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 NOVEMBER 28, 2006

Upon review before the FULL COMMISSION, Little Rock, Pulaski County, Arkansas.

Claimant is not represented by counsel but appears *pro se*.

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

Decision of Administrative Law Judge: Reversed.

OPINION AND ORDER

The respondents appeal the findings of the Administrative Law Judge in an Opinion filed July 6, 2006. Pursuant to stipulation by the parties, the compensability of the claimant's injury is not disputed. Accordingly, medical benefits and temporary total disability benefits are currently being paid. The primary issue on appeal is the amount of weekly temporary total disability benefits to which the claimant is entitled. The Administrative Law Judge found that the claimant, a seasonal employee, is entitled to the maximum compensation rate of $466.00 per week. According

to this finding, the Administrative Law Judge ordered the respondents "make up the difference" between the weekly rate of $118.00 that was paid to the claimant by the respondents, and the rate of $466.00 that she awarded in her Opinion, and to "continue indemnity benefits at the maximum rate". Further, the Administrative Law Judge found that the claimant is entitled to attorney's fees.

A carefully conducted de novo review of this claim in its entirety reveals that the Opinion of the Administrative Law Judge should be reversed with regard to both an increase in the claimant's weekly benefit award, and to an award of attorney's fees.

Ark. Code Ann. §11-9-518 sets forth the guidelines for calculating average weekly benefits with regard to temporary total disability. In pertinent part, Ark. Code Ann. §11-9-518(a)&(c) state:

> (a) 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 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.

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. However, the Court examined the issue of weekly compensation rates for seasonal employment in Chapel Garden Nursery v. Lovelady, 47 Ark. App. 114, 885 S.W.2d 915 (1994). In that case, the employee, Ms. Lovelady, had worked for the employer approximately seven months in the year prior to her compensable injury. The employee's contract for hire was for forty hours per week or more, whenever work was available, at a rate of $4.50 per hour. Based upon her contract, the Commission calculated her average weekly benefits to be $120.00 per week. The appellant employer contended that this rate was erroneous because it resulted

in the payment of benefits in excess of her annual income. The Court affirmed the Commission, stating:

> First, the record shows that the appellee's working hours depended in large measure upon the weather; given the limited amount of time she had been employed, any projection of her expected annual income is necessarily speculative.

The Court found the case to be controlled by Gill v. Ozark Forest Products, 255 Ark. 951, 504 S.W.2d 357 (1974), where the employee was a seasonal employee in the timber industry, whose hours depended on the weather and on supply and demand. In the Gill case, the Supreme Court calculated the employee's benefits on the basis of a full-time workweek. Therefore, the Court found that the Commission did not err in computing Ms. Lovelady's compensation rate on the basis of a full-time workweek, despite the seasonal nature of her employment.

Although the Administrative Law Judge in the present claim cited Chapel Garden, supra, as part of her authority to award the claimant benefits based on a full-

time workweek, she based her decision primarily on Magnet Cove School District v. Barnett, 81 Ark. App. 11, 97 S.W.3d 909 (2003). In that case, the employee, a first-grade teacher, was awarded benefits based on her contract which provided that she work one hundred, eighty-eight (188) days during a nine-month period, for a total salary of $26,500.00 to be paid in twelve monthly installments. The employer challenged the Administrative Law Judge’s award, which was calculated by dividing the claimant’s total compensation ($26,500.00) by thirty-nine weeks (which represented nine months), as was designated in her contract. The employer contended that Ms. Barnett’s rate of compensation should be based on her salary at the time of her injury ($26,500.00) paid over the fiscal year of fifty-two weeks. The Commission affirmed and adopted the Administrative Law Judge’s Opinion. In affirming the Commission, the Court stated:

> In sum, appellants seek to require this court to determine that appellee’s weekly income is based on the date she received her pay and not the date she earned the pay.

In rendering its decision, the Court took into consideration that the claimant’s pay was reduced at a specific daily rate for each day that she missed after she had exhausted her leave. This daily rate was calculated according to the one hundred, eighty-eight (188) days that the employee was contracted to work each year.

In the present claim, the respondents contend that the claimant’s benefits should be calculated based on a fifty-two week formula. In other words, the claimant’s gross contractual wages of $9,180.00 for a nine-week [sic] period, should be divided by fifty-two weeks. Using this formula, the claimant’s average weekly income would be $176.54, for a calculated benefits rate of $118.00, which is the amount that the respondents had been paying the claimant in temporary total disability benefits. The Administrative Law Judge calculated the claimant’s weekly compensation rate by dividing his total seasonal contracted wages of $9,180.00, by nine weeks, which was the length of his contract. Using this formula, the claimant’s average weekly gross earnings were $1,020.00. 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. Based upon his actual earnings of $1,020.00 per week, the Administrative Law Judge found that 66-2/3% of that amount is $680.00.($1,020.00 AWW x 66-2/3% = $680.00.) Therefore, according to the Administrative Law Judge's method of calculating benefits, the claimant is entitled to the maximum $466.00 per week for temporary total disability benefits.

