THOMAS HOGQUIST, Employee, v. BILL TEMME d/b/a AFFORDABLE REMODELING, UNINSURED, Employer/Appellant, and MN DEP'T OF HUM. SERVS., Intervenor, and SPECIAL COMP. FUND.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 21, 2000

No. [REDACTED SSN]

HEADNOTES

EMPLOYMENT RELATIONSHIP - INDEPENDENT CONTRACTOR. Although the relationship between the parties was "muddled and confused" and records and documentation of employment was poor, the compensation judge's resolution of conflicting evidence as to whether the employee was an employee or an independent contractor at the time of his injury was not unreasonable, and his conclusion that the petitioner was an employee and not an independent contractor at the time of his injury was not clearly erroneous and unsupported by substantial evidence.

WAGES - CONSTRUCTION INDUSTRY. Where it was clear that a substantial portion of the employer's business involved remodeling and improvement of residential and commercial structures, the compensation judge's conclusion that the employee was working in the construction industry for purposes of Minn. Stat. § 176.011, subd. 3, was not clearly erroneous and unsupported by substantial evidence, regardless of the fact that not all of the construction was technically "new" construction.

WAGES - CONSTRUCTION INDUSTRY; STATUTES CONSTRUED - MINN. STAT. § 176.011, SUBD. 3. The weekly wage for an employee in the construction industry is, as a matter of law, to be calculated at not less than five times the daily wage under Minn. Stat. § 176.011, subd. 3, even without proof that the employee's particular employment is in an industry where hours of work are affected by seasonal conditions; and, where the court had affirmed the judge's finding that the employee was working in the construction industry, the judge's calculation of the employee's weekly wage by application of the construction industry provisions in the statute was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wheeler, C.J., and Wilson, J.
Compensation Judge: William R. Johnson

OPINION

WILLIAM R. PEDERSON, Judge

The uninsured employer appeals from the compensation judge's finding of an employer-employee relationship and his determination of the employee's weekly wage. We affirm.

BACKGROUND

In about May of 1999, Bill Temme formed Affordable Remodeling, a business involved in residential property remodeling and repair work. The business was solely owned by Mr. Temme, and advertising, bidding, purchasing, and all other expenditures were handled by him. Between late May and August 15, 1999, Thomas Hogquist worked on six remodeling projects with Temme, evidently working twelve days, for which he was paid $3,315.00.[1] Mr. Hogquist [Hogquist] did not have an ownership interest in Affordable Remodeling. The six projects on which he worked entailed exterior as well as interior repair, including repair and replacement of windows and doors, painting, trim work, and roofing. On August 15, 1999, on his third day on a roofing job on a private residence in Savage, Minnesota, Hogquist fell off the roof and was seriously injured.[2] Temme, who did not carry workers' compensation insurance, denied liability on grounds that Hogquist was an independent contractor rather than an employee.

The matter came on for hearing before a compensation judge at the Office of Administrative Hearings on February 2 and 3, 2000. At the hearing, evidence included testimony from Temme, Hogquist, and several other witnesses concerning the alleged employment relationship.[3] That testimony revealed a significant dispute between the parties with regard to factors relevant to determining whether Hogquist was an independent contractor or an employee.[4]

Hogquist testified that he was paid $15.00 an hour for non-roofing work and $20.00 an hour for roofing, that he was not compensated on a per-job basis and never made a per-job competitive bid, and that he kept track of his own hours and reported them to Temme at the end of each day. Hogquist testified also that he never held himself out to the public as an independent contractor, that he never telephoned any of Temme's customers, and that he never purchased any advertising or maintained a separate business office. He admitted that he did bring his tool belt and a bucket of tools to the jobs, but he claimed that he also used tools supplied by Temme. He

[1] This is according to evidence later produced at hearing by Temme.

[2] At the hearing, the parties stipulated to the date of injury, the nature of Mr. Hogquist's injuries, that Hogquist had been temporarily totally disabled since August 16, 1999, that MMI had not yet been reached, that Hogquist had a minimum of 28% whole body permanent partial disability, that medical expenses incurred were reasonable and necessary, and that he was entitled to a rehabilitation consultation.

[3] Witnesses included Mr. Hogquist's significant other, Joanne Holmes, and her son, Travis Rasmussen; John Hughley, an independent plumber; Joshua Thomas, a friend of both Temme and Hogquist; and Kyle Temme, Mr. Temme's wife.

[4] See, generally, Minn. R. 5224.0330 and Minn. R. 5224.0340.

testified that Temme would decide when each job would begin, would order any necessary materials, and would decide if any insurance was required. Hogquist testified that he did not have any recurring business liabilities or obligations and that he was not likely to lose any money on a job unless he was not paid for his time by Temme. He testified that he did not work on other jobs while working for Temme and that he never helped Temme put bids together.

