

NO. A06-0291

State of Minnesota
In Court of Appeals

Westfield Insurance Company,

Appellant,

vs.

Kenneth Neutgens,

Respondent.

APPELLANT'S BRIEF AND APPENDIX

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
STATEMENT OF ISSUE.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
I. THE AUTOMOBILE ACCIDENT.....	3
II. THE WAGE LOSS CLAIM.....	3
LEGAL ARGUMENT.....	6
I. STANDARD OF REVIEW.....	6
II. THE TRIAL COURT ERRED IN CONFIRMING THE ARBITRATOR’S AWARD WHEN THE SELF-EMPLOYED BUSINESS OWNER RESPONDENT DID NOT SHOW A DECREASE IN THE GROSS INCOME OF THE BUSINESS, BUT RATHER A VOLUNTARY REDUCTION IN SALARY.....	6
CONCLUSION.....	9
CERTIFICATE OF COMPLIANCE.....	10

TABLE OF AUTHORITIES

Cases

<u>Erickson v. Great American Ins. Co.</u> , 466 N.W.2d 430, 432 (Minn. Ct. App. 1991).....	8
<u>Johnson v. American Family Mut. Ins. Co.</u> , 426 N.W.2d 419, 421 (Minn. 1988)	8
<u>National Indem. Co. v. Farm Bureau Mutual Insurance Co.</u> , 348 N.W.2d 748, 750 (Minn. 1984)	6
<u>Rotation En'g & Mfg. Co. v. Secura Ins. Co.</u> , 497 N.W.2d 292, 294, 295 (Minn. Ct. App. 1993)	1, 7
<u>Rindahl v. Nat'l Farmers Union Ins. Co.</u> , 373 N.W.2d 294, 299 (Minn. 1985).	1, 7
<u>State v. Berthiaume</u> , 259 N.W.2d 904, 909 (Minn. 1977).....	6

Statutes

Minn. Stat. § 572.19, subd. 1(3) (2005)	6
Minn. Stat. § 65B.44, subd. 3 (2005)	6

STATEMENT OF ISSUE

- I. **DID THE ARBITRATOR EXCEED HIS POWERS WHEN HE AWARDED NO-FAULT WAGE LOSS BENEFITS TO THE SELF-EMPLOYED BUSINESS OWNER RESPONDENT, WHO DID NOT SHOW A DECREASE IN THE GROSS INCOME OF THE BUSINESS, BUT RATHER A VOLUNTARY REDUCTION IN SALARY?**

The district court held the arbitrator did not exceed his powers.

Apposite authorities:

Rotation En'g & Mfg. Co. v. Secura Ins. Co., 497 N.W.2d 292 (Minn. Ct. App. 1993).

Rindahl v. Nat'l Farmers Union Ins. Co., 373 N.W.2d 294 (Minn. 1985).

STATEMENT OF THE CASE

On September 3, 2004, Respondent Kenneth Neutgens filed a petition for no-fault arbitration against Appellant Westfield Insurance Company with the American Arbitration Association. In his petition, Mr. Neutgens made a claim for wage loss benefits allegedly arising out of a November 14, 2002 motor vehicle accident. At the time of the accident, Mr. Neutgens was a self-employed business owner, serving as the sole shareholder and officer of Neutgens Excavating and Construction, Inc.

On May 18, 2005, the arbitrator awarded Mr. Neutgens \$20,000 in wage loss benefits.¹ The arbitrator based his decision on Mr. Neutgens' claim that he had incurred a loss of earnings based on his personal income tax returns. The arbitrator made the award despite the fact that Mr. Neutgens, a self-employed business owner, failed to offer proof of a decrease in the gross earnings of his business.

Westfield brought a motion to vacate the arbitration award because the arbitrator exceeded his powers when he determined that Respondent's proof of wage loss claim could be based on what his personal tax forms indicated, rather than on the gross income of his business.

