RONALD A. BERG, Employee/Appellant, vs. BAYPORT PRINTING HOUSE, INC. and WESTFIELD COS., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
JULY 16, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES. The compensation judge did not err by excluding a profit-sharing bonus from the calculation of the employee's weekly wage where the bonus was based upon the employer's overall profits, not the employee's personal efforts.

Affirmed.

Determined by: Rykken, J., Johnson, J., and Wheeler, C.J.
Compensation Judge: Jennifer Patterson

OPINION

MIRIAM P. RYKKEN, Judge

The employee appeals from the compensation judge's denial of the employee's claim that his weekly wage should be calculated by inclusion of his $7,744.33 payment received in March 1999, as that payment was a form of profit sharing and was not a bonus based substantially on the employee's personal work efforts. We affirm.

BACKGROUND

Ronald Berg, the employee, commenced work for Bayport Printing House, the employer, in 1997, working as a bindery worker. He performed production duties including making books, folding copies and operating a folding machine, and also occasionally made deliveries. On March 18, 1999, while lifting boxes off a conveyor belt to a pallet, the employee sustained an admitted injury to his low back. At the time of his injury, the employee was 32 years old, and earned an adjudicated weekly wage of $594.35. On March 18, 1999, the employer was insured for workers' compensation liability in the state of Minnesota by Westfield Companies, the insurer.

Following the employee's injury on March 18, 1999, he remained off work and ultimately underwent surgery to his lumbar spine on July 12, 1999, in the nature of a discectomy at the left L5-S1 level. The employer and insurer paid the employee temporary total disability benefits from March 19 through February 12, 2000, and periodic permanent partial disability benefits based upon 11 percent permanent partial disability of the body as a whole. In addition, they provided rehabilitation benefits and paid medical expenses on behalf of the employee. Due to the employee's permanent work restrictions, including a 30-pound lifting limit and a

recommendation to avoid prolonged sitting and other postures, the employee was unable to return to the full duties of the production job he performed on the date of his injury. The employee ultimately returned to work in February 2000 as a salesman for Asphalt Driveway Company, and the employer commenced payment of temporary partial disability benefits.

The employee's compensation package while employed by Bayport Printing House included his wage in addition to an employer contribution to an Internal Revenue Service deferred profit sharing plan account. When possible due to annual profits, the employer also allocated some of its pre-tax profits to its employees. For example, in March 1999, the employer paid each of its sixteen employees a profit sharing bonus based on calendar year 1998 profits. Between the end of calendar year 1998 and March 15, 1999, a certified public accountant calculated balance sheets and income statement numbers on behalf of the employer and determined the employer generated a profit for calendar year 1998. Utilizing IRS guidelines and timetables, the employer determined that there was sufficient profit to allow allocation of some of the pre-tax profits to its employees. (Finding No. 6.) The employer paid the employee $7,744.33 as his profit sharing bonus.

The employer and insurer originally paid temporary total disability to the employee post-injury using a compensation rate based on a weekly wage of $533.99. On October 6, 1999, the employee filed a claim petition, claiming entitlement to an underpayment of temporary total disability benefits from March 18, 1999, based upon an alleged weekly wage of $706.68. The employee claimed that inclusion of his profit sharing bonus, and also his wages from the 26 full work weeks prior to his injury, calculated to a weekly wage of $706.68. The employer and insurer denied liability for additional temporary total disability benefits, arguing that the employee's weekly wage on his date of injury was $533.99, and that the March 1999 payment was a profit sharing sum to be excluded from calculation of his weekly wage.

On approximately February 14, 2000, the employee commenced work for Asphalt Driveway Company. He worked in the sales area, estimating and selling driveway repaving. He initially earned a salary plus commission, but later was paid on a straight commission basis, so his earnings fluctuated between pay periods. During some pay periods, the employee earned less than his date of injury wage, and more during other periods. The employer denied payment of temporary partial disability benefits based upon the straight commission payments. The employee accordingly amended his claim petition to claim that temporary partial disability benefits should be calculated based on his commission wages earned at Asphalt Driveway Company. He also claimed a penalty pursuant to Minn. Stat. § 176.225, alleging that the employer asserted a frivolous defense against payment of temporary partial disability benefits.

