

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. F603466

ARNOLD L. YOUNG, EMPLOYEE

CLAIMANT

CLYDE YOUNG LOGGING, EMPLOYER

RESPONDENT

**AMERICAN INTERSTATE INSURANCE COMPANY,
CARRIER**

RESPONDENT

OPINION FILED SEPTEMBER 20, 2007

Hearing before Administrative Law Judge O. Milton Fine II on July 11, 2007, in Russellville, Pope County, Arkansas.

Claimant represented by Mr. Matthew L. Lindsey, Attorney at Law, Fayetteville, Arkansas.

Respondents represented by Mr. Michael E. Ryburn, Attorney at Law, Little Rock, Arkansas.

STATEMENT OF THE CASE

On July 11, 2007, the above-captioned claim was heard in Russellville, Arkansas. A prehearing conference took place on June 25, 2006. A prehearing order entered that same day pursuant to the conference was admitted without objection as Commission Exhibit 1. At the hearing, the parties confirmed that the stipulations, issues, and respective contentions, as amended, were properly set forth in the order.

Stipulations

At the hearing, the parties discussed the stipulations set forth in Commission Exhibit

1. They are the following, which I accept:

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.

2. The employee/employer/carrier relationship existed on or about March 14, 2006, at which time Claimant sustained compensable injuries to his back and right knee.

Issues

At the hearing, the parties discussed the issue set forth in Commission Exhibit 1.

The following was litigated:

1. What was Claimant's average weekly wage during the period at issue?

Contentions

Claimant:

1. Claimant contends that he sustained an injury to his back and knees while unloading logs on March 14, 2006 while in the scope and course of his employment.
2. Claimant's compensation rate is currently \$37.00 per week, which equates to a drastic underpayment.

Respondents:

1. Respondents contend that Claimant sustained a compensable injury and all medical benefits have been paid. There is a dispute as to the correct compensation rate. Claimant was paid at the maximum rate from the date of injury to January 31, 2007. After Claimant's tax return was obtained, it was determined that the Claimant, who has his own business, made only \$2,905.00 in the year before the accident. The compensation rate is \$37.00 per week and there is a large overpayment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record as a whole, including 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, I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. § 11-9-704 (Repl. 2002):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. The stipulations set forth above are reasonable and are hereby accepted.
3. The disposition of this claim is controlled by *Hunt v. Lovett*, 1996 AWCC 225, Claim No. E218307 (Full Commission Opinion filed September 16, 1996).
4. Claimant's average weekly wage cannot be fairly determined by using the formulas set forth in Ark. Code Ann. § 11-9-519(a)(1)-(2).
5. Exceptional circumstance exist that required the Commission to determine Claimant's average weekly wage by a method that is just and fair to all parties.
6. Under *Hunt*, the fairest and most just method of calculating Claimant's average weekly wage is to reduce his 2005 gross earnings by an amount equal to business expenses paid during the period, including depreciation, which equals \$2,905.00, and to divide that figure by 47 weeks that he worked, which equals an average weekly wage for the period in question of \$61.81.

CASE IN CHIEFSummary of Evidence

_____ Claimant was the sole witness testified at the hearing. In addition to the pre-hearing order discussed above, the exhibits admitted into evidence in this case consist of the following: Claimant's Exhibit 1, a Form 1099 for Claimant for 2005 and consisting of one (1) page; Claimant's Exhibit 2, Clinic Notes from Dr. Russell B. Allison regarding Claimant dated April 27, 2007 and consisting of one (1) page; and Respondents' Exhibit 1, Claimant's 2005 federal income tax return, including schedules, consisting of thirteen (13) pages.

Testimony

Arnold L. Young. Claimant testified that he is a resident of Pelsor, Arkansas and has been employed at Kings River, a logging operation and essentially a d/b/a of Respondent Clyde Young Logging (hereinafter "Young"), for three years. On March 14, 2006, he was working for Kings River and operating a loader owned by Respondent Young. When he stepped out of the loader, he missed a step and fell. An inquiry was made regarding his wages, and he stated that he made over \$84,000.00 that year. He began receiving workers' compensation benefits at the rate of \$980.00 twice a month. Claimant underwent two separate surgeries on his right knee. The second procedure, an ACL replacement, took place on February 15, 2007, which was about the time that he stopped receiving benefits in the above amount. Jeremy Johnson with Respondent American Interstate Insurance Company (hereinafter "American") requested his W-2 forms and tax returns. Following receipt of this information, Johnson told him that from then on, he would only receive \$35.00 every two weeks. However, Claimant only received one

more benefits check, in the amount of \$40.00. Claimant testified that he stayed off work until Dr. Robert Allison released him on April 27, 2007. He returned to work on May 1, 2007, but he stated that he did not feel physically able to and did so only because he needed the income. When Respondents stopped paying benefits, Claimant had to deplete his savings and to borrow funds to cover his payments. When he was working, however, he was able to save some of his income.

