MERLE J. LORENSON, Employee/Appellant, v. POLARIS INDUS., SELF-INSURED/ALEXSIS RISK MGMT. SERVS., Employer.

WORKERS' COMPENSATION COURT OF APPEALS
AUGUST 25, 1999

No. [REDACTED SSN]

HEADNOTES

PRACTICE & PROCEDURE - DISCOVERY; WAGES - BONUS. Where the information sought by the employee regarding the employer's profit sharing, stock distribution and 401(k) plans were limited to questions about the employer's budget process, hiring advertisements and plan documents, and not to the critical factual issue necessary for determining if the plans met the requirements of the Stewart v. Ford Motor Co., 474 N.W.2d 162, 45 W.C.D. 175 (Minn. 1991) (profit sharing plans), or Boschee v. Barry Blower, slip op. (W.C.C.A. Aug. 25, 1989) (pensions), decisions, the motion to compel was properly denied. The information sought was not related to the question of whether the employee had control over the overall annual profits of the company and was therefore not relevant to his claim that the payments should be included in his weekly wage.

WAGES - BENEFIT PAY. Employer matching contributions to an employee's 401(k) retirement savings plan account are not includable in the calculation of his weekly wage.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Johnson, J.
Compensation Judge: Catherine A. Dallner.

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the compensation judge's dismissal of the employee's claim petition on the basis that no issues raised in the claim petition remain to be tried. Specifically, the compensation judge determined that the employee's request for certain discovery from the self-insured employer would not be granted and since the evidence presented by the employee was insufficient to support the claim petition, it was dismissed. The specific information sought by the employee related to the self-insured employer's profit sharing, stock distribution and 401(k) plans. The employee's claim was that payments and the value of stock distributions made by the employer under those plans should be included as "wages" when determining the employee's pre-injury weekly wage. The compensation judge determined, in the context of earlier motions and hearing, that the information sought would not be relevant to a claim for an increase in weekly wage. We affirm the compensation judge's determination on the

relevance of the information sought and her dismissal of the claim petition.

BACKGROUND

On March 25, 1994, the employee sustained an admitted injury to his low back while working for Polaris Industries, hereinafter the employer, as a mig welder at its plant in northern Minnesota. The employer manufactures snowmobiles, all terrain vehicles and personal watercraft. (Malone deposition, p. 23.) The employee had been hired by the employer in February 1990. When injured he was receiving an hourly pay of $9.49 and worked 40 hours per week. At the time of the injury the employee was 45 years of age.

The employee was paid temporary total disability or temporary partial disability from December 2, 1994 through December 3, 1995 based on a weekly wage of $379.60. In addition, the employee was paid $8,800.00 as permanent partial disability, in the form of impairment compensation, for a 15% permanent partial disability of his body as a whole. (Judgment Roll: Notice of Intention to Discontinue Benefits filed 2/26/96.) On April 26, 1995, the employee underwent fusion surgery on his low back. His medical expenses were paid by the employer.

On August 29, 1995, the employee, acting without the assistance of his attorney, filed a claim petition seeking an increase in the weekly wage used as a basis for his workers' compensation benefits. He sought to have included in the weekly wage calculation a profit sharing payment, the value of a stock distribution and employer matching payments to his 401(k) plan account. Attached to the claim petition were pay records which indicated that in March of 1994 the employee received a cash profit sharing payment of $7,209.09, as a result of company profits for 1993, and a stock distribution (called an "employee ownership award") with a stated market value of $3,700.25. It is unclear how much the employer had contributed in matching 401k payments. The employee's pay stub indicates that perhaps $487.35 had been contributed by the employee to his 401(k) plan account. A second payroll record indicated that in March of 1995 the employee received a cash profit sharing payment of $8,845.85, as a result of the company's profits in 1994. He also received a stock distribution which had a market value at the time of distribution of $1,845.39. There is no indication on this payroll record of any contributions to a 401(k) account. Based on the number of hours that the employee worked during 1994 divided into the total value of the cash profit sharing and stock distribution the employee contended that his hourly wage should be at least $5.95 above his regular wage of $9.49.

