DONALD R. BROWN, Employee, v. BOXERS GRILL & PARTY PUB and MINN. ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer/Appellants, and ALLINA HEALTH SYS./ABBOTT NORTHWESTERN HOSP. and FAIRVIEW HOSP. & HEALTHCARE SERVS., Intervenors.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 31, 1998

HEADNOTES

WAGES - MULTIPLE EMPLOYMENTS. Where the employee's primary employment had been car sales for ten years prior to the work injury and the employer testified that but for the injury the employee would have continued to work in car sales indefinitely, the compensation judge's inclusion of the employee's wages from employment as a car salesman in determining weekly wage is supported by substantial evidence.

REHABILITATION. An injured employee is entitled to a rehabilitation consultation as a matter of law upon the request of the employee pursuant to Minn. Stat. § 176.102, subd. 4(a), and the question of whether the employee is a qualified employee is not a threshold issue in determining whether an employee is entitled to a rehabilitation consultation but is to be made in the course of the rehabilitation consultation by the assigned QRC.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Johnson, J.
Compensation Judge: Carol A. Eckersen.

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's findings that 1) the employee earned a weekly wage of $800.00 from his self-employment as a car broker, 2) that his self-employment earnings were includable for purposes of calculating his average weekly wage and 3) that the employee is entitled to a rehabilitation consultation. We affirm the compensation judge's decision.

BACKGROUND

The employee, Donald R. Brown, was born on September 28, 1957, and is currently 40 years old. He is a high school graduate and has completed one year of sales and marketing courses at North Hennepin Junior College. At the time of the hearing the employee was married but separated from his wife and had three children. (T. 68-70.) Prior to working for the employer,

the employee held a number of jobs, including moving and delivering cars for a Mazda dealership in Hopkins, mowing lawns during the summer, serving as a front door man at a nightclub, owning and managing a restaurant/nightclub and managing a restaurant. (T. 70-71.) In 1985 the employee began working as a car salesman at John Naughton Ford in Tampa, Florida. Over the next five years, until mid 1990, the employee worked as a car salesman at Dimmit Nissan in Florida and Southdale Ford and Walzer Mazda in Minnesota. (T. 72-73.) After leaving Walzer Mazda, the employee worked for approximately one year at a business which he owned with his sister, importing and exporting high line automobiles and exotic cars. That business dissolved in 1995 or 1996 and the employee opened his own business, High Line Auto Corporation, in which he sold, bought, financed and rented used vehicles. (T. 72-74.) Sometime in 1996, the employee dissolved High Line Auto Corporation and moved with his family to Arizona. There, the employee worked with a friend, Mark Tharp, for approximately six months selling used automobiles. In addition, during that six-month period, the employee worked part-time selling automobiles at Just Trucks. The employee separated from his wife and moved back to Minnesota in approximately September 1996. (T. 77-78.)

In October 1996, the employee entered into an arrangement of working together selling automobiles with John Nyberg, the owner of Wholesale Trucks. (T. 20.) The employee worked as a broker, buying, selling and inspecting cars using Amoney, licenses, connections [and] cars [provided by Wholesale Trucks] to make income. Mr. Nyberg testified that the employee would set up deals which would vary on a buy fee for him, buying a car from me from my stock or selling one of my cars at a 50% commission or selling one of my cars to a dealer for a commission. His deals were primary retail although he did find some cars for me wholesale. (T. 21.) He further testified that if the employee bought a car for me I would pay him a -- usually a $100, what I call a bird dog fee or a buy fee . . . And on the retail end he would sell a car, collect his commission up front from the retail customer usually in the form of a down payment or a trade and then I would, you know, him and I would settle up when the car was delivered and the customer would pay in full. (T. 23.) Pursuant to the agreement between the employee and John Nyberg, the employee received compensation in two ways: 1) he would receive a buy fee of anywhere between $100 and $300 when he purchased vehicles for Wholesale Trucks, and 2) he would receive a commission of between 40% and 50% of the net profit from the sale of a vehicle. (Pet. Ex. G) Mr. Nyberg further testified that he kept track of the cash transactions involving the employee and two other individuals in a ledger. The ledger indicated that the employee had earned a total of $5,350 during the month of October, $3,950 in the month of November and $2,700 in the month of December 1996. (T. 28-31.) Additionally, Mr. Nyberg testified that but for the employee's January 1997 injury, the employee's working relationship with Wholesale Trucks would have been an indefinite relationship. (T. 37.)