When asked to describe his job for Kings River, Claimant testified that "I haul loads for him. I haul them to his mill and wherever he tells me to go." Claimant stated that with the exception of his logging truck, he uses Clyde Young's equipment. He is responsible for the fuel for and maintenance of his truck, which is used only for Kings River. Claimant testified that Claimant's Exhibit 1 reflects the only income he received for that period. He is still employed at Kings River.

Claimant stated that a certified public account prepares his tax returns. He reviewed his 2005 Schedule C, which is part of Respondents' Exhibit 1. He stated that he has two vehicles that he claims depreciation on, for a total of \$24,217.00. One is a 2006 Dodge pickup that he uses for work, to haul tires, rear ends, etc. The second is a 1985 International truck, which is a logging truck. He has listed \$5,307.00 as insurance expense. He stated that he has \$1,000,000.00 in insurance on his vehicles. Legal and professional services is placed at \$80.00. Repair and maintenance is listed at \$10,857.00—this is for repairs to and maintenance on his work vehicles, which Kings River will not pay for. He claimed \$613.00 for supplies, which includes work clothes, and \$550.00 for meals and entertainment, which is for food while he is working away from

home. Claimant claimed \$28,508.00 for diesel and oil, and \$1,396.00 for licenses for his logging truck and trailer.

He stated that Kings River pays him at the rate of \$10.00 per ton. Tickets are used to keep track of what Claimant is owed. Kings River pays him weekly. He works solely for Kings River. The expenses shown on his tax return relate solely to his work as a logger for Kings River.

When questioned by Respondents, Claimant testified that he is part of the organization that helps Kings River Wood Products get wood to the mill. He hauls the lumber there in his own truck. Some of the other trucks used to haul the lumber are owned by Clyde Young. He stated that he and Young are not related. Claimant testified that he deducts his expenses before he arrives at his net income. He stated that Claimant's Exhibit 1 is not a Form W-2 but a Form 1099. The tax return that constitutes Respondents' Exhibit 1, while unsigned, is the return that Claimant filed for the 2005 tax year. While he testified that he also uses the 2006 Dodge pickup for his family, he maintained that the depreciation on it was properly deducted to arrive at his net income.

Claimant stated that he told Respondent American that he made \$84,000.00 because they merely asked what he made and not what his net versus gross income was. He then started receiving benefits at the maximum compensation rate, based on Respondent American thinking that he made \$84,000.00 per year. However, after Johnson received a copy of Claimant's tax return, he explained to Claimant that he could no longer be paid at the maximum rate.

Claimant testified that his record-keeping for his business consists of his keeping his receipts, which he turns over to his accountant. A significant portion of the money he

is paid is used for experiences incurred in his business, including the depreciation of his equipment. He stated that while he has paid taxes to the State of Arkansas, it has been a couple of years since he had to pay federal taxes. He attributed this to the fact that it was costly to operate his business. Claimant got the earned income credit for 2005. He testified that he made \$2,905.00 in the year preceding his injury. In explaining how he was able to avoid tax liability, he stated: "I usually buy a new pickup or something to take care of the taxes. If you want to go back that far. I buy a new pickup about every other year." He stated that Clyde Young has a similar arrangement with two other individuals as he does with Claimant.

Claimant stated that he works six to seven days per week, and is idle only four to five weeks a year. His entire job involves using his truck and Clyde Young's loader.

When questioned by me, Claimant testified that he has a child support arrearage, out of Newton County, Arkansas. However, he did not know the amount of the arrearage. He also testified that he never received a W-2 from Kings River—only a Form 1099.

Records

The records that were introduced at the July 11, 2007 hearing reflect the following:

Claimant's Exhibit 1. Kings River Wood Products, Inc., issued a Form 1099 for Claimant reflecting that in 2005 he received non-employee compensation totaling \$84,243.18.

Claimant's Exhibit 2. Clinic Notes regarding Claimant by Dr. Russell Allison dated April 27, 2007 reflect that Claimant underwent ACL reconstruction surgery on February 15, 2007. While he showed more stability, Claimant did not show much improvement in motion. He was assessed as having a right ACL tear, a medial meniscal tear, and an OCD

lesion. Dr. Allison wrote: "He states he has to return to work. He owns his log truck and has to work. I think it is reasonable and the only thing that will improve him is time. He agrees and I will see him back in six months."

