DANIEL LAMBIE, Employee, v. GILBERT CONSTR. and USF&G/ST. PAUL COS., Employer-Insurer, and S.T.I. CONCRETE & MASONRY and GEN. CAS. INS. CO., Employer-Insurer/Appellants.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 14, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES - CALCULATION; WAGES - IRREGULAR. Where payroll records were available from which the total amount paid to the employee during the 24-week period prior to his work injury could be determined, and from which a minimum number of days worked per week could be ascertained, the compensation judge erred in computing the employee's daily wage by using a hypothetical 5-day work week and multiplying it by the employee's hourly wage.

CAUSATION - SUBSTANTIAL EVIDENCE. Substantial evidence, including the employee's testimony together with the expert opinion of Dr. Dowdle supports the compensation judge's determination that the employee's June 15, 1992 work-related injury was the sole cause of his disability.

Affirmed in part and reversed and remanded in part.

Determined by: Johnson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Bernard Dinner

OPINION

THOMAS L. JOHNSON, Judge

S.T.I. Concrete & Masonry and General Casualty Insurance Company appeal the compensation judge's finding that the June 15, 1992, injury was the sole cause of the employee's disability and the compensation judge's method of computing of the employee's daily wage. We affirm in part and reverse and remand in part.

BACKGROUND

On February 4, 1978, the employee worked for Gilbert Construction, insured by USF&G/St. Paul Companies. On that date, the employee sustained a personal injury to his low back for which liability was accepted by the employer and insurer. Following the injury, the employee was hospitalized for traction and physical therapy directed by Dr. Robert L. Merrick. When discharged from the hospital, Dr. Merrick noted the employee had improved and had only minimal discomfort in his left hip. The doctor re-examined the employee in April 1978 and his examination was essentially normal. In an unappealed finding, the compensation judge found the

February 4, 1978 injury was temporary in nature and fully resolved by April 17, 1978. (Finding 6.)

On August 30, 1990, the employee was working as a block tender for S.T.I. Concrete & Masonry when he sustained a second personal injury to his low back. (Finding 13, unappealed.) The record contains no evidence of any benefit payments to the employee by General Casualty for this injury. The employee returned to work with S.T.I. as a block tender following the August 30, 1990 injury. This job required the employee to lift and carry concrete blocks weighing 53 pounds each. The employee carried one brick in each hand and typically lifted 300 blocks during the course of a day. The employee also mixed and carried mud and climbed scaffolding.

On June 15, 1992, the employee had an onset of low back pain at work. He testified he missed two days of work the week of June 15 and four days the following week. Thereafter, the employee testified he worked more slowly, modified his work duties somewhat and wore a back brace. The employee continued working until November 24, 1992 when he left the job. The employer prepared a First Report of Injury which reflected a date of injury of November 24, 1992.

The employee saw Dr. Richard Foreman on December 7, 1992, and gave a history of an onset of low back pain six months previously at work. The doctor referred the employee to Dr. Neil R. Dahlquist whom he saw on December 29, 1992. The employee reported a history of an onset of low back pain in June 1992, which by November 24 became so severe he was unable to continue working. The doctor ordered an MRI scan which showed multi-level degenerative disc disease with herniations at L1-2 and L3-4 and a partial tear of the annulus at L4-5. Dr. Dahlquist then referred the employee to Dr. John A. Dowdle who examined the employee on February 1, 1993. Dr. Dowdle diagnosed a lumbosacral strain/sprain complicated by multi-level degenerative disc disease. Dr. Dowdle was unsure whether the employee would be able to return to construction work without restrictions. The doctor referred the employee to Dr. Brian Nelson at the Physicians Neck & Back Clinic for physical therapy. On May 24, 1993, Dr. Nelson concluded the employee had reached maximum medical improvement and released the employee to return to work on a part-time basis increasing to full-time, subject to restrictions limiting bending and repetitive stooping. In June the employee reaggravated his back at work and Dr. Nelson again took the employee off work and prescribed physical therapy.

The employee was off work from November 24, 1992 through May 31, 1993 and from June 10, 1993 through July 14, 1993. The employee returned to work for the employer on a part-time basis and gradually increased to eight hours a day. He continued to work as a block tender but testified he changed the way he did his job to ease the burden on his back. The employee stated he continued to experience back pain and problems and worked more slowly as a result. Over time, the employee testified his back pain remained and flare-ups got worse. The employee saw Dr. Chua, his family physician, in October 1995 complaining of low back pain. In 1996, the employee's back again flared up and he left work on March 18, 1996. The employer and insurer prepared another injury report listing a March 18, 1996 date of injury.

The employee returned to Dr. Chua on March 19, 1996. The doctor diagnosed an acute low back strain and told the employee to see Dr. Dahlquist. The employee saw Dr. Dahlquist

who referred him for physical therapy. The employee then saw Dr. Dowdle on April 25, 1996. The doctor ordered an MRI scan which he interpreted as showing severe multiple level degenerative disc disease. Dr. Dowdle gave the employee a 30-pound lifting restriction with instructions to avoid repetitive bending and prolonged sitting and standing. Ultimately, the employee left his job with S.T.I. and found other employment at a wage loss.