Temme testified that he did not obtain workers' compensation insurance for Affordable Remodeling because he had no employees. He indicated that he not only considered Hogquist an independent contractor but also worked with other independent contractors on various jobs. Temme testified that he never deducted income and Social Security taxes from payments made to Hogquist, nor did Hogquist ever request that he do so. He testified that, in preparing bids for potential jobs, he would sometimes call in other individuals to assist him in calculating the bid and that on certain occasions Hogquist assisted him in preparing bids. He indicated that both he and Hogquist used their own tools on the job. He testified that on at least two jobs Hogquist brought along his own assistants - - his significant other, Joanne Holmes, and her son, Travis Rasmussen - - and that it was Hogquist who determined how much those people would be paid. Temme indicated that, during the brief period of time that he and Hogquist worked together, Hogquist also worked on projects without Temme. Temme said that he was aware of those projects and did not preclude Hogquist from accepting them. Temme testified that, on the job where Mr. Hogquist was injured, an argument had ensued in which Hogquist had threatened to pull "his people" off the job if they were not immediately paid. He noted that, after the injury occurred, Ms. Holmes had signed a lien waiver on behalf of Mr. Hogquist in favor of the homeowner.

In Findings and Order issued April 17, 2000, the compensation judge found that Hogquist was an employee of Bill Temme, d/b/a Affordable Remodeling, and that his weekly wage on the date of injury was $1,381.25. Temme appeals.

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 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

Employment Relationship

The primary issue presented to the compensation judge was whether Mr. Hogquist was an employee of Bill Temme, d/b/a Affordable Remodeling or, as argued by Temme, an independent contractor. In analyzing this issue, the judge properly evaluated the evidence under the independent contractor rules, Minnesota Rules chapter 5224. He concluded that Hogquist did not substantially meet the safe harbor criteria for either employee or independent contractor status under Minn. R. 5224.0020, the portion of the rules dealing with artisans. The judge went on to apply Minn. R. 5224.0330 and Minn. R. 5224.0340, which contain general criteria for determining whether a worker is an employee or an independent contractor. Under those rules, the judge concluded that Hogquist had been an employee of Temme at the time of his injury.

On appeal, Temme argues that the credible evidence of record does not support the judge's conclusion that Temme exerted sufficient control over Hogquist to be considered his employer. For example, Temme contends that the record establishes that Hogquist brought along his own assistants and directed Temme as to what they would be paid. He argues that Hogquist provided his own tools and did not require detailed instructions about when, where, and how to perform his work. He argues that both he and Hogquist were paid on a per-job basis and that Hogquist worked on other projects while he was working with Temme. Temme notes that he paid Hogquist by check and cash without making any deduction for income or social security taxes. He contends that he did not believe that he had the right to discharge Hogquist, nor, he argues, does a total of six jobs over a period of twelve days in ten weeks evidence a continuing relationship. In addition, Temme notes that a lien waiver was provided by Hogquist for the job on which he was injured.

We are not persuaded that the judge's finding of an employment relationship between Temme and Hogquist was unreasonable. At the outset, the compensation judge noted that "[t]he relationship of Affordable Remodeling, Mr. Temme and Mr. Hogquist is truly a muddled and confused relationship." That being said, the judge noted that, pursuant to Minn. R. 5224.0330, subp. 1, the most important criteria in determining the issue of employment status is the right to control the means and manner of performance. See also Hunter v. Crawford Door Sales, 501 N.W.2d 623, 48 W.C.D. 637 (Minn. 1993). The judge held that the evidence supported the conclusion that "[o]ver all, that control clearly rested with Temme." The record also substantially supports the conclusions that Hogquist was not paid on a job basis or responsible for incidental expenses; that Temme controlled the finances, made the financial decisions, and furnished the materials used on the job; that a continuing relationship existed between Temme and Hogquist; and that Hogquist did not work for other persons or firms at the same time.

Additional factors to be considered in evaluating whether an individual acted as an employee or as an independent contractor are provided in Minn. R. 5224.0340. The judge concluded that each of the factors listed in that rule suggests that an employment relationship existed in this case, and there is ample evidence to support the judge's conclusions. The judge

found the following: that Temme had the right to discharge Hogquist and that Hogquist would be powerless to do anything about it; that Hogquist did not make his services available to the general public; that Hogquist was paid on an hourly basis and not on a per-job basis; that Hogquist had no chance to realize a profit or a loss as a result of his services; that Hogquist was not responsible for the satisfactory completion of the work or services Temme contracted for and was not liable for failure to complete the work or services; and that Hogquist had no substantial investment in facilities used in performing his job for Mr. Temme.

We concede that the evidence offered at the hearing is subject to differing interpretations, but we cannot conclude that the compensation judge's analysis of the facts is unsupported by substantial evidence. It was the responsibility of the compensation judge to resolve conflicts in testimony and ultimately to weigh all of the evidence in the case to decide whether Hogquist was an independent contractor or an employee. Where evidence is conflicting or more than one inference may reasonably be drawn, the findings of the compensation judge are to be upheld. Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240. To a great extent, the judge's analysis was dependent on his assessment of the credibility of the witnesses. "Assessment of witness credibility is the unique function of the factfinder." Tews v. George A. Hormel & Co., 430 N.W.2d 178, 41 W.C.D. 410 (Minn. 1988). This court must give due weight to the compensation judge's opportunity to observe the witness and judge his credibility; a finding based on credibility of a witness will not be disturbed on appeal unless there is clear evidence to the contrary. See Even v. Kraft, Inc., 445 N.W.2d 831, 42 W.C.D. 220 (Minn. 1989). As the compensation judge noted, the relationship between the parties was "muddled and confused." In addition, records and documentation was poor at best. The compensation judge's resolution of the conflicting evidence was not unreasonable, and we cannot conclude that he erred in his conclusion that Hogquist was Temme's employee on the date of injury. We therefore affirm that decision.[5]

