

LYNDA REILLY, Employee, v. BURNS INT'L SEC. SERVS. and CONST. STATE SERVS. CO., Employer-Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 9, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - BENEFIT PAY; WAGES - BONUS. The compensation judge erred by failing to properly prorate the employee's annual vacation pay and manager's bonus over a 52-week period, and she also erred in including an annual bonus, paid in January of 1994 for the employee's performance in 1993, in calculating the employee's weekly wage on the date of her September 1994 injury. Because the evidence is ambiguous and the compensation judge did not look to the proper period in deciding whether the employee's weekly wage should include annual bonus pay, the matter would be remanded for further proceedings.

PRACTICE & PROCEDURE - MATTERS AT ISSUE. The compensation judge erred in finding that the employee injured her cervical spine at work where there was no admission to that effect, the parties did not specify that as an issue to be decided, and a decision on that issue was not necessary to the judge's resolution of the matters in controversy.

Affirmed as modified in part, reversed in part, and vacated and remanded in part.

Determined by Wilson, J., Pederson, J., and Hefte, J.
Compensation Judge: Carol A. Eckersen.

OPINION

DEBRA A. WILSON, Judge

The employer and insurer appeal from the compensation judge's findings as to weekly wage and the nature of the employee's work injury. We modify in part, vacate in part, reverse in part, and remand the matter for further proceedings consistent with this decision.

BACKGROUND

In 1984, the employee began working in a security position at the NSP power plant in Monticello. Security work is provided to NSP on a contract basis, and, when a new security service wins the contract, existing security personnel generally stay in their jobs. For this reason, the employee was employed by several different services after beginning work at the NSP plant. She is not an employee of NSP itself.

On September 23, 1994, the employee sustained a work-related injury while employed by Burns International Security Services [the employer], which had at that time been providing security at the Monticello plant for several years.¹ On the date of injury, the employee was working as a First Lieutenant, a managerial position she had held for about five years, and was earning \$15.24 an hour, plus overtime. The employee was also entitled to 120 hours, or 15 days, of vacation a year, which accrued at the rate of 1.25 days a month but which could be taken in its entirety at any point during the year. Employees who left employment were required to repay the employer for vacation that had been taken but that had not yet accrued by the time of their termination.

On January 13, 1994, nine months prior to her injury, the employee was paid a manager's bonus of \$1,179.38, for her performance in 1993. She testified that she had received a manager's bonus annually for at least four years and that the amount of those bonuses had not varied much. She also testified that she did not recall whether she received a bonus in January of 1995.

The employee was off work entirely from shortly after the injury until sometime in October of 1995. By the time she returned to work at the Monticello plant, a company called Wackenhut was providing security services. The employee was unable to return to her previous First Lieutenant position and incurred a wage loss.

On June 17, 1998, the matter came on for hearing for resolution of a dispute over the employee's weekly wage, the employee's earning capacity after December 15, 1996, and the employee's entitlement to penalties for underpayment of benefits. Evidence included the employee's testimony as to her earnings, bonuses, and vacation pay, and exhibits prepared by both parties concerning wage calculation. Primarily at issue, with respect to wage, was how, if at all, the employee's manager's bonus and vacation pay should be included. The compensation judge resolved the issues in the employee's favor and, apparently adopting the figures contained in the employee's wage exhibit, concluded that the employee's weekly wage on the date of injury was \$804.49. The compensation judge also made a finding as to the nature of the employee's work injury. The employer and insurer appeal.

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

¹ The employee testified that she thought Burns had provided services for about three years.

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

It is undisputed that the employee’s earnings were irregular and that the 26-week statutory averaging formula is applicable in calculating her weekly wage. See Minn. Stat. § 176.011, subds. 3 and 18. It is also undisputed that the employee worked regular or frequent overtime and that overtime pay should be included. See id. In her wage exhibit prepared for hearing, the employee indicated that her gross pay in the 26-week pre-injury period, including overtime pay but excluding vacation pay and the manager’s bonus, was \$18,143.28. The employee then determined that there were 37.8 weeks in the calendar year 1994 prior to her injury, calculated that the 26-week pre-injury period constituted 68.78% of those 37.8 weeks, multiplied her vacation pay (\$1,828.80) and 1994 manager’s bonus (\$1,179.38) by 68.78%, added the resulting figure to her other gross earnings, and then divided the total by the 25 weeks she had actually worked in the 26-week pre-injury period. Apparently adopting these figures, the compensation judge concluded that, as claimed by the employee, the employee’s weekly wage on the date of injury was \$804.49.