Also in October the employee began accompanying his girlfriend, Susan Barkley, to Boxer's Grill and Party Pub. One night in October, while the employee was at Boxer's, the owner, Ms. Dawn Ryan, asked the employee if he would help out by carving meat for a party in the back room. (T. 159.) The employee agreed and Ms. Ryan paid him the gratuity from the party. (T. 160.) Thereafter, sometime in November, the employee began to work for the employer on a cash-for-services basis. The employee worked as a bouncer from 9:00 p.m. to 1:30 a.m. on

Fridays and Saturdays and was paid $6.00 per hour. (T. 161-62.) The employee worked approximately one night a week beginning in November and worked approximately four and a half hours per night. (T. 163-64.)

On January 10, 1996, while working as a bouncer at Boxer's Grill and Party Pub, the employee was struck in the back of the neck and on the back while attempting to break up a fight. The employee testified that after receiving the blows to his neck and back, he was in a daze and that his whole body went numb. After a couple of minutes the numbness went away and he experienced shooting pains down my arms and my index fingers. (T. 100-101.) The employee testified that at the end of his shift that night there was still numbness and the fire going down my fingertips and that he was worried about what was wrong with him. (T. 102-03.) The employee and Ms. Barkley drove that night from Faribault, Minnesota, where the bar was located, to Ms. Barkley's home in the Twin Cities. By 7:00 a.m. the following morning, the employee's pain had increased and the employee was treated in the emergency room of Fairview Southdale Hospital. (T. 104.) The employee was eventually diagnosed with a herniated C5-6 disc with impingement of both C6 nerve roots and underwent an anterior cervical discectomy and fusion on January 20, 1997. (Pet. Exs. B and C.) The employee was released from the hospital on January 23 with instructions to wear a cervical collar 24 hours a day for eight weeks and to return for a follow-up check in four weeks. (Pet. Ex. B.)

On February 17, 1997, the employee was seen by his treating physician, Dr. Eric P. Flores, M.D., at Neurosurgical Associates, Ltd. Dr. Flores noted that the employee is doing quite well, but that the employee would need to continue wearing the cervical collar for four weeks. He opined that the employee may be able to return in two to three weeks to employment which involves working at a desk or walking, if no lifting, twisting or driving is involved. The doctor further noted that the employee may be able to continue working as a used car salesman providing that he remains well and no lifting or twisting of his head is involved. He is also strongly advised against driving, since he will not be able to turn his head very well while in this stiff cervical collar. (Pet. Ex. B.)

The employee treated again with Dr. Flores on March 25, 1997. At that time, Dr. Flores noted that the employee has done very well post operatively and I suggested that he should wear his cervical orthosis only when he expects to be busy or if he is taking a long trip . . . In terms of occupation, any occupation that involves mostly sitting, writing, or walking would be fine at this point. I cautioned him to avoid occupations that require a lot of lifting. The doctor noted that the employee should return in about four weeks time for another follow-up. (Pet. Ex. B.)

On April 29, 1997, the employee was seen by Dr. Mark C. Engasser, M.D., an orthopaedic surgeon, at the request of the employer. Dr. Engasser obtained a history from the employee, reviewed medical records and preformed a physical examination of the employee. In his report from that examination dated April 29, 1997, Dr. Engasser opined that the employee experienced a permanent aggravation of an underlying pre-existing neck condition and had experienced an excellent result following his treatment. Dr. Engasser released the employee to

work full time with the limitations of no lifting over 30 pounds and avoid positions of the neck which involve maximum flexion and extension for prolonged periods of time. (Resp. Ex. 3.)

