LARRY H. ROSS, Employee/Appellant, v. KAS SERVS., INC. and STATE FUND MUT. INS. CO., Employer-Insurer, and BLUE CROSS/BLUE SHIELD OF MINN., Intervenor.

WORKERS' COMPENSATION COURT OF APPEALS
NOVEMBER 29, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES - IRREGULAR HOURS; WAGES - SEASONAL WORK. Although the judge's calculation of the employee's average weekly wage based on a twenty-six-week pre-injury wage period as contemplated by the statute instead of on a fifty-two-week period as proposed by the employee was not clearly erroneous and unsupported by substantial evidence, the matter was remanded to the compensation judge for further consideration, because it appeared that the judge may have felt erroneously restricted by the language of the statute, in this case where the employee's pre-injury weekly wage was irregular and fluctuated seasonally, where specific evidence regarding the employee's pre-injury daily wage was not presented to the judge, and where the parties sought a determination of the employee's average weekly wage based simply on either a twenty-six-week pre-injury wage history or a fifty-two-week pre-injury wage history in light of total earnings during those periods.

Remanded.

Determined by: Pederson, J., Wilson, J., and Wheeler, C.J.
Compensation Judge: Catherine A. Dallner

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's determination of the employee's weekly wage based on a twenty-six-week earnings history rather than a fifty-two-week earnings history. We remand.

BACKGROUND

The facts relevant to the issue on appeal are not disputed. The case was submitted to the compensation judge on stipulated facts and written arguments from counsel for both the employee and the employer and insurer. On March 11, 2000, Larry Ross [the employee] sustained an injury to his low back arising out of and in the course of his employment at KAS Services, Inc. [the employer]. On that date, the employer was insured against workers' compensation liability by State Fund Mutual Insurance Company [the insurer]. The employer and insurer initially denied primary liability but subsequently admitted it, based in part on the opinions of their independent medical examiner, Dr. Jack Drogt, M.D.

According to the stipulated facts submitted to the compensation judge, the employee's weekly wage on March 11, 2000, was either $723.78 or $826.42, depending on whether that wage is computed based on a twenty-six-week or based on a fifty-two-week wage history. The employee is paid on a salary-plus-commission basis. Commission payments to the employee are based on the volume of the work and the nature of the services that he performs during any given pay period. The parties agree that, on an annual basis, the spring and summer months are a time of higher earnings for the employee, based on the volume of work available during those months and the consequential higher commissions earned by the employee for the work he performs.

The matter was submitted to a compensation judge for determination on April 17, 2001. In a Findings and Order issued May 14, 2001, the judge determined that the employee's weekly wage on March 11, 2000, was $723.78, concluding that this wage, based on a twenty-six-week earnings record, is a "fair approximation of the employee's probable future earning power which has been impaired or destroyed by his injury." The employee appeals.

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

In arriving at her determination of the employee's average weekly wage, the judge noted that Minnesota Statutes § 176.011, subdivisions 3 and 18, specifically require that the wages of an injured worker whose earnings are irregular be calculated based on his wages during the period of twenty-six weeks prior to the date of injury.[1] In a memorandum accompanying her

[1] Subdivision 3, daily wage, is as follows:

> If the amount of the daily wage received or to be received by the employee in the employment engaged in at the time of injury was irregular or difficult to determine, or if the employment was part

Findings and Order, the judge pointed out that "[i]n virtually every case involving injured workers with irregular earnings, lesser and greater average weekly wages can be calculated depending upon the period of time utilized prior to the date of injury." Based on the record submitted in this case, the judge concluded in Finding 4 that a weekly wage of $723.78 constituted "a fair approximation of the employee's probable future earning power which has been impaired or destroyed by the injury."

On appeal, in agreement with the judge's standard, the employee quotes case law to the effect that the object of wage determination is to arrive at "a fair approximation of [the employee's] probable future earning power which has been impaired or destroyed because of the injury." Quoting Bradley v. Vic's Welding, 405 N.W.2d 243, 245-46, 39 W.C.D. 921, 924 (Minn. 1987), quoting Knotz v. Viking Carpet, 361 N.W.2d 872, 874, 37 W.C.D. 452, 455 (Minn. 1985). The employee argues, however, that in the year preceding his injury his annual earnings were $42,974.05, yielding an average weekly wage of $826.42. The employee contends that the wage found by the compensation judge, $723.78, results in the assumption that the employee had the capacity to earn only $37,633.44 annually--$5,340.61 less than his actual earnings. The employee argues that use of a twenty-six-week earnings record in this case does not reflect his earning capacity and so does not fulfill the intent of the statute. He argues that, under the facts of this case, where weekly earnings have fluctuated seasonally according to recognized variations in the industry, basing calculations on less than a full fifty-two-week pre-injury period of income results in an artificial average weekly wage that is much lower than actual earning potential.

While acknowledging that the object of a pre-injury wage determination is to arrive at a fair approximation of the impairment in the employee's probable future earning power due to his injury, it is apparent from her memorandum that the compensation judge felt compelled by "legislative intent" to utilize a twenty-six-week period in calculating the employee's average weekly wage. In Loberg v. Northome Healthcare Ctr., 57 W.C.D. 113, 119 (W.C.C.A. 1997), this court stated, "Where, in unusual factual situations, application of the statutory wage calculation formulas creates a result which does not fairly reflect the earning capacity lost due to an injury, the finder of fact may substitute any reasonable method of calculation which achieves this statutory objective." See also Boelter v. City of Ham Lake, 481 N.W.2d 50, 51, 46 W.C.D. 220, 221 (Minn. 1992); Hansford v. Berger Transfer, 46 W.C.D. 303 (W.C.C.A. 1991).

> time, the daily wage shall be computed by dividing the total amount the employee actually earned in such employment in the last 26 weeks . . . .

Subdivision 18, weekly wage, is as follows:

> If the employee normally works less than five days per week or works an irregular number of days per week, the number of days normally worked shall be computed by dividing the total number of days in which the employee actually performed any of the duties of employment in the last 26 weeks . . . .

Based on the minimal evidence submitted in this case, we cannot conclude that the compensation judge's calculation of the employee's weekly wage is clearly erroneous and unsupported by substantial evidence. However, because it appears the judge felt constrained by language in the statute, we remand the matter to the judge for further consideration.