

BEFORE THE ARKANSAS WORKERS' COMPENSATION COMMISSION

CLAIM NO.: H206746

**JEREMY C. RUSSELL,
EMPLOYEE**

CLAIMANT

**PERFORMANCE PROPPANTS, LLC,
EMPLOYER**

RESPONDENT

**BRIDGEFIELD CASUALTY, INS. CO./
SUMMIT CONSULTING, LLC,
INSURANCE CARRIER/THIRD PARTY
ADMINISTRATOR (TPA)**

RESPONDENT

OPINION FILED JUNE 9, 2023

Hearing held before ADMINISTRATIVE LAW JUDGE CHANDRA L. BLACK in Texarkana, Miller County, Arkansas.

Claimant represented by the Honorable Andy L. Caldwell, Attorney at Law, Little Rock, Arkansas.

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

Statement of the Case

On March 14, 2023, the above-captioned claim came on for a hearing in Texarkana, Arkansas. Previously, a pre-hearing telephone conference was conducted in this matter on January 11, 2023. That same day, a Pre-hearing Order was filed. A copy of said order has been marked as Commission's Exhibit 1 and made a part of the record.

Stipulations

During the prehearing telephone conference, and/or hearing the parties agreed to the following stipulations:

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

2. That the employee-employer-insurance carrier relationship existed at all relevant times, including on or about June 9, 2022, when the Claimant sustained an admittedly compensable injury to his right knee, while working for the respondent-employer.
3. The Respondents accepted the right knee injury and paid some benefits.
4. The Respondents have paid the Claimant temporary total disability (TTD) at the rate of \$719.00 per week.
5. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Issues

By agreement of the parties, the issues to be litigated at the hearing included the following:

1. The Claimant's correct average weekly wage (AWW) on the day of his injury.
2. Whether the Claimant is entitled to an underpayment of temporary total disability due to a miscalculation of his average weekly wage.
3. Whether the Claimant's attorney is entitled to a controverted attorney's fee.

Contentions

The respective contentions of the parties are as follows:

Claimant:

The Claimant contends that he sustained injuries to his left knee in the course and scope of his employment while working for the Respondent-employer on August 6, 2020. The Claimant was placed at maximum medical improvement (MMI) on April 22, 2022, and released by Dr. Smith for his left knee injury with permanent restrictions of limited standing and limited stairs permanently. On or about May 13, 2022, Respondents wrote to the Claimant and advised that his prior job (earning \$23/hour and working 60-84 hours per week) was not available. Respondents offered the Claimant another position earning \$20/hour working six twelve-hour days on/two days off. The Claimant started that position on May 23, 2022, and suffered an injury to his right knee on or about June 9, 2022, while bending over to set a toolbox down that he was carrying. The Claimant contends that the Respondents miscalculated his AWW and TTD benefits.

Ark. Code Ann. §11-9-518 provides, in pertinent part, that the average weekly wage shall be computed on the average weekly wage earned by the employee under the contract of hire at the time of the accident and in no case shall be computed on less than a full-time work week. Overtime is 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 at the time of the accident. According to the Respondents' evidence, the Claimant's contract of hire at the time of his accident was \$20.00 an hour for six days per week working 12 hours per day. Forty (40) hours per week at \$20.00 an hour equals \$800.00. The contract of hire called for the Claimant to work 32 hours of overtime per week at the overtime rate of \$30.00 an hour, which equals \$960.00. The base rate of \$800.00 plus the overtime rate of \$960.00 equals an AWW of \$1,760.00. Therefore, $\$1,760.00 \times .6667 = \$1,173.00$. The Claimant anticipates that the testimony will actually reflect that even though the employer offered the aforementioned contract of hire, the employer changed the contract of hire to a seven-day work week, working twelve (12) hours a day at the same rate of pay of \$20 per hour times 40 hours per week with the employee to take the following week off. If the Commission finds in favor of this evidence, the appropriate AWW should be \$1,430.00. This is calculated by multiplying the base rate of pay of \$20.00 per hour times 40 hours per week. Ark. Code Ann. §11-9-518(a)(1) provides that in no case shall the average weekly wage be calculated using less than a full-time work week. Ark. Code Ann. §11-9-518(b) provides that 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 at the time of the accident. If the Claimant worked 42 hours of overtime per week but only worked two weeks under the new contract of hire, then that would be 21 hours of overtime per week. Thirty dollars (\$30.00)

multiplied by 21 hours of overtime equals \$630.00. Eight hundred dollars (\$800.00) plus \$630.00 equals an average weekly wage of \$1,430.00. One thousand four hundred thirty (\$1,430.00) x .6667 = \$953.00. The maximum compensation rate for a 2022 injury is \$790.00.

