SCOTT LEACH, Employee, v. PACESETTER CORP. and LIBERTY MUT. INS. CO., Employer-Insurer/Appellant.

WORKERS' COMPENSATION COURT OF APPEALS
JANUARY 24, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES - SUBSTANTIAL EVIDENCE; REHABILITATION - RETRAINING. Where it would not have been unreasonable for the compensation judge to find that the trainee employee's approved commissions at the time of injury did not reflect his total date-of-injury earning capacity and that the employee had an expectation under terms of his contract of a guaranteed income irrespective of earned commissions during the period at issue, and where the employer and insurer in their appellate brief based their appeal from the employee's retraining award entirely on the issue of the employee's average weekly wage, the compensation judge's award of retraining benefits based in part on a calculation of the employee's average weekly wage based on pay that included "draws" that were "guaranteed" under the employment contract was not clearly erroneous and unsupported by substantial evidence.

Affirmed.

Determined by Pederson, J., Wilson, J., and Rykken, J.
Compensation Judge: Gregory A. Bonovetz

OPINION

WILLIAM R. PEDERSON, Judge

The employer and insurer appeal from the compensation judge's determination of the employee's weekly wage and award of retraining benefits.[1] We affirm.

BACKGROUND

In October of 1996, Scott Leach commenced commission-based employment as a traveling sales representative with Pacesetter Corporation, to sell cabinets, siding, and replacement windows. On March 6, 1997, Mr. Leach [the employee] sustained a work injury to his low back when he was involved in an automobile accident in the course of his work. Pacesetter Corporation [the employer] admitted liability for the injury and commenced payment of benefits, based on a

[1] In their Notice of Appeal, the employer and insurer raised issues with 25 of the judge's 43 findings and with all six of the judge's orders. However, they address in their brief only the finding of the employee's weekly wage and the award of retraining benefits. Therefore we deem all other issues waived. Minn. R. 9800.0900, subp. 1 ("Issues raised in the notice of appeal but not addressed in the brief shall be deemed waived and will not be decided by the court").

weekly wage of $384.00. Permanent restrictions prevented the employee from returning to his job with the employer, and subsequent job search efforts with the assistance of QRC John Witzke and a job placement specialist proved unsuccessful. Mr. Witzke and the employee subsequently developed a sixty-eight-week retraining plan, designed to qualify the employee as a computer information systems microcomputer specialist.[2] The plan was apparently presented by mail to the employer and insurer on December 14, 1998, and, when no response was forthcoming, on January 15, 1999, Mr. Witzke contacted the insurer and was informed that the plan would not be approved. On February 18, 1999, the employee apparently submitted a Rehabilitation Plan Amendment to the employer and insurer, to which he apparently received no objection. On April 12, 1999, having received 105.4 weeks of temporary total disability benefits, the employee filed a Rehabilitation Request, seeking implementation of the retraining plan. Following an administrative conference on July 15, 1999, the plan was approved by order of a compensation judge filed August 24, 1999. On September 16 and 17, 1999, respectively, the employer and insurer requested a formal hearing and a change of QRC, and the matters were consolidated for hearing on December 22, 1999.

On the date of the hearing, the employer and insurer raised for the first time, among several sub-issues for determination, the issue of the employee's weekly wage on the date of injury. The employee had been presuming that his weekly wage was $384.00, the wage on which the employer and insurer had all along been basing payment of his benefits, but he was unprepared at the time of hearing to substantiate that figure because he had not anticipated litigation of the issue. The employer and insurer offered into evidence documentation showing that, during his nineteen weeks of pre-injury employment with the employer, the employee had received "draws" totaling $6,091.46, only $3,979.49 of which reflected approved commissions. With the employee's consent, the compensation judge left the record open for further submissions and argument. The employer and insurer subsequently contended that the employee's weekly wage should be calculated by taking what the employee earned in commissions, $3,979.49, and dividing by the number of weeks worked, nineteen, for an average weekly wage of $209.45.

