GILBERT BISEK, Employee, v. MEYER BROOKSIDE FARMS, UNINSURED, Employer/Appellant, and D & A MEYER FARMS, UNINSURED, Employer, and HEALTH COST CONTROLS, Intervenor, and SPECIAL COMPENSATION FUND.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 18, 1998

HEADNOTES

ARISING OUT OF AND IN THE COURSE OF. Where the employee's work at the time of injury was performed for the benefit of both Meyer Brookside Farms and D & A Farm, the employee's two employers, and where the employee was working under the direction of the owner of Meyer Brookside Farm, the compensation judge properly concluded that the employee's injury arose out of and in the course of the employee's employment with Meyer Brookside as well as D & A, even though the injury occurred on D & A property and only D & A was responsible for the employee's pay for this particular work.

EXCLUSIONS FROM COVERAGE - FAMILY FARM. The compensation judge properly concluded that earnings from hogs sold in the employee's name were includable for purposes of meeting the family farm wage threshold in Minn. Stat. § 176.011, subd. 11a, and that the family farm exemption in Minn. Stat. § 176.041, subd. 1(b), was inapplicable to shield the employee's farm employer from workers' compensation liability.

Affirmed.

Determined by Wilson, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Kathleen Nicol Behounek.

OPINION

DEBRA A. WILSON, Judge

Meyer Brookside Farms, Inc., appeals from the compensation judge's decision imposing liability for workers' compensation benefits, arguing that the employee's injury did not arise out of and in the course of his employment with Meyer Brookside and that the employee's employment with Meyer Brookside constituted excluded employment pursuant to Minn. Stat. § 176.041, subd. 1(b). We affirm.

BACKGROUND

Phil and Don Meyer are brothers who operate family farms in the New Prague area. In 1979, Phil Meyer's farm was incorporated, as Meyer Brookside Farm [Meyer Brookside], with Phil and his wife as officers and sole shareholders of the corporation. Don Meyer's farm was

similarly incorporated as D & A Meyer Farm [D & A]. Don and Phil have joint ownership of most or all of the large equipment used in the farming operations, but they otherwise own and run their respective farms separately.

Gilbert Bisek [the employee] began working for the Meyers as a farm laborer, full time, in about 1976. His job duties included field work and machinery maintenance for both brothers and hog tending for Phil Meyer. The employee kept a running tally of his hours on a sheet posted in Phil Meyer's shop, attributing his time to either Phil, to Don, or to both men.[1] For the period relevant to this proceeding, the employee's pay rate was $9.00 an hour. Some of this pay came in the form of checks from Meyer Brookside and/or D & A. At some point, however, Phil Meyer decided to use hogs to pay the employee for some of his work for Meyer Brookside.

Phil Meyer's method of paying the employee with hogs worked as follows: Phil Meyer would periodically decide to sell hogs through Central Livestock Association, a livestock cooperative, and he would hire a driver to transport the hogs to the Livestock Exchange Building in South St. Paul, where Central Livestock is located. On some occasions, some of these hogs would be marked or otherwise designated to be sold in the employee's name. Central Livestock accepted the hogs on consignment, and when the designated hogs were sold, Central Livestock would deduct its commission and various other fees[2] from the gross sales price before issuing a check for the net proceeds directly to the employee. When the employee received his check from Central Livestock in the mail, he would report the amount of the check to Phil Meyer, who would then apply that amount against what he otherwise owed the employee for the hours the employee had worked for Meyer Brookside. The employee testified that he was sometimes unaware that hogs had been sold in his name until he received a check from Central Livestock; Phil Meyers testified that he always notified the employee when such a sale was planned. Neither party could recall when Phil Meyer began arranging hog sales on the employee's behalf, but Phil estimated that he had done it for at least five years prior to the injury at issue in these proceedings. Phil Meyer also testified that he began using hogs to pay the employee after being advised that no FICA was owed, either by the employer or the employee, on in kind payments.

