

LAWRENCE SCHNAGL, Employee/Appellant, v. MIKE GARANT, UNINSURED, Employer,  
and MN DEP'T OF HUMAN SERVS., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS  
JULY 22, 1999

No. [REDACTED SSN]

HEADNOTES

WAGES - CALCULATION. In the absence of sufficient information to perform the statutory wage calculations or reasonably determine a daily wage, the compensation judge did not clearly err in dividing the total earnings by the total weeks worked to determine the average weekly wage.

Affirmed.

Determined by Wilson, J., Pederson, J., and Wheeler, C.J.  
Compensation Judge: Jeanne E. Knight

OPINION

STEVEN D. WHEELER, Judge

The employee appeals from the weekly wage figure determined by the compensation judge. We affirm.

BACKGROUND

The employee, Lawrence Schnagl, began working for the employer, Michael Garant, as a painter in late April 1998 at a rate of pay of \$20.00 per hour. He continued to work for Mr. Garant on an as-needed basis during May and June 1998 while waiting for an opportunity for union work through his union hiring hall. On June 24, 1998 the employee sustained a work-related injury resulting in bilateral lower extremity fractures in a fall from a moss-covered roof onto which the employee had carried a power washer. The employee filed a claim petition on July 27, 1998 seeking temporary total disability compensation and other benefits based on a claimed weekly wage of \$800.00. As the employer was uninsured for workers' compensation purposes, defense of the claim was undertaken by the Special Compensation Fund. (T. 12-17; Finding 2 [unappealed]; Judgment Roll: 7/27/98 claim petition; answer of the Special Compensation Fund.)

On November 10, 1998 a hearing was held before a compensation judge of the Office of Administrative Hearings to determine whether the claimant was an employee or an independent contractor and to determine his pre-injury weekly wage. The compensation judge found that the claimant was an employee rather than an independent contractor, which finding has not been appealed. The compensation judge found the employee's weekly wage to be \$350.00.

On the wage issue, the employee introduced his handwritten daily planner annotations setting forth his hours worked for the employer for the period from June 10, 1998 through June 24, 1998, the date of injury. (Exh. A.) These records show 11 days of work with daily hours ranging from 7 to 12, and totaling 92 hours for an average of 8.36 hours per day. The employee testified that he did not have any records detailing specific days and hours worked for the employer for prior periods, as he had periodically submitted his wage records to the employer and had been paid in cash. The employee also testified that there were many days when he did not work due to rain or when supplies were not available, and that he "didn't have eight hours or so a day. They were always different. I mean, every day they were different hours." He testified that based on his records, the total pay he had received from the employer was \$1,740.00 for eight weeks during which he worked, and that the employer still owed him \$1,060.00. (Exh. A; T. 18-20, 24-29, 39-42; Finding 9.)

The employee argued that because he was a construction worker, his weekly wage should be determined as five times his daily wage pursuant to Minn. Stat. §176.011, subd. 3. He proposed that the daily wage be determined by multiplying the average number of hours worked per day during the last two weeks (8.36) by his hourly rate to obtain a daily rate and then multiplying by five (5). The employee's method would have resulted in a weekly wage of \$836.00. The compensation judge rejected the employee's proposed calculation method, noting that the employee's method ignored the work performed in April and May. She found that the employee had proven \$2,800.00 in earnings for eight weeks of work. (Finding 10.) The compensation judge did not "find it appropriate to base the wage solely on days worked in June." (Mem. at 6.) As no daily wage could be determined for the later period worked, since the number of days worked was unknown prior to June, the judge calculated the employee's weekly wage by dividing the total earnings by the eight weeks during which the employee worked, and arrived at a weekly wage of \$350.00. The employee appeals.

## STANDARD OF REVIEW

On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. §176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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 the evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must 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). Factfindings may not be disturbed, even though this 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

An injured worker's wage loss benefits are to be based on the employee's weekly wage at the time of injury. Minn. Stat. §176.101, subd. 1. Where wages are irregular or difficult to determine, wages are usually calculated according to the formulas contained in Minn. Stat. §176.011. Under these formulas, a daily wage is first determined by dividing the total wages earned in the 26 weeks prior to the injury by the number of days in which the employee actually performed work. In the case of construction workers, the weekly wage is then determined by multiplying the daily wage by five. Minn. Stat. §176.011, subd. 3.

We note that this statutory method, which first calculates the employee's daily wage, was not possible here because the evidence did not indicate the number of days worked during any but the last two weeks of the employment. We have frequently stated that where a compensation judge does not have available the evidence upon which to make calculations based on the statutory formulas, alternate calculation methods may need to be used to determine the employee's lost earning potential. Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991); Decker v. Red Wing Shoe, 41 W.C.D. 763 (W.C.C.A. 1988).

The employee argues that the compensation judge should have calculated a daily wage by referring only to the employee's earnings in June, in the last two weeks of his employment for the employer. This was the only period for which specific evidence was offered about the number of days worked. The compensation judge concluded that the employee's earnings in this brief period did not constitute an appropriate basis for the wage calculation in this case. (Mem. at 6.)

We cannot conclude that the compensation judge erred in this conclusion. During these two weeks, the employee worked an average of 8.36 hours per day for 11 days. The shortest day worked during this period was 6.5 hours, and for the majority of the days he worked eight hours or more. The employee worked a total of 92 hours and at his pay rate of \$20.00 per hour \$1,840.00 of his total earnings was attributable to his work during these two weeks. The compensation judge found, based on accepting the figures from the employee's testimony, that the employee had earned a total of \$2,800.00 during eight weeks in which he worked for the employer. Thus, in contradistinction to the \$1,840.00 earned during the two weeks in June, the employee's total earnings during the previous six weeks worked were only \$960.00, representing 48 hours of work at \$20.00 per hour. The employee testified that during May "[t]here's a lot of days where we would go to work, and it would be raining . . . and we would turn around and go right home, or we would go in and work two hours and turn around and go home." (T. 25.) The evidence taken as a whole suggests that the employee's work for the employer during this period likely included a great many days in which the hours worked were far less than the 8.36 hours per day the employee averaged during his work in June. Thus, a daily wage determined only on the June earnings likely would significantly overstate the employee's actual daily earnings in the employment.

The employee points out that the uninsured employer in this case did not respond to discovery requests for wage data and, indeed, did not appear at either a deposition or at the

hearing. He argues that the wage calculation used by the compensation judge unfairly punishes the employee by placing on him rather than on the employer the consequences of the failure to introduce sufficient wage information on which to have made the statutory daily wage calculations. We note, however, that the employee bears the burden of proof on the issue of his wage claim.

In making her determination, the compensation judge considered all the evidence available, including the employee's testimony and the wage data provided by the employee's exhibit. Without the ability to fairly determine a daily wage, the compensation judge was unable to apply the seasonal wage correction formula for construction workers which requires multiplying the daily wage by five to determine a weekly wage. In the absence of sufficient evidence to support any other means of calculation, her determination of a weekly wage by dividing the total earnings by the total weeks worked cannot be said to be unreasonable. We therefore affirm.