Circuit Court for Baltimore City
Case No. 24-C-22-003951

UNREPORTED*

IN THE APPELLATE COURT

OF MARYLAND

No. 1456

September Term, 2023

IN THE MATTER OF THE PETITION OF CESAR PEREZ

Graeff,
Tang,
Eyler, Deborah S.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Tang, J.

Filed: September 16, 2024

*This is an unreported opinion. This opinion may not be cited as precedent within the rule of stare decisis. It may be cited for its persuasive value only if the citation conforms to Rule 1-104(a)(2)(B).

The issue in this case concerns the method used by the Workers' Compensation Commission ("Commission") to determine the "average weekly wage" of an injured worker, Cesar A. Perez ("Perez"). The Commission determined that Perez's average weekly wage was $282. Perez sought judicial review, arguing that the Commission used the wrong method to determine his average weekly wage, which he contends should have been $526.25. The Circuit Court for Baltimore City confirmed the Commission's decision.

On appeal, Perez presents the following question for our review, which we quote:

> Did the lower court commit reversible error by not accepting the correct evidence of wage information submitted by [Perez] and finding the average weekly wage should be $526.25[?]

For the reasons below, we hold that the Commission did not err in using the method it did to determine Perez's average weekly wage. We conclude, however, that the Commission misconstrued the facts and clearly erred when it used an incorrect figure for the gross wages as the numerator to calculate the average weekly wage. Accordingly, we affirm in part and vacate in part the circuit court's decision and remand this case to the Commission for further proceedings.

I.

RELEVANT STATUTORY AND REGULATORY SCHEME

The Workers' Compensation Act, Maryland Code (1991, 2016 Repl. Vol.), §§ 9-101 – 9-1201 of the Labor and Employment Article ("LE"), "is designed to protect workers and their families from hardships inflicted by work-related injuries." *Gross v. Sessinghause & Ostergaard, Inc.*, 331 Md. 37, 39 (1993) (citation omitted). "This protection includes, *inter*

alia, compensation for lost earning capacity, paid as a percentage of a worker's pre-injury 'average weekly wage.'" *Id.* (noting that LE § 9-637(a) provides "that an employee who has suffered a permanent total disability shall be paid compensation equal to two-thirds of the employee's average weekly wage"). "The statute, however, does not specify a particular time period to be used in calculating a worker's average weekly wage." *Gross*, 331 Md. at 39. "Instead, [LE] § 9-602 lists the elements to be considered as within the average weekly wage." *Id.* In pertinent part, LE § 9-602(a)(1) provides:

> (a)(1) Except as otherwise provided in this section, the average weekly wage of a covered employee shall be computed by determining the average of the weekly wages of the covered employee:
>
> (i) when the covered employee is working full time; and
>
> (ii) at the time of:
>
> 1. the accidental personal injury; or
> 2. the last injurious exposure of the covered employee to the hazards of an occupational disease.

The "Commission is expressly authorized" by LE § 9-309(a) to "adopt regulations to carry out this title." *Gross*, 331 Md. at 40. "In addition, § 9-701 broadly authorizes the Commission to promulgate procedural rules and regulations, specifically including regulations concerning 'the nature and extent of evidence and proof' for establishing a right to compensation." *Id.*

Maryland Code of Regulations ("COMAR") 14.09.03.06 outlines a three-stage process for determining a covered employee's average weekly wage. *See Richard Beavers Constr., Inc. v. Wagstaff*, 236 Md. App. 1, 21 (2018). "In the first stage, the Commission

makes a preliminary determination based on the amount reported by the employee." *Id.* COMAR 14.09.03.06(A) states:

> **A. Preliminary Determination.** For the purpose of making an initial award of compensation before a hearing in the matter, the Commission shall determine the claimant's average weekly wage from gross wages, including overtime, reported by the claimant on the employee's claim form.

