2020 IL App (5th) 190041WC-U
No. 5-19-0041WC
Order filed January 30, 2020

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WORKERS' COMPENSATION COMMISSION DIVISION

DANTE BEATTIE, Petitioner-Appellant, v. THE ILLINOIS WORKERS' COMPENSATION COMMISSION, *et al.*, (St. Clair County Sheriff's Department, Respondent-Appellee).	)	Appeal from the Circuit Court of St. Clair County No. 18-MR-0081 Honorable Julie Katz, Judge, Presiding.

JUSTICE HUDSON delivered the judgment of the court.

Presiding Justice Holdridge and Justices Hoffman, Cavanagh, and Barberis concurred in the judgment.

ORDER

¶ 1 *Held*: The Commission's decision that claimant's secondary work was not concurrent employment was not against the manifest weight of the evidence; claimant forfeited argument regarding whether such wages constituted overtime pay.

¶ 2 I. INTRODUCTION

¶ 3 Claimant, Dante Beattie, appeals an order of the circuit court of St. Clair County confirming a decision of the Illinois Workers' Compensation Commission (Commission)

awarding him certain benefits under the Illinois Workers' Compensation Act (Act) (820 ILCS 305/1 *et seq*. (West 2010)). It is undisputed that claimant sustained a work-related injury while in the employ of respondent, the St. Clair County Sheriff's Department. On appeal, claimant contends that the Commission made two errors in calculating his average weekly wage. For the reasons that follow, we affirm.

¶ 4 II. BACKGROUND

¶ 5 Claimant first testified—in pertinent part—as follows. He had worked most of his life in "public safety as a police officer or a firefighter, correction officer, public protection officer up until now." He has a two-year degree in criminal justice. Prior to November 11, 2013, claimant never had a problem with his right shoulder. On that date, he was injured when he was passing through a jail gate and the gate was closed on him. Significant treatment followed, and claimant was never released to perform the duties he had performed prior to the accident. He is now employed as a security guard at a marina in Florida.

¶ 6 At the time of the accident, claimant was employed as a corrections officer by the St. Clair County Sheriff's Department and had been so employed for about three years. He was also working as "a public safety officer with Metrolink." He had performed such duties for Metrolink for approximately a year and a half on a consistent basis (16 to 20 hours per week). In his duties at Metrolink, he earned $16.50 per hour. His work at Metrolink was scheduled by the sheriff's department. Claimant described his duties at Metrolink as follows: "To ensure public safety [and] ensure the parties got on and off the Metrolink safely. We would do occasionally [*sic*] arrests or checks. Just basically it's an armed officer on site." Following the accident, he was placed on light duty and not allowed to work at Metrolink. Metrolink is also known as BiState Development,

which "runs the Metrolink tracks." At the time of the hearing, corrections officers employed by respondent were making $24.99 per hour.

¶ 7 On cross-examination, claimant testified that he worked for respondent as a corrections officer from May 9, 2011, to May 2, 2016. His employment was ultimately terminated because he could not return to full duty. He was injured on November 11, 2013, when a jail gate was closed on him. He also performed work for Metrolink. It was respondent's policy that he had to be working for a year before he could request employment with Metrolink. He volunteered for work with Metrolink; it was not mandatory. He signed up through the sheriff's department. Secondary employment was also available guarding prisoners undergoing treatment at hospitals. Lieutenant Jim Lay coordinated secondary duty. An officer would state his availability, and if something was available, the officer would be assigned to a shift by Lay.

¶ 8 When he performed secondary duty, claimant would wear his sheriff's department uniform, carry his regular badge, and carry the weapon issued by the sheriff's department. None of these items were provided by Metrolink. He would work with another officer who was also employed by respondent. Claimant acknowledged that he had to be interviewed by a person employed by Metrolink in order to be able to work secondary duty (Ms. Merriweather from human resources). Sometimes, he would call respondent's dispatch and tell them he was reporting for his Metrolink shift, and, sometimes, he just showed up. In the latter part of the time he was employed at Metrolink, he would call Metrolink dispatch and tell them he was on duty. Metrolink also has its own public safety officers who are not affiliated with respondent. If claimant had to miss a shift at Metrolink, he would notify respondent. If an emergency arose where claimant had to leave his shift, he would contact the "supervisor that was on shift at that time that worked in the Metro." This supervisor was employed by respondent.

¶ 9 Claimant explained that if he conducted an arrest, he would fill out a report that was returned to respondent. Typically, he would call the East St. Louis Police Department to pick up an arrested individual, unless there was a St. Clair County warrant on the person, in which case respondent would pick up the arrestee. Secondary duty with Metrolink is only available through respondent. Metrolink public safety officers could not sign up for it. Moreover, an officer of respondent could not accept any outside job without the sheriff's approval. If an officer performing duty at Metrolink violated a policy, the officer would be subject to discipline by respondent. When claimant was terminated, he received a letter from respondent but not from Metrolink.