At the hearing, the employee testified that, on the date of his injury, he had been receiving a draw of $400.00 a week from the employer against his eventual commissions, which draw he understood to be "guaranteed income" regardless of his sales during the period of his work for the employer. In his post-hearing memorandum, the employee argued that his average weekly wage should be calculated by taking the $6,091.46 in draws, plus the $500.00 in car allowances he had received, dividing that sum by the ninety-six days he had worked, and then multiplying by five. In a telephone call on April 5, 2000, the employee's counsel clarified that he was claiming an average weekly wage of $343.30 ($6,591.46 ÷ 96 = $68.66 x 5 = $343.30).[3]

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[2] The employee has some experience and apparent aptitude in this area already but no formal education in it.

[3] There appears to be no issue among the parties as to the amount of the draws paid, $6,091.46, the amount of the car allowance, $500.00, and the number of days in which the employee actually performed the duties of his employment, 96. We therefore rely on those figures.

By Findings and Order filed April 18 and amended May 5, 2000, and expressly noting that evidence introduced was sparse, the compensation judge concluded that the employee's weekly wage on the date of injury was $343.30. The employer and insurer appeal.

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 been paid a total of $6,591.46 for working a total of ninety-six days for the employer by the date of his work injury, yielding a daily wage of $68.66 and therefore a weekly wage of $343.30. This decision was based in part on a finding that "the employee, throughout his employment through the date of injury, March 6, 1997 was in a 'learning phase' during which time it was the employee's understanding that he would receive a guaranteed $400.00 per week irrespective of sales." The judge found further that "no evidence was introduced establishing or even tending to establish that any of the $6,591.46 paid to the employee was ever repaid by the employee or that any request for repayment had ever been made." The employer and insurer contend that substantial evidence does not support a conclusion that the weekly wage found by the judge reflects what the employee actually earned and that it does not support the judge's interpretation of the employee's contract with the employer, particularly with regard to the employee's income from the employer being guaranteed. We do not agree.

Draws

The object in calculating a work-injured employee's weekly wage on the date of injury is to arrive at a fair approximation of what would probably have been the employee's future earning power had that earning power not been impaired by the injury. Bradley v. Vic's Welding, 405 N.W.2d 243, 245-46, 39 W.C.D. 921, 924 (Minn. 1987); Knotz v. Viking Carpet, 361 N.W.2d 872, 874, 37 W.C.D. 452, 455 (Minn. 1985; and Sawczuk v. Special School Dist. 1, 312 N.W.2d 435, 437-38, 34 W.C.D. 282, 287 (Minn. 1981). The employer and insurer contend initially that the compensation judge's determination of the employee's weekly wage in this case was erroneous

and unsupported by the evidence because it was based solely on what the employee was "paid" rather than on what he actually earned. In support of this argument they cite Knotz v. Viking Carpet, 361 N.W.2d 872, 37 W.C.D. 452 (Minn. 1985) ("the focus [in Minn. Stat. § 176.011, subd. 3] is on what an employee was earning rather than what he received for his work"). In Knotz, the injured employee was president and co-proprietor with his brother of their own corporate carpet installation business. As such, he had exercised his office to authorize and receive a draw on corporate assets to compensate himself for his work. Mr. Knotz was injured at the end of a period during which he had taken a very minimal draw, apparently in order to preserve his company's working assets. The compensation judge concluded that the statute required him to base his calculation of Mr. Knotz's weekly wage on that very minimal draw of actual pay. This court reversed and the supreme court affirmed our reversal, both courts concluding that the employee's minimal draw of actual pay did not reflect either the value of the work that the employee was doing or his probable future earning power at the time he was injured.

We agree that Knotz has some applicability in the case before us, but not exactly that suggested by the employer and insurer. The employee in Knotz, like the employee in the case before us, was receiving no wages quid pro quo with either his work product or the time he spent at work. He was working essentially full time at a job that would normally pay substantially more than the draw that he was actually receiving at the time he was injured. The same is true of the employee in the case before us. The job was evidently advertised as paying at least $400.00 a week and potentially paying up to two and a half times that amount. The employee's work injury occurred within five months of his commencing his commission-based job. The employee testified, and the compensation judge apparently credited the fact,[4] that he was still in a training mode at the time of his injury.[5] The employee testified also that he understood that he had been guaranteed a draw that would be his to keep for his work. As the supreme court stated in Bradley v. Vic's Welding,

> While the computation of weekly wage is frequently based upon actual wages, there are various circumstances which make the claimant's actual earnings during a particular period an unreliable measure of his future earning power. As Professor Larson has stated, "sometimes it is as important to reject as it is to accept a brief recent-wage experience, if a realistic approximation of future wage loss is to be obtained." 2 A Larson, The Law of Workers' Compensation § 60.21 (c) (1987).

