

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Marlin Hagg,	:
	:
Petitioner	:
	:
v.	: No. 532 C.D. 2007
	:
Workers' Compensation Appeal	:
Board (Dresser Manufacturing),	:
Respondent	:
Dresser Manufacturing,	:
	:
Petitioner	:
	:
v.	: No. 716 C.D. 2007
	:
Workers' Compensation	:
Appeal Board (Hagg),	:
Respondent	: Submitted: July 27, 2007

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JAMES GARDNER COLINS, Senior Judge *
HONORABLE JAMES R. KELLEY, Senior Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY SENIOR JUDGE COLINS**

FILED: January 24, 2008

Before the Court are cross-appeals. Both the employer and the claimant contend that the Workers' Compensation Appeal Board (Board) erred in affirming the decision of the Workers' Compensation Judge (WCJ) granting employer's petition to modify benefits it paid to claimant based on claimant's self-

*The decision in this case was reached after the date that Judge Colins assumed the status of senior judge.

employment earnings. Employer, Dresser Manufacturing, contends the error lies in the WCJ's calculation of the amount of Claimant's self-employment income. Claimant, Hagg, contends the error lies in the WCJ's finding that his self-employment income can be used to offset his workers' compensation disability benefits. We find neither party to the action has presented a meritorious issue; accordingly, we affirm the Board.

In 1985, Hagg began operating Hagg's Comp-U-Tax. The business is a tax preparation business in which Hagg acts as the principal tax preparer and his wife acts as the officer manager. Hagg operated the business while in the employ of Dresser (Employer) where he initially worked as a welder. In 1993, Hagg sustained a knee injury that solely related to his work with Dresser. The injury resulted in two arthroscopic surgeries and a total knee replacement. Pursuant to a notice of compensation payable, Hagg received total weekly disability benefits of \$393.28. Effective September 16, 1996, he returned to work with limitations, but with no loss of earnings. Hagg's benefits were suspended.

On November 4, 2002, Hagg (Hagg/Claimant) filed a petition to reinstate/review compensation benefits asserting that effective November 1, 2002, he had a worsening of condition, resulting in a decrease in earning power. At the hearing¹ before the WCJ, it was found that Hagg took a six-month voluntary layoff starting January 22, 2002 and ending July 22, 2002. In July 2002, he returned to his light duty assembly position. After his return to work, Hagg's legs became worse, and his treating physician provided him with an off-work slip. The WCJ found that effective August 7, 2002 Employer did not offer Hagg employment

¹ The findings from this hearing were entered on March 15, 2004. These findings are not in dispute and are recounted in this opinion to provide a history of this case.

within the restrictions dictated by Hagg's treating physician. The WCJ concluded that Claimant sustained his burden of proof and awarded Claimant total disability benefits effective August 7, 2002. At all times relevant hereto, Hagg was operating Hagg's Comp-U-Tax.

On June 2, 2004, Dresser (Employer) petitioned to modify benefits based on Hagg's self-employment. Based on the evidence presented to the WCJ, the WCJ found that beginning in 1985 Hagg and his wife opened a tax-preparation business titled Hagg's Comp-U-Tax. Hagg prepared approximately 90% of the returns, employed seasonal tax preparers, and his wife acted as office manager handling all clerical responsibilities.

The WCJ heard testimony from certified public accountants presented by both Hagg and Dresser regarding Hagg's Comp-U-Tax business, the business organization, the business expenses, and the propriety of certain business deductions. In particular, Hagg's own accountant testified that the business was reported on Internal Revenue Form Schedule "C" although the profit distribution was more akin to that of a partnership. Additional testimony was that Hagg was a significant contributor to the business, such that his personal management and endeavors resulted in at least a generation of 50% of the business profits, with Hagg and his wife allocating the profits between themselves on a 50-50 basis. The WCJ found credible the testimony of Employer's accounting expert, Ms. Salvia. Ms. Salvia reviewed Hagg's tax returns and set forth what expenses and deductions she would disallow. The WCJ accepted Ms. Salvia's testimony and accepted her adjustments to Hagg's return.

Based on the testimony of Hagg and his wife, the WCJ found that the profits and earnings of that business were almost entirely the direct result of

Hagg's personal management and endeavor. The WCJ found that Hagg operated the business with his wife and that they shared equally in the profits.

