COURT OF APPEALS
DECISION
DATED AND FILED

May 25, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3212-FT

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

ASSOCIATED INDEMNITY CORP., AND SEATTLE MARINERS BASEBALL CLUB,

PLAINTIFFS-APPELLANTS,

V.

LABOR AND INDUSTRY REVIEW COMMISSION, AND JOHN DAVID VANHOF,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County: GERALD C. NICHOL, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 PER CURIAM. Associated Indemnity Corporation and the Seattle Mariners Baseball Club appeal from an order affirming a workers compensation decision by the Labor and Industry Review Commission (LIRC). The issues relate

to whether the Commission properly determined an employee's average weekly earnings and ordered temporary total disability payments. We affirm.

¶2 John Vanhof was a minor league player in the Mariners organization. He was injured on or about August 1, 1996. The first issue relates to the establishing of his "average weekly earnings."

¶3 The methods for setting the average weekly earnings are provided in WIS. STAT. § 102.11(1) (1995-96). In addressing Vanhof's claim, LIRC concluded that para. (a) of that subsection could not be applied because there was insufficient evidence in the record as to certain necessary figures. It concluded that para. (b) could not be applied because Vanhof had worked more than fourteen weeks within the calendar year. It stated that although para. (c) provides a method for determining earnings if for some reason earnings cannot be determined under paras. (a) or (b), there was insufficient evidence in the record to establish the necessary calculation under para. (c).

¶4 LIRC ultimately decided to apply para. (d), which provides that, except where para. (b) applies, the average weekly earnings "shall in no case be less than" the amount arrived at by a certain calculation specified in para. (d). LIRC described para. (d) as "merely an alternative method of determining average weekly wage." In essence, then, LIRC concluded that when paras. (a), (b) and (c) do not apply, either by their terms or because of a failure of proof, LIRC will apply para. (d) to establish average weekly earnings at the minimum level permitted.

¶5 On appeal, the appellants argue that para. (d) is a comparative method, to be used only as a floor when earnings are already established under paras. (a) or (c). This presents a question of law. The parties discuss the different

standards of review that might be applied, depending on various factors, but we need not address that in detail because our conclusion would be the same under all of them.

¶6 We conclude LIRC's decision was reasonable. The appellants do not argue that LIRC's inability to apply paras. (a), (b) and (c) should result in Vanhof receiving no payment whatsoever. Therefore, they apparently agree that *some* other method must be applied. The appellants argue that when the above paragraphs cannot be applied, the earnings should be determined under a formula described in ***Struck & Irwin Fuel Co. v. Industrial Comm'n***, 222 Wis. 613, 269 N.W. 319 (1936). The appellants argue that in ***Struck & Irwin*** the court "declined" to use the provision that is now contained in para. (d), but instead used a different formula. However, we see no indication in that opinion that any party argued whether that provision should be applied when other provisions are not applicable. The court did not "decline" to apply the provision, and does not appear to have considered the question at all. We do not regard the case as controlling, and in the absence of controlling case law, LIRC's decision to use para. (d) was a reasonable one.

¶7 The appellants next argue that even if LIRC was correct in using para. (d), LIRC erred by concluding that Vanhof worked only twenty-two weeks during the relevant period, rather than the entire year. If Vanhof is considered to have worked the entire year, as the appellants argue, his average weekly earnings will be lower because his annual salary would be distributed over more weeks. The appellants' argument is that pursuant to the terms of Vanhof's contract, his salary obligated him to perform services throughout the entire year without additional compensation, and not just during the period typically regarded as "the baseball season." Those additional services include training, exhibition games,

winter league and others. The appellants argue that there is no evidence in the record as to when Vanhof actually worked, and therefore LIRC should have assumed he worked the entire year.

¶8 In its decision LIRC appears to have inferred that, "absent evidence to the contrary," Vanhof worked only during the period he was receiving salary payments. Pursuant to Vanhof's contract, his annual salary was paid in installments from March to September, and that was the period on which LIRC based its calculation. Thus, it appears that the appellants are correct in arguing there is no specific evidence in the record as to when Vanhof actually worked. However, given what was apparently a lack of direct evidence from either party, the appellants have not convinced us that LIRC's inference as to when Vanhof worked was unreasonable.

¶9 The appellants' next argument is that LIRC erred in ordering temporary total disability (TTD) benefits for the period before January 1, 1998. After Vanhof was injured in 1996, the Club still paid him his contracted salary for 1996 and 1997. LIRC concluded that Vanhof was entitled to TTD for certain periods of those years.

¶10 The appellants argue that Vanhof was a full-year rather than a seasonal employee, and because he had already received all of his contracted salary for those years, he did not suffer any actual wage loss which is properly compensable with TTD. LIRC responds that Vanhof's injury prevented him from earning other wages during the off-season time in which he was not performing services for the Club. However, the appellants argue that there was no evidence in the record that Vanhof was scheduled to work elsewhere.

¶11 In addressing the previous issue, we already concluded that LIRC properly determined that Vanhof worked only part of the year. The appellants cite no law requiring a part-year employee to present evidence of scheduled employment with other employers during the remainder of the year. LIRC's treatment of the situation as to TTD was reasonable.

By the Court.—Order affirmed.

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