

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jeffrey Gummoe,	:	
	:	
Petitioner	:	
	:	
v.	:	
	:	
Workers' Compensation	:	
Appeal Board (Projan Cleaning	:	
& Restoration),	:	No. 2341 C.D. 2007
Respondent	:	Submitted: March 14, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY

FILED: April 18, 2008

Jeffrey Gummoe (Claimant) petitions for review of the order of the Workers' Compensation Appeal Board (Board) which affirmed in part, as amended, and reversed in part the decision of the Workers' Compensation Judge (WCJ). The Board affirmed the WCJ's grant of Projan Cleaning and Restoration's (Employer) modification petition but amended it to reflect that Employer was entitled to a credit for the gross, not the net, amount of Claimant's earnings as a real estate agent. The Board reversed the WCJ's decision to order Employer to pay Claimant's litigation costs.¹

¹ The Board also affirmed the WCJ's denial of Claimant's penalty petition and the grant of Employer's petition to compel physical examination. That portion of the Board's order is not before this Court.

Claimant sustained an ankle injury in the course and scope of his employment with Employer on May 12, 2005. Employer issued a temporary notice of compensation payable. By operation of law, the temporary notice of compensation payable became a notice of compensation payable. In October 2005, Claimant began working, as an independent contractor, as a real estate agent/broker/realtor for Coldwell Banker, Korpics & Sader, Inc.

Employer petitioned to modify benefits on the basis that Claimant had returned to work selling real estate. Claimant testified before the WCJ concerning his new position. The parties stipulated that in 2006 Claimant earned commissions on six sales of real property totaling \$7,102.30 and incurred expenses of \$2,980.93.²

The WCJ granted the modification petition and awarded a credit based upon Claimant's net real estate earnings in the amount of \$4,122.07 and ordered Employer to pay Claimant's litigation costs. The WCJ made the following relevant finding of fact:

4. The parties agree claimant received earnings as set forth more fully in the Stipulation of Facts. This Judge finds that in addition to his commissions, claimant incurred directly related business expenses. For purposes of modifying claimant's benefits, these business expenses should be deducted from claimant's gross earnings. After deducting the business expenses, the defendant/employer is entitled to a credit for the net earnings amount received by claimant, not his gross

² In four of the six cases, Claimant was retained to act as the seller's realtor in 2005, but he did not receive a commission until 2006.

commissions. To the extent the modification petition sought credit for the gross amount of commissions received by claimant, the same is denied. Credit will be awarded for claimant's net earnings as set forth in the attached stipulation.

WCJ's Decision, March 12, 2007, (Decision), Finding of Fact No. 4 at 1-2; Reproduced Record (R.R.) at 104a-105a.

Both parties appealed to the Board. Employer asserted the WCJ erred when he awarded a credit for Claimant's net, and not gross, earnings as a real estate agent. Employer also argued that the WCJ erred when he awarded litigation costs. Claimant appealed and argued that Employer should not receive any credit. The Board agreed with Employer that it was entitled to a credit based on the gross amount of the earnings:

Here, we have a situation where an independent contractor has earnings but also business expenses. . . . Claimant here could use the business expenses as deductions on his tax return. Thus, we determine here that Defendant [Employer] is entitled to a credit for the gross amount of all self-employment earnings received by Claimant. Therefore, we shall amend the Decision and Order to reflect that Defendant [Employer] is entitled to a credit for the gross, not net, earnings received by Claimant from his self-employment. (Citation omitted).

Board Opinion, December 5, 2007, at 5; R.R. at 114a. The Board also determined that because it amended the WCJ's decision and order to reflect a credit based on gross earnings, Claimant did not prevail and was not entitled to litigation costs.

Claimant contends that the Board erred when it determined that Employer was entitled to a credit on the gross amount of his real estate earnings and when it reversed the award of litigation costs.³

In Acme Markets, Inc. v. Workers' Compensation Appeal Board (Brown), 890 A.2d 21 (Pa. Cmwlth. 2006), this Court addressed the issue of whether the gross or net earnings of a self-employed claimant was appropriate. Stephen Brown (Brown) worked as a produce manager for Acme Markets, Inc. (Acme). Brown suffered a work-related shoulder injury and received workers' compensation benefits. His benefits were suspended when he returned to work at no loss of earnings to his time of injury job. Brown began working as an independent real estate appraiser on a part-time basis while continuing to work for Acme. On December 14, 1996, he quit his job with Acme due to pain in his arm and shoulder. He continued to work as a real estate appraiser. Brown petitioned to reinstate benefits. The WCJ awarded Brown total disability benefits as of December 14, 1996, and awarded Acme a credit for Claimant's net income as a real estate appraiser. Acme, 890 A.2d at 23.