¶ 10 Claimant agreed that respondent "controlled all the job duties and assignments as a correctional officer" and also "all your job duties and assignments for the secondary." He added, "[W]ith that one particular job for Metro they controlled the schedule."

¶ 11 On redirect-examination, claimant testified that he did not receive "any overtime [or] bonuses or anything" when he worked at Metrolink. Rather, he received a straight wage of $16.50.

¶ 12 Claimant was the only witness to testify at the hearing. Substantial medical evidence was also presented; however, as it is not relevant to the issue before this court, we will not recount it here. An intergovernmental agreement addressing reimbursement between "The St. Clair County Transit District and the County of St. Clair and Sheriff of St. Clair County" concerning respondent's personnel working at Metrolink was also introduced into evidence.

¶ 13 The arbitrator determined that claimant's average weekly wage was $1,202.92 (based on claimant's earnings at both respondent and Metrolink). She found that the wages claimant received for performing duties at Metrolink should be included in calculating the average weekly wage. She explained that respondent controlled all of plaintiff's activities while he worked at Metrolink. Further, she stated, "Respondent provided evidence showing that [Metrolink] was reimbursed by

respondent for those wages" paid to plaintiff for the duties he performed at Metrolink. Accordingly, she held that these wages were part of claimant's compensation from respondent. This amounted to $11,385 and resulted in claimant's average weekly wage being increased by $253 per week. We observe that the arbitrator expressly noted claimant's testimony that "secondary duty was not mandatory" in the section of her decision titled "Findings Of Fact."

¶ 14 The Commission modified the arbitrator's decision, finding that wages earned from claimant's work at Metrolink should be excluded from the average weekly wage calculation. The Commission first noted that section 10 of the Act (820 ILCS 305/10 (West 2012)) states that when a claimant works for two employers and the respondent has notice of the concurrent employment, wages from all such employment shall be used to determine the claimant's average weekly wage. Citing *Chicago Housing Authority v. Industrial Comm'n*, 240 Ill. App. 3d 820, 822 (1992), the Commission observed that employment does not exist in the absence of a contract for hire. The Commission then noted claimant's testimony that claimant was not permitted to work at Metrolink until completion of his one-year probationary period for respondent. His duties at Metrolink were that of an armed officer. Respondent determined when claimant could work for Metrolink. Respondent offered two secondary positions—at Metrolink and at area hospitals guarding prisoners receiving medical treatment. Claimant sometimes worked the hospital duty. Hours were assigned by respondent. When performing duties at Metrolink, claimant wore a uniform and badge issued by respondent and carried a weapon that was also issued by respondent. Petitioner worked with other personnel assigned by respondent. Metrolink employs its own security guards, and claimant was in no way affiliated with them or employed in such a capacity. If claimant needed to miss or change a shift at Metrolink, he contacted respondent. He was subject to discipline by respondent.

¶ 15 The Commission further noted that claimant was interviewed by Metrolink's human resources manager prior to beginning duty at Metrolink. He sometimes reported to Metrolink dispatch when he began his shift. Claimant was issued a W-2 statement from Metrolink.

¶ 16 Relying on the control respondent maintained over claimant while claimant worked at Metrolink and the fact that respondent provided equipment that claimant used during this duty, the Commission determined that claimant remained in respondent's employment while at Metrolink. It acknowledged that claimant had interviewed with Metrolink and that Metrolink "may or may not have been reimbursed by Respondent"; however, it concluded that "such factors do not overcome the control maintained by Respondent." As no employment relationship existed between Metrolink and claimant, wages earned at Metrolink were excluded from the calculation of claimant's average weekly wage. Rather, according to the Commission, these wages were the result of voluntary overtime. It therefore determined that claimant's average weekly wage was $949.92. Claimant now appeals.

¶ 17 III. ANALYSIS

¶ 18 On appeal, claimant advances two main arguments. First, he contends that the Commission erred in finding that Metrolink was not a concurrent employer. Second, he argues that the wages he earned at Metrolink were not the result of voluntary overtime. Whether an employment relationship exists is a question of fact (*Ware v. Industrial Comm'n*, 318 Ill. App. 3d 1117, 1122 (2000)), as is the question of whether wages resulted from voluntary overtime (see *Arcelor Mittal Steel v. Illinois Workers' Compensation Comm'n*, 2011 IL App (1st) 102180WC, ¶ 44). As such, we will reverse these determinations only if an opposite conclusion to the Commission's is clearly apparent. *Ware*, 318 Ill. App. 3d at 1122.