"In the [second] stage, the employer or its insurer must promptly produce documentation of the actual wages earned by the employee in a 14-week period preceding the accident." *Wagstaff*, 236 Md. App. at 21. COMAR 14.09.03.06(B) provides:

> **B. Filing of Wage Statement.** As soon as practicable, the employer/insurer shall file a wage statement containing the following information:
>
> (1) The average wage earned by the claimant during the 14 weeks before the accident, excluding the time between the end of the last pay period and the date of injury, provided that periods of involuntary layoff or involuntary authorized absences are not included in the 14 weeks;
>
> (2) Those weeks the claimant actually worked during the 14 weeks before the accident;
>
> (3) Vacation wages paid; and
>
> (4) Those items set forth in Labor and Employment Article, § 9-602(a)(2), Annotated Code of Maryland.

"The third stage is the hearing stage, in which the parties may present other evidence so that the Commission may make an accurate determination[.]" *Wagstaff*, 236 Md. App. at 21. COMAR 14.09.03.06(C)(1)-(2) provides:

> **C. Determination at First Hearing.**
>
> (1) Calculation of the average weekly wage shall be adjudicated and determined at the first hearing before the Commission.

> (2) All parties shall be prepared to produce evidence from which the Commission can determine an accurate average weekly wage at the first hearing.

II.

FACTUAL AND PROCEDURAL BACKGROUND

Perez worked as a general laborer for Benedicto Amaya, the owner of Amaya Remodeling Services ("Amaya Remodeling"). Roberts Renovation & Restoration, LLC ("Roberts Renovation") hired Amaya Remodeling to perform construction work at a property located in Baltimore City.[1]

On March 10, 2020, while working at the property, Perez fell from a ladder and injured his right leg.

A.

Proceeding Before the Workers' Compensation Commission

Perez filed a claim to obtain workers' compensation benefits. Since Amaya Remodeling and Roberts Renovation did not have workers' compensation insurance at the time of the accident, the Maryland Uninsured Employers' Fund ("Fund") participated in the proceeding.[2]

---

[1] Neither Amaya Remodeling nor Roberts Renovation filed an appellee brief.

[2] "The [Workers' Compensation] Act requires all employers to obtain workers' compensation insurance or to implement an approved self-insurance program to cover the cost of any benefits awarded to an injured worker." *Uninsured Emps.' Fund v. Lutter*, 342 Md. 334, 340 (1996) (citing LE § 9-402(a)). "In the event that an employer does not purchase the required workers' compensation insurance, an injured employee can still receive benefits by applying to the state-operated Fund." *Id.* (citing LE § 9-1002(e)). "The obligation of the [Fund] to pay an Order or Award of the Commission is derived from the

On May 18, 2022, Perez, Amaya Remodeling, the Fund, and their respective counsel appeared at the hearing before the Commission.[3] It was undisputed that Perez was injured and entitled to compensation, specifically, an award based on a percentage of his average weekly wage**.** The main point of contention was the determination of Perez's average weekly wage.

Perez claimed that his average weekly wage was $875. He testified that his salary was $175 per day for five days per week, which added up to $875 ($175 × five days). He stated that the amount he received each week varied between $700 and $850, depending on the number of hours he worked. Perez admitted that he did not file his tax returns for the 2020 tax year and had no documents to support his claim. Mr. Amaya disputed Perez's testimony, stating that he agreed to pay Perez $150 per day for days that he actually worked and that Perez did not typically work five days a week.

Amaya Remodeling, through counsel, explained that Perez was a seasonal employee whose employment was "not constant." It proposed calculating Perez's average weekly wage by averaging his gross wages earned over the fourteen weeks before his injury. The paystubs for the fourteen weeks were admitted into evidence, and Perez confirmed that they were accurate. These paystubs showed that Amaya Remodeling paid Perez the following amounts:

---

obligations of the employer itself." Richard P. Gilbert et al., *Maryland Workers' Compensation Handbook* § 14.04[3] at 14-6 to 14-7 (4th ed. 2023) ("Gilbert").

