PAUL LARSIEN, Employee/Appellant, v. VANSTAR CORP. and FIREMAN'S FUND INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 2, 2000

No. [REDACTED SSN]

HEADNOTES

EVIDENCE - ADMISSION; WAGES - IRREGULAR; STATUTES CONSTRUED - MINN. STAT. § 176.011, SUBD. 3. Where the judge could have reached his decision even without certain evidence the admission of which was challenged on hearsay, best evidence, and untimely disclosure bases, and because that decision was not unreasonable, the compensation judge's conclusion that the employee's weekly wage was not irregular or difficult to determine within the meaning of Minn. Stat. § 176.011, subd. 3, was not clearly erroneous and unsupported by substantial evidence..

Affirmed.

Determined by Pederson, J., Wilson, J. and Wheeler, C.J.
Compensation Judge: Rolf G. Hagen

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's admission of certain evidence and from the judge's calculation of his weekly wage. We affirm.

BACKGROUND

On March 3, 1997, and December 8, 1997, Paul Larsien sustained work-related injuries to his low back in the course of his employment as a networking engineer and project manager with Vanstar Corporation. Mr. Larsien [the employee] was thirty-nine years old on the latter date, and his weekly wage on that date remains at issue. The employee went off work on December 9, 1997, and Vanstar Corporation [the employer] and its insurer paid benefits for apparently one day at the maximum compensation rate. It appears that the employee remained off work thereafter until February 12, 1998, but, as a salaried employee, was paid his full wages during the period instead of workers' compensation benefits. On April 1, 1998, the employer and insurer filed a Notice of Intention to Discontinue [NOID] the employee's temporary total disability benefits on grounds that he had returned to work on February 12, 1998, at full wage. No date-of-injury weekly wage is identified on the notice.

On August 3, 1998, the employee filed a Rehabilitation Request, seeking rehabilitation services because the employer was unable to keep him occupied in work that he

could do in his physical condition. The following day the employer filed a First Report of Injury related to the December 8, 1997, injury, indicating that the employee had been a full time employee on that date but indicating ".00" as the employee's weekly and hourly wages. By a Notice of Insurer's Primary Liability Determination filed August 26, 1998, the employee was informed that liability had been accepted for his December 8, 1997, work injury, with lost time commencing August 6, 1998. The notice indicated that benefits would be calculated based on an average weekly wage of $869.23, which in turn was based on total earnings of $22,600.00 in the twenty-six weeks preceding the injury.

On October 13, 1998, the employee filed a Claim Petition, alleging entitlement to benefits continuing from August 6, 1998, but at a weekly wage of $913.00. In their Answer on October 28, 1998, the employer and insurer again acknowledged liability for the injury but specifically denied that the employee's weekly wage was more than about $869.23. On January 6, 1999, the employer and insurer filed another NOID, indicating that the employee had returned to work on January 4, 1999, and that temporary total disability benefits would therefore be discontinued and temporary partial disability benefits commenced, based on a weekly wage of $869.23.

On February 1, 1999, the employee's attorney wrote to counsel for the employer and insurer, reiterating a request for wage records which he claimed to have made three times previously. Four days later the employee filed a Motion to Compel Discovery for the same purpose. On February 26, 1999, counsel for the employer and insurer mailed to the employee's attorney a copy of the requested wage records. These records indicated that the employee had been paid wages of $1,835 semi-monthly from August 31 1996, through March 31, 1997; that he was paid a substantially greater wage of $2,798 on August 15, 1997; that he was paid wages of $1,872 semi-monthly from August 30, 1997, through October 31, 1997; that he was again paid a substantially greater wage of $2,070 on November 14, 1997; that he was paid wages of $1,938 semi-monthly from December 15, 1997, through July 31, 1998; and that he was paid $5,547.01 on August 6, 1998, apparently upon termination from the employer. Counsel stated in his cover letter that the employee's weekly wage on the date of injury was about $894.00, explaining as follows:

> It appears that Fireman's Fund originally paid wage loss benefits to [the employee] based upon an annual salary of $45,200.00, as that was the figure which appeared on the First Report of Injury. This equates to a weekly wage of $869.23, which is the figure which appears on the NOID dated January 4, 1999, a copy of which is enclosed herewith.
>
> However, the wage information received from the employer suggests that [the employee] received a raise in November of 1997, shortly before his injury. Accordingly, as of December 8, 1997, it appears that he was being paid $1,938.00 on a bi-monthly basis. By our calculations this would equate to $46,512.00 or approximately $894.00 per week.

