

NOT DESIGNATED FOR PUBLICATION

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO. F803212

BILLY KOLB (DECEASED), EMPLOYEE	CLAIMANT
BILLY KOLB LOGGING, EMPLOYER	RESPONDENT NO. 1
AMERICAN INTERSTATE INSURANCE, INSURANCE CARRIER	RESPONDENT NO. 1
DEATH & PERMANENT TOTAL DISABILITY TRUST FUND	RESPONDENT NO. 2

OPINION FILED NOVEMBER 3, 2009

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

Claimant represented by the HONORABLE C. MICHAEL WHITE,
Attorney at Law, North Little Rock, Arkansas.

Respondents No. 1 represented by the HONORABLE MICHAEL
E. RYBURN, Attorney at Law, Little Rock, Arkansas.

Respondent No. 2 represented by the HONORABLE DAVID
PAKE, Attorney at Law, Little Rock, Arkansas.

Decision of Administrative Law Judge: Affirmed and
Adopted.

OPINION AND ORDER

Claimant appeals an opinion and order of the
Administrative Law Judge filed July 6, 2009. In said
order, the Administrative Law Judge made the following
findings of fact and conclusions of law:

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

2. The 17 stipulations set forth above that were entered into by Claimant and Respondents No. 1 as part of the Joint Stipulations and Agreed Record are reasonable and are hereby accepted.
3. The disposition of the average weekly wage issue 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) (Repl. 2002).
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 reported 2007 gross earnings by an amount equal to reported expenses paid during the period, including depreciation, which equals \$9,379.00, and to divide that figure by the 51 full weeks that he worked that year, which equals an average weekly wage for the period in question of \$183.90.
7. Respondents No. 1 have controverted all permanent benefits over and above those based on the \$180.00 average weekly wage they have been paying.
8. Claimant has proven by a preponderance of the evidence that he is entitled to a controverted attorney's fee at the expense of Respondents No. 1 on all indemnity benefits awarded to Claimant over and above what is being paid pursuant to the inaccurate average weekly wage, pursuant to Ark. Code Ann. § 11-9-715 (Repl. 2002).

We have carefully conducted a de novo review of the entire record herein and it is our opinion that the

Administrative Law Judge's decision is supported by a preponderance of the credible evidence, correctly applies the law, and should be affirmed. Specifically, we find from a preponderance of the evidence that the findings of fact made by the Administrative Law Judge are correct and they are, therefore, adopted by the Full Commission.

Therefore we affirm and adopt the July 6, 2009 decision of the Administrative Law Judge, including all findings and conclusions therein, as the decision of the Full Commission on appeal.

IT IS SO ORDERED.

A. WATSON BELL, Chairman

KAREN H. MCKINNEY, Commissioner

Commissioner Hood dissents.

DISSENTING OPINION

I must respectfully dissent from the majority opinion. Under the Arkansas Workers' Compensation Law, the compensation rate for injured workers and for the individuals entitled to death benefits is based on the average weekly wage of the injured worker. Ark. Code

Ann . §11-9-501; Ark. Code Ann. §11-9-518. With regard to the determination of the average weekly wage, Ark.

Code Ann. §11-9-518 provides the following:

(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.

(b) Overtime earnings are to be added to the regular weekly wages and shall be computed by dividing the overtime earnings by the number of weeks worked by the employee in the same employment under the contract of hire in force at the time of the accident, not to exceed a period of fifty-two (52) weeks preceding the accident.

(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.

Importantly, the purpose of providing indemnity benefits to injured workers is to provide income replacement sufficient to allow the injured worker or the deceased worker's dependents to maintain his or her standard of living, subject to statutory maximums. Consequently, the objective of determining the average weekly wage of the injured worker, and in calculating the compensation rate, is to arrive at as fair of an estimate as possible of the worker's earning capacity at the time of the injury. Arthur Larson, Workmen's Compensation Law, §60 (1993). In other words, the goal is to accurately estimate a claimant's earning capacity and to provide a level of compensation bearing a proper relationship to it. Arthur Larson, Workmen's Compensation Law, §60.32 (1993). Thus, in determining the average weekly wage and the correct compensation rate, the goal of replacing what an injured employee would have earned, but for the injury, must be the primary consideration.