In 1991, the employee received checks totaling $4,072.92 from Meyer Brookside and totaling $6,203.25 from D & A. In addition, in 1991 and 1992, the employee received checks totaling about $12,058.00 from Central Livestock, for hogs sold in the employee's name. The employee's accountant treated income from the hog sales as Profit or Loss from Business, rather than wages, for purposes of preparing the employee's income tax returns. The employee testified

[1] When the employee's work was for both of the Meyers, each brother paid half of the employee's wage for that work. The parties agree that Phil Meyer paid two-thirds of the employee's earnings, overall, for the relevant period, while Don Meyer paid one-third.

[2] Other fees that might be subtracted from the gross sales price included a yardage fee (for rent of pens), a veterinarian's fee, a fee to the National Pork Council, and the charge for the driver who had transported the hogs to market.

that he himself had little to do with the tax return preparations and that he made no decisions as to how to classify the hog sale income.

On February 5, 1992, the employee sustained a significant injury to his low back while working with Phil Meyer to move a harrower in a machine shed located on Don Meyer's property. The harrower, jointly owned by both Meyer brothers, was being moved in preparation for sale or trade-in on new equipment. The record indicates that, because the employee was working with Phil Meyer, Don Meyer would have been charged for the employee's time, as the employee would be taking [Don Meyer's] place for the work.

Neither Meyer Brookside nor D & A had workers' compensation coverage, and the Special Compensation Fund assumed responsibility for payment of substantial benefits related to the employee's February 1992 injury. The matter ultimately came on for hearing on July 22 and 23, 1997, for resolution of the employee's claim petition and the Fund's claim for reimbursement and penalties from either or both farm corporations. In a decision issued on November 6, 1997, the compensation judge determined, in part, that the employee's injury arose out of and in the course of his employment with both Meyer Brookside and D & A and that the employee's income from hog sales was includable for purposes of meeting the wage threshold for family farm workers' compensation liability under Minn. Stat. § 176.011, subd. 11a, and 176.041, subd. 1(b). Finding further that D & A was exempt from workers' compensation liability under the act but that Meyer Brookside was not, the judge ordered Meyer Brookside to reimburse the Fund for benefits in proportion to Meyer Brookside's share of the wages that had been paid to the employee. Meyer Brookside appeals.

STANDARD OF REVIEW

In reviewing cases on appeal, the Workers' Compensation Court of Appeals must determine whether the 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, 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). 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, unless 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.

DECISION

Arising Out Of and In the Course Of

The compensation judge concluded that the employee's February 1992 injury arose out of and in the course of his employment with both D & A and Meyer Brookside. On appeal, Meyer Brookside contends that the compensation judge erred in her finding as to the liability of Meyer Brookside, in that the injury occurred on D & A property, and in that D & A was responsible, under the parties' arrangement, for the employee's pay for his work at the time of his injury. We find no error in the compensation judge's finding. The harrower in question was jointly owned by both farm corporations, and the employee's injury occurred as the employee was attempting to move the equipment in preparation for a sale or trade for the benefit of both employers. We also note that the employee was working under the direction of Phil Meyer of Meyer Brookside, not Don Meyer of D & A. Under these circumstances, neither the location of the accident nor the identity of the employer liable for the employee's pay is controlling. Cf. Knutson v. K.M. Nelson Stucco, Inc., No. *[redacted to remove social security number]* (W.C.C.A. Sept. 18, 1997); Hough v. Independent Sch. Dist. #115, No. *[redacted to remove social security number]* (W.C.C.A. Mar. 5, 1996). We affirm the judge's finding on this issue.

