LARRY R. JUDAY, Employee, v. EAST CENTRAL ELEC. ASS'N and FEDERATED MUT. ELEC. INS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 9, 1999

No. [REDACTED SSN]

HEADNOTES

EMPLOYMENT RELATIONSHIP - APPRENTICE. Substantial evidence, including the employee's testimony and payroll records, supported the compensation judge's conclusion that the employee was an apprentice, for purposes of wage and benefit calculations, on the date of his work injury.

WAGES - MINORS & APPRENTICES. The compensation judge incorrectly calculated the imputed wage for the employee, an apprentice on the date of his injury, using the current version of Minn. Stat. § 176.101, subd. 6, rather than the statewide average weekly wage on the date of injury.

ECONOMIC RECOVERY COMPENSATION - SUITABLE JOB; EVIDENCE - BURDEN OF PROOF. Where the compensation judge used an incorrect imputed wage in considering wage disparity and improperly placed the burden on the employer and insurer to prove that the employee's post-injury job was economically suitable, remand was necessary for reconsideration of the employee's entitlement to economic recovery compensation for his permanent impairment.

Affirmed in part, modified in part, and remanded.

Determined by Wilson, J., Pederson, J., and Rykken, J.
Compensation Judge: Jeanne K. Knight.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's decision that the employee was an apprentice on the date of injury, from the judge's calculation as to the employee's imputed wage, and from the judge's award of economic recovery compensation. We affirm the finding that the employee was an apprentice, modify the judge's calculation as to imputed wage, and remand the matter to the judge for reconsideration on the issue of economic recovery compensation.

BACKGROUND

The employee began an apprenticeship program in the power line worker trade with the employer, East Central Electric Association, on May 13, 1988. The apprenticeship consisted of on-the-job training and book work with tests. The employee had nine sections of testing to complete each year for a period of four years. He completed all nine sections for his first year by June 1, 1989, began his second year on September 1, 1989, and had completed four sections when, on August 20, 1990, he sustained an admitted work-related injury to his low back. The employee was earning an apprentice wage of $12.52 per hour on the date of this injury.

The employer and insurer paid temporary total disability benefits from August 21, 1990, to August 28, 1990, and temporary partial disability benefits from August 28, 1990, to September 6, 1990, based on an average weekly wage of $605.60. The employee returned to full-time work on September 6, 1990, and reinjured his back on October 22, 1990. He was still earning $12.52 per hour at that time. Payroll records reflect that the employee was given a "step increase" to $12.89 per hour as an apprentice lineman effective November 16, 1990. The employer and insurer paid temporary total disability benefits from October 23, 1990, through March 11, 1991, based on the August 20, 1990, injury date. Rehabilitation services were instituted in December of 1990, and on or about March 12, 1991, the employee returned to work for the employer. He was no longer physically able to perform the necessary work as a lineman and began working full time as a meter reader on June 3, 1991, earning $7.54 per hour. On July 16, 1991, the employee's apprenticeship was formally canceled by the State of Minnesota. The employer and insurer paid temporary partial disability benefits continuing from March 12, 1991, again based on an average weekly wage of $605.60 from the injury of August 1990. The employer and insurer also paid the employee impairment compensation for a 19% permanent partial disability of the whole body, based on a March 20, 1992, report of Dr. Randall Westerberg.

The employee filed a claim petition on August 20, 1997, claiming an underpayment of temporary total and temporary partial disability benefits[1] and seeking economic recovery compensation for his permanent partial disability. The matter came on for hearing before a compensation judge of the Office of Administrative Hearings on December 2, 1998. In findings filed on January 26, 1999, the compensation judge determined that the employee was an apprentice "on both dates of injury,"[2] that the employee was entitled to an imputed average weekly wage of $922.50, and that the employee's job as a meter reader was not economically suitable, therefore entitling the employee to economic recovery compensation for his permanent impairment. The employer and insurer appeal.

STANDARD OF REVIEW

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[1] The employee claimed entitlement to an imputed wage because he was an apprentice.

[2] At oral argument, counsel for the employee stipulated that the only injury that the employee was claiming at trial was the injury of August 20, 1990. Our decision is therefore based on that date of injury.

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

Apprentice

The employer and insurer do not dispute that the employee enrolled in a state-approved apprenticeship program effective May 13, 1988. They contend, however, that, since the employee did not complete any testing after May 1, 1990, "the facts indicate [the employee] had clearly dropped out" and was no longer an apprentice on the date of injury. We are not convinced.

The only testimony regarding the apprenticeship program came from the employee. He testified, and payroll records reflect, that he was receiving apprentice wages on the date of his August 20, 1990, work injury. He further testified that, although he did not complete any testing between May 1, 1990, and his injury on August 20, 1990, he had not abandoned the program and still intended to complete the remaining five tests by the end of the second year. There is no evidence that this would not have been permissible or possible. At oral argument, counsel for the employer and insurer contended that the employee's testimony on this subject was not credible. The judge, however, obviously accepted the employee's testimony, and assessment of a witness's credibility is the unique function of the trier of fact. Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989).

Evidence also establishes that the employee continued to perform the on-the-job training aspects of his apprenticeship through the date of his injury. Also, records show that the employer gave the employee an apprentice raise after his date of injury, and the only formal evidence of termination of the apprentice program was the notice of cancellation from the Department of Labor and Industry dated July 16, 1991. Substantial evidence clearly supports the compensation judge's finding that the employee was an apprentice on the date of injury.

