COURT OF APPEALS
DECISION
DATED AND RELEASED

October 17, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0486-FT

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IN RE THE MARRIAGE OF:

THOMAS DALE BOTTOMLEY,

Petitioner-Appellant,

v.

LINDA LEE BOTTOMLEY,

Respondent-Respondent.

APPEAL from an order of the circuit court for Grant County: JOHN R. WAGNER, Judge. *Affirmed in part and reversed in part*.

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM.[1] Thomas Bottomley appeals from an order requiring him to pay Linda Bottomley child support pursuant to their 1990

[1] This is an expedited appeal under RULE 809.17, STATS.

divorce judgment. Specifically, the circuit court ordered Thomas to pay Linda $6,700 of a worker's compensation award, $10.50 per week for their minor child's health insurance, a $673.50 reimbursement for past insurance costs incurred by Linda, and $440 in attorney's fees. Thomas raises three issues: (1) whether Iowa's lump sum worker's compensation award for permanent partial disability is subject to payment for child support when he lost no income as a result of the injury; (2) whether the divorce settlement required him to pay Linda one-half of the cost for obtaining additional health insurance through her employer when he was providing insurance through his employer; and (3) whether Linda was entitled to attorney's fees for bringing the action against him for a portion of the worker's compensation award, child support arrearage, interest and health insurance costs.

We conclude that the lump sum worker's compensation award for permanent partial disability was not intended to replace income and therefore does not qualify as "gross income" under WIS. ADM. CODE § HSS 80.02(13)(b). We also conclude that the divorce decree did not require Thomas to pay one-half of the health insurance costs incurred by Linda when he was providing insurance through his employer. We therefore reverse those parts of the circuit court order. We cannot determine the extent to which Linda may have been entitled to attorney's fees because Thomas failed to include as part of the record the necessary affidavits regarding Linda's attorney's fees. We therefore affirm that part of the order.

BACKGROUND

Thomas Bottomley and Linda Bottomley were divorced in August 1990. The divorce decree provided that each would pay seventeen percent of their income as child support if their minor child was placed with the other spouse.

In June 1993, Thomas suffered a workplace injury at John Deere Dubuque Works. In March 1995, Thomas received $39,445.08 as part of a worker's compensation claim for permanent partial disability of his left upper extremity. Thomas did not miss any work or lose any wages due to his injury, and his employer covered his medical costs stemming from the injury.

In August 1995, Linda filed an order to show cause, alleging that Thomas failed to pay child support in full in 1993 and 1994 and failed to pay health insurance costs for their minor child. She also moved the court to award her seventeen percent of the worker's compensation award as child support. After a hearing in September 1995, Thomas conceded that he owed child support on his VA benefits, but disputed whether he owed child support on his worker's compensation award or one-half of the insurance costs incurred by Linda. The circuit court granted Linda's motion and ordered Thomas to pay child support on the worker's compensation, health insurance costs and attorney's fees. Thomas appeals.

WORKER'S COMPENSATION AWARD

Thomas argues that he should not be required to pay child support on the worker's compensation award because the worker's compensation was not intended to replace income. To determine whether Thomas must pay child support, we must interpret an administrative regulation, which is a question of law we review *de novo*. ***Richland County DSS v. DHSS***, 183 Wis.2d 61, 66, 515 N.W.2d 272, 275 (Ct. App. 1994). To determine intent, we examine the language of the regulation and look beyond it only if the language is ambiguous. ***Greene v. Farnsworth***, 188 Wis.2d 365, 370, 525 N.W.2d 107, 109 (Ct. App. 1994).

The 1990 divorce decree stipulated that "each party be required to pay 17% of their respective gross earnings toward the support of the child not permanently physically placed with that party." The income standard for child support is governed by Chapter 80 of the Wisconsin Administrative Code.[2] Wisconsin Administrative Code § HSS 80.02(13)(b) includes "[n]et proceeds resulting from worker's compensation or other personal injury awards intended to replace income" in the definition of gross income.[3] The phrase "intended to

[2] This chapter was revised effective March 1, 1995. Neither party argues for application of the previous version, which was in effect when the divorce was finalized in 1990.

[3] The parties do not address whether worker's compensation could fall under WIS. ADM. CODE § HSS 80.02(13)(i), which includes in gross income "[a]ll other income, whether taxable or not, except that gross income does not include public assistance or child support received from previous marriages or from paternity adjudications." Accordingly, we limit our review to whether WIS. ADM. CODE § HSS 80.02(13)(b) includes

replace income" modifies both "personal injury awards" and "worker's compensation." Otherwise, the word "other" would be superfluous. "It is a maxim of statutory construction that a law should be so construed that no word or clause shall be rendered surplusage." ***City of Hartford v. Godfrey***, 92 Wis.2d 815, 820, 286 N.W.2d 10, 13 (Ct. App. 1979). We see no reason why this rule should not apply to administrative rules. Therefore, worker's compensation qualifies as gross income only when it is intended to replace income lost due to the underlying injury.

