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bad faith by not releasing its lien. Finally, we conclude that neither side is entitled to attorney fees under § 25-824.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

WRIGHT and MCCORMACK, JJ., not participating.

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## JONI MUELLER, APPELLEE, V. LINCOLN PUBLIC SCHOOLS, APPELLANT.

803 N.W.2d 408

Filed August 5, 2011. No. S-10-748.

1. **Workers' Compensation: Wages.** The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.
2. **Workers' Compensation: Appeal and Error.** Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.
3. **Employer and Employee: Wages.** In calculating an employee's average weekly wage, abnormally low workweeks resulting from circumstances such as vacation time, sick leave, or holidays should be excluded from the calculation.
4. **Workers' Compensation.** The goal of any average income test is to produce an honest approximation of a workers' compensation claimant's probable future earning capacity. The emphasis is on not distorting the employee's average weekly wage.
5. **Stipulations.** The construction of a stipulation is a question of law.

Appeal from the Workers' Compensation Court. Reversed and remanded with directions.

Riko E. Bishop, of Perry, Guthery, Haase & Gessford, P.C., L.L.O., for appellant.

Jon Rehm, of Rehm, Bennett & Moore, P.C., L.L.O., for appellee.

HEAVICAN, C.J., CONNOLLY, GERRARD, STEPHAN, MCCORMACK, and MILLER-LERMAN, JJ.

GERRARD, J.

Joni Mueller, an employee of the Lincoln Public Schools (LPS), was awarded workers' compensation benefits after she

was injured on the job. As a school employee, Mueller worked only during the school year and did not work during summer vacation. But her salary was spread out so that she was paid every month of the year, even during the summer. The issue presented in this appeal is how to calculate Mueller's average weekly wage for workers' compensation purposes.

## BACKGROUND

Mueller sought workers' compensation benefits after she suffered a whole body injury on February 2, 2007, arising out of and in the course of her employment as a food service manager at Arnold Elementary School. The compensability of her injury is not at issue—only the determination of her wage.

At trial, Mueller explained that when she was hired, it was understood that she would be paid monthly for 12 months a year, even though she would work only during the school year—essentially, 9 out of 12 months. Mueller's health insurance benefits were also provided over a 12-month period. And each year, Mueller was essentially assured of returning to her job the following year, after filling out a form notifying LPS of her desire to do so. In other words, Mueller's employment contract with LPS was on a 1-year renewable basis, wherein Mueller would work during the school year, but her income would be spread out so she would be paid every month.

The director of LPS' school nutrition services explained that the hourly wage paid to LPS food service workers was higher than the surrounding market rate, because the intent was to offer workers an annual salary that was competitive with the annual salary offered in the field. LPS food service employees were considered full-time employees at 37½ hours per week. In essence, the workers' hourly wage was used as a means to calculate an annualized 12-month salary.

LPS offered to stipulate that Mueller's hourly wage was $15.27 and that her average weekly wage was $411.49. Mueller accepted that her hourly wage was $15.27, but disagreed with respect to the average weekly wage. The dispute, as presented to the court, was whether the average weekly wage should be calculated over a 9-month period or a full calendar year. Based on what Mueller had actually been paid over the 6 months

before her injury, LPS calculated her average weekly wage for purposes of temporary indemnity as being $411.49. LPS also proposed that because Mueller's wages were earned over 39 weeks, but paid over 52 weeks, her average weekly wage for purposes of permanent indemnity should be calculated by annualizing her hourly income, then dividing that total by 52 weeks—resulting in a proposed average weekly wage of $458.10.

But the trial court rejected those arguments, reasoning that the basis of calculation should be what Mueller earned during the 6 months before her injury, not necessarily what she was paid. The trial court acknowledged LPS' observation that its reasoning would result in wage calculations for workers' compensation purposes that would significantly exceed the wages Mueller had actually been receiving from LPS. But the trial court believed that LPS' proposal would, in effect, lower the hourly wage to which the parties had stipulated.

So, the trial court determined that Mueller's average weekly wage for temporary total disability purposes was $572.62 ($15.27 per hour × 37½ hours per week). And for permanent partial disability purposes, the trial court found that Mueller's average weekly wage was $610.80 ($15.27 per hour × 40 hours per week). The trial court rejected the opinion of the court-appointed vocational rehabilitation counselor with respect to Mueller's loss of earning capacity, because her opinion had been based on LPS' calculation of Mueller's average weekly wage. The trial court made its own calculation of Mueller's loss of earning capacity and awarded Mueller temporary and permanent disability benefits based upon its determinations.

