JAMES TAKEMOTO, Employee/Appellant, v. LAZER COMMC'NS, INC. and AM. COMP. INS. CO./RTW, INC., Employer-Insurer.

WORKERS' COMPENSATION COURT OF APPEALS
DECEMBER 14, 2001

No. [REDACTED SSN]

HEADNOTES

WAGES - IRREGULAR HOURS; WAGES - PIECEWORK. Where it was not unreasonable for the compensation judge to find that the employee's seven-plus weeks of work as an installer was a sufficient amount of time to establish a probable future earning power, where it was not unreasonable for the judge to conclude that the earnings of coworkers were more speculative than the employee's actual earnings, and where it was not unreasonable for the judge to conclude that, because the employee's earnings during the time that he worked for the employer varied from week to week, the employee's final week of work alone was not an accurate reflection of the employee's potential earnings, it was not clearly erroneous and unsupported by the substantial evidence for the compensation judge to conclude that the employee's actual earnings after commencement of piece-work, with application of statutory calculation procedures, constituted the most accurate reflection of the employee's average weekly wage.

WAGES - IRREGULAR HOURS; WAGES - PIECEWORK. Where the employee's earnings were irregular because his pay was dependent on the varying number of days he worked each week and varying number of jobs he did, where the judge properly determined that the employee's daily wage by dividing the employee's total earnings by the total forty-two days that he worked for the employer, and where, notwithstanding the employee's testimony that he normally worked six days a week, the judge reasonably determined that the employee's work week varied in length and that employee worked an average of only 5.25 days a week, the compensation judge properly concluded that the employee's weekly wage should be calculated by multiplying the employee's daily wage by 5.25.

Affirmed.

Determined by Pederson, J., Wheeler, C.J., and Johnson, J.
Compensation Judge: Carol A. Eckersen.

OPINION

WILLIAM R. PEDERSON, Judge

The employee appeals from the compensation judge's determination of his average weekly wage on September 23, 1999. We affirm.

BACKGROUND

James Takemoto began working for Lazer Communications, Inc., on July 22, 1999. Lazer Communications, Inc. [the employer], was a subcontractor for Paragon Cable T.V., and Mr. Takemoto [the employee] was hired as an installer. The employee received training through the end of July 1999, ten to twelve hours a day, six days a week. The employee testified that employees in the employer's business normally worked six-day weeks rather than five-day weeks. During the two-week training period, the employee was paid $5.15 per hour, plus overtime. Thereafter he was compensated on a piece-work basis. As the employee became more proficient in his use of the equipment, his speed increased and so did his earnings. On September 23, 1999, about two months after commencing employment with the employer, the employee injured his low back in the course of uninstalling an old cable line and reinstalling it between two poles. The employer and insurer admitted liability for the injury and commenced payment of temporary total disability benefits. On December 13, 2000, the employee filed a Claim Petition, alleging underpayment of benefits, contending that his weekly wage on the date of injury was at least $675.48 and that his benefits had been erroneously based on a lesser amount.[1]

The issue of the employee's date-of-injury weekly wage came on for hearing before a compensation judge on April 17, 2001. At trial, the employee contended that, where an employee is learning the employer's business, where his earnings are increasing each week, and where he had not had enough time on the job to demonstrate what his probable earning capacity was, his average weekly wage should be based upon a comparison with fellow workers doing similar work who had a 26-week earnings history. Using this method of calculation, and based on evidence of other employees at the employer's workplace, the employee argued for a weekly wage of $688.97. In the alternative, the employee argued that his weekly wage was at least $655.68, based on the last three days he worked, contending that he would have earned at least that amount on an ongoing basis but for his injury. The employer and insurer argued that, although the employee had not worked a full twenty-six weeks before his injury, actual earnings in this case present an adequate history of earnings upon which to calculate the date-of-injury wage. Application of the employee's actual earnings to the statutory formula found in Minn. Stat. § 176.011, subds. 3 and 18, yields, they argue, an average weekly wage of $509.90. In the alternative, they argue that, even if the two weeks of training are excluded from the calculations, the employee's earning capacity was at most $519.22.

In a Findings of Fact, Conclusions of Law and Order issued June 18, 2001, the compensation judge accepted the employer and insurer's alternative position, concluding that application of the statutory formula to the employee's actual post-training earnings was the most accurate method of determining the employee's earning capacity as an installer. The employee appeals.

[1] We are unable to determine accurately the wage on which the employer and insurer had been basing their payment of benefits.

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.

"[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

On appeal, the employee contends that the compensation judge erred in rejecting his argument that his weekly wage should be based either on analogy with co-employees' earnings or on the employee's final week of work. The employee also contends that the judge erred in her application of the statutory formula found in Minn. Stat. § 176.011, subds. 3 and 18. We are unpersuaded.

