

Page 814

293 S.E.2d 814
58 N.C.App. 602
Callie Mae BALDWIN, Widow, Willie
Baldwin, Deceased,
Employee, Plaintiff;
v.
PIEDMONT WOODYARDS, INC.,
Employer;
American Mutual Liability Insurance
Company, Carrier, Defendants
No. 8110IC1116.
Court of Appeals of North Carolina.
Aug. 3, 1982.

Paul S. Messick, Jr., Gunn & Messick, Pittsboro, for plaintiff-appellee.

Teague, Campbell, Conely & Dennis by G. Woodrow Teague and George W. Dennis, III, Raleigh, for defendants-appellants.

WEBB, Judge.

The defendants' first assignment of error is to the Commission's failure to give effect to the agreement for compensation dated 6 February 1979 which was signed by the parties. This agreement was not approved by the Industrial Commission pursuant to G.S. 97-17 and it is not binding.

The only other question involved in this appeal is the correctness of the determination of the decedent's earnings in setting compensation. G.S. 97-38 provides that death benefits shall be based on the decedent's average weekly wages. G.S. 97-2 provides in part:

"(5) Average Weekly Wages.--'Average weekly wages' shall mean the earnings of the employee in the employment in which he was working at the time of the injury ... divided by 52

* * *

* * *

Page 816

[58 N.C.App. 604] But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury."

The calculation of compensation is difficult in this case. G.S. 97-38 provides compensation will be based on average weekly wages. The decedent did not receive wages from Piedmont Woodyards but sold pulpwood to Piedmont for a certain price per cord. The Deputy Commissioner treated the entire sum received by the decedent in 1978 as wages. The Full Commission calculated the income of decedent by deducting certain expenses from what he received from Piedmont. We agree with the Full Commission that by the method it used in determining income from Piedmont, expenses incurred in producing revenue should be deducted. We believe, however, that depreciation on business equipment, interest on business debts and the purchase price of a saw should have been included as business expenses. We note that depreciation as allowed by the Internal Revenue Service might not coincide with actual depreciation and that if the interest paid is on a business debt incurred during a previous year, it would not be deductible from the current year's income. If the saw were to last for more than one year, its cost could be amortized rather than the entire price being deducted in the current year. We reverse and remand for further consideration.

We have filed today York v. Unionville Fire Department, --- N.C.App. ---, --- S.E.2d --- (1982) in which a problem was faced similar to the one in this case. We point out, as in that case, that if the Commission does



not feel the method it first used produces a result fair to the employer and employee, it may use an alternate method in determining compensation. Since the decedent in this case operated his own business, the return to him for his work would not necessarily coincide with the profit and loss statement. The return to the decedent might, in operating his own business, be substantially more than is reflected in the profit and loss statement. The Commission might also want to consider what it would have cost the decedent to hire someone to have done his job.

[58 N.C.App. 605] The defendants also contend the Industrial Commission erred in its mathematical calculations in fixing compensation. We do not discuss this assignment of error as the matter upon which it is based may not recur.

Reversed and remanded.

CLARK and WHICHARD, JJ., concur.