The employer, in its September 15, 1995 answer to the claim petition, contended that the profit sharing cash payment, the value of stock distribution and matching contribution to the employee's account in the 401(k) retirement savings plan made during 1993 and 1994 were *bonuses* paid as a result of the overall performance of the company and not directly the result of the employee's efforts or under his control.[1] Under the holdings in Stewart v. Ford Motor Co.,

[1] Later, the employer made this argument only with respect to the profit sharing and stock distributions. As to the 401(k) contributions, the employer later contended that they are akin to

474 N.W.2d 162, 45 W.C.D. 175 (Minn. 1991), and Krempges v. Bayliner Marine Corp., slip op. (W.C.C.A. Sept. 14, 1993), the employer asserted that these distributions were therefore not includable in the calculation of the employee's pre-injury weekly wage.

In early October of 1995 the employee retained his current counsel in preparation for hearing. The employee's January 1996 pre-trial statement stated that the only issue raised in the claim petition was the level of pre-injury weekly wage, which should have been $779.27. In preparation for hearing the employee noted the deposition of a representative of the self-insured employer for purposes of obtaining information concerning the employer's profit sharing plan. In response, the employer voluntarily produced Michael W. Malone, vice president of administration of Polaris Industries, whose deposition was taken on May 20, 1996. During the deposition Mr. Malone was asked a number of questions concerning the employer's profit sharing plan and the relationship between the employer's annual business plan and budget and the amount of profit sharing to be distributed to employees. Mr. Malone answered certain questions concerning the company's budgeting process and profit sharing plan. On instruction from his counsel, Mr. Malone refused to answer certain other questions and to produce any budgets or documents concerning the profit sharing results for the prior ten years, on the basis of relevancy and a need to protect proprietary information.

Soon thereafter, on June 7, 1996, employee's counsel filed a motion to compel discovery, contending that the employee's weekly wage calculation should include the profit sharing payment received by the employee. The employee sought "budgets from 1992 to present and actual profit sharing results for the last ten calendar years (1985 - 1995)" from the self-insured employer. Prior to a preliminary hearing scheduled for July 3, 1996, the employee filed a series of exhibits, including wage information concerning the employee, the deposition of Mr. Malone and several letters and documents provided to employees explaining the profit sharing and stock distribution (called the Employee Ownership Plan) plans. No mention was made in the motion of the stock distribution or the employer's matching contributions to the employee's 401(k) plan account. The exhibits included a letter, dated February 1996, entitled "Polaris Thanks a Billion" and was addressed to "Dear Polaris Partner." It stated in part:

> We congratulate you on your contribution to yet another record year at Polaris. With your enclosed 1995 profit sharing check, as well as information on your stock award, this is a fitting occasion to say "thanks a billion" for your role in achieving record sales exceeding the $1 billion mark.

The exhibits also included a letter entitled "1995 Profit Sharing Packet Letter of Explanation February 1996." This letter stated in part: "Your profit sharing distribution and employee ownership award are an important part of our total compensation package. It is made possible by

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pension contributions, which are also excludable from the weekly wage calculation under Boschee v. Barry Blower, slip op. (W.C.C.A. Aug. 25, 1989).

Polaris' success which is, and will continue to be, the direct result of your efforts and dedication." In addition, the exhibits included a document entitled "Employee Ownership Plan of Polaris Industries, Inc." The document stated in part:

> What is the purpose of the Plan?
>
> The Plan was adopted to reward employees with ownership stakes in Polaris. You do not have to invest any money under the Plan. Your investments will be in the form of your continued employment and your contributions to the future success of Polaris. We hope you see the incentive the Plan provides for continued teamwork, attention to quality, efficiency and steady productivity. The ownership interests you receive are in addition to cash which may be paid to you under the Polaris profit sharing plan and to Polaris' matching contribution under the 401(k) Retirement Savings Plan.

