BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

WCC NO. G502752

GWENDOLYN AMBROSE, Employee	CLAIMANT
TLI CARPET & RESTORATION, Employer	RESPONDENT
FIRSTCOMP INSURANCE COMPANY, Carrier	RESPONDENT

OPINION FILED SEPTEMBER 23, 2015

Hearing before ADMINISTRATIVE LAW JUDGE GREGORY K. STEWART in Springdale, Washington County, Arkansas.

Claimant represented by JASON M. HATFIELD, Attorney, Fayetteville, Arkansas.

Respondents represented by JARROD S. PARRISH, Attorney, Little Rock, Arkansas.

STATEMENT OF THE CASE

On August 26, 2015, the above captioned claim came on for a hearing at Springdale, Arkansas. A pre-hearing conference was conducted on July1, 2015, and a pre-hearing order was filed on that same date. A copy of the pre-hearing order has been marked Commission's Exhibit #1 and made a part of the record without objection.

At the pre-hearing conference the parties agreed to the following stipulations:

1. The Arkansas Workers' Compensation Commission has jurisdiction of the within claim.

2. The employee/employer/carrier relationship existed among the parties on March 31, 2015.

3. The claimant sustained a compensable injury to her left elbow on March 31, 2015.

At the pre-hearing conference the parties agreed to litigate the following issues:

1. Compensation rate.

2. Attorney fee.

The claimant contends her average weekly wage was $325.00 at the time of the work-related injury pursuant to A.C.A. §11-9-518(a). Claimant was not an hourly employee

of respondent, being paid by the job, and, therefore, A.C.A. §11-9-518(b) does not apply. Pursuant to A.C.A. §11-9-518(a), partial work weeks are not considered and, therefore, claimant's average weekly wage based on two full weeks of work would be $325.00, equating to a TTD rate of $216.67. Further, A.C.A. §11-9-518(c) provides the Commission with authority to determine a just and fair average weekly wage.

The respondents contend that claimant's average weekly wage was calculated pursuant to Ark. Code Ann. §11-9-518(a)(2). Pursuant to the strict construction of the Act, wages are to be calculated based on compensation received for the fifty-two (52) weeks "preceding the week in which the accident occurred." In light of this, wages have been calculated to reflect an average weekly wage of $78.00 with a resulting temporary total disability rate of $52.00 per week.

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 A.C.A. §11-9-704:

FINDINGS OF FACT & CONCLUSIONS OF LAW

1. The stipulations agreed to by the parties at the pre-hearing conference conducted on July 1, 2015, and contained in a pre-hearing order filed that same date, are hereby accepted as fact.

2. Claimant's average weekly wage equaled $325.00 which would entitle her to compensation at the rate of $217.00 for temporary total disability benefits.

3. Respondent has controverted the difference between claimant's compensation rate of $217.00 and the rate at which it paid benefits of $52.00. Claimant's attorney is entitled to a fee based on this difference.

FACTUAL BACKGROUND

The claimant is a 48-year-old woman who began working for respondent on Wednesday, March 18, 2015, as an apartment cleaner. The respondent operates a business which cleans apartments after they become unoccupied because someone moved out or is evicted. Respondent's employees are paid by the apartment and the amount of pay is determined by the size of the apartment and the particular apartment complex.

Respondent's pay period begins on Thursday and runs through Wednesday of the next week. Claimant's first day to work was the last day of that week's pay period. Claimant only helped clean one apartment on that day while undergoing training and was paid $40.00 for the "week's" work.

The next pay period began on March 19, 2015. Records from respondent show that claimant cleaned eight apartments during that weekly pay period. During that week claimant chose to work with her sister and split the pay for cleaning. As a result, claimant was paid $115.00 for that work week.

Claimant's last pay period began on March 27, 2015, and records show that she cleaned seventeen apartments and was paid $535.00. On Tuesday, March 31, 2015, one day before the end of the pay period, claimant was cleaning a ceiling fan when she fell off a ladder. Medical records indicate that claimant suffered a left elbow dislocation with comminuted radial head fracture. Surgery to repair this injury was performed by Dr. Johnson on April 20, 2015.

Respondent accepted claimant's injury as compensable and paid compensation benefits; including temporary total disability benefits at the rate of $52.00 per week. Claimant has filed this claim contending that her correct compensation rate equals $217.00 based on an average weekly wage of $325.00.

ADJUDICATION

The statute governing calculation of the average weekly wage is codified at A.C.A. §11-9-518 which states in pertinent 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.
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> ***
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> (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.

As previously noted, claimant worked for the respondent during three weekly pay periods. The first pay period the claimant worked only the last day while undergoing training, earning $40.00. The second week claimant worked with her sister and worked a full week, earning $115.00. During the last week claimant worked five days and earned $535.00.