No matter how it is calculated, the Claimant is entitled to the maximum compensation rate for 2022. Respondents have underpaid the Claimant. The Respondents made two payments on September 23, 2022, and September 30, 2022, at the maximum compensation rate of \$790.00 then, the Respondents notified the Claimant that they had made an overpayment and they started paying the Claimant at the rate of \$719.00 per week and they deducted their claimed credit in the first check issued on or about October 18, 2022, which was for \$1,296.00. The remaining payments have been paid in the amount of \$719.00 per week. The Claimant is entitled to the maximum compensation rate for 2022. The Claimant is entitled to the underpayment and attorney's fees for the past benefits and additional indemnity going forward.

All other issues are reserved.

Respondents:

The Respondents contend that the Claimant injured his left knee. The claim was accepted. Benefits were paid at the correct compensation rate by the Respondents. The file numbers on the Claimant's prehearing information are incorrect as is the correct carrier.¹

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on my review of the relevant evidentiary record, to include the documentary evidence listed below, other matters properly before the Commission, and after having had an opportunity to hear the testimony of the witnesses and observe their demeanor during the hearing,

¹ The Claimant's attorney has corrected the aforementioned clerical error.

I hereby make the following findings of fact and conclusions of law in accordance with Ark. Code Ann. §11-9-704 (Repl. 2012):

1. The Arkansas Workers' Compensation Commission has jurisdiction over this claim.
2. I hereby accept the above-mentioned proposed stipulations as fact.
3. The Claimant evidence preponderates that the Claimant's average weekly wage on June 9, 2022, was \$,1016.66. His weekly compensation rates are \$728.00 and \$546.00.
4. The Claimant proved by a preponderance of the evidence that he is entitled to an underpayment and attorney's fees for past benefits and additional indemnity benefits due him in the future.
5. All issues not litigated herein are reserved under the Arkansas Workers' Compensation Act.

Summary of Evidence

Mr. Jeremy C. Russell (referred to hereafter as the "Claimant") testified on his own behalf. Also, Ms. Cason Wilkinson testified on behalf of the Respondents.

The record consists of the March 14, 2023 hearing transcript and the following exhibits, which were offered into evidence without objection: Specifically, Commission's Exhibit 1 includes the January 11, 2023 Pre-hearing Order; Claimant's Exhibit 1, comprises 13 numbered pages of Claimant's Non-Medical Exhibit; Respondents' Hearing Exhibit consists of four pages, which was marked as Respondents' Exhibit 1; and Respondents' Exhibit 2 consists of one page of calculations for the Claimant's average weekly wage.

The Claimant's and the Respondents' responses to the Pre-hearing Questionnaires have been blue-backed and made a part of the record. They were inadvertently omitted from the hearing transcript of March 14, 2023. Also, the parties filed Post-Hearing Briefs which have been blue-backed and made a part of the record.

Testimony

Jeremy C. Russell

The Claimant has worked for the respondent-employer for five years. He began working for them in March of 2019. The Claimant verified that he sustained a prior on-the-job injury to his left knee on August 6, 2020. While on light duty due to this injury, the Claimant confirmed that he got a raise from \$20.00 to \$23.00. During the Claimant's first injury of August 2020, he received treatment from Dr. Joel Smith. On April 22, 2022, Dr. Smith pronounced the Claimant to be at maximum medical improvement (MMI) and released him to return to work due to his left injury.

At that time, Dr. Smith placed the Claimant on permanent restrictions of limited standing and limited climbing of stairs. He confirmed that he continued to work in the same position that he had worked in for a few weeks. The Claimant agreed that between April 22 and May 23, he continued working the other job that he had been doing. At that point, the Claimant was still making \$23.00 an hour.

The Claimant admitted that included in Respondents' Exhibit 1 is a letter dated May 13, 2022. Per this letter, the employer gave the Claimant the choice of three (3) positions within his restrictions. The three job choices were that of a dry plant operator, a dredge operator, and a load out operator. He verified that he accepted the new position on May 23, 2022, as a dredge operator. The Claimant agreed that as a dredge operator he made \$20.00 an hour. Initially, the Claimant was working 12 hours per shift. He explained that this meant he was working six days on and six days off. The Claimant admitted that he worked that schedule for a period of time.

However, the Claimant agreed that the terms of his employment changed to seven days on and seven offs, which meant he worked seven 12-hour shifts and then he had seven days off. The Claimant sustained a second injury on June 9, 2022. His most recent injury was to his right knee.

At the time of his injury, the Claimant testified that he had just come back to work the seven on shift. He had been on the seven offs. However, at that point, the Claimant had come back, they were changing to the six (6) and two (2) again, but the seven (7) is what he was working on June 9, the date of his injury. The Claimant admitted he worked light duty for a period of time after that, but he has been taken off of work on September 22. He agreed that he has been off work since that time and the Respondents have been paying him temporary total disability benefits beginning on September 23, 2022.