In the claim presently before the Commission, the claimant was in the logging business, and his income was derived from the delivery of logs to the mill. Consequently, there was no contract of hire upon which

to base an average weekly wage, and he was not compensated on a piece basis. Accordingly, due to exceptional circumstances, "the commission may determine the average weekly wage by a method that is just and fair to all parties concerned."

Here, the parties have agreed that, under the circumstances, the tax returns of Mr. and Mrs. Kolb provide the best evidence of Mr. Kolb's earnings from the sole proprietorship. Their 2007 tax return reports gross earnings of \$187,746.00. From these gross earnings, the following expenses were deducted:

Advertising	\$250.00
Contract Labor	\$30,198.00
Depreciation	\$40,135.00
Interest	\$9,973.00
Supplies	\$36,475.00
Utilities	\$3,250.00
<u>Other Expenses (Fuel)</u>	<u>\$58,086.00</u>
Total Expenses	\$178,367.00

After the above expenses were deducted a net income of \$9,379.00 remains. This leaves an average weekly wage of \$180.36, resulting in a total disability compensation rate of \$120.00. Common sense leads to the conclusion that the claimant did not support a family of

six on \$9,379.00 a year. However, under this theory, Mrs. Kolb is currently receiving \$42.00 per week for herself, and she is currently receiving \$18.00 per week for each child. This makes no sense, and is not "a method that is just and fair to all parties concerned." A method that would be "just and fair to all parties concerned" would be to not deduct depreciation from the claimant's gross earnings. Under this method, the claimant's net earnings totaled \$49,514.009, resulting in an average weekly wage of approximately \$952.00 for a compensation rate of \$504.00. Thus, under Ark. Code Ann. §11-9-527, the Mrs. Kolb is entitled to 35% of the \$504.00, or \$176.00 per week, and she is also entitled to 15% of that amount, or \$75.60 per week, for each of the four surviving children. Clearly, this is more in line with the support that the claimant provided to his family during his lifetime.

The inclusion of depreciation expenses in the calculation does not result in an average weekly wage that accurately reflects the actual earning capacity of the injured worker. Depreciation is not an active expense which affects the amount of expendable income earned. Instead, depreciation is simply an accounting method which affects income only on paper.

Specifically, depreciation is a means of allowing a person to regain expenditures by allocating the expense over the useful period of the property, thereby spreading the tax advantage of the expenditure over the anticipated life of the property. Since the purpose of depreciation is to assist a person in regaining expenditures in this means, it does not follow that depreciation is a business expenses for the purpose of determining an individual's disposable income for any specific period. Thus, the depreciation expense simply had no affect whatsoever on the actual earnings available to the claimant and his family over the previous 52 weeks which are to be considered in determining average weekly wage. Accordingly, deducting depreciation expenses from his gross earnings results in an inaccurate and distorted estimate of the injured worker's earning capacity at the time of the injury, and it does not produce a compensation rate that bears a reasonable relationship to that earning capacity.

Again, the objective of determining the average weekly wage of the injured worker, and in calculating the compensation rate, is to arrive at as fair of an estimate as possible of the worker's earning capacity at the time of the injury. Arthur Larson,

Workmen's Compensation Law, §60 (1993). The majority has not done so here, stating that the issue is controlled by Hunt v. Lovett, Claim No. E218307 (Full Commission Opinion filed September 16, 1996.) It is my opinion that Hunt, while certainly in line with precedent from other states, does not follow the purpose of Arkansas workers' compensation law, See Ark. Code Ann. §11-9-101, and should not be followed.

For the aforementioned reasons I must respectfully dissent.

PHILIP A. HOOD, Commissioner