(Letter dated 6/24/96.) Based on the testimony of Mr. Malone and the employer's letters, the employee proposed a theory that the cash payment and stock distribution made to the employee, although labeled as profit sharing, were actually wages. The motion stated in part:

> The employer must establish that within the budget, there is a plan to have money to distribute to their employees. The budget will show the way these monies are distributed. These monies are treated as wages for all tax purposes and are thus not discretionary or just a hope for profit. They are planned and budgeted for in exactly the same way wages are. In order to establish this fact, the employer must produce their budgets for the years 1992, 1993, 1994 and 1995."

The employee contended that discovery was necessary to confirm how the profit sharing payments were budgeted and to show that they were handled in exactly the same way as were wages in other parts of the company's budgets. It was the employee's position that not all of the company profit sharing payments were discretionary since the budget recognized that the payments would be made if the profits were available. He contended that some profit and some profit sharing had been paid every year for many years, that some amount was predictable, was anticipated and expected by the employer and the employees and should, therefore, be included in the employee's wages. It was the employee's position that the information sought would enable him to obtain evidence which would permit him to distinguish the self-insured employer's profit sharing plan from profit sharing plans which had been found by the Minnesota Supreme Court as not to provide monies which should be included in the weekly wage calculation.

On June 21, 1996, the self-insured employer filed its response to discovery and its motion to limit discovery, along with an affidavit by Michael W. Malone. In his affidavit Mr. Malone repeated much of his deposition testimony, including the following statements:

2. Many factors are involved to determine whether or not, in any given year, Polaris makes a profit. The primary factors are the amount of sales, which in turn is dependent upon, for each of our businesses, how many units are going to be sold and purchased by consumers. There are a lot of factors involved in the decisions of the buying public or, stated another way, there are many factors involved in the decision making of a consumer; first, whether or not to buy the type of product we sell, and then whether or not to buy our product. The overall economy has a big impact on our profits; interest rates affect our profits; weather clearly influences the sale of both snowmobiles and personal watercraft, the sale of these two products is greatly weather-dependent. Also, Polaris is in a very competitive environment in each of our product lines, and Polaris needs to price its product competitively; therefore, whatever our competition happens to be doing in a particular year has a big impact on what we can sell our products for and, in turn, how much profit we can make on those individual products. The cost of materials to build the products has a significant impact on profitability. Further, in this regard, the Exchange Rate for the Japanese Yen with the United States Dollar can fluctuate significantly, which impacts our profitability because approximately 25% of our raw material costs are in the engine and the engines come from Japan; if the exchange rate moves significantly, it can affect our costs of materials, which obviously affects the profitability of the company and can have a significant impact on pre-tax earnings, which, in turn, has an impact on the amount of money available for profit sharing. These are just a few of the factors that affect income and profit.

3. Profit sharing at Polaris is determined by a formula that calculates the maximum available that can be paid in profit sharing. This formula is based on actual earnings and other factors of the company for a particular calendar year. The profit sharing is primarily based on actual earnings, but it is a pre-tax calculation of reported earnings of the company. These pre-tax earnings are then adjusted by adding back certain non-cash charges, principally depreciation and amortization, and then adjusted to subtract for investments in capital additions. This generates a maximum amount of funds that are available to distribute profit sharing among eligible employees. The amount to be distributed can never be known until the year in question is over because it cannot be determined until the year is over whether Polaris made a profit.

4. Whether or not any available profits are distributed as profit sharing is within the discretion of the company's Board of Directors.

5. If the company has shown a profit the previous calendar year, and if the Board of Directors decides to distribute the calculated profit sharing, the distribution is typically done in February or March of the following year for the preceding calendar year. It is also distributed based on eligible earnings. Polaris became public in 1987 and the profit sharing plan currently in use was approved in the prospectus of the company when it originally went public. It is the same plan now in effect at Polaris. 1988 was the first year of that plan.