¶ 19 A. CONCURRENT EMPLOYMENT

¶ 20 Claimant first argues that the Commission erred in finding the wages he earned while working at Metrolink were not the result of concurrent employment. Section 10 of the Act (820 ILCS 305/10 (West 2012)) provides, in pertinent part, "When the employee is working concurrently with two or more employers and the respondent employer has knowledge of such employment prior to the injury, his wages from all such employers shall be considered as if earned from the employer liable for compensation." Thus, the question before us is whether Metrolink was claimant's employer when he performed duty there or whether he remained in the employ of respondent.

¶ 21 Courts have set forth a number of factors to consider in making such a determination. The most important factor is whether the alleged employer has a right to control the actions of the employee. *Ware*, 318 Ill. App. 3d at 1122. Furthermore, the nature of the work performed by the worker in relation to the general business of the employer is significant. *Id.* Other factors include "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." *Id.*

¶ 22 Here, the Commission was justified in concluding that control remained primarily with respondent. Claimant testified that respondent scheduled his shifts, he would report arrests to respondent, he was subject to discipline by respondent, and he was ultimately terminated by only respondent. While there is some contrary evidence in the record (*i.e.*, claimant had to interview with Metrolink's human-resources representative), it is not so significant that it renders an opposite conclusion to the Commission's clearly apparent. Further, respondent provided the instrumentalities of claimant's duties with Metrolink—specifically, his badge, gun, and uniform. Moreover, the nature of the work performed at Metrolink was the sort of work respondent

performed—policing—as opposed to Metrolink's business—transportation. Although it is true that some evidence favors claimant's position here, such as the fact that Metrolink withheld taxes and issued claimant a W2 form, it is not sufficient to render the Commission's decision contrary to the manifest weight of the evidence, particularly given that the two most important considerations (right to control and nature of work) support the Commission's conclusion.

¶ 23 We note that there is some dispute as to who actually paid claimant's wages. Respondent introduced an intergovernmental agreement between the "St. Clair County Transit District" and the "County of St. Clair and Sheriff of St. Clair County." This agreement concerns reimbursement "to the County and Sheriff of the self-insured retention costs associated with workers compensation claims of the sworn deputy sheriffs performing work upon the MetroLink by the District." One of the recitals states, "[T]he District contracts with Bi-State to reimburse Bi-State for the costs of obtaining police services upon MetroLink trains and properties from the County and Sheriff." The Commission apparently deemed this document inconclusive, as it made the express finding that claimant "received wages from Metrolink (which may or may not have been reimbursed by respondent)." Thus, the Commission attributed no weight to who actually paid claimant for his shifts at Metrolink. In any event, given the strong evidence supporting the Commission's decision delineated above, even granting claimant this consideration would not render the Commission's decision contrary to the manifest weight of the evidence.

¶ 24 Similarly, claimant's contention that the Commission made factual errors with respect to where arrestees were delivered would not alter the outcome, even if we were to grant claimant this point (indeed, it is not a usual consideration in an inquiry such as this (see *Ware,* 318 Ill. App. 3d at 1122)). The Commission found that if claimant violated a sheriff department policy, he would be subject to discipline by respondent rather than Metrolink (claimant's testimony on this point,

read in context, indicates that he was speaking to a violation occurring during a shift at Metrolink). Claimant argues that there is no evidence that respondent would have been responsible for "a violation of Metrolink specific duties." Although this proposition was not explicitly stated, it was a fair inference from claimant's testimony. The Commission, as trier of fact, is entitled to draw such inferences. *Caterpillar Tractor Co. v. Industrial Comm'n*, 124 Ill. App. 3d 650, 653 (1984). Further, claimant asserts that an employee may be employed by more than one employer; however, claimant points to little evidence of Metrolink exercising control over him (much less enough necessary to show that an opposite conclusion to the Commission's is clearly apparent).

¶ 25 Claimant complains of the Commission's reliance on *Chicago Housing Authority*, 240 Ill. App. 3d 820. In that case, a claimant, who was employed as a police officer by the Chicago Police Department (CPD), performed duties for the Chicago Housing Authority (CHA) while working part-time there under a "special employment program." *Id.* at 821. This court reversed a determination by the Commission that the claimant was an employee of the CHA. *Id.* at 823. The claimant had applied to the CPD for the position in the program. The claimant received a separate paycheck for time worked in this program, though both it and his regular check were issued by the city of Chicago. He wore a CPD uniform while working under the program. This court held no employment relationship existed between the claimant and the CHA, relying primarily on the facts that the CPD maintained control over the claimant while he was working in the program, CPD provided the instrumentalities of the claimant's employment in the program, and the claimant applied to the CPD rather than the CHA. *Id.* at 822. *Chicago Housing Authority* is, in fact, so similar to this case as to be extremely persuasive here.

