WILMA KMETT, Employee/Appellant, v. CENT. SPECIALTIES, INC., and MD. CAS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MARCH 25, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - SEASONAL WORK; WAGES - IRREGULAR; WAGES - OVERTIME. Where the employee's job was seasonal and her hours and days of work per week were affected by weather conditions; and where substantial evidence supported the finding that employee's work week was not more than five days a week; and where the employee's overtime work hours were regular and frequent; and there is evidence in the record from which the statutory calculation of the employee's daily and weekly wage can be made; and the computation of the employee's average daily wage includes regular overtime hours; therefore, the employee's average weekly wage pursuant to Minn. Stat. § 176.011, subd. 3, is the five times the employee's daily wage.

Reversed.

Determined by Hefte, J., Pederson, J., and Wheeler, C.J.
Compensation Judge: Joan G. Hallock

OPINION

RICHARD C. HEFTE, Judge

The employee appeals the compensation judge's finding of the employee's average weekly wage. We reverse.

BACKGROUND

While working for the employer, Central Specialities, Inc., Wilma Kmett, the employee, sustained an admitted work-related injury on July 11, 1996. At the time of her injury the employee was working as a flag person on a road construction site near Cass Lake, Minnesota. The employee was hired as a seasonal worker who directed traffic at a construction site. Flaggers were hired by the employer on a seasonal basis for projects that usually lasted for "two or three weeks." Flaggers were generally hired from the local area near the construction project and rarely were hired for future projects because the employer's construction company, headquartered in Alexandria, Minnesota, performed projects in a wide geographical area. The employee lived about 15 miles from the project where she was injured.

The first time the employee worked for the employer was on July 3, 1996, a

Wednesday. The employee testified when she noticed a road construction crew working on a road near her home, she applied for work at the job site on July 3, 1996, was hired, and began working that same day, July 3, as a flagger. She claimed she was hired to work 10 hour days, six days a week; however, she would not work in the event the employer had to shut down because of the weather conditions. The employer denied the employee's statement that she was hired to work a six-day work week.

In July 1996, the employee worked three days for the employer during her first week at work: 13¼ hours on July 3; 15¼ hours on July 5; and 7¾ hours on July 6. During her second week at work, the employee worked four days including the day she was injured: 8 hours on July 8 (Monday); 11 hours on July 9; 14 hours on July 10; and 9½ hours on July 11. According to the employer, her basic hourly rate of pay was $8 per hour, plus time and a half for overtime. There is some confusion as to the rate of pay as the employee initially testified that her hourly rate of pay was $14.50 per hour, which apparently included benefits. When asked what her base rate of hourly pay was, the employee said she didn't know what it was at the time of her injury. Employer's Exhibit E indicated the employee's rate of pay was $8.00 per hour. The employee's 1996 W-2 form completed by the employer shows wages for the year to be $1,193.41, which represented the employee's wages for her seven days of work for the employer. The total wages of $1,193.41 is not disputed. There is no evidence the employee worked for the employer for more than the seven days in 1996. Time records were introduced of four other flaggers who worked for the employer in July 1996 which indicated that they worked only 3, 4 or 5 days a week with similar overtime as the employee in this matter.

There is no dispute that the employee's job was seasonal and not a year-round job. Previous to 1996, the employee worked as a flagger for different employers in construction during the summer season. Her tax records show that the employee's employment grossed $13,907.00 in 1993, $7,710.00 in 1994, and $9,493.65 in 1995. Specifically the employee earned $3,400.00 as a flagger in 1993, $849.00 as a flagger in 1994 and $5,446.16 in 1995.

The compensation judge found that the employee's overtime was irregular and infrequent and that the evidence did not support a finding that a six-day work week should be used for calculating the employee's weekly wage. The compensation judge found that the employee's average weekly wage at the time of her work injury was $320.00 (40 hours a week times $8.00 per hour). The compensation judge did not include any overtime wages in calculating the employee's average weekly wage. The employee claims that her overtime was regular and frequent, and that pursuant to the statutory provisions in Minn. Stat. § 176.011, subd. 3 and subdivision 18 her daily wage should be $170.49 (total wages divided by the number of days worked) and her average weekly wage should be $852.45.[1] The employee appeals.

