RICK L. BLIGHT, Employee, v. HARBOR CITY MASONRY and MICHIGAN PHYSICIANS MUT. LIABILITY CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 8, 2000

No. [REDACTED SSN]

HEADNOTES

WAGES - CALCULATION; WAGES - CONSTRUCTION INDUSTRY. Where the employee worked three full and one partial day prior to his work injury, and, as an employee in the construction industry, was entitled to an imputed wage of five times the daily wage to adjust for loss of work days due to weather or seasonal conditions, the compensation judge erred in concluding that the employee's actual earnings were an unreliable measure of his future earning capacity. The compensation judge's calculation of the employee's pre-injury wage based on the earnings of a parallel co-employee, after the date of injury, is speculative and is not appropriate on the facts in this case.

Reversed.

Determined by Johnson, J., Wilson, J., and Pederson, J.
Compensation Judge: Donald C. Erickson

OPINION

THOMAS L. JOHNSON, Judge

The employer and insurer appeal the compensation judge's calculation of the employee's pre-injury weekly wage. We reverse.

BACKGROUND

Rick L. Blight, the employee, was a tuck pointer/caulker and a member of the Bricklayers and Tile Setters Union in Duluth, Minnesota. (T. 25-26.) On June 20, 1996, the employee was hired by Harbor City Masonry, the employer, to perform tuck pointing and caulking for a project at Duluth Central High School. The employer hired the employee through the Bricklayers Union. (T. 28.) The employee was told by the employer's foreman he would work eight hours a day and five days a week, weather permitting. (T. 29-30.) The employee was paid the union rate of $22.92 an hour. (Pet. Ex. A.)

The employee worked eight hours on Thursday, June 20, 1996. On Friday, June 21, 1996, the employee worked only 3.5 hours because of rain. The employee did not work on Saturday or Sunday. On Monday, June 24, and Tuesday, June 25, the employee worked eight hours. The employee did not work on June 26th due to rain. On Thursday, June 27, 1996, the employee worked for only one-half hour and then sustained an injury. (Pet. Ex. D.) The

employee's injury ultimately required surgery and the employee was unable to return to work for the employer.

On the same day the employer hired the employee, June 20, 1996, the employer also hired Lyle Johnson. Mr. Johnson was also a tuck pointer/caulker and was hired to perform the same type of work as the employee at the same project. (T. 28.) Mr. Johnson continued to work after the employee was injured. (T. 31.) Mr. Johnson's time cards were received into evidence and reflect that he worked through the week ending September 1, 1996. (Pet. Ex. E; T. 56.) Roger Anderson, the president of the employer, testified that the employee would have been laid off before Mr. Johnson because of differences in seniority. He further stated the employee definitely would have been laid off by July 15, 1996. (T. 62-63.)

The employer and insurer admitted liability for the employee's personal injury and paid 104 weeks of temporary total disability benefits pursuant to Minn. Stat. § 176.101, subd. 1(k). The employee returned to work thereafter, and the employer/insurer began payment of temporary partial disability benefits based on a pre-injury wage of $916.80 a week. In February 1999, the employer and insurer filed a NOID asserting the employee's weekly wage on the date of injury was $641.76 and contending the employee was overpaid benefits. An administrative conference was held before a compensation judge at the Settlement Division of the Office of Administrative Hearings. The judge concluded the employee's wage on the date of injury was $787.92 and granted a 20% credit to the employer and insurer on future benefits up to the amount of the overpayment. The employee objected to the decision and sought a formal hearing.

The case was heard by Compensation Judge Donald C. Erickson on July 2, 1999. In a Findings and Order filed on July 22, 1999, the compensation judge found the employee earned $641.76 a week during his employment with the employer and found the employee's daily wage was $157.575. (Findings 13, 14.) The compensation judge found the employee worked in a construction trade where the hours of employment were effected by seasonal conditions, and concluded the employee's weekly wage was five times the daily wage, resulting in a total wage of $787.87. (Finding 15.) These findings are unappealed. The compensation judge further found the co-employee, Lyle Johnson, worked 224.5 hours over a 30-day period for the employer. The compensation judge found Mr. Johnson's daily wage was $171.90, which, multiplied by five, yielded a weekly wage of $859.50. (Finding 16.) Finally, the compensation judge found the best measure of the employee's loss of earning capacity was the weekly wage earned by the parallel employee, Lyle Johnson. (Finding 17.) Accordingly, the compensation judge found the employee's weekly wage on the date of injury was $859.50 and ordered the insurer to base its credit on that weekly wage. (Order 1.) The employer and insurer appeal Findings 16 and 17 and Order 1.