The Claimant agreed that they initially paid him two weeks of temporary total disability benefits at the maximum rate of \$790.00. However, the Claimant's next check, which was for the period of October 7, through October 20, the Respondents paid the Claimant only \$1,296.00 and told him it was their position that they had been overpaying him. Therefore, they deducted the overpayment and took a credit, and his next check was for \$1,438.00. Since that time, they have been paying the Claimant at this rate, every two weeks, which amounts to \$719.00 per week.

He explained:

Q And then after that, after your right knee injury on June 9, 2022, you continued to work light duty up until September 22nd?

A Yes, that's correct.

Q And you been off since?

A Yes.

Q Okay, when you went to work for Performance, did you get paid the first week that you worked there?

A Yes.

The Claimant was questioned about the Employer's Wage Records of evidence. He agreed these records purportedly show his wages from June 4, 2022, through June 6, 2021. (Rx. 3) The Claimant confirmed that payments from May 29 through June 4; would have actually been for the work done for the week of May 22 through May 28. He agreed that in these records there is nothing showing that he was paid for the week of June 5th. Therefore, the Claimant maintained that there are two (2) weeks of wages missing from this document with respect to the wages he earned before his injury.

On cross-examination, the Claimant confirmed that prior to his current injury, he was making \$23.00 an hour. The Claimant admitted that upon his release, he was on light duty, which restricted him from climbing stairs, ladders, and things of that nature. Therefore, they offered him three jobs within his restrictions. The Respondents' counsel asked the Claimant why his job was changed to \$20.00 an hour. His reply was: "I have no idea. They offered me When the doctor released me, they said they had three positions open for me, and I could take one of those three or go home and all three were upstairs."

The Claimant admitted that he signed a new contract in May 2022. He confirmed that his contract of hire was offered into the record by the Respondents. The Claimant specifically agreed that the contract of hire in force at the time of his injury was for \$20.00 an hour. He confirmed that he is currently on restrictions and is drawing temporary total disability.

Regarding his pay, the Claimant admitted that he gets paid straight time for 40 hours. Anything over 40 hours per week, the Claimant gets paid \$30.00 an hour. The Claimant agreed that per the Respondents' exhibit, the year prior to his injury, he made \$51,000.00.

With respect to his earnings for 2022, the Claimant confirmed that the \$6,594.00 is for his wife's earnings, but he did not recall. He denied having a business. The Claimant admitted that he knew he was making three dollars less on the new contract.

On redirect-examination, the Claimant confirmed that when he went back to work following his left knee injury, they offered him the new position in May 2022, as a dredge operator. Per the terms of the contract, based on the Respondents' exhibit, the Claimant worked 12 hours per day, six days a week. He agreed that when he worked over 40 hours, he got time and a half, which amounted to \$30.00 an hour.

He agreed that he was under a new contract of hire at the rate of \$20.00 an hour, with 12 hours per shift six days a week, then he was off for a week, and then he started seven on and seven off. The Claimant confirmed that he was off for a week and then he worked a week and was injured.

On recross examination, the Claimant agreed that the 52 weeks of wages prior to his injury includes his overtime pay as well as his regular pay. He agreed the year prior to his injury, he was making \$23.00 an hour. The Claimant was released from the first injury on April 22, 2022.

Ms. Cason Wilkinson

Ms. Wilkinson confirmed she is employed at Performance Proppants. She has worked there for a little over four years. She is the HR manager and oversees various things pertaining to payroll and the assignment of jobs and things of that nature. Ms. Wilkinson confirmed that she

worked there in 2022 and 2023. She also confirmed that she is familiar with the Claimant's two injuries. She agreed the Claimant's first injury is not an issue.

She verified that when the Claimant came back to work from his first injury, he had some restrictions. Per Ms. Wilkinson, the restrictions placed on the Claimant after his first injury involved limited climbing of stairs and ladders. She confirmed that she worked with the plant manager to find a position for the Claimant within his restrictions. Ms. Wilkinson testified that they came up with three positions and the Claimant chose the one he preferred.

Ms. Wilkinson confirmed that although employees have a set schedule, it can be changed or altered at any time. She explained:

Q It appears that none of his checks are the same amount. Is there a reason for that?

A Because hours can vary. They could get called in, they could get called off.

She confirmed that employees work a lot of overtime hours depending on their position.

Ms. Wilkinson agreed that when Respondents' counsel asked for the payroll records preceding the date of the Claimant's second injury, she sent counsel those records retrieved from the records she keeps at the plant. She agreed those payroll records are kept in their payroll system. Ms. Wilkinson denied that employees are not paid for the first week of their work with the company. Instead, employees get paid from the day they start, and for every payroll they get paid for the hours worked in that payroll period. She testified employees are not paid on a biweekly basis.