[1] The employee in her claim petition, claimed her average weekly wage to be $852.45. (Total wages $1,193.41 divided by seven equals $170.49 times five days per week equals $852.45.) The issue in the compensation judge's findings and order is stated as "whether the employee's average weekly wage is $852.45." In the employee's brief, the employee claims an average

STANDARD OF REVIEW

"[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).

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.

DECISION

There is no dispute that the employee, at the time she sustained a work-related injury, was employed as a seasonal worker in the road construction industry as a flagger. The sole issue in this case is the employee's average weekly wage. The compensation judge concluded that the employee's average weekly wage should be based on a five-day, 40-hour work week at $8.00 per hour in this matter and therefore her average weekly wage would be $320.00. The employee claims the compensation judge erred in the determination of the employee's average weekly wage. We agree and reverse.

Minn. Stat. § 176.011, subd. 3 provides, in pertinent part:

> **Subd. 3. Daily wage.** "Daily wage" means 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. If the amount of the daily wage received or to be received by the employee in the employment engaged in at the time of injury was irregular or difficult to determine, or if the

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weekly wage of $1,022.94, daily wage times six days.

> employment was part time, the daily wage shall be computed by dividing the total amount the employee actually earned in such employment in the last 26 weeks, by the total number of days in which the employee actually performed any of the duties of such employment, provided further, that in the case of the construction industry, mining industry, or other industry where the hours of work are affected by seasonal conditions, the weekly wage shall not be less than five times the daily wage.

And, Minn. Stat. § 176.011, subd. 18 provides, in pertinent part:

> **Subd. 18. Weekly wage.** "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 the employee normally works less than five days per week or works an irregular number of days per week, the number of days normally worked shall be computed by dividing the total number of days in which the employee actually performed any of the duties of employment in the last 26 weeks by the number of weeks in which the employee actually performed such duties, provided that the weekly wage for part time employment during a period of seasonal or temporary layoff shall be computed on 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. Occasional overtime is not to be considered in computing the weekly wage, but if overtime is regular or frequent throughout the year it shall be taken into consideration.

As a seasonal construction worker, the employee did not work year-round and would not work a full work week when bad weather prevented the employee from working on a certain day or days of a week. It is evident in this case that the wages received by the employee herein were irregular or difficult to determine so that the daily wage should be calculated pursuant to the applicable sections of Minn. Stat. § 176.011, subd. 3. The supreme court has concluded Minn. Stat. § 176.011, subd. 3 "imputes a full-time wage basis to workers in certain industries." Berry v. Walker Roofing Co., 473 N.W.2d 312, 314, 45 W.C.D. 125, 127 (Minn. 1991). Deviation from the statutory formula may be permitted "[w]here the evidence necessary to comply with the statutory directives concerning calculation of the weekly wage is not available." Hansford v. Berger Transfer, 46 W.C.D. 303, 309 (W.C.C.A. 1991). In the present case, there is evidence submitted by the parties of the necessary wage information needed to comply with the statutory directives concerning the calculation of the employee's daily and weekly wage. Thus, the daily wage would be calculated by dividing $1,193.41 (the total amount the employee actually

earned) by the total number of days the employee performed her duties of employment, seven. This would result in $170.49 as the employee's daily wage. Further, under subdivision 3, where the hours of work of the employee in the construction industry were affected by seasonal conditions, the weekly wage is, as a matter of law, calculated at not less than five times the daily wage. Berry, 473 N.W.2d at 315, 45 W.C.D. at 129.

