

WILLIAM GERNER, Employee, v. H&E CONSTR. CO. and GEN. ACCIDENT INS. CO., Employer-Insurer, and TRI-SUN CONSTR., UNINSURED, Employer, and PREFERRED BUILDERS and STATE FARM FIRE & CAS., Employer-Insurer/Appellants, and MICHAEL OLSON d/b/a OLSON CONSTR. and WAUSAU INS. CO., Employer-Insurer, and MN DEP'T OF HUM. SERVS., FAIRVIEW HOSP. & HEALTH CARE, BLUE CROSS AND BLUE SHIELD OF MINN./MEDICARE and CTR. FOR DIAGNOSTIC IMAGING, Intervenors, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 8, 2000

No. [REDACTED SSN]

HEADNOTES

EMPLOYMENT RELATIONSHIP - SUBSTANTIAL EVIDENCE; STATUTES CONSTRUED - MINN. STAT. § 176.215. Substantial evidence, including the employee's testimony, testimony of the subcontractor's owner, and documents support the compensation judge's finding as to the identity of the general contractor at the time of the employee's injury.

Affirmed.

Determined by: Rykken, J., Wilson, J., and Johnson, J.
Compensation Judge: Danny P. Kelly

OPINION

MIRIAM P. RYKKEN, Judge

Preferred Builders and its insurer, State Farm Fire & Casualty, appeal from the compensation judge's determination that Preferred Builders was a general contractor for the employee's employer, Tri-Sun Builders, on June 8, 1993, and therefore is liable for benefits payable to the employee as he was an employee of an uninsured subcontractor. They have also appealed from the compensation judge's finding that Preferred Builders and State Farm Fire & Casualty are liable for payment of indemnity benefits, including impairment compensation based upon 12 percent permanent partial disability to the body as a whole, medical expenses, attorney's fees, and costs and disbursements due to the employee as a result of his injury on June 8, 1993.

BACKGROUND

This matter involves three work-related injuries the employee sustained between 1985 and 1993, while employed as a carpenter. On July 15, 1985, the employee worked as a carpenter for H&E Construction, which was insured by General Accident Insurance Company. Born on December 19, 1956, the employee was 28 years old on July 15, 1985. On that date, he strained his low back while framing an interior wall. The employee remained off work for approximately two years, received medical treatment and was assigned permanent physical work

restrictions. Thereafter, he commenced working for Bor-Son as a “cut man” for a siding crew, working on a light-duty basis; he continued to experience low back symptoms.

Following the employee’s July 15, 1985 injury, H&E Construction Company and General Accident Insurance Company paid economic recovery compensation to the employee based upon 3.5 percent permanent partial disability of the body as a whole, and were later ordered to pay an additional 7 percent permanent partial disability as impairment compensation.

On June 8, 1993, the employee was employed by Tri-Sun Construction as a carpenter, framing a single family home. On that date, Tri-Sun Construction was acting as subcontractor on various house building projects, but was uninsured for workers’ compensation liability. On June 8, 1993, as he lifted framing trusses, the employee developed severe low back pain and collapsed to the ground. He sought medical treatment at St. Paul Ramsey Hospital, was diagnosed as having a low back strain, and remained off work for approximately three days. He returned to work performing light activities, but continued to experience shooting pains and cramping with gradually worsening low back pain and numbness extending into both legs.

Between June and November 1993, the employee’s employment continued with the same employer/owner, although the name of the business entity changed by at least October, 1993. Whereas in June 1993 Mr. Olson owned Tri-Sun Construction, in October 1993 he began conducting business as Mike Olson Construction. On November 1, 1993, the employee was employed as a carpenter by Mike Olson Construction, which on that date was insured for workers’ compensation liability by Wausau Insurance Company. On November 1, 1993, the employee sustained another work-related injury, to his cervical spine. On that date, the employee was hit in the head by a two-by-eight piece of lumber which had been thrown from a window. The employee developed pain and numbness in his neck, which spread throughout his entire body; the employee’s coordination worsened and he began stumbling. The employee sought medical treatment for this injury, and underwent surgery on November 22, 1993 in the nature of an anterior cervical discectomy and fusion at the C6-7 level, with right iliac bone graft.

The employee’s low back symptoms also persisted. He underwent two surgeries to his lumbar spine, on March 22, 1994, and October 17, 1995. Following those surgeries, the employee continued to notice low back pain and symptoms in both legs. The employee has not returned to full-time work since his injury on November 1, 1993.

This case has a long and complex procedural history. The employee initially brought a claim, in August 1994, against H&E Builders and General Accident Insurance Company. As a result of extensive discovery and multiple petitions for joinder and motions to dismiss, additional employers and insurers were identified and then later dismissed from the claim. Prior to the hearing held on June 22 and 23, 1999, four employers and insurers, along with the Special Compensation Fund, remained as co-defendants on the claim.