The employee's claim petition was addressed at a hearing on August 25, 2000. At issue were the proper calculation of the employee's weekly wage, the employee's claims for an underpayment of temporary total disability benefits, proper calculation of temporary partial disability benefits and payment of penalties pursuant to Minn. Stat. § 176.225. In Findings and Order served and filed November 6, 2000, the compensation judge determined that the employee earned a weekly wage on March 18, 1999, of $594.35.[1] Since the employer originally paid

[1] In an unappealed finding, the compensation judge concluded that the employee's weekly wage calculations should be based on wages earned during the 26 full weeks worked during the

temporary total disability benefits to the employee based upon a weekly wage of $533.99, the compensation judge ordered the employer to pay the employee for the resulting underpayment. The employer and insurer did not appeal from that finding, and therefore that portion of the claimed underpayment is not at issue on appeal.

The compensation also judge found that due to the fluctuations in the employee's earnings at Asphalt Driveway Company, it was appropriate to base temporary partial disability calculations on earnings averaged over 26 weeks. The compensation judge denied the employee's claim for penalties based on an alleged frivolous defense to the claim for temporary partial disability benefits.

The compensation judge also determined that the profit sharing bonus paid by the employer to the employee in March 1999, in the amount of $7,744.33, was a form of profit sharing and was not a bonus based substantially on the employee's personal work efforts. (Finding No. 9.) The compensation judge concluded that this payment was not includable in the weekly wage calculation. The employee appeals, claiming that his weekly wage on the date of injury was actually $706.68, based on the necessary inclusion of the March 1999 profit sharing bonus payment.

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.

"[A] decision which rests upon the application of a statute or rule to essentially undisputed facts generally involves a question of law which [the Workers' Compensation Court of Appeals] may consider de novo." Krovchuk v. Koch Oil Refinery, 48 W.C.D. 607, 608 (W.C.C.A. 1993).

DECISION

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28 calendar weeks prior to the employee's injury. Whereas the employer had paid benefits based on a weekly wage of $533.99, the compensation judge concluded that the correct weekly wage was $594.35.

The sole issue on appeal is whether the $7,744.33 payment paid to the employee in March 1999 was a performance-based bonus, to be included in his weekly wage calculation, or whether that was a profit sharing sum, not includable in the weekly wage calculation. The compensation judge determined that this payment was a form of profit sharing and was not a bonus based substantially on the employee's work efforts. The issue is whether the compensation judge erred in concluding that the bonus payment issued to the employee in March 1999 was a profit sharing payment based on factors outside the control of the employee, and accrued independently of the employee's own efforts, and therefore which must be excluded from the employee's weekly wage.

The purpose of determining weekly wage is to fairly approximate the injured worker's future earning capacity that has been damaged or destroyed by a work-related injury. Knotz v. Viking Carpet, 361 N.W.2d 872, 37 W.C.D. 452 (Minn. 1985). In addition to wages earned by an employee, additional items to include in the calculation of weekly wage can include various payments, such as tips and gratuities if accounted for by the employee to the employer, and payments made by the employer for board or allowances. Other items to be included are vacation, holiday and sick pay, overtime pay, attendance bonuses, performance bonuses and incentive bonuses.[2]