Ms. Wilkinson confirmed that she called the company to get information concerning the missing week of June 5 through June 9, 2022. She calculated the Claimant's regular hours based on the rate of \$20.00 an hour, and his overtime rate of pay was \$30.00 an hour. Ms. Wilkinson agreed that she calculated the Claimant's pay for the week of June 9, 2022, and it came to \$1,209.50.

On cross-examination, she confirmed that employees are paid on a weekly basis. She confirmed that the days of pay were for June 5, 6, 7, 8 and 9. Ms. Wilkinson confirmed that what they offered was for the Claimant to be paid at the rate of \$20.00 an hour, 12 hours per day, six days per week. She admitted that from his first injury, he was on light duty for the most part. Ms. Wilkinson did not have any reason to dispute the Claimant's testimony of there being a seven and seven. She agreed that the shifts schedules change from time to time.

Adjudication

Average Weekly Wage

Arkansas Code Annotated section 11-9-518 provides:

(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.

(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 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.

The Claimant had an earlier injury to his left knee in August 2020. He was released from medical care of his left knee with permanent restrictions of limited climbing of stairs and ladders. As a result, the company offered the Claimant three options of suitable jobs within his restrictions. Said job options included that of a dry plant operator (\$18/hr.); loadout operator (\$17/hr.); and dredge operator (\$20/hr.).

Upon the Claimant's release to return to work following his August 2020 injury, the Claimant decided to take the position of dredge operator. The Claimant began working under this new contract of hire as a dredge operator on May 23, 2022. However, the Claimant sustained an injury to his right knee on June 9, 2022. At that juncture, the Claimant had been working under his new contract of hire as a dredge operator for only eighteen (18) days.

Currently, at issue is the Claimant's correct average weekly wage at the time of his June 9, 2022, accidental right knee injury. A copy of the Claimant's contract of hire in force at the time of his June 2022 accidental injury has been made a part of the record. (Rx 1 at 2)

The parties agree that the Claimant's contract of hire in force at the time of his June 2022 injury was for forty hours per week at the rate of \$20.00 an hour. The Claimant's regular weekly wages amounted to \$800.00. The contract of hire does not specify that the Claimant was guaranteed a set number of overtime hours. It simply states that the Claimant is eligible for overtime pay. I found that Ms. Wilkinson was credible in stating that the Claimant was not guaranteed a specific number of overtime hours each week. Her testimony is corroborated by the Claimant's pay for the three weeks he worked and the contract of hire, which does not specify a set number of overtime hours each week. Nevertheless, both parties agree that the Claimant overtime rate of pay was \$30.00 an hour.

At dispute is the proper calculation of the Claimant's overtime pay. Both parties' contentions are discussed above and in their Post-Hearing Briefs. However, I respectfully disagree with both parties' calculations.

In that regard, the most relevant law for guidance reads:

(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 exceed a period of fifty-two (52) weeks preceding the accident.

My review of the evidence of records that the Claimant worked approximately three weeks before his June 2022 injury to his right knee. The Claimant began his new contract of hire on May 23, 2022. Payroll records show that from May 22, 2022 through May 28, 2022, the Claimant earned \$1,016.66 (overtime earnings \$216.66). For the week of May 29, 2022 through June 4, 2022 the Claimant's wages totaled \$1,049.05 (overtime pay \$249.05). Ms. Wilkinson testified that for the week of June 5 through June 9, 2022, the Claimant made \$1,209.50 (overtime pay \$409.50). The Claimant's total overtime earnings for the three weeks he worked under his contract of hire in force at the time of his accident equals total overtime earnings of \$875.21, which is divided by the three weeks worked for a total overtime rate of \$291.74; therefore, \$291.74 plus \$800.00 equals an average weekly wage of \$1,091.74. His compensation rates are \$728.00 and \$546.00. This means the Respondents have been underpaying the Claimant for his weekly indemnity benefits since they have been paying him at a rate of \$719.00.

Therefore, I must find that the Claimant proved by a preponderance of the evidence he is entitled to an award for an underpayment of indemnity benefits. Hence, the Claimant is entitled to the underpayment and attorney's fees for the past benefits and additional benefits going forward.

Of note, I realize that the Claimant's earnings for May 22, 2022 is pursuant to his previous contract of hire. However, I am persuaded that including this one day in the Claimant's earnings for that week is just and fair to all parties concerned.

AWARD

The Respondents are directed to pay benefits in accordance with the findings set forth

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herein.

IT IS SO ORDERED.

Hon. Chandra L. Black
Administrative Law Judge