LPS appealed to the review panel of the Workers' Compensation Court, which panel found that the trial court's decision was "based on findings of fact which are not clearly wrong." The review panel affirmed the award. LPS appeals.

## ASSIGNMENTS OF ERROR

LPS assigns that the Workers' Compensation Court erred in (1) determining how to calculate the average weekly wage of a school employee who is paid over 12 months for work performed during the 9-month school year and (2) declining to

adopt the court-appointed vocational rehabilitation counselor's opinion that Mueller's loss of earning capacity was 20 percent, based upon her 26-week wage history, or alternatively, 25 percent, based upon an annualized average weekly wage of $458.10.

## STANDARD OF REVIEW

[1,2] The determination of how the average weekly wage of a workers' compensation claimant should be calculated is a question of law.[1] Regarding questions of law, an appellate court in workers' compensation cases is obligated to make its own decisions.[2]

## ANALYSIS

In workers' compensation cases, the amount of benefits awarded to a claimant is dependent upon the court's calculation of the claimant's average weekly wage. For employees who are paid by the hour, the average weekly wage is determined pursuant to Neb. Rev. Stat. §§ 48-121 (Reissue 2004) and 48-126 (Reissue 2010). Section 48-126 provides in relevant part that "wages" mean "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident." In continuous employment, if immediately before the accident the claimant's rate of wages was fixed by the hour, the claimant's weekly wage is "his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer," except as provided (as relevant in this case) in § 48-121.[3] And § 48-121(4) provides that for purposes of calculating permanent disability benefits of an hourly employee, "the weekly wages shall be taken to be computed . . . upon the basis of a workweek of a minimum of forty hours."

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[1] *Ramsey v. State*, 259 Neb. 176, 609 N.W.2d 18 (2000).

[2] *Id.*

[3] § 48-126.

We have said that as a general rule, "[t]he weekly wage of a worker compensated on an hourly basis is a simple function of the hourly rate multiplied by the number of hours worked in a given week."[4] And in *Ramsey v. State*,[5] we further explained that for claimants with permanent disabilities, § 48-121(4) requires that a minimum of 40 hours per week be utilized in that computation, so part-time employees with permanent disabilities are treated as though they had worked a 40-hour workweek.

[3] But we have also recognized that this formula is not inflexible. For instance, in *Ramsey*, we held that § 48-126 does not permit the backward extrapolation of a wage increase so as to distort the average weekly wage actually earned by the worker before a compensable injury. And in *Harmon v. Irby Constr. Co.*,[6] we held that a $30 per diem which a worker earned during the 6 days immediately before his injury would be considered income only for each of the 6 days on which he actually earned it, because application of the $30 per diem to the entire 26-week period preceding his injury would distort the calculation of his average weekly wage. Similarly, we have held that in calculating an employee's average weekly wage, abnormally low workweeks resulting from circumstances such as vacation time, sick leave, or holidays should be excluded from the calculation.[7]

[4] In other words, as we explained in *Powell v. Estate Gardeners*,[8] "the addition of the language '"ordinarily constituting his or her week's work"' precludes an automatic mathematical calculation based on the past 6 months' work." So, for instance, "abnormally low output or weekly hours due to illness or vacation will not be averaged in."[9] The goal of any

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[4] *Ramsey, supra* note 1, 259 Neb. at 181, 609 N.W.2d at 21.

[5] *Ramsey, supra* note 1.

[6] *Harmon v. Irby Constr. Co.*, 258 Neb. 420, 604 N.W.2d 813 (1999).

[7] See, *Canas v. Maryland Cas. Co.*, 236 Neb. 164, 459 N.W.2d 533 (1990); *Clifford v. Harchelroad Chevrolet*, 229 Neb. 78, 425 N.W.2d 331 (1988).

[8] *Powell v. Estate Gardeners*, 275 Neb. 287, 294, 745 N.W.2d 917, 923 (2008) (emphasis omitted).

