GREGORY A. RICE, deceased employee, BY VICTORIA RICE, Petitioner/Appellant, v. PENNY'S SUPERMARKETS and TRAVELERS INS. CO., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
MAY 23, 2001

No. [REDACTED SSN]

HEADNOTES

DEPENDENCY BENEFITS - CALCULATION; DEPENDENCY BENEFITS - HEIRS. Where the insurer's benefit calculations, as accepted by the compensation judge, were accurate and consistent with the method approved by the supreme court in Lemke v. Knudsen Trucking, Inc., 291 N.W.2d 378, 32 W.C.D. 386 (Minn. 1980), and where the petitioner's calculations were contrary to case law and statute, the compensation judge's denial of the petitioner's additional claim for dependency benefits was proper and affirmed.

APPEALS - LAW OF THE CASE. Where the compensation judge had ordered the insurer to pay benefits in accordance with a previous judge's Findings and Order through the date the record closed in that previous proceeding, where the benefit period at issue in the current proceeding was a different one, and where the methods of computation employed by the earlier judge were legally erroneous and not in accordance with the supreme court's holding in Lemke v. Knudsen Trucking, Inc., 291 N.W.2d 378, 32 W.C.D. 386 (Minn. 1980), the compensation judge's calculation of dependency benefits by a different method in the current case was not unreasonable or otherwise in violation of the "law of the case." There is no legal basis for permitting a legally erroneous and inaccurate method of computation to be perpetuated indefinitely, based solely on that method's tacit affirmance by the supreme court in an earlier decision where the method was not fully litigated.

Affirmed.

Determined by Pederson, J., Rykken, J., and Wilson, J.
Compensation Judge: Bradley J. Behr.

OPINION

WILLIAM R. PEDERSON, Judge

The petitioner appeals from the compensation judge's determination that dependency benefits were properly calculated by the employer and insurer for a May 21, 1981, work-related injury and death, in accordance with Minn. Stat. §§ 176.111, 176.645, and case law. We affirm.

BACKGROUND[1]

On May 21, 1981, Gregory Rice suffered a fatal injury that arose out of and in the course of his employment as an assistant manager at Penny's Supermarkets. On that date, Mr. Rice was survived by his widow, Vikki Rice [the petitioner], and two sons, Spencer and Lucas. His weekly wage was $557.63, and the insurer commenced payment of workers' compensation death benefits at the maximum compensation rate effective on May 21, 1981.

In addition to workers' compensation benefits, the dependents also received social security survivor's insurance benefits. Minn. Stat. § 176.111, subd. 21, allows an offset for government survivor benefits to the extent that the government survivor benefits, when combined with the weekly workers' compensation benefits, exceed the weekly wage of the deceased employee at the time of the injury that caused the death. On May 21, 1981, the statute provided:

> The following provision shall apply to any dependent entitled to receive weekly compensation benefits under this section as the result of the death of an employee, and who is also receiving or entitled to receive benefits under any government survivor program:
>
> The combined total of weekly government survivor benefits and workers' compensation death benefits provided under this section shall not exceed 100 percent of the weekly wage being earned by the deceased employee at the time of the injury causing his death; provided, however, that no state workers' compensation death benefit shall be paid for any week in which the survivor benefits paid under the federal program, by themselves, exceed 100 percent of such weekly wage provided, however, the workers' compensation benefits payable to a dependent surviving spouse shall not be reduced on account of any governmental survivor benefits payable to decedent's children if the support of the children is not the responsibility of the dependent surviving spouse.

Minn. Stat. § 176.111, subd. 21 (1980).

Also on May 21, 1981, dependency benefits were subject to yearly adjustment increases under Minn. Stat. § 176.645, which provided in pertinent part:

> For injuries occurring after October 1, 1975 for which benefits are payable under section 176.101, subdivisions 1, 2 and 4, and section 176.111, subdivision 5, the amount due the employee or any dependents shall be adjusted in accordance with this section. On October 1, 1976, and each October 1 thereafter the amount due shall

[1] The facts as set forth in this background are drawn from the parties' joint stipulation of facts and from documents found in the judgment roll, including the supreme court's decision in Rice v. Penny's Supermarkets, 369 N.W.2d 508, 37 W.C.D. 742 (Minn. 1985).

> be adjusted by multiplying the amount due prior to each adjustment by a fraction, ... No adjustment increase made on October 1, 1977 or thereafter under this section shall exceed six percent a year.

