

TIMOTHY J. KOIVISTO, Employee, v. UNIV. OF MINN.-DULUTH, SELF-INSURED,
Employer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
APRIL 3, 2000

No. [REDACTED]

HEADNOTES

WAGES - IRREGULAR. Substantial evidence supports the compensation judge's finding that the employee's weekly wage was difficult to determine and should include overtime and premium pay and a longevity bonus.

PRACTICE & PROCEDURE - MATTERS AT ISSUE. Where the nature of the employee's injury was not at issue, the compensation judge erred by indicating that the employee's July 1996 work injury consisted of a herniated lumbar disc.

Affirmed in part and modified in part.

Determined by: Rykken, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Donald C. Erickson

OPINION

MIRIAM P. RYKKEN, Judge

The self-insured employer appeals the compensation judge's finding determining the employee's weekly wage and a finding indicating that the employee's July 1996 work injury consisted of a herniated lumbar disc. We affirm in part and modify in part.

BACKGROUND

On April 6, 1995, Timothy J. Koivisto, employee, sustained an admitted work injury in the form of a ventral hernia while working as an assistant gardener for the University of Minnesota–Duluth, self-insured employer. The employee was off work from April 12, 1995, through May 25, 1995, and received temporary total disability benefits during that time. The employee's benefits were calculated based on a weekly wage of \$479.60. In July 1997, the employee sustained an aggravation of his hernia in the nature of an abdominal infection, and was off work from July 29, 1997, through August 19, 1997. The employer also admitted liability for this aggravation and paid temporary total disability benefits, again based upon a weekly wage of \$479.60.

On the date of his original injury, April 6, 1995, the employee earned an hourly wage, under a collective bargaining agreement, of \$11.99 per hour. The employer determined the employee's weekly wage by multiplying the employee's base pay by his scheduled work week of

forty hours per week, Monday through Friday. The employer did not include premium pay which the employee received for operating heavy equipment, overtime pay, a longevity bonus (also referred to as “stability pay”), or vacation and sick leave.

Wage records admitted into evidence at the hearing documented the wages paid bi-weekly to the employee during the twenty-six weeks preceding his April 6, 1995, work injury. In those twenty-six weeks, the employee earned \$11,366.61. The employee was off work for three of those weeks for reasons unrelated to his work injury, and worked overtime in five of the thirteen two-week pay periods. During winter months, the employee was assigned to assist workers in the buildings and grounds department. Often his overtime was caused by winter weather conditions which would require snow removal or campus maintenance, and generally was not scheduled in advance. For these overtime hours, the employee was paid overtime wages at one and a half times his regular hourly rate. In seven of the thirteen pay periods, the employee also received premium or augmentation pay for operating heavy equipment outside of his job classification.

On July 10, 1996, the employee sustained an admitted work injury to his low back. As a result of this injury, the employee received medical expenses, temporary total disability benefits, temporary partial disability benefits, and permanent partial disability benefits. At the time of the hearing, these benefits were not disputed; however, a claim remained for penalties for delayed payment for physical therapy and medical expenses.

On August 3, 1998, the employee filed an amended claim petition which, among other claims, alleged an underpayment of temporary total disability benefits based upon miscalculation of the employee’s April 6, 1995, weekly wage. A hearing was held on May 18, 1999. The compensation judge found that the employee’s overtime, premium, stability, vacation and sick leave pay should all be included in calculating the employee’s weekly wage. The compensation judge awarded the claimed penalty for the delayed payments of medical expenses related to the July 1996 work injury, which the compensation judge indicated was a herniated lumbar disc.

The self-insured employer appeals from the compensation judge’s calculation of the employee’s weekly wage. The self-insured employer also appeals from the compensation judge’s characterization of the employee’s 1996 lumbar spine injury as a herniated disc, although the employer did not appeal from the award of penalties due to late payment of medical bills related to the 1996 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 (1998). Where evidence conflicts or more than one inference may reasonably be drawn from the evidence, the findings must be affirmed. Hengemuhle v. Long Prairie Jaycees, 358 N.W.2d 54, 60, 37 W.C.D. 235, 240 (Minn. 1984). Similarly, findings of fact may 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

Weekly Wage

The object of a wage determination is to arrive at a fair approximation of the employee’s probable future earning power which has been impaired or destroyed by the injury. Sawczuk v. Special School District 1, 34 W.C.D. 282, 312 N.W.2d 435 (Minn. 1981). See also, Bradley v. Vic’s Welding, 39 W.C.D. 921, 405 N.W.2d 243 (Minn. 1987); Beissel v. Marschall Line, Inc., 58 W.C.D. 470 (W.C.C.A. 1998). The self-insured employer argues that the compensation judge erred by including premium pay and overtime pay in calculating the employee’s weekly wage, claiming that the compensation judge’s determination overestimates the employee’s earnings. The self-insured employer argues that the contracted pay, at the regularly-scheduled hours, is the best estimate of the employee’s earning power and the best guide for calculating weekly wage: \$11.99 times 40 hours per week, plus the pro-rated share of the stability or longevity bonus.