Following his operation, the employee did not return to employment as a used car salesman. The employee testified that his inability to lift heavy weights and engage in frequent twisting or bending of his neck precluded him from returning to that occupation. (T. 109.) As a result of his inability to return to car sales, his business relationship with Wholesale Trucks was terminated and another individual began providing the services the employee had been providing prior to his injury. (T. 64, 110.) The employee began an unassisted job search on March 27, 1997, based on his understanding that his doctor had released him to part-time work at a desk. (T. 108.) The job search records submitted by the employee at trial indicates the employee made six job contacts between March 27 and April 2. (Pet. Ex. K.) The employee also testified that he contacted a bunch of car dealers looking for a desk job but was not successful. (T. 109.) As a result of his job search the employee was offered and accepted a part-time job at a Northwest Athletic Club starting April 3, 1997. At the time of the trial in this matter the employee was working twenty hours a week at a rate of $5.00 per hour. The employee testified that although he was not able to find work as a used car salesman within his restrictions he was intending to return to used car sales as soon as he was released by Dr. Flores to do so. (T. 109-112.)

The employee next treated with Dr. Flores on May 13, 1997. Dr. Flores noted that the employee was healing well and suggested that the employee continue with physical therapy but avoid excessive twisting or bending of his neck and avoiding lifting heavy weights at this time. Dr. Flores noted that the employee should return in about two-three months for reevaluation. (Pet. Ex. A.)

On January 30, 1997, the employee filed a claim petition, claiming entitlement to temporary total disability benefits from January 11, 1997 and continuing, permanent partial disability benefits to be determined, payment of certain medical benefits and requesting a rehabilitation consultation. On February 17, 1997, the employer filed an answer to the claim petition denying the extent of the claimed disability. On May 2, 1997, the employee filed an amendment to the claim petition seeking payment of additional medical benefits. On May 30, 1997 the employer admitted liability for the employee's injury and paid temporary total disability benefits from January 20, 1997 through March 25, 1997 based on a weekly wage of $24.00 and various medical benefits.

The matter came on for hearing on July 15, 1997, before Compensation Judge Carol A. Eckersen, at the Office of Administrative Hearings. At the time of trial the issues were 1) the employee's weekly wage at the time of the injury and underpayment of temporary total disability benefits if any, 2) entitlement to temporary partial disability benefits, 3) entitlement to a rehabilitation consultation and 4) whether section 176.225 penalties were awardable for bad faith denial of the employee's claims for benefits. The compensation judge, in her Findings and Order, served and filed September 12, 1997, found that the employee's employment relationship with Wholesale Trucks constituted regular employment as required by Minn. Stat. § 176.011 subd. 3 and that his wages from that employment were includable in calculating the employee's weekly

wage. She determined that the employee's weekly wage was $827.00 and that there had been an underpayment of temporary total disability benefits. The compensation judge also found that the employee had not proven that his current wage was an accurate reflection of his earning capacity and that he was not entitled to temporary partial disability benefits. She further found that the employee was entitled to a rehabilitation consultation. The employer appeals from the compensation judges findings concerning calculation of the employee's weekly wage and to a rehabilitation consultation.

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

Weekly Wage

In her Findings and Order, served and filed September 12, 1997, the compensation judge found that the employee had a verbal agreement with John Nyberg from October 1996 to January 1997 to sell cars either to Mr. Nyberg or through Mr. Nyberg's retail sales license. She also found that Mr. Nyberg kept a ledger which showed cash transactions and that the ledger shows that the employee earned $12,000.00 from October 1, 1996 through January 10, 1997. The employee earned this over 15 weeks resulting in an average weekly wage of $800.00. (Finding 4.) In her memorandum the compensation judge stated

> Mr. Nyberg's testimony and his ledger sheets are credible. The ledger sheets show the cash Mr. Nyberg paid to Mr. Brown for the cars sold or located for Mr. Nyberg to buy. The amount is consistent with Mr. Brown's 1996 tax return.

She then addressed the employer and insurer's argument that the reasoning in Richards v. National Design Ware, No. *[redacted to remove social security number]* (W.C.C.A. Sept. 28, 1993), was applicable to the case at hand and concluded

> . . . while there are similar elements in this case, the preponderance of the credible evidence leads me to conclude that the employee was regularly employed as a car broker. There is no accounting of the amount of time the employee worked but Mr. Brown and Mr. Nyberg testified that the hours are irregular. The tax forms prepared and offered here were generated after this litigation commenced. However, Mr. Nyberg testified that he was satisfied with the business relationship he had with Mr. Brown and intended to continue buying and selling cars with him. His records show that Mr. Brown sold or located a number of cars and was paid for his services. A preponderance of the credible evidence leads me to conclude that Mr. Brown was regularly employed as a self-employed car broker on January 10, 1997.