6. Employees are determined to be eligible or not eligible for profit sharing based on the criteria in the profit sharing plan for all eligible employees. The funds available to be distributed as profit sharing are allocated to eligible employees according to a formula. For hourly employees, a determination is made regarding their eligible wages and their length of service. The formula takes an 85% weight to the eligible wages, and a 15% weight to the length of service, and the funds are allocated in that manner. Profit sharing is not paid at a percentage of hourly income; it can be calculated as such after it is received but that is not how it is paid.

* * *

8. Hourly rates for specific jobs are set once a year, and the hourly rates for each hourly position at each of our locations have been determined to be competitive in the local market place. For example, hourly pay for specific hourly job classifications in Roseau are considered to be competitive for Roseau's labor market. Hourly pay for specific hourly job classifications in Spirit Lake, Iowa, are considered competitive for that labor market, and so on. Generally, the way Polaris sets hourly wage structure is to look at competitive employers in the area and see what the competitors, not necessarily product competitors, but employers competitors are offering their hourly employees in the same area.

9. Polaris budgets every year, based on its best estimate, regarding what will happen the next year. What Polaris estimates is going to happen, in turn, generates a budgeted income statement. Therefore, in an accounting sense, Polaris budgets what it believes may happen; but what really happens is dependent upon a lot of factors mentioned above, many of which the company has absolutely no control over. These factors, in turn, have a significant impact on pre-tax income, which in turn has a significant impact on the amount that is available for profit sharing. For example, there are a number of factors that the company has no control over in budgeting for our operation. Therefore, Polaris has to make the best possible assumption, including assumptions like how many of its units customers are going to buy, what the interest

rates are going to be, what the exchange rates are going to be on some foreign currencies, and a variety of assumptions like that which are not only out of its control, but which may vary significantly within a 12 month period.

* * *

14. Profit sharing is the result of a business plan. Profit sharing is calculated, based on the actual results of the company. Therefore, Polaris does not go into a year with a target or goal of what profit sharing is going to be. Polaris attempts to plan for all of the factors mentioned above that may affect profit. For example, how many machines are going to be sold, what they are going to be sold for, costs of making those machines, costs of operation and how much the company is going to have to invest into the business. All of these and many more considerations results in a business plan which we try to maintain for a given year. If Polaris is successful, Polaris shows the expected profit. If not, we do not show a profit or less a profit than expected.

15. Profit sharing results for the last 8 years are:

The average hourly employee profit sharing paid for the calendar years 1988 through 1995 when calculated as a percent of hourly pay (which is not how it is paid) are as follows:

1988	23%
1989	35%
1990	40%
1991	40%
1992	37%
1993	42%
1994	51%
1995	40%

These percentages are averages. Profit sharing received by an individual between 1988 and 1995 may be more or less than these percentages.

On July 3, 1996, employee's counsel filed suggested language for a protective order should the compensation judge issue an order to compel discovery.

On October 18, 1996, in anticipation of a scheduled October 21, 1996 hearing before Compensation Judge Catherine A. Dallner, employee's counsel filed a letter brief again outlining the employee's position. The employee argued the annual payments made in February/March of each year were wages because they were part of the employer's budget as the result of anticipated profits. (Letter brief at p. 3.) The October hearing was apparently delayed until December 16, 1996. On December 13, 1996, the self-insured employer filed its brief in opposition to the motion to compel. It was the employer's position that the information sought by the employee was not relevant and not necessary for the proper presentation of the employee's

claim. The principal basis for its position was that the Minnesota Supreme Court and the Workers' Compensation Court of Appeals had ruled on many occasions that profit sharing distributions were not to be included in the calculation of an employee's weekly wage calculation. It was their position that the proposed discovery would not uncover any evidence which would place in question the basic features of the self-insured employer's profit sharing plan, namely that (1) the payments were dependent on a profit by the company, which was a result of many factors not under the control of the employee and (2) whether payments would be made, and in what amount, was totally discretionary with the employer's board of directors.