In that same letter, counsel also requested an explanation as to how the employee had arrived at the figure of $913.00 as his weekly wage. On March 1, 1999, the employer and insurer filed an Amended NOID, realleging the employee's return to work on January 4, 1999, but now indicating that subsequent benefits would be paid based on a weekly wage of $894.56. A subsequent NOID, filed by the employer and insurer on April 9, 1999, alleged that same weekly wage.

On March 1, 2000, in response to a query from the employee, counsel for the employer and insurer wrote to the employee's attorney, indicating that he had obtained an explanation from the employer as to the two unusually large wage payments reflected in the employee's wage records at the dates August 15, 1997, and November 14, 1997. Counsel stated that "[e]nclosed herewith [is] the response which I received from Mr. Gary Ferguson, Director of Finance at Inacom," a company that had apparently acquired the employer sometime after the employee's termination. Counsel indicated that Inacom's "payroll department states that these two payments represent retroactive pay adjustments made to take into account salary increases that were received by [the employee]." Counsel went on to recount the employee's pay history with the employer, stating that the employee received pay raises on April 1, 1997 - - from $1,835.00 to $1,872.00 per half-month pay period - - and on October 1, 1997 - - from $1,872.00 to $1,938.00 per half-month pay period. Counsel's history indicated that these pay raises were not executed in actually increased pay until August 15, 1997, and November 14, 1997, respectively, resulting in lump-sum retroactive payments on those dates that increased the total sums paid on those dates by $926.00 and $132.00, respectively. Counsel indicated that he was willing to stipulate to the amounts paid, that he did not see any difference between those figures and the ones that the employee had been using, and that he did not believe that there was any necessity to employ the twenty-six-week average rule to calculate the employee's wage, in that "it is clear from the enclosed wage records that, at all times material hereto, [the employee] was paid a salary which did not vary."

The matter came on for hearing on March 28, 2000. The sole issue for litigation was the employee's weekly wage on December 8, 1997, and, based on that, whether the employee had been underpaid wage replacement benefits. The employee's position was that his wages on December 8, 1997, had been irregular or difficult to determine and that, pursuant therefore to principles of wage calculation provided for in Minn. Stat. § 176.011, subd. 3, he was entitled to compensation based on a weekly wage of $978.61, his average wage over the twenty-six week period preceding his work injury. The employer and insurer's position was that the employee was a salaried employee earning $3,876.00 a month on December 8, 1997, resulting in an average weekly wage of $894.46.

On the morning of the hearing, the employer and insurer offered into evidence the March 1, 2000, letter from the employer and insurer's attorney to the employee's attorney, together with the documents to which it referred as enclosed. The employee objected to the judge's receipt of the exhibit, on grounds that one of the referenced enclosures, the letter from Mr. Ferguson dated January 31, 2000, had not been included among enclosures mailed under the original March 1, 2000, cover letter, had not been disclosed prior to the date of hearing, and was, after all, hearsay.

The employee contended also that counsel's own cover letter contained a figure that did not comport with the employee's pay records and so was not the best evidence. The employer and insurer acknowledged the inaccuracy of the cover letter and permitted the judge to repair it, indicating that the letter was, at any rate, only for illustrative purposes. They also acknowledged that Mr. Ferguson's letter was hearsay, but they argued that it should be received nevertheless, noting that workers' compensation judges are not rigidly bound by the rules of evidence and that, at any rate, Mr. Ferguson resided in Nebraska and so was arguably unavailable for testimony. With regard to the argument that Mr. Ferguson's letter was not timely disclosed, the employer and insurer contended that they did enclose the letter with their March 1, 2000, mailing.

The compensation judge overruled the employee's objections and admitted the exhibit, indicating that he would "give it the weight it's due." By Findings and Order filed April 4, 2000, the judge concluded in part that the employee's weekly wage on December 8, 1997, was $894.46, as contended by the employer and insurer. The employee 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

The compensation judge found that the employee's average weekly wage on December 8, 1997, was $894.46, based in part on a conclusion that the employee was a salaried employee on that date.[1] The judge also found that, from his date of hire, August 1, 1996, through his date of termination, August 6, 1998, the employee had received periodic salary increases, implementation of which was sometimes delayed and then accomplished retroactively to adjust

[1] The judge indicated that he calculated the $894.46 weekly wage figure by first doubling the semimonthly wage of $1,938.00 that was being paid to the employee on the date of injury, to arrive at monthly earnings of $3,876, then multiplying those monthly earnings by twelve to arrive at yearly earnings, and then dividing those yearly earnings by fifty-two to arrive at weekly earnings.