Two issues unresolved prior to the hearing were the identification of the insuring entity at the time of the employee’s June 8, 1993 injury, and therefore whether the Special

Compensation Fund or the general contractor on that date should be deemed as the insuring entity. The employee's employer on June 8, 1993, Tri-Sun Construction, was uninsured for workers' compensation liability. The Special Compensation Fund, uninsured section, argues that pursuant to Minn. Stat. § 176.215, Preferred Builders, as general contractor for Tri-Sun Construction, is liable for payment of compensation due to the employee of the uninsured subcontractor. Whereas the record contains information directly showing that Preferred Builders, one of the co-defendants, was the general contractor for the employee's employer on the injury date of November 1, 1993, no definitive determination or agreement was made prior to the hearing as to whether Preferred Builders was the general contractor for Tri-Sun Construction when the employee was injured on June 8, 1993. The Special Compensation Fund argues that the evidence and the testimony identify Preferred Builders as the general contractor. Preferred Builders refutes that argument, arguing that the records in evidence do not document its general contractor status and further that the employee was not even injured at the specific job site identified by the Special Compensation Fund.

Hearing was held on this matter on June 22 and 23, 1999. In dispute were numerous issues including whether the employee was an independent contractor or employee in 1993, entitlement to permanent partial disability benefits and permanent total disability benefits, attainment of maximum medical improvement, the nature and extent of each of the employee's three work-related injuries, equitable apportionment of liability for indemnity and medical expenses related to each injury, apportionment of liability pursuant to Minn. Stat. § 176.101, subd. 4a, and reimbursement claimed by medical intervenors. The compensation judge determined that the employee was an employee and not an independent contractor, that he had been permanently and totally disabled since November 1, 1993, and that liability for the employee's permanent total disability was to be equitably apportioned one-third to each of the employee's three work-related injuries. The employee was awarded certain permanent partial disability benefits and medical expenses; two different insurers were assigned to be paying agents for indemnity benefits, medical expenses, interest and costs.

The issues on appeal relate solely to the employee's June 8, 1993 injury. In an unappealed finding, the compensation judge determined that the employee sustained a permanent injury to his lumbar spine on June 8, 1993, while employed as a carpenter for Tri-Sun Construction. The compensation judge also determined that on June 8, 1993, Tri-Sun Construction was a subcontractor for Preferred Builders, general contractor. The compensation judge determined that pursuant to Minn. Stat. § 176.215, Preferred Builders, as general contractor, is liable for payment of all compensation due to the employee as a result of his June 8, 1993 injury, since the subcontractor was uninsured on that date. The compensation judge determined that the employee sustained a total of 22.5 percent permanent partial disability to the body as a whole due to his lumbar spine injuries, that 10.5 percent was attributable to his July 15, 1985 injury and that 12 percent was attributable to his June 8, 1993 injury. The compensation judge ordered Preferred Builders to pay impairment compensation based upon that rating.

The compensation judge also determined, in an unappealed finding, that liability for the employee's lumbar condition is apportioned 50 percent to the employee's July 15, 1985 injury and 50 percent to his June 8, 1993 injury. State Farm Fire & Casualty, insurer for Preferred

Builders, was assigned by the compensation judge to administer and to be the paying agent for the medical expenses and statutory interest related to the lumbar spine, subject to 50 percent reimbursement from General Accident Insurance Company, which was on the risk at the time of the employee's 1985 injury.

Preferred Builders and State Farm Fire & Casualty appeal from the compensation judge's determinations concerning Preferred Builders' general contractor status at the time of the employee's June 8, 1993 injury.

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 Finding No. 8, the compensation judge found that Tri-Sun Construction was a subcontractor for Preferred Builders, a general contractor. The compensation judge determined that pursuant to Minn. Stat. § 176.215, Preferred Builders, as the general contractor, was liable for workers' compensation insurance coverage, as the subcontractor was uninsured for workers' compensation liability at the time of the employee's injury on June 8, 1993. Minn. Stat. § 176.215 states as follows:

176.215. Subcontractor's failure to comply with chapter.

Subdivision 1. Liability for payment of compensation. Where a subcontractor fails to comply with this chapter, the general contractor, or intermediate contractor, or subcontractor is liable for payment for all compensation due an employee of a subsequent subcontractor who is engaged in work upon the subject matter of the contract.