[3] Roberts Renovation did not appear at the Commission hearing.

Week No.	Week Ending	Pay Date	Amount
1	12/06/2019	No payment	$ 0
2	12/13/2019	No payment	$ 0
3	12/20/2019	12/20/2019	$ 430.00
4	12/27/2020	No payment	$ 0
5	01/03/2020	No payment	$ 0
6	01/10/2020	No payment	$ 0
7	01/17/2020	No payment	$ 0
8	01/24/2020	01/20/2020 01/24/2020	$ 150.00 $ 360.00
9	01/31/2020	01/30/2020	$ 150.00
10	02/07/2020	02/04/2020 02/07/2020	$ 550.00 $ 100.00
11	02/14/2020	02/10/2020 02/14/2020	$ 150.00 $ 600.00
12	02/21/2020	02/19/2020 02/21/2020	$ 200.00 $ 500.00
13	02/28/2020	02/28/2020	$ 220.00
14	03/06/2020	03/04/2020 03/06/2020	$ 550.00 $ 250.00
		TOTAL	**$ 4,210.00**

The paystubs for the fourteen weeks showed that the gross wages during that period totaled $4,210. However, counsel for Amaya Remodeling proffered that the total was $3,960. Based on this, counsel proposed to the Commission that Perez's average weekly wage should be $282 ($3,960 ⁄ fourteen weeks).

The Commission raised concerns that this method of determining average weekly wage did not represent Perez's earnings due to his intermittent work during the fourteen weeks. Consequently, the Commission requested evidence of Perez's annual earnings instead. Amaya Remodeling provided Perez's Form 1099, which indicated that Perez

earned $11,920 in 2019. Based on this annual figure, the average weekly wage would be $229 ($11,920 / fifty-two weeks), which was lower than the calculation based on the fourteen weeks.

After the hearing, the Commission issued an award of compensation. It found that Perez was temporarily totally disabled from August 29, 2020 through October 6, 2020, and it ordered Amaya Remodeling, the employer, and Roberts Renovation, the statutory employer,[4] to jointly and severally pay Perez compensation at a rate of $188, payable weekly for the period of disability. The Commission also found that a credit of $12,940 should be applied against the permanent partial disability. Relevant to this appeal, the Commission determined, without explanation, that Perez's average weekly wage was $282.

Perez filed a request for a rehearing and included a Statement of Wage Information claiming that he earned $3,340 over the fourteen weeks, resulting in an average weekly wage of $417.50.[5] He arrived at this average by dividing $3,340 by eight, representing each week he actually worked. The Commission denied Perez's request for a rehearing.

---

[4] Under LE § 9-508, a statutory employer is a principal/general contractor that has contracted to perform work that is part of its trade, business, or occupation and that has contracted with a different party for that party to act as a subcontractor of all or any part of the work required by the initial contract. *See Honaker v. W.C. & A.N. Miller Dev. Co.*, 278 Md. 453, 460 (1976). "If there is a subcontract and the covered employee is employed by the subcontractor, but the subcontractor is uninsured, the principal contractor becomes the statutory employer, and hence, liable for workers' compensation benefits to the covered employee." Gilbert § 3.04[3] at 3–7.

[5] As explained later, Perez acknowledged during the circuit court hearing that the numerator of $3,340 was incorrect and should have been $4,210.

B.

Judicial Review in the Circuit Court

Perez sought judicial review of the Commission's decision and demanded a jury trial.[6] The trial was set for August 23, 2023. On the trial date, Perez filed a "Motion for Summary Judgment as a Matter of Law on the Issue of Average Weekly Wage." In that motion, he asked for the Commission's order to be reversed and for a determination that his average weekly wage was $526.25 "as a matter of law." He included a revised Statement of Wage Information to show the payments made during the fourteen weeks totaling $4,210. Using the same formula he used for the first wage statement, he divided the gross wages earned over the fourteen weeks ($4,210) by eight (representing each week he actually worked). Perez stated it was undisputed that Amaya Remodeling paid him $4,210 during the fourteen weeks before the accident, with actual payments made during eight weeks.

