

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F512282

CANDELARIO M. SIERRA , EMPLOYEE	CLAIMANT
GRIFFIN GIN , EMPLOYER	RESPONDENT
AG-COMP SIF CLAIMS , CARRIER	RESPONDENT

OPINION FILED JULY 6, 2006

Submitted on the record in lieu of a full hearing before ADMINISTRATIVE LAW JUDGE ELIZABETH W. HOGAN.

Claimant proceeded pro se.

Respondents represented by the HONORABLE BETTY J. DEMORY, Attorney at Law, Little Rock, Arkansas.

ISSUES

This case was submitted on the record in lieu of a full hearing to determine the correct compensation rate.

At issue is whether or not the compensation rate is just and fair pursuant to Ark. Code Ann. §11-9-518(c).

After reviewing the evidence impartially without giving the benefit of the doubt to either party, Ark. Code Ann. §11-9-704, I find the evidence preponderates in favor of the claimant.

STATEMENT OF THE CASE

The parties stipulated to an employer-employee-carrier relationship on October 3, 2005 at which time the claimant sustained compensable injuries in a fall at work. Medical expenses and temporary total disability benefits are currently being paid at the rate of \$118.00.

The parties further stipulated that the claimant's job with the cotton gin was seasonal employment. At the time of his injury, the claimant was earning \$1,020.00

per week for nine weeks of work.

The claimant contends the method used by the respondents to calculate the average weekly wage is unreasonable. The claimant makes no contention regarding the correct compensation rate, asking that the Commission determine the figure based on Ark. Code Ann. §11-9-518(c).

The respondents contend the average weekly wage was calculated over the course of a year (52 weeks) as the claimant's work was seasonal. The respondents contend the claimant's average weekly wage was \$176.54, entitling him to a compensation rate of \$118.00 per week.

The following was submitted without objection and comprise the evidence of record: the parties' prehearing questionnaires and exhibits along with a brief filed by the respondents. The claimant does not speak English and his son acted as his representative, providing the necessary information and participating in the prehearing telephone conference.

The claimant's exhibits include pay stubs showing he worked a 48 hour week with 36 hours of overtime, using a wage rate of \$10.00 per hour. His gross earnings for each pay period totaled \$1,020.00.

The claimant is considered a "seasonal employee". The respondents contend his contract of hire is for \$9,180.00 paid over a nine week period of time. The respondents calculated the claimant's average weekly wage to be \$176.54 making the compensation rate \$118.00.

$$\$1,020.00 \times 9 = 9,180.00 \div 52 \text{ weeks} = \$176.54 \text{ AWW}$$

Pursuant to Ark. Code Ann. §11-9-519(a), the compensation rate is 66-2/3% of the average weekly wage subject to a maximum of \$466.00 for the year 2005.

$$\$176.54 \times 66\frac{2}{3}\% = \$118.00$$

FINDINGS AND CONCLUSIONS

In pertinent part, the Act provides:

Ark. Code Ann. §11-9-518

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

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

In cases interpreting this statute, the Court has emphasized the importance of calculating benefits based on the contract of hire and a full time work week, even in seasonal employment, Chapel Gardens Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994), Magnet Cove School District v. Barnett, 81 Ark. App. 11, 97 S.W.3d 909 (2003), Herman Young Lumber Co. v. Koon, 30 Ark. App. 162, 785 S.W.2d 44 (1990).

Unlike other states, Arkansas has no specific provision for seasonal employees who work less than six months out of the year, see Larson's Workmen's Compensation, "Disability and Benefits: Wage Basis" §93.02 [3][6] "Seasonal Employment." Desk Ed. In fact, there has been no change in the statutory language regarding the calculation of the average weekly wage since 1948.

If the claimant had missed a week of work for personal reasons, he would have been docked \$1,020.00 not \$176.54, and he is now disabled from working for

the respondent-employer as well as other employers. His situation is not unlike that of a teacher's employment.

Based on the Magnet Cove case, supra, I find the claimant is entitled to the maximum compensation rate.

$$\$1020.00 \text{ AWW} \times 66\text{-}2/3\% = \$680.00$$

1. The Workers' Compensation Commission has jurisdiction of this claim in which the relationship of employer-employee-carrier existed among the parties on October 3, 2005 at which time the claimant sustained a compensable injury.
2. The correct average weekly wage is \$1,020.00, and the claimant is entitled to the maximum compensation rate of \$466.00 for temporary total disability benefits.
3. The respondents are directed to make up the difference between the weekly amount paid of \$118.00 and the compensation rate of \$466.00, and continue indemnity benefits at the maximum rate.

AWARD

Respondents are directed to pay benefits in accordance with the Findings of Fact above along with their proportionate share of attorney's fees. All accrued sums shall be paid in a lump sum without discount and this award shall earn interest at the legal rate until paid, pursuant to A.C.A. §11-9-809, and Couch v. First State Bank of Newport, 49 Ark. App. 102, 898 S.W.2d 57 (Ark. Ct. App. 1995), and Burlington Industries, et al v. Pickett, 64 Ark. App 67, 983 S.W.2d 126 (1998), 336 S.W. 515, 988 S.W.2d 3 (1999).

IT IS SO ORDERED.

ELIZABETH W. HOGAN
Administrative Law Judge