Imputed Wage

The employer and insurer contend in their brief that the compensation judge erred in using an imputed weekly wage of $922.50, because the "parties had stipulated that the imputed wage is $615." At oral argument, the employer and insurer clarified that, if the employee was an apprentice, the correct imputed wage would be $619.50, calculated pursuant to Minn. Stat. § 176.101, subd. 6.

Counsel for the employee argued that Minn. Stat. § 176.101, subd. 6 (1990), does not mandate calculation of an imputed wage based on the statewide average weekly wage on the date of injury.[3] Rather, according to the employee, a compensation judge may "depart upwards" in finding an imputed wage, and substantial evidence supports the judge's conclusion that $922.50 should be used as the employee's imputed wage as an apprentice in the present case.[4] We are not persuaded by this argument.

The statute in effect on the date of injury applies to calculation of an apprentice's imputed wage. We find no support in the case law for the employee's position that a compensation judge can "depart upwards" for purposes of that calculation. Minn. Stat. § 176.101, subd. 6, was addressed by the Minnesota Supreme Court in the case of Woodwick v. Shamp's

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[3] Minn. Stat. §176.101, subd. 6 (1990), reads:

> If any employee entitled to the benefits of this chapter is a minor or is an apprentice of any age and sustains a personal injury arising out of and in the course of employment resulting in permanent total or a compensable permanent partial disability, for the purpose of computing the compensation to which the employee is entitled for the injury the compensation rate for temporary total, temporary partial, and permanent total disability or economic recovery compensation shall be the statewide average weekly wage.

[4] The $922.50 figure used by the compensation judge appears to be based on the statute in effect on the date of hearing and utilizes the maximum compensation rate effective as of that date. Minn. Stat. § 176.101, subd. 6(a) (1998), reads:

> If any employee entitled to the benefits is an apprentice of any age and sustains a personal injury arising out of and in the course of the employment resulting in permanent total or compensable permanent partial disability, for the purpose of computing the compensation to which the employee is entitled for the injury, the compensation rate for temporary total, temporary partial, or permanent total disability shall be the maximum rate for temporary total disability under subdivision 1.

Pursuant to Minn. Stat. § 176.101, subd. 1(b)(1) (1998), "the maximum weekly compensation payable is $615 per week." ($922.50 x 2/3 = $615.00 - maximum compensation rate on date of hearing).

Meat Market, 435 N.W.2d 816, 41 W.C.D. 674 (Minn. 1989). While that case involved a minor rather than an apprentice, the applicable statute is the same for both classifications.[5] In Woodwick, the court held that Minn. Stat. § 176.101, subd. 6, governed calculation of benefits for a minor and awarded temporary partial disability benefits based on the difference between an imputed wage of $513.00 and the employee's actual wages post-injury. The $513.00 figure represented the wage necessary to produce a compensation rate of $342.00, which was the statewide average weekly wage on the date of injury (2/3 of $513 = $342). Accordingly, the appropriate imputed wage in the instant case is $619.50, the wage necessary to produce a compensation rate of $413.00 (the statewide average weekly wage on the date of injury). The judge's imputed wage finding is therefore modified to reflect an imputed wage of $619.50.

Economic Recovery Compensation

The compensation judge found that the employee's job as a meter reader was not economically suitable and awarded economic recovery compensation. There are two problems with the compensation judge's analysis on this issue, requiring remand.

First, citing Nelson v. Dahlen Transport, Inc., 43 W.C.D. 479 (W.C.C.A. 1990), the compensation judge stated in her memorandum that the burden of proof was on the employer to prove that the employee's job was suitable. Nelson, however, involved an employer and insurer's petition to discontinue benefits based on refusal of a suitable job offer. An employer and insurer do have the initial burden of proof in a petition to discontinue. See King v. Farmstead Foods, 45 W.C.D. 292 (W.C.C.A. 1991). However, the present case involves a claim petition for economic recovery compensation filed by the employee. The burden of proof in this instance is on the employee. See Gazett v. Manpower Temporary Servs. slip op. (Feb. 10, 1994). Second, the compensation judge was using an incorrect imputed wage of $922.50 when she considered the issue of "wage disparity." Economic suitability must be reevaluated using the correct imputed wage of $619.50. We therefore remand this matter for reconsideration of the issue of the economic suitability of the meter reading job, utilizing the correct burden of proof and imputed wage. On remand, the compensation judge should also determine when maximum medical improvement [MMI] was reached and served,[6] and the meter reader job should be analyzed with reference to the employee's earnings and earning potential as of the 90-day post-MMI period. When considering economic suitability, the judge should compare not only any wage disparity between the imputed wage and what the employee was earning as a meter reader in the 90 days post-MMI, but also the opportunities for advancement that existed in that job, in addition to the other factors outlined in Jerde v. Adolfson and Peterson, 484 N.W.2d 793, 46 W.C.D. 620 (Minn.

[5] The legislature subsequently amended subdivision 6 to distinguish between minors and apprentices, but that amendment is irrelevant here.

[6] The record includes an MMI Physician's Report of Dr. Westerberg dated March 20, 1992; however, we see no evidence that this or any other MMI report was ever served on the employee.

1992). The judge may reconsider the matter on the present record or receive additional evidence as she deems necessary.