STEVE R. KROYER, Employee, v. PURE PRIDE and WESTFIELD COS., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
FEBRUARY 28, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES - MULTIPLE EMPLOYMENTS; WAGES - SELF-EMPLOYMENT; WAGES - IRREGULAR HOURS; WAGES - SEASONAL WORK. Where the employee was working effectively at producing crop products and building his herd of saleable livestock in his second-employment farm business in 1998, the year of his work injury, where there was evidence that the employee was building his livestock herd toward the end of where it could replace the town job at which the employee was injured, and where his 1997 income tax return reflected a profit from his farm business, substantial evidence supported the compensation judge's decision to base the employee's second-employment average weekly wage at his farm business on the profit reflected on the 1997 tax return, although tax returns in evidence from other years reflected financial losses from the business for taxable purposes.

Affirmed.

Determined by Pederson, J., Rykken, J. and Johnson, J.
Compensation Judge: Jeanne E. Knight

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's determination of the employee's average weekly wage. We affirm.

BACKGROUND

In September of 1998, Steven Kroyer and his wife owned and operated a one hundred-acre farm, and Mr. Kroyer [the employee] was also employed with Pure Pride. On September 23, 1998, the employee sustained a work-related injury to his left wrist in the course of his employment with Pure Pride [the employer]. He was thirty-two years old at the time and was receiving from the employer a weekly wage of $692.30. The employer and its insurer admitted liability for the employee's injury and commenced payment of various benefits.

Subsequent to his work injury, the employee was unable to perform several of his usual chores around his farm, including such tasks as hay baling and machinery repair. He obtained the help of his father, who owned his own farm, but many of the routine farm chores now had to be performed by the employee's wife. The employee's QRC proposed that the employee

might need to hire someone to assist with the farm work, and his research revealed that one such employment in the vicinity was paying $8.77 an hour. He suggested that the employee's wife keep records of her hours of work on the farm and submit them to the insurer for compensation at $8.77 an hour. The insurer's adjuster initially agreed to the plan, and the insurer ultimately paid the employee a total of $1,976.00 in "replacement services" over the months of May, June, July, and August 1999. The insurer eventually changed its mind about paying for these replacement services, however, on grounds that they were not compensable under Minnesota workers' compensation law. On that conclusion, and pursuant to a letter to the employee dated September 30, 1999, the insurer began taking a 20% credit against the employee's weekly benefits, projecting in a Notice of Intention to Discontinue Workers Compensation Benefits [NOID] filed December 13, 1999, that it would recoup its entire $1,976.00 by March 3, 2000. The insurer's entitlement to the credit was ultimately authorized by an Order on Discontinuance Pursuant to Minn. Stat. § 176.239, issued by Compensation Judge Jane Gordon Ertl on January 26, 2000. In approving the insurer's claim to a credit, Judge Ertl explained in her memorandum that, while it did not support the employee's claim to payment for work performed by his spouse, "[c]ase law provided by the employee supports a claim that employee's farming income be included in the determination of average weekly wage. This is a means established by case law to address the loss of a second income from farming as part of an employee's average weekly wage."

On February 3, 2000, the employee filed an Objection to Discontinuance in response to Judge Ertl's approval of the insurer's credit, and on February 7, 2000, he filed also a Claim Petition, alleging underpayment of temporary total disability benefits since the date of his work injury, consequent to a miscalculation of his weekly wage. The matters were consolidated and came on for hearing on May 25, 2000. Issues at hearing included (1) whether the employer and insurer had been entitled to the credit they took against the employee's weekly compensation benefits for the money they had paid to the employee for his wife's work on the farm during the employee's disability and (2) whether the employee's average weekly wage should include income from the employee's farm and, if so, how that income should be calculated. Wage-related evidence introduced at hearing included the employee's income tax returns for the years 1994 through 1999, which reflected farm losses for tax purposes in all but 1997. Wage-related testimony addressed those returns as well as the development, building, and management of the employee's farm assets in light of the applicable farm economy. The employee testified in part that he had about 3,500 bushels of crops on hand in 1998, the year of his work injury, and essentially cleaned out his bins, selling some of the crops and feeding some of them to his cattle, retaining in his bins by the end of the year 2,000 bushels of newly harvested soybeans, which he refrained from selling because the price was so low at the time. The employee valued that 2,000 bushels of soybeans at about $10,000 at the 1998 $5.00-a-bushel price, indicating that more recently he had received $8.00 a bushel for soybeans.

By Findings and Order filed July 21, 2000, the compensation judge concluded that the insurer had properly taken the credit for its payment of replacement services, in that payment for such services was not provided for under the statute and was not, at any rate, agreed upon by the parties in a written contract. The judge also found that the employee's income tax returns

reflected taxable farm profits in 1997 of $8,100.00[1] but farm losses for tax purposes in 1998, the year of the employee's work injury. The judge also found that the employee refrained from selling his crops in the latter year for economic reasons.[2] The judge found further that the employee built his herd of cattle from 36 in 1997 to 51 in 1998 and to 60 in 1999, all of which the employee has refrained from selling, in an effort to build his herd to 150, in order to be in a position to live off his farming without need of his town job. Apparently based on those findings and on the employee's taxable profits in the year 1997, the compensation judge found that the employee's average weekly wage from farming was $155.77[3] and that his total average weekly wage from both the employer and farming was therefore $848.07. The employer and insurer appeal from the judge's calculation of the employee's average weekly wage.