Acme appealed to the Board and contended that the credit should be based on Brown's gross income. The Board concluded that the critical issue was whether Brown's gross or net income more accurately reflected Brown's earnings from self-employment. The Board found that there was no evidence in the record

³ This Court's review is limited to a determination of whether an error of law was committed, whether necessary findings of fact are supported by substantial evidence, or whether constitutional rights were violated. Vinglinsky v. Workmen's Compensation Appeal Board (Penn Installation), 589 A.2d 291 (Pa. Cmwlth. 1991).

on this issue and remanded to the WCJ. On remand, Brown testified regarding his gross income, his business expenses, and the salary he paid his wife who served as secretary/treasurer of the appraisal business. Acme, 890 A.2d at 23. Acme presented the deposition testimony of Carole G. Fisher (Fisher), a certified rehabilitation counselor and an expert in vocational counseling. Fisher conducted a wage survey for the occupations of real estate appraiser, secretary, and bookkeeper. The WCJ accepted Brown's testimony and rejected Fisher's. The WCJ again awarded a credit based on the net earnings. Acme once again appealed to the Board and argued that the WCJ erred when he failed to determine whether Brown's gross or net income more accurately reflected Brown's earning power. The Board agreed and again remanded to the WCJ. This time, the WCJ found Brown credible that his net earnings more accurately reflected his profit from self-employment. Acme appealed to the Board which affirmed. Acme, 890 A.2d 24.

Acme petitioned for review with this Court and asserted that no substantial evidence supported the WCJ's determination that Brown's net and not gross income more accurately reflected Brown's earning power from self-employment. Acme, 890 A.2d at 24-25. This Court affirmed:

Where a claimant does not return to work with his pre-injury employer but becomes self-employed, the critical issue in determining his earning power is whether his gross income or net income more accurately reflects his earnings from self-employment. This issue is a question of fact to be determined by the WCJ. . . . The WCJ's findings of fact on the issue of earning power, if supported by substantial evidence, must be accepted. . . .

Here, the WCJ credited Claimant's [Brown] testimony that his net earnings accurately reflected his actual earnings from self-employment. Claimant [Brown]

explained the various business expense deductions indicated on his tax returns and stated that all of the claimed expenses were accurate and incurred in connection with his appraisal business. Claimant [Brown] supported the deductions for his wife's salary by explaining, in detail, the duties she performs on a full-time, daily basis. Notably, Claimant [Brown] stated that his wife performed the work of two people and that her salary is commensurate with her efforts. Claimant's [Brown] credited testimony is substantial evidence that his net income, rather than his gross income, reflects his earning power for purposes of the Act. (Citations omitted).

Acme, 890 A.2d at 25.

A review of the WCJ's decision reveals that the WCJ found that Claimant incurred "directly related business expenses" and determined that "[f]or purposes of modifying claimant's benefits, these business expenses should be deducted from claimant's gross earnings." Decision, Finding of Fact No. 4 at 1; R.R. at 104a . As this Court stated in Acme, the critical issue in determining a claimant's earning power is whether his gross income or net income more accurately reflects his earnings from self-employment. From the WCJ's decision, it appears that the WCJ determined that Claimant's net earnings more accurately reflected his earnings from self-employment. This determination is a question of fact for the factfinder, the WCJ. Neither this Court nor the Board can make this finding. Accordingly, the Board erred when it usurped the WCJ's role as factfinder and determined that Employer deserved a credit based on Claimant's gross earnings.

Claimant next contends that the Board erred when it reversed the WCJ's award of litigation costs.

Section 440 of the Workers' Compensation Act⁴ (Act), 77 P.S.

§996(a), provides:

(a) In any contested case where the insurer has contested liability in whole or in part, including contested cases involving petitions to terminate . . . the employe . . . in whose favor the matter at issue has been finally determined in whole or in part shall be awarded, in addition to the award for compensation, a reasonable sum for costs incurred for attorney fee, witnesses, necessary medical examination, and the value of unreimbursed lost time to attend the proceeding: Provided, that cost for attorney fees may be excluded when a reasonable basis for the contest has been established by the employer or insurer.

Here, Claimant prevailed on the issue of whether Employer was entitled to a credit on his net earnings, and, consequently, he was entitled to litigation costs.

Accordingly, this Court reverses and reinstates the decision of the Workers' Compensation Judge.

BERNARD L. McGINLEY, Judge

⁴ Act of June 2, 1915, P.L. 736, as amended. This section was added by Section 3 of the Act of February 8, 1972, P.L. 25.

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ORDER

AND NOW, this 18th day of April, 2008, the order of the Workers' Compensation Appeal Board in the above-captioned matter is reversed and the decision of the Workers' Compensation Judge is reinstated.

BERNARD L. MCGINLEY, Judge