

JAMES C. SAMPSON, Employee, v. LETOURNEAU & SONS and CNA INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
OCTOBER 21, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - SUBSTANTIAL EVIDENCE. Where the employee and his wife testified that the employee worked five days in the full work week before the date of injury and this testimony was supported by notations on a daily calendar kept by the employee's wife, the compensation judge was supported by substantial evidence when he determined that the employee's weekly wage was to be based on having worked five days during that week rather than three days, which was the position of the employer's treasurer, whose records were based on conversations with the employee's supervisor, who did not testify.

Affirmed.

Determined by Wheeler, C.J., Wilson, J., and Johnson, J.
Compensation Judge: Gregory A. Bonovetz

OPINION

STEVEN D. WHEELER, Judge

The employer and insurer appeal from the compensation judge's determination of the employee's weekly wage at the time of his injury on November 2, 1998.

BACKGROUND

The employee, James Sampson, started work for the employer, Letourneau & Sons, on October 22, 1998. His work responsibilities were as a shop hand and as a general maintenance person. The employee testified that he was hired for full-time plus overtime work. (T. 15-6.) The employer's representative stated that the employee's job was part-time, not on a regular schedule and depended upon work availability. (T. 44.) The employee sustained an admitted injury on November 2, 1998.

The employee testified that on Thursday, October 22, 1998, he worked eight hours. He indicated that he worked all day the following day, Friday, October 23 but didn't state the exact number of hours worked. (T. 16.) He stated that he turned down a request to work on the weekend of October 24-25, because of a lack of notice and day care concerns. He testified that he then worked eight or eight and a half hours per day for each of the five week days, Monday

through Friday, October 26 through October 30. He stated that he did not work on the weekend and returned to work on Monday, November 2, the date he was injured. The employee's wife testified that based on notations made by her in a daily calendar, the employee worked the following hours: October 22: 9-6:30, October 23: 9-6:00, October 26: 9-6:00, October 27: worked, but no hours listed, October 28: 9-6:00, October 29: 9-6:00, October 30: 9-6:30, November 2: 8:30-12:00. The daily calendar was introduced into evidence as Petitioner's Exhibit B.

The employer's representative, John Letourneau, Jr., its secretary/treasurer, testified that based on the company's time records, between the date of hire and the date of injury, the employee only worked eight hours on October 22 and 29 and eight and a half hours on October 23, 27, and 28 for a total of 41.5 hours during five days. The work was completed in two separate work weeks. Wages were paid weekly based on a work week from Monday through Sunday. Employees were to submit time cards on Monday each week. He stated that the employee did not turn in a time card for the first week, ending Sunday, October 25, or for the second week ending November 1. As a result, the employee's supervisor was asked to notify the treasurer of the number of hours the employee worked from his date of hire. Based on the supervisor's report, the treasurer created two time cards for the employee which totaled 41.5 hours. (Resp. Ex. 1.) He further testified that the employee was paid for the 41.5 hours in a paycheck issued November 6, 1998. (T. 49.) The employee never called to complain that his check was inadequate. (T. 49.) Because the hours worked in the two separate pay periods were improperly aggregated and entered into the employer's computerized pay system as having been worked in one week, the system generated a check for \$295.75, based on the erroneous belief that the employee had worked 1.5 hours of overtime at \$10.50 per hour. At \$7.00 per hour his total wages for the two pay periods worked would have been \$290.50. (41.5 hours at \$7.00 per hour.) The employer agrees that the employee did return to work on November 2, but that their time and pay records do not reflect the partial day worked and the employee was not paid for that time, because the employee did not submit a time card or other claim specifying the number of hours worked. (T. 56.)

On some undisclosed date the employer and insurer admitted liability for the employee's low back injury and paid temporary total disability benefits from November 2, 1998 through March 7, 1999 at the minimum compensation rate of \$104.00. Apparently the employer and insurer calculated the employee's weekly wage to be \$145.25. (T. 5.) On December 3, 1998, the employee filed a claim petition alleging entitlement to temporary total disability from and after November 2, 1998 based on a weekly wage of \$280.00. The claim petition also indicated a claim for retraining benefits.

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on March 17, 1999. The only issue before the compensation judge was the appropriate level of the employee's weekly wage on the date of injury. The compensation judge found that the appropriate wage was \$285.25, essentially as claimed by the employee. The employer and insurer appeal.

STANDARD OF REVIEW

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, 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." Northern States Power Co. v. Lyon Food Prods., Inc., 304 Minn. 196, 201, 229 N.W.2d 521, 524 (1975).