Preferred Builders and State Farm Fire & Casualty argue that no evidence in the record establishes that Preferred Builders was the general contractor at the job site where the employee was injured. Preferred Builders therefore argues that the Special Compensation Fund

has failed to meet its burden of establishing that Preferred Builders is responsible for benefits due to the employee, and that the compensation judge's determination of Preferred Builders' contractor status was erroneous and therefore should be reversed. As outlined in Minn. Stat. § 176.421, subd. 1, this court must determine whether the Findings of Fact and Order are clearly erroneous and unsupported by substantial evidence, in view of the entire record submitted to the compensation judge. Where evidence is conflicting or more than one inference may reasonably be drawn from the evidence, the findings of the compensation judge are to be upheld. Redgate v. Sroga's Standard Serv., 421 N.W.2d 729, 734, 40 W.C.D. 948, 957 (Minn. 1988).

The record contains testimony by the employee and testimony by Michael Olson, the owner of Tri-Sun Construction, and also contains documents purporting to demonstrate the general contractor relationship between Preferred Builders and Tri-Sun Construction. The compensation judge reviewed this testimony and these records, and determined that the records supported the finding of a general contractor-subcontractor relationship between Preferred Builders and Tri-Sun Construction. The compensation judge's finding on that issue was supported by substantial evidence of record, and we affirm.

The location of the job site where the employee was injured on June 8, 1993, was disputed. The Special Compensation Fund ("Fund") offered documents into the record in support of its argument that the employee was injured while working on a house building project at 6810-29th Street North, Oakdale, Minnesota. The Fund then argued that certain documents showed that Preferred Builders acted as general contractor on that job site, with Tri-Sun Construction serving as a subcontractor for the framing work. These records include (1) a purchase order dated June 11, 1993, with the name of Preferred Builders preprinted on the form, made out to Tri-Sun Construction for supplies obtained for the houses located at 6810 and 6812-29th Street, North, Oakdale, Minnesota; (2) a building permit application dated April 21, 1993, applied for by Preferred Builders for 6810-29th Street North; and (3) a document showing that the Oakdale City Building Inspector performed a "framing inspection" at 6810 29th Street North on June 11, 1993. (SCF's Exs. 1 & 2.) The Fund argues that inferences drawn from these business records reveal that during the week of the employee's June 8, 1993 injury, Tri-Sun Construction's crew framed a house located at 6810 29th Street North, Oakdale, Minnesota. The Fund further argues that the employee's injury on June 8, 1993, occurred at this location, and that Preferred Builders was the general contractor for that house.

According to the employee's testimony, the employee worked solely for Tri-Sun Construction during the summer of 1993. The employee worked with a crew of four or five workers (Tri-Sun's only crew), and worked on every one of Tri-Sun Construction's job sites in 1993. (T. 172.) The employee testified that Tri-Sun Construction worked only as a subcontractor. (T. 127.) The employee also testified that Tri-Sun Construction's main general contractor was Preferred Builders. (T. 72.) The employee admitted that he was not always aware of who the general contractor was on each job (T. 72), but that he was aware of only one general contractor for which Tri-Sun Construction worked in 1993: Preferred Builders. (T.127.)

On the first day of trial, the employee testified that he could not specifically recall the geographic location of the job site where he was injured on June 8, 1993. (T. 76.) The employee agreed, on cross-examination, that because he framed 50-60 houses each year for Tri-Sun Construction, it would be difficult for him to remember each house framed in 1993. The employee also testified that he remembered the job where he worked when injured, and recalled what the house and land looked like. However, the employee also testified that during the course of this litigation he had attempted to locate the house site where he was injured, and that he “had gone back to a couple of areas, and it’s so built up now, I hardly recognize anything . . .” (T. 150.) The employee testified that he tried to locate the residence where he was injured, and “to the best of my knowledge, no, I can’t recall it.” (T. 115.)

What the employee did recall was that at the time he was injured on June 8, 1993, he was lifting and setting trusses on a split-level house. (T. 73.) The employee described the typical timing for framing of a house. He explained that his crew could completely frame a house in an average of four days, and that once the trusses are set in a house project, the framing job is within two days of completion. City framing inspections typically are performed upon completion of the framing portion of the project, within one day or at least within one week of completion. (T. 176, 201.)

The house located at 6810-29th Street, North, in Oakdale, Minnesota (“the 29th Street house”) is a walk-out rambler; the employee testified that his injury occurred while he was working on a split-level house. However, the employee admitted that a walk-out rambler can be similar in style to a split-level, explaining that the house may “go from a full basement to a half basement to a half upper. If it does have a full basement, you would have a walk-out down on the lower level out the back.” (T. 134.) The employee further testified, “a split level can have a walk out basement similar to a walk-out rambler.” (T. 182.)

The employee’s testimony was the only identifying testimony presented at the hearing; the only other references to a particular job site and street address were in the documents submitted by the Special Compensation Fund. The employee recalled he worked on the crew which built the 29th Street house, even though he could not recall when he worked there. The employee’s testimony concerning the job site where he was injured was equivocal. Whereas on the first day of hearing the employee claimed that he could not identify where he was injured on June 8, 1993, while testifying on the second day of hearing, he asserted that he was not injured at the 29th Street house. The employee testified that he visited that particular address the evening between the two days of hearing, took photographs of the front and back of the house, and was able to determine that he was not injured at that job site because he now “remembered the view.” (T. 198.)