Dr. Paul Wicklund first examined the employee on June 21, 1994 at the request of USF&G. Following a review of medical records and an examination of the employee, he diagnosed multi-level degenerative disc disease of the lumbar spine. The doctor concluded the February 4, 1978 injury was a temporary injury which resolved. The doctor opined the employee's work activities for S.T.I. between June and November 25, 1992 were a substantial contributing cause of his current condition and rated a 10.5 percent whole body disability. Dr. Wicklund again examined the employee on July 20, 1999. His diagnosis was unchanged. The doctor opined the employee's work in the summer of 1992 was a substantial contributing cause of an L3-4 herniated disc on the right. The doctor opined this "would have been a specific injury that happened sometime during that period of time, most likely mid-June of 1992." (Pet. Ex. I.) Finally, Dr. Wicklund further opined the employee sustained a Gillette injury which culminated on March 18, 1996, when the employee could no longer work. Dr. Wicklund apportioned the employee's disability and need for medical care equally between the 1992 and 1996 injuries.

Dr. Mark Engasser examined the employee on behalf of S.T.I. and General Casualty on July 27, 1999. Dr. Engasser diagnosed multi-level lumbar degenerative disc disease and rated a 10 percent whole body disability. The doctor opined the employee sustained Gillette injuries to his low back in 1978, 1992 and 1996 and apportioned liability to all three injuries.

Dr. Dowdle's deposition was taken on February 15, 2001. The doctor last examined the employee in January of 2000, and testified his diagnosis was mechanical low back pain secondary to degenerative disc disease. The doctor testified that the employee's work from 1993 until 1996 did not aggravate or accelerate the employee's underlying condition. Rather, the doctor stated the employee had a specific onset of symptoms on June 15, 1992 which gradually progressed and worsened. The doctor opined this injury was a substantial contributing cause of the employee's current condition.

The employee filed a claim petition seeking temporary total and temporary partial disability benefits. The case was heard by a compensation judge at the Office of Administrative Hearings. In a Findings and Order filed April 9, 2001, the compensation judge found the employee sustained a personal injury on June 15, 1992 at which time his weekly wage was $672.00. The compensation judge based the wage computation on an eight hour a day, five days a week basis. The compensation judge further found the June 15, 1992 injury was the significant contributing and aggravating cause of the employee's ultimate disability. S.T.I. and General Casualty Companies appeal.

Daily Wage Computation

The employer and insurer, S.T.I. and General Casualty, appeal from the compensation judge's determination that the employee's weekly wage was $672.00 for a 40 hour work week, asserting that the method of calculation used by the compensation judge was legally erroneous.

Pursuant to Minn. Stat. § 176.011, subd. 3, if the amount of the daily wage paid to the employee was irregular "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." Where the evidence necessary to comply with this statutory directive is not available, the compensation judge may use an alternate method so long as that method reasonably reflects the employee's injury-related loss of earning capacity. Straley v. World Book Educational Prods., 50 W.C.D. 370 (W.C.C.A. 1994); Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991).

The compensation judge here concluded the actual number of days the employee worked was unknown and did not, therefore, use the statutory formula to compute the employee's daily wage. Based on the employee's testimony that he was hired to work eight hours a day, five days a week at $16.80 an hour, the compensation judge determined the employee's daily wage was $134.40 ($16.80 x 8). The compensation judge then multiplied this daily wage times five to arrive at a weekly wage of $672.00. See Minn. Stat. § 176.101, subd. 3.[1] The employer and insurer contend the compensation judge's computation of the daily wage is erroneous because the number of days the employee worked during the 26 weeks prior to his injury can be ascertained from the employee's payroll records.[2] The compensation judge failed to use these records in computing the daily wage. The appellants assert the compensation judge's computation of the employee's weekly wage is, therefore, legally incorrect. We agree.

Petitioner Exhibit S, the employee's payroll history, sets forth the employee's earnings for each of the 24 weeks between the weeks ending January 3 and June 12, 1992. This payroll history report reveals that the number of hours worked and the employee's total pay varied nearly every week. Accordingly, the employee's wage was irregular and the statutory formula for computing the daily wage applies.

Calculation of the daily wage under Minn. Stat. § 176.011, subd. 3, requires a determination of the total amount earned by the employee and the number of days in which the employee actually performed employment duties during the relevant period. The total amount

[1] The employer and insurer acknowledge the employee, as a construction worker, is entitled to an imputed weekly wage based on the employee's daily wage times five pursuant to Minn. Stat. § 176.011, subds. 3 and 18. (Appellate Brief at p. 13.)