(Emphasis added.) The parties agreed to allocate the dependency benefits two-thirds to Mrs. Rice and one-third to the children. See Minn. Stat. § 176.111, subd. 10 (1980). In accordance with Minn. Stat. § 176.111, subd. 20, the insurer paid dependency benefits at the maximum weekly compensation rate of $244.00. For the period of May 21, 1981, through September 30, 1981, the insurer allocated $162.67 to Mrs. Rice and $81.33 to the children. On October 1, 1981, the dependency compensation benefit was increased by 6% under Minn. Stat. § 176.645. No reduction was taken for social security benefits received by the dependents, because the combined total of weekly social security benefits and workers' compensation death benefits did not exceed Mr. Rice's wage of $557.63.

In April 1982, the insurer alleged that it had mistakenly overpaid dependency benefits because it had compared the children's survivor benefits against Mr. Rice's entire adjusted weekly wage rather than against the children's allocated share of the adjusted wage, as clarified by the supreme court in Saukkola v. Airtex Indus., 313 N.W.2d 921, 34 W.C.D. 357 (Minn. 1981). Therefore, it sought a credit for its overpayment against future payable dependency benefits.

The issue of whether dependency benefits were available to the children in light of their simultaneous receipt of social security benefits came on for hearing on October 7, 1983. In a Findings and Order issued November 16, 1983, Compensation Judge John Parker determined that the children were not entitled to workers' compensation dependency benefits because the social security benefits they received exceeded their allocated share of Mr. Rice's adjusted wage. Judge Parker awarded the insurer a credit against future dependency benefits for the insurer's overpayment. At Finding 11, the judge illustrated his calculations to the date of trial as follows:[2]

Compensation to Spouse:

Dates	Adjusted Weekly Wage	2/3 thereof	Government Survivor Benefits	Limit on Compensation	Available Compensation	Comp.ensation Due
05/21/81 - 09/30/81 (19 weeks)	557.67[*]	371.75	- 0 -	371.75	162.67	162.67
10/01/81 - 05/20/82 (33.2 weeks)	591.09	394.06	- 0 -	394.06	179.00[*]	178.00
05/21/82 - 05/20/83 (52.2 weeks)	626.56	417.71	- 0 -	417.71	178.00	178.00
05/21/83 - hearing (20 weeks)	664.15	442.77	- 0 -	442.77	193.33	193.33

[2] Judge Parker's calculations were, in substantial part, adopted from Respondent's Exhibit 2, submitted at the hearing on October 7, 1983. In particular, the figures in the "available compensation" column were provided by the employer and insurer. Additionally, we note that the tables do contain typographical errors where noted by an asterisk.

Compensation to Children:

Dates	Adjusted Weekly Wage	1/3 thereof	Government Survivor Benefits	Limit on Compensation	Available Compensation	Compensation Due
05/21/81 to 05/31/81	557.63	185.88	237.46	Surpassed	81.33	- 0 -
06/01/81 - 09/30/81	557.63	185.63	264.05	"	81.33	- 0 -
10/01/81 - 05/20/82	591.09	197.03	264.05	"	89.00	- 0 -
05/21/82 - 05/31/82	626.56	208.85	264.05	"	89.00	- 0 -
06/01/83 - 05/20/83[*]	526.56[*]	208.85	291.46	"	89.00	- 0 -
05/21/83 - date of hearing	664.15	221.38	291.46	"	96.68	- 0 -

On appeal, this court reversed the compensation judge's award, determining that no offset of government survivor benefits against dependency compensation allocated to Mr. Rice's minor children was required because the unallocated adjusted weekly wage after deduction of the government survivor benefits remained in excess of the maximum compensation available. On further appeal, the supreme court reinstated the decision of the compensation judge, noting that the difference between the calculations of the compensation judge and the Workers' Compensation Court of Appeals resulted from the latter's use of the total adjusted wage. Citing Lemke v. Knudsen Trucking, Inc., 291 N.W.2d 378, 32 W.C.D. 386 (Minn. 1980), as authority, the court held that the compensation judge had correctly combined the children's government survivor benefits with their allocated share of Mr. Rice's weekly wage at the time of injury, as adjusted under Minn. Stat. § 176.645. See Rice v. Penny's Supermarkets, 369 N.W.2d 508, 37 W.C.D. 742 (Minn. 1985).