On February 14, 1997, Compensation Judge Dallner issued her Findings and Order in which she found that she had jurisdiction to compel the production of the information sought but that the data sought was not necessary for the proper presentation of the employee's claim and was therefore not relevant to the employee's claim. She determined that because the amount of the employer's profit available for profit sharing was not related to the employee's individual efforts, but was controlled by many factors, including the weather, interest rates and other factors, the distributions, based on the principles outlined in the Stewart decision, should not be included in the weekly wage calculations. She further reasoned that the distributions were also outside the employee's control because they were contingent on the discretion of the company and were not guaranteed from year to year. The compensation judge stated that so long as an annual bonus was based on overall company performance the payments were not includable in the employee's workers' compensation wages, even if they had been included or anticipated in the company's annual budget. (Memo. at p. 6.)

Shortly thereafter, the employee issued subpoenas noticing the depositions of two of the self-insured employer's employees who were familiar with the employer's personnel policies and advertisements used to attract new employees. The subpoenas directed the designated employees to bring with them all of the employer's job advertisements from January 1994 to the present, all documents of any nature provided to job applicants and internal documents which discussed offers of employment, wages, bonus plans and other benefits. The employee also requested further information regarding the employee's profit sharing plan, 401(k) program and stock distribution program.

The employer refused to provide the requested information or to make the employees available for deposition. The employer, instead, filed a motion to quash the subpoenas on April 29, 1997. The employee responded by opposing the motion to quash and by filing a motion to compel the requested discovery. Attached to its memorandum in opposition to the motion to quash, the employee attached a series of exhibits, mostly communication from the employer, to establish that the value of the annual bonuses were wages. The documents were the same or similar to those attached to the May 1996 motion to compel. One of the documents was entitled "Profit Sharing and Employee Ownership Program." It stated in part that all employees were eligible and "[t]he exact amount of the contribution is determined by the Board of Directors after evaluating the company's operating results. From these results, Polaris may make a contribution based on gross wages paid to all participants during the plan year." Another document, which was untitled, indicated that "[t]he purpose of the Employee Ownership Plan is

to reward employees with ownership stakes in Polaris." The exhibits included a February 3, 1997 letter from the employee to the employer complaining about the 20 cent per hour wage raise received on January 1, 1997. He asked for more base pay and less annual bonus. He received a response from the president of the employer who stated in part:

> Over the past several years, Polaris' compensation philosophy has been to compensate employees with wages, profit sharing, company stock and dividends. When taken as a whole on a yearly basis, employee compensation at Polaris has certainly far exceeded the market. In fact, we at Polaris historically compare our total compensation using the above components, wages, profit sharing and company stock, with both Marvins and Arctco to make sure our salaries are competitive and reasonable.
>
> The enclosed comparison graph shared with employees at the January meetings indicates that Grade 3 employees, such as yourself, are paid more than 30% above those at Marvins and Arctco. Accordingly, we believe our employee compensation is both fair and competitive with other companies in Northern Minnesota.

The cross motions were heard by Judge Dallner on July 28, 1997. In an order, served and filed October 21, 1997, the compensation judge granted the employer's motion to quash and denied the employee's motion to compel. The compensation judge based her decision on the holding in Stewart. She noted that this decision had held that distributions from a profit sharing plan need not be included in the calculation of an employee's pre-injury weekly wage. The compensation judge found that the profit sharing payments and stock distributions at issue were discretionary, speculative and dependent upon various factors outside of the employee's control. As to the matching contributions to the employee's 401(k) account the compensation judge found them to be akin to contributions to a pension plan and not includable under the holding in Boschee v. Barry Blower, slip op. (W.C.C.A. Aug. 25, 1989). The compensation judge found that the information requested was therefore not necessary for the proper presentation of the employee's claim.

The employee filed an appeal from the compensation judge's decision to this court on October 30, 1997. The employee also filed a petition for writ of mandamus. This court dismissed the appeal and denied the petition on December 2, 1997, because the appeal had not been taken from a "final order."