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

The employer and insurer appeal the compensation judge's use of a parallel or co-employee's earnings to compute the employee's weekly wage. They contend this method of computing the employee's wage is legally erroneous, speculative and results in a weekly wage in excess of the employee's actual earning capacity. They request this court reverse the compensation judge's weekly wage finding and allow computation of their credit based on a weekly wage of $787.87 a week.

Minn. Stat. § 176.011, subd. 3, defines daily wage as "the daily wage of the employee in the employment engaged in at the time of injury." Wage determinations should generally be calculated in accordance with the statute. A compensation judge is not, however, always bound to compute weekly wage based on the employee's actual earnings. "The object of wage determination is to 'arrive at a fair approximation of [the employee's] probable future earning power which has been impaired or destroyed because of the injury.'" Knotz v. Viking Carpet, 361 N.W.2d 872, 874, 37 W.C.D. 452, 455 (Minn. 1985) (quoting Sawczuk v. Special Sch. Dist. No. 1, 312 N.W.2d 435, 437-38, 34 W.C.D. 282, 287 (Minn. 1981)). If, in unusual factual circumstances, the statutory wage calculation results in a weekly wage which does not fairly approximate the injured employee's lost earning capacity, the fact finder may use another reasonable method of wage calculation which does so. Lobert v. Northome Healthcare Ctr., 57 W.C.D. 113 (W.C.C.A. 1997).

In Bradley v. Vic's Welding, 405 N.W.2d 243, 39 W.C.D. 921 (Minn. 1987), the employee was hired to work a "turn-around" maintenance period at the Pine Bend Refinery. During this three-week period, Pine Bend Refinery closed down and the employer maintained two ten-hour shifts, seven days a week. On completion of the refinery turn-around, the employer resumed its regular 40-hour work week. Bradley was injured during the third week of the turn-around. At issue was whether Bradley's weekly wage should be computed based on his actual earnings or based on the employer's standard 40-hour work week. The compensation judge found that overtime with the employer was not regular or frequent throughout the year.[1] Accordingly, the judge calculated the employee's weekly wage on a 40-hour week rather than his actual earnings

[1] Minn. Stat. § 176.011, subd. 18, defining weekly wage provided that "[o]ccasional overtime is not to be considered in computing the weekly wage, but if overtime is regular or frequent throughout the year it should be taken into consideration."

during the two and a half weeks of work at the refinery. The Supreme Court affirmed stating, "While the computation of weekly wage is frequently based upon actual wages, there are various circumstances which make the claimant's actual earnings during a particular period an unreliable measure of his future earning power." Id. at 246, 39 W.C.D. at 924.

In Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991) the employee was injured two weeks after starting work as a truck driver for the employer. The compensation judge concluded that basing the employee's weekly wage on his earnings from Berger alone was speculative and unfairly exaggerated the employee's loss of earning capacity. On appeal, the Workers' Compensation Court of Appeals noted the employee's trip was cut short by his accident so his expenses for the return trip were unknown. Further, basing the employee's weekly wage on the two weeks of Berger employment alone resulted in a weekly wage far in excess of the employee's historical earnings as a truck driver. Based on this evidence, this court affirmed the compensation judge's use of the employee's earnings as a truck driver over a three-year period as reflected on his tax returns.