At the circuit court hearing, Perez confirmed that his motion presented "an issue of law and not of fact" that he thought "should be decided by the [c]ourt." There were protracted discussions about the discrepancy in the total gross wages over the fourteen weeks reflected in Perez's two versions of the Statement of Wage Information ($3,340 vs.

[6] Initially, Roberts Renovation filed a petition for judicial review regarding the Commission's decision on its classification as a statutory employee and the amount of credit. Perez then filed a cross-petition for judicial review. In the end, the court affirmed the Commission's decision that Roberts Renovation was a statutory employee, and the parties agreed to reduce the credit. Roberts Renovation appealed the court's ruling but later dismissed the appeal.

$4,210). But Perez clarified that the total of $3,340 in the first statement was based on "the wrong figures."

The Fund agreed that $4,210 was the correct total. It argued, however, that there was no legal basis for requiring the Commission to use eight weeks as the denominator in calculating the average weekly wage. The Fund explained that the Commission considered two methods of calculating the average weekly wage—one using earnings over the fourteen weeks preceding the accident, and the other using earnings over a longer period. According to the Fund, the Commission used the former method, which yielded a higher average weekly wage. Thus, the Fund argued that the Commission's decision was reasonable and should be affirmed.

At the hearing, Perez added that if the court wanted to consider his expected pay, his average weekly wage was $875. This is because he testified at the Commission hearing that he was paid $175 daily, five days a week. He asserted that he made about $800 a week before the accident. The Fund disagreed. It pointed out that despite Perez's testimony that he made $875 per week, Perez admitted that the payments reflected in the paystubs during the fourteen weeks were correct. Those payments did not reflect that Perez earned $875 per week.

The court denied Perez's motion for summary judgment, explaining that "[a]s a matter of law on the issue of average weekly wage," it found that the Commissioner's "figures and computations and basis" were "reasonable" and "based on the facts and the law that the Commissioner had before her, and the evidence presented."

After deciding the motion, the court asked the parties if any factual issues needed to be submitted to the jury. The Fund and Amaya Remodeling responded that the issue of average weekly wage was a matter of law that should not be submitted to the jury. Perez, through counsel, agreed, stating, "I do think that the issue of average weekly wage . . . is an issue of law. I don't believe the jury needs to hear it." The court also agreed that the issue of average weekly wage "does not go to the jury" and considered the issue concluded.

On August 28, 2023, the court entered an order affirming the Commission's finding that Perez's average weekly wage was $282. Perez timely noted an appeal of the court's decision.[7]

III.

STANDARD OF REVIEW

Despite initially requesting a jury trial, Perez later submitted the issue of average weekly wage to the circuit court without a jury. The circuit court treated the issue as a purely legal one, in line with the Supreme Court of Maryland's holding that if the issue in

[7] This is an appeal from a final judgment. Ordinarily, the court's denial of a motion for summary judgment does not terminate the litigation or prevent further prosecution or defense of a case. Rather, the court's denial of summary judgment may reflect that the determination of the issues presented in the motion should be resolved at trial. *See Porter Hayden Co. v. Com. Union Ins. Co.*, 339 Md. 150, 164 (1995); *Metro. Mortg. Fund, Inc. v. Basiliko*, 288 Md. 25, 29 (1980) ("[A] denial (as distinguished from a grant) of a summary judgment motion . . . involves not only pure legal questions but also an exercise of discretion as to whether the decision should be postponed until it can be supported by a complete factual record . . . ."). Here, however, after the court denied the motion for summary judgment, Perez agreed that no factual issue would go to the jury, and the court considered the issue of average weekly wage concluded. The court resolved the rest of the issues raised by Roberts Restoration leaving nothing pending in the circuit court. *See* n.6.

a workers' compensation case does not depend on resolving disputed facts but concerns the method for determining the injured worker's average weekly wage, it is considered a question of law. *See Gross*, 331 Md. at 48.