On October 20, 1998, the employer made a motion to dismiss the employee's original 1995 claim petition on the basis that there were no issues which remained to be litigated. The employee opposed the motion in a memorandum that was filed on October 28, 1998. In an order for dismissal of claim petition, served and filed January 11, 1999, the compensation judge granted the employer's motion to dismiss. The employee now appeals to this court.

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).

DECISION

The compensation judge dismissed the employee's claim petition because she determined that there was no issue presented in the original claim petition which remained to be litigated. This conclusion was based on her earlier determinations, in her orders of February 14, 1997 and October 21, 1997, that the employee was not entitled to undertake the discovery he sought concerning the self-insured employer's profit sharing, employee ownership (stock distribution) and 401(k) retirement plans. The employee does not dispute that if the compensation judge's determination on the discovery issues is correct that he does not have a basis upon which he could litigate his position that his pre-injury weekly wage should be increased above that which has formed the basis of payments voluntarily made by the employer. As a result, the issue before us is whether the compensation judge's earlier decisions resolving the employee's request for additional discovery were correct.

A compensation judge at the Office of Administrative Hearings (OAH) is empowered to resolve discovery disputes under the regulations governing practice at OAH. Discovery is covered by regulations contained in Minn. R. 1415.2200. Subpart 2 of the section indicates that depositions may be taken "in the manner which the law provides for depositions in civil actions in the district courts for the state, except where a judge orders otherwise." If a party objects to the taking of the deposition it would be necessary for a motion to be made before the judge. Among other reasons, the judge should order the deposition to proceed if she finds that "the deposition is needed for the proper presentation of a party's case." Pursuant to subpart 3 of the discovery section, if a party desires additional discovery to which another party objects it must make a motion to a judge. This rule indicates that the compensation judge may order discovery of "other relevant material or information, recognizing all privileges recognized at law." The rule further states that "the judge may order discovery available under the rules of civil procedure for the district courts of Minnesota provided that the discovery: (a) is needed for the proper presentation of a party's case." The rules further provide that with respect to trade secrets or other proprietary information, a compensation judge may order appropriate discovery subject to "protective orders as are reasonable and necessary or as otherwise provided by law." Minn. R. 1415.2200, subp. 6.

The employee contends that the information that he sought in his discovery motions was both relevant and necessary for him to proceed with his claim that the calculation of his weekly wage should include the value of profit sharing and stock distribution payments and 401(k) matching contributions made by the employer. The employee further contended that should the employer have any proprietary or trade secret concerns that these interests could be safeguarded

by a protective order. The employee argued that any need for protection was far outweighed by the employee's need for the information. The employee further contended that discovery rights should be liberally granted under the flexible standard for discovery in civil actions incorporated in Rule 26.02A of the Minnesota Rules of Civil Procedure, which provides in part:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party, seeking discovery as to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not grounds for objection that the information sought will be inadmissible at the trial if the information appears reasonably calculated to lead to the discovery of admissible evidence.

The specific information which the employee sought is set forth in the employee's June 7, 1996 motion to compel discovery, his February 14, 1997 subpoenas and his June 2, 1997 motion to compel discovery. In the first motion, the employee sought "budgets from 1992 to present, and actual profit sharing results for the last ten calendar years (1985 - 1995)." In the subpoenas the employee sought the opportunity to take the deposition of Rhonda Stein and Terry Larson, employees of the self-insured employer, and for them to bring the following documents: "(1) all advertisements for employment since January 1, 1994; (2) all documents of any nature provided to applicants for employment; and (3) any internal documents which discuss offers of employment, wages to be paid, bonus plan or other benefits." In the 1997 motion, the employee sought the following information: "(1) the booklets from the years 1986 to 1996 entitled "The Plan" regarding Polaris' employee ownership plan; and (2) all documents evidencing "Rights," BAC's and stock distributions to Mr. Lorenson, including all "conditions" to be met from the years 1986 to 1996; and (3) all 401k contributions to Mr. Lorenson from 1986 to 1996." The compensation judge found that none of the information sought was relevant to the employee's claim and was not needed for the proper presentation of the employee's case. (Findings and Order of 2/14/97 and order of 10/21/97.)