In Johnson v. D.B. Rosenblatt, Inc., 265 Minn. 427, 122 N.W.2d 31, 22 W.C.D. 468 (1963), the supreme court addressed the proper wage calculation for an employee paid by the piece. The court held that where evidence of a piece worker's past performance was lacking, other evidence may be used to determine the probable productive capacity of the employee. The court stated "in cases where the employee has been employed for only a very short period of time, it has been held that the wages the employee could have earned may be gauged by the wages paid to one doing similar work." Id. at 33, 22 W.C.D. at 471. Similarly, in Berry v. Walker Roofing Co., 473 N.W2d 312, 45 W.C.D. 125 (Minn. 1991) the employee, a roofer paid by the piece, was injured within hours after beginning employment. The compensation judge calculated the employee's weekly wage based on the average weekly earnings of three other full-time employees engaged in similar work. The supreme court affirmed this method of calculation stating "the wage calculation based on the average weekly wage of three co-employees was more reliable than a speculative extrapolation of Berry's earning capacity based on a few hours of work about which there was conflicting testimony." Id. at 316, 45 W.C.D. at 130. See also Wright v. Robo Roofing, 48 W.C.D. 551 (W.C.C.A. 1993).

The compensation judge here found the best measure of the employee's loss of earning capacity was the weekly wage earned by Lyle Johnson. In the memorandum, the judge explained his conclusion, stating that computing the employee's weekly wage under the statute "understates the amount of the employee's earning capacity as the short period of time exaggerates the effect of any work loss." (Memo at 5.) We conclude substantial evidence does not support the compensation judge's finding and we are, therefore, compelled to reverse.

Prior to his injury, the employee worked three eight-hour days and one partial day. Granted, the fact that the employee worked only 3.5 hours on June 21, 1996 does reduce the amount of his daily wage. Inherent in the statutory method for calculating daily wage is the fact that, had the employee worked more hours on June 21, or not worked at all, his daily wage would be higher. This fact, standing alone, does not, however, mandate a conclusion that the employee's

actual pre-injury earnings do not fairly approximate his lost earning capacity. Minn. Stat. § 176.011, subd. 3, provides an imputed weekly wage for employees in the construction industry of not less than five times the daily wage. Keklah v. Gebert's Floor Coverings, 511 N.W.2d 437, 50 W.C.D. 80 (Minn. 1994). The provision is intended to factor out periods of no work or reduced work due to seasonal conditions and compensate the employee as a full-time worker. Koziolek v. Aconite Corp., 49 W.C.D. 498 (W.C.C.A. 1993). Construction workers are often unable to work full time because of weather and the legislature addressed that reality through use of an imputed wage. In this case, we see no reason to depart from the statutory method of calculation simply because the employee worked less than eight hours on one day prior to his injury.

The employee asserts the Berry and Johnson cases are directly on point and are controlling. We disagree. Both Berry and Johnson were piece workers and worked for too short a time to determine what they would have earned. In this case, the employee was not a piece worker and worked on four days prior to his injury. This is a short period of time, but not so short as to be inherently an unreliable measure of lost earning capacity. Using the statutory method of compensation, the compensation judge found the employee's weekly wage was $787.87. Had he worked a 40-hour week, the employee's weekly wage would have been $916.80.[2] The difference is not so significant as to mandate or justify a departure from the statutory method of wage calculation. We find no evidence to support the conclusion that the employee's actual earnings are an "unreliable measure of his future earning power." Bradley, 405 N.W.2d at 246, 39 W.C.D. at 924. Accordingly, we find no legal basis for deporting from the statutory method of calculation on these facts.

Finally, we do not agree that Lyle Johnson's post-injury earnings are a more accurate or reliable measure of the employee's lost earning capacity than the employee's actual pre-injury earnings. Johnson's earnings after the employee was injured were equally susceptible to the vagaries of the weather. Further, the employer testified the employee would have been laid off at least two weeks before Mr. Johnson was. Based on the facts in this case, the use of the co-employee's post-injury earnings is a speculative extrapolation of the employee's earning capacity. While such an extrapolation may be appropriate in cases where there is little or no evidence of the injured employee's actual earnings, this is not such a case. Accordingly, we conclude the compensation judge's failure to use the statutory method of wage calculation was erroneous. We reverse Finding 17 and modify Order 1 to reflect an average weekly wage of $787.87.

[2] $22.92 an hour times 40 hours equals $916.80.