Average Weekly Wage

The compensation judge calculated Hogquist's daily wage to be $276.25, pursuant to principles outlined in Minn. Stat. § 176.011, subd. 3, multiplying that figure by five to arrive at $1,381.25 as Hogquist's weekly wage, pursuant to further provisions of that subdivision that are to be applied in cases where the employee is working in the construction industry.[6] Temme agrees

[5] The compensation judge also analyzed this case under Minn. Stat. § 176.042. The judge concluded that, even if Mr. Hogquist were considered an independent contractor under the rules, Mr. Hogquist would still be considered an employee under this statute because he was engaged in residential building construction or improvement. Because we have affirmed the judge's conclusion that Hogquist was an employee under the independent contractor rules, we need not consider the judge's additional analysis under this statute.

[6] Minn. Stat. § 176.011, subd. 3, provides in part as follows:

> "Daily wage" means the daily wage of the employee in the employment engaged in at the time of injury but does not include tips and gratuities paid directly to an employee by a customer of the

with the judge's calculation of Hogquist's daily wage but not with the judge's calculation of Hogquist's weekly wage, contending that Hogquist was not employed in construction work for purposes of the statute. If Hogquist was not engaged in the construction industry, his weekly wage would, under provisions of Minn. Stat. § 176.011, subd. 18, be calculated by dividing the total number of days he worked, twelve, by the number of weeks in which the work was performed, ten, multiplied by the daily wage. This would yield an average weekly wage of $331.50 instead of $1,381.25.

Temme asserts that "[t]he 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." Bradley v. Vic's Welding, 405 N.W.2d 243, 245-6, 39 W.C.D. 921, 924 (Minn. 1987). He contends that, by imputing a construction industry wage to the facts of this case, Hogquist's actual earning power has unreasonably been inflated. He argues that the work that Hogquist performed was not "construction work" within the common meaning of that term, because none of his business was in new construction, all of it being in remodeling or repair of existing structures, and because it was not affected by seasonal conditions. We are not persuaded that the judge's decision was erroneous or unreasonable.

Temme's very argument as to new and old construction was presented to the supreme court in Keklah v. Gebert's Floor Coverings, 511 N.W.2d 437, 50 W.C.D. 80 (Minn. 1994). Keklah was a carpet installer who was injured while working on a commercial remodeling project. In addressing the attempted distinction between new construction and a remodeling project, the supreme court stated,

> We can ascertain no rational basis for saying that carpenters, bricklayers, plumbers, electricians, roofers, painters, as well as carpet layers, are members of the construction industry if the project on which they are presently engaged is the construction of a completely new building but that they step outside of the constructions industry whenever the current project calls for the remodeling, renovation or major refurbishing of an existing structure.

> employer and not accounted for by the employee to the employer. If the amount of the daily wage received or to be received by the employee in the employment engaged in at the time of injury was irregular or difficult to determine, or if the employment was part time, the daily wage shall be computed by dividing the total amount the employee actually earned in such employment in the last 26 weeks, by the total number of days in which the employee actually performed any of the duties of such employment, provided further, that in the case of the construction industry, mining industry, or other industry where the hours of work are affected by seasonal conditions, the weekly wage shall not be less than five times the daily wage.

Keklah, 511 N.W.2d at 438, 50 W.C.D. at 82 (emphasis added).

While the evidence suggests that Affordable Remodeling may have been involved in some jobs that might be viewed as separate from the construction industry, it is clear that a substantial portion of its business involved remodeling and improvement of residential and commercial structures. At the time of his injury, Hogquist was applying a new roof to a private residence. We see no basis for suggesting that the employee in this case was not a member of the construction industry.

Temme also argues that Hogquist's work in this case was not affected by seasonal conditions, as most of the projects were done indoors. He contends that, because the work performed was not affected by seasonal conditions, Hogquist's average weekly wage is not subject to the construction industry calculation. Again, we disagree.

The weekly wage for an employee in the construction industry is, as a matter of law, to be calculated at not less than five times the daily wage under Minn. Stat. § 176.011, subd. 3, even without proof that the employee's particular employment is in an industry where hours of work are affected by seasonal conditions. Berry v. Walker Roofing Co., 473 N.W.2d 312, 45 W.C.D. 125 (Minn. 1991). Even had the compensation judge accepted Temme's position, that Hogquist's work could be performed year-round and was not affected by seasonal conditions, the result here would not change, in light of our affirmance that Hogquist was an employee in the construction industry. As Temme has no dispute with the judge's calculation of Hogquist's daily wage, we conclude that the compensation judge properly calculated Hogquist's average weekly wage under the statute.