Respondent contends that claimant's average weekly wage equals $78.00. Respondent relies upon the decision in *Tabor v. Levi Strauss & Company,* 33 Ark. App. 71, 801 S.W. 2d 311 (1990) as standing for the proposition that earnings during the week of the accident are to be excluded from the average weekly wage calculation. Respondent has also cited other decisions in support of its calculation including *Forrester v. H.W. Tucker Company*, Full Commission Opinion filed January 4, 2013 (G003375); and *Rivera v. Suspended Systems II, Inc.*, Full Commission Opinion filed August 13, 2012 (G005548).

Based upon these decisions, respondent added earnings from week one of $40.00 to the earnings of week two of $115.00 and arrived at an average weekly wage of $78.00 per week.

Claimant contends that the average weekly wage equals $325.00. Claimant calculated this average by not considering the one-day work week of $40.00, and claimant

then took the earnings from week two of $115.00 and week three of $535.00 to arrive at an average weekly wage of $325.00.

I find based upon my review of the evidence that exceptional circumstances exist in this case and that claimant's average weekly wage cannot be justly determined by the formulas set out in the statute. A.C.A. §11-9-518(c).

First, none of the cases relied upon by the respondent involved exceptional circumstances. In each of the cases cited by the respondent, the claimant worked more than 51 weeks whereas here the claimant worked only three weeks and only one of those weeks was for an entire 7-day pay period.

Further, with regard to respondent's reliance on *Tabor* for the proposition that earnings earned during the week of claimant's accident are to be excluded, I disagree based on the facts presented here. Again, no exceptional circumstances existed in *Tabor* as they do in this case. In *Tabor*, the claimant worked 52 weeks. The Court's exclusion of wages from the week of the injury is not an absolute requirement; otherwise, it could lead to unjust results. For instance, under the respondent's theory if claimant had only worked one week and it was the week she earned $535.00 when she was injured respondent would contend under *Tabor* that this week would have to be excluded and claimant would be limited to the minimum benefits of $20.00 per week. This obviously would not be just and fair.

Here, I find that the calculation proposed by claimant is fair and just. The first week should be excluded because claimant worked only one day while undergoing training. The second week would be considered because it was a full work week. However, I find under the exceptional circumstances presented in this case that claimant's last week of wages should also be included even though it was the week of injury. First, we are dealing with a limited period of work. Also, the claimant had already worked five days during this pay period. Furthermore, I believe it should be noted that the purpose of dropping the wages

from the week of the injury is so that the average weekly wage is not artificially discounted due to a partial work week. That is not the situation present in this case given the fact that claimant worked five days during the pay period.

In reaching this decision, I note that respondent contends that based upon claimant's calculations it is possible that she will earn more money while drawing temporary total disability benefits than she would have earned if she had continued working. Respondent's contention is based upon testimony presented at the hearing by Larry Devinney. Devinney is the owner of the respondent and he testified that he never knows how much work will be available until a particular day arrives. Devinney also noted that because the respondent performs cleaning for apartment turnovers they are excessively busy from the 28th of the month through the 5th of the month. Devinney testified that he would be speculating as to how many apartments the claimant might have cleaned during the next week. It is the respondent's contention that based upon Devinney's testimony claimant would have earned considerably less than the $535.00 she earned the week of her injury. However, this is speculation. Speculation and conjecture are not to be substituted for credible evidence by the Commission. *Dena Construction Company v. Herndon*, 264 Ark. 791, 575 S.W. 2d 155 (1979). As Devinney testified, there was no way of knowing what the claimant would have earned after that point in time.

> Q. Would she make that [$535.00] every week going forward - -
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> A. There is no way of knowing what even the next day is going to bring.
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> ***
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> Q. So there actually would be no way to know what her average pay would have been going forward?
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> A. No.

Finally, it should also be pointed out that Devinney testified that their busiest time period went through the 5th of the month. Claimant's next pay period would have included

the 1st, 2nd, 3rd, 4th, and 5th of the month.

In summary, claimant's average weekly wage can only be determined based upon the wages she earned while she worked for the respondent, not upon wages she may or may not have earned in future weeks. For the reasons discussed herein, I find that claimant's average weekly wage equaled $325.00 and accordingly find that she is entitled to compensation at the rate of $217.00 per week for temporary total disability benefits.

AWARD

Claimant's average weekly wage equals $325.00 which would entitle her to compensation at the rate of $217.00 for temporary total disability benefits. Respondent has controverted claimant's entitlement to the difference between this compensation rate and the rate at which it paid compensation benefits.

Pursuant to A.C.A. §11-9-715(a)(1)(B), claimant's attorney is entitled to an attorney fee in the amount of 25% of the compensation for indemnity benefits payable to the claimant. Thus, claimant's attorney is entitled to a 25% attorney fee based upon the indemnity benefits awarded. This fee is to be paid one-half by the carrier and one-half by the claimant.

The respondents are ordered to pay the court reporter's charges for preparing the hearing transcript.

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.

GREGORY K. STEWART
ADMINISTRATIVE LAW JUDGE