On appeal the employer and insurer argue that the compensation judge's conclusion that the employee's earnings from his self-employment venture with Mr. Nyberg are includable for purposes of determining his weekly wage is clearly erroneous and unsupported by substantial evidence. They argue that the language of Minn. Stat. § 176.011 subd. 3, requires that the employee be regularly employed by two or more employers at the time of the injury for both wages to be considered in determining the employee's weekly wage. Here, they assert that there were Ano earnings whatsoever for the employee from his self-employment venture in January 1997" and that the employee did not have any outstanding contracts with customers that would have guaranteed any earnings in January 1997. They further assert that it is impossible to determine by these ledger statements [drafted by Mr. Nyberg] when the employee actually worked. Therefore, they argue, that it is speculative, at best, as to whether or not the employee was truly >regularly employed' at the time of the January 10, 1997 injury. (Employer's Brief p. 7.) Additionally the employer and insurer argue that the Richards case does apply to the case at hand and urge that compensation judge Eckersen's finding that the employee's earnings are includable for purposes of determining his average weekly wage be reversed because like Richards, the employee's evidence submitted in support of his >regular employment' is nebulous at best. (Employer's Brief p. 10.)

Minn. Stat. § 176.011, subd. 18, provides a definition of weekly wage. It states in relevant part that

> >Weekly wage' is arrived at by multiplying the daily wage by the number of days and fractional days normally worked in the business of the employer for the employment involved. . . If at the time of the injury, the employee was regularly employed by two or more

> employers, the employee's days of work for all such employments shall be included in the computation of weekly wage.

The statute does not define regularly employed, however, this court has held that the term >regularly employed' is used in contrast to >casual' employment, a distinction which >. . . must be determined with principal reference to the scope and purpose of the hiring.' Where there is a continuing engagement to serve the employer in his business at such time as the particular and essential service may be needed, the employment is not >casual' according to any of the judicial definitions of that term. Newbauer v. Pepsi Bottling Group, 43 W.C.D. 339 (1990) citing McSherry v. City of St. Paul, 277 N.W.2d 541, 545 (Minn. 1938). Additionally, this court has held that the primary purpose of a wage determination at the time of injury is to reach a fair approximation of [the employee's] probable future earning power which has been impaired or destroyed because of the injury. Bradley v. Vic's Welding, 405 N.W.2d 203, 245-46, 39 W.C.D. 921, 924 (Minn. 1987). See also, Boelter v. City of Ham Lake, 481 N.W.2d 50, 51, 46 W.C.D. 220, 221 (Minn. 1992).

In the Richards case the compensation judge reviewed the evidence submitted by the employee and determined that there was a lack of proof in respect to regular employment other than with [the employer] on the date the employee was injured. Additionally the employee in that case did not declare or file any of the required income tax forms on earnings from any employment other than with the employer until learning that the employer's attorney had obtained copies of the employee's previously filed tax forms. On appeal from that decision this court reviewed the evidence submitted at trial and concluded that there was substantial evidence to support the compensation judge's factual finding. As stated above, on appeal this court 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). Where evidence conflicts or more than one inference may be reasonably drawn from the evidence, the findings are to be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Our decision in Richards stands only for the proposition set forth in Hengemuhle and does not set forth any rule of law compelling a certain weekly wage finding under similar circumstances.

Here, the compensation judge determined, after reviewing all the evidence, that the employee was regularly employed with John Nyberg and Wholesale Trucks. The employee worked as a car salesman for ten years prior to entering into the business relationship with John Nyberg in October of 1996. Mr. Nyberg testified[1] that he and the employee had entered into a verbal agreement to work together selling automobiles, that in early January he still considered Mr. Brown to be working full-time doing this car brokering and that but for the employee's January

[1] The compensation judge in her memorandum specifically found that Mr. Nyberg's testimony was credible. The credibility of witness testimony is uniquely the province of the finding of fact, and this court will not reverse determinations based upon witness credibility unless clearly erroneous. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

injury the employee's working relationship with Wholesale Trucks would have been an indefinite relationship. We find that the employee's long history of primary employment as a car salesman, coupled with Mr. Nyberg's testimony, is substantial evidence which the compensation judge could have relied upon in determining that the employee's business relationship with John Nyberg constituted regular, and more than casual, employment.