On April 21, 1999, a claims representative from the insurer wrote to the petitioner, providing her with copies of a payment audit covering May 21, 1981, through April 4, 1999, and contending that she had been overpaid. Based on the insurer's audit, the petitioner alleged an underpayment of dependency benefits continuing from May 1985, and on July 21, 1999, she filed a Claim Petition for Dependency Benefits.

The issues of the alleged underpayment of dependency benefits and the proper method of calculating those benefits came on for hearing on August 1, 2000. The case was submitted on stipulated facts and written argument. The parties stipulated that the insurer paid the dependency benefits as set forth in its letter of April 21, 1999. (Resp. Ex. 1.) In a Findings and Order issued September 28, 2000, the compensation judge denied the claim of an underpayment, concluding that Judge Parker's calculations were the law of the case through November 10, 1983, and that the insurer's benefit calculations from November 11, 1983, to the date of hearing were accurate and consistent with the calculation method approved by the supreme court in Lemke. The petitioner appeals.

STANDARD OF REVIEW

"[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

In 1980, the supreme court addressed the issue of whether dependents who are receiving government survivor benefits subject to the weekly wage limitation of Minn. Stat. § 176.111, subd. 21, are also entitled to receive the benefit of adjustment increases under Minn. Stat. § 176.645. In Redland v. Nelson's Quality Eggs, Inc., 291 N.W.2d 371, 32 W.C.D. 376 (Minn. 1980), Patterson v. Dvorak Constr. Co., 291 N.W.2d 376, 32 W.C.D. 399 (Minn. 1980), and Lemke, the court constructed a complicated process by which to reconcile the anti-inflation purpose of section 176.645 and the intended weekly wage limitation in section 176.111, subdivision 21. The parties to this case agree that the dispute centers on their differing interpretations of these decisions.

In Redland, the court held that "the most logical way to read subdivision 21 and section 176.645 in harmony is to increase the weekly wage by the applicable percentage." Id. at 375, 32 W.C.D. 384. Arguing primarily from Lemke, the petitioner contends that case law clearly holds that this adjustment in the weekly wage should be made without corresponding adjustment in the compensation rate in determining the amount of benefits due. She argues that the compensation judge erred when he concluded that Redland called for an adjustment of the weekly wage solely for the purpose of determining whether the insurer was entitled to a reduction of dependency benefits to the surviving spouse or children who are also receiving government survivor benefits. We do not agree.

At Finding 3, the compensation judge determined, and the petitioner agrees, that the proper method of calculating dependency benefits is illustrated by the first two benefit charts in Lemke, which are applicable to deaths occurring before July 1, 1981. The substance of those charts is as follows:

Compensation to Spouse:

Dates	Adjusted Weekly Wage	2/3 thereof -	Government Survivor Benefits=	Limit on Compensation	Available Compensation	Compensation Due
1/1/77-- 9/30/77	$235.64	$157.10	$23.32	$133.78	$ 96.89 [2/3]	$ 96.89
10/1/77--12/31/77	249.78	166.52	23.32	143.20	102.70	102.70
1/1/78-- 9/30/78	249.78	166.52	21.32	145.20	102.70	102.70
10/1/78--12/31/78	264.77	176.52	21.32	155.20	108.86	108.86
1/1/79-- 9/30/79	264.77	176.52	Not in Record	?	108.86	?

Compensation to Children:

Dates	Adjusted Weekly Wage	1/3 thereof-	Government Survivor Benefits=	Limit on Compensation	Available Compensation	Compensation Due
1/1/77-- 9/30/77	$235.64	$78.55	$145.25	Surpassed	$48.44 [1/3]	- 0 -
10/1/77--10/31/77	249.78	83.26	145.25	Surpassed	51.35	- 0 -
11/1/77-- 12/3177	249.78	83.26	124.11	Surpassed	51.35	- 0 -
1/1/78-- 9/30/78	249.78	83.26	124.57	Surpassed	51.35	- 0 -
10/1/78--12/31/78	264.77	88.26	124.57	Surpassed	54.43	- 0 -
1/1/79-- 9/30/79	264.77	88.26	Not in Record	?	54.43	?

The petitioner, however, misinterprets Lemke as holding that the adjustment under Minn. Stat. § 176.645 is applied to the weekly wage rather than the base compensation rate. The Lemke court clearly applied the adjustment increase to both the weekly wage and the compensation rate, but for different purposes. The adjustment to the weekly wage was to arrive at the subdivision 21 limit on compensation; the adjustment to the compensation rate was to arrive at the available compensation.

