmed and adopted the arbitrator's decision without any additional comment, the arbitrator's decision became that of the Commission, including the legally erroneous portion of that decision. Thus, while the parties may have presented the *Chicago Transit Authority* decision to the Commission, the Commission's blanket adoption of the arbitrator's incorrect decision as its own indicates it failed to adhere to the holding in that case. As a result, the Commission also utilized an incorrect

legal standard when denying claimant benefits.

¶ 42 We note that the elements necessary to establish a compensable claim under the Act present a question of law that is subject to *de novo* review. *Diaz v. Workers' Compensation Comm'n*, 2013 IL App (2d) 120294WC, ¶ 21, 989 N.E.2d 233. Further, the Commission's decision may be overturned either when it is based on factual findings that are against the manifest weight of the evidence or when it is contrary to law. *Franklin v. Industrial Comm'n*, 211 Ill. 2d 272, 279, 811 N.E.2d 684, 689 (2004). In this case, the Commission's original decision was contrary to law and, therefore, correctly set aside by the circuit court.

¶ 43 However, while we agree that the circuit court correctly reversed the Commission's original decision, we disagree with the manner in which it otherwise resolved the matter. In particular, we find it was error for the circuit court to assume the Commission's role of fact finder. See *Yocum v. Industrial Comm'n*, 297 Ill. App. 3d 813, 816, 697 N.E.2d 766, 768 (1998) (noting that "[w]hile the circuit court may only exercise appellate review," the Commission "may exercise original rather than appellate jurisdiction and make findings of fact in derogation of those made by the arbitrator"); *Durand v. Industrial Comm'n*, 224 Ill. 2d 53, 63, 862 N.E.2d 918, 924 (2006) (stating the "Commission is the ultimate decisionmaker in workers' compensation cases").

> "When a decision of the Commission is set aside, but the facts found by the Commission are sufficient to determine the correct decision, a reviewing court may simply enter the correct decision. [Citations.] However, when it is not clear from the record what decision is required, the appropriate remedy is to remand to the Commission so that it may decide in the first instance. [Citation.] Original jurisdiction is vested in the Commission, even though it is reviewing the decision

of an arbitrator without hearing additional evidence. [Citation.]" *Franklin*, 211 Ill. 2d at 285, 811 N.E.2d at 692.

¶ 44 In *Chicago Transit Authority*, 2013 IL App (1st) 120253WC, ¶ 23, 989 N.E.2d 608, we noted that the facts in the case were undisputed but "subject to various interpretations and [were] capable of supporting different reasonable inferences." Specifically, we stated as follows:

> "From the evidence presented during the arbitration hearing, it would be reasonable to infer that the claimant suffered a sudden shock during the bus accident which caused a psychic injury, even though she did not seek treatment for her psychic injury for approximately two months. On the other hand, based on the claimant's failure to seek treatment in a timely manner, it would also be reasonable to infer that the claimant did not suffer a severe emotional shock during the accident."
>
> Because different inferences can be drawn from the evidence presented at the arbitration hearing, we will not disturb the Commission's decision unless it is against the manifest weight of the evidence [citation]." *Id.* ¶¶ 23-24.

Ultimately, we affirmed the Commission's decision that the claimant sustained psychological injuries arising out of and in the course of her employment, stating it was not contrary to the manifest weight of the evidence. *Id.* ¶ 31.

¶ 45 Here, the Commission did not make factual findings relative to appropriate legal standard. However, rather than remanding to the Commission for such a determination, the circuit court made its own factual findings and weighed the evidence presented. It then remanded to the Commission, directing that it enter "an award of compensation to include [TTD]

and a permanency award." We find the proper course of action would have been for the court to remand to the Commission so that it could determine claimant's entitlement to compensation in the first instance under the correct legal standard. Specifically, whether claimant demonstrated that he suffered a sudden, severe emotional shock which caused a psychological injury.

¶ 46 Additionally, had the Commission determined claimant sustained an injury that arose out of and in the course of his employment, it could then have determined his entitlement to benefits under the Act, if any. Even assuming the existence of a work-related, psychological injury, we note the record contains evidence regarding the extent of claimant's injury and his ability to work as a semi-truck driver that is subject to different interpretations and from which different reasonable inferences could be drawn. Specifically, although Dr. Bassett opined claimant could not return to the type of work he performed for the employer, he also described claimant's symptoms as being of "moderate" intensity and not so severe that he required ongoing treatment. Further, he testified both that claimant had reached MMI and that there were medical treatments available to him, which might improve his psychological condition and allow him to return to driving a semi-truck. Finally, evidence showed that although claimant experienced difficulties when he returned to driving a semi-truck shortly after the October 2010 accident, he also successfully completed his "run," expressed a desire to continue working as a semi-truck driver, and applied for work with other trucking employers seeking any available position.

¶ 47 However, despite evidence leading to multiple reasonable inferences, no specific findings were made by the Commission regarding the extent of claimant's psychological injury and his ability to return to work. Rather, the circuit court simply ordered benefits to be awarded by the Commission after finding claimant's PTSD arose out of and in the course of his employment. Thus, the circuit court's remand was in error for this additional reason.

¶ 48 2. *Motion for substitution of judge*

¶ 49 In its appeal, the employer next argues the circuit court erred in granting claimant's motion for substitution of judge during the proceedings to review the Commission's original decision. It argues that a workers' compensation case is not a "civil action" and is governed solely by the provisions of the Act. Thus, the employer maintains section 2-1001(a)(2) of the Code of Civil Procedure (Code) (735 ILCS 5/2-1001(a)(2) (West 2012)), providing for substitution of judge as of right in civil cases, does not apply in workers' compensation proceedings.

¶ 50 "The Code and supreme court rules generally do not apply to workers' compensation proceedings 'in so far as or to the extent that the procedure is regulated by *** the *** [A]ct.' " *Illinois Institute of Technology Research Institute v. Industrial Comm'n*, 314 Ill. App. 3d 149, 154, 731 N.E.2d 795, 800 (2000) (quoting *Elles v. Industrial Comm'n*, 375 Ill. 107, 113, 30 N.E.2d 615, 618 (1940)). "However, where the Act or Commission rules do not regulate a topic, civil provisions have been applied to workers' compensation actions." *Id*.

¶ 51 Here, the employer fails to identify any portion of the Act or any Commission rule which would regulate procedures for substitution of a circuit court judge. Thus, as neither the Act nor the Commission rules appear to regulate this topic, we find no error in applying the substitution of judge provisions of the Code on review of the Commission's decision before the circuit court. The employer's assertion is without merit.

¶ 52 B. Claimant's Appeal (4-16-0369WC)

¶ 53 In his appeal, claimant argues the Commission erred in failing to award him wage differential benefits. However, as discussed in connection with the employer's appeal, we find, even assuming a determination that claimant suffered an injury that arose out of and in the course

of employment, the circuit court erred in directing the Commission to make a permanency award without first determining whether such an award was warranted based on the evidence presented. Thus, given our resolution of the employer's appeal, the issue presented on appeal by claimant is moot.

¶ 54 III. CONCLUSION

¶ 55 For the reasons stated, we vacate both the Commission's decision and opinion on remand and the circuit court's April 19, 2016, judgment, confirming that decision, as well as the circuit court's April 16, 2014, remand order. We remand the matter to the Commission with directions that it determine claimant's entitlement to compensation under the Act consistent with this court's holding in *Chicago Transit Authority*.

¶ 56 Orders vacated; cause remanded with directions.