Family Farm Exemption

Pursuant to Minn. Stat. § 176.041, subd. 1(b), the Minnesota Workers' Compensation Act does not apply to a person employed by a family farm as defined by section 176.011, subdivision 11a. Family farm is defined in relevant part as any farm operation which pays or is obligated to pay less than $8,000 in cash wages, exclusive of machine hire, to farm laborers for services rendered during the preceding calendar year. Minn. Stat. § 176.011, subd. 11a (emphasis added). The Minnesota Supreme Court has indicated that the family farm exclusion is intended to prevent hardship only to those small farm operations basically run by resident family members with a minimal amount of labor requiring payment of cash wages. Meyering v. Wessels, 383 N.W.2d 670, 673, 38 W.C.D. 482, 485 (Minn. 1986).

In the present case, it is undisputed that the employee earned well over $8,000 from his work for Meyer Brookside in 1991, the calendar year prior to his work injury. However, only just over $4,000 in earnings came from checks written by Meyer Brookside; the remainder of the employee's earnings for Meyer Brookside work came from checks payable to the employee from Central Livestock for hogs sold in the employee's name. Meyer Brookside takes the position that it paid the employee with hogs, not cash, an in kind payment in commodities that does not qualify as cash wages for purposes of Minn. Stat. § 176.011, subd. 11a.

We note initially that the term cash wages is not defined in the worker's compensation act,[3] and we might agree with Meyer Brookside that some earnings that are

[3] Black's Law Dictionary defines cash as [m]oney or the equivalent; usually ready money.

includable in calculating an employee's daily or weekly wage may not be includable for purposes of meeting the cash wages threshold for family farm workers' compensation liability.[4] At the same time, however, the record here amply justifies the compensation judge's decision that the employee's hog earnings are includable for that purpose. First, there is evidence that suggests that the payments in question were not in reality in kind payment to the employee of hogs at all. Phil Meyer decided which hogs to sell, when to sell them, whether to insure them, and who would deliver them to market. The fact that he designated the employee as the payee for certain hogs sales does not necessarily compel the conclusion that the hogs actually or legally changed hands, in that the record reasonably suggests that the employee had no real control over either the hogs or the sales transactions at all.[5] Second, whether or not the hog sale program devised by Phil Meyer was in fact payment in kind with hogs, the record indicates that Meyer Brookside was nevertheless obligated--and recognized that it was obligated--to pay the employee $9.00 an hour in cash for his work, within the meaning of Minn. Stat. § 176.011, subd. 11a. According to the compensation judge's unappealed finding, Phil Meyer used the net amount of the Central Livestock checks to offset what he owed the employee for the hours that the employee worked. In other words, the employee was not responsible for any of the costs associated with the sale of the animals, meaning that his actual pay remained $9.00 an hour in cash, whether through checks from the employers or checks from Central Livestock. There is simply no evidence that the employee assumed any risks or expenses that would otherwise be attendant to the ownership and sale of livestock.

The compensation judge concluded that Phil Meyer's hog sale payment plan was a legitimate business practice utilized by farmers to decrease tax liability for both the farmers and their workers. However, as the compensation judge recognized, the fact that Phil Meyer may have had no intent to avoid workers' compensation liability is essentially irrelevant to the question of whether Meyer Brookside was in fact liable for benefits. The record reasonably supports the conclusion that Meyer Brookside was obligated to pay the employee more than $8,000 in cash wages for his work, that the employee actually received more than $8,000 in cash for his work, and that Central Livestock was merely a conduit for part of the payments owed to the employee by Meyer Brookside. Under these circumstances, we affirm the judge's conclusion that Meyer Brookside is not exempt from workers' compensation liability under Minn. Stat. § 176.041, subd. 1(b).

Currency and coins, negotiable checks, and balances in bank accounts. That which circulates as money. Black's Law Dictionary 196 (5th ed. 1979).

[4] For example, Minn. Stat. § 176.011, subd. 3, concerning an employee's daily wage, makes specific provision for inclusion of board or allowances at their value to the employee. Id.

[5] Phil Meyer testified that the employee could have decided to do something else with the hogs but that the subject never came up. However, how the value of the hogs would have been calculated had the employee chosen not to sell was not addressed. In addition, the employee testified that he did not think that he had any choice in the matter.