BEFORE THE IOWA WORKERS' COMPENSATION COMMISSIONER

JAMES DELIRE,

Claimant,

vs.

KEY CITY TRANSPORT, INC.,

Employer,

and

GREAT WEST CASUALTY COMPANY,

Insurance Carrier,
Defendants.

File No. 5038022

REMAND

DECISION

Head Note No.: 3001

STATEMENT OF THE CASE

On September 10, 2015, the Iowa Court of Appeals issued a remand order in the above captioned case instructing this agency to review the evidence and calculate the appropriate weekly benefit rate to be used in the payment of benefits for the injured worker who had been employed for less than thirteen weeks at the time of the injury.

In the underlying arbitration decision, the deputy workers' compensation commissioner set the benefit rate at $820.99 per week. The deputy commissioner relied upon the second run made by claimant James Delire with an additional $200.00 in hypothesized drop fees for a total average weekly wage of $1,494.26 per week. The deputy commissioner found this to be consistent with the approximate $75,000.00 annual figure claimant testified he was told was the representative earnings for west coast route drivers.

In the appeal decision dated April 17, 2014, the former workers' compensation commissioner reduced the weekly benefit rate to $748.78, relying upon an average weekly wage of $1,346.15. The former commissioner's decision held that the three weeks of actual wages earned by the injured worker were not representative and the weekly compensation rate was based on a projected annual income of $70,000.00, which resulted in an average weekly wage of $1,346.15.

ISSUE ON REMAND

What is the appropriate weekly benefit rate for the employee in this case who was employed less than thirteen weeks prior to the injury which occurred on June 11, 2008?

FINDINGS OF FACT

Claimant James Delire was forty-eight years old at the time of the hearing. The parties stipulated that claimant was single and entitled to one exemption.

Claimant was recruited by Joe Bitter, a managing partner of the employer. Claimant testified Mr. Bitter represented that drivers working the west coast routes for the employer made between $70,000.00 and $75,000.00 per year. (Transcript page 31) Mr. Bitter did not testify at hearing. Douglas Stahr, the west coast dispatcher for the employer, testified that "if they really want to hustle, they can make--they could possibly make $75,000 a year, but I'd say generally our guys make a little less than that." (Tr. p 155)

The first run claimant was assigned was a straight load out and a straight load back, "for confidence," according to Mr. Stahr. (Tr. pp. 150-151) Mr. Stahr stated the bulk of a driver's money is earned as the truck's wheels are rolling. (Tr. p. 151)

Clamant was paid $.34 per mile with $40.00 for each drop made along a given route. (Tr. p 31) A straight line route between Dubuque and California and back would be approximately 3,800 to 4,000 miles. (Tr. pp. 155-156) A typical route will have two to five stops on the way out to California and between six and twelve stops on the way back which would add on 600 or 700 miles as the driver travels down into Missouri, for example, to pick up freight. (Tr. p. 156) According to Mr. Stahr, each trip to the west coast would take approximately ten days. (Tr. p. 152) A driver usually takes two days of rest before returning to the road. (Tr. pp. 152-153)

In trips two and three, claimant drove 3,689 allowed miles and 4,193 miles, respectively. (Exhibit 18, pages 5, 7)

Based on those numbers, the most a driver would drive in any given month is two trips to the West Coast.

Claimant's first week included only shorter, local runs in Iowa and Wisconsin. He drove for six days, earning a total of $412.04 before deductions: $257.04 for mileage and $155.00 in drop fees. (Ex. J, pp. 2-3) During claimant's second week, he drove to the west coast but had only one stop. The trip took five days and he was paid $1,294.26, which was a combination of $1,254.26 for mileage and $40.00 for the single drop in Claifornia. (Ex. J, pp. 4-5)

During claimant's third week, he was injured. The pay records show he was on the road for eight days and he earned $1,665.62: $1,425.62 for mileage and $240.00 for drop fees. (Ex. J, pp. 6-7)

Mr. Stahr testified that claimant's second and third weeks when he made his two trips to California were atypical for a driver in the employ of Key City because the first trip had only one drop and the second trip to the west coast had no drops on the return trip. (Tr. pp. 151-154) Regarding claimant's second trip to California, Mr. Stahr testified as follows:

> Q: But it was still atypical because he got back quicker than what a normal West Coast run would have done; right?
>
> A: On that trip he did due to the fact that he came straight home because of his injury on his arm. Ideally what would have happened--our bread and butter out there is furniture loads with lots of stops. Ideally he would have pedaled that whole week coming back."

(Tr. pp. 153-54)

The majority of the drivers will have "lots of furniture stops coming back" according to Mr. Stahr. (Trans. pp. 154)

The record in this case does not include the pay records of any similarly situated drivers.