Michael Olson, owner of Tri-Sun Construction in June 1993, also testified at his deposition that Preferred Builders was likely the general contractor with whom Tri-Sun Construction worked in 1993. (Olson depo. 10/15/97, pp. 46-47.) It is significant that no testimony was presented at the hearing or by deposition by a representative of Preferred Builders, nor were any records placed into evidence by Preferred Builders documenting or refuting whether

Preferred Builders had a general contractor-subcontractor relationship with Tri-Sun Construction in June 1993, either generally or specifically at the job site where the employee was injured.

The Fund argues that all of the information presented creates the inference that the employee, as part of the crew for Tri-Sun Construction, worked on the 29th Street house during the week of June 7 through 11, 1993. Based upon the framing inspection report dated June 11, 1993, and based upon the witness's testimony, it was reasonable for the judge to conclude that the Tri-Sun Construction crew worked on the 29th Street house during the week of June 7-11, 1993. Even though the employee did not recall working at the 29th Street house on the date of his injury, he does recall that at some point he worked on the building crew for that house project. (T. 204.)

The appellants, Preferred Builders and State Farm Fire & Casualty, argue that it was erroneous for the compensation judge to draw the conclusions he did from the evidence in the record. Preferred Builders relies on the lack of specific documentation of the particular job site where the employee was injured on June 8, 1993, and points specifically to the employee's testimony at hearing that he was not injured at this particular address. Preferred Builders also argues that although the compensation judge did not directly find that the employee was injured at the 29th Street house, he found that "[o]n June 8, 1993, Tri-Sun Builders [sic] was a subcontractor for Preferred Builders, a general contractor." (Finding No. 8.) Preferred Builders argues that implicit in the compensation judge's findings, therefore, is that the employee was injured at the 29th Street house, but also argues that the Fund did not meet its burden of proof in establishing that the employee was injured at the 29th Street house or that Preferred Builders was the general contractor on June 8, 1993.

The issue on appeal, however, is not whether the evidence will support a contrary finding but whether the compensation judge's findings of fact are supported by substantial evidence in view of the entire record as submitted. Minn. Stat. § 176.421, subd. 1; Wills v. Minnesota Alpha Found., slip op., (W.C.C.A. April 17, 2000). No dispute existed that the employee was employed by Tri-Sun Construction as a carpenter on June 8, 1993. Based upon the totality of the evidence in the record, it was reasonable for the compensation judge to infer that Preferred Builders was the general contractor for Tri-Sun Construction at the time the employee injured his low back on June 8, 1993.

Preferred Builders argues that the Special Compensation Fund failed to meet its burden of proving that Preferred Builders was the general contractor, and that the compensation judge's finding of that general contractor status was based on "refuted conjecture." We disagree. The record is replete with information which supports the compensation judge's determination of that general contractor-subcontractor relationship. The factors which the compensation judge clearly had opportunity to review include the following: The employee testified that he worked solely for Tri-Sun Construction in the summer of 1993, that Tri-Sun had only one crew, and that he worked on each of Tri-Sun's job sites; the employee testified that Tri-Sun worked only as a construction subcontractor and that Preferred Builders was the only general contractor he could recall; the purchase order dated June 11, 1993, supports the compensation judge's conclusion that Preferred Builders had a general contractor-subcontractor relationship with Tri-Sun; and the time

frame for installation of trusses and framing inspections, as described by the employee, is consistent with the inspection report submitted into evidence. The employee was injured on Tuesday, June 8, 1993, while lifting trusses. This portion of the framing project would have been within two days of completion of the framing. The inspector for the city of Oakdale, Minnesota, inspected the house on Friday, June 11, 1993, which presumably was the day after completion of the house framing.

The question of whether Preferred Builders was a general contractor for purposes of assigning liability under Minn. Stat. § 176.215 is a factual matter, see Weme v. Lastavica, 458 N.W.2d 404 (Minn. 1990). The compensation judge reviewed an extensive record and issued factual findings concerning the employee's work for Tri-Sun Construction on June 8, 1993, and Preferred Builders' and Tri-Sun Construction's general contractor-subcontractor relationship in June 1993. It was not unreasonable for the compensation judge to conclude, under the facts of this case and in the absence of any information to the contrary, that Preferred Builders was the general contractor for Tri-Sun Construction during the time frame of the employee's June 8, 1993, injury. We believe that the evidence of record substantially supports the compensation judge's findings, and that those findings were not clearly erroneous; see Northern States Power v. Lyon Food Prods., 304 Minn. at 201, 229 N.W.2d at 524 (1975). Accordingly, we affirm.