On December 12, 2005, the District Court: 1) denied Westfield's motion to

¹ 05/18/05 Award of Arbitrator, A001.

vacate the arbitration award; and 2) confirmed the arbitration award.² Westfield timely filed this appeal.³

STATEMENT OF FACTS

I. THE AUTOMOBILE ACCIDENT

On November 14, 2002, Kenneth Neutgens was traveling south on Plymouth Boulevard in the City of Plymouth, Minnesota. As Mr. Neutgens crossed Highway 55, a driver traveling west on Highway 55 failed to obey a stop light and collided with the front driver's side of Mr. Neutgens' vehicle.⁴

II. WAGE LOSS CLAIM

At the time of the accident, Mr. Neutgens was self-employed, operating as the sole shareholder and officer of Neutgens Excavating and Construction, Inc.⁵ On March 17, 2004, Mr. Neutgens' counsel requested that Westfield pay the maximum no-fault benefits of \$20,000 for wage loss.⁶ Westfield requested Neutgens Excavating's tax returns to properly evaluate Mr. Neutgens' wage loss claim, but that request was refused.⁷

² 12/12/05 Order and Memorandum, A002.

³ 02/09/06 Notice of Appeal, A012.

⁴ 11/14/02 Police Accident Report, A014.

⁵ 2000-2003 Neutgens Excavating Tax Returns, A016.

⁶ 03/17/04 Owens Letter, A127.

⁷ 07/16/04 Westfield Letter, A128.

After Mr. Neutgens filed his Petition for wage loss benefits on September 3, 2004, the business tax records were disclosed after numerous requests by Westfield's counsel. Tax records from 2000 through 2003 (two years before and after the accident) failed to show that the business suffered any financial detriment. There was no decrease in the gross earnings of the business.⁸ In fact, Mr. Neutgens agreed prior to the hearing that the business was successful, but believed that a voluntary reduction in pay, and his sons' assuming some of his work responsibilities, entitled him to no-fault wage loss benefits:

The business has continued to succeed because his sons have assumed the responsibilities once performed by their father. Therefore, although we provided the business tax returns, we maintain they are irrelevant, and the arbitrator need only concern himself with Mr. Neutgens' personal tax returns which show a decrease in income since his collision.⁹

At the No-Fault hearing, Mr. Neutgens' son, Tom Neutgens, testified as to what his father could accomplish at work prior to the accident versus after the accident.¹⁰ Although Tom Neutgens opined that Neutgens Excavating is not as successful since his father's accident, he did not know if the business had lost income as a result of his father's alleged inability to work.¹¹

⁸ 2000-2003 Neutgens Excavating Tax Returns, A016.

⁹ 04/18/2005 Owens Letter, A129.

¹⁰ No-Fault Hearing Transcript at 31-34, A131.

¹¹ *Id.* at 41, A135.

Similarly, Mr. Neutgens' wife, Leona Neutgens, described what her husband could do prior to the accident as opposed to after the accident due to his cognitive problems.¹² Nevertheless, she answered no questions regarding how Mr. Neutgens' alleged inability to work affected the earnings of his company.

Mr. Neutgens testified that he believed his alleged inability to work caused a decrease in Neutgens Excavating's income, but like his son, could not articulate why he believed as such:

By Mr. Mayer:

Q: Now, do you claim at all, Mr. Neutgens, that your accident has caused a decrease in the earnings of the business?

By Mr. Neutgens:

A: Yes.

Q: Okay. Could you specifically tell me what you feel those decreased earnings are?

A: Not really. I mean --¹³

None of the witnesses at the hearing testified that Neutgens Excavating's tax returns reflected a decrease in the earnings of the business. Nor could any of them articulate any change in the gross income of the business. Nonetheless, on May 18, 2005, the arbitrator awarded Mr. Neutgens \$20,000 in wage loss benefits.¹⁴

¹² *Id.* at 50-56, A136.

¹³ *Id.* at 66, A143.

LEGAL ARGUMENT

I. STANDARD OF REVIEW

An arbitration award shall be vacated when an arbitrator has exceeded his powers. Minn. Stat. § 572.19, subd. 1(3) (2005). The Minnesota Court of Appeals is not bound by and need not give deference to a lower court's decision on a question of law. *See National Indem. Co. v. Farm Bureau Mut. Ins. Co.*, 348 N.W.2d 748, 750 (Minn. 1984). Whether the arbitrator exceeded his authority is subject to *de novo* review. *State v. Berthiaume*, 259 N.W.2d 904, 909 (Minn. 1977).