As the respondents correctly assert, however, this claim represents an "exceptional circumstance", that does not fall squarely within the confines of prior case law. This claim is distinguishable from prior cases primarily because the claimant was under contract to work for nine weeks, versus an unlimited number of weeks throughout the year depending on the weather or other factors, or pursuant to a yearly, renewable contract. And, while the Administrative Law Judge used the correct formula to calculate the claimant's weekly compensation rate pursuant to Magnet Cove School District v. Barnett, supra, she erred

by not taking into consideration that the claimant's contract was for a very limited period of time: specifically, nine weeks. Therefore, as the respondents correctly assert, should the claimant receive $466.00 per week in temporary total disability benefits, he would receive more in disability benefits after twenty weeks than he was contracted to earn in nine weeks.

As previously discussed, the claimant was contracted to earn $9,180.00 over a nine week period, which averages $1,020.00 per week. ($9,180.00 ÷ 9 = $1,020.00.) According to Ark. Code Ann. §11-9-519(a), the maximum amount that a claimant can receive in temporary total disability benefits per week is 66-2/3% of the his average weekly wage, not to exceed $466.00. In the claimant's case, therefore, under regular employment circumstances, he would be entitled to the maximum compensation rate of $466.00 per week. The maximum rate of $466.00 multiplied by fifty-two weeks equals $24,232.00 ($466.00 x 52 = $24,232.00). Obviously, this amount far exceeds what the claimant was contracted to earn while working for the respondent employer. On the other

hand, the maximum rate of $466.00 at twenty weeks equals $9,320.00, ($466.00 x 20 = $9,230.00), which is $140.00 above what the claimant would have earned with the respondent employer pursuant to his contract. ($9,230.00 - $9,180.00 = $140.00.) However, the claimant's contracted compensation of $9,180.00 divided by fifty-two weeks equals $176.54 per week. ($9,180.00 ÷ 52 = $176.54.) This weekly amount times 66-2/3% equals $118.00 per week, which multiplied by fifty-two weeks totals $6,136.00.($176.54 x 66-2/3% = $118.00 x 52 = $6,136.00.) Sixty-six and two-thirds percent (66-2/3%) of the claimant's contracted wages of $9,180.00 equals $6,127.65. Therefore, a weekly compensation rate of $118.00 fairly represents 66-2/3% of the claimant's contracted wages with the respondent employer.

Considering the exceptional circumstances of this claim, it would be both unjust and unfair to award the claimant temporary total disability benefits at the maximum compensation rate of $466.00 per week. The claimant was not a regular employee. Rather, the claimant was a seasonal

employee contracted to work for the respondent employer for a period of nine weeks. In Farm Air Corp. v. Reader, 11 Ark. App. 72, 666 S.W.2d 717 (1984), the Court of Appeals recognized that it is generally considered contrary to the concept of "fair and just to both employee and employer" and "against public policy" to compute an employee's wage so that it will result in a compensation award that pays the employee more during his period of disability than he is accustomed to earn in his usual or normal year around activity. (Quoting from, 11 Schneider, Workmen' Compensation Law 2175 (perm. ed. 1957)). Moreover, it can be logically assumed that the claimant was employed elsewhere throughout the year. Therefore, the respondents' argument that it would be inappropriate to find that the claimant earned an average weekly wage of $1,020.00 year round, as this would require consideration of the other income the claimant earned at other jobs he might hold throughout the year, is persuasive. This argument is persuasive, in that it would place an unfair burden on the respondents to pay compensation based on his yearly combined income, rather than on the wages he

earned at the job at which he was injured. See, Hart's Exxon Service Station v. Prater, 268 Ark. 961, 597 S.W.2d 130(Ct. App. 1980).

Based on the above and foregoing, we find that the claimant has failed to prove by a preponderance of the evidence that he is entitled to the maximum compensation rate of $466.00 per week. Rather, we find that the preponderance of the evidence supports a finding that a weekly compensation rate for temporary total disability benefits in the amount of $118.00 is just and fair to all parties concerned. Therefore, the decision of the Administrative Law Judge to award increased weekly compensation should be and hereby is reversed. Moreover, the Administrative Law Judge ordered the respondents to pay "their proportionate share of attorney's fees." However, the claimant was not represented by counsel in this claim. Therefore, the provisions set forth in Ark. Code Ann. §11-9-715 do not apply in this case. Because the Administrative Law Judge erred in directing the respondent's to pay

attorney's fees, this award should be and hereby is reversed.