Citing Johnson v. D.B. Rosenblatt, Inc., 265 Minn. 427, 122 N.W.2d 31, 22 W.C.D. 468 (1963), and Berry v. Walker Roofing Co., 473 N.W.2d 312, 45 W.C.D. 125 (Minn. 1991), the employee contends first that "case law indicates that the rule on determination of the average weekly wage to a 'piece worker' who has experienced only a short time on the job, is that the wages the Employee could have earned *may be gauged by the wages paid to one doing similar work*" (quoting the employee's brief). In Johnson, the employee was injured on the first day of the third week of her employment. Similarly, in Berry, the employee, a roofer paid by the piece, was injured within hours after beginning employment. We acknowledge that a compensation judge is not always bound to compute weekly wage based on the employee's actual earnings.[2] Nor

[2] As the supreme court has stated, "[w]hile 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." Bradley v. Vic's Welding, 405 N.W.2d 243, 246, 39 W.C.D. 921, 924 (Minn. 1987). "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'." Knotz v. Viking Carpet, 361

is there any hard and fast rule as to when weekly wage must be computed based on the employee's actual earnings and when use of another reasonable method is appropriate. However, while the employee's argument here has merit, we cannot conclude that it was unreasonable for the compensation judge to find that seven-plus weeks of work as an installer was a sufficient amount of time to establish a probable future earning power that had been impaired or destroyed because of the injury. Nor was it unreasonable for the judge to conclude, in weighing the evidence presented, that the earnings of coworkers were more speculative than the employee's actual earnings. Moreover, we reject also the employee's argument that his weekly wage should have been based on his last week of actual earnings. The compensation judge concluded that, because the employee's earnings during the time that he worked for the employer varied from week to week, one week was not an accurate reflection of the employee's potential earnings. This also was not an unreasonable conclusion.

Because the judge's rejection of the employee's calculation proposals was not unreasonable, we affirm the judge's determination that "the employee's actual earnings after starting piece-work and applying the statutory calculation are the most accurate reflection of the employee's [average weekly wage]." See Hengemuhle, 358 N.W.2d at 59, 37 W.C.D. at 239.

The employee also contends that the compensation judge erred in her application of Minn. Stat. § 176.011, subds. 3 and 18,[3] to the facts of this case and that consequently her conclusion that the employee's weekly wage is $519.22 is clearly erroneous. We do not agree.

N.W.2d 872, 874, 37 W.C.D. 452, 455 (Minn. 1985), quoting Sawczuk v. Special Sch. Dist. No. 1, 312 N.W.2d 435, 437-38, 34 W.C.D. 282, 287 (Minn. 1981). If, in unusual factual circumstances, the statutory wage calculation results in a weekly wage which does not fairly approximate the injured employee's lost earning capacity, the factfinder may use another reasonable method of wage calculation which does so. Loberg v. Northome Healthcare Ctr., 57 W.C.D. 113 (W.C.C.A. 1997).

[3] Minn. Stat. § 176.011, subd. 3, provides, in pertinent part:

> **Subd. 3. Daily wage.** "Daily wage" means the daily wage of the employee in the employment engaged in at the time of injury but does not include tips and gratuities paid directly to an employee by a customer of the employer and not accounted for by the employee to the employer. 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 time, 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, ...

Minn. Stat. § 176.011, subd. 18, provides, in pertinent part:

> **Subd. 18. Weekly wage.** "Weekly wage" is arrived at by multiplying the daily wage by the number of days and fractional days normally worked in the business of the employer for the employment involved. If the employee normally works less

In her memorandum, the compensation judge noted that "[t]he employee worked approximately seven weeks as an installer at a piece worker wage. The jobs he did and the number of days he worked varied so his wages varied" (emphasis added). The employee's earnings were therefore irregular, because his pay was dependent on the varying number of days he worked and jobs he did. The judge therefore, properly, resorted to calculation of the employee's daily wage, pursuant to Minn. Stat. § 176.011, subd. 3. Implicit in the judge's decision is her acceptance of the employer and insurer's exhibits indicating that between August 2, 1999, and September 23, 1999, the employee worked forty-two days.[4] This conclusion by the judge has support in the record and is not specifically challenged on appeal. Further, the parties do not dispute that the employee's earnings during this time frame were $4,153.77. Therefore, in accordance with the statute, the judge properly determined the employee's daily wage at the time of injury to be $98.90--$4,153.77 ÷ 42.[5]

Minn. Stat. § 176.011, subd. 18, provides the method for calculating the weekly wage of an employee who works an irregular number of days per week. Although the employee testified to working a six-day week, the judge concluded that the number of days he worked varied. There is support in the record for the judge's conclusion. According to Respondent's Exhibit 2, adopted by the compensation judge, the employee worked only five days during two of his eight work weeks, and no explanation is offered for this variance. Because he only worked three days into his eighth work week, the employee argues for application of the statute to only the seven full weeks that he worked. However, the statute provides in part that, where an employee 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 by the number of weeks in which the employee actually performed such duties" (emphasis added). In the instant case, it is undisputed that the employee performed work for the employer during eight work weeks, excluding the training period. The statute requires that the wages earned by the employee during all eight of these weeks be considered in calculating the employee's weekly wage. The judge determined that the employee worked forty-two days over the course of the eight-week period, for an average of 5.25 days per week. Based on these numbers, the judge determined the employee's average weekly wage to be

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> 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 by the number of weeks in which the employee actually performed such duties, ...

[4] The trial exhibits are in conflict as to the total number of days the employee performed the duties of his employment during this time. According to Petitioner's Exhibit B, the employee worked 44 days. Respondent's Exhibit 2 indicates that the employee worked 42 days, and this is corroborated by Respondent's Exhibit 3.

[5] Neither party contests the judge's conclusion that the employee's hourly earnings while in training are not reflective of his earning capacity as an installer.

$519.22--$98.90 x 5.25. We find this determination of the employee's weekly wage neither factually unreasonable nor legally improper, and therefore we affirm it in its entirety.