DEANNA L. BEISSEL, Employee/Appellant, v. MARSCHALL LINE, INC. and STATE FUND MUT. INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 31, 1998

HEADNOTES

WAGE. Where an employee is regularly employed in more than one job on the date of injury, but was on leave status in one of the jobs on the date of injury, proof of a set date for resuming work is not a legal prerequisite to the inclusion of earnings from the employment in which the employee was on leave status. Such cases represent unique circumstances and must be determined on their individual facts, with consideration of such factors as, among other things, the employee's history of employment in that job, the nature of the job, the duration and purposes of the leave, and the expectations of the employee and the employer who granted the leave regarding the employee's return to work. The weighing of the evidence bearing on the likelihood that a reasonably timely return to work would have occurred, and on the ultimate question whether including the earnings most fairly represents the employee's lost earning capacity, is for the compensation judge as finder of fact.

Reversed.

Determined by Wilson, J., Hefte, J., and Wheeler, C.J.
Compensation Judge: William R. Johnson

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's conclusion that the issue of the employee's wage on the date of injury was controlled by the holding in Gray v. DeZurick, 49 W.C.D. 577 (W.C.C.A. 1993), and from the wage which the judge determined on that basis. We reverse and substitute the alternative wage findings of the compensation judge.

BACKGROUND

The employee, Deanna L. Beissel, came to Minnesota with her family in 1985. She took a job for Dairy Queen at the Minnesota Zoo in January 1986. She left this job to work for the Raise & Glaze Bakery, later leaving there to work for the Farmington Bakery, which was closer to her home. In 1990, the employee began working full time for the employer, Marschall Line, as a school bus driver, while continuing to work part-time at the Farmington Bakery. In the spring of 1992, the employee left her job with the Farmington bakery and began working as a part-time driving instructor for Action Driving, still continuing to work full time for Marschall Line. (T. 28-31.)

Effective January 30, 1995, the employee went on an unpaid leave of absence from her part-time job at Action Driving for family reasons. The employee and her employer at Action Driving anticipated that the leave of absence would be for approximately one year, although no specific date was set for the employee's return to work. During 1995, the employee retained keys to Action Driving's classroom and Action Driving renewed the employee's license as a driving instructor. (Finding 5 [unappealed]; T. 76-79, 83, 112-116.)

On February 10, 1996, the employee sustained a personal injury to her neck arising out of and in the course of her employment at Marschall Line. She returned to work for the employer in September 1996 under medical restrictions, which the employer accommodated by providing her work driving a van rather than a full-size school bus. Under her medical restrictions, the employee was at first limited to part-time work, three to four hours per day. The employee testified that, as a result of her medical restrictions and physical condition, she was unable to return as planned to her second job with Action Driving in early 1996. She returned to her part-time job with that employer in January 1997. (T. 58- 62, 80.)

Marschall Lines and its insurer admitted liability for the employee's 1996 work injury and paid various benefits, including temporary total and temporary partial disability compensation. In calculating the amount of benefits paid, they used only the employee's earnings with Marschall Lines, $399.38 per week, in determining her weekly wage as of the date of injury. The employee claimed an underpayment of benefits on the basis that the employee's weekly wage was $507.78 per week, based on the inclusion of earnings from the part-time job for Action Driving.

A hearing was held on this issue before a compensation judge of the Office of Administrative Hearings on December 11, 1997. Following the hearing, the judge concluded that the $507.78 wage rate proposed by the employee best approximated the extent of the employee's earning power impaired or destroyed by the injury, but further concluded that a contrary result was required in this case because of his interpretation of this court's holding in Gray v. DeZurick, 49 W.C.D. 577 (W.C.C.A. 1995). Accordingly, the judge found that the employee's wage on the date of injury was $399.98 per week. The employee appeals.

STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. ' 176.421, subd. 1(3). Substantial evidence supports the findings if, in the context of the record as a whole, they "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). 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). While this court may not disturb a compensation judge's findings of fact unless clearly erroneous and unsupported by substantial evidence in the record as a whole, a decision which rests upon the interpretation and application of case law to essentially

undisputed facts involves a question of law which this court may consider *de novo*. See Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607 (W.C.C.A. 1993).

