IN THE COURT OF APPEALS OF IOWA

FILED
NOV 2 9 1988
CLERK SUPREME COURT

276

ERVIN CURTIS NORTON,

Petitioner-Appellant,

vs.

STYLECRAFT, INC. and AETNA CASUALTY AND SURETY COMPANY, a/k/a AETNA LIFE AND CASUALTY,

Defendants-Appellees.

8-204
87-803

Appeal from the Iowa District Court for Woodbury County (No. 92630C), Edwin L. Mitchell, Judge.

Petitioner appeals the district court's judgment on his petition for judicial review, which affirmed the industrial commissioner's determination of the amount of petitioner's weekly workers' compensation benefits. **AFFIRMED.**

Paul W. Deck, of Deck & Deck, Sioux City, for petitioner-appellant.

Lorraine J. May, of Duncan, Jones, Riley & Finley, Des Moines, for defendants-appellees.

Heard by Oxberger, C.J., and Schlegel and Hayden, JJ.

OXBERGER, C.J.

277

Petitioner appeals the district court's judgment affirming the industrial commissioner's determination of the amount of petitioner's weekly workers' compensation benefits. Our limited review of this agency action is governed by section 17A.19 of the Iowa code. We affirm an agency action upon a finding of substantial evidence in the record viewed as a whole. Iowa Code § 17A.19(8) (1987). We affirm.

Petitioner Ervin Curtis Norton is an employee of defendant Stylecraft, Inc. Norton was a truck driver for Stylecraft until July 31, 1981, when he was injured on the job. Prior to January 1980 Norton received a gross weekly salary plus a per diem amount for expenses in two separate checks in the amounts of $281.93 and $120 respectively. Beginning in January 1980 Norton received one weekly check of $401.93. Norton asked for this change in order to accumulate a greater amount of social security as he was contemplating retirement. Norton was the only employee treated in this manner. After Norton was injured he first received workers' compensation benefits based on a gross weekly wage of $401.93. After an inquiry from their insurance carrier, Stylecraft determined Norton's gross weekly wage was $281.93 and he received $120 per week for per diem expenses. This finding caused Norton's workers' compensation benefits to be reduced.

In 1983 Norton filed a petition with the industrial commissioner claiming his benefits had been incorrectly calculated. After a hearing a deputy industrial commissioner determined Norton's gross weekly wages were $281.93 and that his weekly workers' compensation benefits should be calculated from that amount. Upon appeal the industrial commissioner came to the same conclusion. Upon petition for judicial review, the district court affirmed the commissioners' decision finding that it was supported by substantial evidence.

Petitioner argues there was not substantial evidence to support the district court's affirmance of the agency action. He argues that his workers' compensation benefits should be based on a gross weekly wages figure of $401.93 which is the total amount of his check. Chapter 85 of the Iowa Code governs workers' compensation. Iowa Code section 85.36(1) provides:

> 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:
>
> 1. In the case of an employee who is paid on a weekly pay period basis, the weekly gross earnings.

Iowa Code § 85.36(1) (1987).

279

> Iowa Code section 86.61(12) defines gross earnings:
>
> "Gross earnings" means recurring payments by employer to the employee for employment, before any authorized or lawfully required deduction or withholding of funds by the employer, excluding irregular bonuses, retroactive pay, overtime, penalty pay, reimbursement of expenses, expense allowances, and the employer's contribution for welfare benefits.

Iowa Code § 86.61(12) (1987) (emphasis added).

A contract, express or implied, is the basis for an employee's right to compensation if quite informal. Prokop v. Frank's Plastering Co., 257 Iowa 766, 133 N.W.2d 878 (1965). In construing a contract, it is the intention of the parties that is controlling. Bjork v. Dairyland Insurance Co., 174 N.W.2d 379 (Iowa 1979).

The record indicates it was the intention of the petitioner to increase his weekly check thus increase his accumulated social security by having his employer combine into one check his weekly salary and per diem amounts. This per diem was to cover road expenses. It was the petitioner who approached the employer in this instance. The record also reveals that if the petitioner were not entitled to an expense account he would have received $120 less each week. The definition of "gross earnings" under section 86.61(12) specifically excludes reimbursement of expenses and expense allowances. See Iowa Code § 86.61(12) (1987). Therefore Norton's weekly earnings by which workers' compensation should be measured is $281.93 (total combined weekly earnings plus reimbursement costs, $401.93, minus reimbursement costs of $120).

We find substantial evidence to support the findings of the agency action.

AFFIRMED.