Because Perez challenges the Commission's decision, our analysis begins with the standard outlined in the Workers' Compensation Act. *See Wagstaff*, 236 Md. App. at 12–13. "In a case involving accidental personal injury, the court's task is to 'determine whether the Commission: (1) justly considered all of the facts about the accidental personal injury . . . ; (2) exceeded the powers granted to it . . . ; or (3) misconstrued the law and facts applicable in the case decided.'" *Id.* (citing LE § 9-745(c)). "The court must confirm the decision unless it determines that the Commission exceeded its authority or misconstrued the law or facts." *Id.* at 13; *see* LE § 9-745(e)(1). "If the court determines that the Commission did not act within its powers or did not correctly construe the law and facts, the court shall reverse or modify the decision or remand the case to the Commission for further proceedings." LE § 9-745(e)(2).

A decision of the Commission "is presumed to be prima facie correct," and "the party challenging the decision has the burden of proof." LE § 9-745(b)(1)–(2). "This presumption of correctness, however, does not extend to legal determinations, which are subject to independent review by the courts." *Wagstaff*, 236 Md. App. at 13. "The courts are 'under no constraint' to uphold a decision if it is 'premised solely upon an erroneous conclusion of law.'" *Id.* (citation omitted).

IV.

DISCUSSION

Perez contends that the Commission's decision and the circuit court judgment confirming it were based on a miscalculation of his average weekly wage. He argues that the Commission should have used $4,210 as the numerator and eight weeks as the denominator, resulting in an average weekly wage of $526.25. Under COMAR 14.09.03.06(B)(2), Perez interprets the language "[t]hose weeks the claimant *actually worked* during the 14 weeks before the accident" to mean that the Commission should have calculated the average weekly wage by dividing the total gross wages earned in the fourteen weeks by the eight weeks he "actually worked." (emphasis added).

Preliminarily, we question whether the argument is preserved for appellate review. At the Commission hearing, Perez never argued that eight weeks should have been used as the denominator. The Statement of Wage Information filed by Perez with the rehearing request indicated only that he divided the (incorrect) total gross wages by eight weeks. The rehearing request did not argue why eight weeks should be used as the denominator. *See Montgomery Cnty. v. Rios*, 244 Md. App. 629, 643 (2020) (holding that, where the County never raised a particular issue before the Commission, the argument was not preserved for appellate review).

Even if preserved, Perez's reliance on section (B) lacks merit. First, the language in section (B) says only that the "employer/insurer shall file a wage statement" containing certain information for the fourteen weeks. *See Wagstaff*, 236 Md. App. at 22. "By

implication, it suggests that, '[*u*]*sually*,' the Commission will calculate average weekly wage 'by adding gross wages that the employee earned in the fourteen weeks preceding the accidental personal injury and dividing the sum by fourteen.'" *Id.* (emphasis added) (citation omitted). But section (B) "does not purport to require the Commission to use any particular method of calculation." *Id.*

Second, subsection (B)(2) does not control the ultimate determination when the Commission holds a hearing. *Id.* at 26. "[I]n a case where there is a hearing, the regulation does not purport to restrict the Commission in any manner from utilizing a different time period if the Commission deems it appropriate to do so." *Gross*, 331 Md. at 50. But the employer/insurer's wage statement, or as here, the paystubs for the fourteen weeks, can serve as the basis for determining the average weekly wage if "'there is a hearing but where no question arises concerning the appropriate time period or where the Commission decides that it should not depart' from the usual standard." *Wagstaff*, 236 Md. App. at 24 (quoting *Gross*, 331 Md. at 50). Section (C) is the controlling provision; it "envisions that the Commission will determine average weekly wage based on the evidence presented at the first hearing." *Id.* at 26. Thus, the Commission was not required to calculate Perez's average weekly wage based on the eight weeks that he actually worked.