Minnesota case law is clear that as a general rule distributions from a profit sharing plan are not included in an employee's weekly wage calculation. Lorenson v. Polaris Indus., 59 W.C.D. 274 (W.C.C.A. 1999). In Stewart v. Ford Motor Co., 474 N.W.2d 162, 45 W.C.D. 175 (Minn. 1991), the Minnesota Supreme Court held that annual bonus payments resulting from company year end profits are not includable where the profits from which the payments were made were not the result of the employee's independent work activities, as opposed to his efforts as one of many employees. In Stewart, as part of a collective bargaining agreement, the employer, Ford Motor Co., instituted a profit sharing plan for its employees whereby eligible employees received a percentage of Ford's profits based upon their "eligible pay." The collective bargaining agreement defined "eligible pay" as including hourly wages and COLA; vacation, holiday and excused absence pay; performance and attendance bonuses; bereavement, jury duty and military duty pay. The employer in Stewart contended that profit sharing payments were not includable when calculating an injured worker's disability benefits, arguing primarily that profit sharing is not a "wage" or "allowance" pursuant to Minn. Stat. § 176.011, subds. 3 and 18. The supreme court agreed and held that wages for purposes of computing worker's disability benefits are compensation for labor and services which reflect an employee's earning capacity. The court stated, in part,

> Not all taxable income is considered "wages" for purposes of computing workers' disability benefits. Wages, for those purposes,

[2] See, Minn. Stat. § 176.011, subds. 3 and 18; Boschee v. Barry Blower, slip op. (W.C.C.A. Aug. 25, 1989); see also Fougner v. Boise Cascade, 42 W.C.D. 281, 460 N.W.2d 1 (Minn. 1990); Anderson v. Ford Motor Co., 46 W.C.D. 24 (W.C.C.A. 1991); Senser v. Minnesota Vikings, 42 W.C.D. 688 (W.C.C.A. 1989); Rogers v. Margaret Bakers Foods, slip op. (W.C.C.A. Sept. 7, 1990).

> are compensation for labor and services which reflect an employee's earning capacity. Backaus v. Murphy Motor Freight Lines, 442 N.W.2d 326, 327 (Minn. 1989). Conversely, profits which accrue independent of an employee's own efforts generally are not includable in the average weekly calculation. See id. at 327-28 (income derived from capital equipment not part of wages). See also 2A. Larson, The Law of Workmen's Compensation, §60.12© (1989) ("Generally, profits from a business, whether commercial or farm, are not considered as wages for purposes of establishing average wage.")
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> [S]uch bonus-type payments to all employees at the end of the year, out of the profits of the employer's business, do not represent the individual efforts of the employee on the line. Rather, the profit sharing here is reflective of Ford's annual financial status, not of the employee's earning capacity, because whether Ford realizes a profit depends largely on factors outside the employee's control, e.g., interest rates, supply and demand, sales and manufacturing costs.

Stewart, 474 N.W.2d at 164.

The employee argues that his March 1999 profit sharing bonus should be included in the calculation of his weekly wage. He relies on Boschee v. Barry Blower, slip op. (W.C.C.A. Aug. 25, 1989) and Anderson v. Ford Motor Co., 46 W.C.D. 24 (W.C.C.A. 1991) in support of his claim. In Boschee, this court determined that the following items are includable in calculating the employee's average weekly wage: vacation/holiday pay, sick leave, attendance bonuses, and shift differential pay. However, the employer's payment into a pension fund was not included in the computation of his wages. The court determined that "[B]ecause this sum was not received by the employee, could not be utilized by the employee at his discretion, and was not taxable as wages, it is not considered a part of the employee's wages or earnings reflective of his ability to earn." Boschee, slip op. at 3. The employee argues that since his bonus was merit or performance-based, since appropriate taxes were withheld and since he was free to do what he wished with the money, that the bonus falls within the exception referred to in Boschee and should be included in his weekly wage calculations. He argues that the bonus was annual, and that it should be apportioned over the entire year's earnings, at the rate of $148.93 per week.

By contrast, the employer and insurer rely on Stewart in support of their contention that the employee's March 1999 bonus payment should not be included in the calculation of his weekly wage. The employer presented testimony concerning the company's profit earnings and the factors considered by the company when determining the amount of profit sharing bonus to be paid to employees. According to testimony presented by Michael Swisher, president of Bayport Printing House, the employer's profit earnings depend on various factors, including price competition; total sales; prices charged by suppliers for raw materials such as paper; predictable overhead expenses such as rent, amortized cost of machinery, heat, electricity, real estate taxes

and other real estate-related expenses; income taxes; retention of funds for anticipated capital improvements; and unanticipated expenses. (T. 81-83.)