An employee’s weekly wage is determined under Minn. Stat. § 176.011, subd. 18, which reads in part as follows:

“Weekly wage” is arrived at by multiplying the daily wage by the number of days and fractional days normally worked in the business of the employer for the employment involved. If the employee normally works less than five days per week or works an irregular number of days per week, the number of days normally worked shall be computed by dividing the total number of days in which the employee actually performed any of the duties of employment in the last 26 weeks by the number of weeks in which the employee actually performed such duties, provided that the weekly wage for part time employment during a period of seasonal or temporary layoff shall be computed on the number of days and fractional days normally worked in the business of the employer for the employment involved. If, at the time of the injury, the employee was regularly employed by two or more employers, the employee’s days of work for all such employments shall be included in the computation of weekly wage. Occasional overtime is not to be considered in computing the weekly wage, but if overtime is regular or frequent throughout the year it shall be taken into consideration. [Emphasis added.]

The appropriate daily wage is determined under Minn. Stat. § 176.011, subd. 3, which defines "daily wage" as "the daily wage of the employee in the employment engaged in at the time of injury" and provides in pertinent part:

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, . . . 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. [Emphasis added.]

The employer argues that the employee's amount of daily wage received was neither irregular nor difficult to determine, claiming that the employee's overtime was occasional, not regular or frequent throughout the year, and, pursuant to section 176.011, subdivision 18, should not be considered in computing the employee's wage. The compensation judge found that the overtime was regular and frequent, and therefore included it in calculating the employee's weekly wage. When analyzing whether overtime is regular or frequent throughout the year, this court has previously defined "regular" as "'steady or uniform in course, practice or occurrence, not subject to unexplained or irrational variation'" and "frequent" as "'occurring or appearing quite often or at close intervals.'" McFadden v. L.L. LeJeune, slip op. at 1 (W.C.C.A. May 30, 1990) (quoting Webster's Third New International Dictionary (1966)).

In this case, the record does not indicate the amount of overtime that the employee worked throughout the entire year. Only the employee's wage records for the twenty-six weeks preceding the April 1995 work injury are in the record. The employee worked overtime in five of the thirteen two-week pay periods, and did not work at all for three of those twenty-six weeks. Based upon the amount of overtime hours worked, the compensation judge could reasonably conclude that the employee's overtime was regular and frequent. In addition, the employee received premium pay for seven of the thirteen two-week pay periods when he was assigned to operate heavy equipment, and received a longevity bonus paid once a year (\$325.00 paid in 1995) which was pro-rated over the year. Under these circumstances, substantial evidence supports the compensation judge's finding that the employee's earnings were irregular and difficult to determine, and that the employee's wage should be determined under Minn. Stat. § 176.011, subd. 3. Accordingly, we affirm.

Nature of Injury

The employer also argues that the compensation judge erred by stating that the employee's July 1996 work injury consisted of a herniated lumbar disc. The only claim at issue at the hearing relating to this injury involved the employee's claim for penalties for delayed payment of medical bills. The specific nature of the injury was not at issue.

In its brief and at oral argument, the employer argued for modified language of Finding No. 17 to delete the reference to a herniated disc. The employee agreed to modification of the language of Finding 17 to conform with the diagnosis listed in the employee's medical records. The employee's medical records list a diagnosis of an L5-S1 annular tear. An MRI of the lumbar spine taken on September 23, 1996, was interpreted to show degeneration of the disc at L5-S1 level, along with bulging and an annular tear at the L5-S1 level. Therefore, we modify Finding 17 to eliminate the reference to a herniated lumbar disc and to read as follows:

On July 10, 1996, the employee sustained an admitted personal injury to his low back, in the nature of an L5-S1 annular tear, that arose out of and in the course and scope of his employment when he twisted his low back while washing windows.