The employee argues that the information sought is both relevant and necessary for him to process his claim for an increased weekly wage. The employee contends that the discovery is calculated to determine whether the so-called "profit sharing" and stock distribution plans and the employer's contributions to the 401(k) plan are different than the types of distributions which the supreme court has determined should not be included in a weekly wage calculation for workers' compensation purposes. It is the employee's contention that the discovery will permit him to determine the exact nature of the various plans maintained by the employer and to determine whether the payments were actually deferred wages made under the guise of the label of a "profit sharing" plan. It is his theory that if the employer budgeted for the payment of the profit sharing, stock distribution and 401(k) payments in a manner similar to the budgeting for wages that to call them profit sharing and stock distributions or forms of pension payments is to simply create a sham

which would permit them to shift what are actually wages into an excludable category. The employee believes that the budgets, hiring advertisements and employee ownership plan documents will establish that these payments are planned in advance and are promised to prospective employees as part of their total annual compensation. This evidence, the employee contends, would establish that the employee's earning capacity equals the total value of each of the elements of the company's "compensation package."[2]

For purposes of our analysis we will consider each of the forms of payment requested to be included in the weekly wage calculation separately.

Annual Cash Payment

It is undisputed that in February or March each year from 1988 through 1996 the employer has made a lump sum cash payment to its employees which it has characterized as a "profit sharing plan" distribution. For purposes of this discussion, even if we were to assume as true the employee's arguments that discovery would show that the annual profit sharing distribution is planned and budgeted for or is advertised as part of the company's benefit package, it does not change the fact that distributions from the profit sharing plan would not be included in the employee's calculation.

Minnesota case law is clear that as a general rule distributions from a profit sharing plan are not included in an employee's weekly wage calculation. In Stewart v. Ford Motor Co., 474 N.W.2d 162, 45 W.C.D. 175 (Minn. 1991), the Minnesota Supreme Court held that annual bonus payments resulting from company year end profits are not includable where the profits from which the payments were made were not the result of the employee's independent work activities as contrasted with his efforts as one of many employees. The court stated, in part:

> Not all taxable income is considered "wages" for purposes of computing workers' disability benefits. Wages, for those purposes, are compensation for labor and services which reflect an employee's

[2] At page 16 of its brief, the employee also argues that it attacks the "unverified and unchallenged assertion that profit sharing, 401K, and stock distributions are unpredictable, being dependent on the vagaries of international commerce, all of which are outside of the control of the employer and the employee." We take this to be the same argument made about the importance of the annual budgets and employment advertising, the argument being that if the payments are predicted and promised they are wages when they are paid. We do not take this as a new argument that attacks the testimony of Mr. Malone that the annual profits of the company are the result of the impact of many forces, including the weather and interest rates. If we are mistaken and the employee is attacking Mr. Malone's testimony, the result of his appeal would be the same because the proposed discovery is not directed at obtaining evidence which would bear on or dispute Mr. Malone's testimony concerning the many factors affecting the company's overall annual profit.

> earning capacity. Backaus v. Murphy Motor Freight Lines, 442 N.W.2d 326, 327 (Minn. 1989). Conversely, profits which accrue independent of an employee's own efforts generally are not includable in the average weekly calculation. See id. at 327-28 (income derived from capital equipment not part of wages). See also 2A. Larson, The Law of Workmen's Compensation, §60.12© (1989) ("Generally, profits from a business, whether commercial or farm, are not considered as wages for purposes of establishing average wage.")

Stewart, 474 N.W.2d at 164. The court further explained that profit sharing in Ford's case was "reflective of Ford's annual financial status, not of the employee's earning capacity, because whether Ford realizes a profit depends largely on factors outside the employee's control, e.g., interest rates, supply and demand, sales and manufacturing costs. Id.