[2] Petitioner Exhibit S is the only payroll record received in evidence covering the period prior to the injury. This payroll record, however, covers only the time from the week ending January 3, 1992 through June 12, 1992, a period of 24 weeks. At the hearing, the employer and insurer offered into evidence Exhibit 3, a payroll record. The exhibit was not received by the compensation judge and is not contained in the file.

earned by the employee between January 3 and June 12, 1992 is known. However, it is not possible to determine from the payroll records the number of days the employee actually worked. The payroll history report does, however, document the number of regular and overtime hours worked by the employee during each week of this 24-week period.[3] It is apparent from the payroll records that overtime was paid for work in excess of eight hours a day, rather than work in excess of 40 hours a week. Accordingly, it is possible to compute the minimum number of days the employee worked each week by dividing the total number of hours worked during that week by eight. Although the employer and insurer advocated this method of computation, the compensation judge rejected it. We conclude the compensation judge erred in his computation of the daily wage.

We acknowledge a calculation of the minimum number of days the employee worked each week may be different than the actual number of days the employee worked. For example, during a week in which the employee worked 32 hours, the minimum number of eight hour days that the employee would have worked was four (32 ÷ 8). It is possible, however, the employee may instead have worked three eight-hour days and two four hour days. But, basing the daily wage calculation on the minimum number of days worked per week is to the employee's advantage since the fewer days worked per week, the higher the daily wage. This method of calculation of daily wage, however, results in a lower daily wage than the wage found by the compensation judge who assumed a 40-hour work week multiplied by the hourly wage.

The object of wage determination is to arrive at a fair approximation of the employee's probable impaired future earning power. Knotz v. Viking Carpet, 361 N.W.2d 872, 37 W.C.D. 452 (Minn. 1985). We conclude in this case the computation of the employee's daily wage using the minimum number of days worked each week more closely approximates the employee's actual pre-injury earnings than a hypothetical five-day work week. The compensation judge's wage finding is reversed and the case is remanded to the compensation judge for a recalculation of the employee's daily and weekly wage. The compensation judge may, in his discretion, receive additional argument from counsel.

June 15, 1992 Injury

The compensation judge found the employee sustained a personal injury on June 15, 1992, which was the sole cause of all disability thereafter. The judge found the November 24, 1992 and March 18, 1996 alleged Gillette injuries were not new personal injuries but were simply manifestations of the continuing effects of the June 15, 1992 injury. S.T.I. and General Casualty do not dispute the judge's finding that the employee sustained a personal injury on June 15, 1992. However, the appellants contend it is undisputed the employee sustained injuries on November 24, 1992 and March 18, 1996. They argue the compensation judge erroneously failed to allocate liability to these injuries and found the June 1992 injury to be the sole cause of the employee's low back condition. They ask this court to reverse the compensation judge's findings.

[3] The employee worked one hour of overtime during the week ending January 31 and 1.5 overtime hours during the week ending June 5, 1992.

Whether the employee sustained a Gillette injury on November 24, 1992 primarily depends on medical evidence. Steffen v. Target Stores, 517 N.W.2d 579, 50 W.C.D. 464 (Minn. 1994). Questions of medical causation are to be resolved by the compensation judge. Felton v. Anton Chevrolet, 513 N.W.2d 457, 50 W.C.D. 181 (Minn. 1984). The employee testified to an onset of low back pain on June 15, 1992 following which he missed a few days of work. Thereafter, the employee modified his job duties to some extent and wore a back brace. The employee later told Dr. Foreman, Dr. Dahlquist and Dr. Dowdle that his condition alternately worsened and improved after June 1992 until November 1992 when he felt he could no longer work. Dr. Dowdle testified the onset of the employee's low back problems was June 15, 1992, and opined that injury was the substantial contributing cause of the employee's disability. The compensation judge could reasonably conclude from the evidence that no new injury occurred on November 24, 1992.

S.T.I. and General Casualty also argue the employee sustained a Gillette injury culminating on March 18, 1996. They contend the employee's work activities from 1993 to 1996 significantly aggravated the employee's condition as opined by Dr. Wicklund and Dr. Engasser. Accordingly, the appellants ask this court to reverse the compensation judge's finding that the employee did not sustain a Gillette injury in March 1996.

The employee believed the 1992 injury was what caused the most damage to his back and testified he continued to have low back problems thereafter. He modified his work duties to avoid further injury but continued to experience periodic flare-ups. Dr. Dowdle opined the employee's work activities from 1993 through March of 1996 did not aggravate or accelerate the employee's condition. Rather, the doctor opined the employee's underlying degenerative disc disease eventually deteriorated to the point where the employee could no longer work. On appeal, this court must determine whether the compensation judge's findings and order are "clearly erroneous and unsupported by substantial evidence in view of the entire record as submitted." Minn. Stat. § 176.421, subd. 1(3) (1992). Substantial evidence supports the findings if, in the context of the record as a whole, 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). The testimony of the employee together with expert testimony of Dr. Dowdle supports the compensation judge's conclusion that the employee's June 15, 1992 personal injury was the sole cause of his disability. Accordingly, the compensation judge's findings must be affirmed.