CONCLUSIONS OF LAW

Iowa Code section 85.36 provides as follows:

> The basis of compensation shall be the weekly earnings of the injured employee at the time of the injury. Weekly earnings means gross salary, wages, or earnings of an employee to which such employee would have been entitled had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed, computed or determined as follows and then rounded to the nearest dollar:

Claimant started working for the employer on May 23, 2008. (Ex. J, p. 2) Claimant was injured on June 11, 2008. Claimant was paid through June 14, 2008, (Ex. J, p. 6) a total of three weeks and two days. Subsection 7 of Iowa Code section 85.36

provides the method to calculate weekly earnings for employees employed fewer than 13 weeks at the time of the injury.

> 7. In the case of an employee who has been in the employ of the employer less than thirteen calendar weeks immediately preceding the injury, the employee's weekly earnings shall be computed under subsection 6, taking the earnings, including shift differential pay but not including overtime or premium pay, for such purpose to be the amount the employee would have earned had the employee been so employed by the employer the full thirteen calendar weeks immediately preceding the injury and had worked, when work was available to other employees in a similar occupation. If the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer.

Claimant and the company's west coast dispatcher both testified that the two runs claimant undertook to California were atypical because they included only a few drops. (Tr. pp. 107-110, 153-154)

Representative hours are those hours typically or customarily worked by an employee during a typical or customary full week of work. Jacobson Transp. Co. v. Harris, 778 N.W.2d 192, 197 (Iowa 2010).

"Customary" means "based on or established by custom"; "commonly practiced, used or observed"; or "usual." Merriam-Webster's Collegiate Dictionary 285 (10th ed. 2002). We have previously defined "customary" as "typical." Ascertainment of an employee's customary earnings does not turn on a determination of what earnings are guaranteed or fixed; rather, it asks simply what earnings are usual or typical for that employee. Jacobson, 778 N.W.2d at 199.

The first week is clearly non-representative and not a customary wage because claimant made only local runs. Claimant was hired to drive the west coast route and his weekly benefit rate should reflect that. The employer's representative indicated that a typical trip to the west coast would take a driver approximately ten days to complete and thus a driver would only be able to complete one trip to the west coast during a two-week pay period, with a possible maximum of three trips in one month. (Tr. pp. 152-153)

Discarding the first week of earnings, claimant's gross earnings were $1,294.26 for the second week and $1,665.62 for the third week. The gross average weekly wage using those amounts would be $1,479.94. It was stipulated by both parties that claimant was single and entitled to one exemption. The weekly benefit rate for an injury date of June 11, 2008, using an average weekly wage of $1,479.94 is $814.20. However, this would result in an inflated rate because it assumes a driver would make

four trips to California each month which is not typical or customary. The record establishes that drivers for this employer typically make two trips, possibly three trips, per month to California. (Tr. pp. 152-153)

The Iowa Court of Appeals made an explicit evidentiary finding in this case:

> "The record does not contain any evidence of the earnings of "other employees in a similar occupation." Nor does it contain evidence of any representative week "had the employee worked the customary hours for the full pay period in which the employee was injured, as regularly required by the employee's employer for the work or employment for which the employee was employed."

(Iowa Court App. Decision, page. 12)

Following Hanigan v. Hedstrom Concrete Prods., Inc., 524 N.W.2d 158, 160 (Iowa 1994), which is cited by the Iowa Court of Appeals at page 13 of its decision in this case, the most fair formulation to use in this matter is to base claimant's weekly benefit rate upon the actual wages earned during the time claimant actually worked for this employer. In Hanigan, the Iowa Supreme Court stated:

> This claimant did not produce evidence of what a truly similar employee would have earned. In view of the lack of evidence on that matter, it would be difficult to formulate a fairer test for a wage basis than to average the wages actually received by the employee.
>
> It was not error for the commissioner to adopt an averaging test in interpreting and applying Iowa Code sections 85.36(6) and (7).

(Id. at p. 160)

The Supreme Court recognized that statutes for computation of wage bases are "meant to be applied, not mechanically nor technically, but flexibly, with a view always to achieving the ultimate objective of reflecting fairly the claimant's probable future earning loss." (Id. at p. 160)

Based on the Iowa Court of Appeals decision and pursuant to their guidance, I find there is no evidence of earnings of other employees in a similar occupation. Nor is there evidence that there was any representative week had the employee worked the customary hours for the full pay period during which the employee was injured.

Subsection 7 of Iowa Code section 85.36 says if the earnings of other employees cannot be determined, the employee's weekly earnings shall be the average computed for the number of weeks the employee has been in the employ of the employer. During

the three weeks and two days claimant worked for the employer he earned a total of $3,371.92. When that amount is divided by 3.286 weeks, the result is an average weekly wage of $1,026.14.

Accordingly, claimant's average weekly wage is calculated to be $1,026.14, and his weekly benefit rate, classification single with one exemption, is $591.58, the calculation of the employer in Exhibit J.

ORDER

THEREFORE IT IS ORDERED that claimant's average weekly wage in this matter is one thousand twenty-six and 14/100 dollars ($1,026.14), and his weekly benefit rate is five hundred ninety-one and 58/100 dollars ($591.58).

Signed and filed this 18th day of November, 2015.

Joseph S. Cortese II

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