On appeal, the employer and insurer argue that one of the figures contained in the employee’s wage exhibit is incorrect, and both parties now agree that the employee’s gross earnings, including overtime but excluding the other items, was \$16,565.91 in the 26 weeks prior to injury. Therefore, the judge’s decision, to the extent that it incorporates an incorrect regular and overtime earnings figure of \$18,143.28, is modified accordingly. The employer and insurer’s remaining arguments on the wage issue concern the treatment of the employee’s manager’s bonus and her vacation pay. Addressing the employee’s vacation pay first, we agree that the judge erred in adopting the employee’s method of including this item in her weekly wage.

As previously indicated, the employee was entitled to 120 hours, or 15 days, of paid vacation a year, and she had received full payment for this vacation, \$1,828.80, by the time of her injury.² However, as noted by the employer and insurer, the employee actually earned only half

² However, contrary to the judge’s decision, the employer did not pay the employee the entire amount on September 24, 1994; rather, the employee had apparently received the entire amount, over the course of the calendar year, by that date. See Petitioner’s Exhibit B. It is not possible to tell, from the evidence submitted, exactly when the employee actually took vacation or

of that vacation pay, or \$914.40, in the 26 weeks preceding her injury, and the issue, for weekly wage purposes, is what the employee earned, not what the employee actually received, in the pertinent period. See Anderson v. Ford Motor Co., 46 W.C.D. 24 (W.C.C.A. 1991). We therefore agree with the employer and insurer that the employee's vacation pay must be prorated to reflect its rate of accrual, rather than treating it as if it had all been earned by the time of the employee's injury, as the employee's figures would suggest.

With regard to the employer and insurer's arguments as to the manager's bonus, we note initially that we are satisfied that this annual bonus is the kind of payment that is ordinarily includable in an employee's weekly wage. It is true, as the employer and insurer contend, that the employee had no guaranteed right to a bonus, and the amount of the bonus was not computable as a percentage of her wage or on any other ascertainable basis. However, the employee earned the bonus primarily by meeting specific goals set by the employee and her supervisor. That is, the employee's receipt of the bonus was dependent almost entirely on her personal performance. This kind of bonus is appropriately considered includable earnings for weekly wage purposes. Compare Stewart v. Ford Motor Co., 474 N.W.2d 162, 45 W.C.D. 175 (Minn. 1991) (profit sharing, reflective of the employer's financial status rather than the employee's earning capacity, was not includable in the employee's weekly wage). We are, however, persuaded by the employer and insurer's other argument on this issue.

The \$1,179.38 manager's bonus paid to the employee on January 13, 1994, was based on the employee's performance in 1993 and as such had no necessary relationship to the employee's earnings on the date of her injury, during the 26-week pre-injury period, or even during the calendar year of her injury.³ The relevant bonus, for weekly wage purposes, is the annual bonus the employee did receive or would have received for her work in 1994. The record on this point is incomplete. The employee testified that she could not recall whether she received a bonus, in 1995, for her work in 1994, and no evidence was introduced to establish whether the other managers in the employee's class received annual bonuses in 1995 or, if not, why not. It is worth noting in this regard that the employer evidently lost the NSP security contract in the spring of 1995. At the same time, however, Petitioner's Exhibit C, a copy of the "Annual Supervisor Evaluation and Incentive Program" form signed by the employee on July 2, 1994, suggests that the employee was at least eligible to receive a bonus based on her 1994 work performance.

The evidence is such that it is impossible to determine whether the employee did in fact receive a manager's bonus applicable to work performed in 1994. If she did, the amount of

received vacation pay; a pay category on the employee's earnings record designated "OTH" apparently includes at least minimal mileage reimbursement and travel expenses, as well as vacation pay.

³ Because the bonus was paid in January of 1994 for work performed in 1993, the employee's method of calculating the amount includable, which takes into account the 37.8 weeks in 1994 prior to her September 1994 injury, makes no sense whatsoever.

that bonus is obviously relevant in determining the employee's weekly wage; if not, evidence as to why not may be important. Because the compensation judge apparently did not consider the timing of the bonus in making her wage decision, we remand the matter for further proceedings, including, at the judge's discretion, the submission of additional evidence. In the event the judge again decides to include an annual performance bonus in her wage calculation, the bonus must be prorated over the entire period in which it was earned. See, e.g., Boelter v. City of Ham Lake, 46 W.C.D. 214 (W.C.C.A. 1991).

Nature of the Injury

In Finding 4, the compensation judge determined that the employee had sustained a work-related injury to her cervical and lumbar spine on September 23, 1994. On appeal, the employer and insurer point out that only the lumbar injury was admitted, that the employer and insurer had in their answer specifically denied liability for any cervical injury, and that the nature of the employee's work injury was not raised as an issue by the parties. Furthermore, determining whether the employee sustained a cervical injury was not necessary to any decision on the issues properly before the compensation judge. Under these circumstances, we vacate the judge's decision that the employee sustained a work-related cervical injury. That issue is preserved for litigation, if necessary, at a future date.