GARY ANDERSON, Employee, v. BAGLEY MAINTENANCE, INC. and ASSIGNED RISK PLAN/OCCUPATIONAL HEALTHCARE SERVS., Employer-Insurer/Appellants, and BAGLEY MAINTENANCE, INC. and AMERICAN FAMILY INS. CO., Employer-Insurer, and AMERICAN FAMILY INS. CO., STEMBER CHIROPRACTIC and LAKE REGION BONE & JOINT SURGEONS, Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 25, 1998

HEADNOTES

COVERAGE - MINN. STAT. § 176.041, SUBD. 1(g). Where the employee was specifically elected to the position of secretary/treasurer of the employer corporation for a 12-month period, his term was not continued until his successor was chosen and qualified in his stead, as provided in the bylaws. Where the only officer function the employee performed was to execute three documents on the first day in office and where thereafter all of his functions were performed by the president, who exercised absolute and complete control over the operation of the employer business, he could not be considered to be an executive officer of the employer after his specified term expired. As a result, at the time of injury he was covered by the workers' compensation insurance policy in effect for the employer.

Affirmed.

Determined by Wheeler, C.J., Johnson, J., and Hefte, J.
Compensation Judge: Nancy Olson.

OPINION

STEVEN D. WHEELER, Judge

The employer and its insurer, Minnesota Assigned Risk Plan/Occupational Healthcare Management Services (hereinafter ARP/OHMS), appeal from the compensation judge's determination that the employee was not excluded from coverage under the Workers' Compensation Act at the time of his injury on September 21, 1994. They appeal the compensation judge's determination that the employer was not formally incorporated on the date of injury, that the employee was not an executive officer of the corporation, that the testimony of certain witnesses were not credible, that the employee was not an owner of the employer and certain other factual determinations. While we tend to agree with the employer and insurer's position with respect to several of these issues, we find that the employee was not an executive officer of the employer corporation at the time of injury and the exclusionary provisions of Minn. Stat. § 176.041, subd. 1(g), did not apply to the employee at the time of his 1994 injury. The

compensation judge's decision that the workers' compensation benefits to the employee are covered by the ARP policy is affirmed.

BACKGROUND

The employee, Gary L. Anderson, was employed by Bagley Maintenance, Inc., the employer, to provide a variety of services. On September 21, 1994, while working as a logger for the employer the employee was struck by a log and sustained certain unspecified and as yet undetermined injuries. At the time of this injury the employee was 49 years old. Following his return to work with the employer he sustained an additional injury to his right foot on October 18, 1996. At the time of the first injury, the employer was insured by ARP/OHMS and on the date of the second injury by American Family Insurance Company. On January 3, 1997, the employee filed a claim petition, seeking temporary total and unrated permanent partial disability benefits and rehabilitation assistance, alleging injuries to his brain, head, teeth, eyes, neck and back on September 21, 1994 and injuries to his right foot on October 18, 1996. The employee later amended his claim to specifically allege sustaining additional illnesses of clinical depression and hypertension, and entitlement to medical expenses and permanent partial disability ratings as follows: thoracic spine - 18%, cervical spine - 10%, lumbar spine - 7%, eyes - 24% and teeth - 5.5%. On June 3, 1997, American Family Insurance Company, the insurer at the time of the 1996 injury, petitioned to be permitted to make payments to the employee pursuant to a temporary order. This request was granted and a temporary order issued by Compensation Judge Olson on June 10, 1997.

In its answer to the employee's claim petition ARP/OHMS maintained it did not provide coverage to the employee at the time of his 1994 injury, alleging that the employee was excluded from coverage pursuant to Minn. Stat. § 176.041, subd. 1(g), because he was an executive officer of a closely held corporation who owned more than 25% of the stock of the corporation and had not elected coverage.

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on November 7 and December 19, 1997. The parties had agreed that the issues in the case would be bifurcated. The only issue to be resolved by the compensation judge in the initial hearings was whether the employee was excluded from coverage under the ARP/OHMS policy under Minn. Stat. ' 176.041, subd. 1(g). This statutory provision provides as follows:

> Subdivision 1. Employments excluded. This chapter does not apply to any of the following:
>
> * * *
>
> (g) an executive officer of a closely held corporation having less than 22,880 hours of payroll in the preceding calendar year, if that executive officer owns at least 25 percent of the stock of the corporation;

The evidence at trial included the testimony from the employer's founder, Norman Otterkill, its insurance agent and accountant and the employee, tax returns for the employee and the employer, the articles of incorporation and minutes of meetings for the corporation and its predecessor and certain financial records. The compensation judge issued her Findings and Order on March 10, 1998. She determined that ARP/OHMS had failed in its burden to establish that the exclusionary provisions of Minn. Stat. ' 176.041, subd. 1(g), applied to the employee. She found that the employer was not a valid corporation at the time of the 1994 injury, but that even if it was a valid corporation the employee was not an executive officer or an owner of the employer. ARP/OHMS appeals from each of these findings.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether Athe findings of fact and order [are] clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1 (1992). Substantial evidence supports the findings if, in the context of the entire record, Athey are supported by evidence that a reasonable mind might accept as adequate. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings are to be affirmed. Id. at 60, 37 W.C.D. at 240. Similarly, [f]actfindings are clearly erroneous only if the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed. Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975). Findings of fact should not be disturbed, even though the reviewing court might disagree with them, Aunless they are clearly erroneous in the sense that they are manifestly contrary to the weight of the evidence or not reasonably supported by the evidence as a whole. Id.