According to Mr. Swisher, profit sharing bonuses paid to the employees from the employer's pre-tax profits depend on a number of factors, including the employee's position held, years of service, and whether, in Mr. Swisher's opinion, the particular employee deserved to be awarded for energetic, careful and productive work. (T. 86-87.) Mr. Swisher testified that because the employer employs only a few employees, sixteen, the decision on who "deserves" a bonus is highly subjective. For example, for the 1998 bonus, the decisions on the amounts payable as bonuses were made solely by Mr. Swisher and his father. (Finding No. 6; T. 85-86, 94.)

During 1998, the period during which the employee received a profit sharing bonus, the employer employed three bindery operators, including the employee. Bindery projects were allocated and performed by those three employees on a project-by-project basis; exact daily tasks differed depending upon customers' orders. The employer had no preset production quotas and, due to the varying length of time needed to process an order, it was not possible to compare the output of three bindery operators by comparing completed units. Mr. Swisher testified that the two other bindery workers each had worked longer for the employer than had the employee, and therefore the employer paid them a larger bonus in March 1999 than the profit sharing bonus paid to the employee.

At hearing, Mr. Swisher also testified concerning the relative effects of the sales and production employees' efforts on the employer's profits. He testified that the sales employees have more of a direct impact on the company's profits than do the production employees. As the compensation judge concluded, the "production people, while necessary, have less of an opportunity to affect the cash flow of the business." The compensation judge also concluded that the "employee's work efforts during calendar year 1998, while of high quality and appreciated by the employer, were not a substantial contributing factor to generating the company's overall profits which led to the payment of checks from those profits to the company's 16 employees in March 1999." (Finding No. 7.)

It is clear from the record that the employer appreciated and valued the employee's work and contributions to the company's production. Mr. Swisher, as company president, did not have daily supervision over the employee's work during the employee's 1 ½ year tenure with the company, but he acknowledged that the employee was considered to be a satisfactory employee. (T. 91.) However, the issue is not whether the employee was a productive employee, but instead is whether the employee's efforts directly affected the company's annual profits and the amount of profit sharing he received in March 1999. Mr. Swisher testified about the impact of an individual employee's efforts on profitability compared with other factors, such as sales, overhead, utilities, and cost of raw materials. He testified that the impact was comparatively minor. He stated that

> Obviously we wouldn't be able to be a business without the employees but in terms of what any individual employee can do to increase or decrease profits in the production area it's considerably less than for example the efforts of the salesman. A salesman can

> make or break your business. A production employee might save you a little money by working harder. He might lose you a little money by damaging or delaying the delivery of a job. . . A salesman gaining [or losing] a million dollar contract . . . is going to have a far greater impact on the bottom line than what a pressman or a folder operator or a press person could do. The damage that they can do is limited and the contribution that they can do to improve the success of the business is limited. And this is true in an equal amount on both sides of the issue I think.

(T.98-99.)

The compensation judge found that the profit sharing payment of $7,744.33 was based on the employer's overall profits in 1998. Substantial evidence supports this finding. The payment issued to the employee in March 1999 represented a distribution made out of the employer's profit sharing plan and is the type of distribution which is not includable in weekly wage calculations. As this court held in Lorenson v. Polaris Indus.,

> These payments are not includable because they do not represent the individual efforts of the employee and because the total amount of the employer's annual profit, from which the distributions are made, is determined by factors almost entirely outside of the control of the employee. The profits are the result of the overall operation of the company. . . . Payment of this benefit was specifically conditioned on the making of a profit for the year.

Lorenson, 59 W.C.D. at 292. See also Brummund v. Simcote, slip op. (W.C.C.A. May 16, 1995). The compensation judge did not err in concluding that the employee's profit sharing bonus was not includable in the calculation of his average weekly wage, and therefore we affirm.