

COURT OF APPEALS OF VIRGINIA

Present: Judges Coleman, Willis and Bray
Argued at Norfolk, Virginia

HAMPTON ROADS ADMIRALS

and

AETNA CASUALTY AND SURETY COMPANY

MEMORANDUM OPINION* BY
JUDGE JERE M. H. WILLIS, JR.

v. Record No. 2128-94-1

AUGUST 8, 1995

PATRICK CAVANAGH

FROM THE VIRGINIA WORKERS' COMPENSATION COMMISSION

Kevin E. Mooney (Robert W. McFarland; Mark S. Davis; McGuire, Woods, Battle & Boothe, on briefs), for appellant.

Patrick Cavanagh, pro se.

The award of the commission is modified and affirmed.

1. The commission's holding that the question of maximum medical recovery was not an issue in the claim is supported by the record. While the employer protested what it termed an ex parte determination of compensable disability, it expressly acknowledged "that the time for requesting a review of such determination has already passed." This supports the commission's determination that the issue of compensability was conceded.

2. We find no abuse of discretion in the commission's determination that the proper measure of average weekly wage was not the allowances paid temporarily during the try-out period,

*Pursuant to Code § 17-116.010 this opinion is not designated for publication.

but the average weekly wage of a player who made the team. The parties agreed that this was the proper approach. The deputy commissioner correctly determined that the average weekly wage was \$277.77, to which should be added a weekly housing allowance of \$46.15, making a total average weekly wage of \$323.92. The commission erred in adding to that figure a meal allowance of \$18 per day (\$126 per week). The uncontradicted evidence established that the meal allowance was paid only during the try-out period, as the alternative to a wage. It was not paid during the regular season, once payment of a regular wage began.

This case is remanded to the commission for entry of an award based upon an average weekly wage of \$323.92.

Modified, affirmed and remanded.