DECISION

The compensation judge accepted testimony from the employee and from the owners of Action Driving that the employee was on a one-year leave of absence from her part-time job at the time of her injury in her full-time primary job at Marschall Line, and that she would have returned to work in the part-time driving instructor job early in 1996 but for the injury on February 10, 1996. (See Mem. at 8-11.) In the light of the procedural posture of this case, we must assume the validity of these factual findings.[1] The parties agreed that the employee's date-of-injury wage rate should be calculated at $399.38 per week if based solely upon the earnings with Marschall Line, and at $507.78 per week if earnings from Action Driving are included.[2] (T. 10-11; Exh. D.) The legal issue presented is whether the wages from both employments should be included in determining the date-of -injury weekly wage.

Pursuant to Minn. Stat. § 176.018, subd. 3, an employee's weekly wage on the date of injury includes wages the employee earned from other employers where, as of the date of injury, the employee was regularly employed by two or more employers. In previous cases, we have noted that, while the workers' compensation act does not define the term regularly employed, our supreme court has explained that this term is used in contrast to casual employment. We have further noted that the question of inclusion or exclusion of wages from additional employment must also be consistent with the underlying object of wage determination, which is to arrive at a fair approximation of the extent of the probable future earning power which has been impaired or destroyed because of the injury. See Newbauer v. Pepsi Cola Bottling Group, 43 W.C.D. 339 (W.C.C.A. 1990) (citing McSherry v. City of St. Paul, 277 N.W.2d 541, 545 (Minn. 1938) and Bradley v.Vic's Welding, 405 N.W.2d 203, 245-6, 39 W.C.D. 921, 924 (Minn. 1987)).

In accordance with these principles, wages from other employments which were inherently casual, had become casual prior to the injury, or had effectively ended prior to the injury, have been excluded from the wage calculation.[3] On the other hand, we have held that income

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[1] While the employer and insurer, in their appeal brief, dispute that the evidence in the case adequately supports certain of the factual findings, we must accept the compensation judge's findings where unappealed. The employer and insurer did not file a cross-appeal challenging these findings, and we cannot consider issues not raised on appeal.

[2] The wages from Action Driving were calculated by averaging the employee's earnings in that job during the years 1993 and 1994.

[3] See, e.g., Welter v. CDL Commissary, Inc., No. *[redacted to remove social security number]* (W.C.C.A. May 5,1994) (summer income from officiating at softball games was irregular and casual) Brummond v.. Simcote, Inc., No. *[redacted to remove social security number]* (W.C.C.A. May 16, 1995) (secondary employment with no guarantee of work and no set hours or shifts was inherently casual); Meyer v. Theis & Talle Mgmt., No. *[redacted to remove social security number]* (W.C.C.A. Sept. 22, 1992) (employee's secondary job had changed from regular part-time to irregular and on-call status prior to date of injury); Boline v. Sunny Fresh Foods, slip

from other employment in which the employee was engaged on an ongoing or recurring basis was properly included in the wage calculation even in cases where the employee was not actively performing that job on the date of injury, so long as the other employment was regular in the sense that, in the light of the history, scope and purpose of the other employment, such employment and earnings would likely have recurred or continued on an ongoing basis but for the employee's injury.[4]

In this case, it is uncontroverted that the employee's job with Action Driving was not inherently casual employment. Instead, the employee had voluntarily requested an unpaid leave of absence, after which she was expected to resume work. The leave of absence was expected to last for about one year, but had no fixed date for the resumption of work. The issue in this case thus is whether an employee who is on an extended leave of absence from secondary regular employment at the time of injury may nonetheless be found to have been regularly employed by two employers such that wages from both employments may be considered in determining the employee's date of injury wage rate.

The compensation judge found that the employee had established that she would have returned to her part-time job with Action Driving but for her injury. He concluded that inclusion of the Action Driving earnings best approximated the extent of the employee's future earning power which had been impaired by her work injury. Nonetheless, the judge concluded that he was constrained by case precedent from including the Action Driving earnings. (See Mem. at 8-11.)