Under this holding, even if the company budgeted for the payment of profit sharing as if they were deferred wages that fact would not make the profit sharing a wage so long as the issuance of the payment was contingent on the making of a profit and the profit was contingent on the efforts of many and factors outside the control of the employee. In line with the holding in Stewart, any distributions made out of the self-insured employer's profit sharing plan are the type of distributions which are not includable in weekly wage calculations. These payments are not includable because they do not represent the individual efforts of the employee and because the total amount of the employer's annual profit, from which the distributions are made, is determined by factors almost entirely outside of the control of the employee. The profits are the result of the overall operation of the company. In addition, it is clear that the employer in this case, even if there were profits from any particular year, was not legally obligated to distribute any of those profits to the employees under the profit sharing plan. Even if the company had budgeted and projected that it would make payments, those payments could not be made without the specific authorization of the board of directors. The board was free to award whatever sum it wished for distribution. This would be true even if the employer had advertised to prospective or current employees that profit sharing or annual bonuses were part of the company's compensation package. Making that representation was not a guarantee of payment. Payment of this benefit was specifically conditioned on the making of a profit for the year. None of the information sought by the employee concerning the employer's profit sharing plan was relevant and necessary to a claim for an increase in weekly wage because it did not serve to dispute the employer's evidence that the payment was determined by factors outside the employee's control.

Stock Distribution

The employee's brief does not make a distinct argument with respect to the inclusion of the value of the annual stock distribution made to the employee in the calculation of his weekly wage. As a result we assume that the employee objects to the compensation judge's ruling on the same premise which he applied to the cash payment, that because the value of the stock distribution may be budgeted and is taxable income each year its value should be considered

part of the employee's earning capacity. (EE's brief at p. 13.) Based on the documents concerning the Employee Ownership Plan submitted by the employee, the company issues its own stock which, for income tax purposes, is valued at the market price on a specific date. The amount of stock which is issued is determined by the company's board of directors based on the prior year's profitability of the company and a desire to give employees an ownership stake in the employer. (Exhs. 11-14 to EE's brief.) The analysis that was used above with respect to the cash payment is equally applicable to the value of the stock distribution. Since the distribution of stock is both not directly related to the employee's independent actions and is discretionary, its value would not be included in a weekly wage calculation. For reasons set forth above with respect to the cash payment, the proposed discovery concerning the ownership plan would be unnecessary since the value of the stock could not be considered a wage for workers' compensation purposes. As a result, no further discovery concerning the employee ownership plan would be necessary.

401(k) Contributions

The employer has a 401(k) retirement pension plan which permits an employee to contribute a portion of his salary or wage to a personal account. The employer matches some percentage of the employee's wage contribution. Under the tax code, the employee's personal contribution is not considered to be part of his taxable income for the year in which it would have otherwise have been earned. This court has held that, although not taxable, the employee's 401(k) contributions voluntarily deducted from wages, are included in his weekly wage calculation. McQuillan v. Sysco, Inc., 57 W.C.D. 210 (W.C.C.A. 1997). The employer's matching contributions are also not included as taxable income for the year in which they were paid. We assume that in conformity with the tax code the Polaris 401(k) plan restricts the employee's ability to withdraw the funds, either by age or other factors. Based on these characteristics, we agree with the compensation judge that the employer's matching contributions to the employee's 401(k) plan participation is similar to an employer's contribution to a pension plan for the employee. An employer's contributions to an employee's pension have long been considered to be not includable in the calculation of an employee's weekly wage for workers' compensation purposes. Boschee v. Barry Blower, slip op. (W.C.C.A. Aug. 25, 1989). As a result, the compensation judge was correct in denying the employee's request to seek discovery concerning the administration of the employer's 401(k) plan because none of the information sought would have been relevant to the issue of the calculation of the employee's weekly wage.

As the compensation judge correctly exercised her discretion in ruling that the requested discovery would not have led to the production of any relevant evidence, her decision to dismiss the claim petition was also appropriate. Her order of dismissal is affirmed.