for income at the higher level. The employee contends that, although technically classified as a "salary," his semimonthly pay varied so much from pay period to pay period that his weekly wage should have been calculated as one "irregular or difficult to determine," under Minn. Stat. § 176.011, subd. 3. He claims further that "[t]he judge based his denial [of calculation under Minn. Stat. § 176.011, subd. 3] on a finding that the employee received 'retroactive' pay adjustments" and that "[t]he only evidence to support the employer's position was the January 31, 2000 letter from Gary Ferguson" (emphasis in the original). The employee contends that Mr. Ferguson's letter was hearsay and untimely disclosed.[2] We are not persuaded that Mr. Ferguson's letter was either relied upon by the judge or essential to his decision or that that decision was not substantially supported by the other evidence of record.

We would note at the outset here that, pursuant to statute, compensation judges are not bound by common law or statutory rules of evidence and that reliable hearsay is expressly admissible under the statute. See Minn. Stat. § 176.411, subd. 1. Moreover, there is no indication that Mr. Ferguson's January 31, 2000, letter was essential to the judge's decision in this case. Mr. Ferguson's letter reads in its entirety as follows: "Payroll's review of the pay records for [the employee] for payrolls ending on August 15, 1997 and November 14, 1997 indicate that the amounts paid [the employee] were higher than the normal pay amounts as a result of retro pay adjustments due [the employee]." Nowhere in his five-page Findings and Order does the compensation judge make any reference at all to Mr. Ferguson's two-sentence letter. Nor does the judge make any finding as to whether or not that letter was included in the employer and insurer's attorney's March 1, 2000, mailing of evidence to the employee's attorney[3] or the degree to which that letter was essential to either the employer and insurer's position or their attorney's statement of their position in his March 1, 2000, cover letter. That letter itself demonstrates, in much clearer detail than does Mr. Ferguson's letter, the calculation rationale adopted by the compensation judge - - a rationale that could, we would emphasize, be derived independent of Mr. Ferguson's letter, upon careful scrutiny of the employee's pay records. The employee's attorney acknowledged receiving the original mailing of the March 1, 2000, cover letter, and the calculation rationale here at issue was clearly accessible from it, whether or not Mr. Ferguson's January 31, 2000, letter was among the enclosures. That the employer and insurer's counsel may have based that rationale on hearsay evidence is no more dispositive than that he may have derived the rationale on his own by

[2] The employee also argues in his brief, in just the following two sentences, that "[t]he documents were simply not accurate. The actual payroll records, produced pursuant to the Order Compelling Discovery, did not square with the new evidence." The employee offers no specifics or any discussion of the inaccuracies to which he refers or their implications. We presume that his reference is to the inaccurate figure in counsel's March 1, 2000, cover letter, which was repaired at hearing to correspond with the payroll records. Noting also that the judge had access to both the letter and the payroll records in the process of his deliberations, we will not reverse the judge's decision on grounds that the the employer's exhibit was not the best evidence.

[3] The only evidence bearing on the issue at all was the employer and insurer's attorney's March 1, 2000, cover letter's reference to Mr. Ferguson's "response" as enclosed and the employee's attorney's subsequent failure to respond to the admittedly received mailing as being in any way incomplete.

his own scrutiny of the employee's pay records. That rationale makes sense as the probable accounting behind the employee's pay records, and the judge was free to either accept or reject it on that basis. Nor is the compensation judge's probable reliance on the March 1, 2000, cover letter a basis for reversal on grounds that that letter was "not the best evidence," in that the repairs of alleged inaccuracies in that letter were essentially stipulated to at hearing.

Because the compensation judge could have reached the decision he did regardless of whether Mr. Ferguson's letter was enclosed in the original packet of evidence, and because counsel's March 1, 2000, letter was repaired at hearing to comport factually with the best evidence, we will not reverse the compensation judge's decision on grounds that he improperly admitted and relied on for illustrative purposes the employer and insurer's March 1, 2000, letter and its enclosures. This is true regardless of the whether or not Mr. Ferguson's letter was hearsay and regardless of whether or not its disclosure to the employee's attorney was timely. Because it was not unreasonable for the compensation judge to reach the same conclusion as that recommended in the March 1, 2000, letter, we will not reverse the compensation judge's finding of the employee's weekly wage, based on a conclusion that the employee was a salaried employee on the date of his work injury, whose actual earnings were not irregular or difficult to determine within the meaning of Minn. Stat. § 176.011, subd. 3. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.