

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. E903531

BILLY YOUNG, Deceased		CLAIMANT
SOUTHERN TELEPHONE COMPANY		RESPONDENT
POTOMAC INSURANCE COMPANY OF ILLINOIS, INSURANCE CARRIER	NO. 1	RESPONDENT
DEATH & PERMANENT TOTAL DISABILITY FUND,	NO. 2	RESPONDENT

OPINION FILED JANUARY 12, 2004

Hearing before ADMINISTRATIVE LAW JUDGE MICHAEL L. ELLIG in Fort Smith, Sebastian County, Arkansas.

Claimant Misty Young, widow, and Elizabeth Dawn Paige and Stephen Chance Young, minor children represented by JAY TOLLEY, Attorney, Fayetteville, Arkansas.

Claimant Ashley Bailey on behalf of Adrian Brooke McKee, minor child represented by EDDIE WALKER, JR., Attorney, Fort Smith, Arkansas.

Claimant Charity Powers on behalf of Vesta Young, minor child represented by GUNNER DELAY, Attorney, Fort Smith, Arkansas.

Respondents No. 1 represented by TERENCE JENSEN, Attorney, Benton, Arkansas.

Respondents No. 2 represented by TERRY PENCE, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

A hearing was held in the above styled claim on December 9, 2003, in Fort Smith, Arkansas. This hearing was necessitated by a dispute between all of the original parties to this claim (i.e. the compensation beneficiaries, the respondent employer, and its workers' compensation carrier) and the Death & Permanent Total Disability Trust Fund. This dispute arises over the appropriate aggregate compensation rate for all compensation beneficiaries. This matter would also affect the date upon which the respondents would meet their obligation under Ark. Code Ann. §11-9-502, so as to make any remaining compensation owed these beneficiaries the obligation of the Death & Permanent Total Disability Trust Fund.

Therefore, the sole issue before the Commission at the present time is the question of the appropriate weekly aggregate compensation rate for all of the deceased employee's

beneficiaries. The compensation beneficiaries and the respondents maintain that this aggregate weekly rate should be calculated on an average weekly wage of \$280.00. The Death & Permanent Total Disability Trust Fund maintains that this aggregate weekly compensation rate should be based upon an average weekly wage of \$258.99.

DISCUSSION

_____ Numerous prior Opinions have been entered in this case. In those Opinions, it has been consistently held that the average weekly wage of the deceased claimant at the time of his death was \$280.00. These prior Opinions have all long since become final, and the respondents have paid a considerable amount of benefits to the various compensation beneficiaries based upon this average weekly wage.

However, it must be noted that these prior findings, in regard to the deceased claimant's average weekly wage were based upon a stipulation of fact by the compensation beneficiaries and the employer-carrier. Thus, the doctrine of collateral estoppel would not bar the Death & Permanent Total Disability Trust Fund, who was not a party to this stipulation or the prior litigation, from now seeking to relitigate this matter. More importantly, as pointed by the Death & Permanent Total Disability Trust Fund, Ark. Code Ann. §11-9-713 provides for a subsequent modification of any final orders or awards upon proof of an erroneous wage rate. However, Ark. Code Ann. §11-9-713(c) expressly provides that such modifications are only effective in regard to future benefits and shall not affect any compensation previously paid pursuant to the prior order or award.

A determination of the appropriate average weekly wage is controlled by the provisions of Ark. Code Ann. §11-9-518. This subsection provides various specific methods whereby the average weekly wage can be calculated. Finally, if none of the methods are appropriate, then subdivision (c), confers on this Commission the authority to create other methods for calculating the average weekly wage, with the caveat that this must be done in a manner that is "just and fair to all parties concerned".

The average weekly wage of \$280.00, previously stipulated by the compensation beneficiaries and the respondents, is based upon assuming a full work week of forty hours. This number of hours is then multiplied by the hourly rate the claimant was receiving at the time of his death. The evidence undisputedly shows that at the time of his death, the claimant was earning an hourly rate of \$7.00 for regular time and \$10.50 for overtime.

In its determination of the claimant's average weekly wage, the Death & Permanent Total Disability Trust Fund has taken a rather simplistic approach. It has taken the claimant's gross wages, less those earned for the week of his death (\$4,661.75) and divided by the number of weeks required to earn these wages (18). These calculations would yield an average weekly wage of \$258.99.

Although I know that this method employed by the Death & Permanent Total Disability Trust Fund is commonly used by many respondents, this does not make such a method appropriate under the Act. First, this is not a method of calculation expressly recognized in Ark. Code Ann. §11-9-518 (a) and (b). More importantly, this method would not be "fair and just" to the claimant, or in his case its compensation beneficiaries. This method does not take into consideration increases in hourly wages, that may have occurred during the period of employment used in the calculation. In the present case, the evidence clearly shows that prior to his death, the claimant received an increase in his hourly wage rate from \$6.50 to \$7.00. This method could also cause the compensation rate to be computed "on less than a full time work week in the employment", as prohibited by Ark. Code Ann. §11-9-518(a)(1).

The evidence shows that during the claimant's brief period of employment with this respondent (18 weeks), he averaged 37.9 four regular hours and .25 overtime hours per week. However, it must be noted that this brief period of employment only ran from November 15, 1998 through March 14, 1999. Obviously, this time of year would not be conducive to stringing telephone lines, the type of employment in which the claimant was

engaged. Therefore, it would not be unreasonable to expect that there would be a number of weeks where weather conditions would decrease the number of working hours that would be available to the claimant, Chappell Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W. 2nd 915(1994), Gill v. Ozark Forest Products, 255 Ark. App. 951, 504 S.W. 2nd 357(1974). The brief period of the claimant's employment may not be reasonably representative of a "full time work week in the employment". Clearly, the respondent employer would be in a better position to ascertain whether a forty hour work week constituted a "full time work week in the employment". In the present case, the respondent employer has so stipulated.

I would also note that the payroll records introduced in this case, reflect payments made to the claimant for "meals" and "motel". These amounts total \$915.00 over the claimant's 18 week period of employment. The evidence fails to establish that these "allowances" were in any way limited to the claimant's actual expenses. The whole dollar amount and consistency of these payments clearly appear to cause them to represent a type of "per diem" payments made to the claimant when his work assignment caused him to be at a distance from his residence. As such, it is possible that these amounts may also, to some extent, be considered in calculating the average weekly wage, Eckhardt v. Willis Shaw Express, Inc., 62 Ark. App. 224, 970 S.W. 2nd 316(1998). In fact, the parties may well have considered all or a portion of these amounts in arriving at their stipulated average weekly wage rate.

After consideration of all the evidence presented, I find no proof, in this case, of an erroneous wage rate. The previously determined average weekly wage of \$280.00 is calculated in a manner expressly recognized in Ark. Code Ann. §11-9-518. It further satisfies the mandate of this section, that such a wage rate be calculated in a method that is "just and fair to all parties concerned". This would include the Death & Permanent Total Disability Trust Fund.

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. At the time of his death, the claimant was earning an average weekly wage of \$280.00. Therefore, the individual and aggregate compensation payable to his beneficiaries, under the Act, should be calculated on this average weekly wage.

ORDER

The respondent employer or its workers' compensation carrier and the Death & Permanent Total Disability Trust Fund are liable to the various compensation beneficiaries in this claim for benefits based upon an average weekly wage of \$280.00.

IT IS SO ORDERED.

MICHAEL L. ELLIG
Administrative Law Judge