Respondents' Exhibit 1. Claimant's 2005 federal tax return, consisting of, inter alia, his Form 1040 and Schedule C, Profit or Loss From Business, reflects the following:

On Claimant's Form 1040, he claimed gross income of \$84,243.00. His Schedule C, Profit or Loss From Business, reflects that he deducted \$81,338.00 for expenses, comprised of the following:

- \$24,217.00--equipment depreciation
- \$5,307.00--insurance (other than health)
- \$8,610.00--mortgage interest
- \$80.00--legal and professional services
- \$10,857.00--repairs and maintenance
- \$613.00--supplies
- \$550.00--deductible meals and entertainment
- \$1,200.00--utilities
- \$28,508.00--diesel and oil
- \$1,396.00--licenses, fees and dues

From this, he arrived at a net income of \$2,905.00.

ADJUDICATION

Claimant contends that he is entitled to much more than the \$37.00 he received per week from Respondents after they re-calculated his average weekly wage. On the other hand, Respondents argue that based on the \$2,905.00 in net income that Claimant reported receiving on his 2005 federal income tax return, his compensation rate is \$37.00 per week.

Arkansas Code Annotated § 11-9-705(a)(3) (Repl. 2002) provides that "[w]hen deciding any issue, administrative law judges . . . shall determine, on the basis of the

record as a whole, whether they party having the burden of proof on the issue has established it by a preponderance of the evidence.” The determination of a witness’ credibility and how much weight to accord to that person’s testimony are solely up to the Commission. *White v. Gregg Agricultural Ent.*, 72 Ark. App. 309, 37 S.W.3d 649 (2001). The Commission must sort through conflicting evidence and determine the true facts. *Id.* In so doing, the Commission is not required to believe the testimony of the claimant or any other witness, but may accept and translate into findings of fact only those portions of the testimony that it deems worthy of belief. *Id.*

In determining the average weekly wage of a claimant, § 11-9-518 gives the following guidance:

- (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 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.

The term “wages” is defined in § 11-9-102(19) in pertinent part as follows:

“Wages” means the money rate at which the services rendered is recompensed under the contract of hire in force at the time of the accident

including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer

I first note that Respondents have not challenged Claimant's status as an employee. In review of this matter, I find that the disposition of this case is controlled by *Hunt v. Lovett*, 1996 AWCC 225, Claim No. E218307 (Full Commission Opinion filed September 16, 1998). In *Hunt*, the claimant was under contract to cut timber. He owned and maintained his own chainsaws along with his pickup truck, which he used in his work. The claimant was paid by the ton, and received a Form 1099 from his employer each year. His entire business income for the year in question came from the logging contract. In his yearly federal tax return, the claimant deducted business expenses such as vehicle depreciation, insurance, and repairs and maintenance. The Commission found that the claimant operated a sole proprietorship in the nature of a subcontract to his employer, and that the claimant "was not recompensed solely for 'services rendered'" but "[i]nstead, the claimant's logging business incurred substantial unreimbursed business expenses" In addition, the Commission took note of the fact that all expenses were paid out of the sums paid by the employer, and that the claimed business expenses "consumed a majority of the gross revenues received from" Claimant's employer.

The above scenario is very similar to the situation at hand. Claimant hauls timber for Respondent Young but uses his own logging and pickup truck in his business. He is paid by the ton, and receives a Form 1099 at the end of the year. Like the claimant in *Hunt*, he testified that his logging income was his sole source of business income reflected on his return. On his federal return, he deducts his business-related expenses listed on his Schedule C, and those expenses comprise the vast majority of his gross income. As

in *Hunt*, the preponderance of the evidence indicates that Claimant accurately reported on his tax return his actual expenses incurred in connection with his work for Respondent Young.

The Commission in *Hunt, supra*, was faced with an issue of first impression in Arkansas: how should a claimant's average weekly wage be calculated in such an instance? It determined that the average weekly wage could not fairly be determined using the formulas set forth in Ark. Code Ann. § 11-9-518(a)(1) or (2). Thus, it found that exceptional circumstances were present that required a determination of the average weekly wage by a method that was just and fair to all parties. The method employed was "to reduce the claimant's 1992 [the dated of the injury was August 13, 1992] gross earnings by an amount equal to business expenses paid during the period, including depreciation, and divide that figure by 42 ½ weeks [which the parties agreed Claimant worked that year]."

Under *Hunt*, I find that in the instant case, the method that is just and fair to both Claimant and Respondents is to take Claimant's reported 2005 gross income and subtract from it his business expenses detailed on his Schedule C for that year. As reflected on his 2005 return, the subtraction of \$81,338.00 in business expenses from his \$84,243.00 in gross income results in a net income of \$2,905.00. Claimant gave credible, unrefuted testimony that he was only idle for four to five weeks a year. The division of the \$2,905.00 figure by 47 weeks yields an average weekly wage of \$61.81.

CONCLUSION

On the bases of the foregoing, I find that Claimant's average weekly wage for the period at issue was \$61.81.

IT IS SO ORDERED.

Hon. O. Milton Fine II
Administrative Law Judge