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 concluded that the employee had an average weekly income of $155.77 from farming and that those earnings were includable in the employee's total average weekly wage for purposes of his work injury compensation. Noting that the employee had no documented taxable income at all from farming during the year in which he sustained his work injury, 1998, the employer and insurer contend, in effect, that the employee's work injury did not diminish the employee's earning capacity as a farmer at all. They argue that the judge's

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[1] The employee's income tax return for 1997 reflects a net farm profit of $8,188.00 rather than $8,100.00

[2] The judge also found that the employee sold 3,500 bushels of soybeans in 1999. This appears to be an inaccurate finding, since, on page 27 of the transcript of hearing, the employee specifically testified that he sold crops in 1998 but in "[19]99 I didn't sell anything."

[3] $8,100.00 divided by 52 weeks.

calculation "has no relationship to the Employee's income earned from farming on the date of injury, during the 26 weeks before the date of injury, during the 1-year period prior to the injury, or in the 4-year period prior to the date of injury." We are not persuaded that the judge's calculation was unreasonable.

Evidence introduced at hearing included income tax returns indicating that the employee had taxable farming profits of $8,188.00 in 1997, which the employee testified were largely attributable to sales in that year of soybeans and corn that the employee had grown and harvested in a previous year. The employee testified that he refrained from selling some of his crops in 1998, the year of his work injury, because the price was so low, retaining in his bins what he valued as being about $10,000 worth of soybeans, even at that year's depressed price. The employee also testified that he built his herd of cattle from 36 to 60 between 1997 and 1999, with the objective of building the herd to 150, a level that the employee testified would allow him to live solely off farming, without the necessity of a town job. From these records and this testimony the compensation judge could reasonably have inferred that the employee was working productively at farming and increasing his farming assets in 1998, although his income tax return for 1998 may not have reflected a taxable financial income from that farming in that year. Nor are these facts sufficiently analogous to those in Gorman v. Cambridge Nursing Care Ctr., No. [REDACTED SSN] (W.C.C.A. Nov. 2, 1988), to preclude inclusion of any farm income in the employee's weekly wage. In Gorman, in which this court affirmed a judge's decision that the employee had no net farm income to include in his weekly wage, we find no indication that the employee's tax returns revealed any profit for any year from her nineteen-acre, twenty- to twenty-five-cow exclusively dairy farm. The exact monetary value of the employee's farm productivity remains, however, difficult to calculate, particularly under the statutory wage calculation directives.

Where evidence necessary to comply with the statutory wage calculation directives is not available, a compensation judge may use another method to calculate the employee's wage, as long as that method reasonably reflects the employee's injury-related loss of earning power. See Decker v. Red Wing Shoe Co., 41 W.C.D. 763 (W.C.C.A. 1988). In this case, the method used by the judge, which was that proposed by the employee, reasonably reflected such a loss. That method was similar to that employed in Newbauer v. Pepsi Bottling Group, 43 W.C.D. 339 (W.C.C.A. May 22, 1990), in which an employee's average weekly wage was held to include his earnings at his lawn care job over the course of the complete calendar year preceding the work injury. In contrast with the method adopted by the compensation judge, all three methods proposed by the employer and insurer would have resulted in a failure to acknowledge any of the clearly evident productivity of the employee's work on his farm or any developing history of actual profits from that productivity.[4]

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[4] The employer and insurer argue that the employee's date of injury farming income should be based on either (1) the 26 weeks immediately preceding his work injury, (2) the 52 weeks immediately preceding his work injury (as opposed to the calendar year preceding the injury), or (3) the four full taxable years preceding his work injury--1994, 1995, 1996, and 1997. As the compensation judge suggested in her memorandum, it is only practical for several reasons that farm income be determined on an annual rather than a weekly basis, given the dependence of the business on annual growing season cycles and the timing of income related thereto. The first

We grant that the employee's taxable farm profits in 1997, which the judge used as a standard for the employee's 1998 annual farm earnings, might well reflect more than one year's profits from crop sales, depending on how much saleable crop was in the employee's bins at the time. We would note, however, that the employee still had 3,500 bushels of soybeans and/or corn in his bins in 1998, which would suggest that 1997 had not been an unusually "sell-off" year. Moreover, there is also clear evidence that the employee's productivity as a farmer in 1998 included, in addition to the $10,000 to $16,000 worth of crops that he grew but did not sell in that year, the addition of fifteen saleable livestock to his herd, which he also refrained from selling in that same year–livestock that the employee valued at $800 to $1,000 for each mature animal.

This was not a clear-cut case, and had we been the factfinder we might well have applied a different method of wage calculation. However, this court "is not to substitute its view of the evidence for that adopted by the compensation judge if the compensation judge's finding are supported by evidence that a reasonable mind might accept as adequate." Hengemuhle, 358 N.W.2d at 60, 37 W.C.D. at 240. Given the particular facts in this case as to the farm commodities that the employee produced but did not sell in the year of his work injury, it was not unreasonable for the judge to base her calculation on the taxable profit from the employee's 1997 income tax return. Because it was not unreasonable, we affirm the judge's calculation of the employee's average weekly wage from farming alone and her consequent calculation of the employee's total average weekly wage. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

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method suggested by the employer and insurer ignores that reality. The second method that they suggest ignores the fact that the employee, at the time of his work injury, had soybeans in the field, and presumably about ready to harvest, which were valued at $10,000 in the depressed market at the time and which would have fetched about $16,000 in a better market in which the employee had recently sold. Application of the third method, which has its appeal, would ignore the increasing development and growth and size of the employee's farming business altogether, particularly with regard to his livestock enterprise. Clearly the employee was involved in more compensably valuable and productive farming work in 1998 than he had been in 1994. Moreover, as we have indicated above, our precedent case on such seasonal work, Newbauer v. Pepsi Bottling Group, 43 W.C.D. 339 (W.C.C.A. May 22, 1990), employs the single year most immediately preceding the work injury.