The WCJ further found that Mrs. Hagg was issued a W-2 form indicating that she was a salaried employee. The WCJ found incongruous the fact that Mrs. Hagg alone received a salary plus a share of the net profits, thereby compensating her at a rate in excess of 50% of the business profits. The WCJ found that there was no business reason for the disparity. Based on the adjusted business figures established by Ms. Salvia, the WCJ set Hagg's business earnings at 50% of the net profits to the business plus fifty per cent of any wages paid to Mrs. Hagg. The WCJ found this formula consistent with *Weissman v. Workers' Compensation Appeal Board*, 878 A.2d 953 (Pa. Cmwlth. 2005).

The WCJ modified Claimant's benefits on a pro-rated basis for the year 2002, and for the year 2003 and ongoing, until Claimant's condition changes. The WCJ concluded that Claimant has earning power, and factual earnings, in an amount of one-half of the increase of the adjusted net profits of the business, plus one-half of any amounts paid to Mrs. Hagg. Both Claimant and Employer appealed to the Board; the Board affirmed the WCJ. Claimant and Employer have both filed appeals to this Court.²

On appeal, Employer argues that Hagg's income after 1993 from the tax preparation business he operates with his wife is either earnings properly treated as wages or is indicative of earning power, which in either event provides a

² Our scope of review is limited to a determination of whether constitutional rights have been violated, whether the adjudication was in accordance with law and whether the WCJ's findings of fact are supported by substantial evidence. 2 Pa. C.S. §704.

basis to offset some or all liability for lost wages under the Act.³ Hagg argues that the WCJ's findings are not supported by substantial evidence and the WCJ erred in granting the petition.

In order to prevail on its petition to modify or suspend benefits, Dresser had the burden to prove that Hagg had recovered some or all of his earning power. *Trimmer v. Workers' Compensation Appeal Bd. (Monaghan Township)*, 728 A.2d 438, 440 (Pa. Cmwlth. 1999). Profits from a business are generally not considered as earnings within the meaning of the Act, and are not accepted as a measure of loss of earning power, unless they are almost entirely attributable to the claimant's personal management and endeavor of the business. *Weissman; accord, Capuano v. Workers' Compensation Appeal Board (Boeing Helicopter Co.)*, 724 A.2d 407 (Pa. Cmwlth. 1999).

Here, the Board affirmed the WCJ's findings that Claimant's duties were significant to the operation of the tax preparation business. Claimant was the principal tax preparer and was solely responsible for all complicated tax returns. Additionally, Claimant reviewed all returns, and in that capacity oversaw the business. That evidence meets the test for substantial evidence and supports the conclusion that the business operated as a direct result of the work of Claimant. We conclude the Board did not err in affirming the WCJ. In addressing claimant's contention that self-employment income cannot offset liability for workers' compensation benefits, we stated:

³ Section 423 of the Act, *as amended*, 77 P.S. § 772, provides, in relevant part, that a WCJ may modify or suspend benefits "upon proof that the disability of an injured employe has . . . decreased." It is well established that "disability" is synonymous with loss of earning power attributable to the work injury. *See Harle v. Workmen's Compensation Appeal Bd. (Telegraph Press, Inc.)*, 540 Pa. 482, 658 A.2d 766 (1995).

earnings from self-employment may indeed be taken into consideration for determining a recipient's earnings or earning capacity. *University of Pittsburgh v. Workers' Compensation Appeal Board (Johnson)*, 167 Pa. Cmwlth. 643, 648 A.2d 1315 (1994) (holding that income earned from self-employment by a recipient of Workers' Compensation benefits may be credited against the amount of benefits which the employer must pay).

Capuano, 724 A.2d at 413. Clearly, here, there was no error in the determination that Employer is entitled to a reduction of benefits based on Hagg's self-employment earnings.

Employer contends that the entire period in which Claimant was self-employed should have been used in calculating the reduction of Claimant's benefits. We cannot agree. At issue herein is the period of disability related to the reinstatement of benefits petition which petition was filed for the period beginning August 7, 2002. The WCJ properly reviewed the self-employment income and determined that Claimant became more than marginally involved in the business in and around 1998. The WCJ then used 1998 as the baseline year for the determination of self-employment earnings. That finding is supported by substantial evidence as it is based on the credible testimony of Claimant.

Accordingly, the order of the Workers' Compensation Appeal Board is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge

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Appeal Board (Hagg),	:	:
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ORDER

AND NOW, this 24th day of January 2008, the order of the Workers' Compensation Appeal Board entered in the above-captioned matter is AFFIRMED.

JAMES GARDNER COLINS, Senior Judge