[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo. Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

The compensation judge first determined that the employer was not Aformally incorporated on September 21, 1994, finding that the corporation was Anot registered with the Secretary of State until October 1995. (Finding 1.) In addition, she held that even if the employer was a valid corporation the employee was not an executive officer because the employee performed no functions normally performed by an officer. After determining that Norman Otterkill, the original founder of the employer, handled and controlled all of the dealings and operations of the employer, the compensation judge found that since the employee made no monetary investment in the corporation, had no control over its operations and was not consulted by Mr. Otterkill concerning any aspect of the running of the business his sole role in the business

was that of an hourly-paid employee. (Findings 2.) In addition, the compensation judge rejected the testimony that the employee had knowingly waived coverage by workers' compensation insurance. She found the testimony of Mr. Otterkill, Mr. Rosch, Mr. Otterkill's accountant, and Mr. Balsiger, the insurance agent, not credible on this issue. (Findings 7, 9.) The compensation judge found credible the employee's testimony that documents which ostensibly indicated that the employee was the secretary/treasurer of the corporation were executed by the employee merely as a personal favor to Mr. Otterkill because he thought he might be paid more in the future. She accepted the employee's testimony that he did not believe or know that he was a part owner or executive officer of the employer. (Finding 10.)

The employer and insurer argue that the employer was a validly constituted corporation and that the employee was an owner of 50% of the outstanding shares of the corporation and was an executive officer at the time of the 1994 injury. On that basis, the employer and insurer argue that all of the requirements of Minn. Stat. § 176.041, subd. 1(g), have been satisfied and that it is not required to provide workers' compensation coverage to the employee. While we agree that the employer and insurer make a strong argument that the employer was a closely held corporation and that the employee was the owner of more than 25% of the stock in the corporation,[1] we agree that there is sufficient evidence to support the conclusion that the employee was not an executive officer of the corporation at the time of the September 1994 injury.

Minn. Stat. § 176.011, subd. 11, defines an executive officer of a corporation to be Aany officer of a corporation elected or appointed in accordance with its charter or bylaws. Based on this definition, it does appear that the employee was elected as an executive officer of the employer as of February 15, 1993. The February 15, 1993 minutes of a special meeting of the shareholders of Robbie Investments, Inc. show that Mr. Otterkill and the employee were made members of the corporation's board of directors. (ARP/OHMS Ex. 4.) At the same time the new

[1] We make no formal determinations concerning the validity of the corporation or the employee's ownership interest. We do note that the compensation judge appears to have misconstrued the exhibits with respect to the existence of the employer as a corporate entity. The Secretary of State issued a Certificate of Incorporation for Robbie Investments, Inc. on January 21, 1988. (ARP/OHMS Ex. 2.) At that time the shareholders of Robbie Investments, Inc. were Keith and Sue Balsiger. (ARP/OHMS Ex. 5.) The minutes of the February 15, 1993 directors' meeting reflect that the board acted to change the name of the corporation to Bagley Maintenance, Inc. (ARP/OHMS Ex. 4.) Articles of Amendment of the Articles of Incorporation of Robbie Investments, Inc. showing the change of name were signed by Norman Otterkill, as president, and the employee, as secretary, on February 15, 1993. These Articles of Amendment, however, were not formally filed with the Secretary of State until June 1995. (ARP/OMHS Ex. 2; EE Ex. G.) The failure to file the name change would not invalidate the corporation. The corporate records of Robbie Investments, Inc. indicate that on February 15, 1993 the shares held by Keith Balsiger were transferred to Norman Otterkill and that the shares owned by Sue Balsiger were transferred to Gary Lee Anderson, the employee.

directors, Otterkill and the employee, held a special meeting and elected the employee as an officer of the corporation. The minutes from the special meeting of the directors stated as follows:

> On motion made, seconded and carried, the following officers were elected to serve for the following 12 months:
>
> Norman D. Otterkill -- President
>
> Gary Lee Anderson -- Secretary/Treasurer

These minutes were executed by Gary L. Anderson as secretary. (ARP/OHMS Ex. 4.)

Construing the dictate of this resolution, we believe that any term of office for the employee was limited by the action of the board of directors to 12 months, until February 14, 1994. The minutes of the corporation's next board of directors' meeting, held on February 1, 1994, indicate that the meeting was called to order by President Norman D. Otterkill and that, no quorum being present, the meeting was adjourned. Those minutes were executed by Mr. Otterkill as president. Similar minutes were prepared with respect to the annual meeting of shareholders, also held on February 1, 1994. These minutes indicate that the employee was not represented at the shareholders' meeting and that the meeting was simply adjourned. This cycle of actions by the shareholders and board of directors was repeated each February from 1995 through at least 1997. As determined by the compensation judge, and not challenged by ARP/OHMS, the evidence also clearly establishes that Mr. Anderson neither performed nor was called upon to perform any of the duties of a corporate officer at any time following the intended expiration of his 12-month term of office in February 1994. As a result, we conclude that, as a matter of law, the employee was not an officer of the corporation after February 14, 1994.

While his employer was a corporation and the employee was the named owner of 50% of its outstanding and issued stock, he was not an officer of the corporation on the date of injury. As a result, the provisions of Minn. Stat. § 176.041, subd. 1(g), did not apply to the employee at the time of his injury in 1994. Because ARP/OHMS stipulated that but for the provisions of Minn. Stat. § 176.041, subd. 1(g), coverage would be provided to the employee for his injuries in 1994, we affirm the compensation judge's determination to provide coverage under the ARP policy.