The employee claims that she was hired to work six days per week as a flagger at 10 hours per day and therefore the daily wage should be multiplied by six. However, the employer's manager testified that the employee was not hired to work six days per week and her work week as a flagger was not six days; however, the employee, on occasion, might work a six-day week if work was available and the weather permitted full-time work during this six-day period. The employee's work records indicate that she did not work six days in any work week. Also there was no other evidence of other flagger employees ever working six days in a week. (Ex. 2, A.) The opportunity for flaggers such as the employee to work more than five days a week was dependent on the weather. Substantial evidence supports the compensation judge's finding that the employee failed to prove that she was not hired for nor did she work a six-day work week at the time of her work injury. Therefore, under subdivision 3, calculating the average weekly wage is initially by determining the daily wage, $170.49, as stated above, and then multiplying the daily wage by five, resulting in a weekly wage of $852.45.

The employer and insurer claim that the employee's average daily and weekly wage determination under subdivision 3, is subject to the limitation in Minn. Stat. § 176.011, subd. 18, which indicates that occasional overtime is not to be considered in computing the average weekly wage. On the other hand, if overtime is regular or frequent it shall be taken into consideration in computing the weekly wage. It is noted that in arriving at the average weekly wage by applying subdivision 3, that there is no mention in subdivision 3 of an overtime exclusion provision. The employer and insurer claim that the overtime exclusion for the employee's weekly wage in subdivision 18 should apply in computing the average weekly wage in this matter. Considering this argument of the employer and insurer of the subdivision 18 overtime exclusion, we have reviewed the overall record in this matter and conclude that the finding by the compensation judge that the employee's overtime was not regular and frequent is contrary to the weight of the evidence and not supported by the evidence as a whole. In the first week the employee worked for the employer, the employee worked 13¼ hours, 15¼ hours, and 7¾ hours, totaling 36.25 hours for three days work (the employee started in the middle of the week, a Wednesday); during the second week that the employee worked for the employer, she worked 8 hours, 11 hours, 14 hours, and 9½ hours, totaling 42.5 hours for the four day's work. The employee was injured while at work on a Thursday, July 11, 1996, her fourth and last day at work. It is evident that a mistake has been made in finding that the employee's overtime was not regular and frequent. We reverse the findings that indicate that the employee's overtime was not regular and not frequent and find that the employee's overtime was regular and frequent. Thus, when considering the overtime provision in subdivision 18, all the hours worked by the employee should be considered in computing the employee's average weekly wage.

The employer and insurer's main argument is that the average weekly wage

calculation claimed by the employee and determined by this opinion, results in an imputed yearly earning potential significantly higher than the employee's actual annual earnings. This court spoke to this argument in a similar case, Palkowski v. Lakehead Constructors, 57 W.C.D. 21 (W.C.C.A. 1997), indicating:

> Although the wage calculation required in this case results in an imputed yearly earning potential significantly higher than the employee's actual annual earnings, it is transparently obvious that application of the statutory formula to a seasonal worker will always produce an imputed wage greater than the employee's actual earnings. Moreover, although the disparity between the employee's actual earnings and the value of the imputed weekly wages magnified by the inclusion of overtime in this case, the result appears to be precisely that contemplated by the statute. The statutory calculation represents the legislative intent to "factor out" the periods of seasonal unemployment or underemployment and to compensate such workers as though they were year round employees. . . . The computed wage here is that which the employee would have earned had his seasonal work been performed year round at the wages he received during the periods of work.
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> We agree with the employer and insurer that there is a large, even extreme, disparity between the employee's average weekly wage as calculated and her actual annual earnings. However, the calculations made in this case are those specifically mandated by the statute, and the question of whether the result is reasonable and fair is a question not for this court, but one best directed to the legislature.

(Palkowski applied the statutory method of determining the employee's weekly wage pursuant to Minn. Stat. § 176.011, subd. 3 based on the fact that the employee's job was subject to seasonal conditions, and based on the employee's overtime wages during the time periods in which the employee actually worked.)

Therefore, we reverse the compensation judge's finding on average weekly wage and modify the finding to the effect that the employee's average weekly wage is $852.45.