The rationale behind Redland, Patterson, and Lemke was to provide a method of determining the offset under Minn. Stat. § 176.111, subd. 21, while preserving the anti-inflationary effect of Minn. Stat. § 176.645. As illustrated in Lemke, the adjusted weekly wage is allocated between the spouse and the children in the same proportion as benefits are allocated. The government survivor benefits are then subtracted from the allocated share of the adjusted wage to arrive at the "limit on compensation." The limit on compensation is the amount of the workers' compensation benefit that may be paid without exceeding the weekly wage limitation of subdivision 21. We agree with the compensation judge that the wage adjustment specified in Redland was intended solely to determine whether the insurer was entitled to an offset for government survivor benefits.

Lemke also clearly illustrates the method of calculating available compensation. Minn. Stat. § 176.111, subd. 20, establishes the maximum weekly compensation rate for dependents. The statute provides in pertinent part that "[t]he total weekly compensation to be paid to full actual dependents of a deceased employee shall not exceed in the aggregate an amount equal to the maximum weekly compensation for a temporary total disability." Mr. Lemke was killed on August 6, 1976. The maximum compensation rate on that date was $135.00. The compensation rate was adjusted under Minn. Stat. § 176.645 on October 1, 1976, October 1, 1977, and October 1, 1978. The compensation available to the dependents in the aggregate did not exceed the maximum adjusted compensation rate on any of these dates.

In the instant case, the petitioner has put forth a proposed schedule of dependency benefits that erroneously determines the "compensation available" to be two-thirds of the adjusted weekly wage. She then calculates the benefit available to the spouse as being two-thirds of the compensation available, subject to the maximum temporary total disability rate at any given point in time. The petitioner does not follow the method of calculation as illustrated in Lemke. As a result, the maximum compensation rate exceeds the limitations set forth in Minn. Stat. § 176.111, subd. 20, and the petitioner's calculation of the annual adjustment of benefits exceeds the limitation of six percent a year established by Minn. Stat. § 176.645 (1977).

We have carefully reviewed the benefit calculations submitted by the insurer, and we agree with the compensation judge that the insurer's benefit calculations have been accurate and consistent with the method approved by the supreme court in Lemke. For these reasons, and because the petitioner's calculations are contrary to case law and statute, we affirm the compensation judge's denial of the additional claim for dependency benefits.

The petitioner also contends that Judge Parker's decision on November 16, 1983, affirmed by the supreme court in 1985, constitutes the law of the case and that the method of calculating benefits employed therein is therefore binding on the parties. Judge Behr's finding that this method of calculation is the law of the case only through November 10, 1983, she argues, is erroneous as a matter of law. We do not agree.

As the compensation judge pointed out in his memorandum, the dispute before Judge Parker and the appeals that followed were centered on whether dependency benefits were available to the employee's children in light of their simultaneous receipt of social security benefits. There was no discussion in any of the decisions that followed as to how the column "available compensation" was calculated. The supreme court affirmed Judge Parker's determination that the government survivor benefits were to be compared with the children's allocated portion of the adjusted weekly wage. The computational errors contained in Judge Parker's findings were not addressed by any of the parties and were not part of the litigation.[3] Judge Behr ordered the insurer to pay benefits in accordance with Judge Parker's Findings and Order through November 10, 1983, the date the record closed in the initial hearing. Apparently Judge Behr, acknowledging that the benefit period at issue before him was a different one from that at issue before Judge Parker, concluded that he was not bound by the methods of computation employed by Judge Parker that he perceived to be legally erroneous, notwithstanding the supreme court's tacit affirmance of those methods in its decision on other issues. Concluding, as did Judge Behr, that the insurer's calculations are in accordance with the supreme court's holding in Lemke, we find Judge Behr's decision reasonable. We perceive no legal basis for permitting legally erroneous and inaccurate methods of computation that have not been fully litigated to be perpetuated indefinitely, based solely on their tacit affirmance in an earlier decision.

[3] In particular, Judge Parker assigned a new maximum compensation rate on October 1, 1981, and again on May 21, 1983, contrary to statute and the supreme court's holding in Lemke. We note also that the insurer's procedure of adjusting benefits on October 1 of each year is in accordance with this court's decision in Broos v. Portec, Inc., 38 W.C.D. 219 (W.C.C.A. 1985).