[9] *Id.* at 294-95, 745 N.W.2d at 923.

average income test is to produce an honest approximation of the claimant's probable future earning capacity.[10] The key to these cases is our emphasis on not *distorting* the employee's average weekly wage.[11]

The Workers' Compensation Court's decision in this case, however, had the effect of distorting Mueller's average weekly wage well beyond what she was actually earning at the time of her injury. To some extent, such distortion is required by § 48-121(4), which requires the use of a 40-hour workweek in calculating benefits, rather than the 37½-hour week that Mueller was actually expected to work during the school year. This is because, while LPS may consider Mueller to be a full-time employee at 37½ hours per week, § 48-121(4) establishes a 40-hour-per-week minimum for workers' compensation purposes.

But the Nebraska Workers' Compensation Act does not dictate that Mueller's weekly wages be calculated without accounting for the unique circumstances of her employment. Part of the problem faced by the Workers' Compensation Court in this case, and this court on appellate review, is that the record is far from clear about how, precisely, Mueller was compensated. The parties seem to assume that because Mueller had an hourly wage, her rate of wage was fixed by the hour within the meaning of §§ 48-121(4) and 48-126. However, if Mueller was purely an hourly employee, her paycheck each month would depend on the number of hours she had worked that month. Obviously, that is not the case, because in the summer, Mueller is paid during months she did not work at all. And neither party does a particularly good job of explaining how Mueller's monthly paycheck is derived from her hourly wage—facts which might have helped the Workers' Compensation Court's calculation.

The record suggests that Mueller's monthly wage is determined by taking her hourly wage, projecting the hours she would be expected to work over the course of the school year, and dividing that total by 12. And as explained above,

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[10] See *id.*

[11] *Id.*

the hourly wage is apparently determined by taking a desired annual salary and dividing it by the number of hours an employee is expected to work during the year. This is confusing, but it does not make for an hourly employee as the term is usually understood. For an employee's "rate of wages" to be "fixed by the day or hour," an hourly wage and the number of hours worked during each pay period should be the starting points for determining remuneration—not the result of some other calculations.[12]

Nevertheless, each of the parties has started from the premise that Mueller had an hourly wage, and then set about trying to pound a square peg into a round hole. And each party argues that the other should bear the consequences of an imperfect fit. But while a perfect fit may not be possible given the applicable statutes, we agree with LPS that a better fit is possible and that the Workers' Compensation Court erred in calculating Mueller's average weekly wage without accounting for the fact that her hourly wages do not, if simply multiplied by 40 hours a week, approximate her actual weekly wages.

Section 48-126 requires that an hourly employee's weekly wages

> be taken to be his or her average weekly income for the period of time ordinarily constituting his or her week's work, and using as the basis of calculation his or her earnings during as much of the preceding six months as he or she worked for the same employer.

Under these circumstances, the trial court erred in not calculating Mueller's average weekly wage, for temporary disability purposes, based upon her *actual weekly income*. And for permanent disability purposes, although § 48-121(4) requires that Mueller's workweek be extended to 40 hours, it does not require the court to ignore that she was paid over the entire year for 39 weeks of work. So, the trial court erred in not accounting for that fact, as LPS suggested.

The trial court's reasoning, in fact, could cut both ways. The basis of the trial court's calculation was, in effect, not what Mueller had been paid during the 6 months before her injury,

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[12] See §§ 48-121(4) and 48-126.

but the hours she had actually *worked* during those 6 months. Which, because Mueller was injured in February, worked to her benefit. Had Mueller been injured in August, however, the court's reasoning would have deprived her of "earnings" because she would not have worked during summer vacation. This appeal would most likely be the same, except the parties' positions would be reversed. As we said in *Powell*, such a result would "not be an accurate reflection" of the employee's loss of earning capacity and "thus would not carry out the beneficent purposes" of the Nebraska Workers' Compensation Act.[13] That, in itself, demonstrates how the court's reasoning runs up against our emphasis, explained in *Powell*, on "'not distorting' the employee's average weekly wage."[14] Neither employers nor injured workers in this situation should experience feast or famine based upon when they were injured.