While neither the fourteen-week nor eight-week sample reflects Perez's average weekly wage with certainty, it was not unreasonable for the Commission to use the fourteen-week sample as a better approximation of what Perez would have earned if not for the injury, given the evidence presented at the hearing. *See id.* at 27–28. This is because

Perez's method of using eight weeks as a denominator would imply that he was working every week, which was not the case. Accordingly, we affirm the Commission's methodology for determining Perez's average weekly wage.[8]

Although we affirm the Commission's methodology for determining Perez's average weekly wage, the Commission clearly erred by using the proffered total of $3,960 to calculate the average weekly wage of $282. *See Bd. of Educ. for Montgomery Cnty. v. Spradlin*, 161 Md. App. 155, 168–69 (2005) (holding that whether the Commission misconstrued the facts depends on "whether the Commission's fact-finding was, as a matter of law, clearly erroneous because not supported by legally sufficient evidence"). Although it did not explain how it arrived at $282, the Commission seems to have divided the proffered sum of $3,960 by fourteen weeks. Evidence from the paystubs, however, showed that Perez was actually paid $4,210 over the fourteen weeks, which the Fund later confirmed during the circuit court hearing. Accordingly, we must vacate in part the

[8] Separately, Perez argues that the evidence established there was an agreement between him and Amaya Remodeling to pay him $875 per week and, therefore, we should reverse and modify the average weekly wage to $875. Perez, however, waived this issue for appellate review by failing to mention it in the "Questions Presented" section of his brief. *See* Md. Rule 8-504(a)(3) (stating that an appellate brief shall include a "statement of the questions presented, separately numbered, indicating the legal propositions involved"). Therefore, we decline to consider it. *See Green v. N. Arundel Hosp. Ass'n*, 126 Md. App. 394, 426 (1999) ("Appellants can waive issues for appellate review by failing to mention them in their 'Questions Presented' section of their brief."). Even if considered, we would conclude that the Commission had reason to conclude that the average weekly wage of $875 did not accurately reflect what he would expect to earn. Perez produced no documentation supporting the claim. He also admitted that the payments reflected in the paystubs during the fourteen weeks were correct, and those payments did not show that he earned $875 per week.

judgment of the circuit court and instruct it to remand this case to the Commission for further proceedings to reconsider the compensation award based on the gross wages earned in the fourteen weeks totaling $4,210.[9]

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY AFFIRMED IN PART AND VACATED IN PART WITH INSTRUCTIONS TO REMAND THIS CASE TO THE WORKERS' COMPENSATION COMMISSION FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO BE EQUALLY DIVIDED BETWEEN APPELLANT AND THE UNINSURED EMPLOYERS' FUND.

---

[9] Perez contends that because of the "significant contest[ed] issues and disagreements by the parties regarding the number of payments and actual amount of payments made, as well as . . . the actual wages agreed to be paid at the hiring time," the circuit court should have directed the issue to the jury. Perez asks us to remand the case for trial to "resolve the disputed issues of fact, if any, in front of the jury." The issue, however, is not preserved. During the circuit court hearing, Perez agreed that the jury did not need to decide the issue of average weekly wage. By doing so, he essentially acquiesced to the court's decision not to send any factual issue to the jury. As a result, he may not now challenge, on appeal, the court's failure to direct any aspect of the issue of average weekly wage to the jury. *See* Md. Rule 8-131(a); *Chimes v. Michael*, 131 Md. App. 271, 288 (2000) ("[Rule 8-131(a)] . . . curbs appeals that are inconsistent with the parties' positions at trial."); *Osztreicher v. Juanteguy*, 338 Md. 528, 534 (1995) (citation omitted) (reiterating that "[t]he right to appeal may be lost by acquiescence in, or recognition of, the validity of the decision below from which the appeal is taken or by otherwise taking a position which is inconsistent with the right of appeal").