The employer and insurer also argue that even if the employee was regularly employed as a car broker the compensation judge's determination that the employee earned $800.00 per week from October 1996 through January 1997 from his employment with Wholesale Trucks is clearly erroneous and unsupported by substantial evidence in the record. They assert that both the employee and John Nyberg testified at the hearing that the employee generally incurred expenses, such as buying parts to repair cars before sale. They point out that Mr. Nyberg testified that often the employee would buy these parts himself and then they would work it out later and that he [Mr. Nyberg] could not be sure whether or not the expenses were ever accounted for in the transactions listed on the ledger sheets introduced by the employee. Therefore, they argue the gross earnings determined by Judge Eckersen do not take into account the expenses incurred by Mr. Nyberg and the employee to generate the revenue. (Employer's Brief p. 11.)

In her memorandum the compensation judge stated that she found the ledger sheets kept by John Nyberg to be credible. Upon review of those ledger sheets, she determined that the employee earned a total of $12,000.00 from October 1, 1996 through January 10, 1997. She then divided the total amount earned by the employee by the number of weeks the employee worked and arrived at an average weekly wage of $800.00. At trial, Mr. Nyberg testified:

> Q. And if there were expenses incurred on the vehicle during the sale, say if you needed a new starter, what would that come out of or how would that be reflected?
>
> A. Well it could come out of anywhere. You know, we've got charge accounts, you know, I could have it charged. Don lots of times would buy it himself and then, you know, we'd work it out when it's done. If it needed this I'll, you know, clean-ups and that type of thing he'd pay himself. You know, I'll pay the clean-up of 60 bucks and then, you know, when we figure out what was made, you know, then we all, you know, it gets all squared up.
>
> Q. So would you take into account his expenses when you calculate the commission?
>
> A. Yeah, I probably did. Probably not to the penny, you know, they're rounded off. I use pretty much round numbers. Like I said, it's just a way of getting an accurate description of what he made. In the car business we pretty much deal in round

> numbers, we don't, you know -- I mean we deal in $500.00 increments usually as a rule.

Upon review of the testimony in the transcript we find that the compensation judge could reasonably have determined that the statement of earnings in the ledger sheets kept by Mr. Nyberg represented the employee's earnings after expenses. Accordingly, we affirm the compensation judge's determinations regarding the calculation of the employee's weekly wage.

Rehabilitation

The compensation judge determined that the employee was entitled to a rehabilitation consultation. The employer and insurer argue that the compensation judge's conclusion that the employee is entitled to a rehabilitation consultation is erroneous and unsupported by substantial evidence because the employee has returned to work. They argue that rehabilitation services may be provided only to a qualified employee and that the compensation judge should have determined that the employee was not a qualified employee for the purposes of determining eligibility for a rehabilitation consultation because the employee was currently working at a wage greater than his alleged weekly wage of $27.00 at Boxer's Grill and Party Pub.

Because we have affirmed the compensation judge's determination as to the computation of the employee's weekly wage, the employer's contention that the employee is not entitled to a rehabilitation consultation because he is currently earning in excess of his alleged pre-injury weekly wage of $27.00 is rejected. Additionally, we note that an injured employee is entitled to a rehabilitation consultation as a matter of law upon the request of the employee pursuant to Minn. Stat. § 176.102, subd. 4(a). This court has previously held that the question of whether the employee is a qualified employee is not a threshold issue in determining whether an employee is entitled to a rehabilitation consultation but is to be made in the course of the rehabilitation consultation by the assigned QRC. See Goodwin v. Byerly's, Inc., 52 W.C.D. 90 (W.C.C.A. 1994); Pelland v. The Gillette Company, slip op. (W.C.C.A. October 25, 1995). The compensation judge's award of a rehabilitation consultation is therefore affirmed.