[5] In arguing to the contrary, Mueller contends that LPS stipulated away its argument about her average weekly wage by stipulating to her hourly wage. Mueller contends that LPS is barred from arguing that her average weekly wage is lower than what the trial court calculated based on that stipulation. We agree that generally, parties are bound by stipulations voluntarily made.[15] But we have also said that the construction of a stipulation is a question of law.[16] In this case, we do not agree with Mueller's construction of the stipulation. An examination of the colloquy at issue will illustrate why:

> [LPS' counsel]: Your Honor, I think that [LPS] would be willing to stipulate that there was an injury on February 2, 2007; that [Mueller's] average weekly wage at that time was 411.49; her hourly rate at that time was $15.27. Are you okay with that so far?
>
> [Mueller's counsel]: Well, I would disagree over the average weekly wage.

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[13] *Powell, supra* note 8, 275 Neb. at 296, 745 N.W.2d at 924.

[14] *Id.* at 295, 745 N.W.2d at 923.

[15] *Lincoln Lumber Co. v. Lancaster*, 260 Neb. 585, 618 N.W.2d 676 (2000).

[16] *Jackson v. Brotherhood's Relief & Comp. Fund*, 279 Neb. 593, 779 N.W.2d 589 (2010); *Foote v. O'Neill Packing*, 262 Neb. 467, 632 N.W.2d 313 (2001).

> [LPS' counsel]: They're challenging the average weekly wage. That's the average weekly wage that was used.
>
> THE COURT: All right. So we don't have an agreement on average weekly wage.
>
> . . . .
>
> THE COURT: The hourly rate . . . of 15.27, do you concede that, or is that at issue too?
>
> [Mueller's counsel]: I think we would — actually, the hourly rate is correct. It's a matter of how you — how it's calculated, the amount of time it's calculated over.
>
> THE COURT: I understand from my reading of the dispute, it's whether or not the average weekly wage is calculated over a nine-month period or a full calendar year; is that correct?
>
> [LPS' counsel]: That's correct.
>
> THE COURT: Is that your understanding?
>
> [Mueller's counsel]: Correct.
>
> THE COURT: I assume you will agree with the other stipulations proposed . . . ?
>
> [Mueller's counsel]: Correct.
>
> THE COURT: I will accept those.

Read in context, it is apparent that LPS' stipulation of Mueller's hourly wage was not a concession of its arguments about her average weekly wage. Mueller seems to be arguing that once the hourly wage is established, the rest is just math. But Mueller's math is based on her construction of the relevant statutes—a construction which, as explained above, is inconsistent with our jurisprudence. As *Powell* notes, we already make exception where the determination of an employee's average weekly wage is distorted by abnormally low output or weekly hours due to illness and vacation.[17] Basic fairness requires that principle to be applied in both directions—as *Powell* explains, the goal is to honestly approximate the claimant's probable future earning capacity.[18] That did not happen here.

Therefore, we find merit to LPS' assignments of error. But rather than recalculate Mueller's award, we find that the cause

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[17] See *Powell, supra* note 8.

[18] See *id.*

should be remanded to the Workers' Compensation Court for further proceedings consistent with this opinion—and, perhaps, greater clarity from the parties about how Mueller's actual take-home pay is calculated. Any issues with respect to possible overpayment should be addressed by the trial court. And because it is not clear whether the trial court would have adopted the opinion of the court-appointed vocational rehabilitation counselor had it not disagreed with her assumptions regarding Mueller's average weekly wage, the court should reconsider that issue in the first instance.

## CONCLUSION

For the foregoing reasons, the judgment of the review panel of the Workers' Compensation Court is reversed, and the cause is remanded with directions to remand the case to the trial court for further proceedings consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.

WRIGHT, J., not participating.

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# MCKINNIS ROOFING AND SHEET METAL, INC., A NEBRASKA CORPORATION, APPELLANT AND CROSS-APPELLEE, V. JEFFREY D. HICKS, APPELLEE AND CROSS-APPELLANT.

803 N.W.2d 414

Filed August 5, 2011. No. S-10-1048.

1. **Contracts: Judgments: Appeal and Error.** The meaning of a contract is a question of law, in connection with which an appellate court has an obligation to reach its conclusions independently of the determinations made by the court below.
2. **Contracts.** When there is a question about the meaning of a contract's language, the contract will be construed against the party preparing it.

Appeal from the District Court for Douglas County: GREGORY M. SCHATZ, Judge. Reversed and remanded with directions.

David V. Drew, of Drew Law Firm, for appellant.

Patrick D. Pepper, of McGrath, North, Mullin & Kratz, P.C., L.L.O., for appellee.