In reaching his legal conclusion, the compensation judge relied upon Gray v. DeZurick, 49 W.C.D. 577 (W.C.C.A. 1993), which, he noted, presented a somewhat similar factual pattern.

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op. No. *[redacted to remove social security number]* (W.C.C.A. June 20, 1991) (employee laid off from second job prior to injury with no guarantee of future employment); Hackett v. Walker Outdoor Equipment, 47 W.C.D. 17 (W.C.C.A. 1992) (employee's secondary self-employment ended permanently prior to date of injury due to loss of right to manufacture and sell the product for which the business was created);

[4] See, e.g., Newbauer v. Pepsi Bottling Group, 43 W.C.D. 339 (W.C.C.A. 1990) (employee had regularly engaged in a seasonal lawn-care business in addition to the job with employer each year for several years prior to injury); Fletcher v. Labor Force/Labor Finders-MN, No. *[redacted to remove social security number]* (W.C.C.A. June 20, 1995) (although work assignments from temporary agencies were individually temporary and intermittent, employee's ongoing pattern of obtaining successive work assignments through two temporary agencies was regular employment requiring inclusion of wages from assignments obtained from both temporary agencies); Loberg v. Northome Healthcare Center, 57 W.C.D. 113 (W.C.C.A. 1997) (although employee had been terminated from her full-time job just prior to sustaining injury in her part-time secondary job, and was actively seeking but had not yet found another full-time job, her long-term and ongoing history of full-time work supplemented by part-time employment permitted compensation judge to consider including some or all of the employee's full-time earnings in the wage calculation).

In Gray, an employee worked full time on the evening shift for the employer, DeZurick, as a welder. He had also been working in a part-time job during the day for Appert Frozen Foods for about 14 months, but in early February 1991 he was assigned to the day shift for DeZurick and stopped working for Appert because the jobs' hours overlapped. The employee's reassignment to DeZurick's day shift was expected to be temporary, although uncertain in duration, and the employee expected eventually to be able to resume his second employment with Appert. The employee sustained an injury while working for DeZurick on March 4, 1991. The judge in Gray found that the employee was not regularly employed with Appert on the date of his injury, and declined to include the employee's earnings in this secondary employment in the calculation of the employee's wage on the date of injury. This court affirmed on appeal on grounds of substantial evidence, noting as particularly significant that it was undisputed that there was no definite date on which the employee might return to work at Appert.

The compensation judge in the present case interpreted this court's affirmance in Gray as represented a holding that, where an employee is in a temporary off-work status in a long-standing second job, wages from that employment must be excluded as a matter of law unless there is a specific date which has been fixed for the employee's return to work in that job. Accordingly, despite finding that the inclusion of the earnings from Action Driving best reflected the extent of the employee's earning capacity impaired by the injury, the judge concluded that the employee's wage rate on the date of injury must be calculated solely on her earnings from employer Marschall Line.

We conclude that the compensation judge erred in his interpretation of case precedent, and applied an incorrect standard to the question presented. In affirming the compensation judge in Gray, we merely recognized that the absence of a fixed date of return to work, in light of the other evidence in the case, provided substantial evidence to support the exclusion of earnings. We did not hold that proof of a set date for resuming work is a legal prerequisite to the inclusion of earnings from otherwise regular employment in which an employee was on leave status as of the date of injury.

Such cases represent unique circumstances and must be determined on their individual facts, with consideration of such factors as, among other things, the employee's history of employment in that job, the nature of the job, the duration and purposes of the leave, and the expectations of the employee and the employer who granted the leave regarding the employee's return to work. The weighing of the evidence bearing on the likelihood that a reasonably timely return to work would have occurred, and on the ultimate question whether including the earnings most fairly represented the employee's lost earning capacity, is for the compensation judge as finder of fact.

Although the compensation judge erred in applying an incorrect legal standard, he considered the relevant evidence and made the requisite factual findings, including the ultimate finding that the inclusion of the employee's Action Driving earnings most fairly approximated the extent of the earning capacity impaired by the injury. In addition, he made alternative factual findings regarding the appropriate wage calculation and resulting benefits due should the Action Driving earnings be considered. Therefore, a remand is unnecessary, and we reverse and substitute the alternative findings of the compensation judge.