

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM F309554

**JULIE L. KNEUVEN,
EMPLOYEE**

CLAIMANT

**BALERS & MORE, INC.,
EMPLOYER**

RESPONDENT

**LIBERTY INS. CORP.,
INSURANCE CARRIER**

RESPONDENT

OPINION FILED JANUARY 8, 2007,

Pursuant to a hearing conducted October 10, 2006, before Administrative Law Judge Richard B. Calaway in Little Rock, Pulaski County, Arkansas, with

Mr. James G. Schulze, Attorney at Law, Little Rock, Arkansas, appearing for the claimant, and

Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas, appearing for the respondents.

STATEMENT OF THE CASE

This was a hearing to address the issues of compensability of the claimant's injuries and her average weekly wage at the time.

The claimant contended that she received compensable injuries during a motor vehicle accident July 9, 2003, and should receive benefits, including reasonably necessary medical and related expenses. Her initial request for temporary total disability benefits from the date of injury until December 1, 2004, the end of her healing period, was withdrawn during the hearing. She further contended that her average weekly wage was \$897.01. An attorney's fee for controversion was also requested. Other possible issues were reserved.

The respondents contended that the claimant's injuries were not compensable because they did not occur in the course and scope of her employment when employment services were being performed, but instead arose as the result of the motor vehicle accident at 9:30 p.m. when the

claimant was driving home for the evening with her twelve year old daughter. Specifically, the respondents contended that the claimant worked from her home and was driving a vehicle which served as her personal vehicle, as well as the company car. They further contended that, if the claim is compensable, the claimant's compensation rates should be the minimum, because her income tax returns reflect a loss in her business.

The record, which included documentary evidence and the testimony of the claimant, her daughter, Sydney Kneuve, her former husband, Donald Wayne Kneuve and her accountant, Milton Halford, was closed at the conclusion of the hearing, pursuant to the Prehearing Order and Ark. Code Ann. §11-9-715(c).

Based upon the record as a whole, and without giving the benefit of the doubt to any party, as required by the Act, the following findings of fact and conclusions of law are hereby made:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The Arkansas Workers' Compensation Commission has jurisdiction of the parties and subject matter of this claim.
2. Pursuant to the stipulations of the parties and the record, the employment relationship existed at all pertinent times; the claimant was involved in a motor vehicle accident July 9, 2003; her healing period ended December 1, 2004; and the claim has been controverted by the respondents.
3. The preponderance of the evidence shows that the claimant suffered compensable injuries arising out of and in the course of her employment at a time when employment services were being performed as a result of a motor vehicle accident July 9, 2003, for which she is entitled to benefits including reasonably necessary medical and related expenses and any period of temporary disability that she may have sustained.

4. The preponderance of the evidence shows that the claimant's average weekly wage at the time of the injury was \$71.51.

5. The respondents have controverted the payment of benefits hereinafter awarded and the claimant's attorney is entitled to the maximum statutory attorney's fee thereon, except for medical benefits, payable one-half by the claimant and one-half by the respondents.

DISCUSSION

For a period of about six months in 2003, the claimant was the primary working employee and shareholder of Balers & More, Inc., which dealt in waste and recycling equipment and in hauling waste to a landfill. As contended by the respondents, the claimant worked out of her house. On July 9, 2003, she was involved in a motor vehicle accident at about 9:30 p.m., as she was returning to her home and office with her twelve year old daughter. She contended that the injuries suffered in this motor vehicle accident were compensable and entitled her to benefits under the workers' compensation coverage she had acquired for herself as the employee of her business.

The claimant had worked in similar businesses beginning since in 1979 but had only started operating in the present corporate form January 1, 2003. It was her testimony that her work included going to businesses, analyzing their needs for trash disposal equipment, recommending appropriate equipment, installing the equipment, and servicing the equipment after installation. To do this, it was necessary for her to travel from job site to job site after leaving her office at home. Occasionally, it was necessary for her to inspect equipment at night in order to see if it had been properly sealed when installed, so that light was not shining through. She testified that she was returning from such a mission to inspect equipment at night when her vehicle was involved in an

accident that caused her to be injured, which occurred in North Little Rock about 12 miles from her home in the Maumelle area.

The claimant's former husband confirmed the claimant's testimony concerning the nature of her employment activities. At the time of this incident, the claimant and her former husband were living together while a second home was being prepared for her occupancy. Both the claimant and her former husband testified that the claimant's daughter was with her on this occasion, rather than at home, because the husband had not yet returned, so that he might take care of the daughter while the claimant inspected the equipment, which was located at the Home Depot Store in North Little Rock.

Although the respondents questioned the nature of the claimant's activities on the evening of the motor vehicle accident, the proof in the record fails to contradict the claimant's contention that she had been involved in work activity and was returning to her home, so that she is entitled to benefits because travel was a part of her employment. The record shows that the claimant's medical care was reasonably necessary in connection with her injuries.

A more complicated question involves the claimant's average weekly wage. The respondent's position, based on tax returns, improperly considers the claimant's diminished ability to earn wages following the accident on July 9, 2003, since tax returns covered the entire year and took into account the expenses and financial activity occurring after July 9, 2003.

The claimant contended that her average weekly wage was almost \$900.00 and presented expert testimony from the company CPA to support her position. He stated that from the first of the year until the date of the accident the claimant was paid \$23,322.00, which worked out to \$897.00 per week. However, he also stated that tax returns for the year 2003 show no W-2 wages for the

claimant. He explained that it was his practice, when dealing with a start-up Subchapter S corporation, to consider money distributed to the owner as shareholder loans until the end of the year, when it would be determined whether the corporation was profitable. If there is no profit, it was pointless to classify the money as wages and pay 15% taxes, which would not be paid on shareholder loans, apparently even if not repaid. Thus, his analysis from a tax accounting point of view indicated that the tax characterization of payments to the claimant was subject to change in order to minimize tax liability, perhaps sound reasoning for tax purposes but less persuasive as to the question of the average weekly wage under the Workers' Compensation Act.

Here, various amounts were paid to or on behalf of the claimant from time to time for reasons which are not entirely clear. For example, the claimant had leased her car to the corporation and was receiving payment under that arrangement, which is not properly considered wages but simply income from a different activity, the lease of some of her property. Her average weekly wage is perhaps best determined by taking checks which were written to the claimant and designated as payroll and dividing the total by 26 weeks, which the claimant's accountant had used in determining her average weekly wage. This yields \$71.51 as an average weekly wage.

AWARD

Pursuant to the foregoing opinion and the law, the respondents are ordered and directed to pay benefits on behalf of the claimant.

This award has been controverted as stated above, and the claimant's attorney is entitled to the maximum statutory attorney's fee on the controverted portion. Pursuant to Coleman v. Holiday Inn, Ark. WCC No. D708577 (November 21, 1990), the claimant's portion of the controverted

attorney's fee is to be withheld from, and paid out of, indemnity benefits, and remitted by separate check by the respondents directly to the claimant's attorney.

Accrued benefits hereinabove awarded shall be paid in lump sum without discount. This award shall bear interest at the maximum legal rate until paid.

IT IS SO ORDERED.

RICHARD B. CALAWAY
Administrative Law Judge