II. THE ARBITRATOR EXCEEDED HIS POWERS WHEN HE AWARDED NO-FAULT WAGE LOSS BENEFITS TO THE SELF-EMPLOYED BUSINESS OWNER RESPONDENT, WHO DID NOT SHOW A DECREASE IN THE GROSS INCOME OF THE BUSINESS, BUT RATHER A VOLUNTARY REDUCTION IN SALARY.

Minn. Stat. § 65B.44, subd. 3 (2005), provides for wage loss benefits under the No-Fault Act as follows:

Disability and income loss benefits shall provide compensation for 85 percent of the injured person's loss of present and future gross income from inability to work proximately caused by the nonfatal injury subject to a maximum of \$250 per week. Loss of income includes the costs incurred by a self-employed person to hire substitute employees to perform tasks which are necessary to maintain the income of the injured person, which are normally performed by the injured person, and which cannot be performed because of the injury.

A self-employed individual's burden of proving entitlement to wage loss

benefits has been clearly set forth in Rotation Eng'g & Mfg. Co. v. Secura Ins.

Co., 497 N.W.2d 292 (Minn. Ct. App. 1993):

To the extent it can be shown that gross income produced by a self-owned business has decreased during the period of the self-employed owner's disability, and the decrease is attributable directly and solely to the owner's disability, that decrease, in the absence of any salary or wage paid, represents "other earnings from work." For this kind of economic detriment, income loss benefits are payable.

Rotation Eng'g & Mfg. Co., at 295, *citing* Rindahl v. Nat'l Farmers Union Ins.

Co., 373 N.W.2d 294, 299-300 (Minn. 1985). As the court observed in Rotation Eng'g: "For a person who is paid on an hourly basis, proof of wage loss is fairly simple: hourly wage multiplied by hours missed equals loss. For the self-employed individual, particularly one like [the claimant] who sets his own salary, proof of wage loss is more difficult." Rotation Eng'g, at 294. Moreover, the court acknowledged the need for certainty in calculating wage loss benefits owed: "We perceive a legislative concern which benefits be calculated on some direct, certain basis that will discourage abuse and will enable benefits to be paid promptly and with a minimum of fuss." Rotation Eng'g, at 294, *citing* Rindahl, at 299.

In this case, self-employed business owner Mr. Neutgens did not show a decrease in the gross income of his business entitling him to No-Fault wage loss benefits. He was awarded benefits based on his voluntary reduction in salary. That voluntary reduction in salary, evidenced by his personal tax returns, cannot be the basis for the wage loss award, any more than the hours missed from work could be the basis for a wage loss award to the self-employed business owner in

Rotation Eng'g. The claimant in Rotation Eng'g decided to continue his salary; in this case, Mr. Neutgens decided not to continue his. But Mr. Neutgens, as the business' owner, could have just as easily decided to continue his salary. What salary he was paid or not paid was totally within his control. That is why Mr. Neutgens' salary, or lack thereof, and personal tax returns cannot be the proof required for entitlement to No-Fault wage loss benefits. The legislature and courts interpreting the No-Fault Act require more certainty. That is why proof of a reduction in the gross income of the business is required, which was not shown here.

The arbitrator misapplied Minnesota law and exceeded his authority when he determined that Mr. Neutgens' proof of wage loss claim could be based on what his personal tax forms indicated, rather than the income of his business. The district court's decision confirming the arbitrator's award should be reversed. Minn. Stat. § 572. 19, subd. 1(3); Erickson v. Great American Ins. Co., 466 N.W.2d 430, 432 (Minn. Ct. App. 1991), *citing* Johnson v. American Family Mut. Ins. Co., 426 N.W.2d 419, 421 (Minn. 1988) ("We think that consistency mandates that the courts interpret the no-fault statutes, not various panels of arbitrators. Therefore, we hold that in the area of automobile reparation, arbitrators are limited to deciding issues of fact, leaving interpretation of the law to the courts").

CONCLUSION

For the reasons set forth above, Westfield Insurance Company respectfully requests that the district court's Order be reversed and that judgment be entered vacating the arbitrator's award.

Respectfully submitted,

Dated: 3-9, 2006

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CERTIFICATE OF COMPLIANCE

This brief complies with the word/line limitation of Minn. R. Civ. App. P. 132.01, subd. 3(a). This brief was prepared using Microsoft Word Version 5.1, which reports that the brief contains 336 lines and 1,904 words.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).