Thomas received a worker's compensation award for the permanent partial disability of his left upper extremity. He did not miss any work or lose wages due to the injury or partial disability. This worker's compensation award is akin to a personal injury award for pain and suffering. This kind or award, whether from a personal injury suit or worker's compensation, is not available for child support under WIS. ADM. CODE § HSS 80.02(13)(b). *See* ***Krebs v. Krebs***, 148 Wis.2d 51, 57-58, 435 N.W.2d 240, 243-44 (1989) (compensation for pain and suffering is presumptively the sole property of the individual).

Linda argues that the award was linked to income or income producing capacity because the award for permanent partial disability is calculated by using a worker's weekly income. The fact that weekly income is used as a mechanism to calculate an award for permanent partial disability does not show that the worker's compensation is intended to replace lost income. The use of "weeks" to calculate worker's compensation awards is merely one way of determining what is really a formula award. The term "units" could as easily have been used.

INSURANCE COSTS

Thomas next argues that he should not be ordered to pay Linda for providing health insurance for their minor child through her employer because he is already providing for insurance through his employer. Thomas

(..continued)

the worker's compensation at issue in this case. Generally, we will not consider or decide issues not specifically raised on appeal. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19, *cert. denied*, 506 U.S. 894 (1992).

contends that the divorce judgment does not require him to pay one-half of health insurance costs incurred by Linda once he is providing insurance through full-time employment. The interpretation of a divorce judgment is a question of law that we decide *de novo* without deference to the trial court. *See* ***Levy v. Levy***, 130 Wis.2d 523, 528-29, 388 N.W.2d 170, 172-73 (1986).

The divorce judgment provides that:

> until [Thomas] becomes fully employed, [Linda] will cause to be placed on her health insurance policy the minor children. [Thomas] will share in any expenses incurred by [Linda] for the cost of the health insurance premiums by paying 1/2 of the cost incurred by the respondent for such coverage. Both parties will be responsible to share equally any uncovered medical, dental or optometric expenses incurred by the children for such needs.

The judgment separately provides for the allocation of health insurance costs and medical expenses not covered by insurance. It provides only for the equal sharing of health insurance costs when Thomas is unemployed and presumably not providing coverage. Otherwise, it specifies that uncovered medical expenses, distinguished from ongoing health insurance coverage, be shared equally. The judgment did not require Thomas to continue paying insurance costs once he was employed and providing insurance.

ATTORNEY'S FEES

Thomas argues that Linda cannot recover attorney's fees because he was not required to pay child support on the worker's compensation or the additional health insurance costs and because he withheld the child support assignable to his VA benefits in good faith and ultimately paid the arrearage with interest. An award of attorney's fees under § 785.04, STATS., is a discretionary act of the trial court, and we review discretionary decisions only to determine whether the trial court properly exercised its discretion. *See* ***State v. Pittman***, 174 Wis.2d 255, 268-269, 496 N.W.2d 74, 79-80, *cert. denied*, 510 U.S. 845 (1993).

Thomas refers to a bill for attorney's fees and asserts that most of the work of Linda's attorney involved the worker's compensation issue. However, this bill has not been made part of the appellate record. Generally, the appellant has the duty to see that evidence material to the appeal is included in the record. ***State v. Smith***, 55 Wis.2d 451, 459, 198 N.W.2d 588, 593 (1972). The procedures for doing this are set out in § 809.15(2), STATS. Assertions of fact that are not part of the record will not be considered. ***Jenkins v. Sabourin***, 104 Wis.2d 309, 313-14, 311 N.W.2d 600, 603 (1981).

The circuit court noted that Thomas waited until Linda brought her motion to concede that he owed $2,006.22 in child support. The circuit court found that it was necessary for Linda to hire her attorney to bring the action before the court because no agreement could be reached prior to the time set for the hearing. The enforcement of a support obligation is accomplished through the use of remedial contempt to secure compliance with the support order. ***State ex. rel. V.J.H. v. C.A.B.***, 163 Wis.2d 833, 844, 472 N.W.2d 839, 843 (Ct. App. 1991).[4] Even though the worker's compensation award is not available as child support and Linda is not entitled to the insurance costs, she is entitled to attorney's fees for bringing the action to recover the initial arrearage stemming from the VA benefits plus interest.

Thomas argues that he negotiated with Linda regarding the child support assignable to his VA benefits and that he should not be punished for such good faith efforts. The award of attorney's fees in this manner is discretionary and Thomas fails to establish how the circuit court erroneously exercised its discretion. Thomas cites no authority supporting a "good faith" defense to the award of attorney's fees under § 785.04, STATS., which governs this action. Absent the attorney's bill we have no basis to determine whether the allocation of $440 to Linda in attorney's fees was a proper exercise of discretion in this case. Therefore, we affirm the award.

By the Court.—Order affirmed in part and reversed in part.

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[4] Although the circuit court made no explicit finding of contempt, we infer such a finding based on the court's order to pay interest and attorney's fees. This court may assume a finding not made on an issue if it appears from the record to exist. ***Sohns v. Jensen***, 11 Wis.2d 449, 453, 105 N.W.2d 818, 820 (1960).

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.