IT IS SO ORDERED.

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OLAN W. REEVES, Chairman

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KAREN H. McKINNEY, Commissioner

Commissioner Turner concurs in part and dissents in part.

CONCURRING AND DISSENTING OPINION

I must respectfully concur in part and dissent in part with the Majority decision. Specifically, I concur with the Majority's decision to deny the claimant attorney's fees. However, I must respectfully dissent from the portion of the decision regarding the calculation of the claimant's average weekly wage.

I agree with the Administrative Law Judge's conclusion that the claimant should receive the maximum compensation rate. As noted by the Administrative Law

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

As also noted by the Administrated Law Judge, 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. See also, Farm Air Corp. v. Reader, 11 Ark. App. 72, 666 S.W.2d 717 (1984).

Further, the Commission is required under the provisions of Ark. Code Ann. § 11-9-704(c)(3) to strictly construe statutes. In Lawhon Farm Services v. Brown, 335 Ark. 272, 984 S.W.2d 1 (1998), the Supreme Court stated:

> Strict construction means narrow construction. In Arkansas Conference Seventh Day Adventists v. Benton City Board of Equalization, 304 Ark. 95, 800 S.W.2d 426 (1990), and Thomas v. State, 315 Ark. 79, 864 S.W.2d 835 (1993), we wrote that strict construction requires that nothing be taken as intended that is not clearly expressed. The doctrine of strict construction is to use the plain meaning of the language employed. Holaday v. Fraker, 323 Ark. 552, 915 S.W.2d 280 (1996). Even when statutes are to be strictly construed, however, they must be construed in their entirety, harmonizing each subsection where possible. MenArk Pallett Co. V. Lindsey, 558 Ark. App. 309, 950 S.W.2d 468 (1997).

In this case, there is no dispute that the claimant was under a contract of hire at the time of his accident. Accordingly, I find that under a strict construction of Ark. Code Ann. §11-9-518, the claimant's wage rate should be calculated by only looking at the claimant's wages during the contract of hire. Accordingly, the claimant's wage rate was calculated correctly.

Finally, as previously noted, the courts have already determined that seasonal wages are to be considered

by calculating the contract of hire in force at the time of hire. In fact, I find this case to be similar to that of Magnet Cove, See supra. In that instance, the claimant worked as a teacher who was under contract to work 188 days per year. She was paid $26,500 per year and was paid in 12 monthly installments. She was docked $143.62 per day if she was absent after her leave time had been exhausted. On appeal the respondents asserted that the claimant's weekly wage rate should be calculated over a 12-month period. The Court rejected the argument, and instead found that pursuant to the contract of hire, the claimant's wages should be calculated by using the ninth month period as specified by the contract of hire. In making this finding, the Court noted that the claimant would be docked for time she was absent from work and noted that pursuant to the language of statute, the compelling consideration was the wage rate pursuant to the contract of hire in force at the time of the injury. Id.

I find the rationale of Magnet Cove to be convincing in the present case. Just as in Magnet Cove, the

current claimant was under a contract of hire for a limited time period each year. Pursuant to that contract, the claimant would receive a set pay, but would receive reduced wages in the event of an absence. Accordingly, the primary consideration should be the wages he was earning under the contract of hire at the time of injury.

The Majority asserts that the Administrative Law Judge’s method of calculating the wage rate will result in the claimant receiving more money during his disability than he would have received in wages during the remainder of the year. In my opinion, part of the reason only the wages under the contract of hire are considered in calculating the compensation rate for seasonal employment is that the claimant will presumably work at other, similar places throughout the year. Therefore, it is unlikely that he would receive more in compensation than he would have earned through gainful employment.

The Majority also admits they believe the claimant worked at other, similar employment during the remainder of the year. This also supports the finding that the claimant

would not receive more in disability benefits than he earned in the past year or would earn in the future. Finally, I note that despite the respondents' admission the claimant had other work throughout the year, the Majority fails to use those wages when arriving at the $118 compensation rate, which clearly reaches an inequitable result for the claimant.

Finally, I note that in the present case, the claimant would have earned wages totaling $9,180 pursuant to the contract of hire. Yet, if one used the $118 wage rate proposed by the respondents, it would take the claimant an estimated 52 weeks to receive 66 2/3% of wages he would have received pursuant to his contract of hire. It would take some 77.79 weeks for him to receive compensation equal to the wages for the period of his contract of hire. Finally his compensation rate would equal only an estimated 12% of the weekly wage he received pursuant to the contract of hire. As such, I find that to use the compensation rate proposed by the claimant would not be the equivalent of 66

2/3% of the claimant's average weekly wage, nor would it adequately compensate the claimant for his loss of income.

For the aforementioned reasons, I respectfully concur in part and dissent in part.

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SHELBY W. TURNER, Commissioner