DECISION

In order to determine the amount of the employee's weekly wage the compensation judge had to resolve a factual dispute between the parties. At the hearing, the employee contended that he had worked an average of 8.3 hours per day for the seven full days he had worked from October 22-30. He then argued that his average week was five times his average day or 41.5 hours. Based on the stipulated base hourly wage of \$7.00 and an overtime rate of \$10.50, the employee contended that his weekly wage had been \$295.75 (40 hours at \$7.00 and 1.5 hours at \$10.50). The employer and insurer took a totally different approach, contending that the employee had worked 41.5 hours during a two-week period. The employer and insurer argued that the employee had earned only \$290.50 (41.5 x \$7) and had an average wage of \$145.25 per week while working for the employer. The compensation judge indicated that he resolved the factual dispute primarily in favor of the employee, based on the evidence contained in the calendar maintained by the employee's wife. He found that the employee had worked five days in the week prior to the injury and had a weekly wage of \$285.25, based on having worked 40.5 hours in the full week before the date of injury (40 hours at \$7.00 per hour and ½ hour at \$10.50 per hour). The compensation judge did not consider the work completed in the first two days of employment in the wage calculation, apparently because it had taken place in a partial work week. (Finding 14.)

The issue before this court is whether the compensation judge's decision is supported by substantial evidence in the record and is not clearly erroneous. The employer and insurer argue that there was substantial evidence in the record to support its position that the employee only worked three days for 25 hours during the week before the date of injury. The affirmative evidence for this position is the testimony of the employer's treasurer who created a time card based on conversations with the employee's supervisor, Mr. Letourneau, Sr. In addition, the employer issued a paycheck to the employee on November 6 based on the employee having only worked three days during that week. The employer and insurer point out that the employee never objected to the amount of the payment until the date of hearing. The employer and insurer also attack the credibility and weight of the employee's evidence. They contend that the employee's version of how he filled out and turned in a two-week time card on Friday October 30, 1998 is not plausible because it is inconsistent with the employer's policies and

procedures. (Er./Ins. Brief at p. 7.) Mr. Letourneau, Jr. stated that all employee's who work in the shop are instructed simply to mark their hours on their time card with no explanation concerning the work that had been done, and to turn in the card on Monday of each week. The employer contends that it never received a time card from the employee. The employee's wife's calendar was attacked primarily because on cross-examination of Mrs. Sampson it was revealed that Exhibit B was not her only calendar, as she had testified on direct, and she did not present her other calendar for review. As a result, the employer and insurer contend the proffered calendar was not reliable. (Er./Ins. Brief at p. 6.)

The employee testified that he worked all five days from October 26 through October 30. This testimony was corroborated by the employee's wife's testimony and the calendar which she kept in connection with her need to establish and verify eligibility for day care assistance. The employee's wife indicated that she entered on to her calendar the number of work hours that her husband worked each day with the exception of Tuesday, October 27, 1998. The daily calendar maintained by the employee's spouse, together with the employer's agreement that the employee worked eight and a half hours on October 27, supports the compensation judge's conclusion that during the full week before the date of injury that the employee worked 40.5 hours.

The compensation judge's responsibility in this case was to determine which version of the facts is favored by a preponderance of the evidence. "Preponderance of the evidence means evidence produced in substantiation of a fact which, when weighed against the evidence opposing the fact, has more convincing force and greater probability of truth." Minn. Stat. § 176.021, subd. 1a. In this case, the compensation judge was required to review the physical evidence concerning the recording of time and to make credibility determinations with respect to the live testimony of the witnesses. With respect to the time records kept by the employer, the employer's representative, its secretary/treasurer, did not testify based on actual knowledge but based on representations made to him by the employee's supervisor. The supervisor, however, did not testify. The employee testified that he worked all five days from October 26-30, 1998 and the employee's wife testified she made the notations in her calendar contemporaneous with the work activity. The compensation judge considered all of this evidence and testimony and simply felt that the weight of the evidence, especially the employee's wife's testimony, as supported by the calendar, dictated a finding that the employee had worked 40.5 hours in the week prior to the date of injury. The weight to be given evidence and credibility determinations are left primarily to the compensation judge. Even v. Kraft, 445 N.W.2d831, 42 W.C.D. 220 (Minn. 1989). In addition, where the compensation judge selects one of several differing, yet reasonable, inferences that can be made from the evidence that decision will not be disturbed. In this case, the compensation judge could have accepted the evidence and inferences raised by the employer and insurer but instead chose those advanced by the employee. Under the circumstances of this case, we cannot find that the compensation judge's resolution of this completely factual dispute was inappropriate. As a result, his decision is supported by substantial evidence and it is affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 59, 37 W.C.D. 235, 239 (Minn. 1984).