

DEANNE P. COYLE, Employee/Cross-Appellant, v. AUGIE'S THEATRE LOUNGE and MINNESOTA ASSIGNED RISK PLAN/BERKLEY ADM'RS, Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 11, 1999

No. [REDACED SSN]

HEADNOTES

WAGES - CALCULATION. Contemporaneous reporting of tip income is not required for the tip income to be included in determining the employee's weekly wage.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence supports the compensation judge's finding that the employee's wrist injury in a slip and fall was not a consequence of her work-related shoulder injury.

Affirmed.

Determined by Hefte, J., Pederson, J., and Johnson, J.
Compensation Judge: Harold W. Schultz

OPINION

RICHARD C. HEFTE, Judge

On November 10, 1997, Deanna P. Coyle (employee) sustained an admitted work-related injury to her right shoulder while working for Augie's Theatre Lounge (employer), which was insured for workers' compensation liability by Minnesota Assigned Risk Plan (insurer). The employee was paid a salary and commissions from the employer, and also received tips from customers while working. The employer did not require the employee to report these tips to the employer. The employee reported the tips on her tax returns. The employee received workers' compensation benefits based on a \$300.00 weekly wage which included her salary and commissions.

As part of the treatment for her shoulder injury, the employee was treated by Dr. Edward McElfresh, who instructed the employee to wear a shoulder immobilizer and to remove it only for bathing. Dr. McElfresh's notes from January 5, 1998, indicated that the employee had reported not wearing the immobilizer for a week. The employee testified that she wore the immobilizer when she went outside. On January 9, 1998, the employee injured her left wrist when she slipped and fell while walking on a snow-covered path. The emergency room records state that the employee fell while skating, and there is no mention of the shoulder injury or immobilizer. Dr. McElfresh opined that the employee's wrist injury was a consequence of the employee's work-related right shoulder injury since when the employee fell on the snow she

"probably put out her left arm rather than both arms or her right arm because of trying to protect the right shoulder which was still painful." On April 15, 1998, the employee underwent an independent medical examination with Dr. Jerry Reese. Dr. Reese opined that there was no relationship between the two injuries.

The employee filed a claim petition alleging a consequential injury, claiming that she was only able to use one arm to catch herself because she was protecting her right arm and using the immobilizer, and also claiming a weekly wage of \$644.65 which included her tip income. A hearing was held on May 21, 1998. The compensation judge found that the employee's left wrist injury was not a consequential injury of her work-related injury, and that the employee's tips should be included in determining her weekly wage. The employer and insurer appeal the compensation judge's decision to include the employee's tips in determining the weekly wage. The employee cross-appeals the compensation judge's finding that the employee's wrist was not a consequential injury.

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 (1998). 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.

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

Weekly Wage

The employer and insurer appeal the compensation judge's finding that the employee's weekly wage was \$644.65, which includes her tip income. The employer and insurer argue that the employee's weekly wage should be based only on her salary and commissions, which

would be \$300.00. The compensation judge found that the employee's weekly wage should include tips that she received from customers and reported on her tax returns for a total weekly wage of \$644.65. The employee's weekly wage is calculated 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. Minn. Stat. § 176.011, subd. 18. Minn. Stat. § 176.011, subd. 3, provides that daily wage is "the daily wage of the employee in the employment engaged in at the time of injury but does not include tips and gratuities paid directly to an employee by a customer of the employer and not accounted for by the employee to the employer." In this case, the employer did not require reporting of tips, and the employee did not report the amount of tip income to the employer until this litigation commenced.

The employer and insurer argue that the employee's tips should not be included pursuant to the statute since the employer did not require reporting of the tips. Contemporaneous reporting of tips is not required, and unreported tip income should not be excluded where necessary to accurately reflect the total tip income received by the employee. Stresemann v. Little Jack's Steakhouse, 44 W.C.D. 408 (W.C.C.A. 1991), summarily aff'd (Minn. Apr. 23, 1991). In that case, a waitress did not report a portion of her tips until six months after the injury. The tips were included in calculating the weekly wage because under the statute, "there is no time frame or manner in which the tips have to be reported." Id. at 413-14. The compensation judge in that case found that the reporting method was reasonable, and there was no showing that the employee was not credible or that the amount reported was not accurate. In this case, the employee did not report the income until litigation commenced. This delay in reporting the tip income does not preclude its inclusion in calculating the employee's weekly wage. The compensation judge did not err by finding that this reporting was sufficient and including the tips in determining the weekly wage. Therefore, we affirm, and we decline to overturn Stresemann.

Wrist Injury

The employee injured her left wrist approximately two months after her work injury. The employee claimed that she slipped and fell on snow while wearing a shoulder immobilizer for her work injury and as a result could only use her left hand to stop her fall. Dr. McElfresh opined that the wrist injury was therefore a consequential injury of the work injury. Dr. Reese, however, opined that there was no relationship between the two injuries. It is the compensation judge's responsibility, as trier of fact, to resolve conflicts in expert testimony. Nord v. City of Cook, 360 N.W.2d 337, 342, 37 W.C.D. 364, 372 (Minn. 1985). While the employee testified that she always wore the immobilizer when she walked outside, the compensation judge found that employee was not wearing her shoulder harness at the time of her wrist injury based on the evidence of emergency room records which indicate that the employee fell while skating and do not mention the immobilizer. Assessment of the credibility of a witness is the unique function of the trier of fact. Brennan v. Joseph G. Brennan, M.D., P.A., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988). A finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 835, 42 W.C.D. 220, 225-26 (Minn. 1989). Substantial evidence supports the compensation judge's finding that the injury was not a consequence of the right shoulder work

injury. Therefore, we affirm.