Bradley, 405 N.W.2d at 246, 39 W.C.D. at 924. We cannot conclude that the compensation judge erred in relying in this case upon draws actually paid, as opposed to commissions earned, as evidence of the employee's probable future earning power at the time he was injured.

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[4] See Brennan v. Joseph G. Brennan, M.D., 425 N.W.2d 837, 839-40, 41 W.C.D. 79, 82 (Minn. 1988) (assessment of a witness's credibility is the unique function of the trier of fact).

[5] We would take notice of the fact that trainees in most employments are normally not presumed to be fully productive during the period of their training and are normally not left without regular compensation for their work on that basis.

The Contract

The employer and insurer contend also that the employee's employment contract is "clear and explicit regarding income being based solely on commissions," arguing that the compensation judge's use of the employee's total pay, including draws and vehicle allowances, as a basis for calculating his weekly wage was unsupported by the contractual evidence. We do not agree.

A review of the earnings records submitted by the employer reveals that the employee initially received two weekly payments of $300.00 and then payments of $400.00 per week in fourteen of the next eighteen weeks. As the judge noted in his memorandum, "[t]his appears to be in keeping with the contract language which reflects that the general manager could allow the employee to receive a minimum fixed guaranteed amount on a weekly basis."[6] The judge also noted that there is no evidence at all that the employer ever requested that the employee begin to repay his draws, even after the employee became reemployed at other work. The language of the Compensation Plan reasonably supports the interpretation that "draws" were only "against future earned commissions" and that only commissions were unearned "until sale is final." It would have been reasonable for the employer to deduct draws from future commissions without holding an employee injured during his training period responsible for repayment of draws not recouped by commissions, nor would it have been unreasonable for the judge to construe the contract in that manner. The judge noted that he had carefully reviewed the language of the employment contract. Under the facts of this case, we believe that he reasonably construed the rather contradictory language indicating that the employee was paid solely on a sales commission basis while at the same time was to effect a "minimum fixed guaranteed weekly draw amount." Therefore, we will not reverse based on contractual language. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

We conclude that, under the particular facts of this case, it was reasonable for the compensation judge to find that the employee's approved commissions at the time of injury did not reflect his total date-of-injury earning capacity and that the employee had an earning capacity and an expectation under terms of his contract of a weekly wage of at least $343.30 at the time of

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[6] The "Summary Of Sales Representatives Compensation" dated October 25, 1996, provides as follows:

> **Fixed Draws.** So long as Representative is meeting performance expectations based upon the Representative's experience, effort and demonstrated productivity, the General Manager may in his/her sole discretion allow Representative to receive a minimum fixed guaranteed weekly draw amount, even though the payment of such draw would create and/or increase a red balance in the Representative's commission account. Any such fixed weekly draw, and any month end surplus paid to Representative shall in all cases be an advance against commissions earned or to be earned in the future and **NOT A SALARY**.

his work injury. This conclusion is particularly compelled given certain salient facts in the case: (1) the employer has paid wage replacement benefits for several years in an amount based on the premise that the employee's draw was part of his earnings on the date of his injury, and never once during that time did the employer request repayment of the draw as a "loan" as it now contends it was; (2) the job at issue was advertised as being one normally productive of earnings of at least $400.00 a week; (3) the employee performed this job for the employer for nineteen weeks without ever being informed that his work was substandard, apparently incurring a contract-authorized deduction in his draw on only four of about eighteen pay periods; and (4) the contractual documents at issues are inconsistent in their provisions and therefore reasonably construable in favor of the nondrafting party, here the employee.

Because it was not unreasonable, we affirm the decision of the compensation judge as to the employee's weekly wage on the date of injury. See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239. Because the employer and insurer in their appellate brief base their appeal from the retraining award entirely on the judge's finding as to the employee's weekly wage, we deem all other issues as to the award of retraining benefits waived. See Minn. R. 9800.0900, subp. 1 (issues not addressed in the appellate brief shall be deemed waived and will not be decided by the court). Therefore, we affirm also the judge's award of retraining benefits.