

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F114278

PATRICIA L. HALES

CLAIMANT

L & H LOGGING

RESPONDENT EMPLOYER

AMERICAN INTERSTATE INSURANCE CO.

RESPONDENT CARRIER

ORDER AND OPINION FILED FEBRUARY 22, 2005

Hearing before Administrative Law JUDGE LINDA K. MARSHALL.

Claimant represented by the HONORABLE STEVEN MCNEELY, Attorney at Law, Little Rock, Arkansas.

Respondents represented by the HONORABLE MICHAEL E. RYBURN, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

The above claim came on for a hearing on January 18, 2005, in Little Rock, Arkansas. A prehearing conference was held on November 9, 2004 and a prehearing order was filed the same date. A copy of the prehearing order was marked as Commission Exhibit No. 1 and made a part of the record without objection.

At the prehearing conference, the parties agreed there was a compensable injury on December 22, 2001.

The claimant contends the compensation rate is incorrect and is requesting additional temporary total disability for periods paid in the past, present and future. The claimant contends loggers are only able to work about 42 weeks a year and that the depreciation and capital gains should be added together to total \$19,047. This provides an average weekly wage of \$454 and temporary total disability/permanent partial

disability rates of \$303/227. Alternatively, claimant contends that by combining the net profits and the depreciation, the total is \$15,341, making an average weekly wage of \$365. Another alternative contention is using the capital gains on the C Form, which is \$8,123, divided by 42 weeks, leaving an average weekly wage of \$193.

Respondents contend the only measure to determine the average weekly wage is the Form C on the claimant's income tax return. The claimant is self-employed and the correct measure is 52 weeks and not 42 weeks. Respondents contend the correct way to determine the average weekly wage is to divide the difference of net income from the business expenses by 52 weeks, which provides for an average weekly wage of \$85.

ISSUES TO BE LITIGATED

1. Average weekly wage.
2. Attorney's fees.

From a review of the record as a whole, to include medical reports, documents and other matters properly before the Commission, and having had an opportunity to hear the testimony of the witnesses and to observe their demeanor, the following findings of fact and conclusions of law are made in accordance with Ark. Code Ann.

§11-9-704:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. There was a compensable December 22, 2001, injury.

2. The preponderance of the evidence provides that the claimant's average weekly wage is \$193.40.

DISCUSSION

The sole issue to be decided is the average weekly wage. The claimant was a self-employed owner of trucks used in the logging business and had been in business about 19 years. On December 22, 2001, the claimant sustained an admittedly compensable injury that entitled her to some disability benefits. The parties have disagreed over the method of calculating the amount of wages the claimant earned in 2001.

First, the claimant contends that a logger is unable to work every week of the year and only works an average of about 42 weeks. The claimant testified that in 2001, she worked only 42 weeks. Donald Lacy, son of the claimant and co-owner of the business, also testified that the weather dictates how much loggers work and the average is about 42 weeks a year.

Ark. Code Ann. §11-9-518 states in relevant part:

(a)(1) Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of the accident and in no case shall be computed on less than a full-time workweek in the employment.

(2) Where the injured employee was working on a piece basis, the average weekly wage shall be determined by dividing the earnings of the employee by the number of hours required to earn the wages during the period not to exceed fifty-two (52) weeks preceding the week in which the accident occurred and by multiplying this hourly wage by the number of hours in a full-time workweek in the employment.

* * *

(c) If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Ark. Code Ann. §11-9-102(19) defines wages as follows:

‘Wage’ means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer and includes the amount of tips required to be reported by the employer pursuant to § 6053 of the Internal Revenue Code of 1954 and the regulations promulgated pursuant thereto or the amount of actual tips reported, whichever amount is greater;

In the present case, the average weekly wage cannot be fairly determined using the formulas in Ark. Code Ann. §11-9-518(a)(1) or (a)(2). Therefore, exceptional circumstances exist in the present case, which requires the Commission to determine the claimant’s average weekly wage by a method that is just and fair to all parties.

The claimant testified that she had gross receipts of \$77,552 in 2001 and depreciation expenses of \$10,924. While depreciation is an expense, there was no check written to a body for that expense, it was more of an accounting matter.

Under cross examination, the claimant confirmed that the 2001 Tax Forms showed a net income of \$4,417 and that was taking the expenses from the gross income.

James Bourne, CPA, testified that “depreciation is basically a uniform standard accepted by the accounting profession and as interpreted by the U.S. tax law as to taking the useful benefit of an asset to the accounting periods which benefit from it.”

(T., pp. 27-28.) Mr. Bourne further testified that depreciation is something deducted from a profit to arrive at an income and is a generally accepted accounting standard.

The 2001 tax records were introduced, which reflected the business to be a sole proprietorship with gross income and expenses deducted from that. The gross profit was listed as \$73,032 with total expenses to include \$10,924 of depreciation being \$68,615, leaving a net profit of \$4,417. A gain of \$3,706 was added to the net profit to produce an adjusted income of \$8,123.

After careful consideration of all the information presented, I find the fairest and most just method of calculating the claimant's average weekly wage is to reduce the claimant's 2001 gross earnings by an amount equal to business expenses paid during the period, including depreciation, add any gains and divide that figure by 42 weeks. This method of calculation follows the same rationale the Commission followed in *Hunt v. Lovett*, Full Commission Opinion, E218307 (September 16, 1996). As in *Hunt*, the claimant in the present case testified that all of her income was generated from the logging business in 2001 and the business expenses were incurred exclusively from the logging business.

In the present case and in the *Hunt* case, the claimant's depreciation expense for 2001 was reported as a depreciation expense consistent with federal law and evidence was not presented that suggested the depreciation expense deviated from the depreciation expense actually incurred by the claimant's logging business. Testimony was presented by Mr. James Bourne, CPA, that deducting depreciation from gross income to arrive at an adjusted income is a generally accepted accounting standard.

Because I find that exceptional circumstances exist in this case for determining the average weekly wage, I find the claimant's gross profit for 2001 (\$73,032) must be reduced by the actual expenses (\$68,615) in calculating the average weekly wage. The difference in these two figures is added to the other gains and then divided by 42 weeks worked in 2001, to arrive at the claimant's average weekly wage of \$193.40.

I found the claimant's testimony to be credible, as well as her co-owner's testimony, that work was available only approximately 42 weeks a year because of weather for a logger.

ORDER

The preponderance of the evidence provides that the claimant's average weekly wage is \$193.40. The parties are directed to utilize this wage rate in determining the correct indemnity benefits rate paid in the past, present and future.

The claimant's attorney is entitled to the maximum statutory attorney's fee on benefits awarded herein, one-half of which is to be paid by claimant and one-half to be paid by respondents in accordance with Ark. Code Ann. §11-9-715 and Arkansas Workers' Compensation Rules and Regulations, Rule 10.

All sums herein accrued are payable in a lump sum without discount and this award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

**LINDA K. MARSHALL
ADMINISTRATIVE LAW JUDGE**