¶ 26 Claimant attempts to distinguish it by pointing out that the claimant in that case was paid by the police department rather than the purported concurrent employer (this is not entirely

accurate as the claimant was paid directly from the City of Chicago for both positions). Further, the claimant in *Chicago Housing Authority* worked in the same geographical area performing the same duties he usually performed while in this case, claimant worked at different locations albeit performing duties consistent with policing. In *Chicago Housing Authority*, the claimant received the same rate of pay in either position while in this case, claimant received a lower wage at Metrolink. While these are, in fact, differences, the similarities are more compelling. Notably, in both cases, the most important factor weighed in favor of finding employment remained with the original employer; as the *Chicago Housing Authority* court observed, "The record shows the claimant was under the control of the CPD at all times." *Id*. Hence, we find claimant's attempts to distinguish *Chicago Housing Authority* unpersuasive and the Commission's reliance on it well taken.

¶ 27 Claimant relies on three additional cases in support of his position: *Ragler Motor Sales v. Industrial Comm'n*, 93 Ill. 2d 66 (1982); *Village of Creve Coeur v. Industrial Comm'n*, 32 Ill. 2d 430 (1965); and *Board of Education of the City of Chicago v. Industrial Comm'n*, 53 Ill. 2d 167 (1972). Claimant points out that in *Ragler*, 93 Ill. 2d at 72, the employer did not withhold income taxes or social security deductions, yet the court found an employment relationship to exist. However, claimant ignores that fact that the *Ragler* court expressly found that the failure to withhold was "not controlling" and instead relied on the control the employer exercised over the employee. *Id*. As such, *Ragler* supports the Commission's decision here, where it found that an employment relationship existed on similar grounds. Similarly, *Village of Creve Coeur*, 32 Ill. 2d at 433, does not support claimant because, in that case, the court found an employment relationship based on "[t]he fact that [the] claimant was compensated for his services, was subject to the control of the fire chief with regard to the manner in which the work was done, was furnished tools,

material and equipment by the village, and was subject to discharge by the village board." The only arguable difference between *Village of Creve Coeur* and the instant case concerns the dispute as to who was ultimately paying for claimant's services at Metrolink; it is thus not distinguishable.

¶ 28 Claimant cites *Board of Education of the City of Chicago*, 53 Ill. 2d at 171, for the proposition that "it is generally recognized that a true employer-employee relationship does not exist in the absence of the payment or expected payment of consideration." However, that statement was made in the context of trying to distinguish an employee from a volunteer. *Id.* There is no doubt that claimant was not volunteering when he worked at Metrolink. As such, *Board of Education of the City of Chicago* provides no guidance here.

¶ 29 In sum, claimant has failed to persuade us that the Commission's decision that no employer-employee relationship existed between him and Metrolink is against the manifest weight of the evidence.

¶ 30 B. OVERTIME

¶ 31 In an exceedingly short argument that is devoid of supporting authority, claimant contends that his wages earned while performing duty at Metrolink were not overtime wages. This argument is forfeited. *Ramos v. Kewanee Hospital*, 2013 IL App (3d) 120001, ¶ 37 (quoting Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018)) (" 'Points not argued are waived' and failure to properly develop an argument and support it with citation to relevant authority results in forfeiture of that argument."). We will nevertheless comment briefly.

¶ 32 Voluntary overtime is not included in calculating a claimant's average weekly wage. See *Arcelor Mittal Steel*, 2011 IL App (1st) 102180WC, ¶¶ 32-39 (collecting cases). Claimant testified that he was not required to work shifts at Metrolink. Having held that the Commission's decision that there was no employment relationship between claimant and Metrolink is not contrary to the

manifest weight of the evidence, the voluntary nature of these shifts renders them properly excluded from claimant's wages paid by respondent as well.

¶ 33 Claimant makes much of the fact that his earnings from the shifts at Metrolink were not included in his wages from respondent on the W2 form or wage statements he received from respondent. As noted above, the method of payment and the withholding of income tax are but two factors in a multifactor balancing test that also includes that right to control and the nature of the work. See *Ware*, 318 Ill. App. 3d at 1122. Thus, claimant's attempt to elevate these facts to controlling significance is contrary to the law.

¶ 34 Beyond being forfeited, this argument is also unpersuasive.

¶ 35 IV. CONCLUSION

¶ 36 In light of the foregoing, the decision of the circuit court confirming the Commission's decision is affirmed.

¶ 37 Affirmed.